



Law Society of Ireland

Blackhall Place, Dublin 7, tel 01 672 4800, fax 01 672 4801

DX: 79 Dublin E-mail: general@lawsociety.ie

Website: www.lawsociety.ie

SUBMISSION OF THE LAW SOCIETY OF IRELAND

ON THE

IMMIGRATION, RESIDENCE AND PROTECTION BILL

2008

Table Of Contents

INTRODUCTION	5
SUMMARY OF RECOMMENDATIONS	8
General Recommendations	8
Immigration Law Recommendations	10
<i>Foreign Nationals without valid residence permits</i>	<i>10</i>
<i>Lawfully Present Foreign Nationals</i>	<i>11</i>
<i>Separated Children</i>	<i>13</i>
Protection Law Recommendations	15
<i>Refugee Status</i>	<i>15</i>
<i>Protection Status</i>	<i>17</i>
<i>Victims of Trafficking</i>	<i>18</i>
<i>Protection Review Tribunal</i>	<i>19</i>
<i>Judicial Review</i>	<i>20</i>
Other Specific Recommendations	21
GENERAL RECOMMENDATIONS	22
1. <i>Immigration Law and Protection Law</i>	<i>22</i>
2. <i>Executive Discretion</i>	<i>22</i>
3. <i>Access to Justice</i>	<i>24</i>
4. <i>Transparency</i>	<i>25</i>
5. <i>Lack of Qualified Personnel</i>	<i>28</i>
6. <i>Non-Discrimination</i>	<i>28</i>
IMMIGRATION LAW CONCERNS	31
Foreign Nationals without valid residence permits	31
7. <i>Irregular Residence</i>	<i>31</i>
8. <i>Detention</i>	<i>32</i>
9. <i>Deportation</i>	<i>34</i>
10. <i>Access to Services</i>	<i>35</i>
Lawfully Present Foreign Nationals	38
11. <i>Independent Immigration Appeals Tribunal</i>	<i>38</i>

12. Refusal of a Visa	39
13. Refusal of Entry	40
14. Compulsory medical examinations.....	41
15. Residence Permission	42
16. Family Reunification	42
17. Long Term Residence.....	44
18. Renewal of Residence Permission	45
19. Liability for Costs	46
Separated Children	48
20. Best Interests.....	49
21. Definition of the Separated Child	49
22. Age Assessment.....	50
23. Responsible Adult.....	51
24. Family Ties.....	52
25. Arrest and Detention	53
26. Family Reunification	53
27. Training	54
PROTECTION LAW CONCERNS	55
Refugee Status	55
28. Definition of Family	55
29. Emergency Family Reunification	55
30. Waiting times	56
31. Family Unity.....	58
32. Unborn Child	59
33. Designation of Countries as Safe Countries	59
34. Conduct of Interviews.....	60
35. Appeal to the Protection Review Tribunal	61
Protection Status.....	62
36. Unfair advantage	62
37. Detention pending protection permit.....	63
38. Detention.....	64
Victims of Trafficking.....	66

39. <i>Recovery and Reflection Period</i>	66
40. <i>Temporary Residence and Co-operation</i>	67
41. <i>Remedies</i>	68
42. <i>Minors who are victims of trafficking</i>	69
Protection Review Tribunal	71
43. <i>Rules of the Tribunal</i>	71
44. <i>Appointment of Members of the Tribunal</i>	72
45. <i>Composition of the Tribunal</i>	72
46. <i>Membership of the Tribunal</i>	73
47. <i>Role of the Chairperson</i>	74
Judicial Review	76
48. <i>Time Limits</i>	76
49. <i>Extension of time-limit</i>	76
50. <i>Resources</i>	77
51. <i>Legal Costs</i>	78
52. <i>Non-Suspensory Judicial Review</i>	79
Other Specific Concerns	81
53. <i>The Right to Marry</i>	81
54. <i>Freedom of Information</i>	81
55. <i>Exchange of Information</i>	82
56. <i>Carrier Liability</i>	83
57. <i>Monitoring and Inspection</i>	83
CONCLUSION	85

INTRODUCTION

The *Immigration, Residence and Protection Bill 2008* was published on the 29th January 2008. The Programme for Government 2007¹ proposed to implement a comprehensive immigration policy dealing with asylum, immigration and integration,² to clarify and consolidate the numerous legislative enactments and policy documents currently operative in this area.³ The Law Society welcomes this unique opportunity to consolidate and clarify the law in relation to immigration and protection and to ensure compliance with international and regional standards.⁴

The Bill has a number of specific functions. Firstly, the Bill aims to “*restate and modify*” the current position in relation to the entry into, residence and removal from the State of foreign nationals and those in need of protection. Secondly, the Bill proposes to give effect to European Union initiatives in the area of “*programme*

¹ *Agreed Programme for Government*, June 2007 signed by Mr. Bertie Aherne T.D., Trevor Sergeant T.D. and Mary Harney T.D.

² *Supra* n. 1 at pp. 56 –57.

³ See for example S.I. No. 656 of 2006 EC (Free Movement of Persons) (No. 2) Regulations 2006; S.I. No. 657 of 2006 Immigration Act 2004 (Visas) (No. 2) Order 2006; S.I. No. 518 of 2006 EC (Eligibility for Protection) Regulations 2006; S.I. No. 253 of 2006 Immigration Act 2004 (Registration Certificate Fee) Regulations 2006; Irish Nationality and Citizenship Act 2004 and associated orders; S.I. No. 730 of 2005 Civil Legal Aid (Refugee Appeals Tribunal) Order 2005; Immigration Act 2004(Visas) Order 2005; S.I. No. 55 of 2005 Immigration Act 1999 (Deportation) Regulations 2005; S.I. No. 56 of 2005 Immigration Act 2003 (Removal Places of Detention) Regulations 2005; S.I. No. 714 of 2004 Refugee Act 1996 (Safe Country of Origin) Order 2004; Immigration Act 2004; S.I. No. 708 of 2003 Aliens (Visa) Order 2003; S.I. No. 444 of 2003 Immigration Act 2003 (Removal Places of Detention) Regulations 2003; S.I. No. 423 of 2003 Refugee Act 1996 (Section 22) Order 2003; S.I. No. 424 of 2003 Refugee Act 1996 (Appeals) Regulations 2003; S.I. No. 422 of 2003 Refugee Act 1996 (Safe Country of Origin) Order 2003; Immigration Act 2003; S.I. No. 103 of 2002 Immigration Act 1999 (Deportation) Regulations 2002; S.I. No. 36 of 2001 Aliens (Visas) Order 2001; Illegal Immigrants (Trafficking) Act 2000; Immigration Act 1999; Refugee Act 1996; Aliens Act 1935.

⁴ This has also been welcomed by the UNHCR representative in Ireland Manual Jordão.

*refugees*⁵ and the granting and withdrawal of refugee status⁶. Thirdly, other matters, such as victims of trafficking, are also addressed. Finally, the Bill makes reference to the power of the Executive in relation to immigration and protection matters.

The preamble to the Bill raises certain general issues that are of concern to the Law Society. These include the uneasy tension in the Bill between immigration law and protection law and the large amount of discretion in the Bill that is left to the Executive. There are also many omissions from the Bill that are evident from the preamble, most notably, the importance of non-discrimination and transparency in the immigration and protection procedures.

The Law Society also has a number of concerns in relation to the substantive provisions of the Bill from the perspective of both legal representatives and applicants. It also considers that there may be potential for human rights violations to occur as a result of the operation of the Bill and would call on the Oireachtas to amend various provisions so as to ensure compatibility with international, regional and constitutional standards.

This submission will provide recommendations and suggest adjustments to Immigration and Protection Law in Ireland. These will be flagged throughout the submission and are also available in the list of recommendations at the beginning of this submission. The Law Society calls on the Oireachtas to ensure that the principle of proportionality would be a cornerstone of any proposed legislation. The general principle of proportionality requires that measures of a public authority which affect human rights be

⁵ Council Directive 2001/55/EC of 20th July 2001 OJ. No. L212 07.08.2001 at p. 12.

⁶ Council Directive 2005/85/EC of 1st December 2005 O.J. No. L326, 13.12.2005 at p. 13.

appropriate to achieving the objective, necessary to achieve the objective and reasonable in all the circumstances.

SUMMARY OF RECOMMENDATIONS

General Recommendations

1.

The Immigration and Protection Law aspects of the Bill should be distinguished from each other and separate Bills published.

2.

The Bill should lay out in detail the law relevant to both immigration and protection. This should not be left to the discretion of the Executive through the introduction of regulations.

3.

Access to justice should be affirmed as a principle throughout the Bill. To ensure this, current provisions such as the imposition of personal liability on legal representatives for frivolous and vexatious judicial review applications should be deleted.

4.

Transparency should be maintained throughout the Bill. This can be achieved by developing an open and transparent process with published decisions, annual reports and monitoring and inspection mechanisms. In keeping with the principle of transparency, the Law Society would ask that the Minister publish the regulatory impact assessment made of the Bill.

5.

Officials who are charged with the task of making decisions that will have an effect on the human rights of immigrants should be adequately trained in protection and human rights law.

6.

A provision of non-discrimination should be included in both the Immigration law and Protection law Bills.

Immigration Law Recommendations

Foreign Nationals without valid residence permits

7.

Provision should be made for irregular foreign nationals to regularise their situation. The Law Society recommends a 90-day period after the expiration of permission to remain in the State during which time the status of the immigrant remains lawful. This gives the foreign national an opportunity to seek permission to remain in the State.

8.

The Law Society recommends that more balanced and proportionate measures be introduced as an alternative to detention. Where detention is necessary specific centres should be developed for the detention of such persons. The right to be informed of the right of access to legal aid and representation in a language that the foreign national understands should be enshrined in the legislation. They should also be given the opportunity to contact their embassy / consulate.

9.

Summary deportation is inconsistent with due process and fair procedures. The well-established procedure under section 3 of the Immigration Act 1999 should be maintained.

10.

All foreign nationals, regardless of their migratory status, should be entitled to full access to all services and essential financial support in a non-discriminatory manner.

Lawfully Present Foreign Nationals

11.

An independent immigration appeals tribunal should be established to hear appeals from the refusal to grant entry or renew residence or the refusal to grant or renew a visa. This will allow the constitutional and convention rights of applicants to be adequately considered.

12.

The criteria for the refusal of a visa should be laid down in the primary legislation. These criteria should be proportionate and reasonable.

13.

The discretion afforded to the Minister to refuse entry in non-protection matters should be exercised in a fair and transparent manner as prescribed by law and governed by fair procedures.

14.

The decision to refer a foreign national for a medical examination upon entry to the State should be governed by fair procedures as prescribed by law in the primary legislation and made by trained personnel.

15.

The criteria that may be considered by the Minister in granting residency are vague and ambiguous. The Law Society recommends that any references to the applicants' family and associates are unnecessary, unfair and should be deleted.

16.

Foreign nationals have a right to family reunification. This should be specified in the primary legislation. The detailed provisions as to the application procedure, criteria to be applied, the maximum time the applicant will have to wait for reunification and the definition of the family should be laid down in the primary legislation.

17.

The right to long-term residence should be clarified and brought in line with Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

18.

The procedure outlined for renewal of residence permits should be simplified. The current time limit of 15 days in which to apply for a renewal of residence is unworkable and should be replaced with a more realistic time frame. It should also be clarified that the status of the applicant does not change while the applicant is waiting for a decision on the renewal of their permit.

19.

