Reception conditions: EU standards during Covid-19 and beyond

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This paper will consider some issues arising from recommendations of the European Commission in its Communication, *COVID-19: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement*, Brussels, 16.4.2020, C(2020) 2516 final. The following issues will be addressed:

I. Social distancing and accommodation

II. Electronic registration and processing of international protection applications

III. Special needs assessments

IV. Access to necessary health care

V. Medical screening prior to deportation

I. Social distancing and accommodation

Communication C(2020) 2516 initially sets out some basic principles that must be respected at a minimum in adopting measures to tackle Covid-19:

- The exemptions in the *Commission Communication Temporary Restriction on Non-Essential Travel to the EU in view of COVID-19*, COM (2020) 2050 final, extend to persons in need of international protection or who must be admitted to the territory of the Member States for other humanitarian reasons.

- Measures taken by Member States to contain and limit the further spread of COVID-19 should be based on risk assessments and scientific advice and must remain proportionate.

- Any restrictions in the field of asylum, return and resettlement must be proportionate, implemented in a non-discriminatory way and take into account the principle of non-refoulement and obligations under international law.

- Particular attention should be paid to the situation of vulnerable persons, families and minors (including unaccompanied minors), and all applicants for international protection must be treated with dignity, and be, at a minimum, able to access, and exercise their basic rights.

At pp. 11 and 12 of the Communication, guidance in respect of accommodation is set out:

> Under EU law Member States must ensure, from the moment a person makes an application, that material reception conditions provide an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health.
> …

- Where reception centres are overcrowded, making it difficult to apply health protocols, applicants should as far as possible be transferred to other facilities. Where there is spare reception capacity, the occupancy rate of each facility can be reduced to lower the risks of spreading diseases. The planned closure of some reception centres could be postponed in order to ensure lower occupancy.
- To decrease the occupancy rate, Member States could also encourage people who have other housing solutions to leave open reception centres by providing them with meal vouchers.

Article 17 of the Reception Conditions Directive 2013/33/EU provides that "member states shall ensure that material reception conditions are available to applicants when they make their application for international protection" and "member states shall ensure that material reception conditions provide an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health".

In a report, *Move Most Vulnerable Out of Direct Provision Centres Now* of 22 March 2020, the Irish Refugee Council set out the following statistics in respect of the Irish direct provision system:

> There are approximately 5,686 people living in 39 direct provision centres around Ireland including 1,739 children.
> An additional 1,585 people, including 285 children, are residing in emergency accommodation B&Bs and hotels.

In this same report, Fiona Finn, chief executive of Nasc, the Migrant and Refugee Rights Centre, said:

> There are people who are immune-compromised or in other high-risk categories who are sharing rooms with strangers. They need to be moved to safety immediately. Being able to take even the minimum precautions of regularly washing your hands with warm water and soap in these conditions can be challenging.

A number of bodies have drawn attention to the incompatibility of the current direct provision system with the social distancing requirements established by the Government on foot of emergency legislation[1]. Amnesty International[2], the Irish Council for Civil Liberties[3], the Irish Refugee Council (IRC) and the Ombudsman have all recently called for the immediate transfer of residents in direct provision centres to safe accommodation in which they can comply with social distancing measures adopted by the Government. The IRC obtained a legal opinion[4] on the issue and has sent this to the Minister for Justice and Minister for Health. The legal opinion submits that the State's obligation to protect the right to life "extends to the provision of single or household occupancy units for those in shared accommodation", given HSE guidelines on reducing contact with people outside your household. It submits that own-door accommodation is required to vindicate a range of other rights under EU directives, European human rights law, and the Irish Constitution, including the right to freedom from inhuman or degrading treatment, the right to protection of the person and to bodily integrity, and the right to equality and non-discrimination, among others.

