

‘Frontloading’: The Case for Legal Resources at the Early Stages of the Asylum Process

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Introduction

In 1992, fewer than fifty people came to Ireland seeking asylum. From 1995, however, there was a rapid increase in the numbers applying for asylum, reaching a peak of 11,634 in 2002. Following the Citizenship Referendum of 2004 and subsequent legislative changes, and consistent with underlying trends internationally, the number of asylum applications fell significantly. By 2008, applications had declined to a total of 3,866 for the year, representing a 2.9 per cent decrease on the total of 3,985 in 2007, and a 200 per cent reduction on the 2002 figure.¹

At any given time, the asylum system will include not just ‘new’ applicants – those whose claim has not yet been subject to an initial decision – but others whose application was initially rejected and who are now availing of the appeals procedures that are provided.

Over the years, many concerns have been expressed about the fact there exists a significant disparity between the number of asylum applicants granted refugee status following their original application (or ‘at first instance’) and the numbers granted refugee status after all appeal mechanisms have been used. This disparity points to problems in regard to the quality of decision-making, particularly in the early stages of the process.

One factor that has been highlighted as potentially contributing to this situation is the quality of legal assistance provided to applicants in the initial stages of the asylum process. This article explores whether the situation could be improved upon through the ‘frontloading’ of legal services within the asylum application process. ‘Frontloading’ refers to the provision of increased legal services to asylum applicants at the very early stage of the process. Several commentators and organisations have highlighted the benefits of frontloading legal advice and legal representation and have argued for the adoption of this approach.²

In this article, the case for frontloading is made on the grounds of both fairness and efficiency. It is contended that better quality decision-making at

the initial stages of the determination system would result in a greater number of positive decisions earlier in the process and in negative decisions that are better reasoned and more sustainable. People seeking asylum would be better informed and supported and less likely to feel that they were on their own, navigating a complex and alien legal process. From the point of view of the asylum system itself, frontloading of legal services could result in a reduction of costly and protracted proceedings at later stages in the determination of applications.

The Asylum Procedure

As a signatory to the 1951 United Nations Convention Relating to the Status of Refugees (Geneva Convention) and its 1967 Protocol, Ireland has accepted clearly-defined international legal obligations towards people seeking asylum. A central commitment is the undertaking to admit to the country any person who arrives at its frontier and asks for asylum. As the United Nations High Commissioner for Refugees (UNHCR) has pointed out, for a person to have the right to be admitted to a State that is party to the Geneva Convention and make an application for asylum in that State, it is sufficient that she or he simply intimates their request, without necessarily expressing it in clear or accurate words.

These obligations are recognised in the 1996 Refugee Act (Amended) which provides that a person who arrives at the frontiers of the Republic of Ireland seeking the protection of the State shall be given leave to enter (Section 9 (1)). A person seeking entry and asylum is subject to a preliminary interview with an immigration officer. The Refugee Act specifies that the interview ‘shall, where necessary and possible, be conducted with the assistance of an interpreter’ (Section 8 (2)). The person must subsequently report to the Office of the Refugee Applications Commissioner (ORAC) which has responsibility for processing applications for asylum.

The legislation also provides that an application for asylum may be made by a person already in

the State (Section 8 (c)); in practice, most applications are made in this way.³ In such cases, the application is made directly to ORAC and the preliminary interview is conducted by a designated official of ORAC.

Every person seeking asylum must complete a lengthy questionnaire; this requires him or her to provide biographical information, details of his or her journey to Ireland and the reasons for seeking the protection of the State. Prioritised applicants must return their questionnaires to ORAC within six working days and non-prioritised applicants within seven working days of their preliminary interview.⁴ A longer and more in-depth interview (the 'substantive' interview) is then arranged. This interview is carried out by an ORAC caseworker.

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The ORAC caseworker prepares a report on the application, drawing on the information obtained from the preliminary interview, the completed questionnaire, the substantive interview, and any relevant documentation, including country of origin information. This report will include a recommendation as to whether or not refugee status should be granted, as well as the reasons for this recommendation. Where a positive recommendation is made – i.e., that the person be granted refugee status – ORAC notifies the Minister for Justice, Equality and Law Reform.