Foreign nationals who are deported should not be liable for any costs due to their detention and deportation.

Separated Children

20.

The best interests principle should be set out in the legislation and should inform any legislative developments in this area.

21.

The definition of a separated child should be laid down in the primary legislation in accordance with the statement of best practice as prescribed by the Separated Children in Europe: Programme Statement of Best Practice.

22.

Clear and objective procedures on the assessment of the age of a child on arrival in the State should be laid down in the primary legislation. Provision should also be made for this assessment to be made by appropriate and trained personnel.

23.

The legislation should lay down clear and objective guidance on the assessment of the responsible adult of a separated child. There is a distinct danger that the current provisions will act as an invitation to traffickers of children in Ireland.

24.

Clear and objective procedures on assessing evidence of family ties should be laid down in the primary legislation.

25.

No child under the age of 18 should be detained under any circumstances and this should be clarified in the primary legislation.

26.

Provision should be made for the tracing the family of the child where to do so is in the best interests of the child.

27.

Immigration officers should be trained to recognise children at risk at the point of entry and to make decisions that are in the best interests of the child. The best interests of the child should inform any decision relating to the entry and stay of the child in the State and should inform any legislation in this area.

Protection Law Recommendations

Refugee Status

28.

The definition of family in relation to family reunification should be extended to include non-marital partners and close family members.

29.

Any legislation enacted should include a right to emergency family reunification in cases where family members are facing danger.

30.

The current waiting times for family reunification must be reduced and a commitment to a six-month maximum wait should be made in the legislation.

31.

An application for asylum should encompass the principle of family unity. However, it should not be mandatory that an application for asylum would include an application by dependent family members.

32.

An application for asylum should not extend to family members not yet born at the time of making the application. Given the uncertainty surrounding the concept of the unborn child in Irish constitutional jurisprudence this is an unnecessary addition to the provision in the Procedures Directive and should be deleted.

33.

The Law Society recommends that the provision relating to the designation of safe countries should be deleted. The right to apply

for asylum is an individual human right available to all human beings in all countries and underpins the philosophy and intent of the Geneva Convention relating to the status of Refugees. No country can guarantee the safety of all its nationals all the time.

34.

Best practice guidelines in relation to the conduct of interviews should be adopted.

35.

The current time limits for an appeal should be extended to at least 20 working days.

Protection Status

36.

Where an applicant is refused both protection and refugee status, the Minister is entitled to have regard to whether or not the presence of the applicant in the State gives that applicant an unfair advantage over a foreign national in a similar situation to the applicant but not present in the State. This broad discretion seriously undermines the principle of *non-refoulement*. The Law Society recommends that this section be deleted.

37.

There should be no need to detain a protection applicant pending the issuing of a protection permit. The State should ensure sufficient resources are provided so that it is practicable to issue a permit at all times.

38.

The Law Society recommends that more balanced and proportionate measures be introduced as alternatives to detention. Where detention is necessary specific centres should be developed for the detention of such persons. The right to be informed of the right of access to legal aid and representation in a language that the foreign national understands should be enshrined in the legislation. At all times the process should be subject to judicial oversight.

Victims of Trafficking

39.

The 45 –day recovery and reflection period currently provided for is too short and should be extended to 90 days to allow the victim to make an informed and reasoned choice.

40.

The right to the six-month temporary protection should not be connected to the choice of a victim to cooperate with the authorities. In its current formulation, the Bill only provides a right to temporary protection where it is necessary for the purposes of allowing the victim to continue to assist the Garda Síochána or other relevant authorities in any investigation or prosecution of the trafficker. The reference to necessary should be deleted and the right to temporary protection should be assured for all victims of trafficking.

41.

The victim should be given the opportunity to pursue civil and criminal remedies against the trafficker if they so wish.

42.

Minors who are victims of trafficking should be granted protection and the best interests of the child should prevail in any decisions made on behalf of the child.

Protection Review Tribunal

43.

The rules, guidelines, procedures and decisions of the Tribunal should be available to the public. Any rules drawn up by the Chairperson relating to the operation of the Tribunal should be laid before the Oireachtas.

44.

All members should be appointed by the Commission for Public Service Appointments.

45.

The Tribunal should sit in panels of three and the membership of the Tribunal should reflect the interests of the parties involved. The Law Society would recommend a similar composition to the type adopted by the Employment Appeals Tribunal.

46.

Members of the Tribunal should have recognised expertise in protection and human rights law and the conduct of examinations at the time of their appointment and should continue to build their expertise in protection and human rights by ongoing study with appropriate experts.

47.

The Chairperson should not review decisions of the Tribunal without giving adequate notice to the applicant, allowing the applicant a right to make a representation and have that representation heard.

Judicial Review

48.

The 14 day time limit for taking a judicial review action is inadequate, unjust and should be extended to at least 20 working days

49.

Provision should be made for the extension of this time limit where there is "good and sufficient" reason to do so.

50.

Sufficient resources should be furnished to the courts and the existing administrative regime to clear the current backlogs before the introduction of any new legislative procedures.

51.

The proposal that legal representatives will be held personally liable for the costs of the application where the court considers that it is frivolous or vexatious should be deleted from the Bill. The Law Society believes that the provision will seriously hamper the ability of applicants to access justice, is contrary to the equality of arms principles in Irish law and in the European Convention on Human Rights and is invidious and unfair.

52.

The provision that allows for non-suspensory judicial review should be deleted. This will create another obstacle for applicants seeking justice and could lead to potential violations of the principle of *non-refoulement*.

Other Specific Recommendations

53.

Foreign nationals should be allowed to marry in Ireland and should not be prevented from marrying someone because of their nationality.

54.

The Freedom of Information Acts should apply to all decisions made under the provisions of the Immigration and Protection Bills.

55.

The provision which allows for the exchange of information is disproportionate and in breach of privacy provisions.

56.

Carriers should not be responsible for the detention of foreign nationals due to the potential human rights violations that may occur. No carrier should be put in a position where they have to make a decision on the non-*refoulement* rights of an applicant. Carriers should also be exempt from penalties in relation to protection applicants.

57.

Inspection and monitoring processes should be introduced to deal with the current inconsistencies in the immigration and protection procedures.

GENERAL RECOMMENDATIONS

1. Immigration Law and Protection Law

Recommendation: The Immigration and Protection Law aspects of the Bill should be distinguished from each other and separate Bills published.

There is an uneasy tension in the Bill between the law on immigration and the law relating to protection. The Law Society would like to see these two areas of law dealt with separately and comprehensively. Immigration and Protection law present the State with different challenges. Immigration law will always be related to the power of the State to control the entry, residence and removal of foreign nationals. Protection, on the other hand, raises very serious human rights considerations, most particularly, the right to non-refoulement. There is also the more practical consideration of ensuring clarity and easy access to legal provisions for both legal practitioners and the vulnerable groups addressed in the Bill. The Law Society respectfully calls on the Oireachtas to reconsider this blend of Immigration and Protection Law in order to assist legal certainty and ensure the protection of human rights.

2. Executive Discretion

Recommendation: The Bill should lay out in detail the law relevant to both immigration and protection. This should not be left to the discretion of the Executive through the introduction of regulations.

There is a large amount of discretion left to the Minister for Justice, Equality and Law Reform in the Bill.⁷ The Bill was intended to provide a comprehensive scheme for immigration and protection law to replace the large amount of existing legislation in this area of law. It is worrying that the Bill does not attempt to deal comprehensively with any of the major issues but prefers instead to provide a bare framework upon which the Minister will build, by policy statement or statutory instrument, the more comprehensive provisions. The current lack of information and the widely dispersed nature of the law, rules, practice and procedure will not alleviate the problems faced by practitioners. There is also the concern that the Minister will be able to introduce provisions that will not have been subjected to the scrutiny of the Houses of the Oireachtas and it will make it more difficult to verify whether such regulations comply with International and European law commitments.⁸

Some examples of this from the current Bill include applications for visas where the issues to be considered by the Minister will be fleshed out by statutory instrument⁹ and the grounds for granting residence.¹⁰ Further, there are many provisions that practitioners and applicants have been waiting on for many years, most notably the law in relation to family reunification. Despite repeated assurances, such provisions have not been introduced.

The Law Society is concerned to ensure that the Bill would contain not only the framework but also the detailed provisions of Irish Immigration and Protection law. The Law Society would respectfully encourage the Oireachtas to take this opportunity to

⁷ The Minister will derive this power primarily from section 127. However, there are other instances of Executive discretion throughout the Bill.

⁸ Tiburcio, *The Human Rights of Aliens under International and Comparative Law* (London: Martinus Nijhoff Publishers, 2001) at p. xix.

⁹ Section 12 2008 Bill.

¹⁰ Section 30 2008 Bill.

comprehensively review immigration and protection law in Ireland. If this is not adopted, the Law Society may wish to comment on future Regulations as they arise.

3. Access to Justice

Recommendation: Access to justice should be affirmed as a principle throughout the Bill. To ensure this, current provisions such as the imposition of personal liability on legal representatives for frivolous and vexatious judicial review applications should be deleted.

The Law Society is concerned by the tenor of the Bill, which appears to be designed to reduce access to justice for foreign nationals.

Due to the manner in which the current system is constructed, applicants often face judicial review proceedings that are expensive, complex and technical. Applicants will be given 15 days in which to locate, engage and instruct a legal representative, prepare the necessary information, seek and consider advice and allow time for the preparation and lodgement of paperwork and translation.

Due to the provisions on non-suspensory judicial review in the Bill, an applicant may be deported during the judicial review process. The only exception to this allowed for in the Bill is where it would be impossible for the applicant to instruct their representative from outside the State.

Even if an applicant can locate and instruct a legal representative in this time, the legal representative may not be willing to take the case on due to the risk of costs being awarded against him/her

personally should the judge find that the claim is frivolous and vexatious.

More significantly, from a human rights perspective, even if the applicant is successful in their judicial review action, the decision may come too late.

4. Transparency

Recommendation: Transparency should be maintained throughout the Bill. This can be achieved by developing an open and transparent process with published decisions, annual reports and monitoring and inspection mechanisms. In keeping with the principle of transparency, the Law Society would ask that the Minister publish the regulatory impact assessment made of the Bill.

Justice must not only be done, it must be seen to be done. The issue of transparency is of great importance to both legal professionals and applicants, is a pillar of good government and a cornerstone of human rights. The legal system should be open and transparent and a conscious effort should be made to establish an organisational structure that increases the opportunities for transparency. The Law Society calls on the Oireachtas to develop an open and transparent process with published decisions, annual reports and monitoring and inspection mechanisms. In this respect, the structure, composition and organisation of the Protection Review Tribunal should be reviewed.

The Law Society is concerned that the reason for the refusal to publish the decisions of the Tribunal is because it is afraid that

people will try to use the decisions for their own cases and that this will encourage further applications. This, however, could be said of any court of tribunal decision. Decision-making bodies are well equipped to deal with such “copy cat” cases in all other areas of law where decisions are published. This is a normal reality. Procedures dealing with the human rights of individuals should be easy to understand so that the public can access them. Without this level of openness the system will attract unfavourable comment because decision-making will be viewed with suspicion. “*Transparency assists in building this understanding*”¹¹.

All rules, policies, guidelines and criteria governing protection claims should be made available in the public domain.¹² All statistics relating to asylum claims should be published on a periodic basis. A report on the work of the Tribunal should be published annually.

