



Reception conditions: EU standards during Covid-19 and beyond



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Purpose



- European Commission 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 Covid-19 Communication”**



Overview



- I. Accommodation and social distancing
- II. Electronic registration and processing of international protection applications
- III. Special needs assessment
- IV. Access to necessary health care



I. Accommodation and social distancing



Article 17 of the Reception Conditions Directive 2013/33/EU:

“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**”.



Covid-19 Communication

Basic principles:

- measures to contain and limit the further spread of COVID-19 should be based on **risk assessments and scientific advice** and must remain **proportionate** and **non-discriminatory**.
- all applicants for international protection must be treated with **dignity**, and be, **at a minimum**, able to access and exercise their **basic rights**.

Recommendations:

- where reception centres are **overcrowded**, making it difficult to apply health protocols, applicants should as far as possible be **transferred to other facilities**.
- 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.



Key considerations:

- **non-discrimination** – appropriate comparator?
- **positive obligation** under the Reception Conditions Directive to provide accommodation that **protects** the physical and mental health of applicants.
- unlike socio-economic rights more generally – positive **legal** obligation into which Ireland has opted.
- Member states should be **proactive** in protecting the health of applicants in accommodation – future pandemics?

Calls for change:

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 Covid-19 emergency legislation (IRC, Amnesty International, ICCL, the Ombudsman).

II. Electronic registration and processing of international protection applications



- Article 23(2) Procedures Directive 2005/85/EC: “member states shall ensure that such a procedure is concluded **as soon as possible**”.
- Covid-19 Communication: to ensure **continuing access** to international protection procedures, the Commission encourages the **use of electronic means** of processing applications:
 - - “where necessary, it should be possible **to lodge applications** by means of a form either by postal mail or preferably online”.
 - - “**personal interviews** should, as far as possible, be conducted remotely through the use of videoconferencing”.
 - - “Member States should consider, in close cooperation with UNHCR, accepting **resettlement submissions** on a dossier-basis and envisage video interviews”.



Online registration v. requirement to make an application in person



Commission recommendation that where necessary, it should be possible **to lodge applications online**

Option for member states in art. 6(1) of Procedures Directive 2005/85/EC 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: “an application for international protection **shall be made in person** and shall be made to the Minister”.



Rationale for this option:



- correct **identification** of applicants
- **physical presence** on the territory of a member state.

In encouraging electronic processing, the Commission seems to recognise that **these concerns may be addressed in other ways** (e.g. requiring identity documents or proof of entry into the State to be scanned and emailed).



Is online registration precluded by this option?



Discrepancy between old and recast Procedures Directives:

Art. 6(1) of the former - “applications for asylum be **made** in person”

Art. 6(3) of the latter - “applications for international protection be **lodged** in person”.

Significance of this distinction: article 6(2) of the recast PD “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”.

KS (Pakistan) v IPAT and MHK (Bangladesh) v IPAT [2019] IEHC 176, 25 March 2019 (C-322/19).



Online lodgement of applications “where necessary”:



- ensure protection of the **health** of applicants.
- **avoid undue delay** arising from the inability of an applicant to attend the IPO office in person (for such reasons as the requirement to self-isolate, cocoon or other).
- the difference between **making** and **lodging** an application suggests that neither s. 15(2) of the 2015 Act nor article 6(1) of the initial Procedures Directive would preclude electronic processing.



Paving the way for **extraterritorial applications / humanitarian visas?**



X and X v État belge (Case C-638/16 PPU), judgment of 7 March 2017 (*cf* Opinion of AG Mengozzi).

M.N. v. Belgium (app. no. 3599/18), judgment of the Grand Chamber of the ECtHR of 5 March 2020.

EP Resolution recommending the adoption of a regulation entitled “Regulation establishing a European Humanitarian Visa” (2018/2271(INL)), 11 December 2018.



EP *Added Value Assessment study*

July 2018



Factual findings grounding recommendation for a Regulation on HVs:

- estimated that 90% of those granted international protection reached the EU through **irregular means**.
- **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.
- **heightened risk of sexual violence and trafficking** for persons in need of protection trying to make this journey.
- **smugglers benefit financially** from these journeys.
- **risk of continued persecution** for persons in need of protection who cannot make such journeys.



III. Special needs assessment



- Covid-19 Communication - references to special measures that should be afforded to “**vulnerable**” applicants.
- Article 22 Reception Conditions Directive 2013/33/EU
- *Assessment of the special reception needs of vulnerable persons*
- 1. ... 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** ... Member States shall ensure that those special reception needs are **also** addressed ... if they become apparent at a **later stage** in the asylum procedure.



European Communities (Reception Conditions) Regulations 2018 (SI 230/2018)



- *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 ...

EASO, Guidance on reception conditions: operational standards and indicators, September 2016.



- Section 7 - recommendations for the implementation of a special needs assessment
 - 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) Where relevant, **specialised actors** are involved in the assessment of 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) Adequate and prompt action is taken **to respond** to the identified and assessed special needs.

- ***X and Y v. MJE*** [2019] IEHC 133 – Francovich damages awarded, yet finding that special needs assessment carried out on the facts.
- Irish context more generally – the roles as between the **IPO**, the **IPAS** (formerly the RIA), the **Minister for Health** and the **HSE** are unclear.
- 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.



IV. Access to necessary health care



- Reception Conditions Directive
- 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 ...
- Article 17(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.
- Article 17(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 ... if the applicants have sufficient resources, for example if they have been working for a reasonable period of time.



The Irish 2018 Regulations



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.



Covid-19 Communication:



- member states must ensure that an applicant's **basic needs**, including **health care**, are met.
- one recommendation of note: “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 International Protection Accommodation Service (IPAS)



- Function: “responsible for the procurement and overall administration of State provided **accommodation and ancillary services** for applicants for international protection”.
- IPAS website:
- Access to health services in Ireland for asylum seekers is provided **on the same basis as for Irish citizens** i.e. it is ‘mainstreamed’ ...
- 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.
- 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.
- 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 ...

- **Link** between an entitlement to a medical card and residence 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 reason of the fact that they are not “ordinarily resident in the State” – seems to be contrary to 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 residence in direct provision.