A person who receives a negative recommendation is entitled to appeal to the Refugee Appeals Tribunal. Generally, an appeal must be made within fifteen working days of the sending of the negative decision and the applicant is entitled to request an oral hearing for his or her appeal. In certain circumstances, specified in the Refugee Act (Section 13), the period within which an appeal must be made is shorter (ten, and in some cases four, working days) and the appeal will be dealt with by the Tribunal without an oral hearing. In cases where an applicant withdraws or fails to participate in the process (for instance, does not attend the interview), the application is deemed withdrawn and a negative

recommendation is issued. There is no appeal against this decision.

Access to Legal Assistance

Asylum applicants may access free legal assistance through the Refugee Legal Service (RLS), a specialised service of the Legal Aid Board. A RLS caseworker, who is usually not qualified in law, is assigned to provide legal information to the asylum applicant. The RLS provides only general legal assistance to an asylum applicant before he or she fills out the detailed questionnaire. Normally, it is only in the case of vulnerable applicants, such as minors, that the RLS will advise on specific details of the claim or provide direct assistance with filling in the questionnaire. A RLS solicitor does not usually accompany an applicant to her or his substantive interview, except in cases where the applicant is considered to be vulnerable.

ORAC encourages asylum applicants to seek professional legal advice.⁵ However, a Customer Survey by ORAC in July 2007 found that 40 per cent of applicants had not consulted a solicitor or the RLS *before their substantive interview*.⁶ The number of applicants who do not consult with RLS or a private solicitor *before filling out the questionnaire* is presumably much higher. In short, many applicants do not have any legal advice pertaining to their case at the critically important early stages of the asylum process.

Asylum Decisions

As noted in the Introduction, concerns have been frequently raised in regard to the quality of decision-making at all stages of the asylum procedure. In recent years, for example, questions have been asked about the fairness of decisions reached by the Refugee Appeals Tribunal.⁷

Critics have pointed to the high number of Judicial Review cases taken following negative asylum decisions as evidence of systemic problems in the asylum process. Judicial Review is an option whereby applicants can challenge the legality of the process by which their application was determined by ORAC or the Refugee Appeal Tribunal.⁸ Judicial Reviews can be both protracted and costly.

Official figures do not provide a breakdown which would allow applications for Judicial Review to

be related to the specific statutory agencies that may be involved in the process. However, figures published by *The Irish Times* in early 2008 showed that 440 of the Judicial Review applications in 2007 related to ORAC and a further 378 related to the Irish Naturalisation and Immigration Service (INIS) and/or the Department of Justice, Equality and Law Reform.⁹

The Irish Times estimated that the balance (206 applications) related to decisions made by the Refugee Appeals Tribunal, and that the Tribunal paid out €4.29 million in respect to 190 cases in 2007, a cost significantly higher than that incurred, as a result of Judicial Review, by ORAC or INIS in the same period.¹⁰

Essentially, the available figures indicate that a significant number of asylum seekers are initially refused asylum but are accepted after appeal or resort to a Judicial Review – at considerable financial cost to the State and human cost to the individuals involved. It is this situation that has given rise to the concerns about how the earlier stages of the process operate and the calls for adequate legal advice and assistance at these stages.

The Use of Case Studies

Behind the statistics relating to the asylum system are people with names and faces. Important insights can be gained from a qualitative assessment of individual applicants' experiences of each stage of the asylum process. It is acknowledged that the use of such case studies can be criticised on the grounds of 'case selection' – the cases chosen will obviously affect the findings obtained. Nonetheless, case studies can be a valuable complement to quantitative analyses of the asylum process. Through the case studies below, this article aims to offer an understanding of the human experience of how the asylum process operates in practice from the point of view of the asylum applicant.

Case Study I

Barat is from Afghanistan and has been in Ireland for two and a half years. He is from one of the ethnic groups targeted by the Taliban. When he first attempted to escape, he was arrested in the country to which he had fled and was returned to Afghanistan, where he was imprisoned and tortured by the Taliban.

I think some people don't know the situation of refugees ... People don't come to Ireland for fun ... They are escaping torture and death, and they come here to feel safe ... When my parents were killed it was the end of everything... Sometimes I wish I had died with them, sometimes I think 'why I am even here?' ... That's very negative ... Just sometimes when I'm in a bad mood.

