

THE SINGLE PROTECTION PROCEDURE

# A Chance for Change

By Brian Barrington BL  
For the Irish Refugee Council



The Irish Refugee Council (IRC) is an independent non-governmental organisation (NGO) which was set up in 1992. Its vision is of a just, fair and inclusive Irish society where people seeking refuge are welcome and valued. Its mission is to pursue fair, consistent and transparent policies and to promote informed public attitudes in relation to people seeking refuge. The IRC's current strategic plan prioritises advocacy and public awareness on the right to protection, a dignified accommodation and welfare system for asylum seekers and the rights and interests of separated children.

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**Brian Barrington**

# Introduction

The Immigration Residence and Protection Bill 2008 introduces a single procedure for the determination of protection applications, that is to say applications for refugee status or subsidiary protection<sup>1</sup>. This is an important development and, if implemented carefully, should be a very positive one.

At present, applications for refugee status and subsidiary protection are determined separately – and an applicant only has the right to apply for subsidiary protection once his or her application for refugee status has been determined. The single procedure will end this two stage process, meaning that protection applications are likely to be determined more quickly. This has advantages for the applicant and the State alike, and builds on progress already made by the Office of the Refugee Applications Commissioner (ORAC) in reducing backlogs.

The quality of ORAC's decision making has improved since its foundation in November 2000. However, more can and should be done to improve quality further – and the single procedure provides an important opportunity to do this.

The introduction of the single procedure also makes it all the more important that investment is made to improve quality. The single procedure will be more demanding and complicated for decision makers since refugee status and subsidiary protection will have to be considered together. Without proper investment, the single procedure could therefore lead to more errors in decision making. That in turn could lead to applicants being put in danger by being wrongly returned to their countries of origin. It could also lead to more judicial reviews.

None of this is to argue that the single procedure does not have real advantages. Plainly, it does –

cutting down on delay means that those who are entitled to protection should get it sooner and those who are not should at least know quickly where they stand.

But it is to argue that the single procedure needs to be well structured, well managed and well resourced in order to deliver fairness and minimise the need for judicial review. This report makes recommendations that should help to deliver this.

This report is concerned with decisions at first instance. The workings of the proposed appeals process before the new Protection Review Tribunal is beyond the scope of this report. Equally, this report does not focus on issues around qualification, that is to say who is entitled to refugee status or subsidiary protection. These are important issues - but for a different study.

This report is designed to influence policymakers and to inform the public. It is hoped that it will shape the work underway to design the new single procedure.

The single procedure is an enormous opportunity for Ireland's protection system. It is in the interests of protection applicants and the Irish people alike that this opportunity is seized - and not squandered.

1. On going to print, the Bill was awaiting its report stage in Dáil Éireann.

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# Key Terms and Abbreviations

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BILL	The Immigration, Residence and Protection Bill, 2008. All references are to the Bill, <i>as initiated</i> in Dáil Éireann. At the time of writing, the Bill was awaiting its report stage in the Dáil.
COUNCIL OF EUROPE	An organisation of 47 member states in Europe that promotes European cooperation and common standards on a range of issues, including human rights. The Council of Europe is entirely distinct from the European Union.
DEPARTMENT	Department of Justice Equality and Law Reform.
ECHR	European Convention on Human Rights. This is Europe's most important human rights charter and is open for signature by all members of the Council of Europe (see above). Ireland has given the European Convention on Human Rights limited effect in Irish law through the European Convention on Human Rights Act, 2003.
ECtHR	European Court of Human Rights. This is the highest court responsible for the interpretation of the European Convention on Human Rights. The European Court of Human Rights is not an institution of the European Union and should not be confused with the European Court of Justice, which decides on EU law. Rather, it is an institution of the Council of Europe (see above).
EU	European Union
FRONTLOADING	This generally refers to the practice of increasing legal assistance to protection applicants at a very early stage in the protection application process.
GENEVA CONVENTION	The United Nations Convention relating to the status of refugees done at Geneva on 28 July 1951 and its 1967 Protocol relating to the status of refugees done at New York 31 January 1967. The Geneva Convention is the main international convention governing the rights of refugees.
INIS	Irish Naturalisation and Immigration Service. INIS is part of the Department of Justice, Equality and Law Reform providing services regarding immigration, citizenship and related matters. Under the

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Immigration, Residence and Protection Bill, 2008, INIS will determine all protection applications.

#### MINISTER

Minister for Justice, Equality and Law Reform.

#### NON-REFOULEMENT

The principle of non-refoulement refers to the general principle that a person must not be returned to a country where he or she would, for example, have his or her life threatened on account of his or her race or religion. The definition of refoulement differs in various national and international instruments. In this Report, refoulement is understood to have the meaning in s.52 of the Immigration, Residence and Protection Bill, 2008, that is to say returning a foreign national to a territory where:

(a) in the opinion of the Minister, the life or freedom of the foreign national will be threatened on account of his or her race, religion, nationality, membership of a social group or political opinion;

(b) the Minister has substantial grounds for believing that the foreign national will face a real risk of suffering serious harm, as defined on page 10; or

(c) the Minister has substantial grounds for believing that the foreign national will be in danger of being subjected to torture or inhuman or degrading treatment or punishment.

#### ORAC

Office of the Refugee Applications Commissioner. This is the office which investigates applications for refugee status in Ireland and makes recommendations to the Minister for Justice Equality and Law Reform on whether refugee status should be granted. The Immigration, Residence and Protection Bill 2008 will abolish ORAC. In future, INIS will undertake this work.

#### PROCEDURES DIRECTIVE

Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status. As its name suggests, the Procedures Directive sets out minimum standards that EU Member States must respect in their procedures for determining applications for refugee status.

#### PRT

Protection Review Tribunal. This is the new Tribunal that the Immigration Residence and Protection Bill 2008 will bring into being. Unlike the current Refugee Appeals Tribunal, it will consider appeals regarding both refugee status and eligibility for subsidiary protection.

#### QUALIFICATION DIRECTIVE

Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals

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or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. As its name suggests, the Qualification Directive sets out minimum standards that EU Member States must respect on who is entitled to refugee status or subsidiary protection. It also sets minimum standards on what their rights should be.

**RAT**

Refugee Appeals Tribunal. This is the body to which an appeal may currently be brought of a decision by ORAC not to recommend recognition of refugee status.

**RDC**

Refugee Documentation Centre. A research centre and library providing country of origin information run by the Legal Aid Board.

**REFUGEE**

See page 9.

**RLS**

Refugee Legal Service. The RLS is part of the Legal Aid Board. It provides legal advice to protection applicants who meet a means test.

**SUBSIDIARY PROTECTION**

See page 10.

**UN**

United Nations.

**UNHCR**

United Nations High Commission for Refugees. The UNHCR is the United Nations agency which leads and coordinates international action to protect refugees worldwide. It strives to ensure that everyone can exercise the right to seek asylum and find safe refuge in another State. The UNHCR has its representation in Ireland at Merrion House, 1-3 Fitzwilliam Street, Dublin 2.

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# What is protection?

World War Two saw death and destruction on a scale never before witnessed in any conflict in human history. Millions were persecuted, including Slavs, opponents of the Nazi regime, religious, ethnic and sexual minorities. Millions more fled their homes in fear of their lives. Worst of all was the persecution, starvation and systematic murder of 6 million European Jews in what has become known as the Holocaust.

Shamed by the failure of so many countries in the 1930s to admit Jews and other refugees fleeing mounting persecution, the Universal Declaration of Human Rights, passed by the United Nations General Assembly in 1948, recognised the right to seek asylum from persecution as a basic human right. Determined to give concrete expression to this right, the 1951 United Nations Convention relating to the Status of Refugees, known as the Geneva Convention, defined who refugees are and set out what their rights should be.<sup>2</sup>

## WHO IS A REFUGEE?

The 1951 UN Convention relating to the Status of Refugees defines a refugee as a person who:

“owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

Ireland has ratified the Geneva Convention and first implemented it in law in the Refugee Act, 1996.<sup>3</sup> That Act has undergone a series of amendments, making it ever more complex.

<sup>2</sup> The definition is contained in Article 1(2) of the Geneva Convention as affected by Article 1(2) of the Protocol relating to the status of refugees done at New York on the 31st day of January 1967.

<sup>3</sup> Ireland ratified the Geneva Convention on 29 November 1956.

