



Tithe an Oireachtais

An Comhchoiste um Dhlí agus Ceart, Cosaint agus Comhionannas

An Tuarascáil Eatramhach maidir leis an Tuarascáil ar an Iniúchadh Réamh-
Reachtaíochta ar Scéim Ghinearálta an Bhille um Chosaint Idirnáisiúnta

Iúil 2015

Houses of the Oireachtas

Joint Committee on Justice, Defence and Equality

Interim Report on
Pre-legislative Scrutiny Report of the
General Scheme of the International Protection Bill

July 2015

31/JDAE/029

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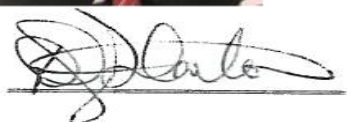
Chairman's Preface

The issues of migration and asylum have presented many new challenges in these times. New crises overseas have increased the numbers of applications for international protection exponentially. In addition, the challenges faced by EU Member States in the Mediterranean further underline this crisis.

Modern times require modern and optimised rules for the examination and processing of asylum requests. This Draft Scheme seeks to do just that and the Committee is glad to have had the opportunity to examine these issues and seek the views of stakeholders.. Given the importance of this legislation, the Committee will continue to examine some outstanding issues and will produce a more detailed Report in the Autumn addressing remaining points and issues.

As this Committee has observed on many occasions, the main challenge in drafting legislation in this area lies in striking a balance between the humanitarian need to assist those in serious and grave danger and a process which provides a timely decision.

I would like to express my gratitude to all those who took the time to make a submission, the contents of which have been noted by the Committee.

A handwritten signature in black ink, appearing to read 'D Stanton', written over a horizontal line.

David Stanton T.D.
Chairman
July 2015

Introduction

The Minister for Justice and Equality forwarded the General Scheme of the International Protection Bill to the Joint Committee on 26th March 2015, inviting it to comment on the proposed legislation. The General Scheme can be viewed on the Department's [website www.justice.ie].

The Committee decided to invite written submissions on the General Scheme of the Bill and a total of 12 submissions were received from various organisations. The submissions raised a diverse range of views and recommendations and the Committee has decided that it should publish these submissions to bring the views expressed into the public domain. These submissions are included in Appendix 3.

Submissions were received from the following bodies:

- Barnardos
- Children's Rights Alliance
- Doras Luimní
- The Immigrant Council of Ireland
- The Irish Refugee Council
- Jesuit Refugee Service Ireland
- The Law Society of Ireland
- Nasc, the Irish Immigrant Support Centre
- National Women's Council of Ireland
- Spiritan Asylum Services Initiative, SPIRASI
- UNHCR Ireland
- Women's Aid

This is an Interim Report on this Scheme, highlighting some of the key issues brought to the Committee's attention by stakeholders. However, a number of important issues remain and the Committee will continue its deliberations of these issues.

Observations of the Committee

The Committee will address its observations sequentially as they arise in the General Scheme.

The definition of ‘acts of persecution’

Head 6 defines ‘acts of persecution’ for the purposes of an asylum application. Head 6(2) sets out examples of acts which may amount to acts of persecution. These include acts of sexual violence (Head 6(2)(a)) and acts of a gender-specific or child-specific nature (Head 6(2)(f)).

The Committee observed that there is an issue arising from this Head regarding the absence of a reference to “domestic violence”. The Committee also noted the absence of a specific set of comprehensive gender-specific guidelines to be followed when assessing applications for asylum.

The requirement for a medical examination

Head 22 provides that the Minister for Justice and Equality or the International Protection Appeals Tribunal (established by Head 55, hereinafter the Tribunal) may require an applicant to be medically examined and a report to be furnished by a nominated medical practitioner in relation to the physical or psychological health of the applicant. The Committee notes a lack of clarity regarding who covers the cost of such an examination and in addition, the lack of specified consequences if an applicant does not consent to undergo a medical examination.

Assessment of facts and circumstances: assertion of citizenship

Head 25(5) outlines the matters to be taken into account by the Minister or Tribunal when considering an application for international protection or determining an appeal in respect of such application. Head 25(5)(e) requires decision makers to consider ‘whether the applicant could reasonably be expected to avail himself or herself of the protection of another country where he [sic] could assert citizenship’. The Committee notes that there is no obligation on the part of an applicant under international law to avail himself or herself of the protection of another country where s/he could “assert” nationality.

Assessment of facts and circumstances: ‘compelling reasons’ ground

The Committee notes the absence of the ‘compelling reasons’ ground from Head 25(6), as originally provided for in Regulation 5(2) of S.I. No. 518 of 2006.

***Sur place* claims**

The provisions of Head 27 address the situation of international protection needs arising *sur place*. This refers to protection needs which may arise in relation to a person after he or she has left his/her country of origin.

Head 27(3) provides that an applicant who is the subject of a subsequent application will not normally be the subject of a positive determination ‘if the risk of persecution is based on

circumstances which the applicant has created by his or her own decision since leaving the country of origin.’

While it is recognised that states face difficulty in assessing the *bona fides* of asylum claims, it may be preferable to address difficult evidentiary and credibility questions by appropriate credibility assessments. As confirmed by Irish jurisprudence, the key question to be determined in an asylum claim, even those where an applicant may not have acted in good faith in engaging in activities since leaving the country of origin, is whether the person has a ‘well-founded fear’.

The limitation on content of positive decision

Currently, when a decision is made by ORAC the full report of the decision is sent to an applicant, irrespective of whether the decision is positive or negative. Head 36 proposes a change to this process, so that where the Minister makes a positive decision (to recognise the applicant as a refugee) at first instance, the notification sent to the applicant will consist only of that fact. Where a person is refused asylum at first instance but is found to be eligible for subsidiary protection, the applicant will be provided with reasons for the asylum refusal but will not be given reasons for the decision to give a subsidiary protection declaration.

Submissions to the Committee claim that these limitations in relation to the content of a positive decision may add an extra complexity to the report writing requirement of first instance decisions, may be ineffective in limiting access to the reasons for positive decisions and may lead to a less efficient process.

The Committee noted that there is no requirement for the Minister to set out his/her findings in addition to his/her determination and the particular findings set out in Head 4. The Committee also noted that the requirement to notify an applicant of the reasons for a decision is not irrespective of whether the determination is a positive or negative.

Processing times and access to work

Head 35(5) of the General Scheme provides that where a determination of an application for international protection cannot be made within 6 months of the date of application then the Minister must, following request from the applicant, provide information on the estimated time within which a determination may be made.

The Committee notes that it is not entirely certain what happens to the applicant if the timeframe for a decision exceeds 6 months. Submissions advocated that consideration should be given to allowing applicants the permission to work pending the final determination of his/her application.

Examination and determination in relation to permission to remain

Head 36A(2) of the General Scheme sets out the factors that the Minister must consider in determining whether to give permission to reside in the State to an applicant. Currently s.3(6) of the Immigration Act 1999 sets out the criteria that the Minister must consider in determining whether to make a deportation order. The Committee notes that several criteria currently contained in s.3(6) of the 1999 Act are omitted from Head 36A(2) and that there is no general reference to either the European Convention on Human Rights and the EU Charter of Fundamental Rights.

Notification of decision

Head 36A(5) provides that the Minister must notify, in writing, the applicant and the applicant's legal representative (if known) of the Minister's determination in relation to the application for permission to reside. The Committee notes from submissions a question of whether an applicant and his/her legal representative is fully informed as to the reasons for the decision. Of particular interest is whether this would aid any future application to renew permission and/or assess grounds for judicial review.

In addition, the Committee notes that the legislation could require that when being notified of a decision under Head 36A(5), the applicant and their legal representative should also be furnished with the reasons for the decision, whether positive or negative, along with a copy of the assessment undertaken.

Consideration of application for permission to remain

Concern has been expressed in the submissions regarding a lack of clarity in the General Scheme as to when applications for permission to remain are to be considered. The Committee notes that there is a call among stakeholders for this to be clarified.

No right to appeal refusal of application for permission to remain

Under the General Scheme, an applicant may appeal a refusal of asylum or subsidiary protection to the International Protection Appeals Tribunal. However, there is no right to appeal a decision to refuse permission to remain. The Committee notes that there may be an issue of whether an applicant should have the right to appeal an entire decision to the International Protection Appeals Tribunal, as an application for permission to remain may give rise to the consideration of certain fundamental human rights.

Refugee Declaration and Subsidiary Protection Declaration

Head 43 of the General Scheme sets out the obligations of the Minister in relation to the granting of a refugee or subsidiary protection declaration. A refugee declaration shall be a statement in writing declaring that the applicant is a refugee (Head 43(2)). A subsidiary protection declaration shall be a statement in writing declaring that the applicant is a person eligible for subsidiary protection (Head 43(6)).

Head 43(11) provides that: ‘A refugee declaration or a subsidiary protection declaration, although given or deemed to have been given under these Heads, shall not be in force in relation to an Irish citizen.’

The Committee notes a possible lacuna here, in that refugees or those granted subsidiary protection may lose the right to family reunification under this provision if they are naturalised. The Committee notes from submissions a call for this provision to be either deleted or clarified in relation to the right of persons in these circumstances to retain a right to family reunification.

Revocation of refugee declaration or subsidiary protection declaration

Head 46 of the General Scheme outlines, amongst other things, the circumstances where the Minister must revoke a refugee or subsidiary protection declaration (Heads 46(1) and 46(3)), and the circumstances where he or she may revoke a refugee declaration (Heads 46(2)).

The Committee notes from submissions that Heads 46(1) and 46(3) require the Minister to revoke a refugee or subsidiary protection declaration, but Head 46(2)(a) and (b) outline the circumstances where the Minister has a discretion. This apparent lack of discretion in Heads 46(1) and 46(3) is a concern noted by the Committee.

The Committee also notes that the discretion in Heads 46(2)(a) and 46(2)(b) applies to where there are reasonable grounds for regarding the person as a danger to the security of the State or the person, having been by a final judgment, convicted, whether in the State or not, of a particularly serious crime and if this constitutes a danger to the community of the State. The Committee observes that this only provides for the revocation of a refugee declaration and not for the removal of the refugee from the State.

Option to voluntarily return

Head 43A provides for the option for an applicant to voluntarily return to the country of origin. The Committee observes that as it is currently drafted, the option for an applicant to voluntarily return is optional on the part of the Minister.

The Committee notes from submissions the need to clarify that this is a mandatory provision and that it may be availed of at any stage up to the time limits set out in Head 43A(4). An issue regarding the time provided to an applicant in respect of the option to voluntarily return was also identified and whether this should be extended to 15 working days, in keeping with what is currently provided for in s.3 of the Immigration Act 1999.

Time limit for applying for family member to enter and reside

Head 50(1) governs applications for permission to enter and reside for a member of his/her family. The application must be made by a qualified person within 12 months. This time frame applies from when the sponsor is granted a refugee or subsidiary protection declaration. The Committee observes that current legislation does not contain any such limitation period.

The 12 month period has been identified by a number of stakeholders as being too limited, as it may make family reunification impossible in cases where the location of family members is unknown or may be an insufficient period of time to secure the monetary means to support family reunification.

The Committee specifically notes concerns over the 12 month time limit and whether it should be removed or alternatively, amended, to allow for extenuating circumstances e.g. where a person is not in a position to make an application within the timeframe due to no fault of their own.

Permission will cease if failure to enter and reside in State by specified date.

Head 50(5) provides that a permission granted to a family member to enter and reside in the State will cease if the person does not enter by a date specified by the Minister. The Committee notes that this provision does not allow for exceptional circumstances which may prevent travel and some submissions express a wish for it to be removed.

‘Member of the family’ of qualified person

Head 50(8) requires that there must be a current family relationship (spouse or civil partner) at the time the application for international protection was made. It also excludes ‘dependent’ family members from the definition of ‘member of the family’ and does not extend a right to family reunification in respect of *de facto* partners.

Concern has been expressed that a sponsor’s application for international protection may have been based on the risk of persecution because of their sexual orientation and it would be unrealistic, in these circumstances, to expect couples to have married or be in a civil partnership prior to the sponsor fleeing their country of origin.

Also, these countries may not allow for any kind of marital type status in relation to LGBTI individuals, capable of recognition under the General Scheme. The Committee has identified an issue from submissions of whether Head 50(8) should be amended in light of these concerns, so as to extend the definition of ‘member of the family’ to include dependent family members and *de facto* partners. There is an additional issue of whether the legislation also provides guidance regarding how the concept of ‘dependence’ is determined and assessed if such an amendment is made.

Right to appeal refusal of family reunification application and time frame for processing applications

The Committee notes that under the General Scheme, there is no right to appeal the refusal of a family reunification application and no statutory timeframe for processing such applications.

Situation of vulnerable persons and children

Head 52(1) provides that in the application of Heads 47 – 51, due regard must be had to the specific situation of vulnerable persons, who are defined in the Head. Head 52(2) provides

that in the application of Heads 47 – 51 in relation to a child under 18, the best interests of the child shall be a primary consideration.

Heads 47 – 51 provide for the extension of certain rights to qualified persons. There is an issue of whether this legislation should be amended to provide for an obligation to consider the specific situation of vulnerable persons not just in circumstances where protection status has been granted but also throughout the application process. There is also an issue of whether the reference to ‘due regard’ in Head 52 be replaced with specified actions, such as identification, support, procedural guarantees and the monitoring of vulnerable protection applicants.

Requirement to consider the best interests of the child

The requirement to consider the best interests of the child is set out in some provisions of the General Scheme, but not all. In particular, it does not apply to the protection determination process. An issue has been identified from submissions on whether the “best interests of the child” requirement be extended to all provisions in the General Scheme.

Proposed abolition of the Office of the Refugee Applications Commissioner

Under the General Scheme, the independent Office of the Refugee Applications Commissioner will be abolished and its role will be taken over by the Department of Justice and Equality. Some submissions raised the need to ensure the independence of the body tasked with investigating applications for international protection and advocate the retention of the Office of the Refugee Applications Commissioner under the General Scheme.

Conclusions

The issue of international protection continues to maintain a topical and ever-evolving relevance and the Committee notes that many of the issues raised by submissions will continue to develop as the legislative process continues. Therefore, the Committee makes this report on the understanding that many stakeholders will continue to engage on this matter and make additional observations.

The Committee refers this Report to the Minister for Justice and Equality for her consideration. The Committee also intends to publish a more detailed Report addressing a number of remaining issues in the autumn. This Interim Report and the Final Report will make up the Committee's full Pre-legislative Scrutiny of the General Scheme.

Finally, the Committee would like to thank all stakeholders who engaged in this process and looks forward to further engagement on the issues raised in the future.

APPENDIX 1

List of Members

Deputies: Niall Collins (FF)
Alan Farrell (FG)
Anne Ferris (LAB) [*Vice-Chairman*]
Seán Kenny (LAB)
Pádraig Mac Lochlainn (SF)
Gabrielle McFadden (FG)
Finian McGrath (IND)
Fergus O'Dowd (FG)
David Stanton (FG) [*Chairman*]

Senators: Ivana Bacik (LAB)
Martin Conway (FG)
Tony Mulcahy (FG)
Rónán Mullen (IND)
Denis O'Donovan (FF)
Katherine Zappone (IND)

APPENDIX 2

ORDERS OF REFERENCE

a. Functions of the Committee – derived from Standing Orders [DSO 82A; SSO 70A]

- (1) The Select Committee shall consider and report to the Dáil on—
 - (a) such aspects of the expenditure, administration and policy of the relevant Government Department or Departments and associated public bodies as the Committee may select, and
 - (b) European Union matters within the remit of the relevant Department or Departments.
- (2) The Select Committee may be joined with a Select Committee appointed by Seanad Éireann to form a Joint Committee for the purposes of the functions set out below, other than at paragraph (3), and to report thereon to both Houses of the Oireachtas.
- (3) Without prejudice to the generality of paragraph (1), the Select Committee shall consider, in respect of the relevant Department or Departments, such—
 - (a) Bills,
 - (b) proposals contained in any motion, including any motion within the meaning of Standing Order 164,
 - (c) Estimates for Public Services, and
 - (d) other matters as shall be referred to the Select Committee by the Dáil, and
 - (e) Annual Output Statements, and
 - (f) such Value for Money and Policy Reviews as the Select Committee may select.
- (4) The Joint Committee may consider the following matters in respect of the relevant Department or Departments and associated public bodies, and report thereon to both Houses of the Oireachtas:
 - (a) matters of policy for which the Minister is officially responsible,
 - (b) public affairs administered by the Department,
 - (c) policy issues arising from Value for Money and Policy Reviews conducted or commissioned by the Department,
 - (d) Government policy in respect of bodies under the aegis of the Department,
 - (e) policy issues concerning bodies which are partly or wholly funded by the State or which are established or appointed by a member of the Government or the Oireachtas,
 - (f) the general scheme or draft heads of any Bill published by the Minister,

- (g) statutory instruments, including those laid or laid in draft before either House or both Houses and those made under the European Communities Acts 1972 to 2009,
 - (h) strategy statements laid before either or both Houses of the Oireachtas pursuant to the Public Service Management Act 1997,
 - (i) annual reports or annual reports and accounts, required by law, and laid before either or both Houses of the Oireachtas, of the Department or bodies referred to in paragraph (4)(d) and (e) and the overall operational results, statements of strategy and corporate plans of such bodies, and
 - (j) such other matters as may be referred to it by the Dáil and/or Seanad from time to time.
- (5) Without prejudice to the generality of paragraph (1), the Joint Committee shall consider, in respect of the relevant Department or Departments—
- (a) EU draft legislative acts standing referred to the Select Committee under Standing Order 105, including the compliance of such acts with the principle of subsidiarity,
 - (b) other proposals for EU legislation and related policy issues, including programmes and guidelines prepared by the European Commission as a basis of possible legislative action,
 - (c) non-legislative documents published by any EU institution in relation to EU policy matters, and
 - (d) matters listed for consideration on the agenda for meetings of the relevant EU Council of Ministers and the outcome of such meetings.
- * (6) A sub-Committee stands established in respect of each Department within the remit of the Select Committee to consider the matters outlined in paragraph (3), and the following arrangements apply to such sub-Committees:
- (a) the matters outlined in paragraph (3) which require referral to the Select Committee by the Dáil may be referred directly to such sub-Committees, and
 - (b) each such sub-Committee has the powers defined in Standing Order 83(1) and (2) and may report directly to the Dáil, including by way of Message under Standing Order 87.
- (7) The Chairman of the Joint Committee, who shall be a member of Dáil Éireann, shall also be the Chairman of the Select Committee and of any sub-Committee or Committees standing established in respect of the Select Committee.
- (8) The following may attend meetings of the Select or Joint Committee, for the purposes of the functions set out in paragraph (5) and may take part in proceedings without having a right to vote or to move motions and amendments:

* By Order of the Dáil of 8th June 2011, paragraph (6) does not apply to the Committee on Justice, Defence and Equality.

- (a) Members of the European Parliament elected from constituencies in Ireland, including Northern Ireland,
- (b) Members of the Irish delegation to the Parliamentary Assembly of the Council of Europe, and
- (c) at the invitation of the Committee, other Members of the European Parliament.

b. Scope and Context of Activities of Committees (as derived from Standing Orders [DSO 82; SSO 70])

- (1) The Joint Committee may only consider such matters, engage in such activities, exercise such powers and discharge such functions as are specifically authorised under its orders of reference and under Standing Orders.
- (2) Such matters, activities, powers and functions shall be relevant to, and shall arise only in the context of, the preparation of a report to the Dáil and/or Seanad.
- (3) It shall be an instruction to all Select Committees to which Bills are referred that they shall ensure that not more than two Select Committees shall meet to consider a Bill on any given day, unless the Dáil, after due notice given by the Chairman of the Select Committee, waives this instruction on motion made by the Taoiseach pursuant to Dáil Standing Order 26. The Chairmen of Select Committees shall have responsibility for compliance with this instruction.
- (4) The Joint Committee shall not consider any matter which is being considered, or of which notice has been given of a proposal to consider, by the Committee of Public Accounts pursuant to Dáil Standing Order 163 and/or the Comptroller and Auditor General (Amendment) Act 1993.
- (5) The Joint Committee shall refrain from inquiring into in public session or publishing confidential information regarding any matter if so requested, for stated reasons given in writing, by—
 - (a) a member of the Government or a Minister of State, or
 - (b) the principal office-holder of a body under the aegis of a Department or which is partly or wholly funded by the State or established or appointed by a member of the Government or by the Oireachtas:

Provided that the Chairman may appeal any such request made to the Ceann Comhairle / Cathaoirleach whose decision shall be final.

APPENDIX 3

Submissions

Introduction

Childhood is a pivotally important time in which a young person learns and develops; it's also a time of vulnerability when children need to be protected. Children seeking international protection and refuge are particularly vulnerable. It is imperative that children are seen as children first and migrants second throughout all of their interactions with the Irish asylum system. This is currently not the case in a system that largely treats children and young people the same as adult migrants, without allowing for their specific needs. The following are comments on the provisions contained in the Heads of the International Protection Bill 2015 and some recommendations about changes required to guarantee the best interests of children interacting with the system. While we have made every effort to stay within the parameters of the Bill, it is impossible to discuss the protection of people seeking asylum in Ireland without discussing the direct provision system, and we feel it should not have been omitted from this Bill.

Context

Since 2000 the official state policy on asylum in Ireland has been dispersal and direct provision; with thousands of children being housed in inappropriate hostel accommodation. Of the 4,460 current residents in direct provision centres, over one third, or 1,507 are children.¹ Children living in direct provision are denied access to social welfare and do not enjoy the same rights as other children, despite many of them being born here. The average length for people awaiting a claim decision in direct provision centres is more than 4 years, with the longest delay reported being 11 years. For children this represents a massive portion of their lives, in some cases their whole life. A report by the Oireachtas Joint Committee for Public Service Oversight and Petitions released earlier this month described the direct provision system as not fit for purpose and stated children are living in cramped and intolerable conditions. The Committee recommended the direct provision system should be immediately replaced "with a system that respects the dignity of all persons in line with best international human rights practice."²

We know there are 138,000 children living in poverty in Ireland, with children 1.7 times more likely to experience consistent poverty than adults.³ Children who enter Ireland seeking asylum are particularly vulnerable to poverty and social isolation. Many have had extremely traumatic experiences including violence and trafficking. The distress children and young people go through in their country of origin and during their journey to Ireland is compounded by the asylum process when they arrive here. Poor living conditions, uncertainty and a lengthy, cumbersome application procedure can lead to poor mental health, both for themselves and their parents.

Between 2000 and 2013 2,205 separated children have applied for asylum in Ireland.⁴ While the numbers of separated children are low now, they are particularly vulnerable especially when they have spent a portion of their teenage years in the care system (either foster placements or residential units) and then upon turning 18 are sent to the direct provision system while they await the outcome of their application. Children depend on adults for their

¹ Reception and Integration Agency (2015), Monthly Statistics Report: January 2015

² Joint Committee on Public Service Oversight and Petitions, (2015)

<http://www.oireachtas.ie/parliament/media/DirectProvisionReport07052015.pdf>

³ Department of Social Protection (2015), Social Inclusion Monitor 2013

⁴ Office of the Refugee Applications Commissioner (2014), Annual Report 2013

protection and those who arrive in Ireland alone are particularly vulnerable to trafficking and exploitation.

The current application and appeals system via the Office of Refugee Applications Commissioner and the Refugee Appeals Tribunal is unacceptably slow and unnecessarily complicated. Furthermore, Ireland's approval rate for asylum claims is well below the EU average and less than a quarter of that, the United Kingdom.⁵ Ireland is the only EU Member State that does not have a single application procedure. So its proposed introduction under this Bill is long awaited and welcomed.

Recommendation: Children and Separated Children

Barnardos welcomes the prioritisation of the best interests of the child as stated in Head 52. Head 52 also states that "due regard" will be given to vulnerable persons including those under the age of 18 years, pregnant women, and single parents with children under the age of 18 years amongst others. The Bill should clearly state what "due regard" will mean in practice for these vulnerable groups. The current application system for children is largely the same as that for adults and does not make allowances for the fact that children and young people have very different needs and vulnerabilities. Children's experiences differ from those of adults, even in the same situations, and they may have a different or incomplete understanding of the circumstances they find themselves in. In general the Bill does not make enough differentiation between how adults and children will be treated when seeking asylum. For example Heads 17, 25 and 26 dealing with the taking of statements, assessment of facts and credibility retrospectively, make no special provision for children or young people. Whilst Head 33 makes specific provisions for the interviewing of children who are separated, it is not far reaching enough. A stark example of where procedures geared towards adults fails is the wholly inappropriate detention of children who arrive into Ireland after hours. Properly resourced systems must be in place to ensure that children are given the care they need at every point of contact with the Irish asylum system, no matter what time day or night.

Recommendations:

- Develop specific application procedures for children and families that place the best interest of the child as paramount.
- Expedite the processing of applications for separated children so their status is determined prior to leaving the care system at age 18.
- Enshrine the guarantee to services such as medical treatment, accommodation, information on rights and entitlements in the Bill.
- Develop a 24 hour social work system so they can readily respond to any child welfare or protection concerns.

Recommendation: Family Reunification

Heads 50 and 51 legislate for family members of qualified persons being reunited with their families. The Bill allows for a child or young person who has been granted refugee status or subsidiary protection to apply to be reunited with their parent and their parent's children. It is not clear if children and young people will be able to apply to be reunited with their siblings in cases where the siblings are travelling alone, without a parent.

Family reunification should be of significant priority in the case of separated children. Head 14 should include provision for separated children to be reunited with their family if they are

⁵ Irish Refugee Council, (2012), Difficult to Believe: The assessment of asylum claims in Ireland

living in Ireland, where this is in the best interests of the child. Being reunited with family members after a long, often traumatic period in a child's life can be challenging for the child. Ongoing family support should be provided to protect the child and ensure that family relationships and bonds can re-develop and grow. Whilst Head 32A (7) (a) & (b) make provision for interviewers to investigate if adults accompanying children are authorised to do so and to inform the Child and Family Agency if they are not satisfied of the adult's legitimate relationship to the child, Barnardos would like to see the procedure surrounding these checks strengthened. Robust guidelines must be in place to equip interviewers with the information and tools required to carry out this function in the best interest of the child. A standardised and comprehensive system of background checks must be carried out where there is any cause for doubts.

Recommendations:

- Enshrine the principle of family reunification for separated children, regardless of their status.
- Ensure ongoing family support for children and families once they have been reunified.
- Ensure sufficient background checks are carried out to guarantee that adults accompanying children are their legitimate guardians.

Recommendation: Trafficking

There are insufficient specific protections for trafficked people in the Bill. Ireland is subject to a number of European conventions and laws guaranteeing specific rights to victims of trafficking and is a signatory to the UN "Palermo Protocol", which prevents the punishment of trafficking victims (particularly women and children). Victims of trafficking, particularly children, are extremely exposed to harm and trauma. As a mechanism to protect those seeking refuge in Ireland this Bill does not adequately legislate for victims of trafficking. It is important that all staff and service providers that come in contact with children are appropriately trained to identify and assist victims of trafficking.

Recommendations:

- Enshrine the appointment of a Guardian ad Litem to all cases of separated children and child victims of trafficking so that the children can apply for protection in their own right.
- Guarantee training in identifying victims of trafficking for all professionals who come in contact with children seeking asylum.

Recommendation: Age Assessment

Amendments to the current procedure to determine if a person is under 18 years old are needed; however the proposed changes contained in the Bill are unclear. The Bill stipulates in Head 25 that medical examination must be carried out by 'qualified medical professionals'; however the Bill does not stipulate the type of medical practitioner or the number. Nor are there guidelines in relation to the type of exam, assessment criteria or margin of error. Clear and prescriptive guidelines around age assessments are required and what is contained in the Bill currently is insufficient.

Recommendation:

- Provision for a panel of experts to conduct age assessments, adhering to specific guidelines and procedures.

Conclusion

In general the focus of the International Protection Bill is very much on the processes and procedures surrounding applications for asylum, and not on the protection or welfare of applicants. Barnardos welcomes the move towards a single application system. This should be implemented as a priority and must ensure that applications are processed within 6 months. Whilst there are some protection and welfare measures, such as medical professionals being required to conduct age examinations, in general the measures are in no way far reaching enough. The Bill does not make provision for a mechanism of earlier identification of people who need international protection, nor does it enshrine migrant rights and obligations in legislation. It is impossible to adequately legislate for the protection and welfare of people seeking asylum without tackling and reforming the direct provision system.

Initial Submission on the General Scheme of the International Protection Bill 2015

May 2015



The Children's Rights Alliance unites over 100 members working together to make Ireland one of the best places in the world to be a child. We change the lives of all children in Ireland by making sure that their rights are respected and protected in our laws, policies and services.

Ag Eisteacht
Alcohol Action Ireland
Alliance Against Cutbacks in Education
Amnesty International Ireland
Arc Adoption
The Ark, A Cultural Centre for Children
ASH Ireland
Assoc. for Criminal Justice Research and Development (ACJRD)
Association of Secondary Teachers Ireland (ASTI)
ATD Fourth World – Ireland Ltd
Atheist Ireland
Barnardos
Barretstown Camp
BeLonG To Youth Services
Bessborough Centre
Border Counties Childhood Network
Carr's Child and Family Services
Catholic Guides of Ireland
Childhood Development Initiative
Children in Hospital Ireland
City of Dublin YMCA
COPE Galway
Cork Life Centre
Crosscare
Dental Health Foundation
DIT – School of Social Sciences & Legal Studies
Down Syndrome Ireland
Dublin Rape Crisis Centre
Dun Laoghaire Refugee Project
Early Childhood Ireland
Educate Together
School of Education UCD
EPIC
Focus Ireland
Forbairt Naíonraí Teoranta
Foróige
GLEN - Gay and Lesbian Equality Network
Headstrong - The National Centre for Youth Mental Health
Healthy Food for All
Immigrant Council of Ireland
Inclusion Ireland
Independent Hospitals Association of Ireland
Inspire Ireland
Institute of Community Health Nursing
Institute of Guidance Counsellors
International Adoption Association
Irish Association of Social Care Workers (IASCW)
Irish Association of Social Workers
Irish Association of Suicidology
Irish Autism Action
Irish Centre for Human Rights, NUI Galway
Irish Congress of Trade Unions (ICTU)
Irish Council for Civil Liberties (ICCL)
Irish Foster Care Association
Irish Girl Guides
Irish Heart Foundation
Irish National Teachers Organisation (INTO)
Irish Penal Reform Trust
Irish Premature Babies
Irish Primary Principals Network
Irish Refugee Council
Irish Second Level Students' Union (ISSU)
Irish Society for the Prevention of Cruelty to Children
Irish Traveller Movement
Irish Youth Foundation (IYF)
Jack & Jill Children's Foundation
Jesuit Centre for Faith and Justice
Junglebox Childcare Centre F.D.Y.S.
Kids' Own Publishing Partnership
Law Centre for Children and Young People
Lifestart National Office
Marriage Equality – Civil Marriage for Gay and Lesbian People
Mary Immaculate College
Mental Health Reform
Mounttown Neighbourhood Youth and Family Project
MyMind
National Organisation for the Treatment of Abusers (NOTA)
National Parents Council Post Primary
National Parents Council Primary
National Youth Council of Ireland
One Family
One in Four
Parentline
Parentstop
Pavee Point
Peter McVerry Trust
Rape Crisis Network Ireland (RCNI)
Realt Beag
SAFE Ireland
Saoirse Housing Association
SAOL Beag Children's Centre
Scouting Ireland
Simon Communities of Ireland
Society of St. Vincent de Paul
Sonas Housing Association
Special Needs Parents Association
SpunOut.ie
St. Nicholas Montessori Teachers Association
St. Nicholas Montessori Society
St. Patrick's Mental Health Services
Start Strong
Step by Step Child & Family Project
Sugradh
Teachers' Union of Ireland
The UNESCO Child and Family Research Centre, NUI Galway
The Guardian Children's Project
The Prevention and Early Intervention Network
Treoir
UNICEF Ireland
Unmarried and Separated Families of Ireland
youngballymun
Youth Advocate Programme Ireland (YAP)
Youth Work Ireland

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1. Introduction

The Children's Rights Alliance unites over 100 organisations working together to make Ireland one of the best places in the world to be a child. We improve the lives of all children and young people by ensuring Ireland's laws, policies and services comply with the standards set out in the United Nations Convention on the Rights of the Child (UNCRC)¹.

Article 22 of the UN Convention on the Rights of the Child obliges States to ensure that children seeking or holding refugee status, whether unaccompanied or not, shall receive appropriate protection and assistance in the enjoyment of the rights of the Convention and other applicable human rights treaties. The State is further obliged to assist the child in the tracing of his or her family and in obtaining information relevant for their reunification. In circumstances where the child's family cannot be found, the child is entitled to the same protections as other children deprived of their family under the Convention.

In 2006, the Committee on the Rights of the Child called on the State to 'take necessary measures to bring [its immigration] policy, procedures and practice into line with its international obligations, as well as principles outlined in other documents, including the Statement of Good Practices produced by the United Nations High Commissioner for Refugees and Save the Children.'² Ireland's next examination by the UN Committee on the Rights of the Child is due to take place in January 2016.

The Alliance welcomes the publication of the General Scheme of the International Protection Bill 2015 and the opportunity to be consulted on the Scheme by the Joint Committee on Justice, Equality and Defence. The Scheme has many positives, including the introduction of a single procedure for international protection applicants to replace the existing multi-layered system, and the inclusion of 'child-specific' forms of persecution as ground for protection.³ The Scheme's proposals provide an important improvement to the existing legislative provisions.

We believe, however, that for the legislation to be effective, the Heads must be amended to strengthen the protections for children under the Bill. The Scheme stipulates under a number of sections that the best interests of the child is a primary consideration, however, there is a significant omission in that the best interest principle does not apply to the protection determination decision-making process, including deportation orders. The Scheme does not provide for the right of a child to lodge a separate protection application from that of his or her parents. In addition, the Scheme does not include a definition of an unaccompanied child. Also of concern is that the requirement to determine the relationship between an adult who is not the child's parent and the child he or she is accompanying is weaker than that recommended by international best practice. In addition, concerns exist in relation to the age assessment process and the possible detention of children. Each of these issues is addressed in turn within this submission.

1 UN Convention on the Rights of the Child, A/RES/44/25

2 UN Committee on the Rights of the Child (2006) *Concluding Observations, Ireland*, CRC/C/IRL/CO/2 para. 65.

3 Head 6(2)(f).

2. The Best Interests of the Child

Article 3 of the UN Convention on the Rights of the Child states:

1. *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of a child shall be a primary consideration.*
2. *State Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and to this end, shall take all appropriate legislative and administrative measures.*

The concept of the child's best interests is a procedural rule which should be followed in all decisions that will have an impact on the rights of the child. The UN Committee on the Rights of the Child, in its 2006 *Concluding Observations* on Ireland called on the State ensure that the general principle of the best interests of the child be a primary consideration without any distinction and that it be fully integrated into all legislation relevant to children.⁴

2.1 Proposed Legislation

The Scheme provides for the best interests of the child to be a primary consideration in relation to specific sections. Head 52 stipulates that the best interests of the child shall be a primary consideration in the application of Heads 47, 48, 49, 50 and 51. These sections cover the extension to qualified persons of certain rights (Head 47), permission to reside in the State (Head 48), travel document (Head 49), permission to enter and reside for member of family of a qualified person (Head 50) and permission to reside for member of family of qualified person (Head 51).

In addition, Head 23 provides that the best interests of the child shall be a primary consideration in the application of this Head which relates to a medical examination to determine the age of an unaccompanied minor. Head 33 also provides that in light of the best interests of the child being a primary consideration, the Minister shall ensure that Tusla – the Child and Family Agency inform and prepare an unaccompanied minor for a personal interview; that the interview is conducted by a person who has the necessary knowledge of the special needs of minors; and the report together with the determination of the Minister under Head 35 is prepared by an person with the necessary knowledge of the special needs of minors.

While the inclusion of the best interests principle under certain provisions is very welcome, these measures are not sufficient to comply with the UN Convention on the Rights of the Child. A significant omission is that the best interest principle does not apply to the protection determination decision-making process, including deportation orders.⁵

2.2 Recommendation+

- The Bill should retain the current provisions on the best interest of the child contained in Heads 23, 33, and as applied under Head 52 to Heads 47, 48, 49, 50 and 51.
- The Bill should provide that the best interests principle be a primary consideration in all substantive decisions relating to the protection determination, including the identification of unaccompanied minors (Head 14) and deportation orders (Head 45).

⁴ UN Committee on the Rights of the Child (2006) *Concluding Observations, Ireland*, CRC/C/IRL/CO/2 para. 23.

⁵ Head 45.

3.Unaccompanied Minors

Unaccompanied minors are the most vulnerable of migrants and require particular safeguards and care. The 2005 *General Comment No.6 Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, issued by the UN Committee on the Rights of the Child, underlines the responsibility of States to ensure that unaccompanied and separated children have their best interests represented through the nomination of a guardian or an adviser.⁶ Furthermore, it states that unaccompanied and separated children involved in asylum, administrative or judicial procedures should be provided with legal representation.⁷

Paragraph 33 of the General Comment stipulates that:

1. *States are required to create the underlying legal framework and to take necessary measures to secure proper representation of an unaccompanied or separated child's best interests.*
2. *States should appoint a guardian or adviser as soon as the unaccompanied or separated child is identified and maintain such guardianship arrangements until the child has either reached the age of majority or has permanently left the territory and/or jurisdiction of the State in compliance with Convention and other international obligations.*
3. *The guardian should be consulted and informed regarding all actions taken in relation to the child.*
4. *The guardian should have the authority to be present in all planning and decision making processes, including immigration and appeal hearings, care arrangements and all efforts to search for a durable solution.*
5. *The guardian or adviser should have the necessary expertise in the field of childcare, so as to ensure that the interests of the child are safeguarded and that the child's legal, social, health, psychological, material and educational needs are appropriately covered by, inter alia, the guardian acting as a link between the child and the existing specialist agencies/individuals who provide the continuum of care required by the child.*
6. *Agencies or individuals whose interests could potentially be in conflict with those of the child's should not be eligible for guardianship.*⁸

3.1 Proposed Legislation

The Scheme does not contain a definition of unaccompanied or separated minors. The lack of a definition may be problematic in circumstances where a child may be travelling with a smuggler, trafficker or non-habitual carer.

Head 32A(7)(a) provides that '[w]here an applicant is under the age of 18 years and is accompanied by an adult other than his or her parent, the interviewer, where he or she considers it appropriate to do so, shall require the adult to satisfy him or her that the adult is taking responsibility for the care and protection of the applicant concerned.' The inclusion of the conditional phrase 'where [the interviewer] considers it appropriate to do so' is weaker than that recommended by the Separated Children in Europe Programme's *Statement of Good Practice*, which states that it is 'necessary to establish the nature of the relationship between the child and the adult'.⁹

Research, published in 2014, found that practice varies among social workers in how they carry out their duties in respect of unaccompanied minors. Some social workers delayed in making an application on behalf of the child until the child was older and could better understand the process

6 UN Committee on the Rights of the Child, *General Comment No.6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, CRC/GC/2005/6, Sept.2005.

7 Ibid.

8 Ibid.

9 Separated Children in Europe Programme, *Statement of Good Practice D.2 Identification*. Available at: http://www.separated-children_europe-programme.org/good_practice/SGP_2009_final_approved_for_print.pdf [Accessed 29th April 2015].

and others decided not to make an application at all, including due to a belief that the child does not have a credible case reiterating the need for an independent *guardian ad litem*.¹⁰

Head 12(4) continues with the current practice that the Child and Family Agency will make the decision on whether or not, and when, to submit a protection application on behalf of a separated child.¹¹ The Scheme fails to stipulate the key duties of the Child and Family Agency in respect of unaccompanied minors, such as ensuring that the child has access to legal advice before making a protection application or that the social worker has taken legal advice on the child's behalf and if a protection applicant is not being made than an alternative form of immigration status is sought.

The Scheme fails to provide for the appointment of a *guardian ad litem* as an independent advocate for unaccompanied minors. The responsibility of the *guardian ad litem* should be stipulated in the Bill and include ensuring that decisions have the child's best interests as a primary consideration, that the child's views are considered in all decisions affecting them, that the child has suitable care, accommodation, education, language support, health care provision, and that the child has suitable legal representation to assist in the procedures that will address his or her protection claim.

3.2 Recommendations

- The Bill should include a definition of an unaccompanied minor as a child under the age of 18, who is outside his or her country of nationality or, if stateless, outside his or her country of habitual residence and who is separated from both parents, or from his or her previous legal or customary primary caregiver. This would bring Irish law in line with the Separated Children in Europe/UNHCR definition as clarified by the UNCRC.
- Head 32A(7)(a) should be strengthened to require the interview in all circumstances to satisfy him or herself that the adult accompanying a child, who is not his or her child, is taking responsibility for the care and protection of the child, in line with the Separated Children in Europe Programme's *Statement of Good Practice*.
- The Bill should stipulate the key duties of the Child and Family Agency in respect of unaccompanied minors, in particular their role in relation to the submission of an application for protection.
- The Bill should include a provision for the mandatory appointment of a *guardian ad litem* for all unaccompanied minors as soon as possible once he or she has been identified. The responsibility of a *guardian ad litem* should be set out in the Bill.

¹⁰ E. Quinn et al (2014) *Policies and Practices on Unaccompanied Minors in Ireland*, ESRI Research Series 38.

¹¹ Head 12 (4) "Subject to Head 21, where it appears to the Child and Family Agency, on the basis of information available to it, that an application for international protection should be made on behalf of a child in respect of whom the Agency is providing care and protection it shall arrange for the appointment of an employee of the Agency or such other person as it may determine to make an application on behalf of the child."

4. Independent Application

Every individual, including a child, has a right to seek asylum under the Universal Declaration of Human Rights and the 1951 UN Convention on the Status of Refugees or the 1967 Protocol. The UNHRC, the Office of the United Nations High Commissioner for Refugees, notes that a child's refugee application should be determined in accordance with the principle of family unity, which "operates in favour of dependants, and not against them".¹² It stated that where "the head of the family is not a refugee, there is nothing to prevent any one of his dependants, if they can invoke reasons on their own account, from applying for recognition as refugees."¹³

4.1 Proposed Legislation

There is no mechanism under the Scheme to allow for the submission of an application by a child in their own right separate from his or her family application.

A child may have individual grounds, apart from those of their parents, upon which to seek protection. These grounds may include acts of persecution of a gender-specific or child-specific nature, such as force recruitment of children to armed services or female genital mutilation. In addition, in some cases children may join their parents in Ireland after a period of time, it may be the case that the child has experienced additional persecution following their parents' departure from their country of origin. It is essential that these experiences are taken into account.

In addition, the Scheme provides no mechanism to allow for the separate consideration of a child within a family application. Of note here is the 2007 Supreme Court decision in *A.N. & ors - v - Minister for Justice & Anor* in which the deportation orders in respect of a mother and her five children were found to be invalid.¹⁴ The court found that although the Minister had correctly considered and refused the application of the mother, the decision did not apply to her dependent children and a deportation order could thereby not be executed as the basis on which the Minister was deporting the minors did not exist. At no stage in the asylum process was reference made to applications on behalf of the children. Taking guidance from the UNHCR Handbook, the court held that, under the principle of family unity, if the head of a family meets the criteria of the definition of refugee, his dependants are normally granted refugee status. However, if this application is unsuccessful, the minor is entitled to apply for refugee status based on his/her own circumstances and reasons. The Supreme Court held that the principle of family unity operates for the benefit of the minor and not against him.

4.2 Recommendation

- The Bill should allow the submission of an application by a child in his or her own right separate from his or her family application. The legislation must ensure that the process accommodates the individual rights of children taking into account their particular vulnerabilities.
- The Bill should allow for the separate consideration of a child within a family application.

12 UNHCR (1992) *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979. Para. 182 - 188.

13 Ibid.

14 [2007] IESC 44.

5. Age Assessment

The Separated Children in Europe Programme has set out that age assessment procedures should only be undertaken as a measure of last resort, not as standard or routine practice, where there are grounds for serious doubt and where other approaches, such as interviews and attempts to gather documentary evidence, have failed to establish the individual's age.¹⁵

The UN Committee on the Rights of the Child has states that '[i]dentification measures include age assessment and should not only take into account the physical appearance of the individual, but also his or her psychological maturity. Moreover, the assessment must be conducted in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child; giving due respect to human dignity; and, in the event of remaining uncertainty, should accord the individual the benefit of the doubt such that if there is a possibility that the individual is a child, she or he should be treated as such'.¹⁶

5.1 Proposed Legislation

Head 23 provides that in cases where doubts exist as to the child's age a medical assessment may be undertaken to determine the age of a child. The Head stipulates a number of safeguards which must be adhered to. These include that the assessment shall be the least invasive examination and shall be carried out by qualified medical professionals (Head 23(2); that it can only proceed with the consent of the child, an adult responsibility for the care and protection of the child or the Child and Family Agency (Head 23(3); and that the best interests of the child shall be a primary consideration (Head 23(5)). These safeguards are welcome.

Despite these safeguards questions, the Head is vague on what can be defined as constituting a medical assessment. Particular methods of medical assessment have been criticised for their unreliability.

5.2 Recommendations

- The Bill should maintain the provision under Head 23 that the informed consent of the child is required.
- The Bill should stipulate that an age assessment procedure should be proportionate and only be undertaken as a measure of last resort, where there are grounds for serious doubt and where other approaches have failed to establish the individual's age, in line with Separated Children in Europe Programme
- The Bill should stipulate that in cases of uncertainty following an age assessment the individual shall be given the benefit of doubt and be considered a child, in line with the UN Committee's *General Comment No.6*.
- The Bill should provide more detail on the type of medical testing that may be permit in law. The Bill should stipulate that the assessment must be conducted in a scientific, safe, child and gender-sensitive and fair manner, in line with the UN Committee's *General Comment No.6*.
- Head 23(4) should be amended to provide that a qualified interpreter should be used where necessary and the child should be made aware of what the procedure involves.

¹⁵ Separated Children in Europe Programme, *Statement of Good Practice D.2 Identification*. Available at: http://www.separated-children_europe-programme.org/good_practice/SGP_2009_final_approved_for_print.pdf [Accessed 29th April 2015].

¹⁶ UN Committee on the Rights of the Child, *General Comment No.6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, CRC/GC/2005/6, Sept.2005, paragraph 31(i).

6. Detention

Article 37 of the UN Convention on the Rights of the Child severely restricts the detention of children stating that '[t]he arrest, detention or imprisonment of a child shall be in conformity of the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.'

6.1 Proposed Legislation

Head 19 sets out the grounds for detention of an applicant. Head 19 (6) stipulates that subject to subhead (7), the provisions relating to the detention of an application do not apply to those under 18 years.

Head 19(7) stipulates that if and for so long as the immigration officer or, as the case may be, the member of the Garda Síochána concerned has reasonable grounds for believing that the person is not under the age of 18 years, the provisions relating to detention as if the individual is 18 years.

