



The Right to Protection

**Submission to the Oireachtas Joint Committee on Justice, Equality ,
Defence and Women's Rights on the protection aspects of the
Immigration, Residence and Protection Bill, 2008
March 2008**

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Introduction: A historic opportunity

The Irish Refugee Council welcomes the publication of the *Immigration, Residence and Protection Bill, 2008*. As the first complete review of asylum and protection legislation since 1996, this Bill provides a historic opportunity to learn from the experience of the last decade and to put in place a fair and humane protection system in line with international best practice.

We support the idea of a single procedure to assess all forms of protection needs. The current system whereby asylum seekers, including many families, can wait for years in *direct provision* accommodation, not allowed to work or study and trying to live on €19.10 per week, leads to asylum seekers becoming de-skilled, demoralised and in many cases severely depressed, as well as being costly to the State.

The introduction of the single procedure, however, makes it even more imperative that the system of determining applications is fair, rigorous and transparent. The decision on an application for protection can quite literally mean life or death for applicants and, as a State with a commitment to compliance with international law, we cannot afford to get it wrong.

The Irish Refugee Council has worked with Government and other stakeholders to defend the rights and interests of asylum seekers and refugees since 1989. This submission draws on the experience of that work, on the views of people seeking protection in Ireland, on the views of the legal profession and other NGOs and on international best practice.

The Irish Refugee Council proposes that three main groups of changes to the Bill, as published, would bring it into line with internationally accepted best practice. These are:

- A. Protection:** Upholding the central principle of ‘*non-refoulement*’, that no one can be returned to a place where they face danger of persecution;
- B. Fair Hearing:** Ensuring that the process for assessing claims for protection, at initial and appeals stages, is fair, rigorous and transparent
- C. Vulnerable groups:** This submission concentrates particularly on the needs of separated children and suspected victims of trafficking. Separate and more detailed submissions on these two issues are also being sent to the Committee.

Specific proposals in all of these areas are laid out in the attached document.

This is not a comprehensive list of our concerns, and we are aware that other NGOs will highlight concerns in areas such as the right to marry, family re-unification etc.

We look forward to an opportunity to discuss these issues directly with the Committee.

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Chairperson

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A: Protection

1. *Non-refoulement*

The principal of *non-refoulement* is described by the UNHCR as the cornerstone of international refugee protection. It is defined in Article 33 of the 1951 Refugee Convention as follows: “*No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.*”).

The definition of *non-refoulement* in the Bill is an improvement over the previous (2007) Bill, but still does not provide the level of protection expected under international law. The Refugee Convention allows *refoulement* only when someone in need of protection is a danger to the security of the state or has been convicted of a particularly serious crime and constitutes a danger to the country. We agree with the UNHCR that the Bill should be modified so that only these exceptions to *refoulement* are applied. If s.53(2) is retained, a clear statement to the effect that the implementation of the Extradition Acts 1965 and 2001 and the European Arrest Warrant 2003 must comply with the principle of *non-refoulement*, as defined in article 33 of the 1951 Convention, and as protected under international human rights law (article 3 *UN Convention Against Torture (UNCAT)*, article 3 ECHR, article 7 *International Covenant on Civil and Political Rights (ICCPR)*), is required.

There are repeated references throughout the Bill to exceptions and restrictions based on ‘public order’/*ordre public*, public health, public security and public policy. These meaning of concepts such as *ordre public* is not specified in the Bill and, as such, cannot guarantee compliance with the principle of *non-refoulement*, (which allows very limited exceptions under article 33(2) of the 1951 Convention, and no exceptions under article 3 ECHR, UNCAT and article 7 ICCPR).