A major development since the Refugee Act was the recognition at EU level of the need for complementary forms of protection for those who did not meet the Geneva Convention definition of a refugee but who were nonetheless entitled under international human rights law to protection. For example, a person might not be persecuted for membership of a particular social group, but nonetheless could face torture or execution if returned to his or her country of origin. In order to ensure that such persons would be protected throughout the EU, a 2004 EU Directive, known as the Qualification Directive, introduced a legal framework for qualification for subsidiary protection and set out who is eligible for it.<sup>4</sup>

#### WHO IS A PERSON ELIGIBLE FOR SUBSIDIARY PROTECTION?

Under the Qualification Directive, a person eligible for subsidiary protection means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face *a real risk of suffering serious harm*, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.

*Serious harm* means:

- death penalty or execution;
- torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
- serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

There are categories of people who are excluded from protection under the Geneva Convention and the Qualification Directive. For example, the Geneva Convention excludes any person where there are serious reasons for believing that he or she has been guilty of a crime against peace, a war crime, a crime against humanity or has committed a serious non-political crime before being admitted to the country of refuge.<sup>5</sup>

However, the right to life and the prohibition on torture and inhuman or degrading treatment are absolute under the European Convention on

<sup>4</sup> See 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, Official Journal L 304, 30/09/2004, p. 12, known as the "Qualification Directive." The term "person eligible for subsidiary protection" is defined by Article 2(e) of the Qualification Directive, while "serious harm" is defined by Article 15 of that Directive. Note that persons falling within Articles 17(1) and (2) are excluded from the definition of person eligible for subsidiary protection.

<sup>5</sup> See Article 1F(a) and (b) of the Geneva Convention and Article 12(2)(a) and (b) of the Qualification Directive. Other exclusions are also contained in Articles 1D-1F of the Geneva Convention and Articles 12 and 17 of the Qualification Directive. Some of the exclusions in the Qualification Directive are wider than those allowed by the Geneva Convention. Compliance with the Qualification Directive does not therefore ensure compliance with Ireland's international obligations under the Geneva Convention.

Human Rights (ECHR).<sup>6</sup> So while a person in Ireland may not qualify for refugee status – and all the rights that it entails – because, for example, he or she may have committed certain serious non-political crimes, he or she cannot be deported from the State if there are substantial grounds for believing, for example, that he or she would be in danger of being tortured or subjected to inhuman or degrading treatment.

This is known as the principle of *non-refoulement*. It is the core principle of international refugee law and is protected in a range of international instruments, including the Geneva Convention, the ECHR, the UN Convention Against Torture and the International Covenant on Civil and Political Rights.<sup>7</sup>

### DETERMINING PROTECTION CLAIMS

Three key questions generally arise in determining protection claims under Irish law:

*First*, is the person entitled to refugee status?

*Second*, is the person eligible for subsidiary protection?

*Third*, if the answer to either of the above is no, would it breach the principle of non-refoulement for the person to be removed from the State?

It is vital that each of these questions is properly considered. A failure to do so could literally be a matter of life or death. It is therefore strongly in

the public interest and the interest of applicants that the procedure for determining claims is fair. Without diminishing fairness, it should also be efficient. In this way, those who are entitled to protection get it as quickly as possible and those who are not know their position promptly. This task is made more challenging by its complexity. The definitions of “refugee” and “person eligible for subsidiary protection” are not straightforward. Ireland’s Refugee Act, 1996, goes into more detail on some points than the Geneva Convention.<sup>8</sup> Meanwhile, considerable caselaw has developed around issues like what a “well founded fear of persecution” means, what “membership of a social group” can be, what an “individual threat” is and what “inhuman or degrading treatment” is.<sup>9</sup> Some of this caselaw is from the Irish courts; some is from the European Court of Human Rights (ECtHR) which interprets the European Convention on Human Rights; and increasingly, decisions of the European Court of Justice, which interprets EU Directives on protection, will be important. As well as this, the United Nations High Commission for Refugees (UNHCR) has issued important guidance on many of these matters.

### CURRENT IRISH PROTECTION LAW

Irish law on refugees and protection is something of a patchwork. The main piece of legislation is the Refugee Act, 1996, which has been amended many times.<sup>10</sup> The Refugee Act deals with refugee status only. Separately, regulations lay down rules on eligibility for subsidiary protection.<sup>11</sup>

<sup>6</sup> See Articles 2 and 3 ECHR and *Chahal v United Kingdom*, (1997) 23 EHRR 413. Article 2 does permit the death penalty. See, however, protocols 6 and 13 to the ECHR, to which Ireland is a state party.

<sup>7</sup> The principle of non-refoulement is stated differently in different places. See Article 33 of the Geneva Convention, which has a prohibition subject to exceptions. By contrast, under the ECHR, the rights to life and the prohibition on torture and inhuman or degrading treatment are absolute – see *Chahal v United Kingdom*, (1997) 23 EHRR 413. S.5 of the Refugee Act sets out the current Irish statutory definition of refoulement – but see also the prohibition on torture in s.4 of the Criminal Justice (UN Convention Against Torture) Act 2000 and the amendment to the definition of torture in s.186 of the Criminal Justice Act, 2006. S.52 of the Bill contains a more comprehensive definition of refoulement. Refoulement is understood in this paper to be as defined in s.52, unless context otherwise requires. See also Article 3 of the UN Convention Against Torture and Article 7 of the International Covenant on Civil and Political Rights.

<sup>8</sup> See for example the definition of social group in s.1 of the Refugee Act 1996 which, unlike the Geneva Convention, makes explicit that sex, sexual orientation and membership of a trade union can be grounds of persecution.

<sup>9</sup> As regards “well founded fear of persecution” see e.g. *OLR v Refugee Appeals Tribunal* [2003] WJSC-HC 11163 (leave). As regards “membership of a social group” see e.g. *NM v MJELR* [2006] IEHC 241 (leave) and Decision Ref. No 11, Iraqi Applicant, Undated. As regards “individual threat” see the judgement of the European Court of Justice of 17 January 2009 in Case C-465/07, *Elgafaji*. As regards “inhuman or degrading treatment” see, e.g., *Ireland v United Kingdom* (1978) 2 EHRR 25.

<sup>10</sup> See the Immigration Act, 1999; the Illegal Immigrants (Trafficking) Act, 2000; the Immigration Act, 2003; the Immigration Act 2004 and the Health Act 2004. See also the European Communities (Eligibility for Protection) Regulations, 2006 (S.I. 518 of 2006) which affect the determination of refugee applications.

<sup>11</sup> See the European Communities (Eligibility for Protection) Regulations, 2006 (S.I. 518 of 2006).

Under the current procedure, applications for refugee status are processed by the Office of the Refugee Applications Commissioner (ORAC), which is independent of the Minister for Justice, Equality and Law Reform ("the Minister"). If ORAC does not recommend in favour of granting refugee status, the applicant can appeal to the Refugee Appeals Tribunal (RAT), or can wait for the Minister to propose to deport him or her.<sup>12</sup> According to the regulations on subsidiary protection, it is only at the point that the Minister proposes to deport that the applicant has the right to apply for subsidiary protection.<sup>13</sup> Also, in the context of the deportation process the Minister must consider whether a person is entitled to stay in the State to prevent refoulement.<sup>14</sup>

This two step process of determining refugee status and only then considering subsidiary protection and refoulement is unfair because it leaves a person who is clearly eligible for subsidiary protection, but not refugee status, having to apply twice for protection and to wait longer than he or she should have to. It is also inefficient since essentially the same file has to be examined twice over, giving rise to delay and increased costs.<sup>15</sup>

### THE CHANGES OF THE IMMIGRATION, RESIDENCE AND PROTECTION BILL 2008

The Immigration, Residence and Protection Bill 2008 ("the Bill") proposes some radical changes. For example, RAT will be abolished and replaced by a new Tribunal called the Protection Review Tribunal ("PRT") which will consider appeals both on refugee status and eligibility for subsidiary protection.

But most important for the purposes of this report are the following key changes:

- The Bill introduces a new *single procedure*

at first instance. This procedure will consider whether a person is entitled to refugee status, to subsidiary protection or to stay in the State for any other compelling reason, including to comply with the rule against refoulement;

- The Bill *abolishes* ORAC. The Minister will take over the functions of the Refugee Applications Commissioner. On a day to day level, the Minister's functions will be carried out by the Irish Naturalisation and Immigration Service ("INIS"). INIS is an integral part of the Department of Justice, Equality and Law Reform ("the Department").

The creation of the single procedure brings Ireland in line with standard European practice. It offers the prospect of a fairer and more efficient procedure. But for that promise to be realised, important changes need to be made both to the procedures set out in the Bill and to current administrative practices.

### PROTECTION STATISTICS IN IRELAND

There are a number of important features of the Irish protection system. While not conclusive, these suggest that there are problems with decision making at first instance, but also that it should be easier now than it has been for some time to resolve them.