Head 19(7) is of grave concern as it provides that a child under 18 years can be detained as an adult if there are reasonable grounds for believing the person is not under 18 years. This is a breach of the UN Committee on the Rights of the Child's General Comment No.6 which provides that in cases of uncertainty as to an individual's age, the individual shall be given the benefit of doubt and be considered a child.¹⁷

6.2 Recommendations

- Head 19(7), which allows for the detention of an individual who is age disputed, should be deleted.

17 UN High Commissioner for Human Rights, 2005, General Comment No.6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin. 31.

7. Child Specific Persecution

7.1 Proposed Legislation

The inclusion of 'child-specific' forms of persecution at Head 6(2)(f), in the context of determining whether or not the child requires protection, is to be welcomed.

7.2 Recommendation

- The Bill should maintain the inclusion of child specific forms of persecution at Head 6(2)(f).



Submission to:

The Department of Justice and Equality
on the
General Scheme of the International Protection Bill (2015)

Submission by:

Doras Luimní

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Submission Date:

8th May 2015

Introduction: Doras Luimní

Doras Luimní (Doras) is an independent non-governmental organisation working to support and promote the rights of migrants living in Limerick city and county. The core areas of our work are direct support, legal advice and advocacy, and integration planning. Doras Luimní was established in response to the temporary establishment of the Direct Provision system in 2000 and has consistently worked with and advocated for the rights of asylum seekers since its inception. We campaign for an end to direct provision and for human rights proofed reform to the protection process.

Our core values are rooted in the human rights framework, with a belief in equality and non-discrimination in both public and private life. Our objectives are to positively *change the lives of migrants, change legislation* and *change society*. We believe that it is a moral imperative to be welcoming towards new communities arriving in Ireland, and to extend particular support to the most vulnerable amongst them. Our vision for Ireland is for a society where equality and respect for the human rights of migrants are realised.

Summary of Doras Luimní's key concerns with the General Scheme of the proposed International Protection Bill are as follows:

- There is an alarming emphasis on immigration enforcement rather than international protection throughout.
- Omission of reference to receptions conditions and the continued rejection of the EU Receptions Conditions Directive. Doras Luimní strongly believes that the introduction of legislation regarding international protection in Ireland must take the opportunity to transpose the EU Receptions Conditions Directive in order to bring Ireland in line with our European counterparts and to meet the basic minimum requirements of an EU country with regard to the treatment of asylum seekers. In particular, the continued prohibition of the right to seek or enter into employment and the punitive measures concerning same;
- The proposal to subsume the independent statutory Office of the Refugee Applications Commissioner (ORAC) into the Department of Justice is in stark contrast to international best practice and goes against recommendations made in relation to the drafting of the Refugee Act 1996.
- Limited and insufficient effort to ensure the best interests of the child.

Submission structure and constraints

The following submission focuses on aspects of the bill most relevant to the work of Doras Luimní and our service users. The submission is structured on a Head by Head basis, followed by general comment. Given the short notice period for submissions, no public consultation process and our own time constraints, Doras Luimní submission outlines our initial concerns only and further time is needed in order to be able to fully comment and analyse the General Scheme put forward.

1. Immigration officers conducting preliminary interview

Head 13: Preliminary interview

Provide along the following lines: (1) A person who is at the frontier of the State, or who is in the State, and who indicates that he or she-

*(a) wishes to make an application for international protection,
(b) is requesting not to be expelled or returned to the frontier of a territory where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment, or
(c) fears or faces, persecution or serious harm if returned to his or her country of origin shall be interviewed by an officer of the Minister or an immigration officer at such time or times as may be specified by the officer concerned and the person shall make himself or herself available for such interview at the time or times so specified.*

Comment: Doras Luimní is concerned that this Bill may grant immigration officers the power to conduct preliminary interviews. We request further clarification on this issue, including details of: (a) in what circumstances would an immigration officer be requested to do so, (b) what qualifications and experience would an immigration officer be requested to have in order to be deemed appropriate for this important role.

2. The Right to Work

Head 15: Permission to enter and remain in the State

Provide along the following lines:

(3) An applicant shall-

(b) Not seek, enter or be in employment (including self-employment) or engage for gain in any business, trade or profession...

(5) An applicant who contravenes subhead (3) is guilty of an offence and shall be liable on summary conviction to a Class D fine (i.e. not exceeding €1,000) or to imprisonment for a term not exceeding 1 month or to both

Comment: Doras Luimní upholds that punitive measures to prevent entry to the labour market, or to prevent movement around the country without permission, as outlined in Head 15, have no place in

legislation that claims to uphold international protection. The continued prohibition of employment for asylum applicants is in stark contrast to the recommendations outlined in the EU Directive on Receptions Conditions, which recommends access to the labour market after a period of nine months in the application process. Ireland is one of only two EU countries that do not grant asylum seekers the right to employment. The denial of this fundamental right continues to cause a multitude of significant issues for asylum seekers as well as recognised refugees who have spent time living under the system of Direct Provision. Forced reliance on the State has led to an institutionalisation of the asylum seeker population who require considerable help accessing employment and housing once permission to remain has been granted. Barriers to employment for refugees are compounded by lengthy periods spent in Direct Provision without access to employment or third level education. Qualifications and skills gained prior to arrival in Ireland are rendered defunct as a result of forced idleness in Direct Provision. In addition, forced reliance on the State has led to negative perceptions of asylum seekers and tense community relations in the areas where centres are located, potentially contributing to racism and prejudice in some places and likely to increase if this policy is upheld. Lack of employment and occupation is proven to cause severe mental health issues among asylum seekers.

Doras Luimní recommends that the Irish Government transpose the EU Reception Conditions Directive to extend the right of asylum seekers to seek and gain employment and to remove punitive measures outlined in Head 15 (5).

3. The right to oral appeal and return to third-countries

Head 20: Inadmissible application

Provide along the following lines:

(2) A country is a first country of asylum for an applicant if he or she- (a) (i) has been recognised in that country as a refugee and can still avail himself or herself of that protection, or (ii) otherwise enjoys sufficient protection in that country, including benefiting from the principle of non-refoulement, and (b) will be re-admitted to that country.

Comment: Clarification is required as to what constitutes “sufficient protection” in (2). Doras Luimní has serious concerns around this proposal and recommend removal of this provision.

(8) Heads 37, 38, 40, 41 and 42 shall apply, mutatis mutandis, to an appeal under subhead (7) with the modification that the Tribunal shall make its decision without holding an oral hearing.

Comment: Persons should be afforded an oral hearing as opposed to a written appeal in (8).

4. Age test for unaccompanied minors

Head 23 - Medical examination to determine the age of unaccompanied minor

(3) A medical examination under subhead (1) shall not be carried out without the consent of (a) the applicant concerned, (b) the adult who is taking responsibility for the care and protection of the applicant or (c) the employee or other person appointed by the Child and Family Agency under Head (12)(4).

(4) The Minister shall ensure that an applicant referred to in Head (12)(4) is informed, prior to the Minister's examination of the application, in a language which the applicant may reasonably be supposed to understand, of- (a) the possibility that the age of the applicant may be determined by medical examination, (b) the method or methods of the medical examination, (c) the possible consequences of the result of the medical examination for the examination by the Minister of the application, and (d) the consequences of refusal on the part of the applicant to undergo the medical examination.

Comment: ORAC officials have stated that medical assessments to determine age/minor status are not carried out and that the benefit of the doubt is given where there is uncertainty (EMN, 2014: 32). The child is then immediately referred to Túsla – Child and Family Agency. Current practice - “If a person claims to be aged under 18 but appears to ORAC to be older, an experienced staff member (with the assistance of an interpreter if required) will conduct an informal interview to try to form a reasonable opinion as to whether the person is a minor and in need of referral to TUSLA. The interview includes questions on details of early childhood, education and the ages of other family members. ORAC indicated that if there is any uncertainty following the interview, the benefit of the doubt is given in favour of the applicant and the referral to TUSLA takes place” (EMN, 2014: 32).

Doras Luimní would like clarification of point (12) (4) (d) the consequences of the refusal on the part of the applicant to undergo the medical examination. We would have serious concerns as to anything short of mandatory medical examinations if separated minors are denied access to international protection should they refuse medical screening.

5. Legal representation

Head 32: Minister's examination of application

Provide along the following lines:

The Minister shall examine each application for international protection for the purpose of determining- (a) whether the applicant is a person in respect of whom a refugee declaration should be given, (b) whether the applicant is a person in respect of whom a refugee declaration should not be given and in respect of whom a subsidiary protection declaration should be given, or (c) whether the applicant, being a person in respect of whom neither a refugee declaration nor a subsidiary protection declaration should be given, is a person in respect of whom a permission to reside in the State should be given in accordance with Head 36A.

Comment: Applicants must have access to legal aid and legal representation before their interview and should be afforded sufficient time to obtain and submit documents, medical legal reports and any other information to support their case.

6. Grounds for permission to remain

Head 36A: Examination and determination in relation to permission to remain

(1) The Minister shall, in respect of an applicant who- (a) is the subject of a determination under Head 35(3)(c), and (b) has informed the Minister of any reason or reasons why he or she should be given permission to remain in the State, examine the reason or reasons presented by the applicant in writing or at the personal interview under Head 32A in relation to why he or she should be given permission to remain in the State.

(2) In determining whether to give permission to reside in the State to an applicant under this Head, the Minister shall have due regard to- (a) the family and personal circumstances of the applicant (with particular reference to the right to respect for private and family life under Article 8 of the European Convention on Human Rights); (b) the nature of the applicant's connection with the State, if any; (c) humanitarian considerations; (d) the character and conduct of the applicant both within and (where relevant and ascertainable) outside the State (including any criminal convictions); (e) considerations of national security and public order; and (f) the common good.

Comment:

Clarification is required as to what will constitute sufficient grounds for being granted permission to remain where neither refugee status or subsidiary protection are being granted. Doras Luimní recommends that these grounds for permission to remain are outlined in detail.

(3) The determination of the Minister under this Head shall be that- 42 (a) the applicant is a person in respect of whom a permission to reside in the State should be given, or (b) the applicant is a person in respect of whom such a permission should be refused.

Comment:

Doras Luimní recommends the right to appeal where permission to remain under Head 36a is denied. Doras Luimní believes that it is necessary for an independent office to be responsible for determining protection applications. At the very minimum it is necessary for at least one of the three protection stages to be determined by an independent office.

7. Family Reunification application time limits

Head 50: Permission to enter and reside for member of family of qualified person

Provide along the following lines:

(1) A qualified person (in this Head referred to as the “sponsor”) may, within 12 months of the giving to the sponsor by the Minister of the refugee declaration or, as the case may be, the subsidiary protection declaration under Head 43, make an application to the Minister for permission to be given to a member of his or her family to enter and reside in the State.

Comment: Doras Luimní recommends the removal of time limit of 12 months for applications for family reunification. Such time limits will render family reunification impossible in instances where the location of a family member (s) are unknown. In some situations 12 months might be insufficient time to secure the monetary means to support family reunification. Sufficient time must be granted to suitably qualified individuals who meet the criteria for family reunification and must be granted the opportunity and time to locate family members who may have been separated as a result of conflict.

8. Vulnerable Persons and Children

Head 52: Situation of vulnerable persons and children

Provide along the following lines

(1) In the application of Heads 47, 48, 49, 50 and 51 due regard shall be had to the specific situation of vulnerable persons such as persons under the age of 18 years (whether or not accompanied), disabled persons, elderly persons, pregnant women, single parents with children under the age of 18 years, victims of human trafficking, persons with mental disorders and persons who have been subjected to torture, rape, or other serious forms of psychological, physical or sexual violence.

(2) In the application of Heads 47, 48, 49, 50 and 51 in relation to a child under the age of 18 years the best interests of the child shall be a primary consideration.

Comment: Doras Luimní recommends that early assessment and identification of particular vulnerabilities must be carried upon arrival in Ireland. Assessment of vulnerable applicants at the earliest possible stage reflects best practice in international protection standards. The provision of necessary appropriate care and support services for vulnerable applicants, including the identification of reception needs, may prevent any physical and mental health needs from further developing into chronic conditions. When physical and mental health issues continue untreated and unrecognised, Ireland may experience a heavier burden on health care resources in the long-term and may lead to an increased usage of emergency services in the short-term.

9. Safe Countries

Head 66: Designation of safe countries of origin

Provide along the following lines:

(1) The Minister may by order designate a country as a safe country of origin. (2) The Minister may make an order under subhead (1) only if he or she is satisfied that, on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that there is generally and consistently no persecution, no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict.

Comment: Safe countries listed in 2008 for Ireland were Croatia and South Africa. Croatia is now a member of the European Union. Doras Luimní would like clarification on the methodology for determining safe country status. Furthermore, EU member states are deemed super safe countries of return, but that should not preclude applicants being removed who have been failed asylum seekers to first countries under Dublin regulation. Despite Human Rights conventions, removal in certain circumstances may increase the risk of refoulement. As per comments made by the IHRC in 2008 (below), the UNHCR has noted that where countries do adopt lists of “safe countries of origin” or “safe third countries”, these should not be applied so as to deny asylum seekers access to asylum procedures or violate the principle of non-refoulement.

From IHRC submission on IRP Bill 2008 – *“In light of Ireland’s obligations to prevent refoulement under Article 3 of the ECHR and Article 33 of the Refugee Convention and the principle that all persons should be entitled to access a protection system as outlined within the UNHCR Handbook, the IHRC considers that the designation of countries as “safe countries of origin” should be seriously reconsidered”* (p.9).

UNHCR has stated that asylum applicants should have the opportunity to rebut the presumption of “safe third country”. Applications for asylum should be assessed on their case by case basis not on the safe country status of the applicants country of origin. This would ensure that access to an individualised and fair protection determination procedure is maintained.

General Comments:

10. Independent statutory function of the Office of the Refugee Applications Commissioner

Comment: Doras Luimní is concerned at the proposal to subsume the Office of the Refugee Applications Commissioner (ORAC) into the Department of Justice. Independent status of the office responsible for investigating applications is critical and we are deeply concerned that by subsuming ORAC into the Department of Justice that the focus of determining asylum applications would be on immigration enforcement as opposed to international protection.

11. Victims of trafficking

Previous versions of the IRP Bill (2010) included putting the rights of victims of trafficking on a statutory footing and we would appreciate clarification on how this protection is foreseen in this Bill.

Victims of trafficking in the asylum system are precluded from accessing full support services (Stamp 4) under the Administrative Immigration Arrangements for victims of trafficking as they do not require 'an additional residency permission' (AIAs, 2011). Doras Luimní request that the Department grant full rights for victims by granting parallel protections in the form of a stamp 4 visa while they assist Gardaí in a criminal investigation, and also proceed with their claim for asylum. This would ensure their formal identification as a victim of trafficking in the state, and as an applicant for international protection. The current system does not allow for full formal identification and asylum seeker victims of trafficking are denied full range of supports as laid out under the EU Directive 2011/36/EU.

12. Human rights language: There is a greater focus on enforcement of immigration procedures than international protection and too little regard to protections, vulnerability and human rights of migrants.

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**SUBMISSION BY THE IMMIGRANT COUNCIL OF
IRELAND INDEPENDENT LAW CENTRE (ICI)
TO THE JOINT OIREACHTAS COMMITTEE ON JUSTICE,
DEFENCE AND EQUALITY
ON THE GENERAL SCHEME OF THE INTERNATIONAL
PROTECTION BILL 2015**

8th May 2015

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Introduction

The ICI is an independent human rights organisation that promotes access to justice for migrants and their families, including Irish citizens, living in Ireland. We offer support information, support and legal services, while also achieving positive change through strategic legal action and engagement with policy and law makers to make immigration laws fit for purpose.

Over 5,000 individuals (across all categories of migrants, including asylum seekers, refugees, stateless persons, migrant workers, international students, undocumented migrants and victims of trafficking) are directly supported through our services each year. Due to limited resources, the ICI provides full legal services in respect of the international protection applications for victims of trafficking only. However, asylum seekers and refugees are supported through our services in respect of all other immigration-related applications as may be relevant to their situation. Our supports are provided across the entire migration system, namely from pre-entry clearance, entry to and removal from the state, international protection and statelessness, residence, family reunification, travel documents and access to citizenship.

Since our establishment in 2002, the ICI has been advocating for comprehensive migration law reform and we have engaged in every public consultation process regarding Government's proposals for immigration, residence and protection legislative reform since then. Previous draft legislation sought to deal with these matters in a single piece of legislation and, in fulfilment of Ireland's international human rights and EU law obligations, the ICI has consistently advocated that international protection determination mechanisms should be addressed separately. For this reason, the ICI welcomes the publication of the General Scheme of the International Protection Bill and this opportunity to comment on it. It is an important step forward in progressing long-overdue law reform of Ireland's existing international protection system through the introduction of the single protection procedure.

The General Scheme of the International Protection Bill proposes significant changes to the existing procedures for determining international protection applications and/or humanitarian permission to remain in the State, in particular the abolishment of the independently established Office of the Refugee Applications Commissioner. This submission is not a comprehensive analysis of the General Scheme, as the ICI intends to undertake further in-depth analysis when the full draft legislation is published. Rather, the ICI takes this opportunity to identify a number of key substantive issues, which in our view warrant further analysis during the legislative process. The submission is informed by our experiences of supporting migrants accessing the ICI's information and legal services over thirteen years.

1. Overall Context

The United Nations High Commissioner for Refugees (UNHCR) identifies that the 20th century and the start of the 21st century have been characterised by the need for many millions of people to seek refuge in countries, including Ireland, which are not their own and often far from their land of birth. The current Mediterranean crisis provides very concrete evidence of the fact that people, including children, are forced to migrate because they are fleeing persecution or other serious harm in their country of origin. The Irish legal system must ensure that the rights of individuals in need of international protection, as protected by the Irish Constitution, national legislation, the European Convention on Human Rights,

the European Union Charter of Fundamental Rights, the European Social Charter and under UN Human Rights Treaties that Ireland has signed and/or ratified, are fully respected. As currently drafted, the ICI has concerns that the proposed legislation does not fully comply with the relevant standards and that specific Heads, identified below, should be amended to the current provisions and/or omissions.

2. Part 1 – Preliminary

- 2.1 The General Scheme contains various references to stateless persons. However, no definition of statelessness is provided (Head 2). Ireland is a signatory to the 1954 UN Convention relating to the Status of Stateless Persons and therefore has obligations in this regard (see further below, re. Part 2). Article 1 of the 1954 Convention contains a definition of statelessness, which should be included in this legislation.
- 2.2 Although there is no reference to ‘appeal’ or ‘review’ in the definitions section, these words appear to be used interchangeably throughout the General Scheme as published, see for example, Head 20(4). Any inconsistency in this regard should be addressed.

3. Part 2 - Qualification for International Protection

- 3.1 Having regard to UNHCR and other international guidelines, as well as relevant case law developments, the ICI is of the view that Head 6(2)(a) should include a specific reference to domestic violence. The ICI has supported a significant number of migrant women and children who have experienced severe levels of domestic violence and who are completely unaware of protections that may be available to them within the international determination process and/or general immigration arrangements. Despite references to physical violence ((Head 6(2)(a) and acts of a gender-specific nature (Head 6(2)(f)), it is the ICI’s view that specifically naming domestic violence as an act of persecution serves in raising awareness and will assist individuals experiencing domestic violence, as well as service providers supporting them, that there may be grounds for making an application for protection.
- 3.2 No reference is made to statelessness in Head 6(2) (acts of persecution) or Head 7 (reasons of persecution). There are no provisions in the General Scheme providing for statelessness determination. It is noted, furthermore, that currently no formal statelessness determination procedure exists in Ireland for stateless persons, some of whom may be need of international protection. This is a significant lacuna, given that Ireland is a party to 1954 UN Convention relating to the Status of Stateless Persons and the 1961 Convention in the Reduction of Statelessness. The International Protection Bill provides an opportunity to introduce a stateless determination procedure compliant with our international obligations.
- 3.3 With reference to Head 7(1)(a), the proposed concept of race appears to be narrower than that contained in the International Convention on the Elimination of all Forms of Racial Discrimination (UNCERD), to which Ireland is a party and should therefore be reviewed. The concept has also been identified to include socially constructed differences among people based on characteristics such as accent or manner of speech, name, clothing, diet, beliefs

and practices, leisure preferences, places of origin and so forth. The Oireachtas Committee is encouraged to seek further expert guidance in this regard.

4. Part 3 – Application for International Protection

- 4.1 As a general observation, it is unclear how the single protection determination procedure provided for under the General Scheme will actually operate in practice and will guarantee that each the separate claims for asylum, subsidiary protection and/or permission to reside will be fully assessed on their individual merits.
- 4.2 It is apparent from the General Scheme that the existing independently established Office of the Refugee Applications Commission will be abolished and that applications for international protection are to be made to the Minister for Justice and Equality. The ICI is strongly of the view that the overall integrity of the international protection system is best served by such applications being assessed by an independent office. The Office of the Refugee Applications should be maintained and re-named the International Protections Applications Office, similar to what is proposed under Head 55 regarding appeals.
- 4.3 The ICI has serious reservations regarding the provisions of Head 12(1)(b) and the provisions allowing an application for international protection to be made on behalf of a child by a person over the age of 18 is 'taking responsibility for the care and protection' of the person. As currently drafted, it is entirely unclear how this is to be determined and poses risks in respect of potential child victims of trafficking. An accompanied child should be in the care and company of their legal parent(s)/guardian(s) or deemed to be unaccompanied. It is acknowledged that the circumstances in which persons seeking international protection may flee, a child may be accompanied by a *bona fide* adult person who is not their parent/legal guardian and who is known in a *bona fide* capacity to that child. This section should be reviewed, however, and provide clear guidance on the assessment of the situation between the responsible adult and child in question and ensure that any determination made in this regard is in the best interests of the child.
- 4.4 With reference to Head 12(4) and Head 14, the ICI recommends that, in accordance with existing UNHCR guidance, a separated child in the care of Child and Family Agency should be appointed an independent guardian assist during the international protection process and to represent their best interests. Furthermore, the legislation should provide clarity regarding the legal relationship between the child and the Child and Family Agency, i.e. that there is a legal guardian with authority to take decisions as may be required on behalf of the child whilst in the State, including, for example, future applications for Irish citizenship by naturalisation.
- 4.5 With reference to Head 13 in respect of applications at the frontier and the preliminary interview, it must be recognised that applicants may be fearful of authorities or individuals they are travelling with and may also be traumatised and/or disorientated arising from their experiences prior to departure or during transit. Applicants may not know until arrival which country they are actually travelling to and are unlikely to have any information or legal advice regarding the application process. Consequently, Head 13(1) should provide that the

preliminary interview will not be conducted immediately at the frontier and make explicitly clear that no negative inferences will be drawn from information provided or omitted at this very early stage of the process. Immigration officers conducting preliminary interviews should be trained to identify victims of trafficking and other persons in need of international protection at the point of entry who for a variety of reasons, not just translation difficulties, may not be able to articulate clearly what their needs are.

- 4.6 Head 13(4) should be extended to include mandatory provision of the preliminary interview records to the applicant's independent guardian and/or legal representatives whenever requested to do so.
- 4.7 Head should 15(3) should include clarification that Ministerial consent required to leave the State (15(3)(a)), as well as permission to re-enter the State if necessary, will not be unreasonably withheld and that any reporting requirements (15(3)(d)) imposed are reasonable.
- 4.8 Head 16 provides for the issuing of a temporary residence certificate to an applicant for international protection. The provisions of Head 16 should clarify that an applicant for international protection may also be issued with separate immigration permission in the State pending the determination of the protection application. This would serve two purposes, namely, to preserve the pre-existing entitlements of a person who may become a refugee *sur place* whilst otherwise lawfully present in Ireland, for example, an international student or employment permit holder and it enable an asylum seeker to benefit from legal entitlements which might otherwise accrue to whilst present in Ireland as a protection seeker, for example, a recognised victim of trafficking. This is envisaged by the existing provisions of section 9(11) of the Refugee Act, 1996 but current administrative immigration practice can lack coherence. For example, it is possible in some instances for an individual to be granted another form of immigration residence permission in the State on a temporary basis pending the determination of their protection application, for example, residence as the parent of an Irish citizen child. Notwithstanding, it is also the case that victims of trafficking who have applied for protection status, are denied the possibility of being granted a temporary residence permit pending the determination of the protection application. The relevant Administrative Immigration Arrangements for Victims of Trafficking purport that "It is a fundamental principle of the immigration system that permission to remain in the State is binary" and that, accordingly, "A person either has permission or does not and it is not possible to have two permissions at the same time".
- 4.9 In respect of Head 19 (detention of an applicant), any detention must comply with international human rights obligations and should always be a measure of last-resort. Head 19(8) should include a specific prohibition on placing a child in a detention facility (with or without their parents). The ICI is further considering the provisions in respect of detention and may make further supplemental submissions in due course.

4.10 In general, the provisions of Head 21 (subsequent application) are a positive development and, by identifying what is required of the applicant to make a request, improve the existing legislative provisions of the Refugee Act 1996 (as amended) regarding readmission to the asylum process. However, Head 21(3)(a) outlines that an applicant shall be informed after making the request the procedures that are to be followed in dealing with the application but currently does not outline what procedure is actually envisaged. The threshold ((21(4)(a) – new elements which make it significantly more like that the person will qualify for international protection) to be met by an applicant in order for the Minister to consent to the making a subsequent application is arguably too high and the legislation should not operate to exclude any person who is need of international protection from gaining access to the determination procedure in circumstances where they were unable for genuine reasons to engage with the original application process (arising from a situation of trafficking, for example) or where new grounds give rise to protection needs.

4.11 Head 22 provides that the Minister or the Tribunal may require an applicant to be medically examined and for a report to be furnished by a nominated medical practitioner in relation to the physical or psychological health of the applicant. The rationale for these provisions is not clear and gives rise to privacy concerns. There is no clarity regarding the consequences for an applicant who does not consent to undergoing a medical examination. The provisions do not specify who is responsible for bearing the costs of any such medical report to be furnished and, in circumstances where the Minister or the Tribunal ‘requires’ the examination, the costs should be borne by the State.

5. Part 4 – Assessment of Applications for International Protection

5.1 Related to the need to observe fair procedures, similar to the obligations imposed on the Chairperson of the proposed International Protection Appeals Tribunal (Head 57(2)), the Minister should be require to develop and publish guidelines in respect of the administration and determination of international protection applications, to include procedures for the conduct of personal interviews and gender and child-friendly guidelines. Training and support is also essential for all individuals undertaking interviews and/or tasked with assessing applications in the international protection application process. This is especially relevant to ensure adequate protections for all applicants, especially those who are particularly vulnerable as a result of experiences of torture, sexual and gender-based violence, and all child applicants. The legislation and/or Ministerial guidelines should also provide for an applicant’s right to be attended by their legal representative at all stages of the process and for access to civil legal aid.

5.2 Head 25(1) and/or any guidelines developed by the Minister in respect of the administration and determination of international protection applications should make clear that the duty of the applicant to cooperate needs to be considered having regard to the particular circumstances of the individual applicant who may be especially traumatised as a result of war, experiences of torture and other forms of violence, including rape, sexual and domestic violence and trafficking. Applicants may be coping with relationship breakdown and/or bereavement. In undertaking the assessment of the application and to avoid possible secondary traumatising of protection applicants, on consent, the Minister should take into

account information that may have already been provided by the applicant to other State authorities and take into account matters, such as statements by a victim of trafficking to An Garda Síochána. The duty to cooperate should also reflect then entitlements of those protection applicants who are eligible for a recovery and reflection permit under the Administrative Immigration Arrangements for Victims of Trafficking and applicants should not be required to attend for personal interview (Head 32A) during this period.

- 5.3 With reference to Head 27 (International protection needs arising *sur place*), Head 27(3) provides that an applicant will not normally be the subject of a positive determination ‘if the risk of persecution is based on circumstances which the applicant has created by his or her own decision since leaving the country of origin’. It is entirely unclear what is intended by this provision and clarification should be provided in the provisions of the Head itself and/or any Ministerial guidelines in respect of the administration and determination of international protection applications. An individual in need of international protection remains in need of international protection regardless of the circumstances that have given rise to the need to seek protection. It is presumed that, for example, a person who may ‘come out’ regarding their sexual orientation or identify as transgender sometime after departing their country of origin would not be deemed ineligible for protection under these provisions but, as currently drafted, the position is not clear.

6. Part 5 – Examinations of applications at first instance

- 6.1 Related to the above at 5.2, with reference to Head 32A (personal interview), to avoid possible secondary traumatising of applicants by having to repeat traumatic accounts of what has occurred, the Head and/or Ministerial guidelines in respect of the administration and determination of international protection applications, should provide, on consent, for interagency cooperation between the Minister and/or other State authorities that the protection applicant is engaged with, for example, a victim of trafficking who is providing statements for the purpose of assisting An Garda Síochána with a criminal investigation into trafficking offences. EU Directive 2011/36/EU on preventing and combatting trafficking in human beings and protecting its victims requires Member States to take measures to reduce the dangers of secondary traumatising. For victims cooperating with the authorities this includes avoiding unnecessary repetition of traumatic accounts.
- 6.2 Head 32A(3)(a) outlines that ‘the person conducting the personal interview is sufficiently competent to take account of the personal or general circumstances surrounding the application, including the applicant’s cultural origin or vulnerability’. In contrast to the provisions of Head 56 (Membership of the Tribunal), neither Head 32 nor other sections of the General Scheme identify any minimum levels of qualifications and/or experience and/or further training required by the Minister and/or any individuals nominated on behalf of the Minister to conduct personal interviews or to assess the application. The conducting of interviews and assessment of applications is skilled work requiring knowledge of international, European and domestic legal instruments and case law, as well as awareness and sensitivity in respect of gender and child-matters. The necessary skills, qualifications

and ongoing professional development training requirements should be set out in the legislation.

- 6.3 The ICI has serious concerns regarding Head 32A(7)(a) and (b), which provides that the interviewer may (not shall in all cases) require a non-parent adult accompanying a minor to the interview to satisfy the interviewer that they, the adult, are taking responsibility for the care and protection of the applicant. How is this to be done? What protections are there for child applicants who may be accompanied by a non-parent adult who may be involved in their grooming or other forms of exploitation? As drafted, the legislation offers no guidance as to how the interviewer should assess the situation, what are the relevant considerations, etc. Please refer to the considerations already set out at section 4.3 in respect of Head 12(1)(b).
- 6.4 Head 32A should include a requirement to provide a copy of the notes of the personal interview to the applicant and their legal representatives at the conclusion of the personal interview.
- 6.5 The provisions of Head 35(5) are welcome. Whilst clearly undue delay in the determination of applications is unsatisfactory, ICI is of the view that mandatory processing times are not appropriate in the context of international protection applications; rather, it is essential to allow sufficient time for the applicant and the State to fulfil their shared duties regarding the making and assessment of the application and to ensure high quality determinations following a thorough consideration. In circumstances where the Minister is not in a position to make a determination within 6 months of the date of application, the ICI recommends that the legislation should provide that the applicant is entitled to access the labour market pending the final determination of their application.
- 6.6 Head 36A(2) lists the considerations that the Minister must consider when examining an application for permission to remain in the State. As drafted, the list does omit several criteria that are currently contained in section 3(6) of the Immigrant Act, 1999, including age, duration of residence in the State, employment record and prospects and representations made on behalf of the person. The Head should be amended to include these relevant considerations. There should also be a general reference to have regard to the provisions of European Convention on Human Rights, not just Article 8, and also a reference to the EU Charter of Fundamental Rights. In addition, the principle of non-refoulement (currently at Head 44) should be referred to in this Head, as should the best interests of any children affected by the application. The Head should identify that the applicant is permitted to update this part of the application pending determination so that all relevant matters are before the Minister.
- 6.7 With reference to Head 36A(5), the applicant and their legal representative should be notified of the determination of the application for permission to remain and should also be furnished with the reasons for the particular determination, whether positive or negative, and a copy of the assessment undertaken. This is particularly essential so the applicant and their legal representatives is fully informed as to the reasons why they have, or have not,

been permitted to reside in the State and to enable the applicant and their legal representative to deal effectively with any future application to renew the permission and/or assess grounds for any appeal or judicial review. The legislation should clarify the nature and duration of the residence permission to be granted to the applicant.

6.8 As currently drafted, it is unclear at what stage applications under Head 36A will be considered and determined, i.e. whether this will only be after the international protection claim has been fully determined, including any appeal to the International Protection Appeals Tribunal. The ICI is further considering these aspects of the General Scheme and may make supplementary submissions, or following the publication of the draft Bill in due course. See also further below at Part 6 regarding appeals.

7. Part 6 – Appeals to Tribunal

7.1 It is apparent from Head 37 that the right of appeal provide for only extends to the assessment of refugee status and subsidiary protection and not any of the reasons that an applicant may have for seeking permission to remain. Given that an application for permission to remain may give rise to fundamental human rights considerations regarding personal liberty, non-refoulement, family and private life, etc. as provided for by international and European legal instruments, as well as constitutional rights and the best interests of children, the ICI is strongly of the view that as a matter of fair procedures and access to justice, an applicant should be afforded a right of appeal to the Appeals Tribunal in respect of the entire decision. The ICI is further considering these aspects of the General Scheme and may make supplementary submissions, or following the publication of the draft Bill in due course.

7.2 There should be no requirement for an applicant who wishes to withdraw a request for an oral hearing to have to provide reasons for so doing, as is provided at Head 38(2)(a).

7.3 With reference to Head 36(6)(a), in addition to a legal representative, the applicant should be entitled to be accompanied by a family member and/or a support worker at the Tribunal hearing, unless the Tribunal has reasonable grounds for believing this would interfere with the conduct of the hearing or contrary to the interests of justice.

7.4 The provisions enabling for appeal hearings to be held in public, subject to the consent of the applicant, are to be welcomed. It is noted, however, that that it must also be the opinion of the Tribunal that it is in the interests of justice to hold the oral hearing in public. In this regard, if the applicant is consenting to a public hearing, the Tribunal should provide reasons as to why this should not be done.

8. Part 7 – Declarations and Other Outcomes

8.1 Head 43A provides for the option for an applicant to voluntarily return to the country of origin, including it seems where the application for permission to remain in Ireland has not

been granted. This contrasts significantly with the automatic issuing of a deportation order under existing statutory provisions of the Immigration Act, 1999 and is therefore to be strongly welcomed. As currently drafted, however, it suggests that this is optional on the part of the Minister (“the Minister may notify a person... of the option..” and the legislation should clarify that this is a mandatory provision. Further, it is considered by the ICI that the time provided to an applicant in respect of this option is too short to fully consider the option and/or seek legal advice on the matter. In this regard, the ICI recommends that a period of 15 working days should be provided to the applicant in order to access legal advice, properly consider the options available and to notify the Minister of their intentions. This timeframe is in keeping with what currently provided under section 3, Immigration Act, 1999.

- 8.2 It is unclear what is intended by the provisions of Head 43(11), which seems to suggest that international protection status holders will be deemed lose entitlements, such as family reunification, afforded to them if they subsequently become an Irish citizen. The intended effects of this provision should be clarified in the legislation. The ICI is further considering this aspect of the General Scheme and may make supplementary submissions, or following the publication of the draft Bill in due course.
- 8.3 In relation to revocation of the deportation, Head 45(4) provides no guidance as to the grounds upon which a deportation order may be revoked, the procedure that the applicant should follow to make such an application, the procedure to be followed by the Minister when considering such an application and no right of appeal against a negative determination of the Minister appears to be provided for. The legislation should take into account relevant case law in this area and, in the interests of fair procedures, this section should be amended to address these identified gaps.
- 8.4 Head 45(5) requires clarification as to the nature and duration of any permission that should be granted to any person in these circumstances. Similar to considerations set out above at 5.11, it is essential that the applicant and their legal representative is fully informed as to the reasons why a deportation order has not been issued, so as to enable the applicant and their legal representative to deal effectively with any future application to renew the permission or proposed revocation of permission to remain.
- 8.5 Head 46(8) provides for a right of appeal to the High Court by an applicant against the decision of the Minister to revoke the declaration. It is entirely appropriate that a right of appeal is provided for in these circumstances. The ICI has some reservations that such a procedure could be very costly and/or give rise to lengthy proceedings and that an effective appeal mechanism may lie with the International Protection Appeals Tribunal. The ICI is giving further consideration to this aspect of the General Scheme and may make further supplementary submissions on this point. At a minimum, the legislation should provide that civil legal aid would be available to the applicant for the purposes of any such proceedings.

9. Part 8 – Content of International Protection

9.1 Under Head 48(2) a family members who is admitted under family reunification provisions will not be granted a residence permit for the same duration as a protection status holder and the permission will cease to be valid where the person ‘ceases to be a qualified person or a family member’. As drafted, no guidance is provided as to the circumstances where a person may ‘cease to be a qualified person or a family member’. For example, it is not clear whether a family member could have their permission to reside revoked in circumstances where protection status holder subsequently naturalises as an Irish citizen or in the event of subsequent relationship breakdown. The ICI has concerns in respect of these provisions, particularly arising from our experience of supporting victims of domestic violence who are frequently fearful of seeking State protection due to immigration-related considerations. This head should be reviewed and provide statutory protections for family members having regard to duration of the relationship, length of stay in Ireland and domestic violence concessions. Similar considerations also apply in respect of Head 50, dealt with below.

9.2 The ICI has reservations regarding the restrictions in respect of family reunification applications, as set out in Head 50, as they completely fail to take into account the situations that many protection status holders find themselves in, i.e. fleeing countries and separated from family members whose whereabouts may be uncertain. Measures concerning family reunification should be adopted in conformity with the obligation to protect the family and respect family life enshrined in many instruments of international and domestic law. Family reunification is recognised as helping to create sociocultural stability and facilitating the integration of all third country national and in particular protection status holders. The ICI does not support the introduction of a 12 month timeframe within which applications must be made. Nor does the ICI support the restriction that family reunification is provided only for spouses or civil partner in respect of who the marriage or civil partnership was subsisting at the time the application for international protection was made. Similar restrictions are currently contained in the relevant provisions of section 18, Refugee Act 1996 (as amended) but are ignored in practice. However, such restrictions could operate to effectively to exclude access to family reunification for those granted protection as minors from access to family reunification with spouses/civil partners for minors upon reaching the age of majority. Moreover, the legal institution of civil partnership or any form of same-sex relationship recognition is not likely available in countries of origin that many LGBTI individuals flee from and an application for family reunification in such circumstances should not be excluded.

9.3 The provisions of the General Scheme appear to omit the possibility of family reunification applications in respect of other dependent family members, including a grandparent, parent, brother, sister, child, grandchild, ward or guardian of the refugee, as is currently provided for in the provisions of section 18(4) of the Refugee Act, 1996. Similar provisions should be re-enacted in this legislation. Taking account of recent Irish case law, the legislation should also provide guidance regarding how the concept ‘dependence’ is determined and assessed.

9.4 In accordance with fair procedures, the legislation should provide for a right of appeal in respect of negative family reunification determinations.

9.5 The provisions of Head 52, which sets out that ‘due regard’ shall be had to the specific situations of identified vulnerable persons and children, is to be welcomed but the legislation should clarify the circumstances in which the Head is intended to apply. Does it mean, for example, that any required fees may be waived, that residence will not be deemed to cease or that individuals may be eligible to apply for family reunification in particular situations? The ICI would also recommend that Head 52 also is amended to include a specific reference to victims of domestic violence.

10. International Protection Appeals Tribunal

10.1 With reference to Head 56, Membership of the Tribunal and the experience required of the chairperson and other members of the Tribunal, the ICI recommends that appointees should be required to have relevant experience and/or qualifications in respect of international protection and human rights law.

10.2 The General Scheme does not contain any reference to the Refugee Advisory Board, as is provided for in section 7A of the Refugee Act, 1996 (as amended). Pending the establishment of any such Board, the ICI recommends that the matters provided for in this legislation should form part of the remit of the Office of the Ombudsman and the Office of the Ombudsman for Children.

11. Respecting the Rights of Children

11.1 The ICI recognises that children, whether separated or accompanied, are particularly vulnerable and they have been recognised to face particular difficulties vindicating their rights. The UN Convention on the Rights of the Child, to which Ireland is a party, is relevant in a number of respects to children in the asylum system. Equality in the enjoyment of rights (Article 2(1) CRC), best interests of the child as a primary consideration (Article 3(1) CRC), ascertaining the views of the migrant child (Article 12 CRC) and Ireland’s obligations to provide protection and assistance to child refugees, whether accompanied or unaccompanied (Article 22(1) CRC) are all recognised. Ireland’s international legal obligations regarding the rights of the migrant child and status determination procedures can be summarised as follows:

- The State has responsibility for ensuring the best interests of the child, in particular where the asylum seeker is a separated child;
- There is a need for child sensitive status determination procedures;
- In general, applications for refugee status by children should be handled on a priority basis, unless there are good reasons not to do so;
- The views of children to be taken into account, and the voice of the child to be heard during status determination procedures. As a corollary to this, decisions need to be communicated to children in a language they understand, and in an age appropriate manner.
- For separated child asylum seekers, an independent guardian should be appointed to represent the interests of the child;

- Decision makers who have training and competence to deal with asylum applications for children, recognising that children communicate differently to adults and cannot be expected to provide adult like accounts of their experiences.

11.2 The ICI notes that the ‘best interests’ principle is identified in various throughout the General Scheme as relevant consideration and this is welcomed. However, it is our view that the International Protection Bill 2015 should include express provision for the recognition of the best interests of the child as the primary consideration whenever there is a determination made in respect of child directly or where a child may be affected by the decision, including deportation decisions.

11.3 In the earlier sections of this submission, the ICI has identified some of the relevant considerations in respect of particular issues of concern. However, ICI considers that more consideration needs to be given to whether the legislation provides sufficient respect and protections regarding the rights of children, whether separated or accompanied, at all stages of the application process, including, for example, their right to be heard. This is particularly the case in respect of minors in the case of the Child and Family Agency and the decision whether or not to make an application for protection on their behalf and also accompanied minors when separate applications are not made on their behalf.

11.4 The legislation also deals with complex issues regarding medical examination of minors and age assessment which we have not dealt with above. Currently there is no consideration given in the draft legislation to the granting of appropriate immigration for unaccompanied children in the care of the State when a decision has been taken, for some reason, not to make an application for international protection on behalf of a child. The ICI is further considering these aspects of the General Scheme and may make supplementary submissions, or following the publication of the draft Bill in due course.

Ends

IRISH REFUGEE COUNCIL

COMMENTS ON THE GENERAL SCHEME OF THE INTERNATIONAL PROTECTION BILL



May 2015

1. Introduction

The Irish Refugee Council (hereinafter IRC) is Ireland's only national non-governmental organisation which specialises in working with and for refugees in Ireland. Our vision is for a just, fair and inclusive Irish society for people seeking protection. The IRC believes, in accordance with the 1951 Convention relating to the status of refugees, that every person has the right to claim asylum and to have their application considered in a fair and transparent manner. Our mission is to promote and enhance the lives of refugees in Ireland.

This Bill represents the most significant overhaul of the protection system in Ireland since the Refugee Act of 1996. Therefore, it is now timely to create an international protection system based on fairness, transparency and efficiency which respects the rights of persons within such a system. As mentioned in the Statement of Government Priorities 2014-2016, the government has committed to treating asylum seekers with the humanity and respect they deserve. Ireland's obligations to provide a fair and humane protection system must also be viewed within the context of Ireland's human rights obligations within the Constitution and international law along with its position within the Common European Asylum System (CEAS). Ireland is a state party to numerous human rights conventions including principally the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of all forms of Racial Discrimination (ICERD), the International Convention on the Elimination of all forms of Discrimination against Women, the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the European Convention on Human Rights and Fundamental Freedoms and the UN Convention on the Rights of the Child. Furthermore, the European Convention on Human Rights is also incorporated in Irish law through the ECHR Act 2003 and Ireland is bound by the EU Charter of Fundamental Rights when implementing EU law which also applies with respect to this International Protection Bill.

Since 1999 Europe has been developing a common view for asylum policy in Europe with the creation of a common legislative framework within CEAS. CEAS foresees a sharing of the same fundamental values and the need for a joint approach among Member States to guarantee high protection standards for refugees and persons otherwise fleeing serious harm. However, Ireland's engagement with CEAS has been piecemeal at best in that Ireland retains an option to opt in or out of Directives in the field of international protection. Increasingly Ireland is out of step with its European counterparts and has only signed up to the following minimum standard Directives: the

Qualification Directive, the Temporary Protection Directive and the Asylum Procedures Directive whilst continuing to engage in the Dublin system by recently adopting the recast Dublin III Regulation.¹

As part of the second stage of CEAS, the legislative framework was recast and improved by the EU institutions to address protection gaps, make protection procedures more efficient in Europe as well as to align the legal framework with obligations stemming from jurisprudence of the European Court of Human Rights and Court of Justice of the European Union. The second phase of CEAS was completed during the Irish Presidency of the European Council in the first half of 2013. In presenting the concluded directives to the European Parliament, Lucinda Creighton TD, as Minister for European Affairs, recognised the importance of the recast directives:

“Mr President, I am very pleased to be here today, representing the Irish Presidency of the Council, to mark this important stage in the completion of the second phase of the Common European Asylum System....[T]he new legislative framework further harmonises national asylum systems, the common standards are more protective and fully in line with the evolving case law of the Court of Justice and the European Court of Human Rights, and the new rules will enable Member States to operate efficient asylum systems capable of tackling abuse....An essential element to a credible and sustainable common European asylum system is that Member States build and maintain sufficient capacity in the national asylum systems.”²

Despite this recognition of the second phase of CEAS and the need for national systems to be robust in their own capacity, the IRC is concerned that Ireland chose to not opt in to these recast Directives despite the fact that some of the changes in the legislation reflect broader jurisprudence stemming from European Courts. The IRC reminds the Committee that Ireland remains bound by such obligations and recommends that the standards within the recast Qualification Directive, recast Asylum Procedures Directive and recast Reception Conditions Directive are incorporated into the Bill. In this regard the IRC notes that a number of provisions from the recast Directives have been incorporated into the Bill and welcomes the fact that the statement of objectives in the Regulatory Impact Analysis refers to bringing Ireland’s asylum system in line with the recast Asylum Procedures Directive. Throughout this submission the IRC also recommends where applicable specific provisions

¹ Ireland is also part of the Eurodac Regulation as part of the Dublin system. Although the recast Dublin III Regulation has direct effect Ireland recently introduced the following statutory instrument to assist in its application in Ireland, S.I. no. 525 of 2014 European Union (Dublin System) Regulations.

² Speech by Lucinda Creighton TD, Minister of State for European Affairs, to the European Parliament in Strasbourg on 11 June 2013

in those recast Directives can be incorporated into the Bill for the purposes of improving the single protection procedure in Ireland.