The publication of decisions would also bring Ireland into line with the best practice of other jurisdictions and give guidance on the interpretation of the Refugee Convention in Ireland. The Asylum and Immigration Tribunal in the United Kingdom publishes their decisions and have a database of reported determinations of the Immigration Appeals Tribunal and the Asylum and Immigration Tribunal. Country guideline determinations and practice guidelines are also available on the website.

In the United States publication of judicial and administrative decisions relating to immigration are published and the Freedom of

¹¹ UN Habitat “Tools to increase transparency through institutional reforms” available at. <http://ww2.unhabitat.org/cdrom/TRANSPARENCY/html/2d.html>.

¹² European Council on Refugees and Exiles, ECRE Guidelines on Fair and Efficient Procedures for Determining Refugee Status (September 1999) at paras 154 – 161.

Information Acts also cover immigration decisions.¹³ In New Zealand, the Refugee Status Appeals Authority provide refugee jurisprudence, including abstracts (headnotes) and full-text .html and .pdf copies of all published decisions and minutes since 1997, with a selection of decisions from 1991 to 1996 and abstracts of relevant decisions of New Zealand's High Court and Court of Appeal. The RSAA's Practice Notes, Annual Reports and statistics relating to refugee appeals are also published in New Zealand.¹⁴

The recent Supreme Court decision in *Astanasov*¹⁵ would also appear to uphold this transparent approach.

Transparency has been recognised as a key concept by the European Court of Human Rights¹⁶. The Law Society calls on the Oireachtas to publish the decisions of the Protection Review Tribunal. At present, the Bill provides for the Chairperson to publish the decisions at his or her discretion.¹⁷ This is not appropriate considering the assistance to the Tribunal in deciding cases and to the development of meaningful jurisprudence in Ireland were such decisions available. Fears surrounding anonymity can be allayed by the use of reporting as currently carried out in family law cases, which do not use names.

¹³ Florida State University Law Library, *Refugee and Asylum Law Research: Judicial and Administrative Decisions* available at <http://www.law.fsu.edu/library/databases/pdf/jurisprudencerefugees.pdf> .

¹⁴ This can be accessed through the New Zealand Refugee Status Appeals Authority website available at http://www.nzrefugeeappeals.govt.nz/Pages/Ref_Home.aspx.

¹⁵ [2006] IESC 53.

¹⁶ In *Finucane v. United Kingdom* Application No. 29178/95 the Court held that investigations should be accountable to the wider public.

¹⁷ Section 95 2008 Bill.

5. Lack of Qualified Personnel

Recommendation: Officials who are charged with the task of making decisions that will have an effect on the human rights of immigrants should be adequately trained in protection and human rights law.

There are many examples in the Bill of areas in which the personnel involved in important decision-making roles are not required to be adequately qualified to be making such decisions.

For instance, it is noted in relation to the detention of immigrants in prisons that prison managers and officials, in various prisons, did not feel appropriately equipped or trained to look after immigration / protection detainees. Immigrants who are to be subjected to medical examinations are to be referred by immigration officials who may not have appropriate knowledge and expertise. Finally, in relation to irregular immigrants, healthcare professionals will, in essence, become immigration officials in deciding who is entitled to essential healthcare.

Clear guidelines should be provided to non-medical and ultimately non-legal personnel who are making decisions that are fundamental to the relevant foreign national's treatment.

6. Non-Discrimination

Recommendation: A provision of non-discrimination should be included in both the Immigration law and Protection law Bills.

In 2006, the Equality Authority launched a report entitled *Embedding Equality in Immigration Policy*¹⁸. This report emphasised the importance of securing a guarantee of equality and non-discrimination in legislation in the area of immigration and protection considering that the current equality guarantees in Irish law do not extend to immigration policy. The Law Society notes that the *Immigration, Residence and Protection Bill 2008* does not contain an equality provision and would respectfully encourage the Oireachtas to consider introducing an equality guarantee into the legislation.

Guarantees of equality in immigration and protection law are included in legislation in Northern Ireland,¹⁹ Britain²⁰ and Canada.²¹ There is also international authority to the same effect.²² The International Covenant on Civil and Political Rights urges state to undertake to “*respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race,*

¹⁸ Equality Authority, *Embedding Equality in Immigration Policy* (Dublin: Equality Authority, 2006).

¹⁹ The Race Relations Order (Amendment) Regulations (Northern Ireland) explicitly prohibits discrimination in the performance of public functions. The Equality Authority comment that this includes public authorities exercising particular powers that are specific and reserved to state bodies including immigration control and policing. *Supra* n. 18 at p. 25.

²⁰ Race Relations (Amendment) Act 2000 (UK) imposes a duty on certain listed public bodies to eliminate racial discrimination with complementary positive obligations to promote equality of opportunity and good relations between people of different ethnic groups. *Supra* n. 18 at p. 26.

²¹ Canadian Charter of Rights and Freedoms Section 15 and the Canadian Immigration and Refugee Protection Act paragraph 3(3)(d). *Supra* n. 18 at p. 28.

²² Article 2 Universal Declaration on Human Rights, Article 2 International Covenant on Civil and Political Rights, Article 14 European Convention on Human Rights, Article 3 Refugee Convention, Article 2 of the United Nations Convention on the Elimination of Racial Discrimination, UN General Assembly Resolution 57/195 para 1.6 adopted 18 December 2002 urged all states to “*review and where necessary revise the immigration laws, policies and practices, so that they are free of racial discrimination and compatible with their obligation under international human rights instruments*” See also UN General Assembly Resolution 58/160 adopted 22 December 2003.

colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”²³.

The Law Society calls for the immigration and protection policy in Ireland to be equality proofed.

²³ Article 2 ICCPR.

IMMIGRATION LAW CONCERNS

Foreign Nationals without valid residence permits

7. Irregular Residence

Recommendation: Provision should be made for irregular foreign nationals to regularise their situation. The Law Society recommends a 90-day period after the expiration of permission to remain in the State during which time the status of the immigrant remains lawful. This gives the foreign national an opportunity to seek permission to remain in the State.

The concept of an “*irregular immigrant*” covers the traditional irregular persons, often described as illegal aliens²⁴, who enter the State in a clandestine fashion either by avoiding inspection completely²⁵ or by utilising false documentation to gain entry, as well as those who enter the State legally but who become irregular where their permission to remain in the State expires and is not renewed or is, for any reason, terminated. The Law Society is

²⁴ The Law Society is aware of the international debate surrounding the terminology of legality when referring to human beings. The use of the term “*illegal*” has been described as an oxymoron by Taran who feels that it is a violation of the right of every human being to recognition before the law. See Taran, *United Nations World Conference Against Racism*, (Durban: International Labour Organisation Statement, 2001) available at www.december18.net/web/general/page.php?pageID+96&lang=EN. The association with criminality “*tacitly encourages discrimination and condones xenophobic hostility and violence*” *Convention on Migrant Workers: Frequently Asked Questions* available at www.unhchr.ch/html/menu2/6/CMW/faqs.hm. With this in mind the 1999 *International Symposium on Migration* held in Bangkok that the term “*irregular*” was a more appropriate term, which clearly described how easily a migrant could fall to irregularity. The Symposium resulted in the Bangkok Declaration on Irregular Migration.

²⁵ In the United States these migrants have become known as *EWI's* – Entry without inspection.

concerned that in the latter case immigrants will be removed from the State for irregular residence peremptorily.²⁶

The Law Society would respectfully encourage the Oireachtas to consider the position in other states, such as Canada, which allow immigrants whose permission to remain in the state has expired, a 90 day period in which to request a restoration of temporary residence status.²⁷ During this time their original status continues until a decision is made and they are notified.²⁸ This protects the human rights of the immigrant by ensuring that they do not become irregular and suffer the many consequences that accrue from that status.

8. Detention

Recommendation: The Law Society recommends that more balanced and proportionate measures be introduced as an alternative to detention. Where detention is necessary specific centres should be developed for the detention of such persons. The right to be informed of the right of access to legal aid and representation in a language that the foreign national understands should be enshrined in the legislation. They should also be given the opportunity to contact their embassy / consulate.

The Bill²⁹ provides for the detention pending deportation of irregular immigrants in prisons or Garda Stations. The Law Society believes that it is inappropriate to detain such persons in places of criminal detention. The Law Society refers to the report of the European

²⁶ Section 4 2008 Bill.

²⁷ IP 6 Processing Temporary Resident Extensions (Canada).

²⁸ R (183)(5) (Canada).

²⁹ Section 4(6) 2008 Bill.

Committee for the Prevention of Torture and Cruel, Inhuman and Degrading Treatment³⁰ that found that a number of foreigners who had been detained for immigration offences were being held in gaol for periods extending to a number of weeks. The CPT reiterated in the report that in their opinion "*prison is by definition not a suitable place in which to detain someone who is neither suspected nor convicted of a criminal offence*".

The CPT were of the opinion that a more suitable location would be centres specifically designed for that purpose offering material conditions and a regime appropriate to their legal situation and staffed by suitably qualified personnel. The CPT delegation noted in their report the situation of a Liberian national who had tried to commit suicide twice in the space of 4 days and was being kept naked in a special observation cell with only a blanket to cover him. Prison managers and officers, in various prisons, did not feel appropriately equipped or trained to look after immigration detainees. The Report highlights the need for training at all levels given the sensitivity of the issues involved.

The Bill could if enacted contravene international law relating to arbitrary detention and the right to a fair trial.

The Vienna Convention on Consular Relations 1963³¹ requires that foreign nationals who are arrested or detained be given notice "*without delay*" of their right to have their embassy or consulate notified of that arrest.³² The Law Society believes that provisions for these protections should be included in the Irish legislation.

³⁰ *Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Cruel, Inhuman and Degrading Treatment (CPT) from 2 to 13 October 2006 (Strasbourg: October 10, 2007) at p. 38.*

³¹ Article 36.

³² Ireland ratified the Vienna Convention on Consular Relations in 1967.

9. Deportation

Recommendation: Summary deportation is inconsistent with due process and fair procedures. The well-established procedure under section 3 of the Immigration Act 1999 should be maintained.

The summary deportation proposed for irregular immigrants³³ is of grave concern to the Law Society. The process of removing a person from the State without notice falls short of the normal standard of fair procedures. It is recognised at an international level that a foreign national has the right to submit the reason why he or she should not be expelled and to have his or her case examined by the competent authority. Pending such review, the person shall have the right to seek a stay of the decision of expulsion.³⁴

The procedure provided for in the Bill also effectively removes the well established procedures under section 3 of the Immigration Act 1999 and the obligation of the courts to consider the constitutional and convention rights of the applicant in an appeal against a deportation order and further to consider whether there is a potential breach of the principle of *non-refoulement*.³⁵ There is not an equivalent procedure in the Bill.

Of relevance also is the provision in the Bill that does not allow the irregular resident to derive any benefit from the period of irregular

³³ Section 4(5) 2008 Bill.

³⁴ Article 13 International Covenant on Civil and Political Rights, Article 1 Protocol 7 European Convention on Human Rights.

³⁵ *Bode v. Minister for Justice, Equality and Law Reform* [2007] IESC 62.

residence.³⁶ Once again this is a departure from section 3(6) of the Immigration Act 1999 where the duration of residence was a factor to be taken into account by the Minister in granting leave to remain.

10. Access to Services

Recommendation: All foreign nationals, regardless of their migratory status, should be entitled to full access to all services and essential financial support in a non-discriminatory manner.