#### Ireland's low protection recognition rate

First, the overall number of positive decisions to grant protection in Ireland is relatively low. EU statistics for 2005 and 2006 show that the Irish protection recognition rate is far below the EU average.

<sup>12</sup> The Minister also has the right to grant refugee status even if ORAC has recommended against granting it. See s.17(1)(b) of the Refugee Act, 1996. However, it is not the Minister's practice to do so.

<sup>13</sup> Article 4 of the European Communities (Eligibility for Protection) Regulations, 2006 (S.I. 518 of 2006).

<sup>14</sup> See s.3 of the Immigration Act, 1999 and s.53 of the Bill.

<sup>15</sup> For example, costs of accommodation may mount while the applicant is awaiting the outcome of his or her application for subsidiary protection. As regards the application process for subsidiary protection see: *H & D v MJELR* [2007] IEHC 277; *N v MJELR* [2008] IEHC 107.



**TABLE 1: PROTECTION RECOGNITION RATES  
IN EU MEMBER STATES AT FIRST INSTANCE<sup>16</sup>**

2005		2006	
<b>EU 27</b>	<b>15.5%</b>	<b>EU 27</b>	<b>22.3%</b>
Lithuania	63.1%	Lithuania	73.1%
Malta	44.8%	Latvia	66.7%
Netherlands	44.7%	Italy	56.3%
Italy	26.4%	Malta	46.4%
Austria	24.4%	Sweden	46.2%
Poland	24.3%	Luxembourg	36.5%
Belgium	21.0%	Poland	33.9%
Luxembourg	20.3%	Belgium	29.2%
Sweden	19.9%	Portugal	28.6%
Denmark	17.4%	Netherlands	28.1%
Portugal	16.7%	Austria	26.2%
UK	14.8%	Denmark	18.4%
Romania	11.7%	UK	18.4%
Hungary	11.5%	Romania	15.1%
France	10.1%	Bulgaria	13.7%
Bulgaria	8.9%	Czech Rep.	10.1%
<b>Ireland</b>	<b>8.7%</b>	Hungary	9.9%
(17th out of EU 27)		<b>Ireland</b>	<b>9.3%</b>
Czech Rep.	7.5%	(18th out of EU 27)	
Spain	6.7%	France	7.6%
Germany	6.5%	Germany	6.3%
Finland	4.2%	Finland	5.4%
Cyprus	2.8%	Spain	5%
Greece	2.4%	Cyprus	3.0%
Slovenia	1.4%	Greece	1.7%
Slovakia	0.7%	Slovenia	1.1%
Latvia	0.0%	Slovakia	0.4%
Estonia	0.0%	Estonia	0.0%

It is of course not straightforward to compare the protection recognition rates of EU Member

States. First, the methodologies employed by Member States may vary somewhat, as the European Commission has admitted.<sup>17</sup> Despite this, these statistics are the best available and are reasonably reliable. More importantly, Member States may get applications from different countries of origin in different numbers. However, it is clear from information provided by ORAC and the European Commission that this alone cannot explain the gap.

In 2005, the top six stated countries of origin of asylum applicants in Ireland were as set out in the table below.

**TABLE 2: TOP SIX STATED COUNTRIES OF ORIGIN OF  
PROTECTION APPLICANTS IN IRELAND IN 2005<sup>18</sup>**

Nigeria	29.6%
Romania	8.9%
Somalia	8.5%
Sudan	4.7%
Iran	4.7%
Georgia	3.5%

Statistics are available broken down by country of origin for all EU Member States in 2005 except Luxembourg. Given that Luxembourg accounted for only 0.5% of the total number of EU protection decisions in 2005, its absence is not a major concern.

If the lower Irish overall protection recognition rate were simply due to the volume of applications from countries with low overall recognition

<sup>16</sup> Source: Eurostat.

The statistics include both decisions to grant refugee status under the Geneva Convention and to grant all other kinds of protection (e.g. subsidiary protection). This seems appropriate since what matters most is that protection is granted as opposed to the reason why protection is granted. Some countries, such as Ireland, have not supplied Eurostat with data on subsidiary protection. This has not, however, skewed the comparison in Ireland's case since subsidiary protection was only introduced effective as of 10 October 2006 and, moreover, in the period from 10 October 2006 to 12 February 2008 only three applications for subsidiary protection were successful – see response to Dáil Written Question 585 given on 12 February 2008 to Caoimhín Ó Caoláin TD. Six further applications have been granted since then according to a Departmental press response to questions from Metro Éireann, 29 January 2009.

“Other positive decisions” as defined by Eurostat are not included in the above figures (that is to say positive decisions granted on non-protection grounds such as where the country of origin refuses to take back the person in question). This is because such decisions are not protection related, and few countries provide data on such decisions in any event.

The EU average is calculated as the sum of all positive decisions (less the category “other positive decisions”) in the EU divided by the sum of all decisions taken in the EU. The EU average is therefore not simply the average of recognition rates in the EU Member States. Accordingly, it is not distorted by countries with low numbers of applications but high recognition rates.

Finally, it should be noted that the EU has recognised that improvements to asylum statistics are needed and a regulation has been passed to this end – see Council Regulation (EC) No 862/2007 of 11 July 2007, which applies to statistics after 1 January 2008.

<sup>17</sup> See *Communication from the Commission to the Council and the European Parliament to present an Action Plan for the collection and analysis of community statistics in the field of migration*, COM (2003) 0173, final.

<sup>18</sup> Source: ORAC.

rates throughout the EU, then one would expect the EU recognition rates and the Irish recognition rates by country of origin to correspond. But, as the table below makes clear, they differ. *In the case of three countries of origin, the Irish recognition rate was significantly lower. In the case of two countries of origin, the Irish recognition rate was significantly higher. In the case of one country of origin, it was broadly the same.*

**TABLE 3: EU (EXCEPT LUXEMBOURG) AND IRISH PROTECTION RECOGNITION RATES COMPARED BY COUNTRY OF ORIGIN FOR THE TOP SIX STATED COUNTRIES OF ORIGIN IN IRELAND IN 2005<sup>19</sup>**

	EU 26	IRELAND
Nigeria	2.6%	0.7%
Romania	4.0%	0.0%
Somalia	46%	28.3%
Sudan	24.5%	41.7%
Iran	17.8%	18.1%
Georgia	2.0%	5.1%

In 2006, the top six stated countries of origin of asylum applicants, as a percentage of the overall number of applicants, were as set out in the table below.

**TABLE 4: TOP SIX STATED COUNTRIES OF ORIGIN OF PROTECTION APPLICANTS IN IRELAND IN 2006<sup>20</sup>**

Nigeria	24.1%
Sudan	7.1%
Romania	6.7%
Iraq	5.0%
Iran	4.8%
Georgia	4.0%

Statistics disaggregated by country of origin are available for 25 of the 27 EU Member States in 2006 – the exceptions being Italy and Luxembourg.

Again, if the lower Irish overall protection recognition rate were simply due to the volume of applications from countries with low overall

recognition rates throughout the EU, then one would expect the EU recognition rates and the Irish recognition rates by country of origin to correspond. But, as the table below makes clear, they differ significantly. *For four of the above top six countries of origin in 2006, the Irish recognition rate was significantly lower than the EU average for that country in that year. For one country of it was broadly the same and for one it was significantly higher.*

As stated above, Italy and Luxembourg are not included in the EU averages by country of origin. However, we know that taken together these countries account for 4.3% of protection decisions in 2006 and 10.4% of all EU positive decisions in that year.<sup>21</sup> Therefore, the EU recognition rates by country of origin for all 27 Member States may well be somewhat higher than those given in the table below.

**TABLE 5: EU (EXCEPT ITALY AND LUXEMBOURG) AND IRISH PROTECTION RECOGNITION RATES COMPARED BY COUNTRY OF ORIGIN FOR THE TOP SIX COUNTRIES OF ORIGIN IN IRELAND IN 2006**

	EU 25	IRELAND
Nigeria	2.7%	0.9%
Sudan	26.3%	26.3%
Romania	3.0%	0.0%
Iraq	48.8%	48.1%
Iran	20.4%	5.1%
Georgia	6.3%	0.0%

Taking 2005 and 2006 together, we can say that in seven cases, the Irish recognition rate by country of origin was substantially lower than the corresponding EU recognition rate. In only three cases was it substantially higher. In two cases, it was broadly the same.

Statistics are not currently available broken down by country of origin for 2007 in respect of four EU Member States: Belgium, Italy, the Netherlands and Luxembourg. This is significant. In 2006, these

<sup>19</sup> Source: Eurostat.

<sup>20</sup> Source: ORAC.