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[1] The Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020 and the Emergency Measures in the Public Interest (Covid-19) Act 2020.
[2] Amnesty International, *Covid-19 and People in Direct Provision*, 31 March 2020.
[3] ICCL, *COVID and Direct Provision: Joint Letter to the Department of Justice*, 1 May 2020.
[4] Legal opinion of Michael Lynn SC and Cillian Bracken BL, obtained by the IRC and submitted to the Government. See Conall Ó Fátharta, *Direct provision settings may be unlawful*, The Irish Examiner, 4 May 2020.

In his annual report on direct provision accommodation for 2019[5], the Ombudsman notably stated that:

> In my view, the crisis, and in particular the highly contagious nature of the virus, brings into sharp relief just how unsuitable and unsustainable it is to have three or more people in the same room as is the case in many Direct Provision centres, particularly those being used on an emergency basis.

Measures taken to tackle Covid-19 must be non-discriminatory. A question arises as to what is the appropriate comparator to direct provision accommodation: nursing homes, boarding schools, other communal living settings? Measures taken in those settings should be similar to those taken in direct provision.

Member states have a positive legal obligation under the Reception Conditions Directive to provide accommodation to applicants which protects their physical and mental health. During the time of Covid-19, if, by reason of their accommodation arrangements, applicants are not physically able to social distance, cocoon or self-isolate, this legal obligation is not met.

II. Electronic registration and processing of international protection applications

In order to ensure continuing access to international protection procedures, the Commission makes a number of recommendations encouraging the use of electronic means of processing applications. In respect of the lodgment of applications, the following recommendation is made at p. 5:

> Lodging of applications: In some Member States it is possible to lodge applications for international protection *via* postal mail. The Commission recommends that, where necessary, it should be possible to lodge applications by means of a form either by postal mail or preferably online. In accordance with Article 6(4) of the Asylum Procedures Directive, the application will be deemed lodged once the form has reached the competent authorities.

In respect of interviews, the Commission recommends, at p. 6 that:

> Personal interviews should, as far as possible be conducted remotely through the use of videoconferencing except if special procedural needs make a personal interview by videoconferencing not suitable for the applicant (e.g. traumatized applicants, gender based persecution, children, applicants with hearing impairments). In addition, remote simultaneous interpretation should be used, through dedicated telephone channels.
>
> Where the authorities set up videoconferencing rooms they should also arrange for the (virtual) presence of legal advisers, other counsellors and persons of trust to support the applicant. A safe environment should be provided including a confidential setting. Measures related to confidentiality also include the security of the connection.

In respect of resettlement procedures, the Commission recommends at p. 16 that:

[5] *The Ombudsman & Direct Provision: Update for 2019, A commentary by the Ombudsma*n, April 2020.

> The Commission encourages Member States to consider new ways of working to keep their resettlement programmes active. In particular, Member States should consider, in close cooperation with UNHCR, accepting resettlement submissions on a dossier-basis and envisage video interviews supported by remote simultaneous interpretation, as well as remote pre-departure orientation measures, as soon as they are possible again in the countries of first asylum, including through the use of the EASO Resettlement Support Facility in Istanbul. This would ensure that the selection of persons in need of international protection can continue and that the selected persons can be ready to travel to the Member States' territory as soon as travel restrictions are lifted.

The Commission's Communication refers throughout to the Recast Procedures Directive 2013/32/EU (into which Ireland has not opted). However, from the sections set out below, it is clear that Ireland has similar obligations arising from the initial Procedures Directive 2005/85/EC and the Dublin III Regulation 604/2013 in respect of ensuring that applications are processed as soon as possible.