The Bill provides that irregular residents are not entitled to any services or benefits provided by a Minister of the Government, a local authority, the Health Service Executive or other bodies.³⁷ Exceptions are made for means tested essential medical services,³⁸ means tested medical or other services necessary for the protection of public health,³⁹ means tested access to education for persons under the age of 16,⁴⁰ the provision of civil legal aid (in relation to removal only),⁴¹ services under s.201 and s. 202 of the Social Welfare Consolidation Act 2005,⁴² other services that are of a humanitarian nature,⁴³ that are provided for the purpose of dealing with or alleviating emergencies,⁴⁴ or are provided by way of assistance to repatriating foreign nationals.⁴⁵

³⁶ Section 4(8) 2008 Bill.

³⁷ Section 6(1)(a) 2008 Bill.

³⁸ Section 6(2)(a)(i) 2008 Bill.

³⁹ Section 6(2)(a)(ii) 2008 Bill.

⁴⁰ Section 6(2)(a)(iii) 2008 Bill.

⁴¹ Section 6(2)(b) 2008 Bill.

⁴² Section 6(2)(c) 2008 Bill. This is the power to make payments in cases of exceptional need and urgency.

⁴³ Section 6(2)(d)(i) 2008 Bill.

⁴⁴ Section 6(2)(d)(ii) 2008 Bill.

⁴⁵ Section 6(2)(d)(iii) 2008 Bill.

The Law Society calls for this section to be deleted. All foreign nationals regardless of their migratory status should have full entitlement to all services and essential financial support in a non-discriminatory manner. The current provisions appear to prevent a foreign national from accessing basic services such as access to health information, the services of social workers or to seek the assistance of the courts or the Ombudsman.

There is a distinct concern that if the provision of a service is not essential and the irregular foreign national is not in a position to pay for it, then the service will be denied to the foreign national.

Example 1: The Law Society refers, by way of an example, to the situation of an irregular foreign national who is a minor with an injury and whose parents cannot pay for treatment. The health care professionals will effectively become immigration officials in deciding whether or not the treatment is essential. If the health care professionals decide that it is not essential, then the child will not be treated. There is the danger that the injury could be exacerbated by this lack of treatment and become more serious putting the health or even life of the child at risk. This raises the potential for breaches of their right to bodily integrity, to be free from torture, inhuman and degrading treatment and to life.

Example 2: The Law Society is also concerned that access to legal services, including civil legal advice and aid, will also be affected. The provision effectively restricts the provisions of the Civil Legal Aid Act 1995 and also access to institutions such as the Employment Appeals Tribunals and the Equality Authority. Section 6(2) of the Bill appears to restrict access to Civil Legal Aid to applicants whose presence in the State is irregular, save in relation to any proceedings challenging their removal. This is a serious

access to justice issue and is breach of a number of international, regional and constitutional principles.

Example 3: The Law Society refers, by way of example, to a nine-year-old minor who may be denied access to basic education, where the State considers that the minor does have sufficient resources to pay for the education. The Law Society refers to the right to education as enshrined in the Constitution and in binding international instruments.

Example 4: The Law Society is concerned that irregular foreign nationals are being denied essential financial supports. There is a distinct danger that irregular foreign nationals will become destitute, homeless or otherwise incapable of providing for their own needs and those of their family. This is in breach of their constitutional rights to bodily integrity, life, their rights under the European Convention on Human Rights and other international instruments. The Law Society refers to the case of *Limbuela v. Secretary of State for the Home Department* [2005] UKHL 66 where the House of Lords held that when it appears on a fair and objective assessment of all relevant facts and circumstances that an individual applicant faces an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the most basic necessities of life their right not be subjected to cruel, inhuman and degrading treatment under Article 3 of the European Convention on Human Rights would be breached.

Lawfully Present Foreign Nationals

11. Independent Immigration Appeals Tribunal

Recommendation: An independent immigration appeals tribunal should be established to hear appeals from the refusal to grant entry or renew residence or the refusal to grant or renew a visa. This will allow the constitutional and convention rights of applicants to be adequately considered.

The Law Society is concerned by the lack of any independent appeals procedure for the refusal or revocation of a visa. Under the Bill the applicant is entitled to make an internal "visa review application"⁴⁶.

There is also no appeal allowed for a refusal of entry permission or renewal of residence. In light of the provisions discussed above and the fact that there is no guarantee that immigration officials will be trained and experienced in law or human rights in making these decisions, this is of grave concern. There is potential for a lack of fairness and transparency and breaches of constitutional and convention rights. In a case in 2004, the Court of Appeal of England and Wales agreed that the refusal of entry clearance to a young child whose adoptive parents lived in the UK breached the right to family life under Article 8.⁴⁷ Such issues may be missed where there is no right of independent appeal.

⁴⁶ Section 17 2008 Bill.

⁴⁷ *Singh v. Entry Clearance Officer, New Dehli* [2004] EWCA Civ 1075.

12. Refusal of a Visa

Recommendation: The criteria for the refusal of a visa should be laid down in the primary legislation. These criteria should be proportionate and reasonable.

The Law Society is concerned at the some of the potential reasons listed in the Bill for refusal of a visa.⁴⁸ The Bill refers to the possibility of refusing a visa where the Minister is of the opinion that any conduct in connection with immigration or criminal convictions of the applicant or any member of his or her family, whether or not they are in the State, indicates that the applicant or any member of his or her family would be unlikely to comply with a condition of permission to enter and be present in the State.⁴⁹ The reference to the family of the applicant is disproportionate and contrary to fair procedures especially as the Bill does not define the term “family” and this concept could be interpreted very broadly. Also, the Bill refers to family members whether or not they are in the State. There is the potential for the arbitrary refusal of a visa to an applicant on the basis that a distant relative has had a criminal conviction in another state.⁵⁰

⁴⁸ Section 14 2008 Bill.

⁴⁹ Section 14(10)(f) 2008 Bill.

⁵⁰ In the case of *Case C-503/03, Commission of the European Communities v. Kingdom of Spain*, the European Court of Justice decided that by refusing entry into the Schengen Area and by refusing to issue a visa for the purpose of entry into that area to nationals of a third country who are the spouses of Member State nationals, on the sole ground that they were persons for whom alerts were entered in the Schengen Information System (this would mean that they had some form of criminal record) for the purposes of refusing them entry, the Kingdom of Spain failed to fulfil its obligations under Articles 1 to 3 of Directive 64/221 and was therefore in violation of Community law. Therefore, the refusal of a visa in Ireland could also be violation of Community law. On the basis of this decision, the Bill should be amended to preclude this.

13. Refusal of Entry

Recommendation: The discretion afforded to the Minister to refuse entry in non-protection matters should be exercised in a fair and transparent manner as prescribed by law and governed by fair procedures.

Even if foreign nationals are granted a visa or residence permit, this does not entitle him/her to enter the State. This only provides them with the right to present at a port in the State. A foreign national may not enter the State without the permission of the Minister, who has the discretion to refuse entry.⁵¹ This raises issues in relation to the constitutional and convention rights of persons who have been granted a visa and opens up the possibility of infringing the rule on *non-refoulement*.

The Law Society would like to express its concern at the grounds for refusing a person permission to enter the State. One of these grounds refers to the fact that the foreign national has been convicted of an offence punishable under the law of the place of conviction by imprisonment for a period of one year or more or by a more severe penalty.⁵² This ground for refusal raises a number of important issues. Firstly, there are many crimes in other states that are not crimes in this jurisdiction. For example, in many countries adultery and homosexuality are considered crimes and are punishable by lengthy prison sentences.

The Law Society calls on the Oireachtas to reconsider this position. Secondly, it is unclear what the Bill is referring to when it mentions a more severe penalty. There is a possibility that this could refer to punishments such as stoning or other inhuman and degrading

⁵¹ Section 19 2008 Bill.

⁵² Section 27(1)(f) 2008 Bill.

punishments that the Oireachtas should not recognise as legitimate penalties.

Another ground that also causes concern is the ground relating to the previous conduct of any person or organisation connected with that foreign national's purpose in being present in the State indicating that any requirement imposed on the applicant will not be complied with.⁵³ This is a very broad provision with much potential for misuse. Firstly, the conduct is not connected just to the applicant or even the applicant's family but extends to any person or organisation connected with the applicants purpose for being in the State. Secondly, there is an assumption that if the applicant has even a slight connection with any of the above the applicant will not be in a position to comply with the requirements of his/her visa. This provision is too broad and sits uncomfortably with the need for transparency and fairness in immigration policy.

All Immigration Officers should be conversant with all international human rights standards including the European Convention on Human Rights and domestic constitutional law so that they can make informed decisions as to whether a person should be granted entry and so that they can accurately recognise all relevant concerns.⁵⁴ The Law Society respectfully seeks assurances that training to achieve this end will be put in place and maintained.

14. Compulsory medical examinations

Recommendation: The decision to refer a foreign national for a medical examination upon entry to the State should be

⁵³ Section 27(1)(p) 2008 Bill.

⁵⁴ This was recommended in the most recent report of the Independent Monitor for Entry Clearance refusals with limited rights of appeal: report to the Secretary of State (Oct 2006 – March 2007).

governed by fair procedures as prescribed by law in the primary legislation and made by trained personnel.

The Bill proposes to subject foreign nationals to medical testing where an immigration official is of the opinion that there are reasonable grounds to do so.⁵⁵ The Law Society respectfully recommends that the grounds upon which an immigration official can refer a foreign national to medical testing should be clearly stated and not left to the discretion of immigration officials.

15. Residence Permission

Recommendation: The criteria that may be considered by the Minister in granting residency are vague and ambiguous. The Law Society recommends that any references to the applicants' family and associates are unnecessary, unfair and should be deleted.

In considering an application for residence, the Minister can have regard to the fact that the applicant or any member of his or her family, whether in the State or not, has a criminal conviction.⁵⁶ As noted above this provision is very broad. There is no definition of what constitutes family and the term appears to extend to family members who are outside the state. There is also no limit on the type of criminal conviction that can operate to deny a foreign national a residence permit.

16. Family Reunification

⁵⁵ Section 23(6)(b)(vii) 2008 Bill

⁵⁶ Section 31(i) 2008 Bill.

Recommendation: Foreign nationals have a right to family reunification. This should be specified in the primary legislation. The detailed provisions as to the application procedure, criteria to be applied, maximum time the applicant will have to wait for reunification and the definition of the family should be laid down in the primary legislation.

There are no specific provisions relating to family reunification for foreign nationals who are not under a protection scheme. This is an unfortunate omission from the legislation.

This omission is inconsistent with the UN Convention on the Rights of Migrant Workers and Members of their Families⁵⁷, the UN Convention on the Rights of the Child⁵⁸, the International Covenant on Civil and Political Rights⁵⁹ and the International Covenant on Economic, Social and Cultural Rights⁶⁰ among others.⁶¹ In a recent report on Mauritania, the Committee on the Rights of the Child noted the lack of a specific law that allowed for family reunification for economic migrants and urged the State party to “*enact legislation, policies and programmes guaranteeing the reunification of families where this is possible*”⁶².

European Instruments such as the European Convention on Migrant Workers 1977⁶³, the European Convention on Human Rights⁶⁴, the European Social Charter⁶⁵, the Committee of Ministers of the Council of Europe Recommendation 4 of 2002 and Council Directive

⁵⁷ Article 44.

⁵⁸ Article 10.

⁵⁹ Article 23.

⁶⁰ Article 10.

⁶¹ See OHCHR Migration Papers “Family Reunification” November 2005.