<sup>21</sup> Again, excluding the category "other positive decisions" as defined by Eurostat.



Member States accounted for 10.9% of all protection decisions in the EU and, importantly, 20.9% of all positive protection decisions.<sup>22</sup> An analysis of recognition rates for 2007 must therefore await more complete data.

*In short, from the data currently available, it appears that there is a significant difference between the Irish and EU protection recognition rates for the main Irish countries of origin.*

### Judicial reviews – brought and settled

*Second, Ireland has a large number of judicial reviews taken – and a large number being settled, that is to say withdrawn following an agreement being reached between the parties out of court.*

Figures obtained by *The Irish Times* from ORAC show that of the 256 cases concluded against ORAC during 2007, over 26% were settled. In that same year, 440 applications for judicial review were commenced against ORAC.<sup>23</sup> By contrast, in that year the number of applications for asylum received by ORAC was less than 4,000 – although the number of judicial reviews will also have reflected applications for asylum made in previous years.

It is also worth noting that the percentage of successful appeals of ORAC decisions to the RAT in 2005, 2006 and 2007 were 12.8%, 12.9% and 10.8% respectively.<sup>24</sup>

Figures are not available for judicial reviews against RAT, but *The Irish Times* has identified 260 judicial review cases as being against RAT in 2007, and also reports that 193 were settled by RAT during that year. It has also estimated the

total cost of asylum judicial reviews settled without a hearing by the State at €20 million, if not more, over in the period 2005-2007.<sup>25</sup>

There are various reasons why judicial reviews may be taken and this, of itself, does not conclusively show problems at first instance. However, the high level of judicial reviews being *settled* suggests that decision making at first instance and on appeal before RAT needs to improve. This concern is reinforced by low Irish protection recognitions rates as compared to the EU average, particularly when disaggregated by country of origin.

Of course, it is not suggested that cases should not be settled. It is right and proper that this occur where there have been problems at first instance or on appeal. What is of concern is that in such cases it was necessary to go to the expense of bringing a judicial review in the first place. More can and should be done to avoid this.

It appears that the courts are restricting the ability of applicants to judicially review ORAC decisions and are instead insisting that they bring appeals to the RAT.<sup>26</sup> While this may be reducing the number of judicial reviews taken against ORAC, it may well be offset – in part at least - by an increase in the number of appeals to RAT. The non-availability of judicial review also makes it all the more important, as a matter of fairness, that every effort is made to ensure quality decision making at first instance.

### The falling numbers of asylum applicants

*Third, the numbers applying for asylum in the country, having reached a peak in 2002, have*

<sup>22</sup> Positive protection decisions being decisions to grant Geneva Convention Status or other humanitarian status (e.g. subsidiary protection) but not other positive decisions.

<sup>23</sup> See *The Irish Times*, 15 April 2008, '1,000 Asylum Review Cases Last Year,' accessed at <http://www.irishtimes.com/newspaper/ireland/2008/0415/1208208529197.html> on 12 February 2009. There is, however, evidence that the courts are becoming more insistent that applicants pursue appeals rather than judicial reviews – see *BNN v MJELR*, Unreported judgment of Hedigan J, 28 October 2008.

<sup>24</sup> Source: RAT.

<sup>25</sup> See *The Irish Times*, 15 April 2008, '1,000 Asylum Review Cases Last Year,' accessed at [www.irishtimes.com/newspaper/ireland/2008/0415/1208208529197.html](http://www.irishtimes.com/newspaper/ireland/2008/0415/1208208529197.html) on 12 February 2009. See also *The Irish Times*, 18 March 2008, 'Asylum judicial reviews costing State €20million,' accessed at <http://www.irishtimes.com/newspaper/ireland/2008/0318/1205706619630.html> on 12 February 2009.

<sup>26</sup> See *BNN v MJELR*, Unreported judgment of Hedigan J, 9 October 2008.

fallen by two thirds and are now back at roughly the same level that they were at twelve years ago.

TABLE 6:  
APPLICATIONS FOR ASYLUM IN IRELAND BY YEAR.<sup>27</sup>

1997	3,883
1998	4,626
1999	7,724
2000	10,938
2001	10,325
2002	11,634
2003	7,900
2004	4,766
2005	4,323
2006	4,314
2007	3,985
2008	3,866

Given the falling level of applications, resources should be freed up to improve the quality of decision making at first instance, with a view to minimising the need for appeals and judicial reviews.

It is, of course, difficult to assess fully the extent to which there may be problems of poor quality decision making at first instance. There are a number of reasons for this. These include:

- the fact that first instance decisions are not published, even with appropriate redactions to protect the identity of the applicants;
- the fact that comprehensive statistics on judicial reviews commenced and settled are not published by either ORAC or RAT;
- the practice of the State to seek confidentiality clauses in settlements on protection issues, meaning that the terms of settlements cannot be identified; and
- the absence of any comprehensive published analysis of the reasons for the difference between the Irish protection recognition rate and the EU average, either as a whole or broken down by country of origin.

In the interests of transparency, it is recommended that full statistics on judicial reviews commenced against each of the bodies involved in administering the immigration system be published, including data on:

- against whom the cases were taken;
- if settled, the stage at which settlements were reached (pre-leave or post leave) and the time both after initiation of proceedings and before any hearing that they were settled;
- if not settled, the outcome of cases;
- the type of the cases; and
- the legal costs involved.

Further, given that the State represents the public, it is generally in the public interest to know the outcome of any cases that have been settled, provided that the identity of the applicant is protected. **The State should abandon its practice of insisting routinely on confidentiality clauses in settlements on asylum and immigration matters, while ensuring that the identity of applicants is protected.**

It is important to establish precisely why the Irish protection recognition rate is so much lower than the EU average. Examination of the statistics for 2005 and 2006 suggests that this is not solely attributable to variations in the countries of origin of applicants between different Member States. However, this is only an analysis of two years: a comprehensive analysis of this issue is needed to assess just how much of the difference is caused by a difference in the countries of origin of applicants and how much cannot be explained by this factor. **It is recommended that the Minister commission independent comprehensive research into the reasons why the Irish protection recognition rate is lower than the EU average (perhaps conducted by UNHCR). This research should, in particular:**

<sup>27</sup> Source: ORAC.

- examine over a number of years the extent to which this is or is not solely a function of variations in the countries of origin of applicants;
- identify the countries for which Ireland's recognition rate is particularly different;
- identify what issues may be causing the differential, such as possible differences in interpretation of country of origin information and/or a possible culture of disbelief; and
- make appropriate recommendations.

To this end, the researchers should have access to decisions taken in individual cases at first instance on a confidential basis.

Further, in view of the differences in recognition rates throughout the EU, the Government should support any future EU initiatives to improve the quality of first instance decision making on an EU wide basis.

The new single procedure will involve decision makers in even more complex work than at present. Without proper training and resources, this could lead to a fall in quality and a further increase in the number of judicial reviews. But with resources frontloaded at first instance, fairness and quality could increase. The fall off in asylum applications should make it easier to put these resources in place.

In view of the high level of judicial reviews being settled, the associated costs, and the risk that the problem could get worse with the added demands of a complex single procedure, the Government should accept the need for fundamental reform to improve the quality of decision making at first instance. In the following sections, it is suggested what those reforms should be.



# How the application process currently works

When an asylum seeker arrives in the State, he or she will have an initial interview. That interview is not merely to get the personal details of the applicant, but also to ascertain the reasons why he or she came to the State. A record has to be kept of the interview, but it is only necessary for this to be a written record and it need not be verbatim.<sup>28</sup>

At present, the initial interview may be conducted by an immigration officer or an ORAC official.<sup>29</sup> Under the Bill it may be conducted by an immigration officer or an officer of the Minister – who will in practice be an INIS official.<sup>30</sup> The applicant is given an application form to fill out setting out briefly the details of his or her claim.

Once the application is lodged, the applicant will be given a detailed questionnaire to fill out which must be completed within the time specified, currently eight working days for non-prioritised cases and seven working days for prioritised cases.<sup>31</sup>

The applicant is then invited to a substantive interview. This interview is carried out by an ORAC caseworker, with the assistance of an interpreter, where necessary and possible.<sup>32</sup>

An applicant's legal representative may make submissions before the substantive interview. An applicant is also entitled to have a legal representative present during that interview, but he or she may only make comments at the beginning or end of the interview process.

At the end of the process, a written record of the interview will be read back to the applicant and he or she will be asked to sign every page of it.

<sup>28</sup> See s.8 of the Refugee Act, 1996.

<sup>29</sup> See s.8 of the Refugee Act, 1996.