The Recast Procedures Directive provides as follows:

> Article 6
> Access to the procedure
> …
> 2. Member States shall ensure that a person who has made an application for international protection has an effective opportunity to lodge it as soon as possible …
> 3. Without prejudice to paragraph 2, Member States may require that applications for international protection be lodged in person and/or at a designated place.
> 4. Notwithstanding paragraph 3, an application for international protection shall be deemed to have been lodged once a form submitted by the applicant or, where provided for in national law, an official report, has reached the competent authorities of the Member State concerned.
>
> Article 31
> Examination procedure
> …
> 2. Member States shall ensure that the examination procedure is concluded as soon as possible, without prejudice to an adequate and complete examination.
> 3. Member States shall ensure that the examination procedure is concluded within six months of the lodging of the application.

The initial Procedures Directive (into which Ireland has opted) provides as follows:

> (13) In the interests of a correct recognition of those persons in need of protection as refugees within the meaning of Article 1 of the Geneva Convention, every applicant should, subject to certain exceptions, have an effective access to procedures …
>
> Article 6
> Access to the procedure
> 1. Member States may require that applications for asylum be made in person and/or at a designated place.
>
> Article 23(2)

> Member states shall ensure that such a procedure is concluded as soon as possible, without prejudice to an adequate and complete examination … where a decision cannot be taken within six months, the applicant concerned shall either be informed of the delay or receive, upon his/her request, information on the time-frame within which the decision on his/her application is to be expected.

Ireland has also opted into the Dublin III Regulation which provides at article 20(2) that:

> An application for international protection shall be deemed to have been lodged once a form submitted by the applicant or a report prepared by the authorities has reached the competent authorities of the Member State concerned. Where an application is not made in writing, the time elapsing between the statement of intention and the preparation of a report should be as short as possible.

The recommendation of the Commission that "where necessary, it should be possible to lodge applications by means of a form either by postal mail or preferably online" sits uneasily with the option for member states that "they may require that applications for asylum be made in person and/or at a designated place". Ireland took up this option in s. 15(2) of the International Protection Act 2015 which provides that "subject to subsections (3) and (4) [concerning dependent and unaccompanied minors], an application for international protection shall be made in person and shall be made to the Minister".

The rationale for this option seems to be in order to ensure the correct identification of applicants and also to ensure that they are physically present in the territory of a member state. To recall, a member state is only obliged to process an international protection application made on its territory or where that member state is otherwise responsible under the Dublin III Regulation. That the Commission is encouraging electronic processing seems to recognise that these concerns may be addressed in other ways.[6]

An interesting discrepancy arises between the wording of this option as between the initial Procedures Directive and the Recast Procedures Directive: the former uses the terms "applications for asylum be made in person", whereas the latter uses "applications for international protection be lodged in person". The latter also makes clear how this distinction between made and lodged is important in article 6(2): "Member States shall ensure that a person who has made an application for international protection has an effective opportunity to lodge it as soon as possible …".

The question of whether an instrument of EU law into which Ireland has not opted could be used in the interpretation of an instrument into which it has opted arose in *KS (Pakistan) v IPAT and MHK (Bangladesh) v IPAT* [2019] IEHC 176, 25 March 2019. A preliminary reference remains pending (C-322/19) and among the questions posed was:

> 18. The first question is, where in interpreting one instrument of EU law that applies in a particular member state, an instrument not applying to that member state is adopted at the same time, may regard be had to the latter instrument in interpreting the former instrument?

[6] For example, in respect of interviews, at p. 6 it is recommended that "the video conference room could have a scanner for example which the applicant could use to send documents", which could include identity documents or proof of entry into the State.

Making arrangements for possible online submission of applications, where necessary, would ensure the protection of the health and dignity of international protection applicants in accordance with the Reception Conditions Directive[7] and the Charter of Fundamental Rights[8].

To avoid undue delay arising from the inability of an applicant to attend the IPO office in person for initial registration of their application or for interview (for such reasons as the requirement to self-isolate, cocoon or other), the Commission encourages the processing of such applications by electronic means.

It could be argued that once the applicant voices an indication to apply in person (makes an application), this suffices for the purposes of s. 15(2) of the 2015 Act and article 6(1) of the initial Procedures Directive. If interpreted in this way, these provisions would not preclude the lodgment and further processing of an international protection application by electronic means where necessary.

