ICCL Submission to the Joint Committee on Justice, Equality, Defence and Women's Rights on the Immigration, Residence and Protection Bill 2008 (as initiated)

March 2008

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About the Irish Council for Civil Liberties (ICCL)

The Irish Council for Civil Liberties (ICCL) is Ireland's leading independent human rights watchdog, which monitors, educates and campaigns in order to secure full enjoyment of human rights for everyone.

Founded in 1976 by Mary Robinson and others, the ICCL has played a leading role in some of the most successful human rights campaigns in Ireland. These have included campaigns resulting in the establishment of an independent Garda Síochána Ombudsman Commission, the legalisation of the right to divorce, more effective protection of children's rights, the decriminalisation of homosexuality and introduction of enhanced equality legislation.

We believe in a society which protects and promotes human rights, justice and equality.

What we do

- Advocate for positive changes in the area of human rights;
- Monitor Government policy and legislation to make sure that it complies with international standards;
- Conduct original research and publish reports on issues as diverse as equal rights for all families, the right to privacy, police reform and judicial accountability;
- Run campaigns to raise public and political awareness of human rights, justice and equality issues;
- Work closely with other key stakeholders in the human rights, justice and equality sectors.

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1. Introduction

1.1 The ICCL thanks the Joint Committee on Justice, Equality, Defence and Women's Rights for the invitation to make a submission in respect of the Immigration, Residence and Protection Bill 2008.

1.2 The Immigration, Residence and Protection Bill 2008 was introduced on 29 January 2008 with the purpose of consolidating and updating the legislative framework for dealing with inward migration. Whilst the overall purpose framework of the Bill is to be commended, the Irish Council for Civil Liberties (ICCL) is concerned that certain sections of the Bill are unconstitutional and in breach of Ireland's human rights obligations. It is the view of the ICCL that some aspects of the Bill do not strike the right balance between the interests of the State and the individual rights of migrants.

1.3 In the present submission, the ICCL has chosen to prioritise several key areas of concern, namely:

- Summary Removal;
- Free Education for Unlawfully Present Children;
- Detention;
- Criteria for Non-Protection Aspects of Protection Applications;
- Protection Review Tribunal;
- Restrictions on Judicial Review;
- Police Powers;
- Restrictions on the Right to Marry.

2. Summary Removal

Foreign Nationals Unlawfully Present

2.1 Section 4(3)(a) provides that a foreign national who is present in or enters the State unlawfully shall be guilty of an offence. A foreign national who is unlawfully present is under an obligation to leave the State [section 4(4)(a)] and is liable for removal in accordance the Act's provisions. Section 4(5) makes it clear that a foreign national may be removed without notice and arrested/detained for the purposes of removal [section 4(6)].

Procedure for Revocation of Entry Permission or Non-Renewable Residence Permission

2.2 Section 30 outlines an application process for foreign nationals to apply for residence permission. Under this provision, the Minister for Justice, Equality and Law Reform[1] may issue residence permission to an individual attaching a range of different conditions.[2] However, the Minister may also issue a person with a non-renewable residence permission which means that the foreign national is not entitled to make an application for its renewal [section 32(1)] or modification [section 33(2)]. The Bill does not state who is likely to be granted entry permission and non-renewable residence permission.[3] However, the ranges of people who may fall into these categories include: tourists, individuals visiting family members, seasonal workers, visitors.

2.3 Section 44(1) states that where the Minister decides to revoke an entry permission or non-renewable residence permission, the foreign national will be notified "where necessary and practicable in a language that the foreign national understands". The notification will indicate reasons why the permission is being revoked [section 44(2)(a)] and if it includes a non-return order, the notice will specify the reasons for removal [section 44(2)(b)(i)]. Consequently, a foreign national issued with a non-return order will be:

- For all purposes unlawfully in the State [section 44(3)(a)];
- Under an obligation to remove himself or herself from the State [section 44(3)(b)];
- Liable to removed without notice, if necessary against his or her will, from the State and to be detained for the purposes of securing his or her removal [section 44(3)(c)].

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[1] Hereinafter referred to as 'the Minister'.

[2] Refer to sections 30(6), 30(7), 30(8) and 30(9).

[3] Press statements from the Minister suggest that entry permits will be issued to tourists/visitors and non-renewable residence permits for short courses of study. Refer to the Minister's speech on the introduction of the Immigration, Residence and Protection Bill

Removal from the State of Foreign National Unlawfully Present

2.4 Section 54(1) provides a general power to immigration officers or any member of An Garda Síochána to remove a foreign national from the State when "it appears" to them that he/she is unlawfully present in the State or at the frontier of the State. Destinations for removal are set out in section 54(2) and section 54(4) specifies that the foreign national must not "by act or omission, obstruct or hinder an immigration officer or a member of the Garda Síochána engaged in the removal of a foreign national under this section".

Human Rights Concerns

The following section deals with: prohibition against *refoulement*, fair procedures, access to justice and family life considerations.

Prohibition Against Refoulement

2.5 The ICCL is concerned that the broad scope of the powers in sections 4(5) and 54(1) may lead to breaches of the prohibition against *refoulement* and the right to be free from torture, inhuman or degrading treatment. The prohibition against *refoulement* broadly means that no one should be returned to a country where they are likely to experience persecution or torture. This prohibition is included in international human rights treaties[4] which Ireland is a party to and the Irish Constitution.[5] In particular, the absolute prohibition contained in Article 3 of the ECHR puts a positive obligation on the State to rigorously protect the individual. In *Chahal v UK*, the European Court noted that:

> Article 3 enshrines one of the most fundamental values of democratic society. The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violation. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct.[6]

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[4] For example, article 33 of the Convention relating to the Status of Refugees and the 1967 Protocol; article 7 of the ICCPR; Article 3 of the UN Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (UNCAT) and article 22 of the International Convention on the Rights of the Child.

[5] In the *State v Frawley* [1976] IR 365, the Court confirmed that the right to bodily integrity would include protection against torture.

[6] (1997) 23 EHRR 413, para 80.

2.6 Section 24(10) provides that a foreign national who wishes to make an application for protection will be given "protection application entry permission" by immigration officers at the frontier. However, what will happen in circumstances where an immigration officer/Garda comes across a foreign national unlawfully resident at the State? If the person indicates that they wish to make an application for protection, will they be allowed to apply to the Minister? Section 73(1) does mention that a foreign national, whether lawfully or unlawfully in the State, may apply to the Minister for protection and section 53(1) includes a general prohibition against non-refoulement. However, sections 4 and 54(1) do not include any explicit provision that a removal will be temporarily suspended in the advent of an individual making a protection application. The ICCL considers that this is a flaw in the Bill and endorses the United Nations High Commissioner for Refugees (UNHCR) recommendation that "all persons must have unhindered access to a procedure".[7]

Fair Procedures

2.7 The ICCL considers that the power of the Minister to remove without notice and without any provision to review the revocation of entry permission/non-renewable residence permission may be in breach of the constitutional right to fair procedures in decision making. This right flows from Article 40.3.1°, is procedural in character and relates to all civil proceedings.[8] Fair procedures are essential to protect against unfair, arbitrary and discriminatory decisions.

2.8 *Audi alteram partem*, the requirement to hear the other side, is one of the two common law rules of natural justice[9] and is a basic principle providing that:

> A person affected by, or with an interest in the outcome of, an administrative decision has the right to have adequate notice of this decision and to be given an adequate opportunity to make his case before that administrative body.[10]

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[7] UNHCR (March 2008) *UNHCR's Comments on the Immigration, Residence and Protection Bill 2008,* at p. 6.

[8] *In re Haughey* [1971] IR 217; *Garvey v Ireland* [1981] IR 217 and *Dublin Wellwoman Centre Ltd. v Ireland* [1995] 1 ILRM 408.

[9] The other is *nemo index in causa sua*: no one shall be a judge in his/her own cause. This rule is referred to elsewhere.

[10] Refer to Hogan, G.W. and Whyte, GF (2003) *JM Kelly: The Irish Constitution,* Lexis Nexus/Butterworths: Dublin, 4th edition, at p. 640.

The fact that a foreign national may be removed without notice or an opportunity to have a decision reviewed is clearly in breach of *audi alteram partem*. While notice is given when an entry permit/non-renewable permit is revoked, there is no possibility to have this decision reviewed and the persons concerned becomes subject to summary removal immediately. The ICCL is extremely concerned that the failure to provide any form of review will allow the Minister and immigration officers/Gardaí acting on behalf of the Minister, to make unfair and arbitrary decisions against foreign nationals. Under sections 4(1) and 54(1), if a Garda comes across an unauthorised migrant, there would be absolutely nothing to stop him/her removing them from the country. This is a radical change. Currently, if the Minister wishes to remove an individual then that person is given notice and has 15 working days to make representations as to why they should not be removed.[11] If representations are not made within the 15 working days then the Minister can proceed to issue a removal order.