In addition, the principle of *non-refoulement* is undermined in the Bill by provisions which restrict access to the asylum process, such as Dublin Regulation rules, the “safe-third-country” and “safe-country-of-origin concepts”, as well as rules on carrier sanctions and transporters' liability. The lack of suspensive effect of judicial review applications and of certain categories of appeals applications and the wide application in the Bill of new powers of summary deportation, further increase the risks of *refoulement*. These risks are discussed further below. In *Bugdaycay v Home Secretary*, [1987] A.C. 514, Lord Templeman noted that where the consequences of a flawed decision may imperil life or liberty, a special responsibility lies on the decision-making process. It is our submission that this special responsibility, arising in the context of the State’s *non-refoulement* obligation, is not being met in this Bill.

2. Carrier Liability

Carrier liability improperly shifts responsibility for protection decisions from the State to carriers. Staff working for carriers cannot be expected to be fully familiar with the State’s obligations under international or national refugee law, and are likely to err on the side of caution in not taking someone on board rather than risk fines or other sanctions.

Carrier sanctions will mean that those seeking protection may be prevented from accessing the State, in breach of the State's obligations under the *1951 Convention*. This may well have the effect of forcing persons to rely on traffickers/smugglers or be sent home to face danger without a hearing of their case for protection.

The Refugee Convention says (Article 31(1)): "*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.*"

The Bill should allow for an asylum/protection-related defence to carrier liability and exempt carriers where persons make protection applications upon arrival to Ireland and/or where persons are particularly vulnerable (e.g. trafficked persons and separated children). In Belgium, France and Luxembourg, carriers are exempted from penalties if an asylum claim is deemed admissible. In Finland and Germany, relief from sanction is available where the asylum claim is ultimately deemed well founded.

Section 2 (9) of the *Immigration Act, 2003* clearly stated that the provisions for carrier sanctions are 'without prejudice' to the Refugee Act, 1996, as amended. This provision should be reinstated, as it affirms the requirement of the 1951 Convention to providing protection to all refugees who travel to a state party, including those without authorisation (Hathaway 2005: 386).

3. Detention

We welcome the Minister's assurance in the Dail (Second Stage Debate on the Bill) that the current legislation is not intended to 'allow for the detention of asylum seekers...' and that 'detention could only be introduced on foot of a Government decision and primary legislation'. Widespread detention of people seeking protection is offensive in itself, contrary to UNHCR guidelines and effectively criminalises people who have not committed and are not suspected of any offence.

We are, nevertheless, concerned at the extended powers of detention at the point of entry introduced in this Bill. We welcome the Minister's assurance in the Dail Second Stage debate that in the case of the 'provision which allows a person who turns up in any part of the State seeking asylum to be held until he or she can be issued with a temporary resident's permit, the detention is for the minimum amount of time needed to issue the card, in most cases no more than a matter of hours.'

The Bill itself, however, has no such time limits on this type of detention. Compliance with the constitutional protections against arbitrary arrest and detention and with ECHR and international human rights standards require, at a minimum, that such limits and the right to challenge the legality of detention before the courts are clearly safeguarded.

We support the statement by UNHCR:

"UNHCR recommends that detention of asylum-seekers is exceptional and should only be resorted to where provided for by law and where necessary to achieve a legitimate purpose; proportionate to the objectives to be achieved; and applied in a non-discriminatory manner for a minimal period. The necessity of detention should be established in each individual case, following consideration of alternative options, such as reporting requirements."

There are, however, a large number of specific areas where detention is either retained or extended in this Bill in a worrying way:

- **Arrest by carriers:** there is a new obligation on a carrier to detain person where so required by an Immigration Officer (S 28 (3)). In the opinion of the IRC, it is inappropriate for carriers to be required to detain persons on board. Such detention may be in breach of the right to life under Article 2 of the *European Convention on Human Rights (ECHR)*, the right to be free from inhuman and degrading treatment under Article 3, the right to private life under Article 8 and the right to liberty under Article 5. There are no safeguards specified in the Bill in relation to these periods of detention. All persons should be disembarked and examined by immigration officers on the territory.
- **Detention of children:** S 58(1) read with S 56(3) permits the detention of children, possibly for lengthy periods of time. S 60(2) also talks about the detention of children. In application of article 37 of the Convention on the Rights of the Child and the principle of the best interests of the child, children should not, as a general rule, be detained. Furthermore, as noted by the UN *Committee on the Rights of the Child (CRC)* in its recent *General Comment No. 6 on Treatment of Unaccompanied and Separated Children outside their Country of Origin*: “Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof.”
- **Arresting and detaining people who apply for protection at the frontier (S 70).** Where an immigration officer cannot issue a protection application permit, the officer shall arrest a protection applicant. As presently worded, S 70 fails to ensure protection of the right to be free from arbitrary arrest and detention, in breach of Art. 40.3, article 40.4.1 of the Constitution, Article 5 of the ECHR and Article 9 ICCPR, which require that any deprivation of liberty must be in accordance with law and strictly required by the exigencies of necessity and proportionality. In *The People (AG) v O’Callaghan*, Walsh J stated: *...It would be contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter upon which he has not been convicted or that in any circumstances he should be deprived of his liberty, save in the most extraordinary circumstances - to secure the preservation of the State in a time of national emergency, for example...*” In the same case, O’Dálaigh CJ held that any deprivation of liberty must be considered a punishment. Article 5(1)(f) of the ECHR allows for detention to effect a deportation. Here, however, s.70 contemplates a deprivation of liberty, without specified time limits, for administrative reasons. Article 5 requires that adequate safeguards are in place to guard against any unlawful deprivation of liberty. Further any deprivation of liberty, in addition to being in accordance with the law, must meet requirements of necessity and proportionality. Deprivation of liberty for administrative purposes, such as in this instance, cannot be said to meet the requirements of necessity or proportionality. In its current form, s.70 could lead to an excessive use of power with little or no accountability. At a minimum, we propose limitations analogous to those provided by s4 of the Criminal Justice Act 1984: Section 4 (3) (a) states that the period for which a person so arrested may be detained shall, subject to the provisions of this section, not exceed six hours from the time of his arrest.
- **Arrest and detention of protection applicants:** The new Bill includes a new provision, under S 71, (g) and (h), allowing for the detention of an applicant who makes a protection application immediately before that person ought to be or was being removed from the State, and where that application is considered to be for the purpose of delaying removal from the State.. This would mean pre-judging the motivation for and validity of a person’s protection application, without due process. This section should be removed.

4. Applications “*deemed withdrawn*”

The Bill provides for a number of ways in which an application can be ‘deemed withdrawn’ and, therefore, a person in need of protection can be put in danger of summary deportation from the state without their protection needs being even considered. There are no appeal rights where a protection application is deemed withdrawn (whether at first-instance or upon appeal).

UNHCR has pointed out that some of these provisions jeopardise the states non-refoulement obligation.

The UNHCR’s response to the Bill expresses concern about eight ways in which an application can be ‘deemed withdrawn’. We draw the Committee’s attention in particular to the following:

1. **Failure to dwell or remain in a particular place or district in the State** (S 68 (6)(a): this is confusing, since at present different Ministerial and Government statements are contradictory as to whether someone is obliged to stay in direct provision accommodation centres or not. (For example, the Minister’s recent statement in the Dail: “*The question appears to imply that asylum seekers are not free to leave state accommodation centres. That is not so. Asylum seekers are not prisoners. They are free to leave such centres, or opt not to avail of the facilities that lie therein from their day of arrival in the state.*”)
2. **Failure to attend for interview/oral hearing:** S. 80(2) and S. 87(1) provide that a person’s protection application will be deemed to be withdrawn if he/she fails to attend for interview or oral hearing and does not provide a reasonable explanation for non-attendance within three working days. This time period is too short.
3. **Failure to cooperate:** S. 70 (7), 80 (3) and S 87 (2) provide that a person’s protection application will be deemed withdrawn where it appears to the Minister/Tribunal that the applicant is failing in his or her duty to cooperate or to furnish information relevant to the application/appeal. For example, under S 70 (7), a person’s protection application could be deemed withdrawn for failing to provide biometric information at the point of entry to the state. The application could therefore be deemed withdrawn before any assessment of the protection claim.