The Commission's eagerness to embrace electronic technology for the purposes of registration, interview and resettlement procedures is interesting as it may pave the way for EU legislation on extraterritorial applications or humanitarian visas in the future.

On 7 March 2017, the CJEU delivered its judgment in *X and X v État belge* (Case C-638/16 PPU) holding that member states were not required, under the EU Visa Code[9], to grant a humanitarian visa to persons who wish to enter their territory with a view to applying for asylum, but they remain free to do so on the basis of their national law. The EU Visa Code concerned short-stay visas and the EU had not yet adopted measures in respect of long-stay visas. On the facts, the applicants intended to apply for a long-stay visa.

The court did not follow the Opinion of AG Mengozzi, in which he found that the applicants were applying for a short-stay visa for the sole purpose of applying for protection once on Belgian territory. If their applications "had not been processed before the expiry of their short-stay visas, their right to remain on that territory beyond 90 days would have stemmed from their status of asylum seekers, under Article 9(1) of Directive 2013/32. Subsequently, that right would have resulted from their status as beneficiaries of international protection" (para. 53). His views can be summed up in the following paragraphs of his Opinion:

"157. Frankly, what alternatives did the applicants in the main proceedings have? Stay in Syria? Out of the question. Put themselves at the mercy of unscrupulous smugglers, risking their lives in doing so, in order to attempt to reach Italy or Greece? Intolerable. Resign themselves to becoming illegal refugees in Lebanon, with no prospect of international protection, even running the risk of being returned to Syria? Unacceptable.
158. To paraphrase the European Court of Human Rights, the purpose of the Charter is to protect rights which are not theoretical or illusory, but real and effective."

On 5 March 2020, the Grand Chamber of the European Court of Human Rights delivered its judgment in *M.N. v. Belgium* (app. no. 3599/18). The applicant argued that article 3 ECHR placed an obligation on contracting States to provide short-term humanitarian visas in their foreign embassies and consulates to potential asylum seekers where the requested member state knew or

[7] Recital 35 and article 19.
[8] Articles 1 and 35.
[9] Regulation (EC) No 810/2009 of 13 July 2009 establishing a Community Code on Visas (Visa Code). This Regulation, into which Ireland has not opted, governs "Schengen visas".

ought to have known of the conditions in the country of origin giving rise to a substantial risk of inhuman and degrading treatment. The court found that the applicants had not been within the jurisdiction of Belgium for the purposes of article 1 ECHR and for that reason the application was inadmissible.

Efforts to amend the EU Visa Code to include the possibility of applying for a humanitarian visa proved fruitless[10], however the European Parliament (EP) has since, on 11 December 2018, adopted a resolution with recommendations to the Commission for the adoption of a separate legal act in the form of a regulation entitled "Regulation establishing a European Humanitarian Visa" (2018/2271(INL))[11].

The EP Added Value Assessment study on this proposed Humanitarian Visas Regulation[12] identified the following factual findings as grounding the urgent need for such an instrument:

– it has been estimated that 90% of those granted international protection reached the European Union through irregular means.
– there is a heightened risk of mortality for persons in need of protection trying to make this journey due to drowning and starvation, peaking at over 5,000 deaths in 2016.
– there is a heightened risk of sexual violence and trafficking for persons in need of protection trying to make this journey.
– smugglers benefit financially from these journeys.
– there is a risk of continued persecution for persons in need of protection who cannot make such journeys.

III. Special needs assessments

Regardless of delays in the processing of an international protection application, this should not result in delays for applicants in accessing reception conditions to which they are entitled under the Reception Conditions Directive. Communication C(2020) 2516, at p. 5 emphasises that "in any event, any further delays in the registration of applications should not affect the rights of the applicants pursuant to the Reception Conditions Directive which apply as from the making of an application".