<sup>30</sup> See ss.23 and 73 of the Bill.

<sup>31</sup> Information supplied by ORAC.

<sup>32</sup> See s.11 of the Refugee Act, 1996.

Having regard to the initial interview, the filled in questionnaire, the substantive interview and any relevant documentation, the caseworker must prepare a report for the Refugee Appeals Commissioner, which must be signed off on by an official a grade higher than the caseworker. As a result of this, the Refugee Applications Commissioner must recommend to the Minister either that refugee status be granted or not granted.<sup>33</sup>

Previously, the applicant, if he or she so requested, had to be supplied during the investigation process with copies of any documents or written representations submitted to ORAC by any third parties as well as an indication of any other information submitted to ORAC.<sup>34</sup> In 2003 this was changed to make clear that this duty of disclosure only applied *after* a decision had been taken.<sup>35</sup> That said, allegations affecting the applicant's claim still have to be put to the applicant as a matter of general administrative law so that he or she can comment in the course of the process.<sup>36</sup>

### THE QUESTIONNAIRE

At present, the questionnaire only deals with refugee status issues. It is a long and complex document with 48 questions. In future, it will need to be even more complex as it will also cover issues related to subsidiary protection.

Some asylum seekers have limited formal education and, owing to experience in their country of origin, may be suspicious of state authorities. Asylum applicants who may be traumatised by torture or gender based persecution, may face particular difficulties filling out the questionnaire.

Yet how they fill out this document – and indeed the application form – is critical. Applicants can have their claims rejected if they are found to have withheld relevant information or if they make inconsistent, contradictory, or insufficient representations.<sup>37</sup> What they say can also be used to draw negative inferences as to their credibility on appeal and in any judicial review that they may take.

Yet, for example, determining what is relevant information presumes a full understanding of the many legal concepts in the definition of a refugee. Many applicants lack this knowledge. Further, the questionnaire's layout can encourage applicants not to provide complete answers.

#### EXAMPLE

Perhaps the most important question in the questionnaire is number 21, which asks each applicant why he or she left his or her country of origin.

It is in this answer, above all others, that the applicant will need to show:

- that he or she has a well founded fear of being persecuted and
- that it is owing to reasons of race, religion, nationality, membership of a particular social group or political opinion.

Yet despite this, only 13 lines are provided for applicants to fill out their answers. Of course, they may use additional sheets – and the questionnaire makes this clear. But by providing 13 lines only, applicants may believe that less detail is required than may actually be the case.

<sup>33</sup> See s.11(2) and 13(1) of the Refugee Act, 1996.

<sup>34</sup> See ss.11(6) and (7) Refugee Act, 1996 (now repealed by s.7(e)(iv) Immigration Act, 2003), considered in *VU v Refugee Applications Commissioner* [2005] 2 IR 537. Note that information supplied by third states is exempt – s.11(7) Refugee Act (now repealed and replaced by s.13(11) Refugee Act, 1996, as inserted by s.7(h) Immigration Act, 2003.

<sup>35</sup> See s.7(e)(iv) and (h) of the Immigration Act, 2003.

<sup>36</sup> See, e.g., *Flanagan v University College Dublin* [1988] 1 IR 724 and, in the protection context, e.g., *VI v. Minister for Justice, Equality and Law Reform & Anor* [2005] IEHC 150 and *M v MJELR* [2008] IEHC 390.

<sup>37</sup> See ss.11B(f) and (i) Refugee Act, 1996 and, as regards the Bill, ss.76(3)(f) and (g).

The Refugee Legal Service (RLS), which is part of the Legal Aid Board, does provide general assistance to protection applicants before they fill out the *questionnaire*. Normally, this assistance is provided by a caseworker, lasts 45 minutes and consists of a general explanation of issues such as the legal definition of a refugee. The RLS will normally only advise an applicant on the detail of his or her claim and assist with filling in the questionnaire in cases where he or she is vulnerable, e.g. a minor. RLS is also not resourced to accompany applicants routinely to substantive interviews - again, it is only where applicants are vulnerable that this will normally occur. Also, if an applicant registers with RLS close to the eight working day deadline for submitting the questionnaire, he or she may not get an appointment before the deadline's expiry.

ORAC encourages applicants to seek professional legal advice.<sup>38</sup> However, in a 2007 Customer Survey conducted by ORAC, it was found that 40% of applicants had not consulted a solicitor or RLS before their *interview*.<sup>39</sup> The number who have not consulted with RLS or a solicitor before filling out the *questionnaire* is presumably significantly higher.

In short, the reality is therefore that many applicants who fill out the questionnaire do not have the benefit of legal advice.

<sup>38</sup> See ORAC, Application for Refugee Status Questionnaire, Guidelines for Completion of Questionnaire, at page 2 at para. 5. However, it is not clear that applicants are advised to get legal advice *before* they fill out the questionnaire.

<sup>39</sup> See ORAC Customer Survey July 2007, Question 8. The figure for 2008 may be somewhat higher. RLS has advised that in 2008 the equivalent of 56% of asylum seekers registering with ORAC applied for RLS services at the pre-interview stage, compared to 49% in 2007.







# “Frontloading”

Frontloading generally refers to the provision of increased legal resources at a very early stage in the asylum process.

There is no single model of frontloading. Practice varies from jurisdiction to jurisdiction – but the goal is the same: to improve decision making at first instance. There are two essential features. *First*, at the very beginning of the asylum process the applicant gets legal advice, that is to say before the questionnaire is filled out. *Second*, the applicant’s legal representative meets the applicant before the interview/hearing to agree the issues that are in contention and represents the applicant at the interview/hearing. In some jurisdictions there is a *third* step when after the interview/hearing stage the legal representative and the official responsible for assessing the claim meet to discuss any issues outstanding.

## Canada

Procedures in Canada are laid down principally in the Immigration and Refugees Protection Act, 2002, but also in regulations and in administrative guidelines. Applications are determined by a tribunal called the Refugee Protection Division (RPD) and are heard by a single member. The work of investigating a claim is carried out by a Refugee Protection Officer, who is an employee of the RPD. The Refugee Protection Officer (RPO) also appears before the RPD when it holds its hearing and may ask questions, but is meant to be neutral in the matter of whether protection is or is not granted. More generally, the process is meant to be inquisitorial and non-adversarial. Occasionally, the Minister may also appoint a lawyer to participate – for example where national security issues arise.

Legal aid is available in most provinces for a lawyer to be appointed in advance. The only other person who can represent an applicant for a fee is an immigration consultant.<sup>40</sup> An immigration consultant must be a member of

<sup>40</sup> See Regulations Amending the Immigration and Refugee Protection Regulations, P.C. 2004-326 30 March 2004.

the Canadian Society of Immigration Consultants, a self regulating non-statutory body. Immigration consultants have long operated in Canada, but some have faced criticism for lack of training and poor ethical standards.<sup>41</sup> As a result, the Canadian Society of Immigration Consultants was created. It has a code of conduct and provides ongoing training to consultants.

Before the hearing, the RPD member hearing the claim will narrow down the issues to be addressed at the hearing in a written document called a File Screening Form and will offer all parties the opportunity to comment on it.

Parties must also disclose the documents that they want to rely on 20 days before the hearing, or 5 days before the hearing if the document is in response to another document provided by a party or the RPD. Exceptionally, documents may be provided later than these deadlines, or even after the hearing – but before allowing this factors will be considered such as whether the document could have been produced earlier with reasonable effort, whether it brings new evidence to the proceedings, what its relevance is and what the personal circumstances of the applicant are.<sup>42</sup>

Immediately prior to the hearing the RPO may discuss matters in advance with the applicant or his or her representative. Parties are generally limited to the issues raised in the File Screening Form, though the RPD member has discretion to allow other matters to be raised.<sup>43</sup> Subject to that, the lawyer has the right to ask any questions on behalf of the applicant. Proceedings are audio-recorded.<sup>44</sup>

Unlike Ireland, there is at present no appeal of a decision of an RPD member. However, judicial review is available.

### Sweden

Sweden also operates frontloading. The Swedish procedures derive from a combination of specific immigration laws, general administrative laws and non-statutory administrative practices.<sup>45</sup>

Upon presenting to the Swedish authorities, the applicant will be subject to a preliminary interview to determine such matters as identity and whether another EU Member State should handle the application. If it appears that an application is clearly well founded, the applicant will be granted protection. If not, a lawyer will be appointed for the applicant by the Swedish Migration Board, which is responsible for determining immigration, protection and citizenship matters at first instance.