⁶² Initial Report of Mauritania § 47 and 48 CRC/C/15/Add.159. 6/11/2001.

⁶³ Article 12.

⁶⁴ Article 8

⁶⁵ Article 19.

2003/83/EC expressly uses the term “right” when referring to the process of family reunification. Article 8 of the European Convention on Human Rights has established very precise requirements with respect to family reunification. There must be effective and strong links between the families concerned, the actual existence of family life and the impossibility of establishing family life elsewhere. The lack of provision for family reunification represents a failure by the State to meet its obligations under international law and the aspirations of the international community.

A recent Directive on Family Reunification⁶⁶ provides that Member States shall authorise the entry and residence of the spouse, minor child, first degree dependent relatives, the adult unmarried children of the applicant and unmarried partners with whom the applicant is in a duly attested stable long term relationship or is bound by a registered partnership.⁶⁷ Family reunification should take no longer than nine months from the date of application.⁶⁸ While Ireland has opted out of this Directive, this Bill is an opportunity to allow Ireland to bring its legislation in line with European harmonisation measures.

There is also the possibility that the State will deter valuable economic migrants from working in Ireland if it does not make adequate provision for family reunification.

17. Long Term Residence

Recommendation: The right to long-term residence should be clarified and brought in line with Council Directive

⁶⁶ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

⁶⁷ Article 4.

⁶⁸ Article 5(4).

2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

There is a right to long-term residence in the Bill⁶⁹ but this right does not provide any real permanence to foreign nationals who have lived in Ireland for more than five years. Under the relevant EU Directive⁷⁰, the long-term residence permit should be renewable automatically and only very serious reasons should warrant a non-renewal and subsequent expulsion. The Bill proposes that the applicants are entitled to a 5-year residence permit that is renewable upon conditions that the Minister will prescribe through statutory instruments. This lack of clarity at this stage makes it very difficult to judge whether the rules for obtaining long-term residence will in fact comply with the EU Directive.

By refusing to provide for automatic renewal, the State will make it very difficult for long-term residents to integrate into society. For example, such immigrants may find it very difficult to get mortgages if their future residence in the state is uncertain.

18. Renewal of Residence Permission

Recommendation: The procedure outlined for renewal of residence permits should be simplified. The current time limit of 15 days in which to apply for a renewal of residence is unworkable and should be replaced with a more realistic time frame. It should also be clarified that the status of the

⁶⁹ Section 36 2008 Bill.

⁷⁰ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

applicant does not change while the applicant is waiting for a decision on the renewal of their permit.

The procedure for the renewal of residence permits is long and difficult and the 15 working day time limit⁷¹ to make a representation in support of a renewal is too short considering the implications of becoming an irregular resident. Canada,⁷² for example, allows for a 90-day period during which time the applicant's status continues to remain lawful. During this time the applicant can make an application to renewal that will either be accepted or rejected. This is a more appropriate formulation that should be adopted here in Ireland. The legislation should also provide for a maximum time period within which the application should be determined.

19. Liability for Costs

Recommendation: Foreign nationals who are deported should not be liable for any costs due to their detention and deportation.

Under the Bill, the Minister may require foreign nationals to pay reasonable costs for their maintenance, accommodation and removal.⁷³ This provision is contrary to international law, in particular the United Nations Convention on the Rights of Migrant Workers and Members of their Families 1990, which provides that in case of expulsion of a migrant worker or a member of his or her family the costs of expulsion shall not be borne by him or her.⁷⁴

⁷¹ Section 45(2)(d) 2008 Bill.

⁷² See discussion earlier.

⁷³ Section 60 2008 Bill.

⁷⁴ Article 22(8) UN Convention on the Rights of Migrant Workers and Members of their Families 1990.

While Ireland has not ratified this Convention this does provide evidence of a general minimum standard that should be followed.

Separated Children

Of the asylum applicants seeking protection in Ireland over the last decade, over 4,500 separated children are estimated to have arrived in the State. Many of these children are in need of special care and protection. There are many reasons why children arrive unaccompanied and Child trafficking (be it for sexual exploitation or labour purposes) is one of those reasons. A startling fact is that over 300 Children have gone missing from the care of the Irish authorities in recent years. The viewpoint expressed by the Council of Europe Commissioner for Human Rights, Thomas Hammarberg is that: "Children in migration should get better protection. Migrant children are one of the most vulnerable groups in Europe today." He goes on to state that when dealing with migrant children, "the starting point must be that migrant children are first and foremost children".⁷⁵ Article 3(1) Convention on the Rights of the Child states that "the best interests of the child shall be a primary consideration" in all actions concerning children.

"Between 2003 and 2006, 599 separated children seeking asylum were presented to, or presented themselves to the Office of Refugee Applications Commission (ORAC), with over 4,500 estimated to have arrived in Ireland over the past decade." (Dr Nalinie Mooten, the Irish Refugee Council, *Making Separated Children Visible*, Dublin, 2006). Children who are separated from their parents may be very vulnerable for reasons which may include a previous exposure to violence, identification with those who have perpetrated violence, the loss or disappearance of their parents,

⁷⁵ University College Cork, Visit of Council of Europe Human Rights Commissioner, 28th November 2007.

severe anxieties, difficulties with mourning and change, difficult experiences on arrival, racism and isolation.⁷⁶

20. Best Interests

Recommendation: The best interests principle should be set out in the legislation and should inform any legislative developments in this area.

It should be remembered that the "best interests of the child" is of paramount importance in all legislation drafted by the Irish legislature. It is specifically referred to in the Procedures Directive⁷⁷ and in the Separated Children in Europe: Programme Statement of Best Practice. In this instance, not only is Ireland's adherence to its European Union and International law obligations being called into question, but the potential issue of its adherence to its own constitutional law principles may be in issue. The Law Society's Child Law Report recommends that the best interests test should always be applied in any dealings with separated children.

21. Definition of the Separated Child

Recommendation: The definition of a separated child should be laid down in the primary legislation in accordance with the statement of best practice as prescribed by the Separated Children in Europe: Programme Statement of Best Practice.

⁷⁶ Training Guide, Powerpoint presentation available at http://www.separated-children-europe-programme.org/separated_children/publications/reports/TrainingPPT.pdf.

⁷⁷ Article 17(6).

There is no definition of a Separated Child in the Bill as defined by the Best Practice Guidelines⁷⁸ or in the Law Society's Report on Rights Based Child Law⁷⁹.

22. Age Assessment

Recommendation: Clear and objective procedures on the assessment of the age of a child on arrival in the State should be laid down in the primary legislation. Provision should also be made for this assessment to be made by appropriate and trained personnel.

In Ireland there is currently no statutory procedure in place in relation to age assessment. The only guide available is from the case of *Moke*⁸⁰ which gives guidance as to minimal procedures that can be followed in making an age assessment. *Moke* established that ORAC has an implicit power under s. 8(5)(a) of the Act of 1996 (as amended) through its authorised officers or immigration officers to determine whether a person is a child under the age of 18 years. This decision making power must be exercised in accordance with the principles of constitutional justice and fair procedures. Such principles require certain minimum safeguards.

In accordance with the UNHCR guidelines on best practice, the Law Society calls on the Oireachtas to make provision for the physical, developmental, psychological and cultural attributes of the child to be examined by independent professionals with appropriate expertise and familiarity with the child's ethnic and cultural background. Examinations should never be forced or culturally

⁷⁸ Separated Children in Europe: Programme Statement of Best Practice.

⁷⁹ *Infra* n. 83 at p. 41.

⁸⁰ High Court October 2005 Ms. Justice Finlay Geoghegan.

inappropriate. Particular care should be taken that the examinations are gender appropriate. In the case that the immigration official is unsure as to the age of the child, they should be directed to err on the side of caution.

The Law Society also seeks clarity in the legislation as to the legal relationship between the child and the Health Service Executive where appropriate. Any legal guidance should be set out in the legislation including who the guardian of that minor is and the duties of the guardian.

23. Responsible Adult

Recommendation: The legislation should lay down clear and objective guidance on the assessment of the responsible adult of a separated child. There is a distinct danger that the current provisions will act as an invitation to traffickers of children in Ireland.

On arrival in the State, the Bill proposes that if an immigration official is of the opinion that a person is under the age of 18, then a responsible adult, or the Health Service Executive will be called upon to take responsibility for that child.⁸¹

The reference to a responsible adult is of concern to the Law Society. There is nothing in the Bill that will protect a child from becoming a victim of trafficking. The responsible adult could in fact be a trafficker but the Bill does not provide any guidance on how the suitability of the proposed adult can be ascertained.⁸² While Section 74(8) provides that an interviewer may inform the HSE

⁸¹ Section 24 2008 Bill.

⁸² Section 24 2008 Bill.

where he or she considers that the accompanying adult is not acting in the best interests of the minor, the interview may not take place for several weeks after the minor's arrival in the State. This period between arrival in the State and the interview is often when minors go missing.

24. Family Ties

Recommendation: Clear and objective procedures on assessing evidence of family ties should be laid down in the primary legislation.

It should be made clear in the Bill that every effort must be made to establish a family tie between the child and the adult based on the documents provided or that the proposed adult is a fit person in all the circumstances and that this is in the best interests of the minor.⁸³ All appropriate investigations, including if necessary DNA testing should be undertaken and specific provision for this should be included in the Bill. Due consideration should be given to cultural differences where the concept of family may extend to persons with whom there may be no direct biological link.⁸⁴

The Law Society recommends that a separated child should be appointed a legal guardian to represent and assist them in the protection process.

⁸³ Law Society of Ireland, *Rights Based Child Law: The case for reform* (Dublin: Law Society of Ireland, 2006) at p. 41.

⁸⁴ Law Society of Ireland *supra* n. 83 at p. 41.

25. Arrest and Detention

Recommendation: No child under the age of 18 should be detained under any circumstances and this should be clarified in the primary legislation.

If an immigration officer is of the opinion that a foreign national is over the age of 18, then summary arrest, detention and deportation will occur as it does with adults.⁸⁵ However, there is no guidance in the Bill on determining how old a foreign national is. In the event of uncertainty or if a young person claims still to be a child, there is likewise no guidance on the best interests of the child and how this can be best achieved. The IRP Bill allows for detention of a minor in some cases.

General Comment No. 6 of the Committee on the Rights of the Child (2005) notes that: "Detention cannot be justified solely on the basis of the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof.....States should ensure that such children are not criminalised solely for reasons of illegal entry or presence in the country..."

26. Family Reunification

Recommendation: Provision should be made for the tracing the family of the child where to do so is in the best interests of the child.

The European Council on Refugees and Exiles noted that based on the concept of the best interests of the child, the separated child should be granted status that would entitle him/her to reunification

⁸⁵ Section 58 2008 Bill.

with his/her parents at the earliest opportunity.⁸⁶ Every effort should be made to determine the location of the parents. The Law Society would welcome the Minister's public commitment to this principle.

27. Training

Recommendation: Immigration officers should be trained to recognise children at risk at the point of entry and to make decisions that are in the best interests of the child. The best interests of the child should inform any decision relating to the entry and stay of the child in the State and should inform any legislation in this area.

⁸⁶ *Infra* n.87 at p. 12.

PROTECTION LAW CONCERNS

Refugee Status

28. Definition of Family

Recommendation: The definition of family in relation to family reunification should be extended to include non-marital partners and close family members.

The definition of family in the Bill is very narrow. It encompasses spouses and parents where the applicant is under the age of 18 and children. The definition of the family effectively excludes co-habitant partners, whether the same sex or otherwise. Dependents are entitled to family reunification if they can show that they are dependent on the applicant or are physically or mentally incapable of looking after themselves fully.