When he first arrived in Ireland, Barat went to the Department of Justice, Equality and Law Reform to apply for asylum and then to RLS to apply for a solicitor. He met a caseworker before his interview and met his solicitor at the Refugee Appeals Tribunal.

I came to the Justice and they told me to fill out a form ... You never get to talk to the solicitor... always the reception take your number and say 'I'll get back to you' ... I haven't met him [the solicitor] till I was refused ... I say to him 'why I haven't seen you before?'

Behind the statistics relating to the asylum system are people with names and faces.

Barat received little assistance during the preliminary interview and when completing the asylum questionnaire:

When [I went] to the Legal Aid, the person I got wasn't a solicitor; it was a caseworker... Maybe a solicitor would help you but the caseworker can't do anything; they just write down what you say ... I didn't know what the questionnaire was ... I didn't even know I needed to go to court – I was, like, 'Why do I need to go to court? I haven't done anything wrong'.

It was difficult for him to complete the questionnaire and in particular to tell his entire story:

That was crazy... They give me few days to fill out the form ... I can't do that ... my life, you know ... it's twenty years experience ... I need to write a book about it ... They have fifteen lines maybe ... even ten years you need to write a novel ... I couldn't fill it in.

Reflecting on what he had written, he said:

I didn't know ... I put down what I thought and now I think ... I don't know ... I should've written something else.

After the questionnaire was filled out, Barat went to a direct provision centre to await a call for the substantive interview. The interview was difficult:

Interview was scary 'cos they say – 'what happened to you?' ... very depressing for me that I had to talk about my family ... it was like a flashback ... it only happened one month ago or maybe two months ago ... it was there in front of my eyes ... a two-hour interview ...

Referring to a difficulty which arose because he was not able to produce the death certificates of his parents as supporting evidence, he said:

If they wanted death certs of my parents that was no problem at all; I just need to get them.

Seven months after the interview Barat was told that his application had not been accepted. He took his case to the Refugee Appeals Tribunal but the solicitor who had previously worked on his case was away. A report which Barat needed to provide to the hearing was not available.

The Appeal was denied and Barat has now applied for Judicial Review of his case. He has employed a private solicitor to represent him:

... Legal Aid doesn't do Judicial Review so I got a private solicitor to go to the High Court ... They say your case is finished; we don't wanna see you again ... But I can't ever go home ... I don't want to say all of them are bad, some take your case seriously, but most don't ... They get paid if you win or lose.

Issues Highlighted

This case exemplifies a number of concerns that are frequently voiced about the current procedure:

Duration of process: The interval between the initial application and the substantive interview and between each subsequent stage in the process is a very difficult time for applicants. The fact that they may not be given any information about how long they will have to wait until the next stage is a source of great frustration. In the case of applications to the Refugee Appeals Tribunal, the average time taken to process and complete substantive appeals is around thirty weeks.¹¹

Burden of proof and case preparation: The late identification of issues that may be in dispute, and a consequent requirement to produce proof of certain aspects of the claim, can present significant difficulties for applicants. Had Barat been told at an earlier stage that he needed the death certificates of his parents, he would have contacted someone at home to send them to him. Good communication between solicitor and client and the timely assembly of all necessary papers and reports could result in fewer delays and perhaps less need for recourse to Judicial Review.

Access to legal services: ORAC caseworkers are not required to have legal qualifications and cannot be expected to have the legal expertise that may be vital to a person in the initial stages of their application for asylum. Access to legal services should mean the opportunity to have advice and representation from a qualified legal practitioner with specialised training in relation to refugee law and practice.

Complexity of the questionnaire: The questionnaire is a complicated and lengthy document, currently running to forty-eight questions. A claim can be rejected if information is missing or if the questionnaire is found to contain contradictory statements. The most critical question is number 21 where the applicant has to explain why he or she came to Ireland. This is the question in respect of which Barat felt he would have needed to write a book in order to explain all the relevant events in his life, the situation in his country and the various internecine conflicts therein.