It must be noted that parts of the Heads of the Protection Bill are vague and ambiguous in wording. Therefore these comments are directed at what the IRC interprets the provision as and the IRC looks forward to further clarity from the Minister for Justice and Equality as to the specific content and text of the International Protection Bill. This submission is made without prejudice to such additional submissions as may be made once the text of the International Protection Bill is published. It primarily concerns the following areas of the Irish Protection System:

- The creation of a fair and accessible asylum procedure
- Addressing the needs of vulnerable persons
- Appeals and Remedies
- Family Reunification
- Operational and other measures

The IRC also recommends a key number of areas which have been omitted from the scheme and which should be introduced into primary legislation. This document should be read in conjunction with the general scheme for the drafting of the International Protection Bill and references the relevant Heads of the Bill where appropriate. It generally follows the outline of the scheme of the Bill although some sections are separated out and addressed in specific topics for example with regard to vulnerable persons.

2. The creation of a fair and accessible asylum procedure

The Single Protection Procedure and the Minister's examination of applications (Part 5 and Head 32)

1. The IRC welcomes the long overdue establishment of a single protection procedure which will address refugee status, subsidiary protection and other humanitarian concerns. This will bring the protection system in Ireland more in line with its counterparts in Europe and will create a more streamlined, fairer and efficient procedure where the protection needs of applicants are identified early in the procedure. Nevertheless, the single protection procedure will not solve all the issues in the current system. Other states which have long experience of a single procedure have experienced continuing problems including delays and have found that attempts to shortcut the process have led to further problems which expose the state to additional costs.

Adequate resourcing, training and capacity will be necessary to ensure that any new system will be properly implemented in practice.

2. Furthermore, the IRC believes that only refugee status and subsidiary protection should be examined within a single protection procedure but that any other reasons for remaining, under Head 36A, should only be considered when there has been a complete examination of a person's protection needs at first instance and that they be reviewed by way of an independent appeal if refused. Otherwise Ireland may fall foul of other international commitments, not least the European Convention on Human Rights, part of Irish law.
3. Going forward in the spirit of transparency, the IRC requests that the international protection procedure at first instance under the auspices of the Minister produce and publish rules and procedures which are in place or are developed in the future at the first instance stage of the procedure. Such an approach would also be in line with the functions of the Chair of the International Protection Appeals Tribunals under Head 57.

Training and Competencies of Officers involved in the International Protection Procedure (Part 3- Part 5)

4. The IRC is concerned that there are no provisions in the Bill scheme for the training, qualifications and skills of personnel engaged in the single protection procedure at first instance and when persons seek protection at ports of entry or elsewhere. Although it is noted in Head 57(7) that the Chairperson of the Tribunal may convene training programmes for members of the Tribunal, no reference is made to any training requirements for personnel examining protection applications at first instance. This is of serious concern given the importance of early identification of protection needs of persons in the single protection procedure.
5. Authorised officers, authorised persons, border officials and other personnel who come into contact with persons seeking international protection should have the necessary competencies, skills, knowledge, attitude and training for their roles. This includes not only personnel examining applications for international protection but also immigration officers or other officers at ports of entry or elsewhere who may interview applicants including for the purposes of the preliminary interview under Head 13. The IRC is concerned by the lack of provisions in the Bill scheme for such training and competencies given the important role of authorised persons

and the severe consequences for applicants whose protection needs are not accurately identified.

6. The recast Asylum Procedures Directive requires that the personnel examining applications have the required knowledge in refugee and asylum law.³ The recast Asylum Procedures Directive also requires that persons conducting interviews are competent to take account of the personal and general circumstances surrounding the application, including the applicant's cultural origin, gender, sexual orientation, gender identity or vulnerability.⁴ The IRC recommends that these provisions from the recast Asylum Procedures Directive concerning training and knowledge of authorised personnel are included in the text of the International Protection Bill.

The definition of a Refugee (Head 2)

7. The definition of a refugee in Head 2 is not restricted to third country nationals but applicable to all persons who fit the definition. This approach is welcomed as being in conformity with the non-discrimination principle in the 1951 Refugee Convention and 1967 Protocol.⁵
8. The IRC also welcomes the fact that the Convention ground provision on 'membership of a particular social group' is drafted in an inclusive manner by determining that such a group exists on the basis of either an innate or common characteristic of fundamental importance.
9. Furthermore, the inclusion of the opportunity to invoke compelling reasons of past persecution or serious harm in order to avoid cessation of refugee status or subsidiary protection in Head 8 and Head 10 is welcomed. Such an approach is in accordance with Article 1(C) of the 1951 Refugee Convention.

³ Article 10 of the Council Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (hereinafter "recast Asylum Procedures Directive") OJ 2013 L180/60.

⁴ Article 15 of the recast Asylum Procedures Directive.

⁵ Article 3 of the 1951 Refugee Convention provides that 'The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.'

Application for International Protection on behalf of Dependents (Head 12(3))

10. With regard to protection applications made on behalf of dependants, Head 12(3) appears to indicate that there is no scope for a dependent child's case to be considered separately to that of their parent. The IRC is concerned that this provision denies the individual child's right to apply for asylum as guaranteed under Article 18 of the Charter of Fundamental Rights. In certain circumstances, children may have protection needs distinct from their parents and so their individual protection needs should be heard and addressed.
11. The IRC also notes there is no provision for adults to be dependants on their spouse's or partner's claims which is permitted under Article 6(3) of the Asylum Procedures Directive. Such spouses or partners should also be given the opportunity to be included within one applicant's claim when their protection needs are linked. Such an approach would eliminate wasted resources or duplication of labour when family members have protection claims dependent on their other family members. This should be provided for in the text of the Bill.

Preliminary Interview (Head 13)

12. Head 13(1) provides a number of ways in which a person who is at the frontier of the State or who is in the State may present that he/she is wishing to apply for international protection. Given the fact that many persons may be unfamiliar with the possibility of seeking international protection and/or may have language difficulties, the IRC recommends that the following wording from the Refugee Act 1996 as amended "or otherwise indicating an unwillingness to leave the State for fear of persecution and/or serious harm" is also included in the International Protection Bill.⁶
13. Head 13(2) refers to establishing a number of matters during the course of that preliminary interview including "details of any person who assisted the person in travelling to the State." It is unclear how this specific information of travel assistance is logically or rationally connected to the protection needs of the person applying for international protection and the IRC reminds the

⁶ Section 8(1) of the Refugee Act 1996 as amended.

Committee of the State's obligations under Article 31 of the 1951 Refugee Convention not to penalise an applicant for irregular entry into Ireland.⁷

Statement to be given to applicant (Head 17)

14. Head 17 appears to refer to the information leaflet issued to applicants which provides information on their rights and obligations during the protection procedure. The format and content of the information leaflet should include clear and accessible language. If it arises that applicants have difficulty understanding the information provided, procedures should be put in place to revise them, considering the particular needs of children. Other methods of delivering such information including by way of audio and video material should also be explored for example for illiterate applicants.

Detention of an applicant (Head 19)

15. Head 19 provides for the detention of an applicant under certain circumstances. The IRC is concerned about the imprecision of terms such as 'reasonable cause' in the provision and notes that there may be situations where a person may need to rely upon false documents out of necessity in order to claim international protection and should not be penalised as an outcome of that as recognised under Article 31 of the 1951 Refugee Convention. Without a clear and comprehensive definition of what constitutes 'reasonable cause' the scheme of the Bill fails to ensure that "*Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum*" as set out in Article 18 of the Asylum Procedures Directive.
16. In terms of a person indicating that they desire to leave the State whilst in detention, it is welcomed that the assigned District Court Judge shall only permit the arrangement of such removal from the State by the Minister on condition that the person no longer wishes to proceed with his/her international protection application and they have obtained, or have been given the opportunity to obtain professional legal advice on the consequences of such a decision under Head 19(13). Legal representation is vital to ensure that the applicant can make an informed choice as to his/her removal from the State.

⁷ Article 31(1) of the 1951 Refugee Convention states that "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

17. The IRC welcomes the fact that detention is not applicable with respect to unaccompanied children and recommends that other vulnerable persons should only be detained as a matter of last resort. The IRC recommends that all detained applicants should have their protection claims prioritised. Furthermore, the IRC reminds the Committee of the State's obligations under the European Convention of Human Rights in that any deprivation of liberty should only be on the basis of individual assessment and subject to the principles of necessity and proportionality where less coercive alternative measures cannot be applied effectively.⁸

Inadmissible Applications (Head 20)

18. The IRC is concerned that this provision enables an application to be found inadmissible because there is deemed to be a first country of asylum. One of the grounds upon which a first country of asylum is identified is "he/she otherwise enjoys sufficient protection in that country, including benefiting from the principle of non-refoulement, and will be readmitted to that country". It is unclear how and on the basis of what information such a determination of 'sufficient protection' with regard to a third country would be conducted. It is also important to note that the declaratory nature of refugee status and that States have an obligation to respect all the rights of refugees within the 1951 Refugee Convention and not only the principle of non-refoulement. Therefore to find an application inadmissible and deny the right to asylum on the basis that non-refoulement is respected in a third country fundamentally denies an applicant of their catalogue of rights under the 1951 Refugee Convention. That obligation applies to Ireland also in the context of determining an application inadmissible on the basis of 'sufficient protection' elsewhere. The unique international status of refugee protection under the 1951 Refugee Convention should not be undermined by such provisions.

19. Furthermore, jurisprudence from the European Court of Human Rights and the Court of Justice of the European Union also indicates that there may be breaches of human rights obligations in other EU Member States irrespective of the fact that they have granted a protection status as indicated in *M.S.S. v. Belgium*⁹ and *Greece* and *N.S. and M.E.*¹⁰ The IRC is also concerned that the

⁸ See also Article 8-11 of Council Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (hereinafter "recast Reception Conditions Directive"), OJ 2013 L180/96.

⁹ ECtHR, *M.S.S. v Belgium & Greece*, Application no. 30696/09, 21 January 2011.

¹⁰ CJEU, Joined Cases, C-411/10, C-493/10 *N.S. v. Secretary of State for the Home Department and M.E. and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, 21 December 2011.

Scheme of the Bill does not provide any assurance as to how these apparent safeguards in another Member State or a third country will be ensured. Given the lack of clarity and the severe consequences of finding an applicant inadmissible the IRC recommends the deletion of Head 20.

20. Notwithstanding our recommendation that this provision is deleted, if it is retained within the legislation, the IRC welcomes the fact that this provision is appealable to the International Protection Tribunal (Head 20(7)). We would however, recommend that an appeal to the Tribunal should permit an oral hearing in accordance with the interests of justice.

Subsequent applications (Head 21)

21. The IRC considers that access to a fresh protection claim is an integral part of a fair and accessible protection procedure. Over time new evidence or information may become available which further identifies the protection needs of applicants and effective access to the protection procedure will be vital to ensure respect for the right to asylum under Article 18 of the Charter of Fundamental Rights.
22. The IRC is concerned that the requirements of Head 21 are too complex and onerous for applicants, especially given the fact that most persons in this position will not have access to legal representation at that stage of the process. The request for consent currently refers to more than one written statement, written explanations for previous action as well as additional evidence as outlined in Head 21(2). The IRC recommends that a more simplified procedure is put in place for submitting a request for Ministerial consent for a subsequent application.

Assessment of Facts and Circumstances (Head 25)

23. The IRC reiterates its concern that no provisions are made obliging the personnel examining applications to have the requisite knowledge, skills and attitudes for such roles.¹¹ The requirement to examine applications in an independent, objective and impartial basis should also be inserted in the Protection Bill in accordance with Article 10(3)(a) and Recital 17 of the

¹¹ See Section 2-3 above.

recast Asylum Procedures Directive. In addition, the IRC recommend the inclusion in Head 25 of the possibility to seek advice from experts on particular issues such as medical, child-related or gender issues and issues related to gender identity or sexual identity as permitted under Article 10(3)(d) of recast Asylum Procedures Directive.

24. The IRC recommends the inclusion of a specific provision on the need for the authorities to obtain precise and up-to-date information from a variety of objective sources as to the general situation prevailing in the country of origin of the protection applicant and, where necessary, in countries through which they have transited in accordance with Article 8(2)(b) of the Asylum Procedures Directive.
25. In terms of the modified ‘benefit of the doubt’ principle under Head 25(7) drawn from the Qualification Directive¹² the IRC reminds the Committee of the ‘benefit of the doubt’ contained within the UNHCR Handbook that “while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application.”¹³ The European Court of Human Rights has also noted that the benefit of the doubt may need to be applied: “The Court acknowledges that, owing to the special situation in which asylum seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when it comes to assessing the credibility of their statements and the documents submitted in support thereof.”¹⁴ Furthermore, the fact that an applicant failed to apply for international protection at the earliest possible time should not be heavily relied upon as a factor to deny the benefit of the doubt.

Credibility (Head 26)

26. The IRC welcomes the fact that the numerated grounds in former section 11B of the Refugee Act 1996 have been removed from legislation in Head 26. The IRC reminds the Committee that it is

¹² Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, *O.J.* L304/12.

¹³ Para 196 UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees.

¹⁴ ECtHR, *R.C. v. Sweden*, Application no. 41827/07, 9 March 2010; See also UNHCR, *Beyond Proof: Credibility Assessment in EU Asylum Systems*, May 2013.

the credibility of the applicant's application for international protection and not the credibility of the person themselves that is examinable for the purposes of international protection.

Actors of Protection and Internal Protection (Head 29 and Head 30)

27. The IRC welcomes the fact that the improved language in the recast Qualification Directive was adopted with respect to actors of protection and internal protection in Head 29 and Head 30.¹⁵ Such an approach is in line with Ireland's human rights obligations under the European Court of Human Rights' jurisprudence such as *Salah Sheekh v. the Netherlands*.¹⁶ Notwithstanding those improvements, the IRC notes that the concept of internal protection has no basis in international refugee law and its applicability will depend on the individual circumstances of the case. In applying that provision, the IRC reminds the Committee that the burden of proof is on the Minister for Justice and Equality, and not the applicant to establish whether there is a viable internal protection alternative in a person's country of origin.

Safe Country of Origin (Head 31 and Head 66)

28. The IRC considers that a country should never be presumed to be safe for all people at all times. A fair asylum procedure is the best mechanism for determining a person's protection needs rather than designating particular countries as safe.

29. Furthermore, the application of this provision, unless there are serious grounds for considering the country is not safe in individual circumstances, places too heavy a burden on the applicant. Head 31(b) is not in conformity with recast Asylum Procedures Directive whereby Recital 40 of that Directive only requires 'counter-indications' from the applicant and not 'serious grounds' to rebut the presumption of a safe country of origin. The IRC recommends the removal of Head 31 and Head 66 from the Protection Bill.

The Minister's examination of applications (Head 32)

¹⁵ Articles 7 and 8 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)(hereinafter "recast Qualification Directive", O.J. L337/9.

¹⁶ ECtHR, *Salah Sheekh v. the Netherlands*, Application no. 1948/04, 11 January 2007.

30. The IRC recalls the importance of maintaining the primacy of the 1951 Refugee Convention in the single procedure in Head 32. The IRC recommends the inclusion of Article 10(2) of the recast Asylum Procedures Directive which calls for the determining authority to first determine whether the applicants qualify as refugees, and if not determine whether the applicants are eligible for subsidiary protection. The standard of ensuring that all applications are examined and decisions taken individually, objectively and impartially should also be included in the Protection Bill.

Personal Interview (Head 32A)

31. The right to be heard is a fundamental right which must be respected within the personal interview.¹⁷ The IRC recommends that interviewing personnel have acquired general knowledge of problems which could adversely affect an applicant's ability to be interviewed via training and supervision, such as indications that the person may have been tortured in the past in accordance with Article 14 of the recast Asylum Procedures Directive.

32. The IRC is concerned that the Protection Bill does not make any specific reference to a requirement of sensitivity skills or training on the part of interviewers, which could potentially lead to re-traumatisation of the applicant and/or possible cultural misunderstandings and lead to an adverse finding on the applicant's account where none objectively exists.

33. Furthermore, provisions should be included within the Protection Bill to ensure that the personal interviews are conducted under conditions which enable applicants to fully present the grounds for their protection applicants. In this regard the IRC recommends the inclusion of provisions enabling an interviewer and/or interpreter of the same sex to be present if the applicant requests in order to ensure a gender-sensitive asylum procedure.

34. In the limited circumstances where a personal interview is omitted under the grounds in Head 32A (8) there should be a provision indicating a positive obligation on the determining authority to provide an opportunity to the applicant to submit further information.

¹⁷ In CJEU, Case C-277/11, *M.M. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney-General*, Judgment of 22 November 2012 the Court affirmed at para. 87 that "the right to be heard guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely."

35. In accordance with the principle of equality of arms and the right to good administration, the IRC recommends that applicants and/or their legal representatives are given a copy of the interview record directly subsequent to the personal interview under Head 32A. This is not only of benefit for the applicant but also the Minister in ensuring that any misunderstandings are quickly addressed and information provided in the personal interview is clarified.

36. Furthermore, the IRC recommends including a provision on the audio recording of preliminary and personal interviews as an element of good practice. This would be in line with the practice in a number of other States such as Canada and Germany.¹⁸ An audio recording system will help to quickly resolve disputes on the content of interview records and is of benefit and protection both for the individual person concerned and the personnel of determining authority as well as leading to a reduction in resources needed by limiting challenges to an interview record at a later date.

Withdrawal or deemed withdrawal of application at first instance (Head 34)

37. The IRC welcomes the fact that the State, when determining an application is withdrawn, no longer refers to determining that the protection applicant concerned is not entitled to protection but in fact the examination of the application is just terminated. However, in terms of the notice period required when an application appears to be implicitly withdrawn we would suggest maintaining the 15 day time limit as is the current standard and not reducing it to 10 days.

38. The IRC notes that the Ministerial notice issued when a case is deemed withdrawn under Head 34(4) requires the applicant to confirm in writing within 10 days of the date of the notice that he or she wishes to continue with his or her protection application. The IRC recommends that this provisions is extended to 15 days' notice which was the previous practice under Section 11(11) of the Refugee Act 1996 as amended.

Report of examination and determination of application (Head 35)

¹⁸ For more information see the Irish Refugee Council, the Single Protection Procedure, a Chance for Change, 2009.

39. The IRC notes that Head 35(5) provides that where a determination cannot be made within 6 months of the date of application then the Minister shall, upon request from the applicant, provide them with information on an estimated timeframe within which a determination may be made. The IRC recommends that persons who are in the protection procedure for longer than 6 months should be given access to greater entitlements.

Notification of determination of application at first instance (Head 36)

40. Head 36(3) provides that where a Minister's declaration is that the applicant is a person in respect of whom a refugee declaration should be given the notification need only consist of that fact. The IRC believes that a decision to grant refugee status should be reasoned in line with best practice and the principle of good administration. This would also be of relevance in the context of any future action the Minister may take in relation to cessation or revocation.
41. Head 36(6) permits the Minister to withhold information obtained by a Department of State, other branch or office of the public service by or on behalf of the government of another State. The provision indicates that such information shall not be disclosed unless the consent of the other State is obtained. The IRC believes that such a provision is not in conformity with the principle of equality of arms and recommends that any information obtained relevant to the applicant's protection application is disclosed to him or her in accordance with the EU law principle of the right to good administration. In this regard, IRC notes Article 22 of the Asylum Procedures Directive which obliges States to not obtain any information from alleged actor(s) of persecution in a manner that would result in such actor(s) being directly informed of the fact that an application has been made by the applicant in question, and would jeopardise the physical integrity of the applicant and his/her dependants, or the liberty and security of his/her family members still living in the country of origin. This, by analogy, also applies with respect to the International Protection Appeals Tribunal under Head 38(12).

Examination and determination in relation to permission to remain (Head 36A)

42. In applying this provision the IRC recalls the State's obligations under the European Convention on Human Rights in particularly Article 3 (prohibition on torture, inhuman and degrading treatment or punishment) and Article 8 (right to respect for private and family life) ECHR as well as other relevant provisions such as the right to the integrity of the person (Article 3 Charter)

and right to human dignity (Article 1 Charter) under the European Charter of Fundamental Rights.¹⁹

43. In addition further guidance should be given to terminology such as ‘national security’, ‘public order’ and the ‘common good’ given the implications for individual applicants. The IRC also recommends that refusal of permission to remain on human rights grounds should be appealable to the International Protection Appeals Tribunal.

44. A person may have very valid reasons for needing to remain in the state and these need to be given equal priority to an international protection claim. The IRC is concerned that the burden on the applicant to identify reasons for remaining when they do not have the necessary knowledge, for example, of rights under the European Convention on Human Rights, is too high. There should be an obligation on the state to properly explore any further reasons for remaining based on their own training and expertise, not least given the serious step of deportation and the effect of it, that is, permanent exclusion from the state.

Prioritisation (Head 67)

45. The IRC reminds the Committee of the requirements under the CJEU ruling of *HID C-175/11* that persons subject to a prioritised procedure are able to fully access their procedural rights under the Asylum Procedures Directive throughout such a procedure.²⁰

46. In the spirit of transparency and legal clarity, the IRC recommends the removal of Head 67(1) which gives the Minister absolute discretion to prioritise any application for international protection. Furthermore, the IRC finds the wording of Head 67(2) unclear and ambiguous as to the objective as the list appears to be more a list of accelerated protection procedures rather than applications which should be prioritised.

¹⁹ For further information see European Council on Refugees and Exiles and Dutch Council for Refugees, *the Application of the EU Charter of Fundamental Rights to Asylum Procedural Law*, October 2014.

²⁰ CJEU, C-175/11, *H.I.D. and B.A. v. Refugee Applications Commission and Others (Ireland)*, 31 January 2013.

Prohibition of Refoulement (Head 44)

47. The principle of non-refoulement is enshrined within the 1951 Refugee Convention as well as international and regional human rights law and customary international law. Accordingly the IRC recommends deleting the reference to 'where in the opinion of the Minister' given the absolute nature of the prohibition of non-refoulement in human rights law which provides for no exception and therefore is broader than Article 33(2) of the 1951 Refugee Convention.
48. The IRC also recommends maintaining within the principle of non-refoulement the wording within the Refugee Act 1996 which states "Without prejudice to the generality of subsection (1), a person's freedom shall be regarded as being threatened if, inter alia.....the person is likely to be subject to a serious assault (including a serious assault of a sexual nature)."

Revocation of refugee declaration or subsidiary protection declaration (Head 46A)

49. The IRC reminds the State of its obligations under Article 14(6) of the Qualification Directive to ensure that where a refugee declaration is revoked under Head 46(2) (a) and (b) that the person concerned has access to their rights and entitlements in Articles 3, 4, 16, 22, 31, 32 and 33 of the 1951 Refugee Convention.

3. Addressing the needs of vulnerable persons

Identification and Assessment of Specific Needs of Vulnerable Persons

50. The IRC regrets the fact that the scheme of the International Protection Bill has failed to include any specific provisions on the identification and assessment of vulnerable persons within the protection procedure. The scheme only recognises the need of vulnerable individuals in relation to the content of their status under Head 52. Failure to take into account the individual and personal circumstances of vulnerable persons may lead to the incorrect determination of protection needs and at the worse, potentially breach the principle of non-refoulement.
51. The European Court of Human Rights has itself acknowledged the vulnerability of protection applicants stating that "The Court attaches considerable importance to the applicant's status as

an asylum seeker and, as such a member of a particularly underprivileged and vulnerable population group in need of special protection.”²¹

52. It is important that an asylum seeker’s specific vulnerabilities are identified early on in the asylum procedure. This is necessary also for the national authorities to respect their international human rights obligations including the right to human dignity under Article 1 of the Charter of Fundamental Rights. The IRC recommends that a specific provision is introduced into the Protection Bill for the early identification and assessment of vulnerable persons and a requirement for the procedural safeguards within the protection procedure to be adapted accordingly to their specific needs.

Report in relation to the health of an applicant (Head 22)

53. The IRC is concerned that no mention is made of the express consent of the applicant for the furnishing of a medical report in relation to the physical or psychological health of the applicant. The IRC further submits that respect for the human dignity of the applicant should be the central principle with regard to such medical examinations and that the least invasive method of medical examination should be used. An independent medical practitioner should be selected for such functions and not a nominated practitioner by the Minister.

Separated Children

Interpretation (Head 2)

54. A definition for separated children should be included to ensure the timely identification of those separated from their parents or caregivers, including those who are in the company of smugglers or traffickers. Such an approach would bring the Bill more in line with the SCEP²²/UNHCR definition of separated children. The IRC recommends that the following is inserted under *Head 2*:

“separated child” means a child under the age of 18, who is outside his or her country of nationality or, if stateless, outside his or her country of habitual residence and who is

²¹ECtHR, *MSS v Belgium and Greece*, Application no. 30696/09, 21 January 2011.

²² Separated Children in Europe Programme

separated from both parents, or from his or her previous legal or customary primary caregiver”²³

55. At a minimum, the IRC recommends that the Protection Bill should transpose Article 2(l) of Directive 2011/95/EU (the Qualification Directive) which states:

“‘unaccompanied minor’ means a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he or she has entered the territory of the Member States”

Age Assessment (Head 23)

56. This Protection Bill, for the first time in proposed Irish asylum legislation introduces a provision on age assessment. This is disappointing as Ireland has always applied a social-age assessment methodology.²⁴ Although the process of appeal and some of the age decisions the various government agencies have made have been criticized, the non-invasive methodology was always viewed as a positive measure. Given the known margin of error in any medical age assessment procedures, the IRC recommends that Ireland should opt instead for a social age-assessment undertaken by an inter-disciplinary body consisting of persons not involved with the child’s care or protection needs. This methodology is best practice and does not expose the child to invasive and sometimes harmful medical procedures.²⁵

Unaccompanied minor seeking international protection (Head 12, 14 & 33)

57. The IRC notes that there is no provision for the appointment of a representative for separated children as required by Article 2(i) in Directive 2005/85/EC Asylum Procedures Directive:

‘representative’ means a person acting on behalf of an organisation representing an unaccompanied minor as legal guardian, a person acting on behalf of a national organisation

²³ Recommended by the Irish Human Rights Commission, *Observations on the Immigration, Residence and Protection Bill 2008*, March 2008.

²⁴ *Moke v. Refugee Applications Commissioner* [2005] IEHC 317.

²⁵ Separated Children in Europe Programme, *Position Paper on Age Assessment in the Context of Separated Children in Europe*, 2012, available at: <http://www.refworld.org/docid/4ff535f52.html> [accessed 7 May 2015]

which is responsible for the care and well-being of minors, or any other appropriate representation appointed to ensure his/her best interests;

Ireland is obliged to transpose the provisions contained within this Directive at a minimum. However, it is recommended that Ireland provides or the provision of *legal* guardianship for all separated children in line with international best practice.²⁶

58. It is recommended that Ireland provides a stand-alone provision on the best interest of the child in line with international best practice which ensures the best interest is taken into account in all actions and decisions taken on behalf of the child.²⁷

4. Appeals and Remedies

International Protection Appeals Tribunal (Head 55 and 56)

59. The IRC welcomes the commitment to an independent International Protection Appeals Tribunal which is inquisitorial in nature. Such an approach reflects Article 8(2)(a) of the Procedures Directive that applications for protection be examined and decisions taken individually, objectively, and impartially.

60. The IRC is concerned that the provision in Head 56 that the Minister appoints International Protection Appeals Tribunal members who determine appeals against first instance decisions would not constitute an impartial examination of applicant's protection needs. Therefore Head 56 may be in violation of Article 14 of the International Covenant on Civil and Political Rights which entitles everyone to a fair and public hearing by a competent independent and impartial tribunal established by law. The IRC recommends that the selection of PRT members be made by an independent commission which would maintain and strengthen judicial independence by removing this responsibility from the Minister and any subsequent perception of impartiality of PRT members.

²⁶ Fundamental Right Agency: FRA Recommendation: A legal guardian should be provided to every separated, asylum seeking child as soon as possible. Appropriate legal representation, advice, counselling and free legal aid should be provided to separated children and their guardians or other representatives as soon as possible.

²⁷ For example: the Borders, Citizenship and Immigration Act 2009 Section 55 on the duty regarding the welfare of children.

Functions of chairperson of Tribunal (Head 57)

61. The IRC welcomes the commitment of the Tribunal to establish or adopt rules and procedures with the objective of ensuring fair procedures in a transparent manner by way of their publication. The IRC recommends that specific reference is included in the Bill for the involvement of the Tribunal Users Group in the development of such procedures and policies into the future as well as other expert parties where appropriate.

Appeal to Tribunal (Head 37)

62. By limiting the right of appeal to applicants only on the grounds of refugee status and subsidiary protection, the IRC has serious concerns that persons who wish to appeal against refusal of permission to remain decisions with raise rights of the European Convention on Human Rights are being denied the effective remedy under Article 13 of the ECHR incorporated into Irish law by the 2003 Human Rights Act. For example, an applicant who states that their removal from the State would breach their right to have their private and family life respected, would not under the general scheme of this Bill, be able to raise these issues as grounds of appeal.
63. Furthermore, under this section, the only opportunity to remedy an infringement of an applicant's human rights under the European Convention on Human Rights which falls outside the scope of refugee status or subsidiary protection is judicial review at the High Court. The IRC argues that this is not, considering its narrow remit, the delay entailed and the expense and timescales placed on all parties of the judicial review process, the effective remedy envisioned by Article 13 of the ECHR.
64. Given the statutorily independent nature of the International Protection Appeals Tribunal, the IRC regrets that the Minister under Head 37(4) may prescribe procedures dealing with appeals to the Tribunal including the holding of oral hearings. Such matters should only be within the remit of the Chairman of the Tribunal.

Oral Hearing (Head 38)

65. The IRC welcomes the fact that the oral hearing at the Protection Appeals Tribunal should be as informal as is practicable, and consistent with fairness and transparency (Head 38(6)(d)). However, the scheme indicates that an oral hearing may only be held in public where there applicant so consents and where in the opinion of the Tribunal, it is in the interests of justice to do so. The IRC believes that public hearings should be the norm before the International Protection Appeals Tribunal unless the applicant is a child or other special considerations apply.²⁸

66. Furthermore the oral hearing is dependent on the applicant requesting it unless the Tribunal Member of their own motion thinks it is in the interests of justice to do so. The IRC believes that there should be a presumption in favour of an oral hearing at all times and not confining to request only.

Accelerated appeal procedures for manifestly unfounded applications (Head 39)

67. The IRC is concerned that decisions including determinations that a claim is manifestly unfounded under Head 35(4) lead to restricted appeal rights with no oral hearing and shorter time-limits for appeal under Head 39. The Tribunal should have the power to conduct oral hearings for such appeals when the interests of justice require it. Such an approach would more correctly reflect the right to be heard under Article 41 Charter of Fundamental Rights and the right to good administration. This is particularly relevant with respect to Head 35(4)(b) which includes a finding that an application is manifestly unfounded when the applicant has made inconsistent, contradictory, improbable or insufficient receptions which are 'clearly unconvincing' in relation to the eligibility of the applicant for international protection. The IRC reminds the Committee that the well-founded fear test for refugee status is a low standard of 'real likelihood of risk' and credibility assessments concerning elements of an applicant's claim are correctly evaluated on the standard of 'balance of probabilities.' Therefore, the use of the terminology 'clearly unconvincing' is misleading, lacks clarity and should be removed.

²⁸ The Irish Refugee Council, *Difficult to Believe – The assessment of asylum claims in Ireland*, 2012.

Decision of Tribunal on Appeal (Head 42)

68. The IRC notes that a number of matters are listed under Head 42(1) which the Tribunal should consider when examining an appeal and recommends that a specific provision should be introduced to the fact that any observations/representations by the applicant's legal representatives are taken into account by the presiding Tribunal member.

5. FAMILY REUNIFICATION

Family Definition

69. The IRC welcomes the fact that civil partners are included within the definition of family under Head 50(8). However, spouse and civil partners only qualify as such if the marriage or civil partnership was already subsisting upon the date the sponsor made an application for international protection in Ireland. The IRC is concerned that this does not provide for families which may be formed upon or after arrival in the State. The principle of refugee family reunification exists in order to ensure that refugees can move on with their lives in the state that provides protection and the presence of a family, including one formed after the protection claim is made, is an important part of that.
70. As in Ireland, the process of granting protection can take years, it is reasonable to expect that families can form once a protection applicant is present in the State. By not providing for this type of family, Ireland runs the risk of interfering with the right to respect for private and family life under Article 8 ECHR. The IRC therefore recommends that the current provision be extended to allow for this type of family reunification as respect for family unity should not be made condition upon the time of application. This is in line with UNHCR Executive Committee Conclusion No. 88 of 1999 to allow for "the consideration of liberal criteria in identifying those family members who can be admitted, with a view to promoting a comprehensive reunification of the family."
71. Furthermore IRC notes in Head 50(8)(e) that 'member of the family' is defined as 'a child of the sponsor who, on the date of the application under paragraph (1) is under the age of 18 years and is not married. Irrespective of the fact that a child may be married the principle of family unity should be maintained with his/her parents and siblings. In addition Head 50(8)(d) excludes married children from the definition of family. The fact that parents are excluded from the

family definition for married children raises questions as to its compatibility with the Convention on the Rights of the Child and in particular Article 2 on the prohibition on discrimination.²⁹

Duration of right of residency for family members of applicants

72. The IRC reminds the Committee of the state's duty to maintain the principle of family unity in Article 23 of the Qualification Directive and Article 8 ECHR and Article 7 of the Charter of Fundamental Rights. Given the fact that family members will also have similar protection needs to their sponsors it is unclear why they should be given lesser residence rights than sponsors as appears to be indicated under Head 48. The IRC recommends that family members are given the same permission to reside in Ireland as their sponsors of the specified period of not less than three years and renewable under Head 48(2). Such an approach would also create a lesser administrative burden on the State in terms of arranging renewable permits.

73. Head 48(3(b)) and Head 50(6) provides that permission to remain as a family member of a qualified person shall cease once that person ceases to be a family member so for example in the event of a marriage separation. The IRC recommends that family members retain the right of residency in Ireland in the event of such separation independently of the qualified applicant as was the previous procedure under section 18 of the Refugee Act 1996(as amended).³⁰

Family Reunification Application

74. The wording under Head 50(1) lacks clarity but seems to indicate that a person must submit a family application within 12 months of the granting of status. The IRC recommends that applying for family reunification should not be conditional on any application for such family reunification being submitted within 12 months of the granting by the Minister of a refugee or subsidiary protection declaration. There may be many reasons as to why family reunification applications may be submitted at a late date including the tracing of missing family members.

²⁹ For further information see ECRE Information Note on Recast Qualification Directive, October 2013.

³⁰ Section 18(3)(a) of the Refugee Act 1996 as amended provides that family members of refugees are entitled to their rights under section 3 of the Refugee Act 1996 as amended so long as the refugee continues to reside in the State.

6. OPERATIONAL AND OTHER MEASURES

Ministerial Discretion

75. The IRC is concerned by the broad discretion granted to the Minister for Justice and Equality to issue Regulations in relation to any matter raised in the International Protection Bill under Head 3. Such matters pertaining to protection should be consolidated and incorporated into this piece of primary legislation rather than creating piecemeal legislation as demonstrated by the plethora of statutory instruments following the Refugee Act 1996 as amended. Now is the time for transparency and clarity in primary legislation.

Programme Refugees

76. The IRC is concerned by the fact that Head 53 permits the Minister to grant permission to reside for programme refugees for a specified period of less than three years. Resettlement is viewed as a durable solution and such persons should be entitled to the permission to reside as other refugees for periods of three years or more, renewable.

Option to voluntarily return to the country of origin (Head 43A)

77. The IRC is concerned that the issuing of a specific notification of the option to voluntarily return to the applicant's country of origin during the protection procedure will result in anxiety and confusion for the applicant's concerned. Such information can be more generally provided by way of the generic information leaflet on the protection procedure outlining the rights and guarantees for applicants within the procedure. Furthermore, it is unclear why such notices are only valid for 5 days and then expire. Given the ramifications of such decisions more time should be made available in order for applicants to individually reach an informed conclusion as to whether to voluntarily return or not.

78. The IRC is also concerned about the vagueness in language under Head 43A(5) which appears to indicate that voluntarily return is not an option and the person must be removed by deportation order if the Minister is of the 'opinion that adverse concerns relating to national security or criminality arise in relation to the person'. The IRC recommends that language should be clear

and unambiguous and terms such as 'adverse concerns' should be omitted for lack of legal clarity.

Contracts for Services (Head 68)

79. The IRC is concerned by the lack of clarity in the wording of Head 68 and its implications. It appears to indicate that the Minister may contract out its services. Although noting and welcoming the work of the Processing Panel in clearing the asylum backlog, the IRC is concerned that in taking such an approach the Minister's personnel will never build within the Department the sufficient capacity, skills and knowledge needed for conducting a protection procedure. Any utilisation of a Processing Panel should only be viewed as a short term measures whilst capacity and resources are built up within the relevant Department. The IRC reminds the Committee that the Minister for Justice and Equality can never contract out of her obligations under international law in this regard.

Abolishment of the Office of the Refugee Applications Commissioner

80. The IRC regrets that the Bill effectively abolishes the Office of the Refugee Applications Commissioner (ORAC) for its work to be subsumed within the Department of Justice and Equality. Given the Minister for Justice and Equality's role in border and immigration control the independence of ORAC in the exercise of its functions should not be lost in the single protection procedure. Over time ORAC has developed the specific capacity and training to conduct a protection procedure and such knowledge will be lost should the Department of the Minister take over this important role. During the passage of the Refugee Bill (which was eventually passed in 1996), all parties recognised the importance of separation of the protection decision from the Department of Justice. No argument has been advanced as to why that has been reversed, particularly given the training, skills and expertise that ORAC has developed over a number of years. The IRC strongly recommends maintaining an independent body outside of the Department of Justice to assess claims within a single procedure.

Lack of Provisions for Reception Conditions and Facilities

81. The IRC strongly recommends the inclusion of a legal framework within the scheme of the Bill for reception conditions and facilities. Given that this is the most significant reform of asylum law in Ireland since 1996, Ireland should take the opportunity to address the issues surrounding

reception facilities given the inherent problems in the Direct Provision system. Such an approach would also be in accordance with the governments' own statement of priorities from 2014-2016 to 'treat asylum seekers with the respect and humanity they deserve'. The framework exists in the recast Reception Conditions Directive and therefore Ireland can either opt-in or incorporate the Directive into the Bill. This would include the right to work, over which Ireland has been out of step with its European partners for more than ten years.

Refugee Advisory Board

82. The IRC believes that an independent Refugee Advisory Board should be established within the scheme of the Bill. Such a board will oversee quality and transparency in the single protection procedure including with respect to reception conditions and should be required to report annually to the Oireachtas on its activities.

Early Legal Advice and Quality Assurance

83. The IRC believes that both early legal advice and representation and the use of quality assurance mechanisms help the quality and consistency of decision making with the protection procedure. The IRC Independent Law Centre has provided early legal advice since 2011 for those with unmet legal needs and particular vulnerabilities within the protection procedure. The IRC believes that early legal advice and representation is an essential pillar of a meaningful asylum system and effective legal aid in this area of law. Given the complexities of this area and the inherent vulnerability of people seeking protection, early intervention is as valuable and important in international protection law as it is in other areas of civil legal aid, such as family and child protection law. The IRC recommends that a specific provision is included within the Protection Bill for the provision of free early legal advice and assistance.

84. The IRC also recommends that an auditing and quality assurance mechanism is incorporated within the relevant Department for the review of quality of decision-making within the protection procedure and that periodic reports are published on training, guides and other procedures and policies put in place by the Minister for the purposes of the protection procedure. The role of an independent inspectorate could also be included within the scheme of the Bill along the similar module to the UK's role of Independent Chief Inspector of Borders and

Immigration. Such independent scrutiny could assist in improving the quality and efficiency of decision-making in the single protection procedure.

Conclusion

Overall, despite some important improvements, the General Scheme of the International Protection Bill indicates that there has been a missed opportunity to develop primary legislation in line with best practice in international protection law and the improved standards within the recast asylum acquis. Although the establishment of a single procedure is a welcome development, it will not be the panacea for all of the deficiencies within the asylum procedure unless further improvements are made in legislation and practice. The IRC believes that the legislation which will set the framework for the future of international protection in Ireland must be guided by clarity and transparency, the protection of human rights, fairness and the rule of law.



Jesuit Refugee Service Ireland

Submission to the Joint Committee on Justice,
Defence and Equality on the

General Scheme of the International Protection Bill

May 2015

1. INTRODUCTION

1.1 About the Jesuit Refugee Service

The Jesuit Refugee Service (JRS) is an international non-governmental organisation, founded in 1980. JRS programmes are found in over 50 countries, providing assistance to refugees in camps, to people displaced within their own country, to asylum seekers in cities and those held in detention.

JRS Ireland has a mission to accompany, advocate and serve the cause of forced migrants in Ireland. It has been serving asylum seekers residing in Direct Provision since 2002. At the present time it provides regular outreach and support to asylum seekers in 11 Direct Provision centres in Dublin, Kildare, Portlaoise, Meath, Clare and Limerick. JRS Ireland prioritises the need of children growing up in Direct Provision running Homework Clubs in centres in Dublin; supporting the delivery of crèche and afterschool services in Knockalisheen; organising a four week Summer Programme of activities and other project supports for children in Direct Provision.

JRS Ireland aims:

- To promote improvements in the reception and integration of asylum seekers, refugees and migrants.
- To support non-Irish nationals who are in detention under immigration legislation.
- To advocate for a more just immigration system and asylum process.
- To foster a more positive public image of asylum seekers and migrants in Ireland and deepen public understanding of asylum and migration issues.
- To encourage the active engagement of volunteers and to support the work of JRS Europe, the JRS International Office and JRS projects on the ground worldwide.

JRS Ireland works principally in the areas of:

- Asylum Seeker Support: providing support to persons seeking asylum through direct outreach, language classes and psychosocial support.
- Integration: contributing to integration by providing language support, by running capacity building courses and sporting activities, by organising intercultural events and by developing intercultural services and resources for teachers and migrant parents.
- Detention: visiting immigration detainees in prisons, organising training for detention visitors and advocating for more just detention policies.
- Advocacy: working for fairer immigration and asylum systems through lobbying, submission of policy papers, education and media work and collaboration with other organisations.

2. CONTEXT

2.1 Context of Submission

It is widely accepted that the biggest single issue facing asylum seekers is the excessive length of time spent in the system awaiting a final determination of their claim. A consequence of structural failings in the asylum determination system and the resultant long delays is that asylum applicants spend years living in Direct Provision.

The system of Direct Provision was envisaged originally as short term (6 months) form of accommodation and is unsuitable for long term stays. JRS Ireland has found that living long term in this institutional environment results in significant human costs for residents, impacting negatively on physical and mental health, on skills and training, family life and relationships and the ability to participate in society. In addition to the human cost experienced by persons living long term in the system, the State also has suffered from a financial, societal and reputational perspective.

In 2014, JRS Ireland engaged in research to identify durable solutions for asylum seekers living long term in Direct Provision. From our analysis, it is clear that the structure of the existing Irish asylum determination process results in a systemic delay in the processing of applications for asylum. The Regulatory Impact Analysis acknowledges ‘the current system is now considered to be inefficient, out-of-step with the practice in other EU Member States and characterised by high rates of judicial review’.

The proposed introduction of a single procedure mechanism via the General Scheme of the International Protection Bill is therefore an important structural reform but not a panacea for all the ills in the asylum system. Crucially it will not address the plight of existing asylum seekers who are ‘stuck’ long term in the system and JRS Ireland contends additional safeguards are required in the General Scheme of the International Protection Bill to prevent backlogs from building up in the future.

JRS Ireland was appointed to the Working Group on the Protection Process - established by the Government in October 2014 - and has thus previously submitted recommendations regarding improvements that can be made to the protection determination process, including the system of Direct Provision and supports provided to protection applicants

2.2 Focus of Submission

The scope of this submission is limited to Part 3 (Application for International Protection) and Part 11 (Further Provisions and Transitional Provisions) of the General Scheme of the International Protection Bill.

Recommendations, relevant to these Parts, are provided under the following sub-themes:

1. Realisation of the Statement of Objectives
2. Head 15 - Prohibition on Employment
3. Head 19 - Detention of Applicants.
4. Head 63 - Transfer of Functions from the Refugee Applications Commissioner

3. RECOMMENDATIONS

3.1 Realisation of the Statement of Objectives

One of the key objectives identified within the Summary of Regulatory Impact Analysis is the reduction of the period of time an applicant typically spends in the system.

This objective is critically important as the human costs associated with living long term in Direct Provision whilst awaiting a determination of an application for protection include:

- Negative impact on family life and the long term healthy growth and development of children
- Boredom, isolation and social exclusion
- Obsolescence of skills and creation of dependency
- Negative impacts on physical, emotional and mental health

It is acknowledge that it was never the objective or anticipated outcome that individuals would find themselves ‘stuck’ for years in the Irish asylum system but that that is the reality which unfolded. As such the International Protection Bill provides an opportunity to put in place safeguards to ensure that a similar situation of lengthy delays does not arise in the future. Key to this objective is the efficient operation of the single procedure, which requires that the decision making bodies are adequately resourced.

JRS Ireland recognises a States sovereign right to manage it borders but contends this is not an unlimited right. It should be balanced against an individual applicant’s right to have their application for protection to be considered in a fair and transparent manner in a reasonable timeframe. Thus, the principles of natural justice would require a State to exercise its sovereign right to manage its borders within an acceptable time limit. This is consistent with other areas of administrative law, such as planning where it is accepted that if a response is not received to a planning application within a stated period of time then the applicant receives planning permission by default. Similarly if the State fails to execute its final decision on an application for protection within a stated period, say 5 years, then the applicant could be granted permission to stay by default.

This proposed “cap” on the length of time that a person spends in the determination process should be guided by the following principles:

- *Integrity of the Protection Process:* The integrity of the protection process needs to be respected, and thus, applicants should not be offered any immigration status at the cost of a full consideration of their protection claim.
- *Appropriate time limit:* In terms of an acceptable time limit, for example, 5 years by any standard is a long period of time for the State with all the resources at its disposal to determine and implement a final decision on an applicant’s protection claim. Many would argue that a much shorter period is appropriate. In the light of the introduction of a Single Procedure and improved quality measures in the determination process there is a reasonable expectation that the State should conclude the process within a fixed period or by default be obliged to grant leave to remain.
- *Overarching Moral Principle:* There is also a compelling overarching moral principle to learn from the past and ‘do the right thing’ by ensuring people never again spend years in limbo awaiting a final determination of their claim with all the attendant human costs.