The European Council on Refugees and Exiles noted in a Report in July 2000 that the definition of family should not be limited to nuclear family members but should be extended to include same-sex or cohabiting partners and dependents.⁸⁷

29. Emergency Family Reunification

Recommendation: Any legislation enacted should include a right to emergency family reunification in cases where family members are facing danger.

⁸⁷ European Council of Refugees and Exiles "Position on Refugee Family Reunification" July 2000 available at <http://www.ecre.org/files/family.pdf> at p. 4.

The Bill should include a right to emergency family reunification in cases where family members are facing danger. This should also extend to close family members who do not fit within the statutory definition of the family for the purposes of family reunification.

30. Waiting times

Recommendation: The current waiting times for family reunification must be reduced and a commitment to a six-month maximum wait should be made in the legislation.

The Law Society welcomes the commitment to family reunification for foreign nationals for whom a protection declaration is in force in the Bill.⁸⁸ The Law Society recalls the position of the family as the “*natural and fundamental unit group of society...entitled to protection by society and the State*”.⁸⁹ This is affirmed in a number of international⁹⁰ and European instruments⁹¹. It is also to be found in the Conclusions of the UNHCR Executive Committee⁹² and in their Handbook on Procedures and Criteria for Determining Refugee status. The presence of one’s family in the State is an important factor in assisting a refugee to integrate into the host society. In this respect, “*protection of the family is not only in the best interests of the refugees themselves but is also in the best interests of the State*”⁹³.

⁸⁸ Section 50 2008 Bill.

⁸⁹ Article 16(3) Universal Declaration on Human Rights.

⁹⁰ Article 17 and 23(1) International Covenant on Civil and Political Rights; Article 10(1) International Covenant on Economic, Social and Cultural Rights; Articles 9 and 10 United National Convention on the Rights of the Child.

⁹¹ Article 8, European Convention on Human Rights and Fundamental Freedoms; Article 16 European Social Charter.

⁹² No. 9 (XXVII); No. 15 (XXX), (e); No. 24 (XXXII); No. 22 (XXXII), B, II, h, (i); No. 84 (XLVII), (b), (i); and No. 85 (XLIX), (u)-(x). Cf: *Supra* n. 87.

⁹³ UNHCR, *Note on Family Protection Issues*, EC/49/SC/CRP. 14 June 1999, point 16.

However, the present situation whereby applicants for family reunification are expected to wait for a number of months before their application is considered is no longer appropriate. Under Article 6 of the European Convention on Human Rights, everyone has the right to a final decision, within a reasonable time, on determinations (“*contestations*”) over his civil rights and obligations.⁹⁴ The European Court of Human Rights has reiterated that the “*reasonableness*” of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute.⁹⁵

The European Council on Refugees and Exiles noted that family reunification should take place within a period of 6 months from the time the application is made.⁹⁶ The European Union Directive on Family Reunification⁹⁷ also makes reference to a 9-month time limit for making a decision on family reunification. However, this is a minimum standard. The Law Society would like to recommend that a 6-month time limit be imposed to ensure the rights of refugees in Ireland. If an application for family reunification is refused on grounds specified in the Bill⁹⁸ the reasons should be specified and the application should be given a right of appeal to an independent tribunal.

⁹⁴ *Šakanovič v. Slovenia* (Application No. 32989/02); *Marini v. Albania* (Application No. 3738/02); *Unión Alimentaria Sanders S.A. v. Spain*, judgment of 7 July 1989, Series A no. 157, pp.14-15, § 38; *Robins v. the United Kingdom*, judgment of 23 September 1997, Reports of Judgments and Decisions 1997-V, § 28.

⁹⁵ *Comingersoll S.A. v. Portugal* [GC], no. 35382/97, § 19, ECHR 2000-IV.

⁹⁶ *Supra* n. 87 at p. 4; *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII .

⁹⁷ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

⁹⁸ S. 50 2008 Bill.

31. Family Unity

Recommendation: An application for asylum should encompass the principle of family unity. However, it should not be mandatory that an application for asylum would include an application by dependent family members.

The 2008 Bill suggests that where an application for asylum is made by a foreign national this claim is deemed to be made on behalf of all the dependents of the foreign national who are under the age of 18 years, whether present in the State at the time of making the application or born or arriving in the State subsequently.⁹⁹ The Procedures Directive provides in Article 6 (3) that an application “may be made” on behalf of his/her dependents. This allows an applicant to choose not to make an application on behalf of his/her dependants if he/she so wishes. The Bill does not appear allow an applicant to opt out from this provision, which is an important provision, considering the consequences of a refusal are so severe. The Bill does not give precise effect to the provisions of the Procedures Directive.

The section would not appear to allow for separate applications for the same dependents. So for example if a father applies and is refused so too are his dependents. However, their mother may have been accepted but she cannot have her dependents considered also as this has already been done. It does not take into account the different circumstances of each of the dependents. It may well be that a female dependent has suffered from female genital mutilation or that there is a threat that she will be subjected to this practice but this will not be considered as it is only the application of the applicant that will be examined.

⁹⁹ Section 17(3) 2008 Bill.

32. Unborn Child

Recommendation: An application for asylum should not extend to family members not yet born at the time of making the application. Given the uncertainty surrounding the concept of the unborn child in Irish constitutional jurisprudence this is an unnecessary addition to the provision in the Procedures Directive and should be deleted.

This proposed section goes much further than the Procedures Directive.¹⁰⁰ The Directive does not make any mention of the unborn child. Considering the uncertainty surrounding the unborn child in Irish law, it is not advisable to make references to it in this context.

33. Designation of Countries as Safe Countries

Recommendation: The Law Society recommends that the provision relating to the designation of safe countries should be deleted. The right to apply for asylum is an individual human right available to all human beings in all countries and underpins the philosophy and intent of the Geneva Convention relating to the status of Refugees. No country can guarantee the safety of all its nationals all the time.

Under section 102 the Minister can designate by order certain countries as safe countries of origin. If a foreign national is a national or has a right of residence in one of those countries then the applicant is presumed not to be in need of protection.¹⁰¹

¹⁰⁰ Council Directive 2005/85/EC.

¹⁰¹ Section 62(3)(a) 2008 Bill.

The Law Society is concerned that this designation may not take account of internal difficulties and other factors that may make a country unsafe. The Law Society is also concerned that a designation may become out of date in the light of developing unrest, rebellion or other disturbances, as happened very quickly in the former Yugoslavia and that persons in need of protection because of the changed circumstances would not receive it because of this provision.

34. Conduct of Interviews

Recommendation: Best practice guidelines in relation to the conduct of interviews should be adopted.

The Procedures Directive provides for a number of best practice guidelines in relation to the conduct of interviews. These should be adopted in the Bill:

1. There should be no personal interview where the applicant is unfit. In such cases, the applicant should be allowed to submit further written information in support of their application. (Article 12).
2. Where the applicant fails to appear at interview for good reasons, it should not be presumed that their application has been withdrawn. (Article 12(6)).
3. There should be a requirement to record an applicant's refusal to approve the record of the interview (Article 14).
4. The Bill requires that the applicant submit documents in support of their application. The Directive only requires information. This is an important distinction particularly as most asylum seekers do not possess documentation. (Article 23(f))

5. There should be a procedure to allow for an applicant to re-open an application as there is in the Directive (Article 20).
6. Where refugee status is to be withdrawn, the Procedures Directive allows for an opportunity for a personal interview as to why such status should not be withdrawn. This should be provided for in the Bill.

35. Appeal to the Protection Review Tribunal

Recommendation: The current time limits for an appeal should be extended to at least 20 working days.

An applicant can appeal to the Protection Review Tribunal where he or she is refused Refugee status by the Minister.¹⁰² The applicant is given 15 working days to make this appeal specifying the grounds for appeal and whether or not he or she wants an oral hearing.

Given that most applicants for protection are not represented at first instance, this time limit is extremely short. 15 working days is a very short time to find, engage and instruct a legal representative, prepare the necessary information, seek and consider advice and allow time for the preparation and lodgement of paperwork and translation. It is also disproportionate considering the consequences of a failure to make an appeal in a timely fashion.

The Law Society recommends that the time limit should be extended to at least 20 working days. There should also be a way for an applicant to make a late application where they have reasonable cause to do so.

¹⁰² Section 84 2008 Bill.

Protection Status

36. Unfair advantage

Recommendation: Where an applicant is refused both protection and refugee status, the Minister is entitled to have regard to whether or not the presence of the applicant in the State gives that applicant an unfair advantage over a foreign national in a similar situation to the applicant but not present in the State. This broad discretion seriously undermines the principle of *non-refoulement*. The Law Society recommends that this section be deleted.

Section 53 of the Bill prohibits removal from the State where such removal would amount to *refoulement*. The Law Society welcomes this. However, there is potential for a breach of this principle in the protection aspect of the Bill. When an application for asylum or subsidiary protection is made, it is either granted or refused. Where both of these are refused there is a third potential avenue for a applicant where as a result of the principle of *non-refoulement* the person should be granted residence.¹⁰³

However, this principle is limited by section 83 of the Bill, which provides that the Minister will not make such a determination in an application for residence unless there are compelling reasons for permitting the foreign national to reside in the State. In determining whether compelling reasons exist, the Minister will have regard to whether the presence of the applicant in the State would give the applicant an unfair advantage over a foreign national not present in the State but in a similar position to the applicant and the Minister

¹⁰³ Section 79(2)(c) 2008 Bill.

shall not be obliged to take into account factors not related to the applicant's departure from his/her country of origin or that have arisen since his/her departure.

The broad discretion granted to the Minister in section 83 seriously undermines the principle of *non-refoulement* in the Bill and the Law Society suggests that such conditions should not be attached to a consideration of whether the Minister considers that the application for residence should be granted.

37. Detention pending protection permit

Recommendation: There should be no need to detain a protection applicant pending the issuing of a protection permit. The State should ensure sufficient resources are provided so that it is practicable to issue a permit at all times.

Of particular concern to the Law Society is section 70, which appears to permit administrative detention where the issue of a residence permit is "not practicable". The provision permits detention pending the issue of a protection permit and no time period is specified. Further there is no judicial supervision of this power.

The Law Society recalls the principle that unless safeguards of reasonable time limits and judicial supervision can be provided for, the Law Society suggests that this power should be omitted from the legislation. Detention should in all cases be necessary and proportionate. It should always be practicable to permit a protection applicant to make a protection application. It should be ensured

that sufficient resources are made available so that protection permits can be issued swiftly so that detention pending the issue of the permit is unnecessary.

38. Detention

Recommendation: The Law Society recommends that more balanced and proportionate measures be introduced as alternatives to detention. Where detention is necessary specific centres should be developed for the detention of such persons. The right to be informed of the right of access to legal aid and representation in a language that the foreign national understands should be enshrined in the legislation. At all times the process should be subject to judicial oversight.

The Law Society refers to a report commissioned by the Irish Refugee Council, the Irish Penal Reform Trust and the Immigrant Council of Ireland entitled "Immigration Related Detention in Ireland"¹⁰⁴ which noted that people detained in such a manner are not being informed of their right to challenge the legality of their detention and / or the validity of the decision to detain them. Moreover the law does not formally recognise their right to be informed of their right of access to a lawyer.