The questionnaire provides thirteen lines to answer this question. Space is available at the end of the questionnaire for the purpose of providing additional information but this is not always clearly understood by applicants. Some asylum seekers have a low level of formal education and struggle to express themselves in writing. Indeed, even a person with a high level of educational qualifications could be daunted by the prospect of having to complete such a lengthy, critically important, questionnaire with no guidance as to what information to include or exclude.

Case Study II

Reem came to Ireland from a Middle Eastern country with her sisters and mother. Her father had obtained asylum here nine years earlier but was not eligible for family reunification. Reem

came here in September 2006 and was granted refugee status in mid-2009.

First we have a problem and second there was a really big war ... We ran away to [another country]... My father left in 1998 ... Things were bad all this time he was gone ... but then they got worse ... when there is no government everyone can kill you ... they don't understand it here ... it's like in Iraq too ... a thousand people are dying and they just say 'close the case'.

She was confused when she first arrived:

When I came here I didn't know what I had to do ... first time in Europe it was a strange for us; it was in Ramadan time which means we are fasting. We had to apply on the same day but we didn't ... we stayed one month and then went to Justice ...when I did apply they asked – 'why did you wait for one month?' ... and they didn't believe me ... Because we didn't see our father for nine years we stayed with him.

Speaking of the importance of advice, she said:

Even though my father was here we were still confused ... What about the people in the hostel who have no-one? ... They came from SPIRASI¹² and told us what we have to do ... what were our rights and that was very good ... they told us in Ireland you must look at a person in the eyes ... this means you respect the person ... in the interview he didn't look at me one time ... and I thought this person doesn't like me ... I felt bad.

Reem met her solicitor only after her application for asylum was refused by ORAC and her case was pending before the Refugee Appeals Tribunal.

She felt it would have been helpful to have had the assistance of a solicitor from the beginning of her case:

If the solicitor helped you ... would've been very good ... If your solicitor was with you he can say don't write that ...

Overall, however, she was very dissatisfied with the service available and commented:

... the people are saving their money to pay for a private solicitor.

She believes that the ORAC looked for small inconsistencies to refuse her claim:

They always want to look for small things to

refuse you ... that's all the interviewer wants ... he did not believe me ... they say in which year did you do this? I forgot what I had for breakfast yesterday ... And when I am stressed I forget things.

She was finally able to prevail in her claim after a complicated process before the Refugee Appeals Tribunal:

I went to court three times ... The first three times they did not look at my father's file ... And again I say ... 'please look at my father's file; I came here because of my father' ... then they sent a form for them to say – yes, the judge can see your case ... fourth time I went to the Tribunal then they accept me ... all this is wasting time ... in the end my father explained everything ... from the start I said 'it's not my problem ... in our country it's very secret with politics ... they get revenge on the children ... And they will scare the family just because the person is not there'.

Issues Highlighted

Reem's experiences draw attention to several concerns regarding features of the current process:

Investigation Procedure: This case illustrates that there can be a determination of a claim by ORAC before all relevant evidence is made available. The initial decision on Reem's application was made before the details of her father's case were brought forward. There was no one representing Reem who could argue forcefully the necessity of referring to her father's case. It took three years until the centrality of her father's successful claim was recognised and a decision was then made based on this, but the delay had cost both sides a great deal of time and money.

Relevant Information: Deciding what is relevant to the application presumes a full understanding of many legal concepts, including the definition of a refugee. Applicants generally lack this knowledge which is why early advice can be so crucial to getting to the important and relevant elements of someone's claim. Reem did not know what to include in the questionnaire because she did not have the relevant legal knowledge.

Information Sharing: Lack of communication and cooperation between legal representatives and decision-makers can have serious consequences for applicants and involve costs for the system. In Reem's case, the decision which was eventually arrived at after three years could have been made much earlier if all parties involved in the process,

including the interviewer, worked together before and during the process of initial decision-making.

Adversarial Approach: It is intended that the asylum process be ‘non-confrontational’ or ‘non-adversarial’. However, this is not the common experience of people seeking asylum in Ireland. In what is supposed to be an inquisitorial rather than an adversarial process, Reem felt intimidated and as if she were being automatically disbelieved.