Table 1: Advantages and Disadvantages of Protection Process ‘Cap’

Area of General Scheme	Advantages	Disadvantages	Potential Mitigating Factors
<i>Cap on Protection Process</i>	<ul style="list-style-type: none"> - Certainty: Applicants have a clear and defined end point to their stay in the system. It will avoid the situation of future applicants spending 6, 7 and more years in the system - Reasonable: The aim is that going forward decisions will be provided in 12 months. A significant buffer is built in for the State for ultimate processing - Humane: Also places <i>de-facto</i> limit on Direct Provision stay with all its attendant human costs - Reduced Direct Provision Accommodation Costs: By ensuring applicants are not long term in the system yields significant financial savings on accommodation costs 	<ul style="list-style-type: none"> - Potential moral hazard in respect of applicant delay arising although could be mitigated by choice of cap e.g. 5 year limit - Separation of powers means that allocation of Court resources outside of State control in Judicial Review cases - Need to ensure transition supports are in place especially with respect to accessing accommodation - There are costs to the State for people receiving status but these are unavoidable 	<ul style="list-style-type: none"> - Positive pressure on State to ensure Single Procedure operates efficiently by investing in decision making at first and second instance to avoid future backlogs - Improved quality of decisions and judicial review processes mean historic delays in Judicial Review processing should not reoccur -Inclusion of review mechanism of operation of ‘cap’ with a view to potentially reduce limit -Dependency grows with each additional year in the system so the earlier a person exits the better in terms of independent living and integration prospects

Table 1 seeks to lay out the main advantages and disadvantages of introducing a ‘cap’ from applicant and State perspectives. It also explores potential mitigating factors arising from its introduction.

In summary, JRS Ireland recommends that a ‘cap’ on the length of time a protection applicant will have to spend in the asylum system awaiting a final determination to avoid the human costs associated with long stays in the system.

RECOMMENDATION

A de-facto maximum length of time in the process is provided for so that any applicant, who finds themselves still awaiting a final determination after an agreed specific duration (for example 5 years) will automatically be eligible, except where public order or security concerns arise, for a grant of permission to reside in the State.

3.2. Prohibition on Employment

Head 15 of the General Scheme of the International Protection Bill maintains the prohibition on access to employment for applicants. This position is out of line with respect to the policy of the majority of EU Member States, including the United Kingdom.

Some of main factors that make the case for the inclusion of a right to work for protection applicants include, but are not limited to:

- Extending the right to work to protection applicants would greatly harmonize the position of Ireland within the Common European Asylum System. This would place persons seeking protection in Ireland in comparably the same situation as other Member States, apart from Denmark¹.
- Employment is an internationally recognised indicator of health and wellbeing.
- Employment facilitates the integration of migrant populations within host communities.
- The right to work promotes self-sufficiency and independence - qualities that deteriorate as a result of residence in an institutional environment such as Direct Provision.
- The right to work offers greater dignity, decision making ability and control over the welfare of children to protection applicants.
- Employment can increase the ability of protection applicants to transition from Direct Provision.
- Some commentators highlight the enhanced ability of failed protection applicants to engage in return processes as a result of the income and motivation generated through employment.

It is acknowledged that there are inherent risks and concerns associated with extending the right to work to protection applicants. Among the concerns raised are:

- The creation of a pull-factor as a result of Ireland harmonising its position with that of other EU Member States.
- The negative public reaction to increasing pressure on a labour market which does not currently meet public need.
- The potential costs associated with the right to work facilitating greater access to and dependence on social welfare.
- The incompatibility with the system of Direct Provision accommodating persons with means to meet their needs.

Yet many of the human costs associated with living long term in Direct Provision are synonymous with the negative impacts of the prohibition on employment:

- Boredom, isolation and social exclusion.
- Obsolescence of skills and creation of dependency.
- Negative impacts on physical, emotional and mental health.

In addition - if human dignity is understood as the affirmation of a person's sense of value or worth and demands the realisation of physical, emotional and mental integrity so that a person has autonomy and effective control over their lives – then the prohibition on the right to seek employment is a barrier to living with dignity.

¹ Although Denmark did not sign up to the revised Reception Conditions Directive, it has provided for the right to work in separate legislation.

Direct Impacts of Prohibition on Right to Work

- Previously acquired skills and competencies made redundant.
- Effective integration of adults inhibited through the denial of a network of colleagues and the accompanying lack of resources necessary for participation in the community.
- Effective integration of children inhibited through the accompanying lack of resources necessary for participation in extra-curricular activities.
- Creation of dependency on State or other sources of support (e.g. philanthropic).
- Increased vulnerability as a result of negative impacts on mental health.
- Corrosion of family life due to the undermining of parent's ability to act as role model; make decisions to improve the welfare of their children; or assume position of household provider.

Indirect Impacts of Prohibition on Right to Work

- Recourse to accessing labour on the "black market" with all its associated risks.
- Recourse to inappropriate or dangerous behaviour as a result of boredom and/or loss of opportunity.
- Ability of Direct Provision residents to transition to independent living undermined.
- Potential loss of taxable earnings for the Irish State.
- Potential loss of skilled labour force by the Irish State.

Testimonies²

- *These wasted years doing nothing. What is the chance of getting a job after leaving the system? What would I put on my CV for these years?*
- *I hate it not being able to work. I am young and healthy. I need to be working. I hate sitting around and doing nothing.*

In summary, JRS Ireland believes there is a compelling case to be made for introducing a right to work primarily on the grounds of fairness and human dignity. It will complement the introduction of a Single Procedure, which if adequately resourced and operating as intended should mean that the majority of applicants will receive a first instance decision within 9 months from their initial application.

RECOMMENDATION

Extend the right to work to those persons who are awaiting a decision at first instance for in excess of 9 months in line with the Reception Conditions Directive. Right to work in this context assumes no attachment of conditions with regard to hours or nature of employment.

² Examples of personal testimonies collected in the course of JRS Ireland's accompaniment of asylum seekers living in Direct Provision, highlighting the significance of this issue and the associated negative impacts.

3.3 Detention of Applicants

Head 19 outlines the circumstances under which an applicant may be detained.

The area of detention has been a strong focus of work by JRS offices throughout Europe. In June 2010 JRS-Europe published, *Becoming Vulnerable in Detention: Civil Society Report on the Detention of Asylum Seekers and Irregular Migrants in the European Union*.³ This research was conducted in partnership with NGOs in 23 EU Member States and was based on interviews with 685 detained asylum seekers and irregular migrants in 21 EU Member States. It reveals that detention itself is a primary determinant factor that influences detainees' level of vulnerability.

JRS Ireland believes that detention negatively affects nearly everyone who experiences it, causing or increasing the vulnerability of persons seeking protection. The JRS Europe research found detention seriously harms the physical and mental health of vulnerable asylum seekers and irregular migrants, even those who entered detention without any previous health problems.

While the provision and definition of alternatives to detention are left to individual member States, JRS Ireland defines alternatives to detention as any policy, practice or legislation that allows asylum seekers and migrants to live in the community with freedom of movement, in respect to their right to liberty and security of person, while they undertake to resolve their status and/or while awaiting removal from the territory.

In the Irish context JRS Ireland recognises that there has been a strong downward trend in the number of persons detained for immigration related reasons. This trend is especially welcome since in Ireland the designated places of detention for immigration detainees are prisons, Cloverhill for men and the Dochas Centre (Mountjoy) for women. JRS Ireland would strongly endorse and urge recourse to alternatives to detention as laid out in paragraph 3 (b) of Head 19, such as reporting requirements.

In summary, the position of JRS Ireland is that recourse to detention should always be a last resort for asylum seekers and forced migrants and alternatives to detention should be used where possible.

RECOMMENDATION

Detention should only be used as a last resort, if at all, under exceptional circumstances and there should always be recourse to community-based alternatives where possible.

³ JRS Europe (2010), *Becoming Vulnerable in Detention: Civil Society Report on the Detention of Asylum Seekers and Irregular Migrants in the European Union*, available at <http://www.jrseurope.org/Research>

3.4 Transfer of functions from the Refugee Applications Commissioner

Head 63 provides for the transfer of functions from the Refugee Applications Commissioner to the Minister for Justice and Equality.

While JRS Ireland recognises that the decision to effectively abolish the Office of the Refugee Applications Commissioner (ORAC) is due to a longstanding policy objective “of improving efficiency in the administration of the asylum caseload and related business”, a cautionary approach is required. Aside from operational concerns indicated below, in principle there is a concern at the loss of ORAC as an independent statutory body.

It is widely acknowledged that in recent years ORAC has been operating very effectively and backlogs are not excessive. Many examples of good practice exist and the institution has shown itself adaptable to changing circumstances, as evidenced by its successful management of the backlog of applications for subsidiary protection. In addition, there has been considerable investment in the training of staff and the implementation of quality assurance procedures in recent years.

As such, any transfer of functions must be carefully managed to minimise any detrimental impacts on the processing of applications for protection. There remains a concern that if the transitional arrangements are not carefully managed it would impact adversely on decision making times and backlogs. Also, care needs to be taken that institutional memory and good practice is maintained in the transition.

RECOMMENDATION

Continuity of experienced and trained staff and existing quality procedures and best practice should be maintained and enhanced where appropriate following the transfer of first instance decision making functions to the Minister for Justice and Equality.

LAW SOCIETY SUBMISSION



SUBMISSION ON THE GENERAL SCHEME OF THE INTERNATIONAL PROTECTION BILL

Joint Committee on Justice, Defence and Equality

8 May 2015

ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

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Introduction

The Human Rights Committee of the Law Society of Ireland welcomes the opportunity to make a submission to the Joint Committee on Justice, Defence and Equality on the General Scheme of the International Protection Bill.

The Human Rights Committee was established in November 2004, with the main purpose of raising awareness in the profession and the public of human rights issues under the European Convention on Human Rights Act 2003, the EU Charter of Fundamental Rights and other national and international instruments. The Committee comprises members of the Law Society who have a particular interest, and/or practice as solicitors in the area of, human rights law.

This submission, prepared by the Human Rights Committee, will take the opportunity to address the Joint Committee on the issues arising out of the General Scheme of the International Protection Bill, which the Human Rights Committee considers as warranting further examination at this point in time.

Certain members of the Human Rights Committee have specific expertise in this area of law:

- Grainne Brophy, Managing Solicitor, Smithfield Law Centre (incorporating Refugee Legal Service), Legal Aid Board;
- Shane McCarthy, Solicitor, Member Refugee Appeals Tribunal;
- Hilka Becker, Solicitor, Independent Legal Expert in Migration, Refugee and Human Rights Law, Member Refugee Appeals Tribunal.

The views expressed in this submission do not purport to reflect the views of the Refugee Appeals Tribunal (its members or Chair), nor do they purport to reflect the views of the Legal Aid Board. The submission is being provided by the Human Rights Committee of the Law Society on the basis of its members acting in their capacity as members of this Law Society Committee, and based on their experience as solicitors with extensive experience in this area of law.

Executive Summary – Overview

On considering the General Scheme of the International Protection Bill (“the Bill”), the Human Rights Committee (“the Committee”) believes that it is vital to bear in mind the broader legal setting of this proposed legislation – that Ireland is bound to implement its international human rights obligations under the [1951 Geneva Convention relating to the Status of Refugees](#) (‘the 1951 Geneva Convention’).

It must also be recalled that Ireland should have regard to the [Common European Asylum System](#) (‘CEAS’) which delineates the agreed common principles of the treatment of asylum seekers in Europe. While being cognisant that Ireland is not directly bound by all the EU Common Standards as set out by CEAS, the Committee strongly recommends that, nonetheless, Ireland should be guided by these European standards and should view them as minimum standards of legal protection which ought to be adhered to in any proposed legal system of international protection.

The Long Title of the Bill reflects this intention of implementing Ireland’s international and European legal obligations.

It is evident from the short title of the Bill – *International Protection* – that the primary aim of the Bill is to provide for the protection of asylum seekers in compliance with our international human rights obligations – this is important to take into consideration in the broader context of the immigration system in Ireland. The immigration system has the additional role of maintaining Ireland’s borders and monitoring migration, which have the potential to come into conflict with the underlying aims of international protection. It is a positive development that this Bill deals solely with the issue of international protection and separates the two roles within Ireland’s immigration and asylum policy.

In any system of international protection for asylum seekers, the fundamental principles of international human rights law should be respected, for example, the right of access to justice, the right to bodily integrity, the right to work (the latter should be in line with EU standards as defined by the CEAS, principally the revised [Reception Conditions Directive](#)).

The Committee notes that the Bill will not be considered in a vacuum by the Justice, Defence and Equality Committee (‘the Justice Committee’); rather, it will be reviewed in the broader context of other issues relevant to international protection, such as the budgetary constraints that lead to delays in the system and the ongoing discussions surrounding direct provision.

Executive Summary of issues and recommendations

In this submission, the Human Rights Committee has attempted to flag a number of issues arising throughout the Bill, as warranting further consideration and discussion; however, while the following summary of observations provides a general indication of some of the primary points addressed, it is not an exhaustive summary of all of the views of the Committee.

- While being cognisant that Ireland is not directly bound by all the EU Common Standards as set out by the [Common European Asylum System](#), the Committee strongly recommends that, nonetheless, Ireland should be guided by these European standards and should view them as minimum standards of legal protection which ought to be adhered to in any proposed legal system of international protection.
- The Committee considers that the opportunity should have been taken to introduce a statelessness determination procedure, and to provide a system that can provide protection for such individuals in line with Ireland's international obligations.
- The Committee has raised two distinct issues as requiring particular further attention
 - separated children and interpretation/translation.
- The Committee has concerns regarding the proposed abolition of the Office of the Refugee Applications Commissioner. The Committee is of the view that this body should be maintained and its independence further guaranteed.
- The Committee strongly recommends that a full impact assessment must be carried out in order to determine the exact implications and consequences of repealing the Refugee Act 1996.
- The Committee recommends that specific provision should be made within the proposed legislation for a right of access to a legal representative. Any such provisions should also clarify that such access must be effective in practice; this means that applicants must be made aware of their right to legal representation and legal advice. It is insufficient to state that all applicants are entitled to access legal services but then fail to take practical steps to ensure this right can be exercised.
- The Committee recommends that the Justice Committee should hear expert evidence on the issue of age assessment (of minors).
- The Committee is concerned that there seems to be no appeal mechanism following refusal of a leave to remain application.

- The Committee is concerned regarding the issue of family reunification and considers that further clarification of the relevant Heads is required, (e.g. it is not entirely clear how a person may '*cease to be a qualified person or a family member*'. The definitions of 'family member' and 'qualified person' are unclear).
- The Committee recommends that Head 22 should be framed in terms of protecting the human rights of the applicant by referring them to whatever medical treatment they might require in their own interest.
- The Committee recommends that Head 35(2)(a) should include reference to the type and quality of fact-finding research which the Minister must carry out in assessing protection claims. (The Committee refers the Justice Committee to the '[Handbook And Guidelines On Procedures And Criteria For Determining Refugee Status](#)', as issued by the UNHCR pursuant to the 1951 Geneva Convention.)
- The Committee recommends that clarification be provided as to when applications under Head 36A ('leave to remain' applications) are to be considered.
- The Committee considers that in circumstances where the Minister fails to make a determination within 6 months of the date of application (see Head 35(3)), then at that point in time of the application process, provision should be included in the Bill to entitle the applicant to access the labour market and pending a final outcome of their application, thereby permitting them to move out of direct provision and allowing them to receive the necessary social supports to do so.
- The Committee recommends that provision should be included in the Bill to give an applicant and their legal representative at least 15 working days to update the application for leave to remain in order to give them the opportunity to provide further information and up-to-date submissions.
- The Committee recommends that grounds for the revocation of a deportation order should at least include those currently provided in Section 3(6) of the Immigration Act 1999 in relation to the Minister's considerations prior to the making of such order. The Committee is concerned that, as the Bill appears to also omit any mechanism for appealing a deportation order or the refusal to revoke such order, then any such order may be rendered permanent in nature by the Bill.
- The Committee recommends that the Minister's discretion under Head 46(1) should be maintained (in relation to '*Revocation of refugee declaration or subsidiary protection declaration*').

Part 1 (*Preliminary*): Heads 1 - 5

- 1.1. Under Head 2 (*Interpretation*), there is no definition included for statelessness. Ireland is a signatory to the [1954 Convention relating to the Status of Stateless Persons](#) and has international obligations in this regard. The Committee considers that the opportunity should have been taken to introduce a statelessness determination procedure, and to provide a system that can provide protection for such individuals in line with Ireland's international obligations.
- 1.2. Generally, throughout the Bill, the Committee notes that there appears to be an inconsistency in terminology in the interchangeable use of 'appeal' and 'review'.
- 1.3. Under Head 5 (*Repeals and revocations*), it is proposed that the Refugee Act 1996 ('the 1996 Act') be repealed in full. The Committee strongly recommends that a full impact assessment must be carried out in order to determine the exact implications and consequences of such a legislative repeal.

Part 2 ('Qualification for International Protection'): Heads 6 - 11

- 2.1. The definition of '*persecution*' under Head 6 appears to be somewhat unclear. It is proposed to be defined as follows:
- (1) In these Heads acts of persecution must be—
 - (a) sufficiently serious by their nature or repetition to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, or
 - (b) an accumulation of various measures, including violations of human rights, which is sufficiently severe to affect an individual in a similar manner as mentioned in paragraph (a).
- 2.2. While the definition appears to be in-line with the definition provided in the 2011 [Qualification Directive](#) (part of CEAS), for the sake of greater clarity it would assist if reference to the definition of persecution as per the 1951 Geneva Convention was also included.
- 2.3. Under Head 7 ('*Reasons for persecution*'), the Committee considers that the proposed concept of 'race' is incomplete and needs further revision (see Head 7(1)(a)). The current proposed definition – "*the concept of race shall in particular include considerations of colour, descent or membership of a particular ethnic group*" - raises serious concerns for the Committee. The definition should, at a minimum, refer to the definition contained in the [International Convention on the Elimination of all Forms of Racial Discrimination](#) (UNCERD).
- 2.4. Equally, the concept of 'membership of a particular social group' – as set out under Heads 7(1)(d) and 7(3) - seems to be incomplete, and creates a higher threshold for inclusion as opposed to the definition contained in the 1996 Act. The 1996 Act explicitly referred to sexual orientation as consisting of membership of a particular social group, but this no longer seems to be the case under Head 7.
- 2.5. The Committee has particular concerns around Head 7(3) regarding sexual orientation ("*sexual orientation shall not include acts considered to be criminal in the State*"), sexual identity and gender identity.
- 2.6. Additionally, recognition of membership of a trade union as consisting of membership of a particular social group appears to have been removed in its entirety.

Part 3 (*'Application for International Protection'*): Heads 12 - 24

- 3.1. The design of the 'Application for International Protection' or 'single application procedure', as set out in the General Scheme of the International Protection Bill ('the Bill') appears to be unnecessarily complicated. Efforts should be made to simplify it. As the Bill now stands, it appears that all claims are considered at once rather than the three very distinct claims of asylum, subsidiary protection, and leave to remain being considered individually.
- 3.2. As it currently stands, the procedure can be broadly outlined as follows:
- At first instance, the applicant will attend a personal interview with an officer of the Minister, where they will be expected not only to make their case for asylum or subsidiary protection, but also for leave to remain on any other ground;
 - If the application for protection is refused, the Minister will go on to determine if there are grounds to grant leave to remain;
 - It appears that a refusal of an application for protection can be appealed to the Tribunal but there seems to be no appeal mechanism following refusal of a leave to remain application.
- 3.3. This mechanism is not sufficiently clear as to how it will guarantee that each claim will be fully assessed purely on its own merits. It must be borne in mind that each application raises its own diverse issues for consideration, particularly as regards the differences between a claim for asylum or subsidiary protection and a claim for leave to remain. The structure of the application process needs to be clarified as potentially it could require the introduction of another mechanism which would consider the leave to remain applications and any residual protection issues.
- 3.4. Head 12 (*'Application for international protection'*) appears to propose that initial applications be made to the Minister, thus removing the Office of the Refugee Applications Commissioner ('ORAC'). ORAC is a dedicated expert body which currently examines these applications; the Committee is of the view that this body should be maintained and its independence further guaranteed.
- 3.5. Head 13(4) (*'Preliminary Interview'*) currently only allows for a "*record of the preliminary interview*" to be "*kept by the officer conducting it*", and it does not include the mandatory provision of such copies to the applicant's legal representative. The Committee considers that any records, notes and/or transcripts of the preliminary interview should be automatically provided to the legal representative of the applicant.
- 3.6. As regards Head 15 (*'Permission to enter and remain in the State'*), the Committee considers that these provisions should clarify that permission for the applicant to leave the

State will not be unreasonably withheld; for example, if permission is sought to travel abroad for health reasons and/or medical treatment.

- 3.7. Head 19 (*'Detention of the applicant'*) – the Committee observes that any detention provisions must be in line with international human rights standards, and must never be used where an alternative mechanism is available.
- 3.8. Specific provision should be made within the proposed legislation for a right of access to a legal representative. Any such provisions should also clarify that such access must be effective in practice; this means that applicants must be made aware of their right to legal representation and legal advice. It is insufficient to state that all applicants are entitled to access legal services but then fail to take practical steps to ensure this right can be exercised. Currently, Head 19(4) states that an immigration officer or member of An Garda Síochána can apply to the District Court to have a person being detained brought before a judge of the District Court, in circumstances where the officer or member forms the opinion that the person should not be so detained (under the proposed detention grounds of Head 19). This is an insufficient protection of the applicant's right to liberty as there is no reference under Head 19 to any right of the applicant to seek legal advice to challenge their detention.
- 3.9. Head 21 (*'Subsequent application'*) is a positive development in terms of this area; however, the Committee notes that the threshold set out in Head 21(4)(a) is too high:
- 4) The Minister shall give consent to the making of a subsequent application where, following a preliminary examination of the request he or she is satisfied that-
 - (a) since the person concerned ceased to be an applicant new elements or findings have arisen or have been presented by the person concerned which makes it significantly more likely that the person will qualify for international protection, and
 - (b) the person was, through no fault of the person, incapable of presenting those elements or findings for the purposes of his or her previous application (including, as the case may be, any appeal in the matter of that application).
- 3.10. This threshold of what can be termed as 'significant changes', does not reflect the reality of such applications and their nature. It is also effectively pre-empting the outcome of any such deemed application without first examining it on its merits.
- 3.11. Similarly, Head 21(4)(b) as above, should be amended to refer to persons who are 'unable' rather than 'incapable'; and it should also take account of situations whereby the applicant was 'unable' to present the findings due to the fact that misinformation was given to the applicant or due to the failure of any agent on the applicant's behalf.
- 3.12. The purpose and rationale of Head 22 (*'Report in relation to the health of an applicant'*) is somewhat unclear.

(1) Where, in the performance by the Minister of his or her functions under these Heads in relation to an applicant, a question arises regarding the physical or

psychological health of the applicant, the Minister may require the applicant to be examined and a report furnished by a nominated registered medical practitioner in relation to the health of the applicant.

(2) Where, in the performance by the Tribunal of its functions under these Heads in relation to an applicant, a question arises regarding the physical or psychological health of the applicant, the Tribunal may require the applicant to be examined and a report furnished by a nominated registered medical practitioner in relation to the health of the applicant.

(3) For the purposes of this Head, “nominated registered medical practitioner” means such registered medical practitioner as the Minister may nominate from time to time.

- 3.13. In such circumstances, whereby “*a question arises regarding the physical or psychological health of the applicant*” and a medical report is deemed as being ‘required’ of the applicant, the Committee recommends that this section should be framed in terms of protecting the human rights of the applicant by referring them to whatever medical treatment they might require in their own interest.
- 3.14. The Committee also has concerns regarding the independence and expertise of the “nominated” medical practitioner and notes that the applicant should be entitled to have their own medical reports commissioned and considered in such circumstances.
- 3.15. Additionally, it is unclear who bears the costs of such a medical report – this ought to be clarified.

Part 4 ('Assessment of Applications for International Protection'): Heads 25 – 31

- 4.1. The Committee considers that, rather than using the term 'country of origin' in the Bill, the term which should be used throughout is '*country of nationality/country of habitual residence*'. Country of origin is defined in this manner under Head 2 ('*Interpretation*') but, for the avoidance of confusion, it would be preferable if the longer phrase were used throughout the Bill.
- 4.2. Head 25 ('*Assessment of facts and circumstances*') appears not to include the "compelling reasons" ground for a declaration of protection. It is essential that such an option be provided for the minority of applicants who may need to rely on it in their applications for refugee status, particularly where a decision on their application has been delayed for lengthy periods.
- 4.3. The Committee notes that a 'compelling grounds' assessment will continue to be included in Head 8(3) to ensure that, where there has been a fundamental change of the situation in the applicant's country of nationality/former habitual residence, a person who otherwise qualifies for protection, is now excluded pursuant to Article 1C of the 1951 Geneva Convention¹. This is currently reflected in Section 21(2) of the 1996 Act.
- 4.4. As regards Head 31 ('*Applicant from a safe country of origin*'), the Committee is concerned that this designation '*safe country of origin*' may not take account of internal difficulties and other factors that may make a country unsafe. The Committee is also concerned that a designation may become out of date in the light of developing unrest, rebellion or other disturbances, and that persons in need of protection because of the changed circumstances would not receive it because of this provision.

¹ The text of the relevant paragraph 5 of Article 1C (also reflected in paragraph 6 with regard to stateless persons) is as follows:

This Convention shall cease to apply to any person falling under the terms of section A if (...) he can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality

Part 5 (*Examination of Applications at First Instance*): Heads 32 – 36A

- 5.1. Provision should be included under Head 32A (*Personal Interview*) to require that a copy of the notes of the personal interview must be provided to the legal representatives and the applicant in a timely fashion and in advance of a decision being issued.
- 5.2. In the interests of ensuring fair procedure, Head 32A(6) should provide for the applicant to have a right to legal representation at the personal interview, and that legal representation will be provided if they cannot afford same.
- 5.3. In relation to Head 35 (*Report of examination and determination of application*), subsection (2)(a) states as follows:

The report under subhead (1) shall-

(a) refer to the matters relevant to the application which are-

- (i) raised by the applicant, in a personal interview under Head 32A or a preliminary interview under Head 13 or at any time before the conclusion of the examination, and
- ii) other matters the Minister considers appropriate,

- 5.4. The Committee considers that Head 35(2)(a) should refer to what is described in international refugee law as the 'shared duty' between the State and the refugee applicant, i.e. the assessment of a refugee claim is based on a shared duty between the applicant and the State (in this case, the Minister at first instance) that all relevant information at the disposal of the applicant will be provided by them, and in turn the Minister undertakes to consider all relevant information available including relevant 'country of origin' information – Head 25 (*Assessment of facts and circumstances*) refers to this duty.² To elaborate on this shared duty, it is evident that the Minister must carry out high quality and objective research (such as recognised 'country of origin' reports) before the determination is made.
- 5.5. The Committee recommends that Head 35(2)(a) should include reference to such research and fact-finding research, as it is important that this proposed section reflect the shared duty as described above. This will assist in ensuring that the Minister takes sufficient care to ensure that there is a fair and complete assessment of the claim before the report is finalised. The Committee refers the Justice Committee to the [*Handbook And Guidelines On Procedures And Criteria For Determining Refugee Status*](#), as issued by the UNHCR pursuant to the 1951 Geneva Convention.

² Head 25 (*Assessment of facts and circumstances*) – Head 25(5):

"The following matters shall be taken into account by the Minister or, as the case may be, the Tribunal for the purposes of the examination of an application for international protection or the determination of an appeal in respect of such an application:

(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application, including laws and regulations of the country of origin and the manner in which they are applied...". Etc.

- 5.6. Head 35(4)³ requires an unnecessarily subjective assessment of the applicant's claim and should be withdrawn from the Bill.
- 5.7. Head 35(5) refers to the Minister failing to make a determination within 6 months of the date of application, and providing the applicant with a revised timeline for a determination. The Committee considers that in these circumstances and at that point in time of the application process, provision should be included in the Bill to entitle the applicant to access the labour market and pending a final outcome of their application, thereby permitting them to move out of direct provision and allowing them to receive the necessary social supports to do so.
- 5.8. Under Head 36A (*'Notification of determination of application at first instance'*), Head 36A(2) contains a list of matters for the Minister to consider in determining whether permission should be granted for leave to remain. This list omits a number of criteria, currently contained in Section 3(6) of the Immigration Act 1999, such as age of the person, length of residence, their employment record, etc., all of which ought to be included in this Head. Additionally, the principle of non-refoulement should also be contained under this Head and the best interests of any children affected should also be considered.
- 5.9. The Committee is of the view that clarification is needed as to when applications under Head 36A ('leave to remain' applications) are to be considered – is it only when there is a final determination of the protection application encompassing any appeal of such an application?
- 5.10. The Committee recommends that provision should be included in the Bill to give an applicant and their legal representative at least 15 working days' notice of their entitlement to update the application for leave to remain in order to give them the opportunity to provide further information and up-to-date submissions.
- 5.11. Finally, the Committee refers the Justice Committee to the regulatory impact assessment prepared in relation to this Bill which outlines the differences between the protection applications as compared to the leave to remain applications.

³ Head 35(4): In addition to the setting out of a determination referred to in paragraph (c) subhead (3) the Minister may include in the report under subhead (1) any of the following findings made by the Minister-

(a) that the examination of the application for international protection revealed only issues that are not relevant or are of minimal relevance to the eligibility of the applicant for international protection,

(b) that the applicant has made inconsistent, contradictory, improbable or insufficient representations which are clearly unconvincing in relation to the eligibility of the applicant for international protection, or

(c) that the applicant has failed without reasonable cause to make his or her application earlier, having had opportunity to do so.

Part 6 ('*Appeals to Tribunal*'): Heads 37 - 42

- 6.1. Head 38(2)(a) requires that reasons be given for a request to withdraw from an oral hearing. This appears to be a somewhat arbitrary requirement as an applicant who declines an oral hearing at the time of lodging their appeal (Head 37(2)(b)) is not required to give reasons as to why they do not want an oral hearing.
- 6.2. It is commendable that there is provision now being made for hearings to take place in public (Head 38(7) – '*An oral hearing may be held in public where the applicant so consents and where, in the opinion of the Tribunal, it is in the interests of justice to do so*'). However, it should not be framed as something which is solely within the discretion of the Tribunal once the applicant consents to the hearing being held in public. Section 16(14) of 1996 Act, which requires that hearings be held in private, should be interpreted as allowing the applicant to waive his/her right to a private hearing. Justice must not only be done but must also be seen to be done.
- 6.3. Hearings should also be recorded, as can be facilitated in Court, via Digital Audio Recording. This will avoid any dispute as to what occurred during the hearing, will allow for quality control in respect of interpreters, and will inevitably speed up settlements and facilitate alternative dispute resolution, etc. in the event of litigation. This should also apply to the preliminary interviews at the first instance for all protection claims.
- 6.4. Head 38(6)(a) refers only to the Tribunal enabling the applicant to be present and their legal representative, where they have one. Explicit provision should be made to allow the applicant to have someone accompany them at the hearing and the Tribunal should facilitate this, unless it appears that it would be contrary to the interests of justice or an interference with the hearing.
- 6.5. Head 41 ('*Withdrawal and deemed withdrawal of appeal to Tribunal*') refers to the applicant being deemed to withdraw their application if no explanation is furnished to the Tribunal within 3 working days of having failed to attend an oral hearing. While the Committee notes that similar provisions are currently contained in the 1996 Act, it considers that this is too short a period and a more reasonable timeframe should be provided.
- 6.6. Generally, the Committee notes that many of its concerns around the processing of claims at the first instance – fair procedures, legal representation, a thorough assessment of the claim, human rights compliant determinations – arise again in relation to the Tribunal.

Part 7 (*'Declarations and other Outcomes'*): Heads 43 - 46

- 7.1. The time constraints contained under Head 43A regarding the option to voluntarily return to the 'country of origin' are too short and provide the individual with little or no options regarding seeking any legal advice within that period of time. This renders this option both impractical and inaccessible, and is contrary to the interests of both the applicant and the State.
- 7.2. Head 43(11) states that '*A refugee declaration or a subsidiary protection declaration, although given or deemed to have been given under these Heads, shall not be in force in relation to an Irish citizen*'. This is of concern as it seems to remove the possibility of family reunification for refugees or subsidiary protection grantees who have since become Irish citizens. This will mean that such individuals are effectively disadvantaged by becoming Irish citizens. Clarification should be provided in relation to the effect of this provision.
- 7.3. Head 44 (*'Prohibition of refoulement'*) defines the principle of non-refoulement as follows:
- A person shall not be expelled or returned in any manner whatsoever to the frontier of a territory, where in the opinion of the Minister, the life or freedom of that person would be threatened for reasons of race, religion, nationality, membership of a particular social group or political opinion, or, where in the opinion of the Minister, there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.
- 7.4. This definition has been expanded to take into account both threats to life and freedom and also the threat of torture. This is a positive development. Nonetheless, further care must be taken in how this definition will be expanded upon and treated by the Bill.
- 7.5. Additionally, Head 45(5) (Head 45 (*'Deportation Order'*)) states that a person who would otherwise be subject to a deportation order 'but for' Head 44, should be given permission to remain but there is no detail or explanation as to the nature or duration or length of that permission.
- 7.6. In relation to revoking a deportation order, Head 45(4) provides no specific grounds upon which the Minister may revoke such an order. The Committee recommends that grounds for the revocation of a deportation order should at least include those currently provided in Section 3(6) of the Immigration Act 1999 in relation to the Minister's considerations prior to the making of such order. The Committee is concerned that, as the Bill appears to also omit any mechanism for appealing a deportation order or the refusal to revoke such order, then any such order may be rendered permanent in nature by the Bill.
- 7.7. Head 46(1) deals with the '*Revocation of refugee declaration or subsidiary protection declaration*' and appears to fetter the Minister's discretion under particular circumstances as to whether or not to revoke a declaration. In such particular circumstances, it will now become mandatory for the Minister to revoke the refugee declaration or subsidiary protection declaration. The Committee recommends that the Minister's discretion in this

regard should be maintained. For example, under Head 46(1)(c), it appears that the Minister would have to revoke a declaration in circumstances where there has been *“misrepresentation or omission of facts, whether or not including the use of false documents”* – this type of revocation should be limited to circumstances where there has been fraudulent or intentional misrepresentation regarding material facts which were core to the application and declaration. On occasion, people who have been trafficked will be in possession of false documentation. Fettering or removing the Minister’s discretion in this manner fails to allow for consideration of such circumstances.

Part 8 ('Content of International Protection'): Heads 47 - 52

- 8.1. Under Head 48 ('*Permission to reside in the State*'), a family member who is admitted through reunification will no longer be entitled to remain for as long as the refugee is, but only for as long as they continue to be, a "*family member*" of a "*qualified person*". It is not entirely clear how a person may '*cease to be a qualified person or a family member*'. This must be clarified. It is not clear if a family member could have their '*permission to reside*' revoked in circumstances where their relative ceases to be a refugee due to becoming an Irish citizen (see the concerns regarding Head 43 above), or perhaps in circumstances where an underage child of a refugee becomes an adult, or in the event of the dissolution of a marriage of a qualified person.
- 8.2. Head 50 ('*Permission to enter and reside for member of family or qualified person*') sets a restrictive deadline of 12 months (from the date of the refugee declaration or subsidiary protection declaration) within which the individual must apply for family reunification. People from war-torn countries often lose track of their family members, sometimes for years. A strict deadline for such applications is unrealistic given the instability of war-torn/politically volatile states from which refugees flee, and could result in families remaining separated with no possibility of reunification thus failing to take account of the human rights to family and private life. Furthermore, such a deadline would exclude persons who became refugees while they were still minors from access to family reunification, upon reaching the age of majority, with spouses/civil partners.
- 8.3. The Committee is also concerned about Head 50(8) and the definition of '*member of the family*' in relation to marriage and civil partnership. The requirement that the marriage or civil partnership must be in existence at the time of the asylum application does not take into account the circumstances in which many refugees find themselves.
- 8.4. In relation to the legal institution of 'civil partnership', civil partnership is defined in the Bill by reference only to the '*Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*'. Many LGBTI individuals flee their country of origin for reasons of persecution of their sexual identity or gender as their countries of origin not only do not allow for any kind of marital status capable of recognition under the 2010 Act, but they also often directly or indirectly persecute such individuals and their families. In effect, this requirement under Head 50(8) could indirectly discriminate against LGBTI refugees/grantees of subsidiary protection.
- 8.5. Head 50(2) refers to investigating the identity of a person making such an application, the relationship between them and the qualified person, and "*the domestic circumstances of the person who is the subject of the application*". Potentially, the latter requirement of 'domestic circumstances' could encompass dependent family members such as elderly parents, etc. but it is unclear. It is further noted that, under Head 50(8), a restrictive definition of 'family member' is provided where a '*member of the family*' is defined as being limited to spouses, civil partners, children of the qualified person who are under 18 and not married, or parents of the qualified person where the qualified person is under 18.

Part 10 (*‘International Protection Appeals Tribunal’*): Heads 55 - 60

- 9.1. Regarding Head 59 (*‘Registrar’*), the Committee notes that this new role is not adequately explained, it requires further clarity in order to ensure that the independence of the Tribunal and the Chairperson is preserved.
- 9.2. The Committee notes the absence of the Refugee Advisory Board, as contained under the 1996 Act. In that absence, the Committee would suggest that the matter of protection and leave to remain determination would come under the remit of the Ombudsman and the Ombudsman for Children.

Separated Children

- 10.1. The Committee considers that greater detail needs to be added to the primary legislation regarding the issue of separated children in the protection context.
- 10.2. Head 52(2) states that, as regards the relevant provisions of the rest of Part 8 (*'Content of International Protection'*), the best interests of the child "*shall be a primary consideration*". It is submitted that the best-interests principle should be fully enshrined in the legislation and that the definition of a separated child as prescribed by the '[*Separated Children in Europe: Programme Statement of Good Practice*](#)' should be laid down in the primary legislation.
- 10.3. 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. Currently, there is no statutory procedure in relation to age assessment.⁴ This decision-making power must be exercised in accordance with the principles of constitutional justice and fair procedures and should include the right of review. Such principles require certain minimum statutory safeguards.
- 10.4. At Head 23 (*'Medical examination to determine the age of unaccompanied minor'*), there is no guidance provided regarding what factors a medical examination should take into account and the qualifications such a medical examiner should hold. In accordance with the UNHCR guidelines on best practice, there should be provision for the physical, developmental, psychological, environmental 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 inappropriate. Particular care should be taken that the examinations are gender appropriate. The Committee recommends that the Justice Committee should hear expert evidence on this hugely complex issue of age assessment.
- 10.5. The current proposals vest powers in the Immigration Officer with potentially serious consequences; for example, the power to detain could lead to the consequential detention of a minor as a result of a flawed age assessment. 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.
- 10.6. The proposed legislation should lay down clear and objective guidance on the assessment of the responsible adult of a separated child. In law a child is either accompanied by a guardian or is a separated child. If the child is a separated child, they should be referred to the Child and Family Agency. The current proposals allow for the use of a "*responsible adult*" (see Head 12 *'Application for international protection'*) – a term which may not protect the interests of the child and does not accord with Irish law and the purpose of which is

⁴ The only 'guidance' available is from the case of [Moke v Refugee Applications Commission](#), 2005 IEHC 317.

unclear. The Committee is of the view that a child is either with their parents/legal guardians or the child is unaccompanied.

- 10.7. There does not appear to be anything in the Bill that will protect a potential child victim of trafficking. The Bill does not provide any guidance on how the suitability of the proposed adult can be ascertained, save the reference at Head 32A regarding the personal interview. While there is provision that an interviewer may inform the Child and Family Agency following enquires, the interview may not take place for several weeks after the minor's arrival in the State, thus potentially creating a vulnerable situation for the child.
- 10.8. There should be clarity in the legislation as to the legal relationship between the child and the Child and Family Agency.
- 10.9. Where it is proposed to place a separated child in the care of an adult or purported relative at any stage, every effort must be made to identify a suitable and verifiable 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. While in practice the Child and Family Agency conduct such investigations, including DNA, such procedures should be reflected in the Bill. .
- 10.10. It is recommended that a separated child should be appointed a legal guardian to represent and assist them in the protection process.

Translation and Interpretation

- 11.1. Given the huge importance of evidence in protection (and leave to remain) claims, particularly in the context of the credibility assessment of an applicant where in most cases such evidence is the deciding factor, it is essential that competent interpreters and translators are provided at all stages of the process. There is no legislation regulating translators and interpreters in Ireland, nor is there any national professional qualification on foot of statute, or a practice direction from the courts. Translation and interpreting are unregulated in Ireland, which means that anyone who speaks English and another language can call themselves a translator or an interpreter.
- 11.2. The Committee understands that practitioners in this area have concerns in relation to the quality of the interpretation and translation services available at each stage of the protection application process. It is the Committee's view that the interpreters' and translators' professions should be regulated by the State to ensure that adequate interpreters are provided and that minimum standards must be discussed, defined and enforced in this area.
- 11.3. The Committee considers that it is absolutely crucial that qualified and regulated interpretation and translation services be provided at every stage of the international protection application system. Such services are essential in ensuring that there is effective and clear communication with all applicants at all stages of the process. It is of extreme importance to ensure that applicants can understand what is happening to their claim, what is required of them, and their legal entitlements. The importance of these services arises repeatedly throughout the Bill.
- 11.4. For example, Head 17 (*'Statement to be given to applicant'*) refers to the Minister providing the person with "*a statement in writing specifying in a language that the applicant may reasonably be supposed to understand of the procedure to be followed ... and of his or her rights and obligations ...*"; the emphasis should be on the importance of ensuring that there is effective communication, such that communication *must be* in a language and form (depending on levels of literacy) which the person can reasonably understand.
- 11.5. Head 32A (*'Personal interview'*) raises a further matter of serious concern regarding the requisite standard of interpretation in the application process. Head 32A(4) states that the Minister's only obligation in this regard is to ensure that the interpreter speaks a language "*that the applicant may reasonably be supposed to understand and in which he or she is able to communicate*". The Committee considers that this minimum threshold does not hold the application process to sufficiently high practice standards. A more practical and effective test would be, at the very least, that both the applicant and interpreter ought to be able to understand and clearly communicate with one another – without misinterpretation.

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Joint Oireachtas Committee on Justice, Defence and Equality Submission on the International Protection Bill 2015

8 May 2015

Overview

Nasc, the Irish Immigrant Support Centre, is a non-governmental organisation working for an integrated society based on the principles of human rights, social justice and equality. Nasc (which is the Irish word for link) works to link migrants to their rights through protecting human rights, promoting integration and campaigning for change. The information we present in this submission is based on our experience providing legal advocacy and support for asylum seekers and refugees.

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A representative of Nasc is willing to appear before the Committee in a public session to discuss the arguments made in this submission.

Submission to Joint Oireachtas Committee on Justice, Equality and Defence on the International Protection Bill 2015

I. Introduction

Nasc, the Irish Immigrant Support Centre, is a non-governmental organisation working for an integrated society based on the principles of human rights, social justice and equality. Nasc (which is the Irish word for link) works to link migrants to their rights through protecting human rights, promoting integration and campaigning for change. Through our legal clinics, Nasc provides information, advice, and support to over 1,000 migrants and their families annually living in the Cork area. It is the only NGO offering legal information and advocacy services to migrants in Ireland's second largest city.

Nasc welcomes the opportunity to make a submission to the Justice Committee on the International Protection Bill 2015. Nasc was founded in 2000 in response to the rapid rise in the number of migrants moving to Cork. This rise was due in part to the introduction of the Government's policy on dispersal and the establishment of the Direct Provision System in 1999, which resulted in an increase in the numbers of asylum seekers being dispersed to direct provision accommodation in Cork. At that time there were no services in the city to address the needs of this vulnerable population. There are currently five direct provision centres in Cork City and County placing Cork as one of the counties with the highest asylum seeking population in the country. We have over fifteen years experience working in the immigration and protection systems and our contribution to this process is directly informed by the issues that present in our legal clinics and through our direct work with asylum seekers at all stages of the process.

II. General Observations

Nasc broadly welcomes the publication of the General Scheme of the International Bill (General Scheme) and welcome the fact that the and General Scheme relates solely to protection, removing the uneasy tension between Immigration and Protection Legislation. We particularly welcome the proposed introduction of a single or unified procedure to replace our current system, in which, eligibility for refugee status and subsidiary protection status are considered sequentially. The sequential nature of our current system has led to inordinate

delays in the processing of applications, resulting in asylum seekers spending many years awaiting a decision on their application.

The introduction of the Single Procedure coupled with the forthcoming report of the Working Group on The Protection Process and Direct Provision, of which Nasc was a member, offers the State a unique opportunity to establish a fair, efficient, and transparent Protection System that is in compliance with our obligations under International Human Rights Law, E.U. Law and Domestic Legislation. The proposed introduction of the Single Procedure, as outlined currently in the General Scheme, goes some way to address some of the systemic issues that have lead our current dysfunctional system.

Current EU Standards

It is Nasc's contention that one of the primary and principle reasons for the well-documented systemic failures in our current Protection and Reception systems stems from the fact that we have failed to meet the relevant minimum E.U. minimum standards for Protection and Reception of Asylum Seekers. These standards are set out in a suite of Directives known as the Common European Asylum System (CEAS) which derives from Member States' obligations under Article 63¹ of the Treaty on the Functioning of the EU (TFEU). The primary Directives here are: the Reception Conditions Directive², the 'Dublin' Regulation³, the Recast Qualification Directive⁴

¹Article 63 Provides: 1. The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising:

- (a) a uniform status of asylum for nationals of third countries, valid throughout the Union;
- (b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection;
- (c) a common system of temporary protection for displaced persons in the event of a massive inflow;
- (d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status;
- (e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection;
- (f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection;
- (g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.

3. In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.

² Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection

(adopted in December 2011), the Recast Eurodac Regulation,⁵ and the Procedures Directive⁶. A number of these Directives were passed by European Parliament in June 2013, when Ireland held the presidency of the European Council.

Ireland is not bound to participate in European instruments in this area,⁷ but may cherry pick or opt-in or any Directive it wishes to. To date, Ireland has opted in to only one Directive in the Recast CEAS instruments - the Recast Dublin Regulation. The current General Scheme, which is absent of any of the substantive provisions across a number of the Directives, would seem to indicate a marked unwillingness and a missed opportunity by the State to introduce and be held accountable to a clear set of minimum basic standards for the reception, processing and withdrawal of protection applications in Ireland. Nasc would therefore strongly recommend that Ireland opt in to all the Directives under the Common European Asylum System, placing us in line with EU member states and ensuring that Ireland has a fair, transparent and humane Protection and Reception System. With the possible exception of the introduction of the Single Procedure and a repeal of the ban on the right to work (Head 15(3)), primary legislation would not be required to implement and give effect to the Directives⁸. This would also enable Ireland to keep up to date with any future developments in changes in EU law without the need for Primary Legislation.

Notwithstanding the above overarching recommendations, Nasc has number of general recommendations:

Equality

Nasc are concerned that the General Scheme does not contain a provision of non-discrimination or equality and given the fact that our equality legislation does not extend to protection policy, Nasc would recommend that consideration be given to the introduction of an equality guarantee.