2.9 The ICCL is also extremely concerned about the subjective nature of the language in section 54(1). For example, an immigration officer or member of the Gardaí will be able to remove an individual if "it appears" they are unlawfully present. This may open the possibility of a foreign national or naturalised Irish citizens being detained removed from the State who does not happen to have his/her documentation on their person. Therefore, the ICCL considers that this section must be amended to ensure that foreign nationals will not be arbitrarily removed.

[11] Refer to Section 3 of the Immigration Act 1999 accessible at: http://193.178.1.79/1999/en/act/pub/0022/sec0003.html

Access to Justice

2.10 The ICCL is concerned that the above provisions provide no opportunity for foreign nationals affected to enjoy a right to access the Irish courts. The right to litigate and access the courts is an unenumerated right which is procedural in character.[12] Non-citizens have a right to access the courts and this was confirmed by Keane CJ in *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* who said that:

> It would be contrary to the very notion of a state founded on the rule of law, as this State is, and one in which, pursuant to Article 34 justice is administered in courts established by law, if all persons within this jurisdiction, including non-nationals, did not, in principle have a constitutionally protected right to access to the courts to enforce their legal rights.
>
> It may be that in certain circumstances a right of access to the courts of non-nationals may be subject to conditions or limitations which would not apply to citizens. However, where the State, or State authorities, make decisions which are legally binding on, and addressed directly to, a particular individual, within the jurisdiction, whether a citizen or non-national, such decisions must be taken in accordance with the law and the Constitution. It follows that the individual legally bound by such a decision must have access to the courts to challenge its validity. Otherwise the obligation on the State to act lawfully and constitutionally would be ineffective. [13]

2.11 The ICCL cannot see how someone who is automatically deemed unlawfully present in the State and liable for summary removal can assert their right to access the court to challenge the validity of a decision to remove them. Statutory machinery cannot be used to deprive an individual from resorting to the courts and the ICCL considers that the above provisions[14] directly infringe on this right. In *The State (Quinn) v Ryan*, an applicant for *habeas corpus* had been arrested on foot of a warrant issued by the English police. However, the warrant contained a flaw and it was apparent that the prisoner would be released by the court. A new warrant was issued without the knowledge of the prisoner, and when he was released the Gardaí rearrested him, bundled him into a car and drove him to Northern Ireland to be handed over to the English police. The Gardaí's actions were lawful under the procedure set out by the 1851 Petty Sessions (Ireland) Act. Nevertheless, the Supreme Court ruled that the extradition machinery could not be

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[12] Refer to *Tuohy v. Courtney* [1994] 3 I.R; M*acAuley v Minister for Posts & Telegraphs* [1966] IR 345; *Murphy v Minister for Justice* [2001] 1 IR 95.

13 [2000] IESC 19; [2000] 2 IR 360 (28th August, 2000) at 365.

[14] In particular, sections 4(5), 54(1) and 54(4).

operated in such a way as to deprive the prisoner of his right to challenge the legality of the new warrant. Ó Dálaigh CJ said:

> In plain language the purpose of the police plan was to eliminate the courts and to defeat the rule of law as a factor in government […] No one can with impunity set [the citizen's rights] at nought or circumvent them [by depriving him of access to the courts] and… the courts' powers in this regard are as ample as the defence of the Constitution requires.[15]

2.12 Sections 4(5), 54(1) and 54(4) also raise issues under Article 6 (right to a fair trial) of the ECHR in connection with Article 13 (right to a remedy). Individuals must have access to the court otherwise the right to a fair trial is meaningless. On that basis, the European Court of Human Rights has developed a 'right of access' out of the provisions of Article 6(1). This right was first recognised in *Golder v UK*[16], a case concerning prison rules which prevented a prisoner from taking defamation proceedings against a prison officer. The European Court said:

> In civil matters one can scarcely conceive of the rule of law without there being a possibility of access to the courts […] The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally recognised fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice. Article 6(1) must be read in light of these principles.[17]

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[15] [1965] IR 70 at 117 122, (1966) 100 ILTR 105 at 130, 132, cited in Hogan and Whyte, *ibid*, at p. 1447.

[16] (1979-80) 1 EHRR 524.

[17] *Ibid*, at paras 35-45.

2.13 In *Juristic and Collegium Mehereau v Austria* (2006),[18] the European Court confirmed that the "right to a court" also encompasses immigration related decisions. In this case the applicants complained against the fact that they were not permitted to have an oral hearing before an administrative court in a dispute involving an employment permit.

2.14 This principle does not mean that the right of access to the court cannot be regulated. However, summarily removing an individual before they can access the courts is clearly in breach of this right. It is the view of the ICCL that the above sections are unconstitutional and that the Bill should be amended to re-insert a similar procedure as set out in section 3 of the Immigration Act 1999. Namely that foreign nationals facing removal must be given proper notice and an opportunity to have that decision reviewed.

Family Life Considerations

2.15 The ICCL is concerned that sections 4 and 54(1) potentially interfere with family rights under Article 8 of the ECHR. Article 8(1) provides that "Everyone has the right to respect for his […] family life'' and Article 8(2) prohibits public authorities from interfering with this right except where the grounds of the interference are: in accordance with the law; pursue a legitimate aim and are necessary and proportionate. While Article 8 does not impose a ban on expulsion, removal must be carried out in a manner which is compatible with the Convention. This means that the removal would have to be lawful domestically, pursue a legitimate aim, and be proportionate. Factors relevant to the assessment of proportionality include: 1) the reasons for the expulsion; 2) the applicant's ties with the removing state; 3) the extent of the disruption of his/her family life; 4) whether there are real obstacles to establishing family life and 5) whether there are real obstacles to establishing family life elsewhere.[19]

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[18] Application No. 6253/00.

[19] Starmer, K. (1999) *European Human Rights Law,* Legal Action Group: London, at p. 519.

2.16 Summary removal as set out in sections 4(5), 4(6), 4(7), 4(8), 4(9), 4(10) and 54(1) of the Bill provides no opportunity for the Minister to determine if the removal of an unlawfully present foreign national raises issues under Article 8. As argued by the State in *Bode (A Minor) v Minister for Justice, Equality and Law Reform,*[20] the Minister can currently determine whether a removal will unduly interfere with family rights by relying on section 3(6) of Immigration Act 1999. Factors to be taken account when determining whether to remove an individual include:

(a) the age of the person;
(b) the duration of residence in the State of the person;
(c) the family and domestic circumstances of the person;
(d) the nature of the person's connection with the State, if any;
(e) the employment (including self-employment) record of the person:
(f) the employment (including self-employment) prospects of the person;
(g) the character and conduct of the person both within and (where relevant and ascertainable) outside the State (including any criminal convictions);
(h) humanitarian considerations;
(i) any representations duly made by or on behalf or the person;
(j) the common good; and
(k) considerations of national security and public policy, so far as they appear or are known to the Minister

2.17 This procedure will be abolished and under the 2008 Bill, the Minister will only provide 15 working days to foreign nationals who are holders of renewable residence permits[21] and long-term residence permits to make representations.[22] Given that there will be no procedure for the Minister to consider the family rights of undocumented workers or persons whose entry permits/non-renewable residence permits have been revoked, how is he to consider the State's obligations under Article 8? Judicial review will be the only effective channel for foreign nationals to challenge the removal and that right will be extinguished if they are summarily removed.

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[20] [2007] IESC 62.

[21] Foreign nationals with renewable residence permits are likely to include all other categories of persons who will be normally resident in the State for more than short-period i.e. migrant workers, international students, persons with business permission and third country spouses of Irish and EU nationals.

[22] Section 36 provides that long-term residence permits will be issued to foreign nationals who have been legally resident in the State for more than five years and who meet certain eligibility criteria.

2.18 Factors to be considered by the Minister when revoking a renewable residence permit have also been significantly reduced in the current Bill. When determining to revoke a renewable residence permission, the Minister will only have to take account of:

(a) humanitarian considerations;
(b) the common good;
(c) considerations of public security, public policy and public order [section 45(8)].

There is no reference to the duration of residence in the State of the person or their domestic and familial circumstances. The ICCL considers that this is a serious omission which must be addressed in order to ensure that the Minister respects his obligations under Article 8.