Proposed Single Procedure

The Immigration, Residence and Protection Bill 2008 provides for a ‘single procedure’ for dealing with applications from those seeking protection. The Bill specifies that the Minister for Justice, Equality and Law Reform should assess, in order, (1) whether someone is entitled to protection on the grounds that they are eligible for refugee status; (2) whether they are eligible for subsidiary protection; (3) whether the principle of *non-refoulement* under the Geneva Convention requires that they should not be returned to a country where their life may be in danger, and (4) whether there are other ‘compelling reasons’ they should be granted protection.



Ensuring the balance of justice within the asylum system

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At present, applications for refugee status and for subsidiary protection are determined separately in a two-stage process: a person has the right to apply for subsidiary protection only after his or her application for refugee status has been turned down. The single procedure will end this two-stage process, meaning that protection applications are likely to be determined more quickly. This is to be welcomed.

However, the single procedure will be more demanding and complex for decision-makers since the claim for protection on Convention grounds

and on other grounds will be considered at the same time. The information contained in the questionnaire will therefore form the basis upon which eligibility for all four protection possibilities outlined above will be considered.

As a consequence, adequate completion of the questionnaire becomes even more important than under the current system, since applicants need to ensure that they are providing information that is relevant not only to a Convention claim but to all the protection possibilities. Looking to this future development, the case for frontloading legal advice to protection applicants becomes all the more pressing.

The Case for Frontloading of Legal Advice

There are several grounds for arguing that earlier and better legal advice and representation would lead to improved outcomes from the asylum process.

Efficiency: access to expert legal advice in completing the questionnaire would assist in assembling the information that could show the grounds, if any, for a protection claim. The involvement of solicitors at this stage would mean that they would be in a position to provide advice as to whether the applicant’s circumstances would be likely to meet any of the grounds on which protection can be granted. A clearly completed and factual questionnaire should provide better quality information and thus facilitate a quicker and fairer decision at first instance. Better decision-making at this point would result in significant savings, as proceedings at the later stages incur significant financial costs and add greatly to the duration of the process.

Fairness: The substantive interview is a pivotal moment in the asylum process. Fairness and the need to ensure protection of applicants’ rights require that access to legal representation should be provided at this stage of the process. Furthermore, the availability of legal services should mean less need for Judicial Review as many of the alleged deficiencies in the process that are later challenged could be dealt with as they arise by legal representatives.

Improved Communication and Information: Complicated legal and technical definitions and concepts could be adequately explained if legal advice were available at an early stage, which should mean that applicants would be better

equipped to provide relevant information in completing the questionnaire, during the interview and throughout the whole application process. The provision of legal advice should also mean that applicants would be adequately informed about what is involved in each stage of the process.

Genuine Non-Adversarial Approach: Applicants would be likely to feel less intimidated and fearful if they were accompanied during the interview and court proceedings by a legal representative who was working with the interviewer and judges to determine the facts of the situation. Having quality legal representation means not just having a lawyer present during the process but having one who is committed and has expertise and experience in the relevant areas of law.

Future Proofing: The anticipated introduction of a single procedure will mean that the questionnaire will be even more detailed and the potential grounds for protection more technical. Legal assistance will be necessary to ensure that applicants do not exclude facts that would be relevant to complementary forms of protection but not to a Convention claim.

ORAC Frontloading Pilot Project

It is not only advocates of asylum seekers who see merit in frontloading legal advice. ORAC itself has stated:

It is considered that direct guidance with the completion of the questionnaire and the provision of all other relevant information will greatly improve the quality of information available to ORAC caseworkers, enhance the quality of pre-interview preparation and interviews themselves as well as ensuring that ORAC's decision makers have as much of the necessary information as is available in order to make informed decisions on the cases concerned. All of this is seen to be in the applicant's best interest and should also result in the more effective and efficient use of resources both in ORAC and in the RLS.¹³

In light of this, ORAC and RLS have implemented a frontloading pilot project on the enhanced and earlier use of legal support and assistance provided by RLS to asylum applicants. The pilot project began in the first quarter of 2009 and was due to be reviewed in October 2009 by RLS and ORAC. The results of the review will be considered in the context of the planned single procedure proposed in the Immigration, Residence

and Protection Bill 2008, and will be used to inform staff in the relevant statutory agencies how best to prepare for the implementation of the single procedure.