Statutory Provision for Reception

³ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person

⁴ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted

⁵ Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013

⁶ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection

⁷ Under Protocol, No 21, annexed to the Treaty of European Union and the Treaty on the Functioning of the European Union, "on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice"

⁸ European Communities Act, 1972 (as amended) provides for the adoption of statutory instruments to implement binding instruments of EU law with the same effect as if they were acts of the Oireachtas

There is currently no legislative basis for the direct provision system. We need to implement a reception system that has undergone Parliamentary scrutiny, and ensures compliance with our international obligations under the ECHR Act 2003 and also EU law. Nasc recommends that statutory provision for reception is included in the General Scheme.

Extending the Remit of the Ombudsman

Several aspects of the Reception and Integration Agency's 'House Rules', including the complaints procedure, were recently deemed unlawful in High Court Justice Mac Eochaidh's ruling in *C.A. and T.A (a minor) v Minister for Justice and Equality, Minister for Social Protection, the Attorney General and Ireland* (14 November 2014). This is an extremely welcome development; Nasc has long highlighted the failures in the existing complaints procedure and called for an independent and impartial complaints mechanism to provide oversight of the direct provision system.

While we understand that the High Court judgment will force RIA to develop some form of independent complaints system, we strongly recommend that oversight of that mechanism be officially extended to the Offices of the Ombudsman and the Children's Ombudsman and that this oversight be guaranteed in legislation in the Protection Bill. Nasc has long advocated for the Department of Justice to recognise the Offices of the Ombudsman and the Children's Ombudsman's investigatory remit over all administrative issues relating to asylum to the exclusion of decisions on status, which includes accommodation, administration processes and internal complaint handling. These are areas the Offices of the Ombudsman and the Children's Ombudsman already believe to be within their remit; however the Department of Justice does not share this understanding.⁹ Clarification in the General Scheme will ensure that that remit cannot be contested.

Further, we recommend that that the remit of the Ombudsman and the Children's Ombudsman be extended to the administration of the law relating to asylum and immigration, which would include asylum decisions. Ombudsman Emily O'Reilly, in one of her last actions prior to taking up the role of European Ombudsman, presented to the Joint Oireachtas Committee on Public Service Oversight and Petitions in September 2013 on this area continuing to remain outside the Ombudsman's jurisdiction, and noted that 'this anomalous situation is virtually unique in terms of the jurisdiction of national Ombudsmen internationally'. We recommend that the necessary amendments to the Ombudsman Act be included in the General Scheme.

Section II Recommendations:

- Ireland opt in to all of the EU Directives under the Common European Asylum System

⁹ See JOC Public Service Oversight and Petitions, Report on the extension of the remit of the Ombudsman to cover all aspects and bodies associated with the Direct Provision System (DPS) on DP, 2015; Office of the Ombudsman, *A report by the Ombudsman for Children on the operation of the Ombudsman for Children Act, 2002* (March 2012).

- The introduction of an equality guarantee into the General Scheme
- Statutory provision for reception to ensure parliamentary oversight
- The remit of the Ombudsman and the Children's Ombudsman be clarified and extended in the General Scheme in relation to handling of all issues relating to asylum and immigration

III. The Best Interest of the Child

The principle of the best interests of the child derives from Article 3 of the UN Convention on the Rights of the Child (CRC), which Ireland ratified in 1992. In addition, Ireland is bound by the European Convention on Human Rights (ECHR), which does not specifically address the principle; however the European Court of Human Rights (ECtHR) has developed a practice of interpreting certain substantive Convention rights in light of the principle.¹⁰ The best interest of the child principle is also enshrined in Article 24 of the EU Charter of Fundamental Rights, which became legally binding in Ireland following the passing of the Lisbon Treaty in 2009. In implementing the various EU Directives under the CEAS in the International Protection Bill, Ireland is bound to do so in conformity with the rights contained in the Charter of Fundamental Rights. Finally, both the Child and Family Agency Act 2013 and the Children First Bill 2014 (published but not yet enacted) give significant prominence to the best interest of the child principle in relation to all functions Tusla, the Child and Family Agency (CFA) performs under the legislation.

The UN Committee on the Rights of the Child defined this principle as a 'threefold concept': a substantive right; a fundamental, interpretive legal principle; and a rule of procedure.¹¹ Thus, giving effect to the best interests of the child principle is not solely a question of incorporating provisions into domestic legislation on substantive rights. It is a question of interpreting and drafting legal provisions in a manner that is compatible with the principle as well as designing rules of procedure to ensure they are compatible with and facilitate the application of the principle.

The General Scheme must reflect the general principle that the best interests of the child be a primary consideration in all actions concerning all children at every stage of the process. Currently, only Heads 23 (medical assessment to determine the age of unaccompanied minor); 33 (unaccompanied minors); 47-49 (extension to qualified persons of certain rights, permission to reside in the State, travel document); and 50-51 (right to family reunification) contain provisions that the best interests of the child be a primary consideration.

¹⁰ In the case of *Neulinger and Shuruk v Switzerland*, the ECtHR held that there is a 'broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount'. *Neulinger and Shuruk v Switzerland*, Appl. No. 41615/07, Judgment of 6 July 2010, para. 52.

¹¹ UN Committee on the Rights of the Child, General Comment 14

The right of a child to make a protection application

The UN Committee on the Rights of the Child's General Comment 6 states that 'asylum seeking children, including those who are unaccompanied or separated, shall enjoy access to asylum procedures and other complementary mechanisms providing international protection irrespective of age'. The General Scheme must contain a clear statement that all children have the right to lodge an application for international protection on their own behalf, or through a representative, which, in the case of accompanied children may be a parent (Head 12). By amending Head 12 to clearly articulate that right, it will remove any potential conflict with Head 6(2)f, which makes explicit reference to acts of persecution of a child-specific nature.

The rights of the child in relation to a protection application

The application of the best interest of the child principle does not give an automatic right to international protection; a child must meet the same eligibility criteria as any other protection application. That being said, the best interest of the child principle is potentially relevant to evaluating a claim for protection when the applicant is a child, for instance acts of persecution of a child-specific nature or child-specific country of origin information may be relevant in assessing an application. The General Scheme should include a clear statement to that effect.

The right of the child to be heard

Article 12 of the CRC (and Article 24 of the CFR) provides that States must assure that a child 'who is capable of forming his or her own views [has] the right to express those views freely in all matters affecting the child', and that 'the views of the child [be] given due weight in accordance with the age and maturity of the child', and that the child 'be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or appropriate body, in a manner consistent with the procedural rules of national law'. Therefore, a child who is capable of forming his or her own views must be provided the opportunity to be heard at all stages of the asylum procedure. The General Scheme must include reference to ensuring the rights of the child to be heard are given sufficient expression and protection.

Training for those working with children

Giving effect to the best interest of the child principle requires those working in the system to have a high level of awareness of the specific rights and needs of children and their obligations under international and domestic law. The provision of training is necessary in this regard. The General Scheme should contain provisions requiring procedural and substantive training for decision-makers who make decisions in relation to children and those who interview them.

Prioritisation of children's applications

Under the Heads of Bill, Head 67 refers to the discretion of the Minister in regard to the prioritisation of applications. Both the Refugee Act 1996 and the 2013 Subsidiary Protection Regulations facilitate the prioritisation of applications with reference to age; however Head 67 does not include specific reference to age as a specific grounds for the Minister to apply discretion. The General Scheme should ensure that the Minister can continue to prioritise cases where appropriate by reference to the age of the application, or his or her status as an unaccompanied minor.

Separated Children or Unaccompanied Minors

Unaccompanied minors (or Separated Children Seeking Asylum) are defined as “children under 18 years of age who are outside their country of origin, who have applied for asylum and are separated from their parents or their legal/customary care giver.”¹² There are many reasons why children arrive unaccompanied and child trafficking is one of the reasons. Separated children are a vulnerable cohort and the state is duty bound by international and domestic law to protect and provide for separated children in the same way as children normally resident in the State. Currently, it is under the Child Care Act, 1991 and the Refugee Act, 1996 (as amended) that the responsibilities of the State are set out in relation to the care needs of separated children who seek asylum in the State. Separated children who arrive in this jurisdiction are placed in the care of the State, with Tusla, the Child and Family Agency (CFA).

For the purposes of the General Scheme, a clear definition of the separated child should be included in the legislation, in accordance with the UNHCR best practice definition. As it stands, there is a lack of clarity in the General Scheme about whether a minor is ‘accompanied’ or ‘unaccompanied’. Under the General Scheme, Head 12(1)b notes that an adult may make an application for international protection *‘on behalf of another person who is in the State (whether lawfully or unlawfully) where the person over the age of 18 years is taking responsibility for the care and protection of the person who is under the age of 18 years’* (emphasis added). In Head 14(1) it states that, when a person indicates that he or she wishes to make an application for international protection, and it appears to an immigration officer that that person is under the age of 18 and *‘is not accompanied by an adult who is taking responsibility for the care and protection of the person concerned’* (emphasis added), the Child and Family Agency is notified. Upon this notification, the Child Care Acts 1991 to 2007, the Child and Family Agency Act 2013 and ‘other enactments relation to the care and welfare of persons under the age of 18 years’ applies to the separated child (Head 14(2)).

In law and international best practice, a child is either accompanied by a parent or guardian or is a separated child. The current General Scheme make reference to a ‘responsible adult’, which is not defined and does not accord with Irish law (unlike the term ‘guardian’). This ‘responsible adult’ has powers to make an application for international protection on behalf of a separated child, and under Head 23, has the power to consent to a

¹² UNHCR, *Separated Children in Europe Programme: Statement of Good Practice* (2004), available: <http://www.unhcr.org/4d9474399.pdf>

medical examination of a separated child, without their relationship to the child ever having to be established. The adult could be a friend, or the adult could be the child's trafficker. If a child enters the state with an adult that is not their parent or legal guardian, the General Scheme must include clear guidance of how to establish the relationship of this adult to the separated child, if the adult is acting in the best interests of the child, and if it is in the best interest of the child to remain with that adult, prior to giving that adult powers to make decisions on behalf of that child. This must include establishing evidence of appropriate ties to the child, with due consideration given to cultural differences.

If the child is a separated child, Nasc recommends that he or she should be taken into the care of the Child and Family Agency using interim and full care orders. This would allow the CFA to act as legal guardian as defined within the Child Care (Amendment) Act 2011. This could apply in the context of acquiring early legal advice to ensure that, if appropriate, a separated child enters into the protection process as soon as possible after he or she enters the care of the state. A care order also means that the Court can appoint a guardian ad litem to provide additional support. The Child and Family Agency would then function as the separated child's legal guardian in the context of age assessment, which under Head 23, currently allows a 'responsible adult' to consent to a medical examination for a separated child. Further to Head 23, UNHCR guidelines on best practice call for the 'medical examination' to make provision for the physical, development, psychological and cultural attributes of the child and be conducted by independent professionals with appropriate expertise and familiarity with the child's ethnic and cultural background, and be gender appropriate.

Section III Recommendations:

- The General Scheme must reflect the general principle that the best interests of the child be a primary consideration in all actions concerning all children at every stage of the process.
- The General Scheme must contain a clear statement that all children have the right to lodge an application for international protection directly, or through a representative, which, in the case of accompanied children may be a parent.
- The General Scheme should include a clear statement that the best interest of the child principle is potentially relevant to evaluating a claim for protection when the applicant is a child
- The General Scheme must include reference to ensuring the rights of the child to be heard are given sufficient expression and protection.
- The General Scheme should contain provisions legislatively requiring procedural and substantive training for decision-makers who make decisions in relation to children and those who interview them.
- The General Scheme should ensure that the Minister can continue to prioritise cases where appropriate by reference to the age of the application, or his or her status as an unaccompanied minor.
- The General Scheme should include a clear definition of the separated child, in accordance with the UNHCR best practice definition.

- The General Scheme must include clear guidance of how to establish the relationship of the ‘responsible adult’ to the separated child.
- The General Scheme should include provision that if a child is a separated child, he or she should be taken into the care of the Child and Family Agency using interim and full care orders.
- The General Scheme should make provision within the medical assessment (Head 23) for the physical, development, psychological and cultural attributes of the child to be taken into consideration and be conducted by independent professionals with appropriate expertise and familiarity with the child’s ethnic and cultural background, and be gender appropriate.

IV. Family Reunification

The right to family reunification for refugees and persons eligible for subsidiary protection (sponsors) is contained in Heads 50 – 51 of the General Scheme. The right to a family life is affirmed by the Irish Constitution¹³ is also recognised by international¹⁴ and European¹⁵ instruments. It is recognised¹⁶ that Family reunification plays an essential part in the long term integration of refugees and, more latterly, persons eligible for subsidiary protection, into their host member State.

Nasc is concerned that the provisions contained in the General Scheme are significantly more restrictive than the rights currently legislated for by section 18 of the Refugee Act, 1996 and Regulation 25 of the European Union (Subsidiary Protection) Regulations 2013 and would represent a significant diminution of family rights for sponsors and their family members.

Restriction of Family Reunification to Nuclear Family

¹³ Article 41, Bunreacht na hÉireann

¹⁴ Article 16(3) *Universal Declaration on Human Rights*; Articles 9 and 10 *United Nations Convention on the Rights of the Child*; Article 17 and 23(1) *International Covenant on Civil and Political Rights*; Article 10(1) *International Covenant on Economic, Social and Cultural Rights*;

¹⁵ Article 8 *European Convention for the Protection of Human Rights and Fundamental Freedoms*; Articles 7 and 9 of the *Charter of Fundamental Rights of the European Union*.

¹⁶ UN High Commissioner for Refugees (UNHCR), *Protecting the Family: Challenges in Implementing Policy in the Resettlement Context*, June 2001, available at: <http://www.refworld.org/docid/4ae9aca12.html> [accessed 5 May 2015] UNHCR has outlined five guiding principles of family reunification:

- a) The family is the natural and fundamental group unit of society, and is entitled to protection by States
- b) The refugee family is essential to ensure the protection and well being of its individual members
- c) The principal of dependency entails flexible and expansive family reunification criteria that are culturally sensitive and situation specific
- d) Humanitarian considerations support family reunification efforts
- e) The refugee family is essential to the successful integration of resettled refugees

Heads 50-51 remove the eligibility for sponsors to apply for dependent family members who may fall outside the 'nuclear family' but who may nonetheless have been a dependent part of the sponsor's household. Head 50(8) limits the definition of a 'member of the family' to spouses or civil partners and unmarried children under the age of 18, or in the case of a minor sponsor, parents and their children. As outlined by UNHCR, refugee families "rarely fit neatly into preconceived notions of a *nuclear* family (husband, wife and minor children... A broad definition of a family unit – what may be termed an extended family – is necessary to accommodate the peculiarities in any given refugee situation."¹⁷

Same-Sex Relationships

While we welcome the extension of family reunification rights to civil partners of refugees, Nasc are concerned that in reality LGBT refugees will remain unable to realise their rights to family reunification with same-sex spouses or partners. The General Scheme provides that the relationship must have been subsisting at the time of the sponsor's application for protection in Ireland however same-sex marriages or civil partnerships are illegal in the top refugee-producing countries. Appendixes 1-3 contain tables establishing that there is no provision for same-sex marriage or partnership in any of the 5 top refugee producing countries in the world or amongst the nationalities making up the highest number of family reunification applications in Ireland. Appendix 1 contains a table showing the nationalities from which the highest numbers of asylum seekers entered Ireland between 2011 and 2014 and shows that there is no provision in any of those countries for same-sex marriages and, in the majority, same-sex sexual activity is illegal. It is quite possible that a sponsor's application for international protection may have been based on the risk of persecution because of their sexual orientation and it would be unrealistic to expect, in these circumstances, couples to have married or cohabitated prior to the sponsor fleeing their country of origin.

De Facto Partnerships

The family reunification provisions contained in Head 50(8) excludes family reunification for *de facto* partners even in circumstances where a couple may have cohabitated and have had children together. Confining the definition of 'family members' to relationships based on civil partnerships or marriage ignores the realities of family life and is contrary to the principles of Article 8 of the *ECHR*. In Ireland 35.4% of all births occur outside marriage or civil partnership. The restrictive definition of 'family members' would mean that sponsors would have a right to apply for biological children, but in some cases, not the other parent and could effectively lead to breaking up the family unit. This would significantly undermine the integrity of the family life in the State.

Dependents

¹⁷ Ibid

The Refugee Act 1996 contains includes the possibility for refugees to apply for dependent family members, “any grandparent, parent, brother, sister, child, grandchild, ward or guardian of the refugee who is dependent on the refugee or is suffering from a mental or physical disability to such extent that it is not reasonable for him or her to maintain himself or herself fully.”¹⁸ No similar provision is included in the General Scheme. Nasc is extremely concerned that these provisions are inadequate and will particularly affect very vulnerable family members including adults with disabilities and orphaned wards who have become part of the sponsor’s family unit.

Sami, a refugee, came to Nasc for assistance with a family reunification application. Sami had spent several years waiting for his application for asylum to be processed in Ireland. Once he was granted refugee status, he immediately wished to apply for family reunification with his wife and 4 children who were living in a refugee camp. Sami’s eldest child was over 18 and suffered from a significant physical disability. Sami had a right to family reunification with his wife and 3 younger children, and the Minister used his discretion to also grant Sami’s eldest son family reunification under s18(4) to ensure that the family unit was maintained.

Time-bound right to Family Reunification

Head 50(1) limits the right to family reunification to the 12 month period after the sponsor has been recognised as a person in need of international protection. Current legislation does not contain this restriction. This time period should be removed as it will severely impact the most vulnerable family members who may have become separated in fleeing conflicts or who may have been imprisoned. Nasc has represented a number of sponsors who have only successfully found family members years after they have been granted status. Under the proposed General Scheme, they would have lost their right to family reunification.

Amino from Somalia was granted refugee status. She successfully applied for family reunification for her children, who were living in a refugee camp in Ethiopia, to join her. At the time of her application, she was unable to find her husband Mohamed who had become separated from the rest of the family. She had applied for tracing through the Red Cross but this did not yield any leads. Four years after she was granted status, her husband contacted her through social media. He had been frantically searching for her and their children for years and a chance encounter with a mutual acquaintance gave him enough information to track her down. Amino was able to apply for family reunification to complete her family.

¹⁸ Article 18(4) Refugee Act, 1996

Loss of family reunification status if a family member does not enter or reside in the State by a specified time

Head 50(5) permits the Minister to provide a time limit by which a family member granted family reunification must have entered the State. Nasc is concerned about the introduction of any such restrictions which may not take into consideration any exceptional measures or obligations which may arise which may prevent travel. Nasc also notes that the cost of travel is borne entirely by the sponsor (there are no grants available) and can represent a very significant cost, particularly for those with large families.

Failure to provide for a right of appeal of negative decisions

The General Scheme does not provide for a right of appeal on a negative family reunification decision. In the event that the sponsor wishes to challenge a decision, the only legal remedy open to him/her is judicial review proceedings. Nasc believes that judicial review is not an adequate remedy as it is not an appeal on the facts of the case and is an inefficient and costly mechanism.

Time limit on processing applications

The General Scheme does not include a statutory deadline by which a family reunification application should be processed. Nasc recommends that a processing time limit be introduced in legislation. Directive 2003/86/EC on the right to family reunification (to which Ireland is not a signatory) contains an obligation on Member States to provide a written decision on a family reunification application no later than nine months after the date of application.¹⁹

Section IV Recommendations:

- The requirement for the marital relationship or civil partnership to have existed at the time of application for international protection be removed;
- The family reunification provisions should be expanded to include cohabitating partners;
- The current definition of a family based on the 'nuclear family' be replaced with a broader definition of a family unit which would include dependent family members;
- The requirement that family reunification applications be made within 12 months of the grant of international protection status be removed;
- Provision regarding the loss of status in the event of the family member's failure to enter or reside in the State should be removed;
- A right of appeal should exist for negative family reunification applications.
- The introduction of a statutory time frame for processing applications.

¹⁹ Article 5(4) Directive 2003/86/EC of 22 September 2003 on the right to family reunification

V. Detention

Access to the Protection Process

Nasc is currently undertaking research into Immigration Related Detention and this is due to be published later this year. The initial finding emerging from the research to date would indicate that a considerable number of migrants who come to Ireland to access the protection system are, in a number of cases, not being given the opportunity to make an application for international protection, and are being "turned around" at our airports. This is a matter of serious concern to Nasc. To ensure that we are in compliance with our International Human Rights obligations, EU Law and our Domestic Legislation we would recommend the following be provided for under Head 19:

- a) All immigration Officers are fully trained on International Protection Legislation and their obligations to grant access to the Protection System for those who seek it.
- b) Any detained person should be informed in writing, in a language that they understand, their right of appeal against any decision to detain or refuse access to the territory.
- c) All protection applications detained should have the right to inform person of their choice and should be granted access to legal representation from the beginning of their detention.
- d) Both the UNHCR and the Minister or Tribunal as the case may be shall also be informed from the outset of a decision to detain a Protection Applicant.

Compatibility with International Legal Obligations

The 1951 UN Convention (the Convention) relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees, to which Ireland is a part and the General Scheme seeks to give effect to, explicitly recognises and provides for the fact that Protection Applicants may enter the state in an irregular manner. Article 31 of the Convention prohibits States from imposing penalties on Applicants who enter the state irregularly. This is in recognition of the fact that those fleeing war and persecution may not be able to obtain the requisite travel documentation. Article 31 of the Convention provides:

The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided

they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

Nasc is concerned that Head 19(1)(c) and (e)(ii) (Detention Provisions) may be incompatible with the Convention as it provides that a protection applicant can be detained if he/she is in possession of forged, altered or substitute documentation. The Article does not afford the Applicant an opportunity to show "good cause" for being in possession of said documents as required under Article 31 of the Convention.

Nasc recommends that in line with both the text and spirit of the Convention that the Head be amended to provide for a consideration of "good cause" to be made for Protection Applicants who enter in this manner.

Detention as measure of last resort

Further, we would also note that detention of Protection Applicants should only be a measure of last resort, with clearly defined limits to avoid risk of long term or indefinite detention. Article 8 of the Receptions Directive provides that "a state should only detain a Protection applicant if other less coercive measures cannot be applied effectively". Head 19 as it is currently drafted does not, in our view, meet this requirement and Nasc recommends that the section be amended to provide that detention only be used as a measure of last resort.

Nasc is concerned that Head 19 (2) provides that Protection Applicants who have been detained shall be brought before a judge of the District Court "as soon as practicable"; this term is undefined. If the judge is satisfied that one or more of the grounds for detention are met he/she may "commit the person concerned to a place of detention for a period not exceeding 21 days" (Head 19 (3) (2) (a)). This means in practice that Protection Applicants, may, potentially be detained for successive 21 day committals until a decision has been made on their Protection Application. Nasc recommends that an upper time limit on the overall period spent in detention be set in line with the requirements of the Article 9 Receptions Directive, which provides that - "An applicant shall be kept only for as short a period as possible".

Nasc is also concerned with the addition of new grounds for detention under 19 (1) (e) (ii), which provides that a Protection Applicant can be detained if he/she "is or has been in position of a forged, **altered or substituted identity document**". Whilst Head 19 offers a definition of a substituted identity document, whether or not a document is substituted is a highly subjective decision, with no oversight, and one which confers wide discretionary powers on immigration officers. This is of particular concern when viewed against the severity of the sanction, which is detention.

Head 19 should be amended to ameliorate the harshness of this provision. Nasc recommends that this be removed from the Head and due consideration should be given to including the requirement to establish nationality, a lower threshold, as an alternative to identity.

Nasc is also concerned by the fact that Protection Applicants can be detained in "a place of detention" (Head (19) (1)). The term "a place of detention" is not defined in the Act. A clear definition of what constitutes "a place of detention" should be provided.

In defining "a place of detention", Nasc considers prisons or Garda Stations are not a suitable place for the detention of Protection Applicants who have not been convicted of a criminal offence and who are attempting to enter the state, are awaiting the outcome of their protection applications or are subject to deportation orders. Detention in prisons and Garda Stations runs contrary to the standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). Where detention is the only option Protection Applicants should be held in specific centres and away from the general prison population.

Head 19 (13) outlines the procedures to be followed where a Protection Applicant indicates a desire to leave the State. Notwithstanding the fact that protection against *non refoulment* is provided for under Head 44, Nasc recommends that to ensure compliance with our obligations not to return an applicant to a place in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion, that this inserted into this Head as be one state grounds to be satisfied before a order is made in the District Court.

Detention of Unaccompanied Minors

Nasc welcomes the fact that unaccompanied appear not to be subject to the detention provisions as currently drafted. This position could be strengthened and further clarified by the insertion of a clear statement in the General Scheme that no child under the age of 18 shall be detained.

Nasc is concerned that under Head (19) (7) if an immigration officer has reasonable grounds for believing an person is over the age of 18, Applicants can be detained in line with the adult provisions. In the absence of any age determination guidance in the Scheme, Nasc has serious concerns that in cases of uncertainty, children may be detained and treated as adults. Nasc recommends that clear age assessment guidelines be established an that immigration officers at the port of entry are fully trained to recognise children at risk and that the "Best Interests of the Child" principle should inform all decisions in this regard.

VI. Voluntary Return

Head 43A of the International Protection Bill, 2015 provides for the option of voluntary return for unsuccessful applicants for international protection. Applicants, who are unsuccessful at first instance and appeal in their applications for refugee status and/or subsidiary protection status and have either not informed the Minister of

any reasons why they should be granted permission to remain in the State or have had such an application refused, will now be notified that their applications/appeals have not been granted and will be given an opportunity to notify the Minister that they wish to avail of voluntary return to their country of origin. The Minister will not make a deportation order in respect of such a person.

While Nasc welcomes this commitment to voluntary return, we believe that the time frame allotted to applicants is inadequate. Head 43(4) states that the notification expires “on the fifth day following it being given to the person concerned”. Nasc submits that this is an extremely short timeframe within which a person or a family is expected to make a life-changing decision. Nasc is concerned that this may not provide unsuccessful applicants with sufficient time to get legal advice on their circumstances.

VII. Preliminary Interview

Head 13 provides for the procedures that follow once a protection applicant arrives at the frontiers of the state seeking to make an application for protection. Nasc is concerned that there is no specific requirement that immigration officers the necessary level of training appropriate to their role. Article 6 (1) of the Recast Procedures Directive²⁰ provides: that "Member States shall ensure that those other authorities which are likely to receive applications for international protection such as the police, border guards, immigration authorities and personnel of detention facilities have the relevant information and that their personnel receive the necessary level of training which is appropriate to their tasks and responsibilities and instructions to inform applicants as to where and how applications for international protection may be lodged".

Nasc recommends in line with E.U. standards that consideration be given to formalise in legislation that all adequate and dedicated training be provided to immigration officers on international protection obligation and cultural awareness. This measure would also provide adequate protection against *refoulement*.

Nasc notes that the General Scheme does not appear to contain a provision dealing with persons who are already present in the state and are seeking to make an application for protection. It is Nasc experience that Protection Applicants often have a fear of authority from experience in their country of origin and may be in a position to make an application upon immediate arrival at the border.

Nasc recommends that clear provisions be made for to ensure that persons already in the state have access to the Protection System.

²⁰Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection

VIII. Permission to Remain in the State

Head 15 outlines the conditions which attach to a permission granted to a Protection Applicant whilst remaining in the state.

Section (3) b places an outright prohibition on the Protection Applicants to seek, enter or be in employment. Ireland is now the only country in the E.U. that has a blanket ban on Protection Applicants entering the work place. The impact that this has on the lives on Protection Applicants is well documented, by Nasc, Protection Applicants and NGOs in the field. It has formed part of the public discourse on our Protection System in recent months receiving wide public support for the lifting of the ban. Despite this Nasc is deeply concerned that the prohibition on the right to work is restated in the current General Scheme.

Nasc recommends in the strongest possible terms that Protection Applicants should be given access to the Labour Market and that Head 15 (3) (b) be removed. This could be provided for by way of Statutory Instrument by giving effect to The Reception Conditions Directive²¹. It should be noted that the provisions outlined in Article 5 of the Directive grants a qualified or limited access to the labour market and provides:

- 1. Member States shall ensure that applicants have access to the labour market no later than 9 months from the date when the application for international protection was lodged if a first instance decision by the competent authority has not been taken and the delay cannot be attributed to the applicant.*
- 2. Member States shall decide the conditions for granting access to the labour market for the applicant, in accordance with their national law, while ensuring that applicants have effective access to the labour market. For reasons of labour market policies, Member States may give priority to Union citizens and nationals of States parties to the Agreement on the European Economic Area, and to legally resident third-country nationals.*
- 3. Access to the labour market shall not be withdrawn during appeals procedures, where an appeal against a negative decision in a regular procedure has suspensive effect, until such time as a negative decision on the appeal is notified.*

²¹ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection

IX. Vulnerable Persons

The early identification of vulnerable applicants is essential, in order to provide targeted supports for this category of people throughout the application process. For vulnerable persons, which could include unaccompanied minors, victims of torture, LGBTI applicants and the elderly, the lack of early identification and the delivery of targeted supports can have a negative impact on the quality of their asylum application, the length of time they are in the system and their care while they in the system. Reports relating to a person's specific circumstances, for example medico-legal reports for victims of torture, may not be available when the person initially submits his or her protection application.

The Refugee Act, 1996 contains only one provision related to the identification of vulnerable persons, the scope of which is confined to unaccompanied minors.²² The only mention of vulnerable persons in the General Scheme is in Head 52, where 'due regard shall be had' in the application of Heads 47-51 (those concerning the 'Content of International Protection'), 'to the specific situations of vulnerable persons such as persons under the age of 18 years (whether or not accompanied), disabled persons, elderly persons, pregnant women, single parents with children under the age of 18 years, victims of human trafficking, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence'. Thus, in the current General Scheme, vulnerability is only taken into account once a person has received a positive decision on their protection application and been granted a protection status, not in the application process itself.

Under the Recast Procedures Directive (Article 24), which Nasc recommends Ireland opt in to, States must ensure vulnerable applicants are provided with adequate support in order to allow them to benefit from the rights and comply with the obligations of the Directive throughout the duration of the asylum procedure. The Directive requires States to assess within a reasonable period of time after an application is made whether an applicant needs 'special procedural guarantees'.²³ The Recast Reception Conditions Directive, which Nasc also

²² Section 8 establishes a procedure to be followed where an unaccompanied minor is identified by an immigration officer or the ORAC.

²³ *The recast Asylum Procedures Directive*

Article 24 - Applicants in need of special procedural guarantees

1. Member States shall *assess within a reasonable period of time* after an application for international protection has been made whether the applicant is an applicant in need of special procedural guarantees.
2. The assessment referred to in paragraph 1 may be integrated into existing national procedures and/or into the assessment referred to in Article 22 of [the recast Reception Conditions Directive] and need not take the form of an administrative procedure.
3. Member States shall ensure that where applicants have been identified as applicants in need of special procedural guarantees, they are provided with *adequate support* in order to allow them to benefit from the rights and comply with the obligations of this Directive throughout the duration of the asylum procedure.

recommends opting in to, also includes provisions on vulnerable persons and how they are to be identified, namely Articles 21 and 22. Article 21 outlines a number of examples of vulnerable persons, which have been used in the General Scheme in Head 52 (this list cross references the Procedures Directive). Article 22 outlines what a vulnerability assessment should look like, and that this assessment should dictate what ‘special reception needs’ are required for the support of that applicant.²⁴

Currently, voluntary health screenings are available in Baleskin Reception Centre for new protection applicants who opt to stay in direct provision accommodation. Vulnerabilities may be disclosed or discovered as part of that screening or subsequently in consultation with an applicant’s GP. However no formal mechanisms currently exist for notifying RIA or decision-making officers of any specific needs arising out of such vulnerability. Nasc recommends that vulnerability be taken into account from the point of initial application for international protection, and that this be included in the General Scheme. Nasc also recommends that a vulnerability assessment for all protection applicants, in line with the Receptions and Procedures Directives, be included in the General Scheme, with formal mechanisms of referral in the case of established vulnerabilities to ensure that vulnerable persons receive appropriate information, health or psychological services and procedural supports.

4. Member States shall ensure that the need for special procedural guarantees is also addressed, in accordance with this Directive, *where such a need becomes apparent at a later stage* of the procedure, without necessarily restarting the procedure.

Recital 29 provides further explanation as to what is intended under this provision:

“Certain applicants may be in need of special procedural guarantees due, inter alia, to their age, gender, sexual orientation, gender identity, disability, serious illness, mental disorders or as a consequence of torture, rape or other serious forms of psychological, physical or sexual violence. Member States should endeavour to identify applicants in need of special procedural guarantees before a first instance decision is taken. Those applicants should be provided with adequate support, including sufficient time, in order to create the conditions necessary for their effective access to procedures and for presenting the elements needed to substantiate their application for international protection.”

²⁴ Article 22 – Assessment of the special reception needs of vulnerable persons

1. In order to effectively implement Article 21, Member States shall *assess* whether the applicant is an applicant with special reception needs. Member States shall also *indicate the nature of such needs*. That assessment shall be *initiated within a reasonable period of time* after an application for international protection is made and may be integrated into existing national procedures. Member States shall ensure that those special reception needs are also addressed, in accordance with the provisions of this Directive, *if they become apparent at a later stage in the asylum procedure*. Member States shall ensure that the support provided to applicants with special reception needs in accordance with this Directive takes into account their special reception needs throughout the duration of the asylum procedure and shall provide for appropriate monitoring of their situation.

2. The assessment referred to in paragraph 1 need not take the form of an administrative procedure.

3. Only vulnerable persons in accordance with Article 21 may be considered to have special reception needs and thus benefit from the specific support provided in accordance with this Directive.

4. The assessment provided for in paragraph 1 shall be without prejudice to the assessment of international protection needs pursuant to [the Qualification Directive].

X. Assessment of applications for International Protection (Part 4)

Head 15: Nasc recommends that this section includes a clear statement in line with Article 10 of the Procedures Directive that all applications will be examined and decisions are taken individually, objectively and impartially.

Withdrawal of Application at first instance:

Head 34 provides that applications for protection at first instance shall be deemed to be withdrawn if the applicant fails to attend for interview and failed to furnish the Minister with an explanation for the non attendance within a three day period. It is Nasc's view that three days is a unreasonable short period of time in which to notify the Minister of the applicants reasons for non-attendance, which may be due to a number of factors such as change of address, lack of language and understanding, and the particularly vulnerable nature of Protection Applicants, among other factors. This provision is harsher than the existing period under the 1996 Act which is 5 days.

Nasc is also concerned that assuming the applicant overcomes this onerous hurdle that the Minister must be satisfied that the explanation offered is reasonable in all the circumstances. Nasc recommends, that at a minimum, the time limit be restored to the current position, which is five working days.

Oral Hearing at the Protection Review Tribunal

Nasc notes that there appears to be some contradiction or a lack of clarity in Head 18 dealing with oral hearings. 38 (4) states that an oral hearing shall be held in private and 38 (7) provides that the Tribunal may hold a hearing in public if the applicant consents and it is in the interests of justice to so. It is Nasc contention that holding a hearing in public is *de facto* in the interests of justice and would recommend that with the consent of that applicant that all hearings should be held in public.

Nasc would recommend that Head 38 be amended to reflect this.

Transitional Provisions

Nasc notes that the General Scheme is seeking to incorporate as many Protection Applicants as is legally possible under the new draft procedures. We remain deeply concerned however that existing applicants will not be afforded the opportunity to decide or consent to having their current application considered or concluded under the new protection regime. Nasc would contend that in the interests of fair procedures and natural justice, written informed consent must be attained from all protection applicants outlined in Heads (63) (1) - (6). This is particularly important as applicants who are granted either International Protection or Subsidiary Protection may be at a clear detriment under the new regime when it comes their entitlement to Family Reunification. The provisions as they currently stand, in the General Scheme are considerably less favourable.

This may give rise to breach of Rights under Article 8 ECHR (Family Rights) if clear consent is not obtained from applicants to have their application considered under the General Scheme.

Nasc recommends that the section be amended to allow for consent to be attained before existing applications can be considered under the new proposed scheme.

XI. Appendices

Appendix 1: Same-sex relationships by country²⁵: Asylum Source Countries in Ireland [Top 5 Nationalities 2011-2014²⁶]

	Same-Sex Unions (Marriage or Registered Partnership)	Same-Sex Sexual Activity Legal	Anti-discrimination laws based on sexual orientation
Pakistan	x	x	x
Nigeria	x	x	x
Albania	x	✓	✓
Bangladesh	x	x	x
Zimbabwe	x	* ²⁷	x
Democratic Republic of Congo	x	✓	x
Malawi	x	x	x
China	x	✓	x
Afghanistan	x	x	x

²⁵ Luxas Paoli Itaborahy & Jingshu Zhu, *State Sponsored Homophobia - A world Survey of Laws: Criminalisation, protection and recognition of same-sex love*, The International Lesbian, Gay, Bisexual, Trans and Intersex Association 2014 available at http://old.ilga.org/Statehomophobia/ILGA_SSHR_2014_Eng.pdf [accessed 05/05/2015]

²⁶ Top 5 applicant countries data each year taken from ORAC Annual Reports 2011-2014 available for download from <http://www.orac.ie/website/orac/oracwebsite.nsf/page/orac-stats-en> [accessed 05/05/2015]

²⁷ Same-sex sexual activity between men is illegal however there are no laws relating to same-sex sexual activity between women.

Appendix 2: Same-sex relationships by country²⁸: Family Reunification Source Countries 2012- 2014²⁹ [Top 5 Nationalities 2012-2014]

	Same-Sex Unions (Marriage or Registered Partnership)	Same-Sex Sexual Activity Legal	Anti-discrimination laws based on sexual orientation
Syria	x	x	x
Afghanistan	x	x	x
Somalia	x	x	x
Sudan	x	x	x
Iraq	x	✓	x
Nigeria	x	x	x

²⁸ Luxas Paoli Itaborahy & Jingshu Zhu, *State Sponsored Homophobia - A world Survey of Laws: Criminalisation, protection and recognition of same-sex love*, The International Lesbian, Gay, Bisexual, Trans and Intersex Association 2014 available at http://old.ilga.org/Statehomophobia/ILGA_SSHR_2014_Eng.pdf [accessed 05/05/2015]

²⁹ Top 5 applicant countries data each year taken from ORAC Annual Reports 2011-2014 available for download from <http://www.orac.ie/website/orac/oracwebsite.nsf/page/orac-stats-en> [accessed 05/05/2015]

Appendix 3: Same-sex relationships by country³⁰: Asylum Source Countries [Top 5 Nationalities 2014³¹]

Table 1: Worldwide

	Same-Sex Unions (Marriage or Registered Partnership)	Same-Sex Sexual Activity Legal	Anti-discrimination laws based on sexual orientation
Syria	x	x	x
Afghanistan	x	x	x
Somalia	x	x	x
Sudan	x	x	x
South Sudan	x	x	x

Table 2: Europe

	Same-Sex Unions (Marriage or Registered Partnership)	Same-Sex Sexual Activity Legal	Anti-discrimination laws based on sexual orientation
Syria	x	x	x
Afghanistan	x	x	x
Kosovo	x	✓	✓
Eritrea	x	x	x
Serbia	x	✓	✓

³⁰ Luxas Paoli Itaborahy & Jingshu Zhu, *State Sponsored Homophobia - A world Survey of Laws: Criminalisation, protection and recognition of same-sex love*, The International Lesbian, Gay, Bisexual, Trans and Intersex Association 2014 available at http://old.ilga.org/Statehomophobia/ILGA_SSHR_2014_Eng.pdf [accessed 05/05/2015]

³¹ <http://www.unhcr.ie/about-unhcr/facts-and-figures-about-refugees>



National Women's
Council of Ireland
Comhairle Náisiúnta
na mBan in Éirinn

Submission to the Joint Oireachtas Committee on
Justice, Defence and Equality on the General Scheme
of the International Protection Bill

7th May 2015

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Introduction

The National Women's Council of Ireland (NWCI) welcomes the opportunity to submit to the Joint Oireachtas Committee on Justice and Defence consultation process on the General Scheme of the International Protection Bill. NWCI appreciates the chance to contribute to the development of this key piece of legislation which will have far reaching implications for the experiences of those people seeking asylum in Ireland.

The NWCI is the leading national women's membership organisation in Ireland. Established in 1973, it represents a membership base of over 180 groups and organisations across a diversity of backgrounds, sectors and locations and is committed to the promotion of full equality between women and men. In preparing this submission we have consulted with our membership and their views and concerns are reflected in the following pages.

Our mission is to lead and to be a catalyst for change in the achievement of equality between women and men. Broadly, our work involves highlighting and addressing gender-based discrimination against all women with an emphasis on women experiencing multiple forms of discrimination. We have a strong track record in working with and supporting a wide diversity of women including Traveller women, lesbian women, women living with disability, migrant women and lone parents.

NWCI chairs of the National Observatory on Violence against Women, the convenor of the Women's Human Rights Alliance and of the European Network against Racism Ireland's women's subcommittee, and are a member of a wide range of networks, including the C&V Pillar. Our work involves the promotion of best practice in highlighting and advancing women's equality concerns within the C&V sector, as well as within State institutions at national and international levels.

1. Introduction of a Single Procedure:

The National Women's Council of Ireland welcomes the introduction of legislation that will allow for a 'single procedure' and other reforms to ensure earlier identification of people who need international protection.

It is important to note that all other EU member states operate a single application procedure and that Ireland is the only member state that currently uses such a lengthy and complicated process. The application of the 'single procedure' in assessing requests for asylum, should in theory ensure that applicants are not subjected to long periods of uncertainty regarding their status, and therefore significantly reduce the amount of time that an applicant will spend in the current Direct Provision system. NWCI is disappointed that this legislation is proceeding without the recommendations of the Working Group on Direct Provision being available. The NWCI urges that the Bill be framed so as to also benefit people whose applications are already in the system.

NWCI echoes the Irish Refugee Council's concerns that the introduction of the 'single procedure' will be utilised in practice as a means to enhance a system of immigration control, rather than to ensure that those applicants in need of protection receive it. It is vital that the 'single procedure' is not merely used as a tool by which deportation of asylum seekers can be expedited.

Both the Ombudsman and Ombudsman for Children have stated that their lack of jurisdiction in the case of actions of the Department of Justice 'taken in the administration of the law relating to immigration or naturalisation' is highly problematic. Ireland is almost unique amongst countries with a public service Ombudsman in having the State's key interactions with asylum seekers excluded from jurisdiction. Other than by way of judicial review, this important area of public administration is effectively free of any external oversight.¹ NWCI recommends that the Bill be amended to provide for an oversight role for both Ombudsman offices.

- NWCI recommends that the Bill be reviewed with so that it will be possible to expedite the applications of those already awaiting decisions under the current system.
- NWCI recommends that the Ombudsman and Ombudsman for Children should have an oversight role in relation to asylum applicants, the asylum system and the processing of applications.

¹ **Dealing with Asylum Seekers: Why Have We Gone Wrong?** Lead article in the Summer 2013 edition of Studies Magazine, vol.102, no.406 by Emily O'Reilly - 31 July 2013

2. Towards a gender sensitive asylum process

The National Women's Council of Ireland has been a long advocated for the reform of the asylum system in Ireland to incorporate a gender sensitive approach in assessing applications.

Women, simply by virtue of their gender, are too often the victims of a range of gender-based persecutions and practices. These practices include rape as a weapon of war, female genital mutilation, forced marriage and stoning to death for presumed adultery. Although Head 6 of the Bill refers to 'acts of a gender-specific or child-specific nature' are named as Acts of Persecution, NWCI recommends that explicit reference be made to the implementation of a set of guidelines in understanding the nature and sensitivities surrounding these practices and their impact on the women they are perpetrated on.

Numerous reports have recommended that Ireland adopt gender sensitive guidelines in line with best international practice².

Such a set of gender based guidelines should comply with relevant UNHCR guidance and cover matters such as female genital mutilation, forced marriage, trafficking and sexual and dowry related violence, all of which can be gender based persecution.

It is also vital that the guidelines ensure that those assessing applications are aware of cultural sensitivities that make it impossible for a woman to be returned to her country of origin.

For women, numerous social, religious, ethnic and political elements which may not be relevant to a male applicant, may play a vital role in whether they are accepted back into their communities. "For instance, the reception of a woman who has been raped during war, may be hostile and life threatening, if society deems her shame to be so great that she does not deserve to live. Thus dangers may remain for women based on their experiences during the war, even though the war itself has ended."³

It is important that the role of the state and the extent of protection it is willing or able to extend to women, be understood in the context of the dangers which women may face.

- NWCI recommends that the Bill make specific reference to the implementation of a set of comprehensive gender guidelines to be followed when assessing applications for asylum. The guidelines should at a minimum be informed by best practice as set out by the UNHCR guide to best practice.

² Women and the Refugee Experience – towards a Statement of Best Practice. ICCL and Irish Times. 2000
The Single Protection Procedure – A Chance for Change, Brian Barrington BL for the Irish Refugee Council, 2009.

³ Women and the Refugee Experience – towards a Statement of Best Practice. ICCL and Irish Times. 2000, p.53

3. Reform of the Direct Provision System

NWCI notes with disappointment the complete absence of any reference to 'Direct Provision' in the General Scheme of the Bill. NWCI feels that this is a lost opportunity to recognise in this most significant piece of reformative legislation that this system is not fit for purpose and will be dismantled and replaced with a more humane and respectful system in the near future.

In consultations with groups working with and on behalf of female refugees in Ireland, NWCI was told that the most important issue for these women awaiting decisions on their asylum applications is the need for women and children to have suitable accommodation, and particularly for policy makers to be aware of the impact of Direct Provision on mental health and well-being, child development and general health. In particular, women recommended that the government should plan for more appropriate accommodation so that it is safe for women and children and take account of the diversity of the population.

The Direct Provision system has been a source of intense criticism both at home and abroad for over 15 years now, and it is vital that this system, which is not fit for purpose and poses serious threats to the wellbeing of those living under it, be dismantled without delay.

As of January 2015, there are 4,382 residents within the direct provision system. The average length of stay for residents is currently cited at four years, yet some applicants have been awaiting decisions and consequently living under the Direct Provision system for up to seven years. Ireland and Lithuania are the only two EU countries which ban asylum seekers from working.

NWCI notes that Minister of State, Aodhán Ó Riordáin has commissioned a Working Group to review the Direct Provision system and make recommendations on how the system might be improved. However, NWCI notes the resignation of the Irish Refugee Council from this Working Group and echoes concerns voiced by the IRC that this legislation was drafted without consultation with the Group.

- NWCI recommends that the Bill be amended, where possible, to reflect the recommendations of the Working Group on Direct Provision once available.

4. Recommendations:

- NWCI recommends that the Bill be reviewed with so that it will be possible to expedite the applications of those already awaiting decisions under the current system.
- NWCI recommends that the Ombudsman and Ombudsman for Children should have an oversight role in relation to asylum applicants, the asylum system and the processing of applications.
- NWCI recommends that the Bill make specific reference to the implementation of a set of comprehensive gender guidelines to be followed when assessing applications for

asylum. The guidelines should at a minimum be informed by best practice as set out by the UNHCR guide to best practice.