ICCL Recommendations

- Section 54(1) should be amended to include an explicit provision that a removal will be temporarily suspended in the advent of an individual making a protection application.
- The Bill should be amended to re-insert a procedure which is similar to section 3(6) of the Immigration Act 1999, whereby the Minister must give notification to a foreign national he/she intends to remove and 15 working days to make representations as to why they should remain within the State.

3. Free Education for Unlawfully Present Children

3.1 The restriction on accessing public services or any service provided through public monies within the Bill, does not apply where a foreign national who is under the age of 16 years is unable due to insufficient funds to "access" education [section 6(2)(iii)]. The ICCL considers that if schools or an educational provider were to implement this provision in practice, they may have:

(1) To determine whether a child or their parents is residing unlawfully within the State and
(2) Conduct a means test based on the parents finances.

This represents a new practice as schools or other education bodies do not currently carry out immigration functions of this kind in relation to children under the age of 16 years. Moreover, parents' incomes with children of school-going age are not subjected to a means test by educational institutions or local authorities.

Human Rights Concerns

3.2 Article 42.2 of the Irish Constitution imposes an obligation on the State to "provide for" [23] free primary education. Section 6 of the Education Act 1998 ensures that all those implementing the said Act shall have regard to "give practical effect to the constitutional rights of children"[24] and "to promote equality of access and participation in education".[25] Article 13 of the ICESCR and Article 28 of the CRC also oblige the State to "make primary education compulsory and free for all". Moreover, the Equal Status Acts 2000-2004 provide that discrimination in relation to goods and services is prohibited on the grounds of race, which includes nationality.[26]

[23] *Crowley v Ireland*, (1980) IR 102.
[24] Section 6(a) Education Act 1998.
[25] Section 6(c) Education Act 1998.
[26] Section 53 of the Equality Act permits "public authorities" to discriminate against unlawfully present individuals. However, section 53 does not include schools as they are not defined as "public authorities" under the Act.

3.3 The ICCL considers that this new restriction on free primary education for undocumented children clearly interferes with the State's obligations to provide for free education. The provision is also discriminatory as it only subjects the parents/families of undocumented children to a means test in order to determine whether to provide for the education.

3.4 Article 2 of Protocol 1 to the ECHR provides that: "No person shall be denied the right to education" and is understood to mean "a right of access" to educational facilities that already exist. [27] Indeed, the right of access to education is unqualified as confirmed by the European Court in *Timishev v Russia:*

> Article 2 of Protocol 1 prohibits the denial of the right to education. This provision has no stated exceptions and its structure is similar to that of Articles 2 and 3, Article 4(1) and Article 7 of the Convention, which together enshrine the most fundamental values of the democratic societies making up the Council of Europe. In a democratic society, the right to education, which is indispensable to the furtherance of human rights, plays such a fundamental role that a restrictive interpretation of the first sentence of Protocol 2 of Protocol 1 would not be consistent with the aim or purpose of that provision.[28]

3.5 Article 14 (freedom from discrimination) of the ECHR does not prohibit all forms of distinctions or differential treatment. However, in a recent case involving a breach of Article 14 together with Article 2 of protocol 1, the European Court affirmed that a difference in treatment must have a reasonable and objective justification meaning that it has to pursue a legitimate aim and there must be a "reasonable relationship of proportionality".[29] In order to meet the ECHR test of proportionality, it is necessary to consider: (1) whether 'relevant and sufficient' reasons have been advanced in support of the measure; (2) whether there is a less restrictive alternative and (3) what the actual effects are on the individual in question.

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[27] Harris, O'Boyle and Warbrick (1995) *The Law of the European Convention on Human Rights,* Butterworths, at p. 541.

[28] At para 64, Applications No. 55762(00 and 55974/00, judgment delivered on 13 December 2005.

[29] *DH and Others v The Czech Republic* (2007) Application no. 57325/00, judgment delivered on 13 November 2007, at para 196.

3.6 The ICCL considers that the State has provided no relevant and sufficient reasons why this new restriction in relation to free primary education is necessary for undocumented children and their families. Indeed, the ICCL considers that this provision is extremely short-sighted. It may result in undocumented parents not sending their children to school to avoid detection by immigration authorities which would have negative consequences for the children.

3.7 The ICCL also considers it highly inappropriate to force education providers working with children to carry out immigration type functions as it will create a conflict of interest. Education providers are required to guarantee equality of access. However, this new provision clearly treats the children of unlawfully foreign nationals unequally as it discriminates against their parents.

ICCL Recommendation

- Delete section 6(2)(iii).
- Insert provision ensuring that the ban on accessing public services by persons who are unlawfully resident does not apply to children under the age of 18 to education.

4. Detention

4.1 Asylum seekers detained under the provisions of the Immigration Residence and Protection Bill 2008 are to be offered legal safeguards broadly equivalent to those set out in the Refugee Act 1996 (cf. Section 71 (15) of the 2008 Bill, and Section 10 (1) and (2) of the 1996 Act). However, the Bill does not recognise that other categories of persons detained for immigration reasons – including people refused permission to land and those detained pending deportation – should also benefit from these safeguards.

Human Rights Concerns

4.2 The ICCL considers that the Bill should be amended in order formally to provide that all categories of persons deprived of their liberty for immigration-related reasons are to be informed, in a language that they understand, of their right of access to a solicitor, their right to notify someone of the fact of their detention, and their right be assisted by an interpreter during consultations with a solicitor. Moreover, the ICCL notes that section 71 (2) of the Bill provides that "the Minister shall make regulations providing for the treatment of persons detained under this section." This would suggest that it is intended to make provision for the treatment of immigration detainees in a manner that departs from the comprehensive formal safeguards set out in the Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987 (S.I. 119 of 1987).

4.3 In the view of the ICCL, this would be an undesirable step, and it would be far preferable for the Bill to provide that safeguards set out in the 1987 Regulations are to be offered to all categories of persons deprived of their liberty by An Garda for immigration-related reasons.

4.4 In addition, the ICCL endorses the UNHCR's recommendations in relation to the detention of asylum seekers, in particular that:

- [The] detention of asylum-seekers is exceptional and should only be resorted to where provided for by law and where necessary to achieve a legitimate purpose; proportionate to the objectives to be achieved; and applied in a non-discriminatory manner for a minimal period;[30]

[30] *Ibid*, at p. 29.

- Provision 70(2) [should be] left out of the final Act as it would allow for detention for unspecified length for the sole reason of lack of administrative capacity;[31]
- The Bill should include a sub-section specifically calling on an assessment of whether it is necessary and proportionate to detain in section to section 4(6);[32]
- [There should be] more specific time limitations with regard to the duration of detention are introduced to sections 70 and 71 of the final Act.[33]

[31] *Ibid*, at p. 30.
[32] *Ibid.*
[33] *Ibid*, at p. 31.

5. Criteria for Non-Protection Aspects of Protection Applications

5.1 Section 73 establishes a single application procedure for persons seeking protection from the State. Sections 79(1) and 79(2) specifies that the Minister having made a determination on a case shall recommend that the applicant:

(a) is entitled to protection in the State as a refugee and will be granted a protection declaration;
(b) is not entitled to protection in the State as a refugee but is entitled to protection in the State as a person eligible for subsidiary protection and will be granted a protection declaration on that basis;
(c) is not entitled to protection in the State but (whether to comply with the rule against refoulement or otherwise) will be granted a residence permission, or
(d) is not entitled to protection in the State and will not be permitted to remain in the State.

5.2 Section 83(1) provides that the Minister will not make a determination that the applicant is entitled to a residence permit under 79(2)(c) unless in the Minister's opinion, there are "compelling reasons" for permitting the foreign national to remain in the State. Section 83(2) states that in determining whether compelling reasons exist in a particular case:

(a) The Minister shall consider whether the presence of the applicant in the State would give the applicant an unfair advantage compared to a person not present in the State but in otherwise similar circumstances, and
(b) the Minister shall not be obliged to take into account factors in the case that do not relate to reasons for the applicant's departure from his or her country of origin or that have arisen since that departure [section 83(2)].

5.3 Presently, asylum applicants who are refused refugee and subsidiary protection can make an application to the Minister on humanitarian grounds via section 3(6) of the Immigration Act 1999 (as amended) after receipt of a notification to deport. The Minister bases his determinations on the following criteria:

(a) the age of the person;
(b) the duration of residence in the State of the person;
(c) the family and domestic circumstances of the person;
(d) the nature of the person's connection with the State, if any;
(e) the employment (including self-employment) record of the person:
(f) the employment (including self-employment) prospects of the person;
(g) the character and conduct of the person both within and (where relevant and ascertainable) outside the State (including any criminal convictions);
(h) humanitarian considerations;
(i) any representations duly made by or on behalf or the person;
(j) the common good; and
(k) considerations of national security and public policy, so far as they appear or are known to the Minister.