The Law Society would call for the following rights to be set out in the legislation:

1. Right not to be detained with convicted prisoners or persons awaiting trial

¹⁰⁴ The report was carried out by Mark Kelly, Human Rights Consultant in November 2005.

2. Right not to be detained unless other measures, such as reporting procedures, are not appropriate in all the circumstances of the case
3. Right to be informed of the right of access to a lawyer and legal aid in writing and in a language that understood by the applicant
4. Right to judicial scrutiny of the detention

Victims of Trafficking

39. Recovery and Reflection Period

Recommendation: The 45–day recovery and reflection period currently provided for is too short and should be extended to 90 days to allow the victim to make an informed and reasoned choice.

The Law Society is concerned that the 45-day recovery and reflection period¹⁰⁵ proposed in the Bill is too short for victims of trafficking for numerous reasons.

Firstly, it is unrealistic to expect a victim of trafficking, often severely traumatised, to have recovered to such an extent that he/she will be able to decide whether to assist in a criminal investigation. The victim must be given adequate opportunity to fully recover from his/her ordeal and to obtain knowledge and information on the Irish legal system in which he / she is being asked to assist. In a recent UK report entitled “Stolen Smiles”¹⁰⁶, a recovery and reflection period of 90 days was recommended. This is to ensure that the person’s “*cognitive functioning has improved to a level at which they are able to make informed and thoughtful decisions about their safety and well-being, and provide more reliable information about trafficking related events*”¹⁰⁷. The report found that victims of trafficking suffer a wide range of health problems of which many are severe and enduring. A 90 day recovery and reflection period would allow the victim to fully

¹⁰⁵ Section 124 2008 Bill.

¹⁰⁶ London School of Hygiene and Medicine and others “Stolen Smiles: a summary report on the physical and psychological health consequences of women and adolescents trafficked in Europe” (2006).

¹⁰⁷ *Ibid* n.106 at Recommendation No. 2.

recover and reflect upon the information which could assist in a prosecution.

Secondly, it may be unrealistic to presume that the DPP will be able to come to a decision within the 45-day period about whether or not he wishes to prosecute. Thirdly, the Law Society notes that there is no provision in the Bill for a situation where the DPP decides not to prosecute.

Measures should be adopted to provide for the physical, psychological and social recovery of victims of trafficking as recommended by the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, particularly Women and Children (hereinafter referred to as the "UN Protocol"). This should include measures to ensure that victims of trafficking can avail of a standard of living capable of ensuring their subsistence (Council of Europe Convention on Action against Trafficking in Human Beings) such as housing (the UN Protocol). Counselling and information should be provided to all victims of trafficking and, in particular, they should be given information in relation to their legal rights in a language that they can understand. The physical safety of victims should be assured at all times and services should be provided in consultation with NGO's. It is important that all services are provided in a consensual and informed basis.

40. Temporary Residence and Co-operation

Recommendation: The right to the six-month temporary protection should not be connected to the choice of a victim to cooperate with the authorities. In its current formulation, the Bill only provides a right to temporary protection where

it is necessary for the purposes of allowing the victim to continue to assist the Garda Síochána or other relevant authorities in any investigation or prosecution of the trafficker. The reference to necessary should be deleted and the right to temporary protection should be assured for all victims of trafficking.

Victims of trafficking should be entitled to six months temporary residence where asylum or other subsidiary protection is unavailable, in line with the United Nations Protocol to prevent, suppress and punish trafficking in persons, particularly women and children and the Council of Europe Convention and this should not be based on their duty or otherwise to cooperate.

At present, the right to a 6 months temporary protection is dependent upon the victim's cooperation. Even where the victim decides to cooperate, the authorities may not consider it necessary for that victim to remain in the State and may after the 45-day period enforce the removal of that victim from the State. The Law Society would recommend that this element of necessity be deleted.

41. Remedies

Recommendation: The victim should be given the opportunity to pursue civil and criminal remedies against the trafficker if they so wish.

The Law Society notes that there is no provision in the Bill for the victim to pursue a civil or other claim against the trafficker. In every case, victims of trafficking should have access to relevant judicial and administrative procedures. Assistance should be provided to

ensure that they are adequately represented and that free legal aid and advice is available. Victims of Trafficking should have the right to seek compensation from perpetrators. This is provided for in the UN Protocol, in the United Nations Convention against Transnational organised crime and in the Council of Europe Convention on Action against Trafficking in Human.

In the report entitled "Stolen Smiles"¹⁰⁸ the right to reparation was specifically recommendation as an important right for victims of trafficking.

42. Minors who are victims of trafficking

Recommendation: Minors who are victims of trafficking should be granted protection and the best interests of the child should prevail in any decisions made on behalf of the child.

There are many issues pertaining to minors and child trafficking that are not addressed in the Bill. None of the recommendations made in the Law Society's Report, "Rights based Child Law: The case for reform" (March 2006), have been adopted. The same applies to the recommendations contained in the recent report on Child Protection made by the Special Rapporteur¹⁰⁹, in particular the granting of temporary permission to remain pending an assessment of their case and the establishment of a designated authority charged with the duty to monitor and prevent child trafficking. Neither of these recommendations are contained in the Bill.

¹⁰⁸ *Ibid* n. 106 at Recommendation No. 3.

¹⁰⁹ Report of the Special Rapporteur on Child Protection, Mr. Geoffrey Shannon.

Council Directive 2004/81/EC provides for a six-month residency permit but again this is subject to the criteria of cooperation. As in the case of adults, the Law Society would therefore recommend that minors who are victims of trafficking should be entitled to temporary residence where asylum or other subsidiary protection is unavailable. Periods of recovery and reflection should also be available to minors. It is also important that minors are provided with representation and that every effort is made to establish their identity and nationality and, if it is in the best interests of the child, to locate their family.

Protection Review Tribunal

The Law Society recommends that transparency, fairness and reasonableness should be the overarching principles surrounding the operation and organisation of the Tribunal.

To ensure compliance with international obligations while establishing fair, fast and firm decision-making processes that are transparent and easy to use,¹¹⁰ it is important to incorporate general principles that will determine the manner in which the Tribunal will operate. Transparency, fairness and reasonableness will ensure consistency in decision-making, openness and public confidence in the system.

43. Rules of the Tribunal

Recommendation: The rules, guidelines, procedures and decisions of the Tribunal should be available to the public. Any rules drawn up by the Chairperson relating to the operation of the Tribunal should be laid before the Oireachtas.

The Bill allows for the Chairperson to establish rules and procedures for the conduct of the Tribunal and to make copies of these rules available to those likely to be affected by them.¹¹¹

The Law Society would call upon the Oireachtas to make these rules public and to require that they be laid before the Oireachtas. Annual

¹¹⁰ New Zealand – Department of Labour Regulatory Impact Assessment – Immigration Act: Protection Statement of Public Policy Objective.

¹¹¹ Section 93(2) IRPB 2008.

reports should be published of the meetings referred to section 93(7). This procedure is common in other jurisdictions. In Canada under s. 161(2) of the Immigration and Refugee Protection Act 2001, the Minister shall cause a copy of any rule to be laid before each House of Parliament on any of the first 15 days on which that House is sitting after the approval of the rule by the Governor of the Council.

The Law Society would also recommend that a recording or transcript of all oral hearings should be taken and made available at the request of the applicant.

44. Appointment of Members of the Tribunal

Recommendation: All members should be appointed by the Commission for Public Service Appointments.

The Law Society recommends that all full time and part time members of the Tribunal, including the Chairperson, should pass a Competition run by the Commission for Public Service Appointments.

It will assist in restoring public confidence in the system, given the recent reports in the media about the inconsistencies in the current procedures.¹¹²

45. Composition of the Tribunal

Recommendation: The Tribunal should sit in panels of three and the membership of the Tribunal should reflect the

¹¹² See article in the Irish Times 4th March 2008 “Members of Refugee Appeal Body considered taking legal action” by Carol Coulter.

interests of the parties involved. The Law Society would recommend a similar composition to the type adopted by the Employment Appeals Tribunal.

46. Membership of the Tribunal

Recommendation: Members of the Tribunal should have recognised expertise in protection and human rights law and the conduct of examinations at the time of their appointment and should continue to build their expertise in protection and human rights by ongoing study with appropriate experts.

Section 92 provides that a Member need not be a qualified lawyer but should have “such experience of protection matters as may be prescribed”. This means that the Bill does not stipulate the minimum experience required. Tribunal hearings are examinations of law and fact that affect fundamental human rights. All those examining should be experts in relevant law and experienced in the conduct of examinations. This should be stipulated in the Bill. In addition, the Bill should provide that Tribunal members will be required to maintain their knowledge and expertise through ongoing study after appointment.

The current formulations of the Bill means that with the abolition of the Refugee Applications Commissioner and its replacement by INIS (an arm of the Department of Justice, Equality and Law Reform), an applicant could conclude his/her entire asylum process without any investigation of his/her claim by a lawyer. In New Zealand it was recently noted that where there are multiple decision makers, who were not necessarily protection specialists, there is a risk of inconsistent decision-making and significant delays where training is

not provided. In Canada, members of the relevant tribunals are required to be a member of the bar of at least 5 years standing or a notary of at least 5 years standing.¹¹³

A Complaints Procedure should be established similar to that established in the Canadian system. Under s. 176 of the Canadian Immigration and Refugee Protection Act 2001, the Chairperson may request the Minister to decide whether any member should be subject to a disciplinary procedure because of his / her incapacity, misconduct, has failed in the proper execution of the office or has been placed, by conduct or otherwise in a position that is incompatible with due execution of that office. In such circumstances an inquiry may be established into the operation of the tribunal. The Law Society recommends the establishment of a complaints procedure. Complaints could be made to the Minister who must report on complaints received annually to the Dail. If there are many complaints, the Minister can then be asked why he has not removed the person complained against.

47. Role of the Chairperson

Recommendation: The Chairperson should not review decisions of the Tribunal without giving adequate notice to the applicant, allowing the applicant a right to make a representation and have that representation heard.

The Bill allows for the Chairperson to ask a Tribunal member to reconsider a decision made by that member where the Chairperson is of the opinion that there is an error of law or fact in their decision

¹¹³ Section 153(4) Immigration and Refugee Protection Act 2001.

before the decision is finalised.¹¹⁴ The Law Society believes that this is unnecessary and inappropriate considering the independence of the members as provided for under section 91(3) of the Bill and suggests that it should be removed. The Law Society is also concerned that no notice of this is provided to the Applicant and any such request for review should be notified to an applicant and any legal representative, who should then have the opportunity to make representations both orally and in writing.

¹¹⁴ Section 93(8) 2008 Bill.

Judicial Review

48. Time Limits

Recommendation: The 14 day time limit for taking a judicial review action is inadequate, unjust and should be extended to at least 20 working days

From the perspective of the practitioner, the provisions relating to Judicial Review in the Bill are of great concern for the Law Society. The 14-day time limit proposed in the Bill is unnecessarily short.¹¹⁵ The Law Society considers that this time frame is unworkable. Given that most applicants for protection are not represented at first instance, this time limit is extremely short. 15 working days is a very short time to find, engage and instruct a legal representative, prepare the necessary information, seek and consider advice and allow time for the preparation and lodgement of paperwork and translation. It is also disproportionate considering the consequences of a failure to make an appeal in a timely fashion. It is impractical and it restricts rights guaranteed by the Irish courts and the European Convention on Human Rights.

49. Extension of time-limit

Recommendation: Provision should be made for the extension of this time limit where there is "good and sufficient" reason to do so.