The consequences of application being deemed withdrawn under this legislation are draconian. If an application is deemed withdrawn, the investigation shall be terminated, and the determination shall note that the applicant is not entitled to protection in the State (see S. 80 (5) (a) (b)). Furthermore, as provided in S 80 (5) (c) there is no appeal if an application is deemed withdrawn. When read with S. 4 of the Bill, a person whose application/appeal is deemed withdrawn and a re-application is not permitted (under S 89) shall be unlawful and liable to be removed without notice. The removal without notice of such persons may breach the rule against *refoulement*.

We concur with UNHCR’s *Comments on the Immigration Residence and Protection Bill 2008* where they advocate for stronger procedural safeguards for some categories. We agree with their recommendation which calls for a change in the Bill so that a withdrawal results in a discontinuation of the procedure only and the closing of the file, but not in a decision that the applicant is not entitled to protection. A reopening of the application should be possible without time limits upon application.

B: Fair hearing

5. Single Decision Process/First Instance

We welcome the introduction of a single procedure for all forms of protection, to assess claims for asylum, subsidiary protection, non-refoulement and *compelling reasons*. We do, however, have significant concerns about many aspects of the extensive use of accelerated procedures in this Bill.

Some concerns about other aspects of the current asylum process continued or extended under the Bill include:

- **Benefit of the doubt and shared fact-finding duty:** Currently, the first instance asylum interview is dominated by what is often referred to as a ‘culture of disbelief’, with the examiner looking for flaws in the case being presented, giving more emphasis to ‘credibility’ than to the actual issues in protection or country information. UNHCR points out that:

“Persons in need of international protection may arrive with the barest necessities and frequently without any documents. In such situations, examiners should use all the means at their disposal to search for the necessary evidence in support of the application. Similarly, it should be kept in mind that certain information not found relevant to the claim by the applicant may be withheld for reasons not relating to bad faith, but to reasons to do with more subtle human and psychological factors. This is for instance often the case in relation to information regarding the travel to the State where the applicant may fear reprisals from smugglers if certain information is provided.”

As established in legal principles relating to refugee law, the applicant should be given the benefit of the doubt. Similarly, there is a shared duty of fact-finding between the applicant and the Minister/Tribunal. We welcome the inclusion in the Bill of S 75 (2) in this regard. We recommend that there be a specific reference in the Bill to the principles of the benefit of the doubt and the shared duty of fact-finding and that this reference be included in S 80 (3) and S 87 (2).

- **Disclosure of information:** There is no rule of disclosure to the applicant as to what information is being relied on by the examiner, so that it cannot be discussed as part of the hearing. We recommend that this Bill should require that all parties to an application know what evidence is before the decision-maker. A rule of disclosure could assist in avoiding misunderstandings and would avoid unnecessary appeals where misunderstandings have arisen, due to incomplete or unreliable information being relied upon.
- **Recording of interviews:** We propose that the Bill should also be amended to specify the recording of interviews, which is particularly important in cases of disputed interpretation, as in many other European jurisdictions, including the UK. Presently there is no complete record of proceedings as the interview is only captured in summary in English by the examiner, who is also conducting the interview and recommending a decision. Recording of interviews also provides additional safeguards for the interviewer, and will ensure a more robust first instance procedure.
- **Publication of decisions** should also be required, as is considered to be good practice internationally.

The above recommendations would not only improve the quality of the decision-making process. They would also avoid unnecessary appeals arising from insufficiently rigorous and robust procedures at first instance.

6. Children deemed part of their parents' application (Section 73 (13)).

Under Section 73 (13) “*a protection application made by a foreign national...shall be deemed to be made on behalf of all the dependants of the foreign national who are under the age of 18 years, whether present in the State at the time of the making of the application or born or arriving in the State subsequently*”.