Human Rights Concerns

5.4 The ICCL is concerned that the Bill replaces the current procedure for determining humanitarian cases with new restrictive criteria which is not compatible with the State's human rights obligations. For example, when determining whether to grant residence permission, section 83(2)(b) provides that the Minister shall not be obliged to take account of factors that do not relate to the applicant's departure from his/her country of origin or that have arisen since that departure. This new limitation is incompatible with the grounds delineated in section 3(6) of the Immigration Act 1999, and in the view of the ICCL, is incompatible with the State's obligations under article 8 (family and private life) of the ECHR.[34] The Minister is obliged to take account of whether a removal is likely to interfere with the family rights of the applicant. The type of cases that might arise concern protection applicants who have either married or entered a committed relationship with an Irish, EU national or a long-term resident third country national. If the protection applicant has become the parent of an Irish citizen child, then the child's constitutional rights would also come into consideration. [35]

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[34] Refer to Section 2.15 in the present paper.

[35] This could occur in circumstances where the other parent is an Irish citizen or lawfully resident within the State for three years.

5.5 The ICCL is also concerned about the express statement in the Bill that the Minister will not to take account of developments which may have occurred in the country of origin since the applicant left. What if a famine has occurred in the applicant's country of origin since they have left which could potentially result in the loss of their life if they were sent home? How could the Minister not be obliged to acknowledge this factor?

5.6 The ICCL believes that the abolition of section 3 and the introduction of this process may result in persons applying for protection who in fact require residency on humanitarian grounds. This could potentially clog the single protection procedure with applications that should really be dealt with through another procedure. This point has been acknowledged by the Report of the UNHRC which suggests that: "in order to avoid compelling an avenue should be created other than the single asylum procedure, to allow for persons unlawfully in the State to seek permission to remain". [36] Indeed, the UN Special Rapporteur on the Rights of Migrants, Ms Gabriela Rodríguez, has called on States "to provide broad consular protection on a humanitarian basis, particularly for its most disadvantaged migrant nationals or those in irregular situations".[37] Therefore, the ICCL believes it is important that a section 3(6) type procedure should be inserted into the Bill to allow for applications to be made on humanitarian grounds.

ICCL Recommendation

- The Bill should be amended to re-insert a procedure which is similar to section 3(6) of the Immigration Act 1999, whereby the Minister must give notification to a foreign national he/she intends to remove and allow 15 working days to make representations as to why they should remain within the State.

[36] *Ibid*, at p. 3.

[37] Refer to *Human Rights of Migrants Report*, A/57/292, 9 August 2002, at para 78.

6. Protection Review Tribunal (PRT)

6.1 Sections 91(1) and 91(2) provide for the establishment of a Protection Review Tribunal (PRT) to independently review decisions made by the Minister in relation to protection applicants. Section 91(3) makes clear that the PRT will be (a) inquisitorial in nature and (b) independent in the performance of its functions.

Membership of the Tribunal

6.2 Section 92(2) deals with the membership of the Tribunal and prescribes that it shall consist of a Chairperson and whole-time and part-time members. While the Chairperson must be a barrister or solicitor with not less than 5 years of practicing experience [section 92(2)(a)], ordinary members of the Tribunal will only need to have "not less than 5 years relevant experience" [section 92(2)(b)]. Section 92(3) further clarifies that "relevant experience" may mean experience as a practising barrister/solicitor, experience of protections matters or a combination of both.

Appointment

6.3 Although section 92(5) provides that the Chairperson of the Tribunal or full-time Tribunal member will be appointed through the Public Appointments Service, section 92(4) allows the Minister to personally appoint part-time Tribunal members.

Terms of Office

6.4 Section 92(8)(a) states that the terms of office of the Chairperson shall be 5 years and he/she may be reappointed to the office for a second or subsequent term not exceeding five years. Section 92(8)(b) stipulates that a full-time member of the Tribunal shall appointed for 3-5 years. Again, the full-time member may be reappointed for a second or subsequent term not exceeding 3-5 years.

6.5 Part-time Tribunal members appointed directly by the Minister shall serve a 3 year term of office and may be eligible for reappointment to the office for a second or subsequent term not exceeding 3 years [section 92(8)(c)].

Functions of the Tribunal Chairperson

6.6 Section 93(1) indicates that the Chairperson shall ensure that the business of the Tribunal will be managed "efficiently and that the business assigned to each member is disposed of as expeditiously as may be consistent with fairness and natural justice".

6.7 Section 93(2) also provides for the Chairperson to establish rules and procedures for the conduct of oral appeals which take account of "the need to preserve fair procedures".

Human Rights Concerns

6.8 The ICCL is concerned that the new PRT may not in practice guarantee protection seekers a fair and independent hearing. This is triggered by section 92(8)(c) which provides that the Minister may appoint part-time members of the Tribunal and the fact that certain safeguards which are important for the operation of an independent tribunal have been omitted from the legislative framework. Given that the PRT will replace the now discredited Refugee Appeals Tribunal, the ICCL considers that it is essential that section 92(8)(c) of the Bill is amended to ensure that the new Tribunal is fully independent.

The following sections deal with: human rights standards on independence and impartiality; the Refugee Appeals Tribunal; appointment of Tribunal Members; part-time Tribunal members and conflicts of interest; the allocation of cases and a Code of Ethics for Tribunal members.

Human Rights Standards on Independence and Impartiality

6.9 The right to fair procedures in decision-making is a constitutional right flowing from Article 40.3.1° and is vital to protect against unfair, arbitrary and discriminatory decisions. The right to "a fair and public hearing by a competent, independent and impartiality tribunal established by law" is also guaranteed by Article 14 of the ICCPR. The UN Human Rights Committee has unambiguously held that the "right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception".[38]

6.10 Two basic principles of justice, *audi alteram partem*[39] and *nemo judex in causa sua*[40] apply to all judicial and quasi-judicial proceedings. The Irish courts distinguish between actual bias and where there might be a real apprehension of bias (the objective test). For objective test to be established there needs to be a "real likelihood of bias"[41] or "a reasonable apprehension".[42] Bias is presumed in circumstances where there is a material or pecuniary interest[43] and prior involvement in a case may be adequate to establish bias. [44] As regards the situations where it has been found that objective bias exists, like the jurisprudence under the ECHR[45], prior involvement in a case may be adequate.

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[38] M.Gonzales de Río v Peru Communication No. 263/1987: Peru 28/10/92.

[39] Latin for 'to hear the other side'.

[40] Latin for 'non man may be a judge in his own cause'.

[41] *Corrigan v Irish Land Commission* [1977] IR 317 at 328; *Dublin and County Broadcasting Ltd v Independent Radio and Television Commission* (12 May 1989) HC. Also see Barron J in *Orange Communications Ltd v Director of Telecommunications Regulation (No 2)* [2000] 4 IR 159 at 186.

[42] *Bula Ltd v Tara Mines* Ltd, [1988] ILRM, 149.

[43] *Doyle v Croke* (6 May 1988, unreported) HC is a leading case here. However, de Blacam *ibid*, at p. 98, asserts that this principle is not so rigid for non-judicial bodies. Refer to *Dublin and County Broadcasting Ltd v Independent Radio and Television Commission* (12 May 1989) HC. Spi

[44] *O'Neill v Irish Hereford Breeders Association Ltd* [1992] 1 IR 431.

[45] *Hauschildt v Denmark* (1990) 12 EHRR 266; *Ferrantelli and Santangelo v Italy* (1996) 23 EHRR 288; *Oberschlick (No. 1) v Austria* (1991) 19 EHRR; *De Haan v the Netherlands* (1997) App No. 84/1996/673/895; *Wettstein v Switzerland* (2000) App. No. 33958/96; *Kyprianou v Cyprus* (2005), App No. 73797/01.

Refugee Appeals Tribunal

6.11 The Refugee Appeals Tribunal[46] has been plagued by allegations of non-transparency, unfairness and bias. This may be partly due to the fact that as an institution, it lacks the basic hallmarks of independence (security of tenure for members, a transparent appointments system, rules on case allocation).