The lawyer will assist the applicant with all aspects of putting together the case. In advance of the substantive interview, the applicant's lawyer will meet with the competent Migration Board case handler to narrow down the issues in the case. The substantive interview involves the applicant, his or her lawyer, the caseworker and a further Migration Board official who takes the first instance decision. The lawyer has the right to ask questions on behalf of the applicant. Interviews are audio recorded to avoid disputes. In many parts of Sweden, it is the practice of the Migration Board also to share a draft of the determination with the applicant's lawyer for comment.

<sup>41</sup> See the commentary on the Regulation at <http://canadagazette.gc.ca/partII/2004/20040414-x/html/sor59-e.html>, accessed on 12 February 2009.

<sup>42</sup> See Immigration and Refugee Board of Canada, Refugee Protection Division rules 29, 30 and 37: [http://www.irb-cisr.gc.ca/en/references/policy/rules/rpdrules\\_e.htm](http://www.irb-cisr.gc.ca/en/references/policy/rules/rpdrules_e.htm), accessed on 12 February 2009. See also commentaries to the Refugee Protection Division Rules regarding rules 29, 30 and 37: [http://www.irbcisr.gc.ca/en/references/policy/rules/rpdcomment\\_e.htm#rule37](http://www.irbcisr.gc.ca/en/references/policy/rules/rpdcomment_e.htm#rule37) accessed on 12 February 2009.

<sup>43</sup> See Immigration and Refugee Board of Canada, Guideline 7 concerning preparation and conduct of a hearing in the Refugee Protection Division, effective date 1 December 2003.

<sup>44</sup> A new digital audio recording system was introduced from 2002/03 to replace the previous analogue system –see [http://www.irb-cisr.gc.ca/en/about/publications/performance/pr0203\\_e.pdf](http://www.irb-cisr.gc.ca/en/about/publications/performance/pr0203_e.pdf), accessed on 12 February 2009.

<sup>45</sup> See the Swedish Aliens Act of 29 September 2005, (2005:716); the Aliens Ordinance of 23 February 2006, (2006:97); Administrative Procedure Act, SFS 1986:223; Administrative Court Procedure Act; Administrative Court Procedure Act SFS 1971:291 – all available as amended in English on <http://www.migrationsverket.se/english.html>.

### Britain - The Solihull Pilot

A pilot project on frontloading began in Solihull in November 2006. Under this pilot:

- each asylum applicant was informed of his or her rights at the 'first reporting event' with UK Border Agency staff at Solihull;
- after the first reporting event each applicant was assigned a legal representative;
- the legal representative then met the applicant to take instructions and draft a written statement for submission to the UK Border Agency caseowner, who had responsibility for the case, before the substantive interview;
- prior to the substantive interview, the legal representative had a discussion with the caseowner to narrow down the issues between them using a pro forma. The caseowner could delay the interview to allow for the provision of evidence, such as medical reports. Funding was available for evidence gathering;
- the legal representative also attended the interview with the applicant and was able to make oral submissions and ask questions to ensure that the applicant was examined on all relevant elements of his or her application;
- after the interview, the legal representative discussed the case with the caseowner to determine if there were any further issues that needed to be resolved, any evidence outstanding or if a further interview was needed. The legal representative also had the opportunity to make further written submissions.<sup>46</sup>

The pilot evaluation was published in March 2009.<sup>47</sup> It shows higher recognition rates but lower rates of appeals allowed, faster determinations and lower overall costs.

The indications of higher recognition rates must be treated with some caution. The pilot did not include protection applicants who were in detention and subjected to fast track procedures – and the recognition rate for such applicants is lower. The higher recognition rate observed in results from the pilot may therefore partly be a reflection of those who were selected for it.

What is clear is that the system is a fairer one at first instance. Instead of leaving issues to be resolved by appeals and judicial reviews, difficulties are ironed out at first instance.

#### EXAMPLE

One of the cases dealt with by the Solihull pilot concerned a Catholic Iraqi woman. During her interview, she was asked about the Three Wise Men, but was unable to respond. Through the intervention of the applicant's caseworker, the interviewer was able to accept that the Three Wise Men were not found in the scriptures and were culturally specific. Normally, a failure to provide a satisfactory response to such a question might have led to an adverse credibility finding and a refusal of protection, necessitating a subsequent appeal. Protection was instead granted at first instance.

Similar simple matters that have given rise to judicial review proceedings being brought in Ireland could be resolved through frontloading.<sup>48</sup>

<sup>46</sup> See Improving Asylum Decisions through Early and Interactive Advice and Representation, Proposition paper by Ruth Evan, New Asylum Model Quality Team available at [http://www.legalservices.gov.uk/docs/cls\\_main/Early\\_Advice\\_Proposition.pdf](http://www.legalservices.gov.uk/docs/cls_main/Early_Advice_Proposition.pdf).

<sup>47</sup> Evaluation of the Solihull Pilot for the UK Border Agency and the Legal Services Commission, Independent Evaluator Jane Aspen, October 2008.

<sup>48</sup> From judicial review papers supplied by a solicitor in private practice.

## EXAMPLE

One of the grounds for a judicial review brought in Ireland by an Iraqi national was that ORAC had not understood the situation in Iraq. At one point in ORAC's decision reference was made to the "border militia." In fact, the applicant had referred to the Badr militia, the well known Shi'ite militia group. Frontloading could have helped to resolve this problem without the need to bring judicial review proceedings.

## Developments at EU level

As part of the first phase of the Common European Asylum System, the EU adopted two key Directives to set minimum standards for Member States. These were the Qualification Directive and the Procedures Directive.<sup>49</sup> Despite this, recognition rates between Member States have continued to vary radically, a fact which the European Commission has recognised.<sup>50</sup> The Commission therefore favours proposing new measures on common procedures, including on legal assistance as part of its recently announced Policy Plan on Asylum.<sup>51</sup> The Commission has also expressed support for frontloading, arguing that:

"good quality decision making, particularly at first instance is also important to ensure the integrity of the system (and this can reduce the number of appeals allowed thereby saving more time and resources.)"

The European Parliament has backed this call and stressed that it requires, among other things, full legal representation of applicants.<sup>52</sup>

## Some conclusions for Ireland's single procedure

The system in Canada, of having a first instance

hearing rather than an interview is obviously best practice. A hearing is also indispensable in Canada given the absence of an appeal.

However, in the Bill the Irish Government has decided to retain the interview process instead. That, however, is no reason not to adopt the other positive features of the Canadian and Swedish systems, such as early legal representation and identifying the issues in dispute in advance. Indeed, that is broadly what the Solihull pilot in Britain has attempted to do. That this appears to have resulted in savings is an encouraging sign that fairness and efficiency can go hand in hand.

In a welcome move, ORAC and the RLS have established a working group to examine frontloading and discussions are advancing on this issue. **It is recommended that the ORAC and RLS group introduce frontloading, having regard to the results of the Solihull pilot.**

Not all aspects of the Solihull model may be applicable here. For example, the timeframes established in Solihull are too tight to allow time for evidence to be gathered and may place ORAC – or in the future INIS – the RLS, and above all the applicant under excessive strain. However, the basic principles upon which frontloading should operate are clear.

At present, s.73(17) of the Bill obliges the Minister as soon as practicable *after* the receipt by him of the protection application to give the applicant information regarding the application procedure. Supplying this after the application form has been submitted is late in the day – the applicants should have it beforehand. Therefore, it is first of all important that **the Minister should be under**

<sup>49</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326, 13 December 2005, p. 13 – "The Procedures Directive."

<sup>50</sup> See Accompanying Document to the Policy Plan on the Common European Asylum System: Impact Assessment, Commission Staff Working Document, 2008 at paras 2.1.2.4 to 2.1.2.6 (available at <http://www.statewatch.org/news/2008/jun/eu-com-asylum-is-jun-08.pdf>)

<sup>51</sup> See above at page 28 and Policy Plan on Asylum: *An Integrated Approach to Protection in Europe*, European Commission, 17 June 2008.