This appears to be in direct contravention of the recent Supreme Court decision, *A.N. & ors –v- Minister for Justice & Anor*, released on 18 October 2007. In this case, the Supreme Court stated that the deportation orders of a Nigerian mother and her five children were invalid because at no stage in the asylum process did any documents emanating from or required by the Minister advert to the existence of applications on behalf of the children.

Moreover, this sub-section undermines the right of every person to seek asylum (Art. 14 (1) of the *Universal Declaration of Human Rights*) and the spirit of the *1951 Convention*. Of course the minor's own refugee status should be determined according to the principle of family unity (UNHCR Handbook, paragraph 213), but this principle operates only in favour of dependants, and not against them (paragraph 185). It's not uncommon that children can invoke reasons on their own account (for example: Military use of children or genital mutilation) and apply for recognition as refugees under the *1951 Convention* or the *1967 Protocol*. Furthermore, where families are separated during flight, and a child is left behind in the country of origin, joining the family after their application is made, that child's own experiences must be examined and his/her protection needs assessed individually.

This provision is also contrary to the child's 'best interests', as protected under article 3 CRC, and to the State's obligations under article 22 CRC, to provide appropriate measures of protection to children seeking refugee status.

The section should be deleted from the Bill.

7. The Protection Review Tribunal (“PRT”)

The Protection Review Tribunal will be a vital opportunity for people denied protection at first instance to have a more thorough and independent hearing of their case. This Tribunal will have an even heavier responsibility than the current Refugee Appeals Tribunal which it will replace because the single procedure effectively makes it the last stage in the protection system.

Questions have been raised about the decisions of the current Refugee Appeals Tribunal (RAT) in the Oireachtas, the media and public debate

We support the Minister's stated intention that the new Tribunal should be independent. In our view, however, this is not fully reflected in the Bill, which replicates many features of the existing legislation which have contributed to the questions over the current Tribunal, as well as some new provisions which are of concern. These include:

- a) **The (non-) publication of decisions.** Section 95 (5) says that “*The Chairperson may, at his or her discretion, where he or she considers the decision of the Tribunals of legal importance, publish the decision in such manner as he or she considers reasonable*”. This falls far short of international best practice of publishing decisions, suitably anonymised, and the failure to publish decisions has been a source of much controversy in the RAT. Publication is normal practice in, for example, the UK, France, Germany, New Zealand, Australia and Canada. As Deputy Barry Andrews stated in the Dail Second Stage Debate on

the Bill “*It is essential, in the interests of consistency, that the Tribunal’s decisions be published and circulated widely.... If people know where they stand legally, the entire system will benefit.*”

- b) **Access to decisions by legal representatives:** Currently, a legal representative may access and search a database of decisions of the RAT. Under the new Bill, a legal representative will need to apply to the Chairperson of the PRT, who may provide a decision or a representative sample. The Chairperson may refuse a request if it is considered *frivolous or vexatious*. In a further bizarre but damaging twist, S 95 (7) requires an applicant’s legal representative to bring to the attention of the Tribunal any decisions of the Tribunal any decision which “*may not tend to support the appeal.*” This leads to an ‘*inequality of arms*’ in the process, as there is no corresponding duty on the presenting officer. As such it offends the right to a fair hearing and is contrary to the requirements of natural justice.
- c) **Appointment of the Chairperson and members:** We welcome the introduction of full-time members to be appointed by the Public Appointments Service (PAS), (s. 92). We recommend that part-time members should also be appointed by the PAS, rather than by the Minister as the Bill stipulates. Under the new single procedure, the Tribunal will be reviewing decisions made by the Minister. It should be noted that all current members, including those earning over €800,000 over the last 8 years, are part-time. We would also recommend the removal of S 137(5) which stipulates that the Chairperson of RAT shall be deemed automatically to be the Chairperson of the PRT and shall hold office for the unexpired period of his/her office.
- d) **Relevant Experience** We welcome the fact that the Chairperson is required to have not less than 5 years’ experience as a practicing barrister or solicitor, but we are concerned that other members of the Tribunal are not required to have legal experience. Under this Bill, an applicant for protection may go through the whole process from application to deportation without having her/his case considered by a legally qualified person.
- e) **Functions of Chairperson.** In S 93 (5) (b), the Chairperson is given power to re-assign business from one member to another. It is unclear from the wording whether a case which has been decided can be re-assigned and whether the applicant will be notified of such a change. We also question the need for the Chairperson to be able to delegate his/her main functions (S 95 (11)) of assigning business to each member and receiving reports from members, and we recommend that this section be removed or at least amended significantly to state under which circumstances this might occur.
- f) **Publication of Guidelines:** The Bill provides that the Chairperson can issue guidelines, but does not specify that they must be published. In the interests of transparency and confidence, this should be changed to require that rules of procedure and all guidelines adopted by the PRT must be published (as is currently the position in the UK, for example).