Throughout the Communication, there are references to special measures that should be afforded to "vulnerable" applicants. In the particular context of Covid 19, examples of vulnerable groups are stated to include "applicants with disabilities, elderly or residents with existing health concern".

The Reception Conditions Directive provides for an obligation on member states to carry out a special needs assessment within a reasonable time after an application is made in order to identify vulnerable applicants:

> Article 21
> General principle

[10] https://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-humanitarian-visas-%E2%80%93-amendment-of-the-eu-visa-code.
[11] https://www.europarl.europa.eu/doceo/document/TA-8-2018-0494_EN.html.
[12] European Parliament, *Humanitarian visas: European Added Value Assessment accompanying the European Parliament's legislative own initiative report*, July 2018.

> Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation, in the national law implementing this Directive.
>
> Article 22
> Assessment of the special reception needs of vulnerable persons
> 1. In order to effectively implement Article 21, Member States shall assess whether the applicant is an applicant with special reception needs. Member States shall also indicate the nature of such needs.
> That assessment shall be initiated within a reasonable period of time after an application for international protection is made and may be integrated into existing national procedures. Member States shall ensure that those special reception needs are also addressed, in accordance with the provisions of this Directive, if they become apparent at a later stage in the asylum procedure.

In the Irish transposing instrument, the European Communities (Reception Conditions) Regulations 2018 (SI 230/2018), this obligation is set out at regulations 8:

> Vulnerable persons
> 8. (1) The Minister—
> (a) shall within 30 working days of the recipient giving an indication referred to in paragraph (a), (b) or (c) of section 13(1) of the Act of 2015, and
> (b) may at any stage after the expiry of the period referred to in subparagraph (a), where he or she considers it necessary to do so, assess—
> (i) whether a recipient is a recipient with special reception needs, and
> (ii) if so, the nature of his or her special reception needs.
> (2) The Minister for Health and the Health Service Executive shall provide the Minister with such assistance as is necessary for the performance by him or her of his or her functions under paragraph (1).

This is a general requirement but is of utmost importance in the context of Covid-19. Given that the purpose of a special needs assessment is both to determine whether or not an applicant is a "vulnerable person" and if so, to determine the special reception needs of that vulnerable person, it seems that such an assessment should be carried out across the board or at least when the Minister has reason to suspect that an applicant is a vulnerable person.

X and Y v. MJE [2019] IEHC 133

One recent case briefly considered this special needs assessment. In *X and Y v. MJE* [2019] IEHC 133, the applicants, a mother and daughter, sought international protection and requested accommodation in Dublin on 17 September 2018. The mother averred that on that day when she requested accommodation, an IPO official stated that they "had obviously slept somewhere the night before and…should return there". On 21 September 2018, Ms X returned to the IPO, requested accommodation and was told to write to the RIA and explain why she needed accommodation. On 24 September 2018, Ms X posted a letter to the RIA seeking accommodation.

An email seeking accommodation was sent to the RIA on 11 October 2018 by Ms X's solicitor, who also submitted that Ms X had special reception needs. On 15 October 2018, the Minister designated an accommodation centre outside Dublin.

On 16 October 2018 the applicants' solicitor requested a vulnerability assessment, submitting that Ms X, a single mother, relied on her cousin in Dublin to take care of her daughter. It was stated that Ms X had a history of depression. She was not currently taking medication but relied on a support network in Dublin. She was frightened that her depression would return if that network was removed (particularly her cousin) impacting on her ability to care for her daughter.

On 24 October 2018, a Department official wrote to a GP requesting his "advice in relation to the issue of this woman having to remain in Dublin". That GP advised on 31 October 2018 that "I see no medical indications for her to be accommodated in Dublin".

Barrett J. held that as the impugned decision to accommodate in Dublin of 15 October 2018 was taken within 30 days, there had been no breach of the reg. 8 requirement to carry out a special needs assessment.