<sup>52</sup> See *A more Efficient Common European Asylum System: The Single Procedure as the Next Step*, Communication from the Commission to the Council and the European Parliament, COM (2004) 513 final, at paras 23 to 24. As regards the European Parliament, see *Report on Asylum Procedure and Protection in Regions of Origin*, Committee on Civil Liberties, Justice and Home Affairs, Rapporteur Jean Lambert MEP, PE 347.073v03-00 A6-0051/2004, at paras 27-28, as approved by the European Parliament by resolution of 15 December 2004.

a duty to provide information about the application process, insofar as practicable, before the application is submitted. The Bill should also require that applicants be informed of their right not only to consult a solicitor but also to apply for legal aid.<sup>53</sup> Also, applicants should be clearly advised to seek legal advice at the earliest possible stage and, above all, before they fill out the questionnaire. The current questionnaire is less clear on this point than it could be.<sup>54</sup>

Second, whatever deadlines are set for submission of documents by the applicant should be clearly drawn to the applicant's attention and should allow the applicant sufficient time, including time to consult a lawyer. At the time of writing, the deadline for the submission of the questionnaire applied by ORAC was different to that stated on ORAC's own website.<sup>55</sup>

Third, every applicant should be able to have legal advice tailored to his or her case, in particular when filling out the questionnaire required as part of the protection application process. The questionnaire is simply too complex and too detailed to fill out without tailored legal advice – and with the single procedure this will be even more clearly the case. To this end, the resources of RLS should be reviewed fundamentally in order to ensure that it can provide early legal advice. The Solihull pilot suggests that early legal advice can lead to savings later through a reduced number of appeals. Increased funding for the RLS should therefore lead to savings elsewhere in the overall process.

Fourth, before the substantive interview the legal representative and the interviewer should meet to define the issues in dispute and the evidence required. By identifying what the issues are in advance, it should be possible to shorten and

simplify the interview process. Also, one of the challenges faced by interviewers at present is to ensure that all significant matters relevant to the claim are put to the applicant.<sup>56</sup> An example might be country of origin information which contradicts the applicant's claim. By encouraging matters to be defined in advance, there is less of a likelihood that such matters will get overlooked at the interview stage – and therefore less of a likelihood of a judicial review being brought or won.

Fifth, the legal representative should attend the substantive interview. His or her primary task should be to ensure that the applicant is able to put forward all relevant aspects of his or her claim. To this end, the legal representative should be able to present the issues of fact and law arising and to ask questions.

Sixth, after the interview has concluded, the legal representative and the interviewer should meet to assess whether there are any further issues outstanding and the applicant should be allowed to submit further information or documents without any adverse finding as to his or her credibility being necessarily made. It may also be appropriate in some cases to arrange a follow up interview. Again, this should help iron out misunderstandings that could lead to judicial reviews.

ORAC in its strategic plan has set itself the goal of investigating applications within a minimum timeframe. Reducing the number of callbacks, that is to say follow up interviews, is set as a performance indicator in this regard.<sup>57</sup> This is sensible. However, reducing the number of follow up interviews should remain a performance indicator and not become a goal in and of itself. With good advance preparation, the number of callbacks can be expected to decline but they

<sup>53</sup> It is accepted that this is currently done in any event, for example, in the Information for Applicants leaflet.

<sup>54</sup> See footnote 37 above.

<sup>55</sup> The deadline is eight working days for non-prioritised applications and seven working days for prioritised applications. At the time of writing, ORAC's website stated that it was a fortnight.

<sup>56</sup> See e.g. *VI v MJELR* [2005] IEHC 150.

<sup>57</sup> ORAC Strategy Statement 2007-2009 at p.13.

**will still be necessary on occasion, not least to ensure fair procedures.**<sup>58</sup> As discussed in the previous paragraph, when the interviewer and the legal representative meet, they may conclude that it would be appropriate to have a follow up interview.

The greater interaction between legal representatives and interviewers proposed in this model requires the adoption of a more inquisitorial style and a more cooperative relationship between lawyers and interviewers. This is entirely consistent with the shared duty to ascertain and evaluate all relevant facts required by the UNHCR.<sup>59</sup> It will be a change, however, from the approach normally adopted by lawyers. Both sides will need to adjust to this, while preserving the integrity of their respective roles.

In Canada immigration consultants are permitted to represent protection applicants, but serious questions have been raised as to their quality.<sup>60</sup> The fair determination of a protection application involves complex legal issues. **It is therefore recommended that legal advice and representation continue to be provided by qualified lawyers only at this time, with caseworkers continuing to provide support to them where appropriate.** However, below it is recommended that, in association with a third level college, an intensive one month course in refugee studies be established. If created, representation by those with this qualification - or any equivalent qualification - could be piloted and if no differential in outcomes is revealed such representation could be considered at first instance. Of course, such persons would also have to be properly regulated to ensure professional and ethical standards.

**Finally, possible moves by the EU towards front-loading on a European basis are welcome and should be supported by the Government.** This would ensure fairness and better protection of

the rights of protection applicants throughout the EU.

<sup>58</sup> See para 199 of the UNHCR Handbook.

<sup>59</sup> See para 196 of the UNHCR Handbook.

<sup>60</sup> See footnote 40 above.





# Protection Process Guidelines

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# Managing the process of change transparently

Implementing the single procedure will necessarily involve detailed decisions on staffing and other operational matters and a transition team has been established involving ORAC and the Department to this end. It is not suggested that others need to be involved in the detail of this. However, ensuring that the system delivers fair outcomes concerns many. There is therefore a case for opening up involvement in the process of change.

It is welcome that there has been consultation on the new draft questionnaire and information leaflet for protection applicants. It is also worthwhile that ORAC meets twice a year with NGOs involved in refugee work to hear their concerns. However, there is scope for a more open system of policy making – and one that better reflects the principle of social partnership. It is welcome that, in addition to the transition team involving ORAC and the Department, a working group has been established involving the Department and the RLS to consider frontloading. However, **it is recommended that the working group on front-loading be expanded to involve NGOs in the field.**

One of the most significant aspects of the change process is the abolition of ORAC and the taking over by INIS of its functions. This raises real concerns. ORAC is a statutory body with a duty to act independently.<sup>61</sup> INIS, by contrast, is part of the Department and, by definition, is subject to political direction and control. There is therefore the potential for political pressure on civil servants to keep the numbers granted protection down. Even if there is in fact no such political pressure, applicants may nonetheless be concerned that it may exist. In order to allay any such concerns, **it is recommended that the Minister provide reassurance that protection applications will be determined impartially.** Public attitudes on asylum issues should never skew this process.

<sup>61</sup> See s.6(2) of the Refugee Act.

## GUIDELINES AND TRANSPARENCY

Unlike in Britain and many other countries, training materials and guidelines on the protection procedure are not published in Ireland. These materials will now have to be revised to take account of the single procedure. **It is recommended that all existing guidelines on the protection process be published and, further, that there be consultation on their revision to take account of the single procedure and any other points that consultees may raise.**

Also, it is particularly important to consult on and publish guidelines covering all aspects of the procedure for vulnerable groups such as victims of sexual violence, trafficking or torture; children - especially separated children; traumatised persons and people with mental health issues. These should comply with any relevant UNHCR guidance.<sup>62</sup> Procedures should be put in place to identify such cases early on so that they are handled appropriately. For example, it will often be appropriate to ensure that such cases are dealt with expeditiously. It is also important to ensure that every effort is made to ensure that the application process does not re-traumatise vulnerable persons and that the interviewer is trained to handle such cases. For example, questions that would re-traumatise victims should be avoided. Also, particular measures should be taken to avoid re-interviewing where possible. Equally, it should be recognised that traumatised persons may require a second interview, if they become too distressed on the first occasion to continue or if, as a result of their trauma, they omit to mention relevant

matters. Indeed, trauma may also be a reason why an applicant does not immediately present all relevant aspects of his or her claim at other stages, such as when filling out the questionnaire, and this should not prejudice the application in any way.

**In line with best practice in other jurisdictions, guidelines should also be consulted on and published regarding all groups that may be subject to persecution.<sup>63</sup> Again, these should comply with any relevant UNHCR guidance.<sup>64</sup>** As well as the grounds specifically listed in the Geneva Convention (race, religion, nationality, political opinion), this should also include - for example - gender, sexual orientation, disability, age and health status.

A separate IRC publication deals with children in the protection system. Regarding gender, guidelines should of course 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.<sup>65</sup> They should also recognise that discrimination and family or community ostracism can in some cases amount to persecution. Regarding the procedures at first instance, the guidelines should:

- ensure, in line with current practice, the right of a person to seek an interviewer and interpreter of the same sex, and also to be informed of that right;
- in appropriate cases, ensure that an interviewer and an interpreter of the same sex be provided

<sup>62</sup> Separated children are children under eighteen years of age who are outside their country of origin and separated from both parents or their previous legal/customary primary caregiver. See Statement of Good Practice, Separated Children in Europe Programme, Save the Children/UNHCR. As regards other vulnerable groups see, e.g. UNHCR, Guidelines on International Protection, The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked, HCR/GIP/06/07, 7 April 2006.

<sup>63</sup> See, e.g. Swedish Migration Board, Gender Based Persecution: Guidelines for the Investigation and evaluation of the needs of women for protection, 28 March 2001; Home Office, Gender Issues in the Asylum Claim, March 2004. Canada, the USA, Australia and South Africa have also produced gender guidelines.