Conclusion

Clearly, getting to the facts in an asylum case is not a straightforward process. It is an unenviable task for those responsible for making and implementing policy to try to strike the right balance between border controls and the right of individuals to protection. It is, however, crucial that this balance be found. There appears to be a compelling case for frontloading legal advice to asylum applicants; such a change would have long-term benefits not only for asylum seekers but for the institutions charged with implementing asylum procedures. The potential value of frontloading legal services is coming to be recognised not only by asylum seeker advocates but by decision-making bodies such as ORAC.

To be effective, frontloading should mean that:

- All persons applying for asylum in Ireland would be informed in a language they understand of their right to legal advice and representation and how this can be accessed.
- All asylum applicants would have access to a legal representative before filling out the questionnaire and would receive legal advice in completing the questionnaire.
- A legal representative would attend the substantive interview and play an active role within it.
- Appropriate training for legal representatives would be provided in order to ensure that they are in a position to adequately represent protection applicants. Such training would be particularly important in the context of the expanded protection framework provided for in the Immigration, Residence and Protection Bill 2008.

From the point of view of decision-makers, frontloading should mean that the best quality information would be available at the earliest juncture in the asylum process. While providing legal assistance at the earliest stages of the process would mean an initial financial investment by the State, this would be offset by a reduction in costs at the later stages, since fewer financial and

human resources would be needed for appeals and Judicial Review proceedings.

Notes

1. It is also worth remembering that more than 85 per cent of refugees in the developing world find a safe haven in neighbouring countries, putting huge strains on these countries, which are already limited in resources. Applications for asylum in Ireland constitute just 1.5 per cent of all applications to the countries of the developed world.
2. See in particular, Brian Barrington, *The Single Protection Procedure: A Chance for Change*, Dublin: Irish Refugee Council, 2009; *Manifestly Unjust: Summary of a Report on the Fairness and Sustainability of Accelerated Procedures for Asylum Determinations*, Dublin: Irish Refugee Council, 2001; *Good Practice in the Provision of Services to Asylum Seekers: Recommendations of a Seminar*, 28th May 2008, funded by SONAS Mainstreaming Group (available at www.integratingireland.ie).
3. The website of the Office of the Refugee Applications Commission can be found at www.orac.ie
4. See www.orac.ie
5. See ORAC, *Application for Refugee Status Questionnaire, Guidelines for Completion of Questionnaire*, at p. 2, para. 5. However, it is not clear that applicants are advised to obtain legal advice before they fill out the questionnaire.
6. See ORAC, *Statistical Breakdown of Figures from the Customer Service Survey, July, 2007*, Question 8 (www.orac.ie). The figure for 2008 may be somewhat higher: RLS has advised that in 2008 the equivalent of 56 per cent of asylum seekers registering with ORAC applied for RLS services at the pre-interview stage, compared to 49 per cent in 2007.
7. 'Call for Review of Up to 1,000 Rejected Asylum Applications', *The Irish Times*, 10 March 2008; 'Evidence of Disharmony among Members of Refugee Appeal Process', *The Irish Times*, 4 March 2008 (available at www.irishtimes.com).
8. Judicial review is not concerned with the substance of decisions, but with the decision-making process. See: Corona Joyce, *Annual Policy Report on Migration and Asylum 2008: Ireland – Research Study Prepared for the European Migration Network*, Dublin: ESRI, 2009.
9. There was a decrease of almost 30 per cent in the number of legal challenges against recommendations of ORAC in 2008, with 266 legal challenges taken, as against 378 during 2007. See Office of the Refugee Applications Commissioner, *Annual Report 2008*, Dublin, 2009, p. 14.
10. '1,000 Asylum Review Cases Last Year', *The Irish Times*, 10 March 2008 (available at www.irishtimes.com).
11. Corona Joyce, *op. cit.*
12. SPIRASI is an Irish NGO which works with 'asylum seekers, refugees and other disadvantaged migrant groups, with a special concern for survivors of torture' (see www.spirasi.ie).
13. Correspondence between JRS Ireland and ORAC, 3 September 2009.

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