The court did however find that as the applicants had applied for protection on 17 September 2018 but were not offered accommodation until 15 October 2018, this amounted to a breach of article 17(1) of the Directive ("Member States shall ensure that material reception conditions are available to applicants when they make their application for international protection"). Francovich damages were awarded for the damage suffered as a result of this breach and the quantum of same was set in a later judgment (*X and Y v. MJE (no. 2)* [2019] IEHC 226).

Difficulties arise with the finding in this case that a special needs assessment was carried out. EASO[13] has compiled a guidance document, *Guidance on reception conditions: operational standards and indicators*, September 2016. Section 7 provides guidance on 'Identification, assessment and response to special needs'. Here, important requirements for the establishment of a special needs assessment procedure are stated to include the following:

a. A standardised mechanism to identify and assess special reception needs of any applicant is in place.
b. The mechanism clearly prescribes who is responsible for the identification and assessment of special reception needs.
c. The mechanism clearly prescribes how identification and assessment are recorded and communicated to the applicant and to relevant actors.
d. Sufficient resources are allocated to identify, assess and monitor special needs.
e. The initial identification and assessment of special needs is conducted as soon as possible.
f. Special needs that become apparent at a later stage are adequately identified and assessed.
g. Where relevant, specialised actors are involved in the assessment of special needs.
h. Communication channels and cooperation between the reception authority and the determining authority are established and used.
i. The identification and assessment of special reception needs takes place without prejudice to the examination of the applicants' need for international protection.
j. Adequate and prompt action is taken to respond to the identified and assessed special needs.

[13] The European Asylum Support Office is an agency of the European Union set up by Regulation (EU) 439/2010 to acts as a centre of expertise on asylum.

k. If special needs have been identified, there is a mechanism in place to ensure their regular monitoring.

On the facts of *X and Y*, it is difficult to see how a decision to accommodate an applicant in a certain accommodation centre taken prior to obtaining an expert medical opinion can be deemed to amount to a special needs assessment in accordance with the above guidance. In the Irish context more generally, the roles as between the IPO, the RIA (now the IPAS), the Minister for Health and the HSE are unclear in terms of the identification of vulnerable persons and the assessment and provision of special needs. Given the lack of a clear standardised mechanism for special needs assessments, it is arguable that the Minister has failed to adequately transpose the Reception Conditions Directive in this respect.

IV. Access to necessary health care

Communication C(2020) 2516 provides as follows on p. 3:

> As regards reception conditions, Member States may make use of the possibility under Directive 2013/33/EU (hereafter "the Reception Conditions Directive") to exceptionally set, in duly justified cases and for a reasonable period that should be as short as possible, different modalities for material reception conditions from those normally required. Such modalities must in any event cover the basic needs including health care. Measures of quarantine or isolation for the prevention of the spreading of COVID-19 are not regulated by the EU asylum acquis. Such measures may be imposed also on asylum applicants in accordance with national law, provided that they are necessary, proportionate and non-discriminatory.

As referred to above, one recommendation in ensuring the protection of health in accommodation is "to decrease the occupancy rate, member states could also encourage people who have other housing solutions to leave open reception centres by providing them with meal vouchers".

The Reception Conditions Directive sets out a number of provisions in respect of the health of applicants:

> Article 13
> Medical screening
> Member States may require medical screening for applicants on public health grounds.
>
> Article 17
> General rules on material reception conditions and health care
> 1. Member States shall ensure that material reception conditions are available to applicants when they make their application for international protection.
> 2. Member States shall ensure that material reception conditions provide an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health.
> Member States shall ensure that that standard of living is met in the specific situation of vulnerable persons, in accordance with Article 21, as well as in relation to the situation of persons who are in detention
> 3. Member States may make the provision of all or some of the material reception conditions and health care subject to the condition that applicants do not have