- NWCI repeats its call on the Government to sign, ratify and set out an implementation plan for the Istanbul Convention on Preventing and Combating Violence Against Women and Domestic Violence.
- NWCI recommends that the Bill be amended, where possible, to reflect the recommendations of the Working Group on Direct Provision.

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Mr David Stanton TD
Chairperson
Joint Committee on Justice, Defence and Equality
Houses of the Oireachtas
Kildare Street
Dublin 2

8th of May 2015

Dear Deputy Stanton,

Please accept on behalf of SPIRASI our submission of recommendations concerning the General Scheme of the International Protection Bill to the Joint Committee on Justice, Defense and Equality.

Name: Greg Straton
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I would be more than happy to appear in public session at any Committee meeting.

Yours sincerely

Greg Straton



SPIRASI

Submission concerning the General Scheme of the International Protection Bill to the Joint Committee on Justice, Defense and Equality

Introduction

SPIRASI is the national center for the care of survivors of torture. Since the center's inception in 2001, we have provided multi-disciplinary services to 3,000 survivors of torture from over 100 different countries. The vast majority of survivors of torture referred by health professionals and legal advisors to SPIRASI are people seeking some form of International Protection status from the Irish state. Annually SPIRASI actively supports a caseload of 600 survivors of torture from around the island of Ireland.

SPIRASI welcomes the publication of the General Scheme of the International Protection Bill (GSIPB) and would like to commend the government for the prioritization of this legislation in the programme for government. The enactment of this legislation should help to bring about much needed efficiencies in the protection determination process for Ireland and is a significant opportunity for real systemic reform of the protection process. Most importantly we hope that it will drastically reduce the time it takes to bring protection cases to a conclusion, which is in the best interests of both the state and protection applicants.

Additionally we specifically welcome the inclusion of Head 52 in the GSIPB. For the first time in protection related legislation a provision for the definition of vulnerable protection applicants beyond separated children has been included. This definition now encompasses victims of torture. We would however like to raise some items for consideration by the Joint Committee on Justice, Defense and Equality on the Heads of the Bill relating to victims of torture.

Head 52 – Situation of Vulnerable persons and children

SPIRASI generally welcomes the inclusion of Head 52 as already stated above. However we would strongly recommend that the following is reviewed:

“In the application of Heads 47, 48, 49, 50 and 51 due regard shall be had to the specific situation of vulnerable persons”

Firstly the application of the Head is only to the preceding Heads 47, 48, 49, 50 & 51¹. These heads only deal with the rights of protection applicants who have already been granted some form of protection status. Vulnerability will therefore under these heads not be given consideration, “due regard” during the revised protection process. Regard for the vulnerability

¹ The preceding heads relating to Part 8, Content of International Protection

of the person must begin at the point of application for protection and the due regard of the state should apply throughout the process. The consideration of the needs of vulnerable groups should not be limited to the heads that bestow protection status alone.

Vulnerability is very relevant in considering International Protection status. It is especially pertinent in respect of Heads 12 to 42, where the determination of protection is being considered. We urge in the strongest possible terms that the restriction of the application of Head 52 is revised in the Bill.

Secondly we would urge something more specific than the phrase, “due regard”. In practical terms we are very concerned that due regard will not translate into action, how does the state bestow due regard to vulnerable protection applicants? We believe that the state must provide for more than due regard to vulnerability, vulnerability is at the core of International Protection decision making. We therefore believe that some mention of the measures that enable consideration of vulnerability need to be included, such as: active identification, support, procedural guarantees and the monitoring of vulnerable protection applicants.

If we consider vulnerability in the Directives that form part of the Common European Asylum System, the regard of the state to vulnerability needs to be more clearly stated. For example the Recast Procedures Directive² states:

*“Certain applicants may be in need of **special procedural guarantees** due, inter alia, to their age, gender, sexual orientation, gender identity, disability, serious illness, mental disorders or as a consequence of torture, rape or other serious forms of psychological, physical or sexual violence. Member States should endeavour to **identify** applicants in need of special procedural guarantees **before a first instance decision is taken**. Those applicants should be provided with adequate **support**, including sufficient time, in order to create the conditions necessary for their effective access to procedures and for presenting the elements needed to substantiate their application for international protection” (emphasis added by author)*

In addition to the above the Recast Reception Conditions Directive, in Articles 21 to 25 also deal with vulnerable applicants. Of this the following is highly relevant:

*“Member States shall assess whether the applicant is an applicant with special reception needs. Member States shall also indicate the nature of such needs. That assessment shall be **initiated within a reasonable period of time** after an application for international protection is made and may be integrated into existing national procedures. Member States shall ensure that those special reception needs are also addressed, in accordance with the provisions of this Directive, if they become apparent at a later stage in the asylum procedure.*

² DIRECTIVE 2013/32/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)

*Member States shall ensure that the support provided to applicants with special reception needs in accordance with this Directive takes into account their special reception needs throughout the duration of the asylum procedure and shall provide for appropriate **monitoring** of their situation.”³*

Although Ireland has not opted into these directives they represent the minimum practice guidelines expected of other member states in the EU.

Furthermore in relation to Head 36a Section 2 (c) we cannot see how the state can determine permission to remain based on humanitarian considerations if this is not actively sought during the preceding protection process, indeed if it is left to only be considered following the conclusion of the process as is stated in Head 52.

Head 25 – Assessment of facts and circumstances

In section (1)(a) of Head 25 it is stated:

*“It shall be the duty of an applicant-
(a) to submit as soon as reasonably practicable all the elements needed to substantiate his or her application”*

We would like to point out the following in paragraph 53 of the European Court of Human Rights on the case of RC vs Sweden⁴.

“While the burden of proof, in principle, rests on the applicant, the Court disagrees with the Government's view that it was incumbent upon him to produce such expert opinion. In cases such as the present one, the State has a duty to ascertain all relevant facts, particularly in circumstances where there is a strong indication that an applicant's injuries may have been caused by torture.”

We believe that in cases where some basic medical evidence is provided by a victim of torture than it is also incumbent upon the state to seek expert evidence. Therefore the above provision in the bill needs to acknowledge that in some circumstances, such as torture, that the duty of the applicant to provide evidence is shared by the state.

Furthermore we would like to see the inclusion that consideration is given to expert medical evidence in this Head, especially in section (5). We would be especially concerned that medical-legal evidence for victims of torture is not included in the matters that form part of the examination of an application for international protection in this section. At present less than half of those persons referred to our services have an opportunity to present a medical legal

³ DIRECTIVE 2013/33/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)

⁴ RC v Sweden (Application no. [41827/07](#)), Strasbourg 9 March 2010.

report to support their asylum claim. We contest that an accurate decision on a case that involves torture is best made when all of the appropriate evidence has been sought, including a medical legal report. It is not clear if this is covered under Head 22 where the state is empowered to seek a medical report relating to the physical and psychological health of an applicant?

Summary of Recommendations to the Committee

1. Revise Head 52 to remove the restriction of consideration for vulnerable applicants for international protection to only those heads that deal with the rights of applicants who have already secured protection. Extend the application of the Head to the entire Bill.
2. Replace “due regard” in Head 52 with specified actions, such as identification, support, procedural guarantees and the monitoring of vulnerable protection applicants.
3. Ensure that vulnerability is considered in Head 36a Section 2 (c) as part of humanitarian considerations for protection.
4. Ensure that Head 25 allows for the state to seek expert medical evidence to verify torture and thereby allow for the gathering of evidence, burden of proof, to shift in such circumstances from the applicant to the state. If this is not already provided for through Head 22.
5. Head 25 Section 5, we call for the inclusion of expert medical evidence as a matter that will be examined in considering a case for international protection.



UNHCR Comments on the General Scheme of the International Protection Bill

I INTRODUCTION

1. The Office of the United Nations High Commissioner for Refugees (hereinafter “UNHCR”) has been entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek solutions to refugee problems.¹ Paragraph 8 of UNHCR’s Statute confers responsibility on UNHCR for supervising international conventions for the protection of refugees, while Article 35 of the 1951 Convention relating to the Status of Refugees (1951 Convention)² and Article II of the 1967 Protocol to the Convention (1967 Protocol)³ oblige States Parties to cooperate with UNHCR in the exercise of its mandate, in particular by facilitating UNHCR’s duty of supervising the application of the provisions of the 1951 Convention and 1967 Protocol. UNHCR’s supervisory responsibility extends to each European Union (hereinafter “EU”) Member State, all of which are States Parties to these instruments.

2. As agreed in the Stockholm Programme, the “establishment of a Common European Asylum System” is a key objective for the EU.⁴ The Programme reaffirms that this system should be based on the full and inclusive application of the 1951 Convention and 1967 Protocol, as well as other relevant international treaties. UNHCR considers the Government’s plans as set out in this proposal in the context of the aspiration to establish a Common European Asylum System.

¹ UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), available at: <http://www.unhcr.org/refworld/docid/3ae6b3628.html>.

² UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations Treaty Series No. 2545, vol. 189, p. 137, available at: <http://www.unhcr.org/refworld/docid/3be01b964.html>. According to Article 35(1) of the 1951 Convention, UNHCR has the “duty of supervising the application of the provisions of this Convention” (hereinafter “Geneva Convention” or “1951 Convention”).

³ UN General Assembly, *Protocol Relating to the Status of Refugees*, 30 January 1967, United Nations Treaty Series No. 8791, vol. 606, p. 267, available at: <http://www.unhcr.org/refworld/docid/3ae6b3ae4.html> (hereinafter “1967 Protocol”).

⁴ Council of the EU, *The Stockholm Programme – An open and secure Europe serving and protecting the citizens*, Doc. Nr.17024/09, Brussels, 2 December 2009, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:en:PDF>.

3. UNHCR welcomes the opportunity to comment on the proposed legislation at this early juncture. The proposed legislation will considerably overhaul the Irish system of international protection, and in particular will establish a single determination procedure, a long-held objective of the Irish authorities.

4. As a general comment, UNHCR welcomes the government's decision to approve legislation that will cut lengthy asylum decision procedures. The International Protection Bill will allow for a 'single procedure' to deal with all applications, cutting the length of time asylum-seekers have to wait to receive a decision and reducing long periods of time spent in direct provision. UNHCR has called since 2009 for the introduction of a single procedure. The enactment of this Bill will be of immeasurable benefit to people who flee persecution and indiscriminate violence in their own countries in the future and seek safety in Ireland. UNHCR stands ready to support the Irish authorities in their early implementation of the procedure.

5. UNHCR welcomes a great number of the provisions in the General Scheme. In particular:

- The introduction of a single procedure for the determination of eligibility for refugee status followed by, in the same first instance procedure, eligibility for subsidiary protection
- Rights granted to beneficiaries of subsidiary protection and refugee status which are almost identical
- A right of appeal for persons granted subsidiary protection but not refugee status
- A right of appeal with respect to decisions on admissibility and subsequent applications
- A general provision on credibility replicating the provision contained in 2013 SP Regulations.
- Full-time members at the International Protection Appeals Tribunal (IPAT)
- A requirement that the Public Appointment Service be responsible for the appointment of IPAT members
- Public hearings at IPAT
- Dispensing of the personal interview at first instance where there is sufficient evidence to grant refugee status
- Commissioning of medical reports at both 1st and 2nd instance by the determining bodies themselves
- Giving effect for the first time to the Temporary Protection Directive to which Ireland opted into
- New procedures giving unsuccessful applicants the opportunity to avail of voluntary return following a decision on international protection and leave to remain and prior to the issuance of a deportation order.

6. UNHCR has a number of comments aimed at further enhancing the Bill which are set out below and which we would be happy to discuss further. In these comments we have focused primarily on substantive points of principle and priority issues. UNHCR has already submitted detailed comments to the 2008 Immigration, Residency and Protection Bill which address in some cases the drafting of particular provisions that have been replicated again here and which we would refer you to again where relevant⁵. In order to facilitate reading, this document contains an outline of our general comments followed by more specific comments on each of the areas relating to UNHCR's mandate, outlining the main concerns and making reference to some specific sections of the General Scheme. Where possible and appropriate, alternative wording has been suggested.

II EUROPEAN AND INTERNATIONAL LAW CONTEXT

7. Measures relating to the Common European Asylum system are covered by Protocol, No 21, annexed to the Treaty of European Union and the Treaty on the Functioning of the European Union, "on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice". Ireland is not bound to participate in European instruments in this area but may opt-in to any it wishes to. In the first phase of EU harmonisation in the field of asylum, Ireland opted into the following core instruments: Procedures Directive⁶, the Qualification Directive⁷, Temporary Protection Directive⁸, the EURODAC⁹ and Dublin¹⁰ Regulations. It chose not to opt-in to the Reception Conditions Directive. These instruments established a suite of minimum standards to be applied in the determination of applications for international protection (defined as refugee status and subsidiary protection).

8. To date Ireland has opted in to four instruments of the second phase of CEAS instruments, the Recast Dublin¹¹ and EURODAC¹² Regulations and also the EASO¹³ and

⁵ <http://www.refworld.org/docid/47d7be382.html>

⁶ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status

⁷ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted

⁸ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

⁹ Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention

¹⁰ Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national

¹¹ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person

AMIF¹⁴ Regulations. These instruments set out a suite of common standards to be applied in the determination of applications for international protection.

9. Although Ireland has not, at present, opted in to the Recast Qualification¹⁵ and Procedures Directives¹⁶, this is an option that remains open to the State and the possibility of a future opt-in has not been excluded. Much of the wording of the General Scheme is closely based upon European Directives which it aims to transpose, the Qualification Directive, the Procedures Directive and the Temporary Protection Directive. It also aims to fully meet the standards set out in the Recast Qualification Directive notwithstanding that Ireland is not obliged by EU law to do so. The General Scheme also transposes in places the more favourable provisions of the Recast Procedures Directive. This approach is welcomed as it would be beneficial to avail of this opportunity to reflect best practice and to contemplate, as far as possible, a future opt-in to the Recasts. Accordingly where the Recast Directives contain more favourable standards or where they more clearly elucidate a principle to be applied, UNHCR would advocate reflecting the more recent provisions in the General Scheme.

10. The comments in this paper to a large extent draw on UNHCR's comments on the Asylum Qualification Directive¹⁷ ("QD") and the Asylum Procedures Directive¹⁸ ("APD"), as well as comments on the more recent Recasts¹⁹.

¹² Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013

¹³ Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office

¹⁴ Regulation (EU) No 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund

¹⁵ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)

¹⁶ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

¹⁷ See UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted (OJ L 304/12 of 30.9.2004) ("UNHCR Annotated Comments on the 2004 Qualification Directive"), 28 January 2005, available at: <http://www.refworld.org/docid/4200d8354.html>

¹⁸ UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004), 10 February 2005, available at: <http://www.refworld.org/docid/42492b302.html>

¹⁹ UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (COM(2009)554, 21 October 2009), August 2010, available at: <http://www.unhcr.org/refworld/docid/4c63ebd32.html>. and UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international

11. As the long title of the General Scheme indicates it also aims to give further effect to the 1951 Convention and the 1967 Protocol. Both conventions are set out “for convenience of reference” in Schedules 1 and 2 of the General Scheme, as was previously the case in the Refugee Act 1996. The High Court in *N.S.*²⁰ has confirmed that this scheduling of the Conventions does not have the effect of incorporating them into law; the ratification of the Convention does not confer rights on applicants which may be invoked before the courts and there could be no legitimate expectation that its provisions could be successfully invoked to oust constitutional or statutory rights. Accordingly the provisions of the Refugee Act now and the International Protection Bill, when enacted, are the primary means by which the State purport to give statutory effect to its obligations under the 1951 Convention.

12. The Original and Recast Directives reflect the aim of EU Member States to create a common European asylum system based on a full and inclusive application of the 1951 Convention²¹. This includes the principle of non-refoulement and a comprehensive set of rights enabling refugees to achieve self-reliance and integrate into society in their host countries. The opening recitals to the Qualification Directive and its Recast furthermore clarify that it is not intended to modify existing international refugee law but provides binding guidance for its interpretation within the framework of the Convention. The Convention is acknowledged as the cornerstone of international legal regime of refugee protection. To maintain the Convention’s centrality to international refugee protection, EU Member States need to take into consideration common understandings achieved in international fora, especially UNHCR’s Executive Committee, as well as UNHCR’s special supervisory responsibility over the application of the Convention by, inter alia, the issuance of guidelines and positions on relevant issues²². EU Member States should also consider State practice outside the EU when interpreting the Convention.

13. Article 3 of the Qualification Directive and its Recast, and Article 5 of the Procedures Directive and its Recast, state explicitly that Member States may introduce or retain more favourable standards in so far as those standards are compatible with the Directives. Read

protection and the content of the protection granted (COM(2009)551, 21 October 2009), 29 July 2010, available at: <http://www.unhcr.org/refworld/docid/4c503db52.html>.

²⁰ *N.S. v. Anderson* [2004] IEHC 440

²¹ Article 78 TFEU (ex Articles 63, points 1 and 2, and 64(2) TEC) states:

“1. The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.”

²² Such guidelines are included in the UNHCR, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, 1979, (re-issued) December 2011, HCR/1P/4/ENG/REV. 3, available at: <http://www.unhcr.org/refworld/docid/4f33c8d92.html>.

in conjunction with their corresponding recitals²³, these articles underlie that the Directives aim to set standards which leave States free to retain or introduce more favourable or additional standards of protection if they so choose. It is UNHCR's view that, the provisions of the Directives do not entirely reflect the standards of the 1951 Convention. Accordingly Member States are urged to assess carefully, in consultation with UNHCR as relevant, circumstances in which more favourable provisions need to be introduced or retained to ensure compliance with international refugee or human rights law. In this connection, more favourable national standards which reflect binding international obligations should always be deemed to be compatible with the Directive. This is, *inter alia*, reflected in the Recitals of the Directives which present the 1951 Convention as the basis and “cornerstone” of the international legal regime for the protection of refugees.

III SUBSTANTIVE PROVISIONS

i. Decisions on Admissibility – First Country of Asylum

14. Head 20 for the first time requires the Minister to find an application inadmissible in the case of applicants who have been granted status in another EU state or another “first country of asylum”. This transposes Article 26 of the Procedures Directive.

Head 20: Inadmissible application

Provide along the following lines:

- (1) The Minister shall determine an application for international protection to be inadmissible if any of the following circumstances applies:
 - (a) another EU Member State has granted refugee status or subsidiary protection status to the applicant, or
 - (b) a country other than an EU Member State is, in accordance with subhead (2), a first country of asylum for the applicant;
- (2) A country is a first country of asylum for an applicant if he or she-
 - (a) (i) has been recognised in that country as a refugee and can still avail himself or herself of that protection, or
 - (ii) otherwise enjoys sufficient protection in that country, including benefiting from the principle of non-refoulement,
 - and
 - (b) will be re-admitted to that country.

²³ Recital 7 Procedures Directive; Recital 14 Recast Procedures Directive; Recital 8 Qualification Directive; Recital 14 Recast Qualification Directive

15. The text of Head 20(2) replicates the wording of the first part of Article 26 of the Procedures Directive which is unchanged in its Recast. We would recall our observations made in UNHCR's comments on the Procedures Directive:

“UNHCR welcomes the requirement that a country be considered a first country of asylum only if the refugee can still avail him/herself of that protection. The Office notes, however, that the term ‘sufficient protection’ in Article 26(b) is not defined and may not represent an adequate safeguard or criterion when determining whether an asylum-seeker or refugee can be returned safely to a first country of asylum. In UNHCR’s view, the protection should be effective and available in practice. The Office recommends, therefore, using the term ‘effective protection’ in national legislation and suggests the elaboration of explicit benchmarks in line with the standards outlined in the 1951 Convention and the Lisbon Conclusions on ‘effective protection’.²⁴ Furthermore, the capacity of States to provide effective protection in practice should be taken into consideration, particularly if they are already hosting large refugee populations. Countries where the Office is engaged in refugee status determination under its mandate should, in principle, not be considered first countries of asylum. UNHCR often undertakes such functions because the State has neither the capacity to conduct status determination nor to provide effective protection. Generally, resettlement of persons recognized to be in need of international protection is required. The return to such countries of persons in need of international protection should therefore not be envisaged.”

16. UNHCR reiterates its view that any protection in that country should be available in practice.²⁵ This is demonstrated by the case law of ECtHR according to which the theoretical right of *non refoulement* is not sufficient.²⁶

17. Article 26 further refers to the criteria of safety enshrined in Article 27(1) relating to the concept of safe third country but is regrettably optional for Member States when applying the concept of first asylum country. Head 20 makes no reference to these criteria and provides no further guidance as to how this concept is to be assessed. UNHCR believes that criteria should be used to define the notion of “effective protection” in line with the

²⁴ ‘Summary Conclusions on the Concept of “Effective Protection” in the Context of Secondary Movements of Refugees and Asylum-Seekers’ - Lisbon Expert Roundtable, 9-10 December 2002, <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=PROTECTION&id=3e5f323d7>

²⁵ UN High Commissioner for Refugees (UNHCR), UNHCR comments on the European Commission's Proposal, *op. cit.*, pp. 32-33.

²⁶ See, *inter alia*, *Abdolkhani and Karimnia v. Turkey*, Appl. No. 30471/08, Council of Europe: European Court of Human Rights, 22 September 2009, para. 88, at: <http://www.unhcr.org/refworld/docid/4ab8a1a42.html>: “The Court reiterates in this connection that the indirect removal of an alien to an intermediary country does not affect the responsibility of the expelling Contracting State to ensure that he or she is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention”.

1951 Convention and the Lisbon Conclusions on “effective protection”. *A fortiori*, the notion of “sufficient protection” if used by Member States should also be further defined in national legislation.

18. Article 38(1) of the Recast introduces a further new element which is also not reflected in Head 20: “The applicant shall be allowed to challenge the application of the first country of asylum concept to his or her particular circumstances.” In UNHCR’s view this is an important additional safe-guard that should also be included.

Recommendations:

- (1) The wording of Head 20(2) be amended to state:
*“(2) A country is a first country of asylum for an applicant if he or she-
(i) has been recognised in that country as a refugee and can still avail himself or herself of ~~that~~ the effective protection of that country, or
(ii) otherwise enjoys sufficient **and effective** protection in that country, including benefiting from the principle of non-refoulement”*
- (2) That the criteria of this notion be clearly defined in the legislation in line with the 1951 Convention and the Lisbon Conclusions on “effective protection”.
- (3) That a new sentence be added to Head 20 stating:
“The applicant shall be allowed to challenge the application of the first country of asylum concept to his or her particular circumstances.”

ii. Actors of persecution or serious harm

19. Head 28 transposes Article 6 of the Qualification Directive and its Recast:

Head 28: Actors of persecution or serious harm

Provide along the following lines:

Actors of persecution or serious harm include:

- (a) a state,
- (b) parties or organisations controlling a state or a substantial part of the territory of a state, and
- (c) non-state actors, if it can be demonstrated that the actors mentioned in paragraphs (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm.

20. UNHCR has long maintained that the 1951 Convention does not confer protection exclusively against persecution due to acts by State agents. Rather, persecutory acts

committed by non-State agents against whom the State is unwilling or unable to protect similarly give rise to refugee status under the 1951 Convention, provided, of course, the other criteria of the refugee definition are met.²⁷ In this connection, the question of whether a State actor exists who could be held accountable for not offering protection is not relevant.²⁸ The European Commission, in its report on the application of the 2004 Directive, noted that Member State practice has acknowledged that a broad range of actors are capable of persecution which gives rise to a need for refugee protection.²⁹

21. The issue of state protection is dealt with comprehensively in Head 29 and therefore it is unnecessary to provide further reference to it here; recommendations are set out in respect of that head below.

Recommendation:

(4) Head 28 (c) be amended as follows:

~~“(c) non-state actors, if it can be demonstrated that the actors mentioned in paragraphs (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm.”~~

iii. Actors of protection

22. Head 29 outlines which actors may be considered as “actors of protection”.

²⁷ See UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, HCR/IP/4/Rev.1, 1979, para. 65, <http://www.unhcr.org/refworld/docid/4f33c8d92.html>; See also V. Türk, Non-State Agents of Persecution in: V Chetail and V Gowlland-Debbas (eds) Switzerland and the International Protection of Refugees, (The Hague: Kluwer Law International, 2002), 95–109; G. Goodwin-Gill, The Refugee in International Law (Oxford: Oxford University Press, 2nd ed., 1996) you need 3rd editions, 70-74; J. Hathaway, The Law of Refugee Status (Toronto: Butterworths, 1991), 124-131.

²⁸ This is acknowledged in the Explanatory Memorandum on Article 9(1), which clarified that the actor of the persecution was irrelevant: European Union: *European Commission, Explanatory Memorandum on the Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection*, (COM(2001)510 final, 12.9.2001, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2001:0510:FIN:EN:PDF>, page 18.

²⁹ An EC QD implementation report states “Non-State actors accepted as actors of persecution in the practice of different Member States are reported to include guerrillas and paramilitaries, terrorists, local communities and tribes, criminals, family members, members of political parties or movements”. European Commission, Report from the Commission to the European Parliament and to the Council on the application of Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, COM(2010)314 final, 16 June 2010, page 6, section 5.1.3, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0314:FIN:EN:PDF>.

Head 29: Actors of protection

Provide along the following lines:

- (1) Protection against persecution or serious harm can only be provided by:
 - (a) a state, or
 - (b) parties or organisations, including international organisations, controlling a state or a substantial part of the territory of a state,

provided that they are willing and able to offer protection in accordance with paragraph (2).

- (2) Protection against persecution or serious harm must be effective and of a non-temporary nature. Such protection is generally provided where the actors mentioned under subparagraphs (a) and (b) of subhead (1) take reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and when the applicant has access to such protection.
- (3) When assessing whether an international organisation controls a state or a substantial part of its territory and provides protection as described in subhead (2) the Minister or, as the case may be, the Tribunal, shall take into account any guidance which may be provided in relevant European Union acts.

23. This Head uses the same wording as Art. 8 of the Recast Qualification Directive and UNHCR welcomes that the General Scheme transposes these more favourable provisions. The Recast provisions now reflect some of UNHCR's original concerns in relation to this Article. It provides greater clarity in determining whether an actor can be considered an "actor of protection". Article 7(1)-(2) now stipulates that the protection must be effective and non-temporary, specifies who can provide such protection, and that actors of protection must be willing and able to enforce the rule of law. This is a key provision in that UNHCR considers that "willingness to protect" is not sufficient in the absence of the "ability to protect".

24. This provision raises the question of the extent to which non-State entities can provide protection against the feared persecution or serious harm so as to reject the request for international protection. Generally, national protection can only be provided by the State, and not by non-State actors. It would, in UNHCR's view, be inappropriate to equate national protection provided by States with the activities of a certain administrative authority which may exercise some de facto – but not de jure – control over territory. Such control is often temporary and without the range of functions required of a State, including the ability to readmit nationals to the territory or to exercise other basic functions of government. Specifically, such non-State entities and bodies do not have the attributes of a

State, are not parties to international human rights treaties, and therefore cannot be held accountable for their actions as can a State. In practice, this generally has meant that their ability to enforce the rule of law is limited.³⁰ Specifically in respect of international organizations, such as the organs or agencies of United Nations, including the UNHCR, they enjoy privileges and immunities.³¹

25. While the final version of the Recast Directive uses the term “non-temporary”, the Commission’s original proposal for the recast referred to protection of a “durable” nature. UNHCR would support the interpretation of “non-temporary” to reflect this intention.

26. Determining the availability of protection requires an assessment of the effectiveness, accessibility and adequacy of available protection in the individual case. Possible guarantors of such protection or the existence of a legal system in a given country may be elements of this examination. However, the assessment to be made is whether the applicant’s fear of persecution continues to be well-founded, regardless of the steps taken to prevent persecution or serious harm. Further, use of the term “reasonable steps” as taken by actors of protection introduces a high level of subjectivity into the determination. In addition, while the initial burden of proof correctly lies on the state, the claimant faces a disproportionate burden to demonstrate that the measures taken by the actor of protection as insufficient, or “unreasonable”.

27. UNHCR would recall the finding of the Court of Justice of the European Union (“CJEU”) in *Abdulla & Others* regarding the interpretation of the degree of protection which must be afforded by actors of protection: “they therefore operate, inter alia, an effective legal system for the detection, prosecution and punishment of acts constituting persecution and that the national concerned will have access to such protection if he ceases to have refugee status”.³²

³⁰ As the EC points out, “The lack of clarity of the concept allows for wide divergences and for very broad interpretations which may fall short of the standards set by the Geneva Convention on what constitutes adequate protection. For instance, national authorities interpreting broadly the current definition have considered clans and tribes as potential actors of protection despite the fact that these cannot be equated to States regarding their ability to provide protection. In other instances, authorities have considered non-governmental organisations as actors of protection with regard to women at risk of female genital mutilation and honour killings, despite the fact that such organisations can only provide temporary safety or even only shelter to victims of persecution”.

European Commission, Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted, 21.10.2009, p. 6, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0551:FIN:EN:PDF>.

³¹ UN General Assembly, Convention on the Privileges and Immunities of the United Nations, 13 February 1946, available at: <http://www.refworld.org/docid/3ae6b3902.html> [accessed 4 May 2015]; UN General Assembly, Convention on the Privileges and Immunities of the Specialized Agencies, 21 November 1947, available at: <http://www.refworld.org/docid/3ae6b3b10.html> [accessed 4 May 2015]

³² *Salahadin Abdulla and Others v. Germany*, C-175/08; C-176/08; C-178/08 & C-179/08, European Union: European Court of Justice, 2 March 2010, <http://www.unhcr.org/refworld/docid/4b8e6ea22.html>.

Recommendations:

- (5) Amending Head 29(1) to:

“(1) Protection against persecution or serious harm can only be provided by:

a state, or

parties or organisations, ~~including international organisations~~, controlling a state or a substantial part of the territory of a state,

provided that they are willing and able to offer protection in accordance with paragraph (2).”

- (6) Amending Head 29(2) to:

*“(2) Protection against persecution or serious harm must be effective and of a ~~non-temporary~~ **durable** nature. Such protection is ~~generally~~ provided where the actors mentioned under subparagraphs (a) and (b) of subhead (1) ~~take reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating~~ **operate** an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and when the applicant has access to such protection.”*

- (7) Adding a requirement to carry out “an assessment of the effectiveness, accessibility and adequacy of available protection in the individual’s case”

iv. Internal Relocation Alternative

28. Head 30 concerns what is termed the Internal Relocation / Flight Alternative (IFA).

Head 30: Internal protection

Provide along the following lines:

- (1) The Minister or, as the case may be, the Tribunal may determine that an applicant is not in need of international protection if in a part of the country of origin the applicant

(a) has no well-founded fear of being persecuted or is not at real risk of suffering serious harm, or

(b) has access to protection against persecution or serious harm,

and he or she can safely and legally travel to and gain admittance to that part of the country and can reasonably be expected to settle there.

- (2) The Minister or, as the case may be, the Tribunal, in examining whether an applicant has a well-founded fear of being persecuted or is at real risk of suffering harm, or has access to protection against persecution or serious harm in a part of the country of

origin in accordance with paragraph (1), shall have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant in accordance with Head 25.

- (3) The Minister or, as the case may be, the Tribunal, in complying with this Head, shall ensure that precise and up-to-date information is obtained from relevant sources, such as the High Commissioner and the European Asylum Support Office.

29. UNHCR welcomes that the General Scheme transposes the more favourable provision of Article 8 of the Recast Qualification Directive. More generally however the General Scheme does not fully reflect UNHCR guidance³³ some of which is also averted to in Recital 27 of the Directive:

"Internal protection against persecution or serious harm should be effectively available to the applicant in a part of the country of origin where he or she can safely and legally travel to, gain admittance to and can reasonably be expected to settle. Where the State or agents of the State are the actors of persecution or serious harm, there should be a presumption that effective protection is not available to the applicant. When the applicant is an unaccompanied minor, the availability of appropriate care and custodial arrangements, which are in the best interest of the unaccompanied minor, should form part of the assessment as to whether that protection is effectively available."

30. Article 8(1) recognizes that in cases involving persecution by non-State actors, an assessment of whether an internal flight, relocation or protection alternative in another part of the country exists such that international protection is not required. This is a two-step inquiry involving both a relevance and a reasonableness test, as reflected in Article 8(1)(b)³⁴ and in line with UNHCR's Guidelines on International Protection on "Internal Flight or Relocation Alternative"³⁵. Apart from considering whether the applicant would not have a well-founded fear of persecution or would face serious harm in the relevant area, it also needs to be considered whether the applicant could practically, safely and legally access the proposed area (the relevance test), and only if this is possible, whether they could also reasonably be expected to relocate there (the reasonableness test). The latter test of reasonableness requires an assessment of all the circumstances, such that the individual, taking into account their personal circumstances, could live there without undue hardship.

³³ UN High Commissioner for Refugees (UNHCR), Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees, 23 July 2003, HCR/GIP/03/04, available at: <http://www.refworld.org/docid/3f2791a44.html>

³⁴ See UNHCR Annotated Comments on the 2004 Qualification Directive, comment on Article 8.

³⁵ UNHCR Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees, 23 July 2003, HCR/GIP/03/04, available at: <http://www.refworld.org/docid/3f2791a44.html>

An assessment of an internal flight or relocation alternative is not normally necessary where the feared persecution emanates from State agents (see Recital 27), as they are presumed to be able to act throughout the territory.

31. This recast has made the test less subjective, moving from the formulation “reasonably be expected to stay” to “he or she can safely and legally travel to and gain admittance”. Nevertheless, physical and legal access to another part of the country is merely one of the first steps towards enjoying effective protection from persecution, and is a necessary but insufficient condition. Article 8 read in conjunction with Recital 27 will require that the applicant “can safely and legally travel” and “gain admittance” to another part of his/her country, and that s/he “can reasonably be expected to settle” there. This reflects elements from the test established by the ECtHR in *Salah Sheekh*³⁶ and is in accordance with UNHCR’s Guidelines on International Protection on “Internal Flight or Relocation Alternative”.

32. The “reasonableness” test - as expressed here as “reasonably be expected” to live - cannot lead to the situation where the asylum-seeker has to demonstrate that s/he could not relocate to multiple possible locations. The proposed place of relocation must be properly and specifically identified by the State, with the applicant given an adequate opportunity to respond. The applicant cannot be required to respond to multiple places, a burden of proof that may prove unreasonably heavy.

33. Although Head 30(2) transposes Article 8(2) QD, it omits the phrase “at the time of taking the decision on the application have regard to”. In UNHCR’s view, it is important to make clear, as this additional phrase does, that any assessment of an internal relocation alternative needs to be made at the time of taking the decision and not in relation to an earlier or later time.

34. In the case of unaccompanied children, Recital 27 provides welcome guidance on assessing “availability of appropriate care and custodial arrangements”, in considering whether internal protection is relevant and reasonable³⁷.

Recommendations:

(8) Amend Head 30(1) as follows:

“... and he or she can safely and legally travel to and gain admittance to that part of the country and can reasonably **and without undue hardship** be expected to settle there.”

³⁶ *Salah Sheekh v. The Netherlands*, Council of Europe: European Court of Human Rights, 11 January 2007, <http://www.unhcr.org/refworld/docid/45cb3dfd2.html>.

³⁷ See paras. 53-57 on internal flight: UNHCR, Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, 22 December 2009, HCR/GIP/09/08, available at: <http://www.refworld.org/docid/4b2f4f6d2.html>

(9) Amend Head 30(2) to state:

“...in examining whether an applicant has a well-founded fear of being persecuted or is at real risk of suffering harm, or has access to protection against persecution or serious harm in a part of the country of origin in accordance with paragraph (1), shall **at the time of taking the decision on the application** have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant in accordance with Head 25”

(10) Amend Head 30 to add the provisions:

“Where the State or agents of the State are the actors of persecution or serious harm, a presumption will apply that effective protection is not available to the applicant.

When the applicant is an unaccompanied minor, the availability of appropriate care and custodial arrangements, which are in the best interest of the unaccompanied minor, must form part of the assessment as to whether that protection is effectively available.”

v. Sur place claims

35. Head 27 concerns *sur place* claims.

Head 2: Interpretation

Provide along the following lines:

...

“Geneva Convention” means the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 (the text of which, in the English language, is, for convenience of reference, set out in Schedule 1 to this Act) and includes the Protocol relating to the Status of Refugees done at New York on 31 January 1967 (the text of which, in the English language, is, for convenience of reference, set out in Schedule 2 to this Act); ...

Head 27: International protection needs arising *sur place*

Provide along the following lines:

- (1) A well-founded fear of being persecuted or a real risk of suffering serious harm may be based on events which have taken place since the applicant left the country of origin.
- (2) A well-founded fear of being persecuted or a real risk of suffering serious harm may be based on activities which have been engaged in by the applicant since he or she left the country of origin, in particular where it is established that the activities relied upon constitute the expression and continuation of convictions or orientations held in the country of origin.
- (3) Without prejudice to the Geneva Convention, an applicant who is the subject of an application made with the consent of the Minister given under Head 21 shall not normally

be:

- (a) the subject of a determination by the Minister under Head 35 that he or she is a person in respect of whom a refugee declaration should be given, or
 - (b) the subject of a decision by the Tribunal under Head 42 that he or she is a person in respect of whom a refugee declaration should be given,
- if the risk of persecution is based on circumstances which the applicant has created by his or her own decision since leaving the country of origin.

36. Head 27 transposes Article 5 of the Qualification Directive which is currently transposed in Regulation 6 of S.I. 518 of 2006. The recognition of *sur place* claims in Article 5(2) is in line with the general position taken in respect of the 1951 Convention. The requirement that a person must be outside his or her country to be a refugee does not mean that he or she must have left it on account of well-founded fear. He may have decided to ask for recognition of his refugee status after having already been abroad for some time³⁸. Diplomats and other officials serving abroad, prisoners of war, students, migrant workers and others have applied for refugee status during their residence abroad and have been recognized as refugees³⁹. Thus, even where it cannot be established that the applicant has already held the belief, convictions or orientations in the country of origin, the asylum-seeker is entitled to the right of freedom of conscience, thought and expression, freedom of religion and freedom of association, within the limits defined in Article 2 of the 1951 Convention and other human rights instruments. Such freedoms include the right to change one's religion or convictions, which could occur subsequent to departure e.g., due to disaffection with the religion or policies of the country of origin, or greater awareness of the impact of certain policies.

37. Head (3) however introduces a new element into Irish law based on Article 5(3) of the Directive concerning the application of the concept to subsequent applications (as defined in Head 21). It states that the consent of the Minister shall not normally be given a declaration if the risk of persecution is based on circumstances which the applicant has created by his or her own decision since leaving the country of origin.

38. There may be instances where an individual outside his or her country of origin who would otherwise not have a well-founded fear of persecution acts for the sole purpose of "manufacturing" an asylum claim. UNHCR appreciates that States face difficulty in assessing the validity of such claims and agrees with States that the practice should be discouraged. It would be preferable, however, to address difficult evidentiary and credibility questions by appropriate credibility assessments. Such an approach would also be in line with Article

³⁸ UNHCR Handbook para. 94

³⁹ UNHCR Handbook para. 95

4(3)(d) of the Directive⁴⁰. In UNHCR's view, such an analysis does not require an assessment of whether the asylum-seeker acted in "bad faith" but rather, as in every case, whether the requirements of the refugee definition are in fact fulfilled taking into account all the relevant facts surrounding the claim. There is no logical or empirical connection between the well-foundedness of the fear of being persecuted or of suffering serious harm, and the fact that the person may have acted in a manner designed to create a refugee claim. The 1951 Convention does not, either explicitly or implicitly, contain a provision according to which its protection cannot be afforded to persons whose claims for asylum are the result of actions abroad. The phrase "without prejudice to the Geneva Convention" in Article 5(3) would therefore require such an approach.

39. Irish jurisprudence on *sur place* claims also confirms that even though an applicant may not have acted in good faith in engaging in activities since leaving his country of origin, the key question remains as to whether s/he has a "well-founded fear". In *HM v Minister for Justice*, Cross J. stated that; "The essential question remains - whether the applicant had a well-founded fear of persecution, even if he had acted in bad faith."⁴¹

40. Finally with respect to terminology, the Geneva Convention is defined in Head 2 as set out above. Whilst the definition is very clear as regards what this refers to in the Head on interpretation, the Geneva Conventions are more frequently referred to in the context of International Humanitarian Law; it may be preferable to refer more specifically to the "1951 Convention" or to the Geneva Convention Relating to the Status of Refugees.

Recommendations:

(11) Deleting Head 27(3) concerning *sur place* claims in subsequent applications.

vi. Assessment of facts and circumstances

41. Head 25 generally and Head (5) in particular concern what's termed the assessment of facts and circumstances:

⁴⁰“(3) The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:

...

(d) whether the applicant's activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether these activities will expose the applicant to persecution or serious harm if returned to that country;”

⁴¹ *HM v Minister for Justice* [2012] IEHC 176, para. 35.

Head 25: Assessment of facts and circumstances

Provide along the following lines:

(5) The following matters shall be taken into account by the Minister or, as the case may be, the Tribunal for the purposes of the examination of an application for international protection or the determination of an appeal in respect of such an application:

...

(e) whether the applicant could reasonably be expected to avail himself or herself of the protection of another country where he could assert citizenship.

42. This Head outlines the considerations which the first and second instance bodies shall take into account when considering a protection application. These paragraphs transpose Arts. 4(3) of the Qualification Directive which states: “The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account ...”. Accordingly Head 25(5) omits two elements in its transposition: the requirement that the assessment be carried out on an individual basis; the characterisation of the list is a non-exhaustive one.

Assertion of nationality

43. Head 25(5)(e) requires decision makers to consider “whether the applicant could reasonably be expected to avail himself or herself of the protection of another country where he could assert citizenship.” UNHCR recommends that this factor not form part of the SP assessment just as it should not feature in the refugee status determination assessment. There is no obligation on the part of an applicant under international law to avail him or herself of the protection of another country where s/he could “assert” nationality. The issue was explicitly discussed by the drafters of the Convention. It is regulated in Article 1A(2) (last sentence), which deals with applicants of dual nationality, and in Article 1E of the 1951 Convention. There is no margin beyond the limits of these provisions. For Article 1E to apply, a person otherwise included in the refugee definition would need to fulfil the requirement of having taken residence in the country and having been recognized by the competent authorities in that country “as having the rights and obligations which are attached to the possession of the nationality of that country”. Since Article 1E is already reflected in Article 12(1)(b) of the 2004 Directive, Article 4(3)(e) should not be incorporated into national legislation and practice if full compatibility with Article 1 of the 1951 Convention is to be ensured.⁴²

⁴² See UNHCR, UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April, comment on Article 4(3)(e).

Compelling reasons

Head 25(6) speaks to the weight to be afforded to a finding that the applicant has already suffered persecution or serious harm and Head (7) to the aspects of an applicant's statement that need not be confirmed where the 1st or 2nd instance body is satisfied of certain matters.

Head 25: Assessment of facts and circumstances

(6) The fact that an applicant has already been subject to persecution or serious harm, or to direct threats of such persecution or such serious harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.

44. Arts. 4 (3)-(5) of the Qualification Directive are currently transposed in Regulation 5(1)-(3) of S.I. 518 2006 but these provisions were amended by the 2013 Subsidiary Protection Regulations which omitted the phrase in Regulation 5(2), "but compelling reasons arising out of previous persecution or serious harm alone may nevertheless warrant a determination that the applicant is eligible for protection." The corresponding provisions in respect of refugee status remained unchanged. UNHCR regrets that this provision has also been removed in the General Scheme, not just in relation to subsidiary protection but now also with respect to refugee status.

45. In line with general humanitarian principles, even where the assessment concludes that persecution or serious harm will not be repeated, compelling reasons arising out of previous persecution, may still warrant the granting of international protection. The basis for this position is the exception to the "ceased circumstances" cessation clauses in Articles 1C(5) and 1C(6) of the 1951 Convention which refers to "compelling reasons arising out of previous persecution". UNHCR has recommended that this provision should be interpreted to extend beyond the actual wording of the provision and to apply to the initial determination of refugee status according to Article 1A(2) of the Convention. The humanitarian reasoning behind this position is a recognition that the level of atrocious acts experienced by a person can in itself be of such extraordinary nature that a forward looking assessment in relation to the need for international protection is unnecessary. While such a provision would only apply in exception cases and the removal of this provision is unlikely to affect a large number of applicants, it is a well-established humanitarian principle that is grounded in State practice.⁴³

⁴³ UN High Commissioner for Refugees (UNHCR), *Cessation of Status*, 9 October 1992, No. 69 (XLIII) - 1992, available at: <http://www.refworld.org/docid/3ae68c431c.html>, para. (e);

46. In *N -v- Minister for Justice & Ors* [2012] IEHC 499 the Irish High Court has similarly found in 2012 that Regulation 5(2) expresses “an intention to extend the humanitarian exception beyond the cessation context. The Minister thereby retained residual discretion to provide a form of quasi-humanitarian protection which is greater than the minimum level of protection required under the Qualification Directive, in the terms advocated by the UNHCR and the Executive Committee.” Notwithstanding that Ms Justice Clark refers to a doubt regarding whether that addition may be *ultra vires* the powers of the minister to enact by S.I. she does not go on to consider the constitutionality of that section and in a subsequent case it was similarly applied without question.⁴⁴

47. UNHCR also notes the complications that may arise from the removal of the “compelling reasons” provision with respect to existing Applicants who may have sought to rely on the compelling reasons provision in making their applications. This substantive change may accordingly have a negative effect on the determination of such applications under the new legislation.

Recommendations:

(12) Head 25(5) be amended as follows:

~~“The following matters shall be taken into account~~ The assessment of an application for international protection, or the determination of an appeal in respect of such an application is to be carried out on an individual basis by the Minister or, as the case may be, the Tribunal ~~for the purposes of the examination of an application for international protection or the determination of an appeal in respect of such an application~~ and includes taking into account-...”

(13) Head 25(5)(e) be deleted

(14) Head 25 (6) be amended to incorporate the original wording of Regulation 5(2) of SI 518 of 2006:

“...but compelling reasons arising out of previous persecution or serious harm alone may nevertheless warrant a determination that the applicant is eligible for protection.”

UNHCR, *Xhevdet Hoxha v. Special Adjudicator and B v. Immigration Appeal Tribunal, and the United Nations High Commissioner for Refugees (Intervener)*. Case for the Intervener, 5 January 2005, available at: <http://www.refworld.org/docid/423ec5724.html>.

⁴⁴ *B (K) v Min for Justice & Refugee Appeals Tribunal* [2013] IEHC 169

vii. Credibility

Head 26: Credibility

Provide along the following lines:

The Minister or the Tribunal, as the case may be, shall assess the credibility of an applicant for the purposes of the examination of his or her application or the determination of an appeal in respect of his or her application and in doing so shall have regard to all relevant matters.