8. *Compelling Reasons/Humanitarian Considerations*

The Bill provides that protection applicants who are not entitled to refugee status, subsidiary protection or protection from refoulement, may be granted residence for *compelling reasons*. However humanitarian considerations are not specified as a reason for such protection, and it is unclear who would meet the *compelling reasons* criterion and whether or not residence criteria (at Section 31) will also be applied. We are concerned that vulnerable persons who are now granted leave to remain status as well as those who cannot be *refouled* may be denied residence permission under the terms of the Bill, particularly if the residence criteria are applied.

The single procedure outlined in the Bill specifies that the Minister should assess, in order, whether someone is entitled to protection because of: (1) being a refugee; (2) subsidiary protection; (3) non-

refoulement and (4) *compelling reasons*. However, it should be possible to apply only for relevant forms of protection if an applicant or their counsel feels that they would not qualify for asylum. This would avoid the additional costs for the State of assessing someone for asylum who does not feel they would qualify and the danger that the applicant's credibility will be undermined at the asylum stage, before their case for other forms of protection is heard.

It is also important that the Bill should spell out the right of separated children and trafficked persons to temporary residence while deciding on their future status.

Some other provisions in relation to the Bill's treatment of '*compelling reasons*' are of concern:

- When considering whether to grant a residence permit the Minister must consider whether the presence of the applicant would give him or her an unfair advantage compared with a person in their country of origin in similar circumstances [section 83(2)(a)]. This does not relate to the applicant at all but to the situation of other people outside Ireland. This provision should be deleted.
- The Minister shall not be obliged to take account of factors that do not relate to the applicant's departure from his/her country of origin or that have arisen since that departure. This might apply in particular to victims of trafficking and separated children

9. Judicial Review

Access to judicial review, which provides crucial judicial oversight of the asylum process, is severely curtailed by s.118 of the Bill. Judicial review plays a central role in the Irish legal system, in safeguarding compliance with the Constitution, the ECHR and requirements of due process.

The additional restrictions imposed in s.118 (3) could potentially remove an important check on the asylum process. As we have seen to date, such checks and balances are essential to ensuring that the asylum process meets the standards that legislation and policy seeks to achieve. These restrictions may also contravene article 13 of the ECHR, which provides a right to an effective remedy, including where *non-refoulement* rights in article 3 may be threatened.