> sufficient means to have a standard of living adequate for their health and to enable their subsistence.
> 4. Member States may require applicants to cover or contribute to the cost of the material reception conditions and of the health care provided for in this Directive, pursuant to the provision of paragraph 3, if the applicants have sufficient resources, for example if they have been working for a reasonable period of time.
> If it transpires that an applicant had sufficient means to cover material reception conditions and health care at the time when those basic needs were being covered, Member States may ask the applicant for a refund.
>
> Article 19
> Health care
> 1. Member States shall ensure that applicants receive the necessary health care which shall include, at least, emergency care and essential treatment of illnesses and of serious mental disorders.
> 2. Member States shall provide necessary medical or other assistance to applicants who have special reception needs, including appropriate mental health care where needed.

The Irish 2018 Regulations set out a right to health care as follows:

> Right to health care
> 18. The Minister for Health shall ensure that a recipient has access to—
> (a) emergency health care,
> (b) such health care as is necessary for the treatment of serious illnesses and mental disorders,
> (c) such other health care as is necessary to maintain his or her health, and
> (d) where the recipient is vulnerable, such mental health care as is appropriate, having regard to his or her special reception needs.

The Reception and Integration Agency (RIA), now the International Protection Accommodation Service (IPAS) is responsible for the procurement and overall administration of State provided accommodation and ancillary services for applicants for international protection. On its website, it provides as follows in respect of access to health care:

> Access to health services in Ireland for asylum seekers is provided on the same basis as for Irish citizens i.e. it is 'mainstreamed'.
> Asylum seekers have access to the Public Health Nursing System as well as a dedicated asylum seeker psychological service operating out of St. Brendan's Hospital.
> …
> Asylum seekers in direct provision will generally qualify for a medical card which entitles them to receive a wide range of health services free of charge, including GP services.
>
> Under the Medical Card Scheme, a RIA resident may have a choice of General Practitioner (G.P.) or may be allocated one depending on local circumstances …
> It should be noted that entitlement to a Medical Card is not automatic. It is means based i.e. their assets and income (from all sources) is taken into account. If they are not entitled to a Medical Card they can continue to access general hospital services.

The difficulty with the above is that it seems to link an entitlement to a medical card to accommodation in a direct provision centre. Applicants who reside with friends or family

(something the Commission urges member states to encourage during Covid-19) have been refused medical cards by the National Medical Card Unit for the reason that they are not "ordinarily resident in the State" (as required by s. 45 of the Health Act 1970). This seems to be contrary to the provisions of the Reception Conditions Directive. In order to be granted a medical card, an international protection applicant may be subject to a financial means test. However, their entitlement to a medical card may not depend on whether or not they reside in direct provision.

V. Medical screening prior to deportation

At p. 22 of the Communication, the Commission recommends that a member state should carry out a medical screening of a person prior to deportation:

> Health screening
> Based on national law, Member States may carry out a medical screening of irregularly staying third-country nationals on public health grounds, which should comply with the principle of non-discrimination and fundamental rights, to identify the appropriate precautionary measures to implement. This would ensure that the state of health of the third-country national is taken into due account in return procedures, in line with the EU acquis.
> Medical tests and screening for COVID-19 of irregular migrants can also facilitate readmission by reassuring third country authorities about the reduced risk of contagion, as can do referrals to quarantine possibilities in third countries facilitated by international partners such as the International Organization for Migration.
> …
> Provide COVID-19 medical certificate for returnees, if requested by the third country of return; where available, work with international partners to refer returnees to quarantine possibilities in third countries.

Ireland has not opted into the Returns Directive 2008/115/EC, but immigration officials do have obligations under s. 3 of the European Convention on Human Rights Act 2003, in conjunction with articles 3 and 8 ECHR, in respect of taking into consideration the health of individuals prior to deportation.