6.12 The Refugee Appeals Tribunal was established as an *independent* body to process asylum appeals from the Office of the Refugee Applications Commissioner (ORAC).[47] For many years, the Tribunal refused to publish its own decisions and when this practice was challenged before the High Court, McMenamin J held that it did not accord with "the principles of natural and constitutional justice, fairness of procedure or equality of arms". [48]

6.13 The Tribunal has also been accused of bias against asylum applicants. Tribunal members have been appointed at the discretion of the Minister for Justice, Equality and Law Reform. The only professional requirement for the post is that they must be a practicing lawyer of five years standing and they have no security of tenure once appointed. With no regulations on the allocation of cases to Tribunal, and members paid by the number of cases they process, statistics obtained by media sources revealed that one member earned 10 per cent of the total earned by 33 members.[49] This led to the suspicion that work was being allocated with the rate of affirmation of ORAC decisions.[50]

6.14 In *Nyembo v. Refugee Appeals Tribunal*, a refugee applicant sought an order preventing a Refugee Appeals Tribunal member, Mr Jim Nicholson, from hearing his appeal, on the basis that there is a reasonable apprehension of bias. In this case, the applicant cited Mr Nicholson's reputation among immigration and asylum lawyers, together with statistics compiled by two leading legal practitioners in the area of refugee law which led one of them to advise clients that there was no prospect of success for an applicant appearing before Mr Nicholson in an oral hearing. According to the evidence relied on by the applicant, Mr Nicholson did not find in favour of an

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[46] http://www.refappeal.ie/

[47] http://www.orac.ie/

[48] McGarry, P. (31 March 2006) "Refugee Appeals Tribunal to publish important decisions", *Irish Times.*

[49] Coulter, C. (2005) "Looking for fairness and consistency in a secretive refugee appeals system", *Irish Times.*

[50] Coulter, C. (20 September 2006) "Strife proceeded refugee body's demise", *Irish Times*.

applicant in an oral hearing in 2002, 2003 and 2004 despite the fact that he determined hundreds of case in those three years. The Refugee Appeals Tribunal settled this case and two other identical cases in December 2007.

6.15 The ICCL is concerned that provisions establishing the PRT are not sufficiently precise enough to ensure that the problems which plagued the Refugee Appeals Tribunal will not be repeated again. For example, section 91(3) states that the PRT will be independent in the performance of its functions and that the Chairperson will establish rules and procedures for the conduct of appeals which take account of "need to preserve fair procedures" [section 93(2)]. However, no real detail is provided as to what these rules will entail. It is the firm belief of the ICCL that the following amendments need to be made to the Bill in ensures that the PRT is fully independent.

Appointment of Tribunal Members

6.16 The Council of Europe's Committee of Ministers Recommendation No. R(94)12 makes clear that decisions taken on the selection of judges should be taken by an independent authority.[51] Given that Tribunal members will be carrying out quasi judicial functions, the ICCL considers that principle applies equally to their selection.

6.17 While section 92(5) of the Bill provides that the Chairperson of the Tribunal or full-time Tribunal member will be appointed through the Public Appointments Service, section 92(4) allows the Minister to personally appoint part-time Tribunal members. The PRT is being set up to independently review decisions made by the Minister and yet section 92(4) would allow the Minister to decide who some of those decision-makers are. Moreover, there is nothing in the Bill to stop the Minister from ensuring that the majority of Tribunal members are part-time as it does not specify how many full-time members will be appointed.

6.18 Impartiality is essential for maintaining the rule of law and ensuring that all individuals are subject to the same general rules. It embodies the ideal that decision-makers base their decisions on objective criteria rather than on select viewpoints, ideological perspectives or prejudice.[52] Bias not only occurs when decision-makers preside over a matter in which they have a personal interest or involvement, *nemo judex in causa sua*, it can happen when decision-makers

[51] Principle 2 (c). The COE decision dates from October 1994.

[52] Prejudice in this context refers to preconceived ideas or holding biased views against social groups.

are selected for appointment on the basis of their political views or connections. If section 92(4) is not amended, it may result in cases of actual bias, or/and will certainly lead to a reasonable apprehension of bias among protection applicants and practitioners. A "right-minded" person aware of that a Tribunal member was personally appointed by the Minister is likely to suspect him/her of bias. If the Tribunal is to be considered truly independent, then the Minister should have no hand in personally selecting its members.

Part-Time Tribunal Members and Conflicts of Interest

6.19 Section 92(10) sets out circumstances whereby a Tribunal member must cease to become a member, for example:

(a) where nominated as a member of Seanad Éireann;
(b) elected as a member of either Houses of the Oireachtas or to be a member of the European Parliament;
(c) regarded pursuant to section 19 of the European Parliament Elections act 1997 as having been elected to that Parliament,
(d) elected or co-opted as a member of a local authority,
(e) appointed to judicial office, or
(f) appointed Attorney General.

This provision is line with general principles of independence and is an important safeguard which is to be welcomed. However, it fails to include situations where the Tribunal member may be employed by the State in another capacity. For example, what if the Tribunal member works in another section of the Department of Justice, Equality and Law Reform on a part-time basis or is appointed to serve as a chair to a statutory body by a Minister of Government. By and large, Chairpersons and members of statutory bodies are not appointed through an open competition, rather they are appointed directly by Ministers. This practice could adversely affect a Tribunal's member ability to be fully independent when reviewing decisions made by the Minister. It is the view of the ICCL that the only way to ensure that Tribunal members are fully independent is to make them full-time so as to avoid a conflict of interests.

Allocation of Cases

6.20 Rules on the distribution of cases are important to ensure that they are not allocated to one specific decision-maker to obtain a certain result. Principle 2(E) of the COE Committee of Ministers recommendation states that:

> The distribution of cases should not be influenced by the wishes of any party to a case or any person concerned with the results of the case. Such distribution may, for instance, be made by drawing of lots or a similar system for automatic distribution according to alphabetic order or some similar system.

This is particularly important in the context of the PRT as this was one of the main problems with the operation of the Refugee Appeals Tribunal. One member of the Tribunal was allocated the majority of cases and it is widely reported that this member only issued negative decisions.

6.21 Section 92(4) of the Bill does permit the PRT Chairperson to assign classes of business to each member having regard to various considerations, including: the grounds of an appeal or country of origin. While section 92(4) is sensible in light of the diversity of protection applicants, it does not contain any particular rules on case allocation. The ICCL considers that it is vitally important that section 92(4) be amended to impose an obligation on the Chairperson to distribute cases through a system of lots or automatic distribution after having due regard to specialisms.

Code of Ethics For Tribunal Members

6.22 The ICCL considers that the Bill should be amended to require the Chairperson of the Tribunal, in consultation with other Tribunal members, to prepare a Code of Ethics to guide members on how to carry out their functions in a transparent and impartial manner. Codes of Ethics play an important part in guiding judges and quasi-judicial officials on what constitutes ethical behaviour, and in particular, around issues of race equality and diversity. The UN Committee on the Elimination of Racial Discrimination recommends that states parties should: "strive firmly to ensure a lack of any racial or xenophobic prejudice on the part of judges, jury members and other judicial personnel".[53]

6.23 The UN Committee on the Elimination of Racial Discrimination also recommends that:

- Judges should be aware of the diversity of society and differences linked with background, in particular, racial origins;
- They should not, by words or conduct, manifest any bias towards persons or groups on the grounds of their racial or other origin;
- They should carry out their duties with appropriate consideration for all persons such as the parties, witnesses, lawyers, court staff and their colleagues, without unjustified differentiation; and
- They should oppose the manifestation of prejudice by the persons under their direction and by lawyers or their adoption of discriminatory behaviour towards a person or group on the basis of their colour, racial, national, religious or sexual origin, or on other irrelevant grounds.[54]

These recommendations are particularly relevant for Tribunal members as every single appellant appearing before the Tribunal will be a foreign national.

[53] No. 31 General recommendations XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system, from A/60/18, pp. 18-108. 16/08/2005.

[54] *Ibid.*

ICCL Recommendations

- All members of the Tribunal should be appointed independently through the Public Service Appointments Commission.
- All Tribunal members should be full-time to avoid situations where there may be a conflict of interest.
- Section 92(4) should be amended to impose an obligation on the Chairperson to distribute cases through a system of lots or automatic distribution after having due regard to specialisms.
- The Bill should be amended to require the Chairperson of the Tribunal, in consultation with other Tribunal members, to prepare a Code of Ethics to guide members on how to carry out their functions in a transparent and impartial manner.