Our concerns about the limitations on judicial review include:

- **The two week time limit for bringing a High Court application, S 118 (2):** There is a danger that this will severely limit protection applicants' access to the courts and counsels' ability to sufficiently prepare the applications. The High Court provides that, in most other areas of the law, applicants have three months or six months to make an application. The two-week time limit was provided for in the *Illegal Immigrants (Trafficking) Act 2000*. The Law Reform Commission's Report on '*Judicial Review Procedure*' (2004) has recommended that the fixed time limit on applications for judicial review of limited type of decisions be increased to 28 days. In the *Illegal Immigrants Trafficking Act* there is discretion for courts to extend this period, but s. 118 (3) of the IRP Bill purports to curtail the High Court's ability to do this. This unduly fetters the discretion of the courts, undermines the right of access to the courts (article 40.3 *Macauley v Minister for Posts and Telegraphs* 1966 IR 345, and the right to an effective remedy (art.13 ECHR), where *non-refoulement* rights may be threatened. We therefore recommend that the 14-day time limit be amended to 28 days and that the restrictions on the courts' powers to extend existing time limits be removed.
- **Allowing costs to be awarded against legal representatives:** The highly-publicised provisions of Section 118 (7) and (8) provide for all or part of the costs to be borne by the

applicant's legal representative where the grounds are considered "*frivolous or vexatious*". This section could act as a deterrent to legal practitioners, particularly in the context of tight time limits. As such, it may further limit access to the courts, undermining the effectiveness of the remedy of judicial review. This provision has not been implemented in any other area of law. Since an applicant cannot proceed with judicial review proceedings unless leave is granted by the Court, and an arguable case established, it is not clear how such a scenario could arise in practice. We recommend that subsections (7) and (8) be struck out.

- **Non-suspensive effect of judicial review:** S 118 (9) provides that *an application by a foreign national for leave to apply for judicial review (of transfer or deportation) shall not of itself suspend or prevent his or her transfer or... removal from the State*. This means that, in many cases, applicants will not be able to proceed with judicial review, or gain from the remedies, because they have already been deported and possibly placed in danger. Article 13 of *ECHR* implies the right to remain in the state until all remedies have been exhausted. Under the Bill (s. 23) the Protection Application Entry Permission is only valid until the sending of a decision to refuse protection status by the Tribunal or until an application is deemed to be withdrawn. As such, a person will be unlawful in the State and may be removed before they have a possibility to make an application for leave to apply for judicial review. We propose that S 118 (9) should be deleted and that there should be judicial review with suspensive effect. In other words, the applicant should remain in the State until the judicial review proceedings have been determined.

10. Biometric Data Procurement and Exchange of Information

S 108 (1) requires a foreign national to furnish on demand to the Minister, an immigration officer, a member of the Garda Síochána or a member of the civilian staff of the Garda Síochána such biometric information in such manner as may be reasonably be "*required for the purposes of the performance of his or her functions under this act*". The term "*Biometric information*" should be better defined throughout the Bill. It could mean, for example, fingerprinting, iris scanning, facial recognition, DNA identification etc.

The purposes of the data collection are not well defined, which seems to be out of line with the principle that: "*the data shall have been obtained only for one or more specified, explicit and legitimate purposes*" (*Data Protection Act 1988*, S. 2 (c) (i), and Art. 6 (1b) of the Directive 95/46).

Under S 108 (8) and (9), it's not clear what happens with the biometric data of a foreign national if s/he doesn't become an Irish citizen. A maximum retention period of 10 years should be specified. Upon expiry of this period, the data should automatically be erased. In general the data should not be kept *for longer than is necessary* for the purposes of the collection of biometric data (*Data Protection Act 1988, as amended*, Art. 2 (c) (iv)).

Biometric testing should only be applied in relation to separated children when it can clearly be demonstrated that the decision to do so has been based *solely* on the best interests of the child. No child shall be subject to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation. As in the Eurodac regulation, a child under 14 shouldn't have to furnish biometric data.

C: Vulnerable groups

11. Protection for Suspected Victims of Trafficking

We welcome the inclusion of a new section on the protection of suspected victims of trafficking. However, as this Section stands, it simply treats the victim as a tool for the investigation and prosecution, disregarding their rights and protection needs. This Section should be amended to facilitate ratification of the *Council of Europe Convention on Action against Trafficking in Human Beings* and the *UN Trafficking Protocol*.