The test to be applied in determining whether removing a person with a serious illness would amount to a breach of article 3 ECHR was clarified by the ECtHR in *Paposhvili v. Belgium* (app. no. 41738/10), 13 December 2016. Mr Paposhvili, a Georgian national living in Belgium, was diagnosed whilst in prison with chronic lymphocytic leukaemia. He claimed that his expulsion to Georgia would put him at risk of inhuman treatment and an earlier death due to the withdrawal of the treatment he had been receiving in Belgium. The ECtHR held that there would have been a violation of article 3 ECHR if Belgium had expelled the applicant to Georgia without having assessed the risk faced by him in the light of the information concerning his state of health and the existence of appropriate treatment in Georgia. The Grand Chamber held:

> 183. The 'other very exceptional cases' within the meaning of the judgment in *N v United Kingdom* [2008] ECHR 453 (§ 43) which may raise an issue under article 3 should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health

> resulting in intense suffering or to a significant reduction in life expectancy. The Court points out that these situations correspond to a high threshold for the application of Article 3 of the Convention in cases concerning the removal of aliens suffering from serious illness.

This test was endorsed by the Supreme Court in *DE v. Minister for Justice* [2018] IESC 16. O'Donnell J. emphasised the importance of the procedural aspect of *Paposhvili*:

> 7. … For my part, I have come to the conclusion that at the moment the decision in Paposhvili should be viewed as essentially procedural and clarificatory, and while an extension of the existing test, should not at this stage be interpreted without more as a dramatic change, and moreover cannot be taken as a guide to, or encouragement of, further expansion.

The procedural guidance in *Paposhvili v. Belgium* (app. no. 41738/10), 13 December 2016 requires that where evidence is adduced capable of demonstrating that there are substantial grounds for believing that the person in question would be exposed to a real risk of being subjected to treatment contrary to article 3 if deported, the burden shifts to the authorities of the returning State to demonstrate that there would be no such breach. The procedural requirements of article 3 ECHR were held to be as follows:

> (a) in para. 186 that it was for applicants to adduce before the returning state evidence "capable of demonstrating that there are substantial grounds for believing" that, if removed, they would be exposed to a real risk of subjection to treatment contrary to article 3;
> (b) in para. 187 that, where such evidence was adduced in support of an application under article 3, it was for the returning state to "dispel any doubts raised by it"; to subject the alleged risk to close scrutiny; and to address reports of reputable organisations about treatment in the receiving state;
> (c) in para. 189 that the returning state had to "verify on a case-by-case basis" whether the care generally available in the receiving state was in practice sufficient to prevent the applicant's exposure to treatment contrary to article 3;
> (d) in para. 190 that the returning state also had to consider the accessibility of the treatment to the particular applicant, including by reference to its cost if any, to the existence of a family network and to its geographical location; and
> (e) in para. 191 that if, following examination of the relevant information, serious doubts continued to surround the impact of removal, the returning state had to obtain an individual assurance from the receiving state that appropriate treatment would be available and accessible to the applicant.

In a recent judgment of the UK Supreme Court delivered on 29 April 2020, *AM (Zimbabwe) v. SSHD* [2020] UKSC 17, the premise behind this procedural guidance was stated to be:

> 33. … that, while it is for the applicant to adduce evidence about his or her medical condition, current treatment (including the likely suitability of any other treatment) and the effect on him or her of inability to access it, the returning state is better able to collect evidence about the availability and accessibility of suitable treatment in the receiving state. [There is an] obligation on the returning state to dispel [any serious] doubts raised by the applicant's evidence …

While the procedural guidance of *Paposhvili* suggests that the initial burden is on the person facing deportation to raise a *prima facie* case that his deportation would breach article 3 ECHR, a question arises as to whether a contracting State could be found to be in breach of the procedural element of article 3 ECHR if there was a failure to carry out a medical screening of a person, throughout the duration of the Covid-19 pandemic, prior to deportation, particularly if that person was old or had any underlying health difficulties or if they presented with any symptoms of Covid-19.