7. Restrictions on Judicial Review

Leave for Judicial Review

7.1 Section 118 sets out general rules for judicial review in respect of all immigration and refugee related decisions by the State. Section 118(2)(a) provides that a person applying for judicial review in respect of an immigration related decision must apply within 14 days beginning on the date on which the person is notified of that decision or determination. The applicant must also make the application by "motion on notice (grounded in the manner specified in the Order in respect of an *ex parte* motion for leave) to the Minister and any other person specified for that purpose by order to the High Court" [section 118(2)(b)].

Grounds for Leave

7.2 Section 118(2)(b) provides that the High Court may only grant leave it is satisfied that there are "substantial grounds" for contending that the act, decision, or determination is invalid or ought to be quashed.

Extension of 14 Day Time Limit

7.3 Under section 118(3)(a) the High Court may not extend the time limit unless it is satisfied that each of the following conditions is fulfilled: .

(i) the applicant –

(I) did not become aware until after the period's expiration of the material facts on which the grounds for his or her application are based, or

(II) became aware of those facts before that period's expiration but only after such number of days of that period has elapsed as would have made it not reasonably practicable for the application to have made his or her application for leave before that period's expiration;

(ii) the applicant, with reasonable diligence, could not have become aware of those facts until after the expiration of that period, or, as the case may be, that number of days had elapsed;

(iii) his or her application for leave was made as soon as was reasonably practicable after the applicant became aware of those facts;

The High Court may also extend the time limit is if “there are exceptional circumstances relating to the applicant and under which, through no fault of the applicant, his or her application could not have been made within that period” [section 118(3)(b)]. Section 118(4) provides that the determination of the High Court for an application for judicial review or to extend the time limits shall be final [section 118(4)(c)] unless the determination involves a question of constitutional invalidity [section 118(6)].

Legal Costs Orders

7.4 Section 118(8) provides that a Court may award costs against an applicant’s legal representative if it is of the opinion that the grounds put forward in for contending that a decision or determination is invalid in seeking judicial review ought to be quashed are “frivolous or vexatious” [section 118(7)].

Removal from the State

7.5 Section 118(9) provides that when a foreign national applies for leave to apply for judicial review of a transfer on Dublin Convention grounds or of a removal from the State or indeed for an extension of time to make an application, this shall not in itself suspend or prevent his transfer or removal from the State. Section 118(1) indicates that the Court may suspend the transfer or removal:

> […] for such period as it is satisfied is necessary for the foreign national to give instructions to his or her representative in relation to the application where it is satisfied that the giving of such instructions would otherwise be impossible.

Human Rights Concerns

7.6 The ICCL's human rights concerns relate to the new restrictions on judicial review within the Bill. The following section deals with: infringements on judicial independence; the right to a remedy; the prohibition on *non-refoulement* and legal costs orders.

Infringements on Judicial Independence

7.7 The ICCL believes that the restrictions set out in section 118 specifically the new criteria by which a judge must decide whether to extend the time limits, are a potential attack on judicial independence, in particular, in respect of the High Court's jurisdictional competence.

7.8 Broadly speaking judicial independence requires that judges be protected from governmental and other pressures so that they can try cases fairly and impartially. According to Principle 1 of the UN Basic Principles on Judicial Independence:

> The independence of the judiciary should be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.[55]

Judicial review is the judiciary's principal means of reviewing law or an official act of a government/public authority employee for constitutionality or for violations of basic justice principles. The power of judicial review was first exercised in the landmark US case, *Marbury v Madison* (1803). Judicial review enables a court to "exercise supervision over public authorities in accordance with the doctrine of *ultra vires* (beyond the law)".[56]

7.9 Article 34.3.1 of the Constitution provides that the High Court is "invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal". Under Article 34.3.2 the High Court also has the power to determine the validity of any law having regard to the Constitution.

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[55] Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. Accessible at: http://www.unhchr.ch/html/menu3/b/h_comp50.htm

[56] Martin, E.A. and Law, J. (2006) *Oxford Dictionary of Law*, Oxford University Press, at p. 293.

7.10 Section 5(2)(a) of the Illegal Immigrants (Trafficking) Act 1999 currently imposes a 14 day limit (not working days) on persons intending to challenge the validity of an immigration or refugee related decision. This provision imposes a heavy burden on potential litigants who have to secure the services of a legal team and launch judicial review proceedings within the timeframe. In *RE Article 26 and the Illegal Immigrants (Trafficking) Bill 1999*, the Supreme Court decided that this provision was not too onerous so long as the High Court has the discretion to extend the time limit where the applicant shows "good and sufficient reasons".[57]

> The court is satisfied that the discretion of the High Court to extend the fourteen day period is sufficiently wide to enable persons who, having regard to all the circumstances of the case including language difficulties, communication difficulties, difficulties with regard to legal advice or otherwise, have shown reasonable diligence, to have sufficient access to the Courts for the purpose of seeking judicial review in accordance with their constitutional rights.[58]

7.11 However, it would appear that the new criterion supplied in section 118(3) of the Bill is an attempt by the State to further restrict the discretion of the High Court to extend the time limit. The ICCL believes that this provision may also be an attempt to reverse the outcome of a successful case, *C.S. v Minister for Justice, Equality and Law Reform and ors*.[59] In this case the Supreme Court ruled that an order could be made by the High Court to extend the 14 day time period if the applicant demonstrated an "arguable case".

7.12 No valid rationale has been advanced by the State to restrict the High Court's jurisdiction and discretion to extend the time limit and the ICCL believes that this provision may be invalid as it impinges on the separation of powers. The ICCL therefore recommends that section 118(3) should be deleted and replaced with a provision allowing the High Court to extend the time limit where there are "good and sufficient reasons".

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[57] *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] IESC 19, at para 84.
[58] At para 88.
[59] [2004] IESC 44.

7.13 With the introduction of the Immigration, Residence and Protection Bill 2008, the ICCL would have expected, at the very least, that the Oireachtas would extend the 14 day time limit given recent recommendations from the Law Reform Commission and the UN Committee Against Racism. The Law Reform Commission considered the issue of time limits in its Report on Judicial Review Procedure. [60] In particular, it noted that the "time limit imposed regarding immigration is more onerous" given the personal circumstances of non-Irish citizens challenging decisions.[61] It also took the view that judicial review proceedings should not constitute a mechanism whereby "a failed immigration applicant" might try to delay the immigration process".[62]

7.14 In 2005, the UN Committee Against Racism also expressed concern that a 14 day time limit had been introduced for immigration related decisions, and recommended that this restriction should be resolved in the forthcoming legislation on immigration.[63] However, it appears the Government has ignored both the Law Reform Commission and the UN Committee Against Racism in this regard.

7.15 It is the view of the ICCL that in light of the Law Reform Commission and UN Committee Against Racism's recommendations, the time limit set out in section 118(2)(a) of the Immigration, Residence and Protection Bill 2008 should be amended to give applicants 28 days to apply for leave for judicial review.

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[60] Law Reform Commission (2004) *Report on Judicial Review Procedure,* Law Reform Commission: Dublin. www.lawreform.ie

[61] Ibid, a p. 35.

[62] Ibid, at p. 48. In this instance, the Law Reform Commission drew on the Attorney General's submission in *Re 26 and the Illegal Immigrants (Trafficking) Bill 1999.*

[63] See 24, CERD/C/IRL/CO/2, 10 March 2005.

Right to a Legal Remedy

7.16 Section 118(2)(b) of the Bill seeks to further restrict an applicant's right to access to judicial review proceedings by raising the standard for granting leave. The ICCL believes that this new provision is potentially in beach of the independent[64] right to an effective remedy guaranteed by Article 13 of the ECHR which provides that:

> Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

The remedy in question does not need to be judicial in character. Instead, the main effect of Article 13 is to require that there is a domestic remedy to deal with the substance of an "arguable complaint"[65] under the Convention.[66]

7.17 The current threshold for granting leave for judicial review was set by the Supreme Court in *G. v DPP* [1994].[67] In this case the Supreme Court decided that applicants for judicial review only needed to have an arguable case.

> The burden of proof on an applicant to obtain liberty to apply for judicial review under the Rules of the Superior Courts O. 84, r. 20 is light. The applicant is required to establish that he has made out a stateable case, an arguable case in law. The application is made *ex parte* to a judge of the High Court as a judicial screening process, a preliminary hearing to determine if the applicant has such a stateable case.
>
> This preliminary process of leave to apply for judicial review is similar to the prior procedure of seeking conditional orders of the prerogative writs. The aim is similar - to effect a screening process of litigation against public authorities and officers. It is to prevent an abuse of the process, trivial or unstateable cases proceeding, and thus impeding public authorities unnecessarily.
>
> Even though the ambit of judicial review has widened in recent years the kernel of the reason for this filtering process remains the same.[68]

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[64] The European Court of Human Rights confirmed that the right to a remedy under the ECHR is an independent right and does not need to be linked to another convention provision. Refer to *Klass and others v Germany*, Judgment of 6 September 1978; Series A, No. 28 (1979-80) 2 EHRR 213.