48. UNHCR welcomes the omission in Head 26 of the elements of Section 11(b) of the Refugee Act, 1996 concerning the assessment of credibility, replicating instead Regulation 11 of the 2013 Subsidiary Protection Regulations. As regards the specific wording of that provision we would repeat our recommendations set out at paragraph 28 of our Observations of 2 October 2013 on those Regulations that the reference to “the credibility of an applicant” be re-worded to read “the credibility of an application”. The reason for this recommendation is that UNHCR’s research for its report *Beyond Proof, Credibility Assessment in EU Asylum systems* has shown the limits and dangers inherent in focussing on an assessment of an applicant’s behaviour and the questionable assumptions that underpin such an approach. Rather, as the report notes:

“The term ‘credibility assessment’ in this context is used to refer to the process of gathering relevant information from the applicant, examining it in the light of all the information available to the decision-maker, and determining whether the statements of the applicant relating to material elements of the claim can be accepted, for the purpose of the determination of qualification for refugee and/or subsidiary protection status...”

*“This understanding is also promoted by the European Asylum Curriculum (EAC) module on evidence assessment, which describes ‘the assessment of credibility as a tool to establish a set of material facts to which you can apply the refugee definition (the findings of facts)’”.*⁴⁵

49. Secondly, while it is the legal position that all elements which will potentially form the basis for adverse credibility findings should be put to an applicant at interview, UNHCR would recommend that specific provision be made for this in the General Scheme.

⁴⁵ UNHCR, *Beyond Proof, Credibility Assessment in EU Asylum Systems*, p.27: Full Report, May 2013, available at: <http://www.refworld.org/docid/519b1fb54.html>

Recommendations:

- (15) It is recommended that the wording of Head 26 be amended to state:

*“The Minister or the Tribunal, as the case may be, shall assess the credibility of an **application under this Act** ~~applicant~~ for the purposes of ~~its~~ ~~the~~ examination ~~of his or her application~~ or the determination of an appeal in respect of ~~his or her~~ **an** application and in doing so shall have regard to all relevant matters.”*

- (16) It is recommended that a specific provision be included in the Bill requiring all elements which will potentially form the basis for adverse credibility findings to be put to an applicant at interview or on appeal.

viii. Exclusion from eligibility for refugee status and subsidiary protection

50. Heads 9 and 11 state:

Head 9: Exclusion from being a refugee

Provide along the following lines:

- (1) A person is excluded from being a refugee where he or she is-
 - (a) subject to subhead (4) is receiving from organs or agencies of the United Nations (other than the High Commissioner) protection or assistance, or
 - (b) recognised by the competent authorities of the country in which he or she has taken up residence as having the rights and obligations which are attached to the possession of the nationality of that country, or rights and obligations equivalent to those.
- (2) A person is excluded from being a refugee where there are serious reasons for considering that he or she—
 - (a) has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes,
 - (b) has committed a serious non-political crime outside the State prior to his or her arrival in the State, or
 - (c) has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.
- (3) A person is excluded from being a refugee where there are serious reasons for considering that he or she has incited or otherwise participated in the commission of a crime or an act referred to in subhead (2).

- (4) Subhead (1)(a) shall not apply where the protection or assistance referred to therein has ceased for any reason, without the position of persons who had been receiving that protection or assistance being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations.

Head 11: Exclusion from eligibility for subsidiary protection

Provide along the following lines:

- (1) A person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that he or she—
- (a) has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes,
 - (b) has committed a serious crime,
 - (c) has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations, or
 - (d) constitutes a danger to the community or to the security of the State.
- (2) A person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that he or she has incited or otherwise participated in the commission of a crime or an act referred to in subhead (1).
- (3) A person is excluded from being eligible for subsidiary protection if he or she has, prior to his or her arrival in the State, committed a crime or crimes, not referred to in subhead (1), which, if committed in the State, would be punishable by imprisonment and if he or she left his or her country of origin solely in order to avoid sanctions resulting from that crime or those crimes.

51. These Heads provide that, in a limited number of serious circumstances, an applicant may be excluded from eligibility for refugee status or subsidiary protection. Head 9 uses almost identical wording as Article 12 of the Qualification Directive and the slight changes in the text are not substantive. The text of the new Head differs in form slightly from its current text in s.2 of the Refugee Act 1996 which does not contain Head (3) or (4) above. Head 11 uses almost identical wording as Article 17 of the Qualification Directive and the slight changes in the text are not substantive. The text of the new Head is exactly the same as is currently contained in Regulation 17 of the 2013 SP Regulations.

52. UNHCR's position on this text has been set out in Comments on the Qualification Directive, Comments on the Recast Qualification Directive and Comments on the Immigration, Residence and Protection Bill 2008:

"Keeping in mind the serious consequences of excluding a person who is in need of protection, UNHCR argues that, as with any exception to human

*rights guarantees, the exclusion clauses must always be interpreted restrictively and used with great caution. The rationale for the exclusion clauses in the 1951 Convention is twofold. Firstly, certain acts are so grave that they render their perpetrators undeserving of international protection as refugees. Secondly, the refugee framework should not stand in the way of serious criminals facing justice”.*⁴⁶

53. With respect to Heads 9(1)(b) and (4):

“[Heads 9(1)(b) and (4)] cover the situation outlined in Article 1D of the 1951 Convention, which particularly refers to persons falling under the protection and assistance mandate of UNRWA for Palestinian refugees. The objective of Article 1D of the 1951 Convention is to avoid overlapping competencies between UNRWA and UNHCR, but also, in conjunction with UNHCR’s Statute, to ensure the continuity of protection and assistance for Palestinian refugees as required. The fact that a Palestinian falls within paragraph 2 of Article 1D (automatic inclusion) does not necessarily mean that s/he cannot be returned to UNRWA’s area of operations. Reasons not to return may be a danger of persecution or other serious protection-related problems or an inability to return, for example, because the authorities of the country concerned refuse readmission.

[Head 9(4) does not replicate paragraph 2 of Article 1D, the automatic inclusion, but simply makes an exception to the exclusion of persons getting UNRWA assistance and protection.”

54. The omitted text from Article 1D referred to above is also contained in Article 12 of the Qualification Directive which states, “these persons shall ipso facto be entitled to the benefits of this Directive”.

55. Head 9(1)(b) refers to the exclusion clause of Article 1E of the 1951 Convention excluding a person “who is recognised by the competent authorities of the country in which s/he has taken residence as having the right and obligations which are attached to the possession of the nationality of that country”. Again we would recall our comments to the IRP Bill 2008:

“The rationale for this exclusion is that such persons would not be in need of international protection as they already have the rights and obligations which are attached to the possession of the nationality of that country. UNHCR is concerned that Section 73(1)(b) extends the scope of this exclusion clause by adding to the definition persons who have ‘rights and obligations equivalent to those’.

⁴⁶ UNHCR's Comments on the Immigration, Residence and Protection Bill 2008, March 2008, p.18

A similar formulation is found in the Qualification Directive Article 12(1)(b) for which UNHCR had the following comments: 'It should be noted that Article 1E applies only to cases where the person is currently recognized by the country concerned as having these 'rights and obligations'. If the country granted such rights in the past but is no longer willing to do so, Article 1E does not apply. Similarly, Article 1E does not apply to the claims of individuals for whom the potential for such enjoyment of right exists, but who have never resided in that country'.⁴⁷

56. With respect to Head 11 and exclusion from subsidiary protection:

"Given the close linkages between refugee status and subsidiary forms of protection, in so far as they cover persons under UNHCR's mandate for persons in need of protection, UNHCR considers that the exclusion clauses in relation to subsidiary protection should be similar to those for refugees....

"UNHCR is therefore concerned with the broad wording of these exclusion clauses in relation to subsidiary protection. In particular UNHCR is concerned with [Head 11(1)(b)]⁴⁸ which excludes a person from subsidiary protection if he or she "has committed a serious crime". The provision does not specify where and when the serious crime has been committed; neither does it require the qualification that the crime be non-political."⁴⁹

57. UNHCR further notes that Heads 9(2)(c) and 11(1)(c) should not be read as broadening the scope of the exclusion clause found in Article 1F(c) to suggest that any act which could be seen as contrary to the Preamble and Article 1 and 2 of the United Nations Charter could give rise to exclusion under this provision.

"It is UNHCR's understanding that only those criminal acts which are contrary to the purposes and principles of the United Nations in a fundamental manner may trigger the application of Article 1F(c). The purposes and principles are set out in Articles 1 and 2 of the United Nations Charter and relate to international peace and security, and peaceful relations between States. However, the broad and general terms of Articles 1 and 2 of the Charter of the United Nations, which set out its purposes and principles, offer little guidance as to the criminal acts which could exclude a person from refugee status through the application of Article 1F(c) of the 1951 Convention. Whether or not a particular crime comes within the scope of Article 1F(c) will also depend on its impact and gravity on the international

⁴⁷ See paragraphs 7-11 of the following document: UNHCR, *UNHCR Note on the Interpretation of Article 1E of the 1951 Convention relating to the Status of Refugees*, March 2009, available at: <http://www.unhcr.org/refworld/docid/49c3a3d12.html>.

⁴⁸ Section 66(3)(b) IRP Bill 2008.

⁴⁹ UNHCR's Comments on the Immigration, Residence and Protection Bill 2008, March 2008, p.18

plane. Therefore Article 1F(c) should be interpreted restrictively in light of the gravity of the consequences of exclusion from refugee protection.”⁵⁰

58. UNHCR is also concerned with the exclusion provision in Head 11(1)(d). This provision is modelled on Article 17(1)(d) of the Qualification Directive, which in turn is similar in scope to Article 14(4-6) of the Qualification Directive (see further below re. revocation). Both provisions reflect the grounds which may give rise to loss of protection against refoulement provided for in Article 33(2) of the 1951 Convention. In its comments to the Qualification Directive, UNHCR expressed concern at the use of these exceptions to the principle of non-refoulement as grounds for exclusion from international protection beyond the provisions of Article 1F of the 1951 Convention, noting that in contrast to Article 1F, Article 33(2) was not conceived as a ground for terminating refugee status or an exclusion clause, and that States are therefore nonetheless obliged to grant the rights of the 1951 Convention which do not require lawful residence and which do not foresee exceptions for as long as a refugee remains within the jurisdiction of the State concerned. Given the close linkages between refugee status and subsidiary forms of protection, in so far as they cover persons under UNHCR’s mandate, similar concerns as those expressed with regard to Article 14 (4-6) of the Directive would apply to the provision in Head 11(1)(d).

59. Similarly UNHCR is concerned with Head 11(3) to non-serious crimes. Given the close linkages between refugee status and subsidiary forms of protection, in so far as they cover persons under UNHCR’s mandate, similar concerns as those expressed with regard to Article 12 of the Directive would seem to apply. UNHCR recommends that this exclusion clause be omitted from the Bill and would also recall that States’ “obligations under international human rights law with regard to non-refoulement continue to apply in such cases”.⁵¹

Recommendations:

- (17) Amending Head 9(4) to add the sentence: “these persons shall ipso facto be entitled to the benefits of refugees recognised under this Act”
- (18) Amending Head 9(1)(b) by deleting the words, “or rights and obligations equivalent to those” in order to be consistent with the language of Article 1E of the 1951 Convention.
- (19) Amending Head 11(1)(b) so that it accords with the provisions 1951 Convention (and as set out in Head 9(2)(b), since the exclusion clauses in relation to subsidiary protection should be similar to those for refugees.
- (20) Deleting the formulation “as set out in the Preamble 20 and Articles 1 and 2 of the Charter of the United Nations” in Heads 9(2)(c) and 11(1)(c), so that it accords with

⁵⁰ *ibid* p.17.

⁵¹ UNHCR’s Comments on the Immigration, Residence and Protection Bill 2008, p.18.

the provisions of the 1951 Convention.

(21) Deleting Head 11(3) so that only “serious crimes” may be the basis of exclusion.

ix. Revocation

60. The General Scheme transposes Articles 14 and 19 with respect to the revocation of refugee status and subsidiary protection status respectively in Head 46:

Head 46: Revocation of refugee declaration or subsidiary protection declaration

Provide along the following lines:

- (1) The Minister shall revoke a refugee declaration given to a person if satisfied that-
 - (a) the person should have been or is excluded from being a refugee under Head 9,
 - (b) the person has, in accordance with Head 8, ceased to be a refugee, or
 - (c) misrepresentation or omission of facts, whether or not including the use of false documents, by the person was decisive in the decision to give the person a refugee declaration.
- (2) ...
- (3) The Minister shall revoke a subsidiary protection declaration given to a person if satisfied that-
 - (a) the person should have been or is excluded from being eligible for subsidiary protection under Head 11,
 - (b) the person has, in accordance with Head 10, ceased to be eligible for subsidiary protection, or
 - (c) misrepresentation or omission of facts, whether or not including the use of false documents, by the person was decisive in the decision to give the person a subsidiary protection declaration...

61. Head 46 closely replicates the text of Articles 14 and 19 of the Qualification Directive. As with exclusion above, UNHCR’s position on this text has already been set out in Comments on the Qualification Directive, Comments on the Recast Qualification Directive and Comments on the Immigration, Residence and Protection Bill 2008:

“The provision seems to confuse the legal concepts of cessation, cancellation and revocation. Cessation refers to the ending of refugee status pursuant to Article 1C of the 1951 Convention because international refugee protection is no longer necessary or justified. Cancellation means a decision to invalidate a refugee status recognition, which is appropriate where it is subsequently established that the individual should never have been recognized, including

*in cases where he or she should have been excluded from international refugee protection. Revocation refers to the withdrawal of refugee status in situations where a person properly determined to be a refugee engages in conduct which comes within the scope of Article 1F(a) or (c) of the 1951 Convention after recognition. UNHCR requests states to differentiate between these concepts and their legal requirements in the implementing legislation.*⁵²

The language 'is excluded from being a refugee [under Head 9]' is understood to refer to a situation where refugee status can be ended or revoked because a refugee has committed a crime within the scope of Article 1F(a) and 1F(c) of the 1951 Convention after recognition. Revocation on the basis of Article 1F(a) or 1F(c) is permitted, as neither of these clauses contain a geographical or temporal limitation. For crimes other than those falling within the scope of Article 1F(a) or 1F(c), criminal prosecution would be foreseen, rather than revocation of refugee status.

As noted above, Article 1F(b) specifies that the serious, non-political crimes must have been committed outside the country of refuge prior to admission. The logic of the Convention is that the type of crimes covered by Article 1F(b) committed after admission would be handled through rigorous domestic criminal law enforcement, as well as the application of Articles 32 and 33(2) of the 1951 Convention, where necessary. Neither Article 1F(b) nor Article 32 or 33(2) provides for the loss of refugee status of a person who, at the time of the initial determination, met the eligibility criteria of the 1951 Convention. In cases which involve serious non-political crimes, Article 14(3)(a) should therefore be understood as referring to crimes committed prior to admission outside the country of refuge...

Misrepresentations or omission of facts, including the use of false documents, can only serve as a basis for cancelling refugee status if this amounts to objectively incorrect statements by the applicant which relate to material or relevant facts (that is, elements which were clearly instrumental to the recognition) and if there was an intention on the part of the applicant to mislead the decision maker. The use of forged documents should also be assessed in light of the circumstances of the case: in many instances, asylum-seekers need to rely on false papers to flee persecution. The use of false documents does not of itself render a claim fraudulent and should not automatically result in the cancellation of refugee status, provided the person revealed his/her true identity and nationality and it has formed the basis of

⁵² See UNHCR's Guidelines on Cessation (HCR/GIP/03/03); UNHCR's Guidelines on Exclusion and Background Note (HCR/GIP/03/05); and UNHCR, Note on the Cancellation of Refugee Status, 22 November 2004

the recognition decision.⁵³ The fact that refugees may sometimes be forced to make use of forged documents is also recognized by Article 31(1) of the 1951 Convention which exempts refugees (under specific conditions) from penalization on account of illegal entry into or stay in the country in which they apply for asylum.”

62. In applying Articles 14(1-3), the burden of proof for establishing that the criteria are fulfilled should be on the Member State applying the provision.

Recommendations:

- (22) Adding a provision which states that the burden of proof for establishing the criteria for revocation have been met lies with the State.
- (23) Amending Head 46 (1) and (3) to bring it into conformity with the 1951 Convention. There should be a clear differentiation between the concepts of cessation, cancellation and revocation and their legal requirements

Head 46: Revocation of refugee declaration or subsidiary protection declaration

- (2) The Minister may revoke a refugee declaration given to a person if satisfied that-
 - (a) there are reasonable grounds for regarding him or her as a danger to the security of the State, or
 - (b) the person, having been by a final judgment convicted, whether in the State or not, of a particularly serious crime, constitutes a danger to the community of the State.

63. In transposing these sections of Article 14(4) of the Qualification Directive the original wording has been followed in a slightly different format. The wording of these provisions in the Directives originates in the provision on non-refoulement in the 1951 Convention in Article 33:

“1. No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final

⁵³ See also UNHCR Note on the Cancellation of Refugee Status, 22 November 2004, available at: <http://www.refworld.org/docid/41a5dfd94.html> [accessed 4 May 2015]

judgement of a particularly serious crime, constitutes a danger to the community of that country.”

64. These exceptional provisions thus stated properly relate to expulsion or return rather than revocation. This is somewhat alluded to in Articles 14 (5)-(6) of the Directive which are not contained in the General Scheme:

“5. In situations described in paragraph 4, Member States may decide not to grant status to a refugee, where such a decision has not yet been taken.

6. Persons to whom paragraphs 4 or 5 apply are entitled to rights set out in or similar to those set out in Articles 3, 4, 16, 22, 31 and 32 and 33 of the Geneva Convention in so far as they are present in the Member State.”

Thus section 6 seeks to extend to refugees their rights under the Convention for as long as they are present in the country of asylum and have not been expelled or returned in accordance with Article 33 of the Convention. UNHCR has previously expressed its concerns in relation to these provisions of the Qualification Directive:

“Article 14(4) of the Directive runs the risk of introducing substantive modifications to the exclusion clauses of the 1951 Convention, by adding the provision of Article 33(2) of the 1951 Convention (exceptions to the non-refoulement principle) as a basis for exclusion from refugee status. Under the Convention, the exclusion clauses and the exception to the non-refoulement principle serve different purposes. The rationale of Article 1F which exhaustively enumerates the grounds for exclusion based on the conduct of the applicant is twofold. Firstly, certain acts are so grave that they render their perpetrators undeserving of international protection. Secondly, the refugee framework should not stand in the way of serious criminals facing justice. By contrast, Article 33(2) deals with the treatment of refugees and defines the circumstances under which they could nonetheless be refouled. It aims at protecting the safety of the country of refuge or of the community. The provision hinges on the assessment that the refugee in question is a danger to the national security of the country or, having been convicted by a final judgement of a particularly serious crime, poses a danger to the community. Article 33(2) was not, however, conceived as a ground for terminating refugee status... Assimilating the exceptions to the non-refoulement principle permitted under Article 33(2) to the exclusion clauses of Article 1F would therefore be incompatible with the 1951 Convention. Moreover, it may lead to a wrong interpretation of both Convention provisions.

‘Status granted to a refugee’ is therefore understood to refer to the asylum (‘status’) granted by the State rather than refugee status in the sense of

*Article 1A (2) of the 1951 Convention ... States are therefore nonetheless obliged to grant the rights of the 1951 Convention which do not require lawful residence and which do not foresee exceptions for as long as the refugee remains within the jurisdiction of the State concerned.*⁵⁴

65. The same interpretation has also been accepted by the High Court in Ireland in *Abramov v. Minister of Justice, Equality and Law Reform*⁵⁵ concerning the existing corresponding provision of the Refugee Act s.21(1)(g):

“Accordingly, revocation of the status of refugee is only appropriate and compatible with the terms of the Geneva Convention where one of the events provided for that purpose in Article 1C has occurred. If a Contracting State considers that in the absence of any such change of circumstance, the presence of the refugee in its territory has become intolerable because of the conduct of the refugee, the appropriate course of action lies under Article 32, namely, expulsion. Where the effect of the decision to expel is to return the refugee to the country of nationality, expulsion is only permissible in accordance with Article 33(2) of the Convention namely upon the ground that the refugee has been convicted by a final judgment of a particularly serious crime and thus constitutes a danger to the community of the country of refuge.”

Recommendations:

(24) Head 46 (2) be amended to bring it into conformity with the 1951 Convention.

x. Best interests of the child

66. The principle of the best interests of the child derives from Article 3(1) of the UN Convention on the Rights of Child (CRC), which provides: ‘In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.’ The concept of the best interests of the child is further elaborated upon by the UN Committee on the Rights of the Child⁵⁶.

67. In the application of the principle to protection decisions it is important to note that the consideration of the best interests of the child does not trump all other considerations. The principle of the best interests of the child directs the attention of the decision-maker to the rights of the child that may be relevant to the assessment of eligibility for international protection. Furthermore, the best interests principle is not absolute: the best interests of

⁵⁴ UNHCR Annotated Comments Qualification Directive, p.30

⁵⁵ *Artur Abramov v. Minister of Justice, Equality and Law Reform* [2010] IEHC 458

⁵⁶ General Comment No. 14, p.4

the child must be ‘a primary’ (as distinct from ‘the paramount’) consideration’. UNHCR has recently produced detailed practical guidance on the principle’s application.⁵⁷

68. The UN General Assembly unanimously adopted the Convention on the Rights of the Child on 20 November 1989 and it entered into force – or became legally binding on States Parties – in September 1990. Ireland ratified the Convention in 1992. The Child and Family agency⁵⁸ became an independent legal entity on the 1st of January 2014, comprising the Health Service Executive Children & Family Services, the Family Support Agency and the National Educational Welfare Board as well as incorporating some psychological services and a range of services responding to domestic, sexual and gender based violence. The CFA is now the dedicated State agency responsible for improving wellbeing and outcomes for children.⁵⁹ It represents a comprehensive reform of child protection, early intervention and family support services. Both the Child and Family Agency Act 2013, and the Children First Bill 2014⁶⁰ (published but not yet enacted) give significant prominence to the principle of the best interests of the child in relation to all functions the agency performs under the legislation.

69. Under EU law, certain rights of the child, including the principle of the best interests of the child and the right of the child to be heard, are restated in Article 24 of the EU Charter of Fundamental Rights (CFR). Following the passing of the Lisbon Treaty, the CFR now has the same legal status as the Treaties and it became legally binding in 2009. All EU secondary legislation and national measures that implement EU law must conform to the rights in the Charter. The International Protection Bill, when enacted, in implementing the Procedures Directive, the Qualification Directive and the Temporary Protection Directive, will bind the State in its transposition and application to do so in conformity with the rights contained in the CFR.

70. The Directives in question themselves make reference to principle of the best interests of the child. The Recast Procedures and Qualifications Directives contain more robust references to the rights of the child than the original Directives. Article 20 of the Qualification Directive requires the best interests of the child to be a primary consideration when implementing Chapter VII of the Directive⁶¹. The Refugee Act currently makes no reference to this principle although S.I. No. 52/2011 makes reference to it with respect to unaccompanied minors; the chairperson of the RAT has also issued guidelines on appeals from child applicants according to which the best interests of the child shall be a primary

⁵⁷ UNHCR, *Safe and Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children* in Europe, October 2014, available at: <http://www.refworld.org/docid/5423da264.html>

⁵⁸ <http://www.tusla.ie/>

⁵⁹ See further: <http://www.tusla.ie/about>

⁶⁰ <http://www.oireachtas.ie/documents/bills28/bills/2014/3014/b3014d.pdf>

⁶¹ See Recital 20 and Article 20(3) - (5)

consideration of the Tribunal during all dealings with a child.⁶² The 2013 Subsidiary Regulations apply the principle to certain limited aspects of the Regulations. Whilst the Procedures Directive originally required the best interests principle to be applied in the case of unaccompanied minors only⁶³, it is notable that its Recast now requires the principle to be applied to the Directive as a whole.⁶⁴ The Recast Qualification Directive also contains a statement to that effect in Recital 18.⁶⁵ The Recast instruments contain a number of more specific provisions and recitals in relation to the principles and give some examples of how it is to be applied.

71. Under the Heads of the International Protection Bill the best interests of the child is required to be a primary consideration in the application of a number of sections:

- Head 23 re. medical assessment to determine the age of unaccompanied minor
- Head 33 re. unaccompanied minors
- Heads 47 - 49 re. the extension to refugees and beneficiaries of subsidiary protection of certain rights: Permission to reside in the State, access to employment; access to education; social welfare; health care; access to accommodation; freedom of movement; access to travel documents.
- Heads 50 and 51 re. the right to family reunification

Recommendation:

- (25) Add a provision requiring the principle that the best interests of the child to be a primary consideration in all actions involving children under the provisions of the General Scheme.

IV PROCEDURAL AND OTHER PROVISIONS

i. Transitional Provisions – Application of the Law to Existing Applicants

72. The transitional provisions contained in Head 63 relate to applications in being and are drafted in a very technically fashion.

⁶² Guidance Note No: 2015/1 issued pursuant to paragraph 17 of the Second Schedule of the Refugee Act 1996 (as amended)

⁶³ Recital 14, Article 2(i) and Article 17

⁶⁴ Recital 33, Article 25(6)

⁶⁵ The Recitals of a Directive are the statement of reasons for the act and are thus not “normative” or binding; they are intended to inform the interpretation of its provisions

Head 63: Transitional provisions relating to caseloads under the existing asylum legislation

Provide along the following lines:

- (1) A person who has made an application for a declaration under section 8 of the Act of 1996 and whose application is not yet the subject of a recommendation under section 13 of that Act shall be deemed to have made an application for international protection under Head 12 and the Minister shall examine the application under Head 32.
- (2) A person who has made an appeal under section 16 of the Act of 1996 against a recommendation of the Commissioner and the appeal has not been decided shall be deemed to have made an application for international protection under Head 12 and the Minister shall examine the application under Head 32 with the modification that the applicant is a person in respect of whom a refugee declaration should not be given.
- (3) A person who has made an application for a declaration under section 8 of the Act of 1996, whose application has been the subject of a recommendation under section 13 of that Act against which no appeal lies and the Minister has not yet refused a declaration under section 17 of that Act, shall be deemed to have made an application for international protection under Head 12 and the Minister shall examine the application under Head 32 and the Tribunal shall decide any appeal with the modification that the applicant is a person in respect of whom a refugee declaration should not be given.
- (4) A person who has made an application for a declaration under section 8 of the Act of 1996, whose application has been the subject of a recommendation under section 13 of that Act which has been affirmed under section 16 of that Act and the Minister has not yet refused a declaration under section 17 of that Act, shall be deemed to have made an application for international protection under Head 12 and the Minister shall examine the application under Head 32 and the Tribunal shall decide any appeal with the modification that the applicant is a person in respect of whom a refugee declaration should not be given.
- (5) A person who is the subject of an application, within the meaning of Regulation 2(1) of the Regulations of 2013, where the Commissioner has not yet commenced the investigation of the application under Regulation 5 of those Regulations shall be deemed to have made an application for international protection under Head 12 and the Minister shall examine the application under Head 32 and the Tribunal shall decide any appeal with the modification that the applicant is a person in respect of whom a refugee declaration should not be given.
- (6) A person who is an applicant within the meaning of section 1 of the Act of 1996, who is an applicant within the meaning of Regulation 2(1) of the Regulations of 2013 or who may make an application for a subsidiary protection declaration under Regulation 3 of those Regulations and who is not by this Head deemed to have made

an application for international protection under Head 12, shall, notwithstanding Head 5, continue to be subject to that Act, the Regulations of 2006 and the Regulations of 2013 for the purpose of an application for a declaration under that Act or an application for a subsidiary protection declaration under the Regulations of 2013.

73. Those provisions in effect would have the following consequences:

- Those in the current split procedure would for the most part be caught by these new provisions.
- All such cases will go back to the Minister to have the entirety /remainder of their application determined at 1st instance before advancing if they wish to avail of their right of appeal to the IPAT.
- Anyone who has received a determination, at either 1st instance or appeal, will not have that determination reopened (unless an application for a subsequent application is granted through the regular channels). The bodies will only assess so much of the application as had not previously been decided.
- The cut-off point for the application of the new Bill is whether or not ORAC has commenced investigating an application for subsidiary protection. If that has begun the applicant will continue to have their application determined under the old legislation. ORAC will finish determining their SP claim, they will have a right to appeal that to the RAT, and they will then (presumably although this is not stated explicitly) go on to make an application for leave to remain to the Minister as before.

74. UNHCR welcomes the fact that the General Scheme seeks to extend the benefits of the new provisions to existing applicants whilst balancing the aim not to require fresh determinations on applications that have already been made under the existing system. However the way these provisions are drafted may have unintended consequences in relation to some very specific classes of cases where applicants would or would not be included under the new legislation.

75. Head 5 does not seem to countenance the possibility, since the H.N. decision⁶⁶, of persons who have submitted an application for SP prior to a refusal of refugee status. As of 8 October 2014, under administrative arrangements, it has been possible to make an application for subsidiary protection at any time once an application for refugee status has been made, however it will not be considered until the application for refugee status has been determined to finality including any appeal. New Regulations were enacted on the 29th April 2015 enshrining these arrangements into law⁶⁷. The phrasing of this Head would appear to preclude such persons from having their refugee application considered.

⁶⁶ C-604/12 N. v Minister for Justice, Equality and Law Reform and Others

⁶⁷ S.I. No. 137/2015 - European Union (Subsidiary Protection) (Amendment) Regulations 2015.

76. Furthermore, Head 6 is a default provision whereby Applicants within its terms will continue to be subject to the current procedures and legislation for the purpose of an application for refugee status or subsidiary protection. This provision could be interpreted as including:

- Persons who have received a negative recommendation from ORAC but not yet entered an appeal
- SP applicants at 1st instance whom ORAC has already commenced investigating
- Persons who have received a final negative determination from the Minister on refugee status and are eligible to lodge an application for SP under Reg 3 of the 2013 Regs but who have not yet done so.

77. The rationale for each particular reference point in Head 63 is not entirely clear and in some cases inconsistent. For example persons who are entitled to enter a new application for subsidiary protection shall be dealt with under the 2013 Regulations however persons who have already lodged an application (where the investigation has not commenced) will be dealt with under the new Act. The same could potentially be said for persons who have received a negative recommendation from ORAC but not yet entered an appeal.

78. It is imperative that such transitional arrangements are not overly cumbersome or create any legal uncertainty in their application. It is also important that such transitional provisions can be clearly understood by applicants and practitioners in the area and that they are perceived as being fair. One example is the reference point of ORAC having not yet commenced the investigation of a SP application under Regulation 5 of the 2013 Regulations; this seems somewhat arbitrary and open to differing interpretations.

79. In the case of persons who have already received a determination at 1st instance, the question of whether or not he/she should be facilitated to lodge a “subsequent application” prior to being sent back to 1st instance should be considered. In some instances there may have been a considerable passage of time in the interim and the situation in their country of origin may have changed significantly. Allowing for such a provision would be in the interests of the State to ensure that a final decision is reached on Applicants’ protection claim which has fully determined all matters up to the point where return or deportation is considered.

Recommendations:

- (26) It is recommended that in the drafting process care is taken to ensure that these provisions are drafted precisely in order to extend the benefits of the new Act to the greatest numbers of existing applicants as is practicable.
- (27) In particular it is recommended that they are altered to as to ensure consistency as much as possible between applicants in similar positions and to ensure that applicants who lodge an application for SP at the same time as for refugee status are not prejudiced by the provisions.
- (28) In the case of an Applicant who has already received a refugee determination at 1st instance, a transitional provision should specifically address the question of whether or not he/she may lodge a “subsequent application” prior to being sent back to 1st instance.

ii. Accelerated Appeal Procedures

80. The accelerated appeal procedures contained in s.13(5) and (6) of the Refugee Act 1996 (which were the subject of challenge in the S.U.N. case⁶⁸ in which UNHCR was joined as an amicus) are retained in part in the General Scheme in Head 35(4) and 39 - the situations in which they may apply have been reformulated and reduced from five to three.

Head 35: Report of examination and determination of application

Provide along the following lines:

...

(4) In addition to the setting out of a determination referred to in paragraph (c) subhead (3) the Minister may include in the report under subhead (1) any of the following findings made by the Minister-

- (a) that the examination of the application for international protection revealed only issues that are not relevant or are of minimal relevance to the eligibility of the applicant for international protection,
- (b) that the applicant has made inconsistent, contradictory, improbable or insufficient representations which are clearly unconvincing in relation to the eligibility of the applicant for international protection, or
- (c) that the applicant has failed without reasonable cause to make his or her application

⁶⁸ S.U.N. v. RAT [2012] IEHC 338; UNHCR were joined on appeal to the Supreme Court before the appeal was ultimately withdrawn

earlier, having had opportunity to do so.

Head 39 – Accelerated appeal procedures for manifestly unfounded applications

Provide along the following lines:

Where the report of the Minister under Head 35(1) includes any of the findings referred to in Head 35(4) the following modifications shall apply in relation to the applicant concerned-

- (a) the period of 15 working days referred to in Head 37(2)(a) shall be 10 working days,
- (b) notwithstanding the provisions of Head 38 the Tribunal shall make its decision in relation to any appeal made by the applicant under Head 37 without holding an oral hearing

and

notification of these modifications shall be included in the statement referred to in Head 36(5)(e).

81. The consequences of the making of such a finding is: an Applicant shall have 10 rather than 15 working day to lodge an appeal; the IPAT must make its decision on appeal without holding an oral hearing. UNHCR welcomes the reduction in the number of situations to which such accelerated procedures may apply, however of the three possible findings at Head 35(4), the first two could be termed manifestly unfounded applications. UNHCR however has concerns in relation to the third possible finding, that “the applicant has failed without reasonable cause to make his or her application earlier, having had opportunity to do so.” Such a finding does not relate to the core aspects of an application and accordingly could not be considered to reflect, in isolation, that an application is manifestly unfounded.

82. As a matter of general principle, UNHCR maintains (as set out in our legal submissions in the S.U.N.⁶⁹ case):

- an applicant should be given the possibility to request an oral hearing on appeal, in particular where facts or credibility are at issue, and
- the appeal authority should have the power to conduct an oral hearing either upon the applicant’s request or at its own discretion.

83. The retention, in part, of this provision maintains the anomaly whereby the actions of the 1st instance body can limit the jurisdiction of the appeal tribunal. As the RAT currently, and the IPAT under the heads, are fulfilling the function of providing an effective remedy for the purposes of EU law it is questionable whether this arrangement would withstand further legal challenge.

⁶⁹ S.U.N. v. RAT [2012] IEHC 338

84. It would be preferable therefore were the Tribunal given the power to decide of its own motion in such cases whether an oral hearing is in fact required. The operation of the current provisions can in some instances create the situation whereby the Tribunal Member may feel constrained in adequately exploring the issues necessary to determine the appeal to their satisfaction.

Recommendations:

(29) Head 35(4)(c) should be deleted to remove the possibility of a finding being made that “the applicant has failed without reasonable cause to make his or her application earlier, having had opportunity to do so” resulting in the application of accelerated appeal procedures.

(30) Head 39 (b) should be amended as follows:

*“notwithstanding the provisions of Head 38 the Tribunal shall make its decision in relation to any appeal made by the applicant under Head 37 without holding an oral hearing **unless it is of the opinion that it is in the interests of justice to hold an oral hearing.**”*

iii. Report of Personal interview

85. Head 32A replicates existing provision in Irish law requiring a report to be prepared of the personal interview at 1st instance:

Head 32A: Personal interview

Provide along the following lines:

(1) As part of an examination referred to in Head 32 the Minister shall cause the applicant to be interviewed in relation to the matters referred to in paragraphs (a) and (b) of that Head (“the personal interview”) at such time and place that the Minister may fix.

...

(12) Following the conclusion of a personal interview under this Head, the interviewer shall furnish to the Minister a report in writing of the interview.

86. This Head transposes Article 14 of the Procedures Directive:

“Member States shall ensure that a written report is made of every personal interview, containing at least the essential information regarding the application, as presented by the applicant, in terms of Article 4(2) of Directive 2004/83/EC.”

87. Although Irish law does not currently contain guidance as to the contents of such a report it is the practice that a written note is prepared of everything of relevance that what

was said at interview and the Applicant is given an opportunity to read it, and to sign it if he/she is satisfied that it is an accurate account. It would be preferable if this was a specific requirement in legislation.

88. Furthermore, Article 17 of the Recast Procedures Directive now contains more favourable and detailed provisions in relation to records of interview:

“Article 17

Report and recording of personal interviews

- 1. Member States shall ensure that either a thorough and factual report containing all substantive elements or a transcript is made of every personal interview.*
- 2. Member States may provide for audio or audiovisual recording of the personal interview. Where such a recording is made, Member States shall ensure that the recording or a transcript thereof is available in connection with the applicant’s file.*
- 3. Member States shall ensure that the applicant has the opportunity to make comments and/or provide clarification orally and/or in writing with regard to any mistranslations or misconceptions appearing in the report or in the transcript, at the end of the personal interview or within a specified time limit before the determining authority takes a decision. To that end, Member States shall ensure that the applicant is fully informed of the content of the report or of the substantive elements of the transcript, with the assistance of an interpreter if necessary. Member States shall then request the applicant to confirm that the content of the report or the transcript correctly reflects the interview.*

When the personal interview is recorded in accordance with paragraph 2 and the recording is admissible as evidence in the appeals procedures referred to in Chapter V, Member States need not request the applicant to confirm that the content of the report or the transcript correctly reflects the interview. Without prejudice to Article 16, where Member States provide for both a transcript and a recording of the personal interview, Member States need not allow the applicant to make comments on and/or provide clarification of the transcript.

- 4. Where an applicant refuses to confirm that the content of the report or the transcript correctly reflects the personal interview, the reasons for his or her refusal shall be entered in the applicant’s file.*

Such refusal shall not prevent the determining authority from taking a decision on the application.

5. Applicants and their legal advisers or other counsellors, as defined in Article 23, shall have access to the report or the transcript and, where applicable, the recording, before the determining authority takes a decision.

Where Member States provide for both a transcript and a recording of the personal interview, Member States need not provide access to the recording in the procedures at first instance referred to in Chapter III. In such cases, they shall nevertheless provide access to the recording in the appeals procedures referred to in Chapter V.

Without prejudice to paragraph 3 of this Article, where the application is examined in accordance with Article 31(8), Member States may provide that access to the report or the transcript, and where applicable, the recording, is granted at the same time as the decision is made.”

89. In UNHCR 's view, making a transcript of every personal interview constitutes the most adequate guarantee for the applicant to ensure accuracy of his/her statements than a thorough and factual report unless there is an audio-recording or audio-visual recording of the personal interview provided admittance as evidence in appeal procedure and compliance with data protection rules and confidentiality.⁷⁰ While oral testimony of the applicant in the examination of an application for international protection is crucial, UNHCR recalls the adverse consequence of a failure to record accurately the applicant's statements that may lead to an erroneous decision liable to challenge upon appeal for the Member State and carrying the risk of breach of non-refoulement for the applicant.⁷¹ More specially, UNHCR reiterates its concerns that the requirement of "thorough and factual report containing all substantive elements" has the consequence of requiring the interviewer to determine which parts of the applicant's statements are worthy of recording in a written report. That may result in relevant oral evidence not being recorded and/or the meaning and accuracy of statements being unwittingly altered.⁷² Despite the strong support provided by UNHCR in favour of the use of a transcript of the personal interview, if a Member State opts for a written summary report of the personal interview under the first disjunction of Article 17(1), it is UNHCR's view in line with its 2010 APD study that this should be permitted only if there is an audio recording of the entire personal interview, and this is admissible as evidence on appeal.⁷³

⁷⁰ UNHCR, Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Detailed Research on Key Asylum Procedures Directive Provisions, March 2010, pages 158-164, available at: <http://www.refworld.org/docid/4c63e52d2.html>

⁷¹ UNHCR comments on the European Commission's Amended Proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast) COM (2011) 319 final. January 2012, page 16, available at: <http://www.refworld.org/docid/4f3281762.html> ;

UNHCR comments on the European Commission's proposal for a Recast Procedures Directive, August 2010, pages 25-26

⁷² UNHCR comments on the European Commission's Amended Proposal for Recast Procedures Directive. January 2012, page 16, available at: <http://www.refworld.org/docid/4f3281762.html> ;

UNHCR comments on the European Commission's proposal for a Recast Procedures Directive, August 2010, pages 25-26

⁷³ UNHCR, Improving Asylum Procedures, p.164

90. UNHCR welcomes that recast Article 17 (2) introducing the possibility for Member States to use audio recording or audio-visual recording of the personal interview. UNHCR further welcomes the obligation enshrined under recast Article 17 (2) “where such a recording is made, Member States shall ensure that the recording or a transcript thereof is available in connection with the applicant’s file”. In UNHCR’s view, the most effective way of making an accurate record of a personal interview is by audio or audio-visual recording.⁷⁴ It does not employ the human resources of the interviewer during the interview; it helps to eliminate disputes regarding the accuracy of the written report; it may help in addressing allegations of inaccurate interpretation during the personal interview, and provide a useful evidentiary resource to both the decision-maker and, in the case of any eventual appeal, the adjudicator. Clearly, rules on data protection and confidentiality apply and must be taken into consideration⁷⁵

91. More specially, the finding of the 2010 APD study⁷⁶ also revealed that making a transcript⁷⁷ of the interview hampers the interviewer’s ability to establish a rapport with the applicant, slows the conduct of the interview and may have a negative impact on the flow of the interview. To that regard, UNHCR notes positively that recast Article 17(2) provides an effective way to address such as a practical difficulty by requiring Member States opting for audio recording or audio-visual to ensure that “the recording or a transcript thereof is available in connection with the applicant’s file”. With that in mind, UNHCR strongly encourages Member State to make a transcript of the audio or audio-visual recording that shall be used to satisfy the compulsory requirement of a transcript under Article 17(1). By doing so, the interviewer will be allowed to complete the written transcript based on the use of the audio or audio-visual recording either at the end of the interview or within a specified time frame. In case Member States have not opt for using audio or audio-visual recording provided by recast Article 17(2) and given the practical problem mentioned above, UNHCR encourages Member States to consider the use of transcribers to assist interviewers in the task of producing a genuine transcript.⁷⁸

92. UNHCR welcomes recast Article 17(5) requiring the applicants and his/her legal advisers or other counsellors have access to the report or the transcript and where applicable, the audio or audio-visual recording before the determining authority takes a decision. This guarantee gives effect to the principle of equality of arms and gives the possibility to provide effectiveness to the guarantees provided by Article 17(3), first indent. However, UNHCR regrets that Article 17 (5) second indent allows an exception of this

⁷⁴ See UN High Commissioner for Refugees, *Building in Quality – A Manual on Building in High Quality Asylum System, Further Developing Asylum Quality in the European Union (FDQ)*, September 2011, page 26, at: <http://www.unhcr.org/refworld/docid/4e85b36d2.html>

⁷⁵ UNHCR comments on the European Commission's Amended Proposal for Recast Procedures Directive, January 2012, p.16, UNHCR comments on European Commission's proposal for a Recast Procedures Directive, August 2010, p. 26.

⁷⁶ UNHCR, *Improving Asylum Procedures*, pp. 158-164

⁷⁷ According to Oxford dictionary, a transcript is “a written or printed version of material originally presented in another medium” available at <http://www.oxforddictionaries.com/definition/english/transcript>

⁷⁸ UNHCR, *Improving Asylum Procedures*, p.164

important guarantee with regard to access to the audio or audio-visual recording in the procedures at first instance. In UNHCR's view, providing access to the audio or audio-visual recording to the applicant's legal adviser or counsellor will allow this latter to verify the accuracy of the transcript or the thorough and factual report before a decision is taken at first instance and therefore be provide an opportunity to make comments and/or clarifications on mistranslations or misconceptions. Ultimately, such a measure will improve the quality decision of first instance decisions resulting in fewer decisions being overturned on appeal. UNHCR therefore encourage Member States to provide the applicant and his/her legal counsellor with access to the audio or audio-visual recording at first instance procedures and before the determining authority takes a first instance decision on the application.

93. When transposing, UNHCR recommends that Member State include also in their national legislation that the applicant shall be afforded the opportunity during the interview to provide explanations in relation to contradictions/inconsistencies between evidences put forward by him/her and other sources of relevant information.

Recommendation:

- (31) Head 32A be amended to give effect to Article 17 of the Recast Procedures Directive in line with UNHCR guidance.
- (32) If this is not accepted then it is recommended at a minimum that Head 32A(12) be amended to require a a thorough and factual report containing all substantive elements to be produced of the personal interview

iv. Limitation to the contents of positive decisions

94. The current practice of sending to the applicant a full report when ORAC determines a claim for refugee status or subsidiary protection is proposed to be changed. Under the heads, where a positive determination is made by the Minister at first instance, then the only statement sent to an applicant would be that it has been found that he/she is a person in respect of whom a refugee declaration should be given will be sent.

Head 35: Report of examination and determination of application

Provide along the following lines:

- (1) The Minister shall cause a written report to be prepared following the conclusion of an examination of an application for international protection in relation to the matters referred to in paragraphs (a) and (b) of Head 32.
- (2) The report under subhead (1) shall-
 - (a) refer to the matters relevant to the application which are-

- (i) raised by the applicant, in a personal interview under Head 32A or a preliminary interview under Head 13 or at any time before the conclusion of the examination, and
- (ii) other matters the Minister considers appropriate,
- (b) set out the determination of the Minister in relation to the application, and
- (c) set out any of the findings referred to in subhead (4) made by the Minister in relation to the application....

Head 36: Notification of determination of application at first instance

Provide along the following lines:

- (1) The Minister shall notify, in writing, the applicant, the applicant's legal representative (if known) and, whenever so requested by him or her, the High Commissioner, of the Minister's determination of the application under Head 35.
- (2) ...
- (3) Where the Minister's determination is that the applicant is a person in respect of whom a refugee declaration should be given the notification under subhead (1) need only consist of that fact.
- (4) Where the Minister's determination is that the applicant is a person in respect of whom a refugee declaration should not be given and in respect of whom a subsidiary protection declaration should be given, the notification under subhead (1) shall be accompanied by-
 - (a) a statement of the reasons for the part of the determination that the applicant is a person in respect of whom a refugee declaration should not be given,
- ...
- (5) Where the Minister's determination includes the part that the applicant is a person in respect of whom neither a refugee declaration nor a subsidiary protection declaration should be given, the notification under subhead (1) shall be accompanied by-
 - (a) a statement of the reasons for that part of the determination,
- ...

95. We understand that this is the practice in some other Member States for the purposes of preventing a perceived risk of applicants sharing stories that led to a grant of status. The explanatory note to Head 36 states:

"The construction of subheads (4) and (5) is intended to ensure that a person who is not a refugee but is a person eligible for subsidiary protection does not need to be given the case established by the Minister for granting subsidiary protection status."