The provisions in relation to judicial review are more restrictive than those currently provided for in the Illegal Immigrants Trafficking Act 2000. Section 99 of the Bill provides for an extension of time where

¹¹⁵ Section 118 2008 Bill.

either the applicant is seeking to rely on new material or where there are other "*exceptional circumstances*". At present, the Court can grant an extension where there is "*good and sufficient reason*". The Supreme Court has acknowledged that this criterion of "*good and sufficient reason*" is wide and ample enough to avoid injustice where an applicant has been unable through no fault of his or her own or for good and sufficient reason to bring the application within the fourteen day period. The Bill currently reduces the reasons that can be advanced for an extension of time. Any such provision should be deleted.

50. Resources

Recommendation: Sufficient resources should be furnished to the courts and the existing administrative regime to clear the current backlogs before the introduction of any new legislative procedures.

Currently, there are extensive backlogs in applications for residence especially for those seeking leave to remain under sections 3 and 4 Immigration Act 1999 and family reunification. In addition there are long delays in judicial review lists in immigration matters. The Bill now sets out extra categories of cases that will be included for judicial review.¹¹⁶ The Bill proposes to add a greater number of cases and complexity to the process. The Law Society recommends that any new legislative processes should not be commenced until the existing backlog has been cleared.

¹¹⁶ Section 118 2008 Bill.

51. Legal Costs

Recommendation: The proposal that legal representatives will be held personally liable for the costs of the application where the court considers that it is frivolous or vexatious should be deleted from the Bill. The Law Society believes that the provision will seriously hamper the ability of applicants to access justice, is contrary to the equality of arms principles in Irish law and in the European Convention on Human Rights and is invidious and unfair.

Irish law already provides for an award of costs against lawyers who bring applications that are deemed frivolous and vexatious. This further proposal, directed only at immigration and refugee law practitioners, that lawyers will be held personally responsible for the costs of a claim that the Court considers to be frivolous and vexatious is of serious concern to the Law Society.¹¹⁷ There seems to be little reason for it other than to inhibit. This would appear to be an unprecedented encroachment on the principle of access to justice and equality of arms.

Order 99 Rule 7 of the Rules of the Superior Courts which provides that if in any case it appears to the Court that costs have improperly or without any reasonable cause been incurred, the Court may call on the solicitor of the person by whom such costs have been so incurred to show cause why such costs should not be disallowed as between the solicitor and his client and also (if the circumstances of the case shall require) why the solicitor should not repay to his client any costs which the client may have been ordered to pay to any other person, and thereupon may make such order as the justice of the case may require. This provision was

¹¹⁷ Section 118(8) 2008 Bill.

introduced to protect the client from a solicitor who is incurring unreasonable costs, which are not to the benefit of the client. This provision adequately protects clients and further encroachments upon this rule are inappropriate.

The European Court of Human Rights has held that the principle of equality of arms is one of the features of the wider concept of a fair trial under Article 6(1) of the Convention. This requires that each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-a-vis his opponent.¹¹⁸ This provision would subject an already vulnerable class of applicant to further difficulty in pursuing their rights and will make lawyers extremely reluctant to risk such costs. Only the applicant's lawyer is at risk. This sub-section is at odds with the right of every person to access the courts which is essential in a country governed by the rule of law.

52. Non-Suspensory Judicial Review

Recommendation: The provision that allows for non-suspensory judicial review should be deleted. This will create another obstacle for applicants seeking justice and could lead to potential violations of the principle of non-refoulement.

The Law Society is very concerned at the provisions in the Bill which provides that a judicial review hearing may not suspend the

¹¹⁸ *Dombo Beheer B.V.v. the Netherlands* judgment of 27 October 1993, Series A no. 274 at p. 19, para 33; *Ankerl v. Switzerland*, 23 October 1996, *Reports 1996-V*, pp. 1567-68, § 38; *Nideröst-Huber v. Switzerland*, 18 February 1997, *Reports 1997-I*, pp. 107-08, § 23; and *Kress v. France* [GC], no. 39594/98, § 72, ECHR 2001-VI.

removal of an applicant from the State.¹¹⁹ As a result the right to seek judicial review is rendered less effective.

A more practical and effective way would be to ensure that applicants are heard promptly. In fact, international law recognises the right of a foreign national to seek a stay of the decision of expulsion pending the determination of his/her appeal.¹²⁰ In the case of *Jabari v. Turkey*¹²¹ the European Court of Human Rights noted that time limits must not be so short, or applied so inflexibly, as to deny an asylum applicant a realistic opportunity to prove his or her claim, in light of the sensitive nature of the determination. The right to effective judicial protection is a general principle of the EU Treaties. The case of *Johnston* held that “community law requires effective judicial scrutiny of the decisions of the national authorities taken pursuant to the applicable provisions of Community law”.¹²²

From a practitioners perspective, non-suspensive judicial review raises problems with pursuing a case where the client is outside the jurisdiction including reasonable opportunity for consultation with clients, problems with interpretation, translation of documentation, ensuring the accuracy of instructions. It also has the potential to infringe the equality of arms principle. Fundamentally, there is a risk that there will be a breach of the principle of non-*refoulement*.

¹¹⁹ Section 118(9) 2008 Bill.

¹²⁰ Article 22(4) United Nations Convention on the Rights of Migrant Workers and Members of their Families.

¹²¹ Application No. 40035/98.

¹²² Case C-222/84 Johnston (1986) ECR 1651 para 18.

Other Specific Concerns

53. The Right to Marry

Recommendation: Foreign nationals should be allowed to marry in Ireland and should not be prevented from marrying someone because of their nationality.

The provision, which effectively prevents a foreign national from marrying an Irish citizen or another foreign national in Ireland because of the insistence upon residence permits, is unconstitutional and should be removed.¹²³ It is also in violation of international law as expressed in the Universal Declaration on Human Rights¹²⁴, the European Convention on Human Rights¹²⁵ and the International Covenant on Civil and Political Rights¹²⁶. Thus the right is a well recognised one and should be granted to all without discrimination.

54. Freedom of Information

Recommendation: The Freedom of Information Acts should apply to all decisions made under the provisions of the Immigration and Protection Bills.

The Law Society is concerned that the Freedom of Information Act does not apply to the decisions made under the Bill.¹²⁷ This is a very serious issue for lawyers engaged in appeals who cannot

¹²³ Section 23, 2008 Bill.

¹²⁴ Article 16.

¹²⁵ Article 12.

¹²⁶ Article 23.

¹²⁷ Section 130 2008 Bill.

access previous decisions or memorandums on their clients even where there is no public security issue. The Law Society asks the Oireachtas to reconsider this issue in the interests of transparency that the Bill should convey.

55. Exchange of Information

Recommendation: The provision which allows for the exchange of information is disproportionate and in breach of privacy provisions.

Section 106 of the Bill refers to the right of an information holder to request relevant information from another information holder. The definition of information holder would appear to cover state or semi-state entities including the Health Service Executive and potentially the Legal Aid Board. Relevant information refers to information about a foreign national and that appears to relate to public security or to have adverse implications for public health, public policy or public order.

The Law Society notes a number of definitional problems with the section including the fact that the definitions are very broad and would appear to run contrary to the constitutionally protected right to privacy. The definition of foreign national also extends to EU nationals and there are potential breaches of EU law in this respect. There are also a number of ethical issues with the provision including their encroachment upon client confidentiality in breach of the solicitors code of ethics, fair procedures, lack of transparency and the ethical values of medical professionals.

56. Carrier Liability

Recommendation: Carriers should not be responsible for the detention of foreign nationals due to the potential human rights violations that may occur. No carrier should be put in a position where they have to make a decision on the non-*refoulement* rights of an applicant. Carriers should also be exempt from penalties in relation to protection applicants.

In the Bill, carriers will be liable to ensure that foreign nationals present themselves at an approved port, disembark in compliance with the directions of immigration officials, have the requisite travel documentation including visas, provide information on the crew and persons on board and detain foreign nationals who have been refused permission to enter the State.¹²⁸ These are very serious obligations to place on people who are not qualified in human rights or civil law and could lead to potential abuse and breach of fundamental human rights.

57. Monitoring and Inspection

Recommendation: Inspection and monitoring processes should be introduced to deal with the current inconsistencies in the immigration and protection procedures.

It has been recognised in the United Kingdom, after much concern was raised over visa refusal decisions, that an independent monitor for entry clearance refusals should be established.¹²⁹ This independent monitor is not a member of staff and the monitor must

¹²⁸ Section 28 2008 Bill.

¹²⁹ Section 23 Immigration and Asylum Act 1999 as amended by paragraph 27 of Schedule 7 of Nationality, Immigration and Asylum Act 2002.

make an annual report to the Secretary of State. Even with this system in place, the latest report emanating from the United Kingdom noted only 87% of the visa refusals were reasonable i.e. in accordance with Immigration rules, Diplomatic Service Procedures and AECIP guidance, the decisions were not perverse and had been based, even loosely, on evidence.¹³⁰ Poor judgement, subjectivity, no evidential basis, references to the wrong immigration rules, no reference to immigration rules and significant maladministration were identified in the decision making process.

Ireland should also introduce independent monitoring and inspection regimes in both the immigration and protection arenas.

¹³⁰ Independent Monitor for Entry Clearance refusals with limited rights of appeal: report to the UK Secretary of State (Oct 2006 – March 2007) at p. 23.

CONCLUSION

The *Immigration, Residence and Protection Bill 2008* was published on the 29th January 2008. The Law Society welcomes this unique opportunity to consolidate and clarify the law in relation to immigration and protection and to ensure compliance with international and regional standards. However, the Law Society has a number of very serious concerns in relation to the manner in which the State has chosen to implement these changes.

Immigration and Protection law present the State with very different challenges. The Law Society is seriously concerned by the uneasy tension in the Bill between these two competing interests and does not believe that the correct balance has been attained. The Law Society would prefer to see these two areas of law dealt with separately in different Bills.

The Bill was intended to provide a comprehensive scheme for immigration and protection law to replace the widely dispersed nature of the law, rules, practice and procedure of existing legislation in this area of law. The Law Society is concerned by the fact that the Bill does not attempt to deal comprehensively with any of the major issues but prefers instead to provide a bare framework upon which the Minister will build, by policy statement or statutory instrument, more comprehensive provisions. The Law Society is gravely concerned that legal certainty, clarity and accessibility will be undermined by this development. Any regulations introduced will not have been subjected to the scrutiny of the Houses of the Oireachtas. It will also make it extremely difficult to verify that the

provisions of the Bill comply with international, regional and domestic human rights standards.

The issue of transparency is of great importance to both legal professionals and foreign nationals, is a pillar of good government and a cornerstone of human rights. The Law Society feels strongly that any procedures developed should be open and transparent and a conscious effort should be made to establish an organisational structure that increases the opportunities for transparency. The Law Society calls on the Oireachtas to publish decisions and annual reports and to develop independent monitoring and inspection mechanisms. The Law Society would strongly advise that the structure, composition and organisation of the Protection Review Tribunal should be reviewed.

Of grave concern to the Law Society is the manner in which the Bill appears to be designed to reduce access to justice for foreign nations. Provisions allowing for summary deportation, a reduction in the time in which to bring a judicial review application, non-suspensory judicial review and the penalty for legal representatives who take a case that is, in the opinion of the judge, "frivolous or vexatious" should be deleted. All of these provisions are in breach of recognised constitutional and international human rights standards and are incompatible with the ethos and philosophy that should permeate any immigration and protection law enactments