In this Section a “foreign national” should mean any person who is not an Irish citizen. The purpose of the reflection and recovery period should not only be to allow the victim to make an informed decision as to whether to assist the investigation, but also to enable victims to remain legally in the State while they recover from their experience and to ensure access to necessary supports including legal aid. This period should be extended to a minimum of 6 months since many trafficked persons are recovering from significant trauma, while others fear retaliation.

Furthermore, specific provisions relating to the protection of suspected trafficked children and the specific entitlements of those who are granted temporary residency should be added. Additional good practice measures should be seriously considered, such as a non-punishment clause and the possibility of granting temporary residency on humanitarian grounds, whether or not the victim is able and willing to co-operate with the authorities. Trafficked persons should be exempted from the pre-removal powers of detention provided in the Bill. An explicit recognition of the right of trafficked persons to seek international protection and to have access to free legal aid should be included.

For a more detailed analysis and recommendations, please see the *IRC’s Submission on Section 124 of the Immigration Residence and Protection Bill and other provisions related to the protection of suspected victims of trafficking*.

12. Protection for Separated Children

A separated child is a child under the age of 18, who is outside their country of nationality or, if stateless, outside their country of habitual residence and who is separated from both parents, or from their previous legal or customary primary caregiver.

Despite the fact that the current system for identifying and protecting separated children in Ireland has been criticised by the UN Committee on the Rights of the Child and the Special Rapporteur on Child Protection, there are no improvements proposed in the Bill.

There is a real need for reform in this area. The current reality is that:

- most separated children are not identified at ports of entry
- of those identified and taken into State care more than 350 have gone missing in recent years
- those in care are discriminated against – receiving a lesser provision of care than Irish citizen children in care
- few have been appointed a guardian ad litem to assess their situation and assist them in making sure that their voices are heard
- some have been reunited with ‘family,’ who turned out to be traffickers and who exploited them for years here in Ireland

- some separated children have waited more than 7 years for a decision, ageing out in the process, unable to continue their education, vulnerable to traffickers and threatened with deportation
- some children and young people have fallen out of the system – particularly in the transfer from the Health Service Executive to the Reception and Integration Agency as a result of little or no aftercare support
- other separated children have come to the attention of the authorities, but continue to live in Ireland for years without proper documentation, with no legal aid, with no legal status – living only with the threat of deportation once they turn 18
- with a lack of protection and timely decision making to ensure an outcome in line with their best interests, many separated children in Ireland have no choice but to become undocumented adults

These children deserve better protection – all children should be cherished equally!

Currently, there is no clear entitlement for separated children to international protection in the Bill. This is an opportunity for the Irish government to incorporate relevant provisions from the *UN Convention on the Rights of the Child* – specifically to acknowledge that every separated child, as a child temporarily or permanently deprived of his or her family environment, is entitled to special protection and assistance provided by the State (CRC Art. 20). As recommended by the Law Society and the Special Rapporteur on Child Protection, the status of temporary permission to remain in the State should be afforded to separated children so as to provide them with legal status while their interests are being assessed.

The IRC calls for a new section to be added to the Bill regarding specific safeguards and protection for separated children. This new section should address a wide range of measures including: identification, age assessment, registration, family tracing, guardianship, best interests determination, treatment and care. The IRC will be making an additional submission outlining detailed recommendations in these areas.

Transition

We understand that the new single process will be set up in parallel with the current process. This raises the possibility that some people may be in the current system for many years, as happens at present, while those in the new system may receive decisions more rapidly.

The new faster procedure provides an opportunity for the Government to come into line with most of the rest of the EU by guaranteeing that anyone waiting for a final decision for more than the expected 6 months should be allowed to work or study. Most EU countries allow people to work after varying periods of time, and the right to work after a maximum of one year waiting is a requirement of the Reception Directive which has been transposed by 25 EU Member States, with only Ireland and Denmark opting out. The current direct provision system is widely acknowledged to be wasteful of funds and talent and to undermine the eventual integration of refugees into Irish society.