96. Under Irish law at present ORAC makes its determination in what is referred to as a s.13 report. Its equivalent is now found in Head 35 of the bill according to which a report must refer to the matters relevant to the application which are:

- raised by the applicant, in a personal interview or a preliminary interview or at any time before the conclusion of the examination
- other matters the Minister considers appropriate

97. It must also contain any findings made under subhead 4 (i.e. accelerated appeal provisions, currently s.13(6) of the Refugee Act). Unlike under the Refugee Act, this head however does not refer to the making of any findings more generally by the Minister – this is an aspect of our training and support to ORAC at present that has been central to enhancing quality, specifically the need to make findings of fact. Finally the report must set out the determination of the Minister.

98. This omission would appear to be intentional as it is evident from Head 36 that the reasons for a decision are intended to be set out only in the notification sent out to applicants in certain circumstances.

99. This elaboration introduces an extra complexity to the report writing requirements of 1st instance determinations. In our training and support of state determination bodies we have emphasised that it's just as important to give adequate reasons for a grant as for a negative decision. This encourages decision makers to always provide an objective justification for their decisions. It is recommended that the current practice of issuing full decisions in the case of both negative and positive decisions continue.

100. In the Irish context it is questionable that it will be effective in limiting access to the reasons for positive decisions. The RAT currently provides public access to all of its decisions which is welcomed. Such an approach promotes transparency, consistency and good decision making and we would encourage the IPAT to continue this approach. Moreover the Freedom of Information Act 2014 became applicable to the state protection determination bodies as of 14th April 2015 and so such information would most likely be available to applicants through its provisions on personal information.

101. Finally, the omission of a requirement that a report at first instance make findings, coupled with the need in some instances to separately prepare “a statement of the reasons for the part of the determination that the applicant is a person in respect of whom a refugee declaration” may lead to a less efficient process. The need to make clear findings is key; if those findings are to be separated out from the report which contains the final determination, it may result in a practice of making fewer clear findings.

Recommendations:

- (33) Head 35 be amended to add a requirement that the Minister set out his/her findings in addition to his determination and the particular findings set out in Head 4.
- (34) Head 36 be amended so as to notify an applicant of the reasons for a decision irrespective if the determination is a positive or negative one.

v. Establishment of the International Protection Appeals Tribunal

102. The General Scheme provides for the creation of a new Tribunal, the International Protection Appeals Tribunal, to replace the current Refugee Appeals Tribunal. Head 64 provides that the same chairman and Tribunal Members will be carried over (with their consent) until a new recruitment process takes place through the Public Appointments Service. Only a small number of changes are proposed to the Tribunal as it is currently constituted:

- Members may now only be appointed for two terms each of 5 years duration (chair) and 3 years (members).
- Full time positions are now possible in addition to the Chairman. The possibility of hiring full-time members is very welcome. It may allow the Chair to avail of greater legal expertise in-house.
- An oral hearing may now be held in public where the applicant so consents and where, in the opinion of the Tribunal, it is “in the interests of justice to do so”.
- The introduction of a requirement that the Public Appointment Service be responsible for the appointment of suitable members is also a welcome development.

103. The provision for a public hearing is also to be welcomed. The consent of the Applicant is a key safe-guard for situations where the anonymity of asylum seekers must be protected and to control for situations where persons likely to report back to their country of origin may seek to attend a hearing. Consideration might be given to making a public hearing a default where the Applicant consents and to providing guidance on the general expression “in the interests of justice”. Special consideration could be given to the situation of vulnerable applicants, or claims relating to sexual or gender based violence. Consideration could also be given to the delivery of decisions, appropriately anonymised, in public.

104. In respect of the new arrangements for the IPAT UNHCR has some concerns related to particular aspects.

105. Comprehensive training, mentoring and other supports have been delivered to Tribunal members by a range of actors over the past 12 months or so at a financial cost to

the State. The quality and rate of case processing has been developing very well at the RAT and it would be ideal if the current incumbents could be retained without a requirement for them to re-apply for their positions

106. The limitation on the number of terms a Member may serve seems unduly restrictive and likely to result in the loss of Members with considerable expertise and experience. Perhaps an argument can be made for compassion fatigue, etc. but a longer period than 6 years in total would be welcome. The law of international protection is a very complicated and nuanced area of practice and the availability of experienced Tribunal Members with a body of developed expertise can serve to enrich the work of the Tribunal more generally. Furthermore, as the IPAT members will be appointed by the Minister for Justice, albeit following a recruitment process by the Public Appointments Service, the requirement for Tribunal Members to be reappointed after just three years may have a negative impact on their independence, perceived or otherwise, particularly as they will be hearing appeals from the decisions of the Minister. It would be preferable if the Tribunal was not reliant on the same Department for staffing and budgetary purposes but was accountable to an independent body such as the Court Service.

Recommendations:

- (35) The existing Chairman and Tribunal Members be reappointed to the new IPAT without requiring them to reapply for their position.
- (36) Duration of terms of appointments to be lengthened to at least 10 years.
- (37) New arrangements be considered to further promote the independence of the IPAT now that it will be reviewing the decisions of the Minister for Justice.

vi. Withdrawal and Deemed withdrawal of applications

107. Head 34 sets out provisions relating to withdrawal or deemed withdrawal of applications at first instance; Head 41 relates to the withdrawal of applications before IPAT. The proposed heads maintain the current provisions whereby the withdrawal of an application, whether explicit or by operation of a deemed withdrawn provision, automatically results in a negative determination on protection. If an applicant subsequently wishes to apply to have their application reopened, no procedure is available to them other than *via* the general subsequent application provisions (Head 21).

108. UNHCR has commented on this aspect of the Irish procedure on previous occasions.⁷⁹ UNHCR notes that in a response to a Parliamentary Question of 30 April 2014, the provisions relating to withdrawal in the Recast procedure Directive were identified as being “particularly problematic aspects for the national asylum system” and thus motivating

⁷⁹ See comments to the IRP Bill and 2013 Subsidiary Protection Regulations

Ireland's decision not to opt-in to that Directive⁸⁰. We would recall our comments to the 2008 IRP Bill:

*"Given the declaratory nature of refugee status, the principle of non-refoulement also applies to those who meet the criteria of Article 1 of the 1951 Convention but have not had their status formally recognized, including, in particular, asylum seekers. As such persons may be refugees, it is an established principle of international refugee law that they should not be returned or expelled pending a final determination of their status. UNHCR would have some concern with this in relation ... protection applicants where the application is deemed withdrawn without consideration of the application on its merits."*⁸¹

109. Under the Procedures Directive as it currently applies in Ireland, there are a number of relevant provisions:

"Article 19

Procedure in case of withdrawal of the application

1. *Insofar as Member States provide for the possibility of explicit withdrawal of the application under national law, **when an applicant for asylum explicitly withdraws his/her application for asylum**, Member States shall ensure that **the determining authority takes a decision to either discontinue the examination or reject the application.***

2. *Member States may also decide that the determining authority can decide to discontinue the examination without taking a decision. In this case, Member States shall ensure that the determining authority enters a notice in the applicant's file.*

Article 20

Procedure in the case of implicit withdrawal or abandonment of the application

1. *When there is reasonable cause to consider that an applicant for asylum has implicitly withdrawn or abandoned his/her application for asylum, Member States shall ensure that the determining authority takes a decision to either discontinue the examination or reject the application on the basis that the applicant has not established an entitlement to refugee status in accordance with Directive 2004/83/EC.*

⁸⁰ <https://www.kildarestreet.com/wrans/?id=2014-04-30a.1615&s=%22Recast+procedures+Directive%22#g1618.r>

⁸¹ Para. 34, p.8

110. In the case of explicit withdrawal Ireland does not apply Article 19(2). Thus in the case of both explicit and implicit withdrawal there is a requirement that the determining authority *take a decision* to either discontinue the examination or reject the application. Under Irish law as it is currently drafted however and under the proposed heads at present, there is no decision actually taken in the sense that the determining body would consider certain matters before deciding which of the two options to take.

111. The difference between the two options is illustrated somewhat by the language of Article 19(2): rather than rejecting the application it is classified as being discontinued and noted in the file that the examination has ceased at that point. In relation to the other option the language of the Directive is informative, “or reject the application on the basis that the applicant has not established an entitlement to refugee status in accordance with Directive 2004/83/EC”. Depending on what stage the investigation of the application has progressed, it is entirely possible that when an application is deemed withdrawn, the applicant will have *already established* an entitlement to refugee status. At present in Ireland for example if an applicant has initially demonstrated sufficient proof of Syrian nationality and given a basic account of his/her claim that may be sufficient to demonstrate an entitlement. Under Head 32(10) this situation is specifically catered for whereby a personal interview may be dispensed with where “based on the available evidence, the applicant is a refugee”.

112. It can be argued therefore that if the second option under Article 20 is decided upon, i.e. to reject the application, this can only be done where the investigation has advanced sufficiently to be rejected on its merits. This interpretation is supported by the amended wording of the Recast Procedures Directive. Although Ireland has not opted-into the Recast Directive, one interpretation is that the amended wording clarifies the aspects of ambiguity in the first Directive. Article 28 states:

“1. When there is reasonable cause to consider that an applicant has implicitly withdrawn or abandoned his or her application, Member States shall ensure that the determining authority takes a decision either to discontinue the examination or, provided that the determining authority considers the application to be unfounded on the basis of an adequate examination of its substance in line with Article 4 of Directive 2011/95/EU, to reject the application.”

113. Under current Irish law, the determining body is precluded from taking the decision specified in Article 20 by operation of the legislation requiring the Minister to automatically issue a negative determination in such instances. As such, there may currently be difficulties between Irish law and the requirements of the applicable Procedures Directive. UNHCR would therefore recommend that the same provisions should not be replicated in the General Scheme.

114. The importance of whether an application has been ultimately rejected or discontinued is relevant primarily to how an applicant may apply to have his application reopened and finalised, or alternatively reconsidered by way of the subsequent application procedure. The Procedures Directive states at Article 20:

“2. Member States shall ensure that the applicant who reports again to the competent authority after a decision to discontinue as referred to in paragraph 1 of this Article is taken, is entitled to request that his/her case be reopened, unless the request is examined in accordance with Articles 32 and 34.

Member States may provide for a time-limit after which the applicant’s case can no longer be re-opened.

Member States shall ensure that such a person is not removed contrary to the principle of non-refoulement.

Member States may allow the determining authority to take up the examination at the stage where it was discontinued.”

115. This paragraph, following on from the first, again refers to “decisions to discontinue” in a way that suggests such decisions are required to be taken in some instances rather than being optional provisions. Articles 32 and 34 refer to the subsequent applications procedure under which Irish law will only allow applicants to apply under this procedure to have a claim reopened. Importantly time-limits may be imposed after which time an applicant’s case can no longer be re-opened. Under the Recast Procedures Directive these provisions are again modified. Article 28(2) now states:

“2. Member States shall ensure that an applicant who reports again to the competent authority after a decision to discontinue as referred to in paragraph 1 of this Article is taken, is entitled to request that his or her case be reopened or to make a new application which shall not be subject to the procedure referred to in Articles 40 and 41.

Member States may provide for a time limit of at least nine months after which the applicant’s case can no longer be reopened or the new application may be treated as a subsequent application and subject to the procedure referred to in Articles 40 and 41. Member States may provide that the applicant’s case may be reopened only once.”

116. We can see that in the Recast Directive separate procedures are now required in relation to an application to reopen a claim as opposed to a subsequent application more generally, whereby in the original Procedures Directive both applications could be considered under the latter procedures.

117. The Irish High Court has found in the *L.H.* case⁸² that the subsequent application procedure as it then operated under Irish law, requires the Minister only to decide whether what was adduced by the applicant was new and that this obligation was not altered by the fact that the original application had not been fully processed but had been abandoned by the applicant and deemed withdrawn. Accordingly, under Irish law at present, if an Applicant has adduced sufficient evidence to establish their entitlement to refugee status prior to their application being withdrawn, and if they subsequently apply to have their application reassessed they will not be allowed to rely on any of that material in applying to have their case reopened.

118. As a result it may be argued that Irish legislation at present, and as it is proposed under the General Scheme, does not accord with the requirements of the Procedures Directive as the subsequent application procedure, required by Articles 32 and 34, is not broad or flexible enough to fulfil the role required of it by Article 20(2), i.e. to consider an application to have a case reopened after it has been discontinued.

119. A further matter to consider is that the Dublin III Regulations clearly create a right for applicants to have their cases reopened if transferred back to a country responsible for determining their protection claim in circumstances where their application had previously been deemed withdrawn. This is an explicit requirement of Article 18 of the Regulations and this has been given effect under Irish domestic law under the European Union (Dublin System) Regulations 2014⁸³. This creates the anomalous situation that whilst applicants may not normally be in a position to have an application reopened following an implicit withdrawal decision, those who are “Dublined” back to Ireland may be entitled to have their application reopened in conformity with the Dublin III Regulations. This may create an incentive to applicants for secondary movement within the EU, the avoidance of which is a primary objective of the CEAS.

Recommendations:

- (38) The deemed withdrawn provisions be amended in line with the Recast Procedures Directive provisions - where an application is explicitly or implicitly withdrawn the application should not be automatically rejected.
- (39) Provision be made for applicants who have had their application discontinued to apply to have that application reopened. Such provision may be by amendment or addition to the current subsequent application provisions or by way of a separate novel procedure. Such a procedure should not be limited to a consideration of new

⁸² *L.H. v. Minister for Justice* [2011] 3 IR 700

⁸³ Regulations 9 – 15; Reg. 12 introduces an extra step in requiring the applicant to set out reasons why their application for subsidiary protection should be reopened and as such may contravene the clear requirements of the Regulations

elements presented by the applicant in relation to the substance of his/her claim but should allow the applicant to advance explanations regarding why their application was originally withdrawn. Reasonable time limits could be imposed to restrict the operation of such provision.

V CONTENT OF INTERNATIONAL PROTECTION

i. Family Reunification

120. A number of significant changes are proposed in relation to the family reunification provisions as they currently apply. The provisions are primarily contained in Heads 50 and 51, the latter being almost identical in its contents. Head 50 relates to family members who are not in Ireland at the time the family reunification application is made whereas Head 51 relates to family members who are in Ireland at the time the family reunification application is made but who do not themselves qualify for protection in Ireland. Article 2(h) and 2(j) of the Qualification Directive and its Recast respectively and Article 23 of both are transposed by these heads. The Recast Qualification Directive introduced some minor amendments to these provisions but these are already incorporated into Irish law (with one exception set out below). The General Scheme proposes to retain Ireland's more generous provisions whereby family reunification is equally open to persons outside of Ireland. Head 52 transposes Article 20 (3) and (5) of the Qualification Directive concerning vulnerable persons and children in respect of persons covered by Heads 50 and 51.

Head 50: Permission to enter and reside for member of family of qualified person

Provide along the following lines:

- (1) A qualified person (in this Head referred to as the "sponsor") may, within 12 months of the giving to the sponsor by the Minister of the refugee declaration or, as the case may be, the subsidiary protection declaration under Head 43, make an application to the Minister for permission to be given to a member of his or her family to enter and reside in the State.
- (2) The Minister shall investigate, or cause to be investigated, an application under paragraph (1) to determine-
 - (a) the identity of the person who is the subject of the application,
 - (b) the relationship between the sponsor and the person who is the subject of the application, and
 - (c) the domestic circumstances of the person who is the subject of the application.
- (3) It shall be the duty of the sponsor and the person who is the subject of the application to co-operate fully in the investigation under subhead (2) including to provide all information in his or her possession, control or procurement relevant to the

application.

- (4) Subject to paragraph (7), if the Minister is satisfied that the person who is the subject of the application is a member of the family of the sponsor, the Minister shall give permission in writing to the person to enter and reside in the State and the person shall, subject to that permission being in force, be entitled to the rights and privileges specified in Head 47 in relation to a qualified person for such period as the sponsor is entitled to remain in the State.
- (5) A permission given under subhead (4) shall cease to be in force if the person to whom it is given does not enter and reside in the State by a date specified by the Minister when giving the permission.
- (6) A permission given under subhead (4) shall cease to be in force in relation to the spouse or the civil partner concerned in the event that the marriage or the civil partnership ceases to subsist.
- (7) The Minister may refuse to give permission to enter and reside in the State to a person referred to in paragraph (4) or revoke any permission given to such a person—
 - (a) in the interest of national security or public policy (“*ordre public*”),
 - (b) where the person would be or is excluded from being a refugee in accordance with Head 9,
 - (c) where the person would be or is excluded from being eligible for subsidiary protection in accordance with Head 11,
 - (d) where the entitlement of the sponsor to remain in the State ceases, or
 - (e) where misrepresentation or omission of facts, whether or not including the use of false documents, by the person was decisive in the decision to give the person the permission.
- (8) In this Head and Head 51, “member of the family”, in relation to the sponsor, means—
 - (a) where the sponsor is married, his or her spouse (provided that the marriage is subsisting on the date the sponsor made an application for international protection in the State),
 - (b) where the sponsor is a civil partner, his or her civil partner (provided that the civil partnership is subsisting on the date the sponsor made an application for international protection in the State),
 - (c) where the sponsor is, on the date of the application under paragraph (1), under the age of 18 years and is not married, his or her parents and their children who, on the date of the application under paragraph (1), are under the age of 18 years and are not married, or
 - (d) a child of the sponsor who, on the date of the application under paragraph (1), is under the age of 18 years and is not married.

Head 52: Situation of vulnerable persons and children

Provide along the following lines:

- (1) In the application of Heads 47, 48, 49, 50 and 51 due regard shall be had to the specific situation of vulnerable persons such as persons under the age of 18 years (whether or not accompanied), disabled persons, elderly persons, pregnant women, single parents with children under the age of 18 years, victims of human trafficking, persons with mental disorders and persons who have been subjected to torture, rape, or other serious forms of psychological, physical or sexual violence.

In the application of Heads 47, 48, 49, 50 and 51 in relation to a child under the age of 18 years the best interests of the child shall be a primary consideration

121. The General Scheme proposes a number of significant changes to the way in which family reunification procedures currently operate. It would for the first time impose a time limit within which an application for family reunification can be made. Head 50(1) states that applications must be made within 12 months of a refugee or subsidiary protection declaration being made.

122. The imposition of time limits for family reunification is not addressed in the Qualification Directive (or its Recast). Article 23(1) of the Directive specifies that Member States shall ensure that family unity can be maintained. It could therefore be argued that this Head falls short of this requirement. Beneficiaries of protection are not always aware of their rights to family reunification and there can often be practical reasons why such an application may not be made within the first 12 months. Given the importance given to family tracing in the CEAS it would defeat its purposes where family members are identified after the permissible application period. Changes in family circumstances in the years following recognition of status, such as births, marriages and deaths, can create a pressing need for reunification of dependant family members where none previously existed. No flexibility or discretion is allowed for in the proposed provisions.

123. An application under the Heads can only be made for nuclear family member to enter or reside in Ireland. Unlike the Refugee Act, 1996 there is no provision giving the Minister discretion to allow dependent family members to enter or reside in Ireland. Article 23 (5) of the Directive concerns dependent family members:

“Member States may decide that this Article also applies to other close relatives who lived together as part of the family at the time of leaving the country of origin, and who were wholly or mainly dependent on the beneficiary of international protection at that time.”

124. The explanatory notes of the Heads state that there is no intention to provide family reunification to such dependent members of the wider family. We would recall UNHCR’s comments to the Qualification Directive in this regard:

“UNHCR encourages Member States to use a definition of the term “family member” which includes close relatives and unmarried children who lived together as a family unit and who are wholly or mainly dependent on the applicant. UNHCR notes in this regard that the definition which was agreed upon in the Temporary Protection Directive encompasses these family members.⁸⁴ This is in line with the right to family unity, as outlined in the UNHCR Handbook which stipulates that other dependants living in the same household normally should benefit from the principle of family unity.⁸⁵ Furthermore, in UNHCR’s view, respect for family unity should not be made conditional on whether the family was established before flight from the country of origin . Families which have been founded during flight or upon arrival in the asylum State also need to be taken into account. With reference to the UNHCR Executive Committee Conclusion No . 24 (XXXII) paragraph 5 and No. 88 (L) paragraph (b)(ii) , UNHCR recommends the application of liberal criteria in identifying those family members who can be admitted, with a view to promoting the unity of the family.”⁸⁶

125. The proposed amendments to the operation of the current family reunification provisions under Irish law, while broader than what is required under the Qualification Directive significantly reduce their scope from the current position. Whilst the State may wish to limit the current provision regarding dependant relatives, which as a result of recent case law is now interpreted quite widely, the proposals could in effect be a disproportionate interference with the right to family life. This is particularly so in the Irish context given the prominent place given to the right in the Irish Constitution (see for example O’Leary & Lemiere⁸⁷).

126. With respect to Head 50(8)(c) the definition of a family member under the Heads has been extended to include children of the applicant's parents who are under the age of 18 years and are not married (where the applicant is under the age of 18 years and is not also married). This is welcomed however this provision is not entirely in conformity with the new provision contained in Article 2(j) of the Recast Qualification Directive:

“‘family members’ means ...

- *the father, mother or another adult responsible for the beneficiary of international protection whether by law or by the practice of the*

⁸⁴ Council Directive 2001/44/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 212/12 of 7 August 2001, Article 15.

⁸⁵ UNHCR, Handbook, para. 185. See also EXCOM, Conclusions Nos. 24 (XXXII) Family Reunification, 1981, para. 5, and 88 (L), 1999, para. (ii).

⁸⁶ UNHCR annotated comments, p.12

⁸⁷ O’Leary & Lemiere v Min for Justice [2011] IEHC 256

Member State concerned, when that beneficiary is a minor and unmarried” (emphasis added)

127. Head 50(5) introduces a further time limit on the grant of family reunification: if the beneficiary does not enter and reside in Ireland by a date specified by the Minister when giving the permission, the permission will cease. As the authorities will be aware, there are many practical difficulties that family members of refugees can face in seeking to come to Ireland to join their family. The financial costs relating to exit permits, travel documents, medical escort and many other ancillary costs of travel can be prohibitive. Persons frequently must wait a long time before they have secured the funds to facilitate the travel of a family member. Accordingly the operation of such a provision could lead to a disproportionate interference with the principle of family unity. It is also a concern that the legislation in no way indicates what kinds of time-limits are envisaged.

128. Subheads 50(6) and 51(5) of the General Scheme state that if a relationship ceases to subsist following the grant of a family reunification permission then the permission will cease. One consequence of this is that a person whose status emanates from family reunification may feel they cannot report or leave a relationship where domestic violence exists for fear of an impact on their status. The wording of the relevant sections imply that the cessation of an immigration permission in such circumstances applies with automatic effect without any discretion. This would appear to contradict the approach taken in the State’s own immigration guidelines in respect of victims of domestic violence⁸⁸. The guidelines allow affected persons to make an application for independent status as a victim of domestic violence.

129. Pursuant to section 18(1) of the Refugee Act, 1996, the Minister is to notify the UNHCR about any family reunification applications. It is a concern that there is no such provision in Head 50.

Recommendations:

- (40) Head 50(1) be amended to allow persons to make applications for family reunification outside of the 12 month limit, or at the very least, where they were not in a position to do so within that timeframe for no fault of their own, for example where the whereabouts of their family member was unknown at the time.
- (41) Head 50(8) be amended to apply a more liberal criteria in identifying family members who may be admitted, with a view to promoting the unity of the family, particularly in cases of dependency.

⁸⁸ <http://inis.gov.ie/en/INIS/Victims%20Of%20Domestic%20Violence%20-%20Note%20for%20Web.pdf/Files/Victims%20Of%20Domestic%20Violence%20-%20Note%20for%20Web.pdf>

(42) Head 50(8)(c) be amended as follows:

*‘(c) where the sponsor is, on the date of the application under paragraph (1), under the age of 18 years and is not married, his or her parents, **or another adult responsible for the beneficiary of international protection whether by law or by the practice of the Member State concerned**, and their children who, on the date of the application under paragraph (1), are under the age of 18 years and are not married, or’*

(43) Head 50(5) be deleted.

(44) Heads 50(6) and 51(5) be amended to allow for the exercise of discretion in the case of victims of domestic abuse.

(45) A provision be added to Heads 50 and 51 to replicate the notification requirements with respect to UNHCR that currently apply by way of s.18(1) of the Refugee Act, 1996.

VI PERMISSIONS TO REMAIN AND RELATED CONSIDERATIONS

130. UNHCR has some limited comments to make in relation to the permission to remain procedures set out in the General Scheme, in respect of the aspects that fall within our mandate.

i. Personal interview

131. As mentioned above, UNHCR welcomes Ireland establishing a single procedure for assessing both refugee protection needs and subsidiary protection needs. The General Scheme suggests that not only protection concerns will be assessed in the single procedure, but that other issues including *non-refoulement* obligations under general human rights instruments and other reasons for granting a person a permission to reside in the State are looked at through a closely related and parallel determination procedure (Head 32 and 36A).

Head 32: Minister’s examination of application

Provide along the following lines:

The Minister shall examine each application for international protection for the purpose of determining-

- (a) whether the applicant is a person in respect of whom a refugee declaration should be given,
- (b) whether the applicant is a person in respect of whom a refugee declaration should not be given and in respect of whom a subsidiary protection declaration should be given, or

- (c) whether the applicant, being a person in respect of whom neither a refugee declaration nor a subsidiary protection declaration should be given, is a person in respect of whom a permission to reside in the State should be given in accordance with Head 36A.

Head 32A: Personal interview

Provide along the following lines:

(1) As part of an examination referred to in Head 32 the Minister shall cause the applicant to be interviewed in relation to the matters referred to in paragraphs (a) and (b) of that Head (“the personal interview”) at such time and place that the Minister may fix.

...

(13) Following the conclusion of a personal interview under this Head, the interviewer shall furnish to the Minister a report in writing of the interview.

Head 36A: Examination and determination in relation to permission to remain

(1) The Minister shall, in respect of an applicant who-

(a) is the subject of a determination under Head 35(3)(c), and

(b) has informed the Minister of any reason or reasons why he or she should be given permission to remain in the State,

examine the reason or reasons presented by the applicant in writing or at the personal interview under Head 32A in relation to why he or she should be given permission to remain in the State.

132. Although Head 32A(1) makes it clear that the Minister shall cause the applicant to be interviewed only in relation to the assessment of refugee and subsidiary protection status⁸⁹, Heads 32A(12) and 36(A)(1) also require that anything relevant to a request by the applicant for permission to remain in the State in the event that his or her application for international protection is refused be recorded in the report of interview. The exact boundaries of if or when an Applicant may offer information or when an interviewer may ask questions relating to this aspect are not currently very clear. It is of paramount importance that Applicants feel at liberty to discuss all aspects of their protection case without fearing ancillary consequences. An Applicant, for example, may wish to admit to using fraudulent documents or otherwise make an admission of conduct with respect to their application for refugee status or subsidiary protection. If they are of the impression that they are not being questioned in respect of their protection application but rather a

⁸⁹ However certain exceptions are set out in Head 32A(8)

permission to remain application they may feel that such an admission would negatively impact them.

Recommendation:

- (46) Further clarity be brought to this section during the drafting process so as to ensure that applicants have certainty regarding what questions may be asked of them at interview and what opportunities they may have, if any, to proffer information in relation to matters wider than their application for refugee status or subsidiary protection.
- (47) Should such questioning be permitted it is only allowable at the very end of the protection interview and in a manner which explicitly acknowledges its purpose.

ii. Voluntary Return

133. Head 43A concerns voluntary return:

Head 43A: Option to voluntarily return to the country of origin

Provide along the following lines:

- (1) The Minister may notify a person-
 - (a) whose application for international protection has not been the subject of a determination of the Minister under Head 35, or
 - (b) whose application for international protection has been the subject of a determination of the Minister under Head 35(3)(c),of the option to inform the Minister of the person's wish to voluntarily return to his or her country of origin and of the relevant provisions of this Act.
- (2) A notification under subhead (1) shall expire-
 - (a) on a day stated in the notification, or
 - (b) within a number of days from the sending of the notification, such number of days being stated in the notification.
- (3) The Minister shall notify a person to whom the Minister has refused to give both a refugee declaration and a subsidiary protection declaration, and
 - (a) who has not informed the Minister of any reason why he or she should be given permission to remain in the State, or
 - (b) who is the subject of a determination of the Minister under Head 36A(3)(b),of the option to inform the Minister of the person's wish to voluntarily return to his or her country of origin and of the relevant provisions of this Act.

- (4) A notification under subhead (3) shall expire on the fifth day following it being given to the person concerned.
- (5) If, before the expiry of the notification, a person who has been notified under subhead (1) or (3) informs the Minister of his or her wish to voluntarily return to his or her country of origin then the following provisions shall apply in relation to the person -
- (a) for so long as the Minister is of the opinion that the person intends to return to his or her country of origin and for so long as the Minister is not of the opinion that adverse concerns relating to national security or criminality arise in relation to the person, Head 45 shall not apply in relation to the person, and
 - (b) in the event that the person leaves the State for the purpose of returning to his or her country of origin, and if applicable, withdraws his or her application for international protection or, as the case may be, his or her appeal under Head 37, a deportation order under this Act shall not be made in respect of the person.

134. UNHCR welcomes the inclusion in the General Scheme of the option for Applicants to voluntary return. Providing effective and efficient outcomes to persons who are not refugees is essential to maintain credible asylum systems and prevent irregular onward movement.⁹⁰ Demonstrating that misuse of the asylum system cannot function as a “back door” alternative to regular migration also serves as a strategy to deter irregular migration and to reduce incentives for human smuggling and trafficking. Sustainability of return is best guaranteed if individuals who do not have a right to stay in a host country return home voluntarily. Voluntariness ensures that the return takes place in a safe and dignified manner. It is also cost-effective for the returning State. Several countries have developed good practices to encourage and support voluntary and sustainable return. These include: the provision of information and counselling on return options and circumstances in the countries of origin; the granting of reintegration assistance; and post-return monitoring. Some countries have also established initiatives to ensure that the specific needs of groups, such as unaccompanied/separated children, people with disabilities, and others, are addressed during the return process.⁹¹

135. Voluntary return can be promoted and supported in many ways, ranging from pre-return support to post-return monitoring. Among the activities that have proven particularly useful are:

- the establishment of appropriate referral mechanisms for agencies assisting with voluntary return in the host country;

⁹⁰ The return of persons found not to be in need of international protection is an objective identified under Goal 2 of Protecting refugees within broader migration movements in *UNHCR's Agenda for Protection, October 2003, Third edition*, available at: <http://www.refworld.org/docid/4714a1bf2.html>

⁹¹ UNHCR, *Refugee Protection and Mixed Migration: The 10-Point Plan in action*, February 2011, p.229 available at: <http://www.refworld.org/docid/4d9430ea2.html>

- the provision of information and counselling on return options;
- the dissemination of accurate and up-to-date country of origin information; and
- the provision of reintegration assistance.⁹²

136. The provisions of the General Scheme are a welcome modification of existing practice. The introduction of a single procedure will make it possible for an Applicant to get a final decision on his/her protection application within a much faster period of time. The consideration of permission to remain applications at first instance also will mean that an Applicant will be much more aware of his/her chances of receiving a positive outcome to that application prior to the possible issuance of a deportation order.

137. UNHCR however has concerns in relation to two specific aspects of Head 43A. Firstly with respect to Heads (1) and (2), the rationale for such provisions is unclear. The Explanatory Note does not provide any guidance on these provisions. An Applicant may wish to avail of voluntary return at any stage of the process. As stated above it is very important in this context that there is provision of accurate information and counselling on return options. Where this is not available the issuance of a notification as set out in Head (1) may be perceived as a formal procedure connected with the Applicant's protection application. It is essential that such information is made available to Applicants in an impartial manner that ensures the voluntariness of any return decision. Furthermore, Heads (1) and (2) impose a temporal limit on when voluntary return may be availed of and as such impose an unnecessary restriction on its availability.

138. Secondly with respect to Head (4), the time allowed is only 5 days. Section 34 of the Employment Permits (Amendment) Act 2014 has now amended s.5 of the Illegal Immigrants (Trafficking) Act 2000 with respect to the rules to be followed for the initiation of judicial review proceedings. These rules now provide that an application for leave to apply for judicial review in respect of asylum and immigration matters⁹³ must be made within the 28 days of the date on which the person was notified of the decision, determination, recommendation, refusal or making of the order concerned.

139. Where an applicant has received notification of a final refusal of their applications for protection and where relevant, for permission to remain, it is important that they be given sufficient opportunity to discuss their options and the details of their cases with their legal advisers. Given the gravity of the decision faced by such persons and the need to be adequately advised on their options it is recommended that greater time be afforded to applicants to consider the option of voluntary return in conjunction with any legal consultations they may be having in relation to their case more generally.

⁹² UNHCR, Refugee Protection and Mixed Migration: The 10-Point Plan in action, February 2011, p.234

⁹³ The specific matters concerned are set out in subsection (1)

Recommendations:

- (48) Heads (1) and (2) to be amended to provide that the option of voluntary return may be availed of at any stage up to the time limits set out in Head (4).
- (49) Extending the time afforded in Head 43A to an Applicant to notify the Minister of his/her intention to voluntarily return to his or her country of origin. At a minimum it is recommended that the period of 5 days be extended to 15 working days in order to allow sufficient time for the Applicant to access legal advice.

iii. Statelessness Determination

140. Through a series of resolutions beginning in 1994, the UN General Assembly gave UNHCR the formal mandate to prevent and reduce statelessness around the world, as well as to protect the rights of stateless persons. Twenty years earlier, the Assembly had asked UNHCR to provide assistance to individuals under the 1961 Convention on the Reduction of Statelessness.

141. UNHCR's governing Executive Committee provided guidance on how to implement this mandate in a "Conclusion on the Identification, Prevention and Reduction of Statelessness and the Protection of Stateless Persons" issued in 2006. This requires the agency to work with governments, other UN agencies and civil society to address the problem.

142. Ireland is a signatory and has ratified two international treaties on statelessness.

- The 1954 Convention relating to the Status of Stateless Persons
- The 1961 Convention on the Reduction of Statelessness

143. The *Irish Nationality and Citizenship Act 1956 (as amended)* contains a number of provisions giving effect to the 1961 Convention. The 1954 Convention is not given effect to in Irish legislation however some of its terms may be met through administrative arrangements, such as the issuance of a stateless travel document. Where stateless persons wish to apply for citizenship or a travel document, or simply to register with the immigration services, the lack of a determination procedure in Ireland can present a considerable obstacle.⁹⁴ Whilst the General Scheme gives effect to the 1951 Convention with respect to stateless persons, it does not give further effect to the 1954 Convention or provide in any way for a determination procedure. "It is implicit in the 1954 Convention that States must

⁹⁴ See further: *UNHCR, Scoping Paper: Statelessness in Ireland*, October 2014, available at: <http://www.refworld.org/docid/5448b6344.html>

identify stateless persons within their jurisdictions so as to provide them appropriate treatment in order to comply with their Convention commitments.”⁹⁵

144. Regrettably in a response to a recent parliamentary question⁹⁶ the current Minister for Justice ruled out the introduction of a determination procedure in the near future:

“Ireland is not unusual in so far as it does not have a specific procedure for determining statelessness claims... While the position adopted by other jurisdictions clearly does not determine the actions that Ireland might take in this area, some caution is nonetheless necessary to avoid a situation where Ireland, as a small country, could become a destination for stateless persons seeking access to a determination process. I have no immediate plans to introduce a formal determination procedure but will keep the matter under review, having regard also to developments in other jurisdictions and the nature of their determination procedures.”

145. UNHCR Ireland continues to work with Department of Justice officials to share information and to address their concerns. “Countries that have established a statelessness determination procedure have not seen an increased arrivals of persons to the country claiming statelessness stature.”⁹⁷ However UNHCR would again call on the State to consider the possibility of using this opportunity to address the lack of a statelessness determination procedure by way of legislation. This could be by way of an enabling provision or some other mechanism allowing the Minister to introduce a procedure at a later date by way of a statutory instrument. Substantive provisions could also be included to be commenced at an appropriate time in the future.

Recommendation:

- (50) Include in the General Scheme enabling provisions to give further effect to the 1954 Convention on Statelessness and to introduce a statelessness determination procedure.
- (51) If or first recommendation is not accepted, then enabling provisions to be added to allow such procedures to be introduced at a future date through a statutory instrument or by the inclusion of substantive provisions on statelessness to be commenced at a later date.

⁹⁵ UNHCR, *Handbook on Protection of Stateless Persons*, p.6, 30 June 2014, available at: <http://www.refworld.org/docid/53b676aa4.html>

⁹⁶ <http://oireachtasdebates.oireachtas.ie/debates%20authoring/DebatesWebPack.nsf/takes/dail2014061200062#WRR00375>

⁹⁷ UNHCR, *Statelessness determination procedures, Identifying and protecting stateless persons*, p.8, August 2014, available at: <http://www.refworld.org/docid/5412a7be4.html>

WOMEN'S AID

Women's Aid

Submission on the General Scheme of the International Protection Bill 2015

May 2015



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Women's Aid welcomes the Joint Committee on Justice, Defence and Equality consultation on the General Scheme of the International Protection Bill. While we acknowledge that the Bill deals with a variety of important issues, given our remit, we will focus only on those issues that most impact on women experiencing domestic violence and their children. We will therefore focus on Heads 49 to 52.

About Women's Aid

Women's Aid is a leading national organisation that has been working in Ireland to stop domestic violence against women and children since 1974. In this time, the organisation has built up a huge body of experience and expertise on the issue, enabling us to best support women and share this knowledge with other agencies responding to women experiencing domestic violence.

National Freephone Helpline

Our National Freephone Helpline (1800 341 900) operates from 10am to 10pm, every day of the year (except Christmas day), and provides support and information to callers experiencing abuse from intimate partners. It is the only free, national, domestic violence Helpline with specialised trained staff and volunteers, accredited by The Helplines Association and with a Telephone Interpretation Service facility covering 170 languages for callers needing interpreting services. In 2013 the Women's Aid National Freephone Helpline responded to 17,254 calls.

One to one support visits and Court Accompaniment

We also provide face to face support visits and Court Accompaniment in the greater Dublin area. Court Accompaniment is a specific service providing support to the particular needs of women seeking legal redress in the Courts regarding violence by a current or former husband or partner.

In 2013 Women's Aid provided 528 support visits and 176 court accompaniments. We supported women applying to the courts in relation to child related orders (Custody, Access and Maintenance) 113 times.

Dolphin House Family Law Support and Referral Service

Women's Aid also operates the Dolphin House Family Law Support and Referral Service, in partnership with the Dublin 12 Domestic Violence Service and Inchicore Outreach Centre. This is a free and confidential drop in service for women who are experiencing abuse in a relationship, located in the Dublin District Family Law Court.



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Training and Development

Women's Aid is a centre of excellence in training to statutory, voluntary and community organisations as they develop and maintain organizational responses to women and their children experiencing domestic violence. Training participants include health and social care professionals, staff from community groups throughout Ireland and Women's Aid National Freephone Helpline volunteers.

Policy and Communications work

The sum of the above contacts with women experiencing domestic violence and their supporters enable us to have a good picture of the issues that need addressing to improve systemic responses and we use that information in our policy and communication work. We provide relevant information and recommendations to government and other relevant agencies on the nature and prevalence of domestic violence, the barriers faced by women experiencing domestic violence and the gaps in existing legislation/systems.

Statistical context

A recent European Union survey¹ on violence against women has found that in Ireland:

- 14% of women have experienced physical violence by a partner (current or ex)
- 6% of women have experienced sexual violence by a partner (current or ex)
- 31% of women have experienced psychological violence by a partner (current or ex)

Women's Aid statistics

In 2013:

- the Women's Aid National Freephone Helpline answered 17,254 calls
- Our Support Services provided 528 support visits with 327 women
- 30% of the women supported for the first time by our Support Services were migrant women
- Women's Aid Support Services advocated and made referrals regarding immigration and residency on 52 occasions either by phone or letter

For many years Women's Aid in conjunction with the Domestic Violence Coalition has highlighted the additional barriers that migrant women face when trying to leave a violent relationship and advocated reform to migration and welfare legislation to address these barriers. Some of these issues are relevant here, in particular the issue of permission to enter/ reside in Ireland being dependent on the continuing relationship with a sponsor.

1 FRA gender-based violence against women survey dataset 2012 available at <http://fra.europa.eu/DVS/DVT/vaw.php>



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Comments on the General Scheme of the International Protection Bill 2015

Head 6, (2) (a) and (f)

Women's Aid welcomes the inclusion of sexual violence and gender based violence in the examples of acts which may amount to acts of persecution. However we support the Immigrant Council of Ireland submission that domestic violence should also be specifically named as to provide clarity to women that they may apply on these grounds.

Recommendation

To include a specific reference to domestic violence under Head 6

In our experience women find it very difficult to disclose sexual and gender-based violence and it is very important that interviewers who deal with these issues are properly trained and supported in doing so.

Recommendation

Women's Aid recommends that all officers interviewing women in relation to sexual and gender based violence should have received specific training and support on the subject

Head 48, 50, and 51 Permission to enter /reside for a member of family of qualified person and revocation of said permission

Head 48, 50 and 51 set out the procedure for a qualified person (a person who has been granted a declaration as refugee or subsidiary protection) to act as a sponsor for a family member to enter and/or reside in Ireland.

However, according to Head 48 (3) (b), 50 (6) and Head 51 (5) this permission is contingent on the relationship continuing and ceases to be in force in the event that the marriage / civil partnership ceases to subsist.

In other words the spouse or the civil partner of a person who has been granted refugee or subsidiary protection status, can only remain in Ireland as long as the marriage /civil partnership continue and may lose permission to remain if the relationship ends.



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Women's Aid is very concerned about this provision.

In our experience working with migrant women (including women who have been sponsored by a refugee/ subsidiary protection holder), one of the main reason why they do not seek help and do not leave a violent relationship is the fear of deportation. Threats of deportation are frequently used by abusers to maintain control on the victim and prevent her from seeking help and support.

This is confirmed by the National Crime Council research on domestic abuse, which has noted that migrant women are forced to stay with abusive partners because of their precarious immigration status and that women in this situation are extremely reluctant to report the abuse to the Gardaí for this reason.²

Women who are married to holders of refugee/ subsidiary protection status may have very good reasons (including the relationship with somebody who was subjected to persecution) to fear to be returned to their country of origin, but may or may not satisfy the requirements for applying for international protection in their own right. They may not want to take the risk to do so and be rejected.

Even when they may not fear persecution, returning to their country of origin may not be a viable option, for economic, social and cultural reasons. If they have children with the abuser, they may not be allowed to take the children outside the jurisdiction even when they do want to leave.

In short, these provisions may trap very vulnerable women in an abusive relationship where they have to endure significant levels of physical, emotional, sexual and financial violence.

Case study

Mary came to Ireland to reunite with her husband, whom had been granted refugee status here, after many years of separation. Her status is dependent on her husband and she is only allowed in Ireland for so long as she is in a relationship with him. Every year she must get her visa renewed and her husband must be present to satisfy the immigration officer that she is still living with him as his wife.

2 National Crime Council and Economic and Social Research Institute, Domestic Abuse of Women and Men: Report on the National Study of Domestic Abuse, The Stationery Office, Dublin, 2005, p.163



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Soon after she moved to Ireland, Mary's husband became very violent and abusive to her to the point that she had been hospitalised due to his violence. Eventually, the abuse was too much and Mary got a barring order against him in order to protect herself from further serious harm.

Once Mary obtained the barring order, she became fearful about her immigration status as she knew that her husband would not cooperate and help her to renew it anymore. She was terrified about going to an immigration officer and telling them her situation in case they deport her.

Returning to her country of origin was not an option for Mary as she had the same fear of persecution as her husband had, as they shared the same political beliefs, and after he fled to seek asylum in Ireland, she suffered greatly there. Applying for refugee status in her own right was a daunting prospect for Mary as she would lose the right to work she had been enjoying so far, would have to move into a direct provision accommodation centre and would have to live on €19.10 per week.

It is imperative that women in situations like Mary's do not feel that they have to stay with an abusive husband to be able to remain in the country. Women's Aid therefore recommends that there should be an exception to the requirement that the marriage/civil partnership subsist in cases where the marriage/civil partnership ends because of domestic violence.

Recommendation

To include under Head 48 (3) (b), the following words in bold

A permission given under subhead (1) or (2)-

(b) shall cease to be valid where the person to whom it was given ceases to be a qualified person or a family member, as the case may be, **unless the person ceases to be a family member because of domestic violence**



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To include under Head 50 (6) the following words in bold

A permission given under subhead (4) shall cease to be in force in relation to the spouse or the civil partner concerned in the event that the marriage or the civil partnership ceases to subsist, **unless the marriage or civil partnership ceases to subsist because of domestic violence**

To include under Head 51 (5) the following words in bold

A permission given under subhead (4) shall cease to be in force in relation to the spouse or the civil partner concerned in the event that the marriage or the civil partnership ceases to subsist **unless the marriage or civil partnership ceases to subsist because of domestic violence**

Head 52

Women's Aid appreciates that Head 52 of the General Scheme provides that “in the application of Heads 47, 48, 49, 50 and 51 due regard shall be had to the specific situation of vulnerable persons such as persons under the age of 18 years (whether or not accompanied), disabled persons, elderly persons, pregnant women, single parents with children under the age of 18 years, victims of human trafficking, persons with mental disorders and persons who have been subjected to torture, rape, or other serious forms of psychological, physical or sexual violence.”

Women's Aid suggests that this list should also include specifically domestic violence, as in the current wording it is not clear if the perpetrators of “psychological, physical and sexual violence” specifically include partners or if it refers to other forms of violence (such as state or militia violence).

Recommendation

To include the words “including domestic violence” in Head 52 (1) so that it would read. “in the application of Heads 47, 48, 49, 50 and 51 due regard shall be had to the specific situation of vulnerable persons such as persons under the age of 18 years (whether or not accompanied), disabled persons,



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elderly persons, pregnant women, single parents with children under the age of 18 years, victims of human trafficking, persons with mental disorders and persons who have been subjected to torture, rape, or other serious forms of psychological, physical or sexual violence, **including domestic violence**".

Evidence required to prove domestic violence

Migrant and refugee women may be extremely unlikely to access authorities and statutory services, especially if they come from a country where police forces were used to persecute them or their family. They may have very limited access to information on their rights, entitlements and support services available, and may face language and cultural barriers preventing them seeking help. Therefore they may not seek help from statutory agencies and support services readily.

Moreover leaving a violent partner is the most dangerous time for all women experiencing male violence and women are most at risk of serious or lethal violence at this time.

It is therefore imperative that rules and requirements to prove domestic violence are not unduly restrictive and especially do not mandate that the woman had made previous contact with the Garda or the courts.

Recommendation

The evidence required to prove that a woman is a victim of domestic violence should be flexible and not rely on the woman having made contact with the Garda and the Legal system.



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