[65] The Court has not defined the meaning of an 'arguable claim' and decides the issue on a case-by-case basis. Refer to *Rice v United Kingdom*, Judgment of 27 1988, Series A, No. 131; (1988) 10 EHRR 425.

[66] At para 60, *Krasuski v Poland*, Application No. 61444/00, judgment of 14 June 2005.

[67] 1 I.R. 374.

[68] Refer to Denham J in *G. v DPP* [1994] 1 I.R. 374, from p. 381-2

7.18 The ICCL is concerned that the change in the standard for leave will in practice results in many applicants having no remedy at all. It must also be remembered that there is no independent appeals mechanism in the Bill for immigration related decisions and so access to judicial review is of particular importance.

Prohibition on Refoulement

7.19 Section 118(9) of the Bill provides that a transfer or removal will not be suspended when a foreign national applies for judicial review unless the court is satisfied that the suspension is necessary for the applicant to give instructions to his/her lawyer. The ICCL believes that this particular provision runs the risk of breaching the absolute ban on torture (Article 3 of the ECHR) and the prohibition on *refoulement*.[69] How can the Courts consider the merits of a protection case if the individual has already been returned to his/her country of origin and potentially subjected to ill-treatment?

7.20 The issue as to whether the institution of judicial review proceedings challenging the validity of a deportation order results an automatic stay on the removal has yet to be considered by the Court. In *Adebayo & ors – v Commissioner of An Garda Síochána,*[70] Denham J stated that the question on:

> […] whether a person is entitled to remain within the State for a minimum period of time in order to exercise a constitutional right to bring judicial review proceedings is a matter to be determined in appropriate proceedings in the High Court concerning the powers of deportation deriving from the Act of 1999.[71]

Given the absolute nature of the prohibition on torture, the ICCL considers that the State must suspend the transfer or removal in order to ensure that the applicant is not subjected to ill-treatment. Moreover, this view is supported by the UNHCR in the context of protection applicants. It recommends that:

> […] Ireland should consider amending the Bill to ensure that rejected asylum seekers could be subject to removal measures only once they had an effective opportunity to apply for judicial review of a Protection Tribunal decision.[72]

[69] Refer to paragraph 2.5 of the present paper for information on the prohibition on *refoulement*.
[70] [2006] IESC 8.
[71] Para 2.6.
[72] *Ibid*, at p. 9

Legal Costs Orders

7.21 Finally, the ICCL can see no rationale justification as to why legal costs orders should be introduced against legal representatives of applicants in relation to "frivolous or vexatious" applications. Denham J confirmed in *G v DPP* that the preliminary process of leave to apply for judicial review is in effect a "screening process" and is designed to "prevent abuse of the process, trivial or unstateable cases".[73] Given that the leave process functions as a filtering mechanism, one wonders what the underlying aim of this measure is. The ICCL deems this provision an improper interference as it will hinder lawyers from representing applicants; thus undermining the right to judicial review and access to an effective remedy. The UN Basic Principles on the Role of Lawyers (1990) specifies that legal representatives should be free to perform "all of their processional functions without intimidation, hindrance, harassment or improper interference".[74] Section 118(8) should therefore be deleted.

7.22 The ICCL also believes that this section is unconstitutional as only applies to legal representatives of the applicant and not the respondent, i.e. the State's lawyers. In the ICCL's view this provision is invalid as it offends the constitutional right to equality before the law (Article 40.1) and the guarantee of fair procedures. It also violates the principle of 'equality of arms' contained in Article 6(1) of the ECHR.

ICCL Recommendations

- Amend section 118(2)(a) to increase the fixed time limit on applications for judicial review to 28 days with judicial discretion to extend where good and sufficient reasons are established.
- Delete 118(2)(b).
- Delete section 118(8).
- Delete section 118(9).

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[73] Refer to Denham J in *G. v DPP* [1994] 1 I.R. 374, from p. 382.

[74] Refer to no. 16. These Principles were adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. Accessible at http://www.unhchr.ch/html/menu3/b/h_comp44.htm

8. Police Powers

8.1 Section 115 of the Bill deals with powers of immigration officers. Section 115(1)(e) empowers immigration officers to:

> Require, at any reasonable time, any person in a place to produce to the officer any documents which are in the control of that person.

Section 115(1)(g) requires any person to give to the officer any other information which the officer may reasonable require. It is an offence for an individual not to comply with an order given by an immigration officer under section 115(1) [section 115(2)].

Human Rights Concerns

8.2 Section 115(1)(e) is of particular concern to the ICCL. Looking at the overall purpose of the Bill, this provision would appear to be aimed at detecting the presence of unlawful migrants. This power is also broader in scope than section 12 of the Immigration Act 2004 which enables members of the Garda to require any "non-national" to produce on demand (a) a valid passport/travel document and (b) a registration certification where the person has registered with the National Garda Immigration Bureau. As with section 12 of the Immigration Act 2004, the main difficulty with section 115(1)(e) is that it will:

- Empower the police to stop black and ethnic minority people on the suspicion that they are an unlawfully resident migrant;
- Potentially lead to the detention of black and ethnic minority people on suspicion that they are an unlawfully resident migrant if they do not have identity documents on their person;
- Provide discretion to police officers to criminalise behaviour which at its essence is not criminal.

In the following sections, the ICCL makes recommendations in relation to discriminatory treatment and protection against vague and indefinite laws.

Discriminatory Treatment

8.3 The ICCL believes that section 115(1)(e) is potentially incompatible with Articles 8 (right to private life) and 14 (freedom from discrimination) of the ECHR. Article 8(1) provides that "Everyone has the right to respect for his private […] life" and Article 8(2) prohibits public authorities from interfering with this right except where the grounds of the interference are: in accordance with the law; pursue a legitimate aim and are necessary and proportionate.

8.4 Article 14 of the ECHR protects against discrimination in relation to the rights and freedoms protected by the Convention. It reads:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

8.5 Article 14 prohibits difference in treatment where there is "no reasonable and objective justification". Such a justification depends upon: 1) the aim and effect of the measure, and 2) whether there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.[75] While Article 14 is a parasitic right, meaning that it only prohibits discrimination in relation to rights and freedoms in the Convention, a breach of Article 14 can be found where there is no breach of a substantive right so long as the matter falls within the ambit of a substantive right.[76]

8.6 The ICCL believes that empowering police officers to single out and stop black and ethnic minorities on suspicion that they are an unlawfully resident migrant, essentially alters the nature of their relationship with the police. Recalling that under the present Bill the police can remove a foreign national from the State when "it appears" to them that he/she is unlawfully present in the State or at the frontier of the State, black and ethnic minority people will be forced to carry their identity documents for fear of being detained for removal.

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[75] *Belgian Linguistics Case,* (no 2) (1979-1980) 1 EHRR 252, at no. 4.

[76] *Rasmussen v Denmark* (1985) 7 EHRR 371.

8.7 The ICCL believes that this measure is invasive and discriminatory and is neither necessary nor proportionate. In practice, it will greatly damage relations between the Gardaí and black and ethnic minority people and may undermine the Government's integration programmes. It is also extremely similar to the UK's old sus (suspicion) laws which empowered police officers to stop-and-search on suspicion alone. This power was based on sections 4 and 6 of the Vagrancy Act 1824 which made it "illegal for a suspected person or reputed thief to frequent or loiter a public place with intent to commit an arrestable offence" and effectively permitted the police to stop and search and even arrest anyone they chose, purely on the basis of suspicion as a crime-prevention tactic. Police officers often targeted black and ethnic minority people using the sus law and this partly resulted in the deterioration of relationships and the outbreak of the Brixton riots in 1981. Indeed, this was acknowledged in the Scarman Report which was an independent inquiry set up to inquire into the "serious disorder in Brixton" in that period. [77]

Protection Against Vague and Indefinite Laws

8.8 The general aim of the criminal law is to create a standard of behaviour which the State will not tolerate and the criminal justice system has developed due process protections to uphold fundamental rights. The guarantee against vague and indefinite laws is one of these protections and it is an essential security against arbitrary persecution.[78] Indeed, in *King v The Attorney General*[79] Kenny J made clear that the ingredients of an offence must be specified with clarity. Striking down the same 1824 Vagrancy Act as discussed above, he said:

> It is a fundamental feature of our system of government by law (and not by decree or diktat) that citizens may be convicted only of offences which have been specified with precision by the judges who made the common law, or of offences which, created by statute, are expressed without ambiguity … In my opinion, both governing phrases 'in s 4 of the Vagrancy Act 1824] "suspected person" and "reputed thief" are so uncertain that they cannot form the foundation for a criminal offence"[80].

[77] 27.04.2004, "Q&A: The Scarman Report", BBC World New Service, www.bbc.co.uk

[78] *Attorney General v Cunningham* [1932] IR 28.

[79] *King v Attorney General* [1981] IR 223.

[80] *Ibid*, at 263.

8.9 The ICCL contends that the powers set forth in section 115(1)(e) is in fact another sus law as it empowers the police to stop-and-search black and ethnic minorities on suspicion that they are an unlawfully resident migrant. It also provides discretion to police officers criminalise behaviour which at its essence is not criminal. In the ICCL's view, this power will cause considerable uncertainty in its application, and as a result, fails a very basic test as it cannot provide security against arbitrary persecution.

ICCL Recommendations

- Delete section 115(1)(e).

9. Restrictions on the Right to Marry

9.1 Section 123(1) provides that the marriage of a foreign national and an Irish citizen does not confer a right on the foreign national to enter or be present in the State.

9.2 Marriages contracted where one person is or both persons are foreign nationals are invalid unless, notification is given to the Minister within three months of solemnisation [section 123(2)(a)] and the foreign national at the time of the marriage, the holder of an entry permit for the purpose of the marriage or a residence permission [section 123(2)(b)].

9.3 In practice this section will generally prevent protection seekers, individuals present in the country on non-renewable residence permits (tourists and students here for short term study) and unauthorised persons from contracting a marriage. A strict reading of the provision would also include EU nationals present within Ireland but who have not yet activated their residency rights by becoming economically active or otherwise entitled to establish themselves in the State.[81] However, the Minister may grant a discretional exemption from the above sub-section upon an application in the prescribed form [section 123(3)].

9.4 Section 123(4) provides the Minister with broad somewhat subjective grounds to refuse an application under sub-section (3). So for example, the Minister can refuse an application if he/he considers it would:

- Adversely affect the implementation of an earlier decision under the Act [section 123(4)(a)];
- Create a factor bearing on a decision yet to be taken under this act relating to one or both of those parties [section 123(4)(b)];
- Not be in the interests of public security, public policy or public order [section 123(4)(c)];
- Adversely affect the implementation of a decision under the Irish Nationality and Citizenship Acts 1956 to 2004 or the European Communities (Free Movement of Persons (No2) Regulations 2006 (S.I. No. 656 of 2006) [section 123(4)(d)].

[81] A foreign national is defined as in section 2 of the Bill as a person who is neither (a) an Irish citizen or (b) a person who has established a right to enter and be present in the State under the European Communities (Free Movement of Persons) (No.2) Regulations 2006 (S.I. No. 656 of 2006).

9.5 Section 123 (7) (a) imposes criminal sanctions against anyone who solemnises or permits a form of marriage which is not valid under this provision. This section also criminalises anyone who is party to [section 123(7)(b)] or who facilitates the marriage [section 123(7)(c)].

Human Rights Concerns

9.6 The right to marry is a fundamental human right and is closely associated with personal autonomy, self-determination, the formation of intimate relationships and founding a family. While there is no absolute right to contract a marriage, current regulatory restrictions only relate to very limited factors such as notice, age or consanguinity.[82] Section 123 is qualitatively different as it allows the State to veto the contracting of marriages involving foreign nationals where this could effect the operation of immigration controls.

9.7 It is the view of the ICCL that section 123 is in breach of the Constitution, and in particular, Article 12 (right to marry and found a family) together with Article 14 (principle of non-discrimination) of the ECHR.

9.8 One of the leading cases on the right to marry in the common law is *Loving v Virginia (1967)*, a US case involving an "interracial" couple who had been convicted of violating Virginia's segregation laws. The US Supreme Court struck down the laws not only on the equal protection clause; it also found the restrictions deprived the couple of a fundamental liberty protected by the due process clause. Writing for the majority, Chief Justice Warren declared that:

> The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the basic civil rights of man, fundamental to our very existence and survival.[83]

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[82] Refer to the Civil Registration Act 2004.

[83] *Loving et Ux. V Virginia,* Supreme Court of the United States, 388, U.S.1. The US Supreme Court subsequently struck down Wisconsin laws as unconstitutional for restricting certain classes of Wisconsin residents from marrying. In this case, the applicant sought and was denied a court order for a marriage license because he failed to pay child support for a child born from a previous relationship. Refer to *Zablocki v Redhail* 434 US 374 (1978). In *Turner v Safeley* (1987) US 482 78, the Supreme Court also struck down prison regulations in the State of Missouri which prevented inmates from marrying unless the prison superintendent approved the marriage after finding compelling reasons for doing so. The Supreme Court decided that the regulations were invalid as they were not reasonably related to penological objectives.

9.9 In the context of Ireland, the only recent case to have fully considered restrictions on the right to marry is *Maura O'Shea and Michael O'Shea v Ireland & AG.* In this case, Laffoy J ruled that legislation[84] preventing a wife from marrying her former husband's brother constituted an unjustified restriction on her right to marry and could not be justified as being necessary in support of the constitutional protection of the family and the institution of marriage.

9.10 Article 12 of the ECHR provides a right for men and women of marriageable age to marry and establish a family. The Convention jurisprudence recognises that marriage itself can be regulated by domestic law but restrictions cannot be imposed on the right to marry if they destroy the essence of that right.

9.11 Article 12 and Article 14 were recently considered in the United Kingdom (UK) case of *R (Baiai and others) v Home Secretary and another.*[85] In this case, the Court of Appeal held that a statutory scheme requiring a certificate of approval by the Home Office for marriage by people subject to immigration control or those who entered the UK illegally was disproportionate and inconsistent with Articles 12 and 14. Buxton LJ stated that while the scheme had a legitimate aim of preventing sham marriages, it was disproportionate in that it used immigration status rather than a lack of a genuine connection to deny permission to marry. The court also ruled that there was a breach of Article 14 (freedom of religion) as the rule did not apply to marriages performed by the Anglican Church.

9.12 The ICCL considers that section 123 will not survive constitutional challenge and would be deemed incompatible with Articles 12 and Article 14 of the ECHR. The fact that foreign nationals must have renewable residence permission in order to contract a marriage immediately excludes individuals who are unlawfully present in the State, protection seekers, non-renewable residence holders and tourists from within the EU is clearly disproportionate with the right to marry and is discriminatory. Moreover, the reasons for refusal of permission to marry are extremely questionable. The overly inclusive nature of the criteria would seem to suggest that the Government is trying to prevent third country nationals from acquiring derivative rights from their potential spouse.

[84] Section 3(2) of the Deceased Wife's Sister's Marriage Act 1907.
[85] [2006] EWHC 823.

9.13 The ICCL accepts 'marriages of convenience' may occur for immigration purposes. However, a sophisticated immigration framework should be able to determine whether a marriage is genuine and real in substance. If the marriage was found to be a 'sham', it could refuse to issue residence permission. Immigration concerns and control cannot be used to override and deny a basic civil right which is fundamental to "existence and survival".

9.14 Furthermore, the ICCL also considers that the discretionary exemption in section 123(3) which allows the Minister to dispense with the conditions in sections 123(2) is invalid as it breaches the constitutional equality guarantee (Article 40.1). In *East Donegal Co-Operative Ltd v Attorney General,* the Supreme Court struck down a similar clause in the section 4 of Livestock Marts Act 1970 allowing the Minister a general discretion to disapply certain licensing requirements.[86]

9.15 Finally, the ICCL considers that criminal sanctions in sections 123(7) are disproportionate and fundamentally wrong as it criminalizes behaviour which at its essence is not criminal. This provision is in line with the overall trend in the entire Bill to force certain providers in the public sector to carry out immigration functions. The Government runs the risk of criminalising religious bodies who consider the right to marry members of their congregation as essential to their religious beliefs and this is a potential infringement of the right to freedom of religion as protected under Article 9 of the ECHR and Article 44 (freedom of religion) of the Irish Constitution.

ICCL Recommendation

- Delete restrictions on the right to marry in section 123.

[86] [1970] IR 317.