<sup>64</sup> See, e.g. UNHCR, Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees HCR/GIP/02/01, 7 May 2002; UNHCR, Guidelines on international protection: "Membership of a Particular Social Group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/02/02, 7 May 2002; UNHCR, Guidance Note on Refugee Claims relating to Sexual Orientation and Gender Identity, 21 November 2008; UNHCR, Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, HCR/GIP/04/06, 28 April 2004.

<sup>65</sup> See, e.g. UNHCR, Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees HCR/GIP/02/01, 7 May 2002; UNHCR, Handbook for the Protection of Women and Girls, January 2008.

as a matter of course, such as where the applicant is a victim of sexual violence or may have difficulty recounting his or her story in the presence of a person of the opposite sex;

- provide that male family members should not generally be present at interview and that applicants should be specifically reassured that details of interviews will be kept confidential;
- provide that all five Geneva Convention grounds should be interpreted in a gender sensitive way (race, nationality, religion etc.).

Given the importance of the issue, **guidelines should in particular also be consulted on and published with regard to internal flight.** It is welcome that the new Bill does not avail of the option in Article 8(3) of the Qualification Directive to allow protection applicants to be refused due to an internal flight alternative to which there are technical obstacles. However, **guidelines should make clear that internal flight must not be used as a ground to deny an application for protection where it is not reasonable to expect the applicant to travel to or stay in the allegedly safe area.** In considering this, not only should the general conditions prevailing in the area be considered, but also the personal circumstances of the applicant. For example, it may be unreasonable or even dangerous in some countries to expect a woman to avail of internal flight if she does not have any male relatives in the relevant area. Any such guidance should also comply with ECHR caselaw and UNHCR guidance.<sup>66</sup>

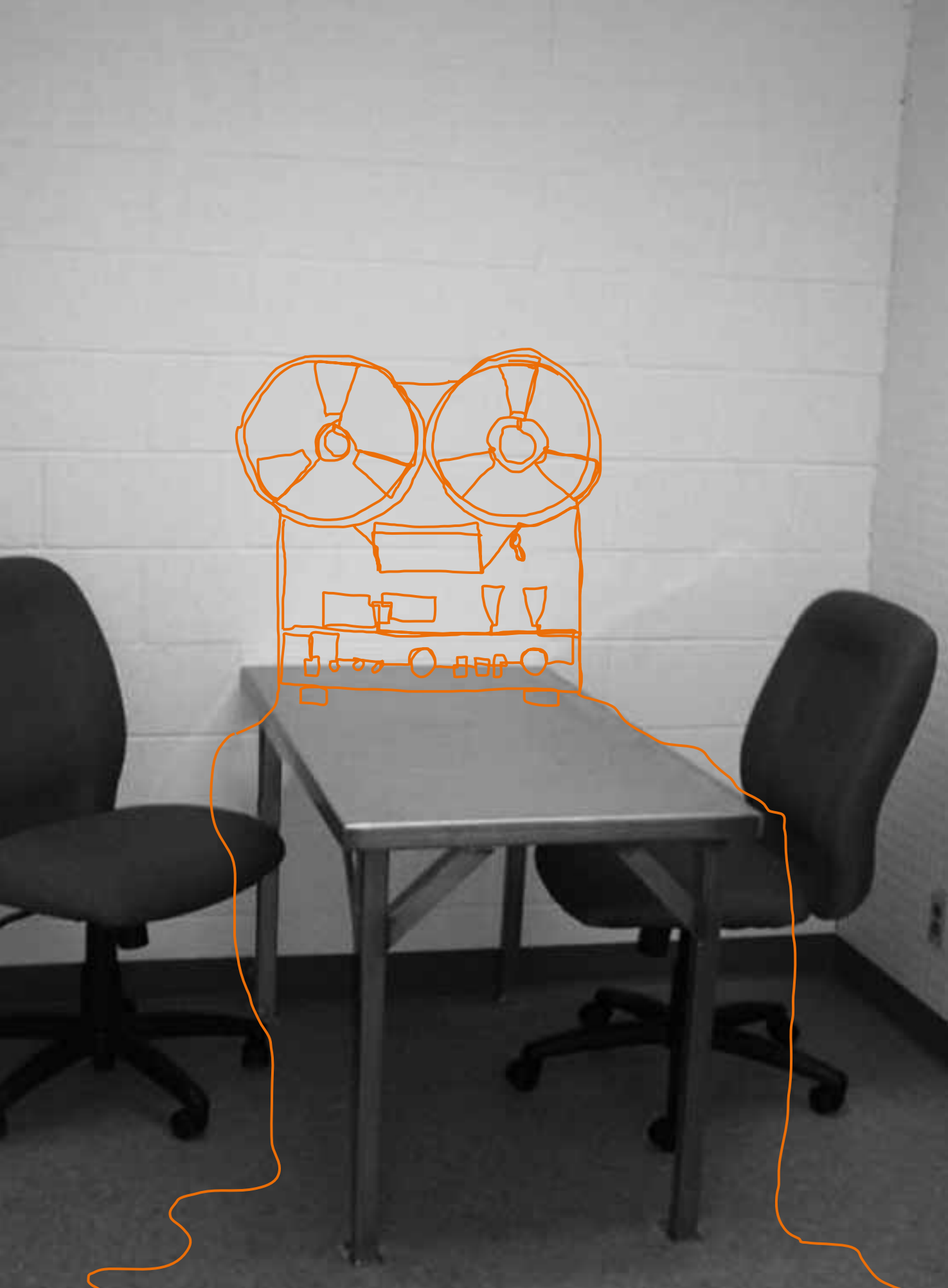
Finally, **all guidelines should be reviewed every two years to ensure that they are appropriate in the light of experience and properly applied. The outcome of any such reviews should also be supplied to UNHCR.**<sup>67</sup>

Of course, it is important that staff are made aware quickly of important Irish court cases. ORAC's Strategy Statement expressly recognises this, and staff have been engaged to assist in this regard.<sup>68</sup> **The jurisprudence of the European Court of Justice and the European Court of Human Rights is becoming increasingly influential and the importance of responding to such caselaw should be explicitly recognised in the Strategy Statement and appropriate steps taken to ensure that this happens in practice.**

<sup>66</sup> See *Salah-Sheekh v. The Netherlands* Judgement 11 January 2007, Application no. 1948/04 and UNHCR, Guidelines on International Protection: *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, HCRGIP/03/04, 23 July 2003.

<sup>67</sup> See Crawley and Lester, *Comparative analysis of gender-related persecution in national asylum legislation and practice in Europe*, UNHCR (2004) at p.159, who recommend a review every two years with regard to gender. This should equally be applied with regard to other guidance, particularly for other social groups.

<sup>68</sup> ORAC Strategy Statement, 2007-2009 at page 12.



# Ensuring fair procedures

## LANGUAGE ISSUES

There are other key changes that need to be taken to improve quality and ensure fair procedures.

Throughout the Bill there are references to information being provided to an applicant in a language that he or she understands “where necessary and practicable”<sup>69</sup> or “where practicable”. For example, the information note about the protection procedure must only be in such a language where practicable. But if applicants do not understand the procedure, they may inadvertently breach requirements placed on them leading to their applications being deemed withdrawn.<sup>70</sup>

By making practicability the key criterion in translation and indeed interpretation, the Bill:

- sets a lower standard than the Refugee Act which demands that information be given where “possible”;
- falls short of the Procedures Directive which states that applicants must be given information regarding procedures “in a language which they may reasonably be supposed to understand”;<sup>71</sup>
- sets a lower standard than is required by Irish caselaw on constitutional justice which has required that important information be given in a language that applicants “are capable of understanding”;<sup>72</sup>
- where a person has been detained, falls short of Article 5(2) ECHR which requires that the person be given the reasons for his or her arrest in a language that he or she understands.

<sup>69</sup> See e.g. ss.23(9) and 73(17) of the Bill.

<sup>70</sup> See the requirements referred to in s.73(17) of the Bill.

<sup>71</sup> See Article 10(1) of Council Directive 2005/85/EEC on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L326/13, “the Procedures Directive.”

<sup>72</sup> *AM v MJELR* [2006] 1 IR 476 at 488.

It is recommended that the Bill require that information be given in a language that the protection applicant understands.

The Bill likewise only requires interpreters "where necessary and practicable."<sup>73</sup> Yet misunderstandings may lead to applicants failing to answer questions properly at interviews, and being found to lack credibility. **It is recommended that an interpreter should be provided whenever necessary to ensure that the applicant understands. Further, an interpreter should always be provided when requested at the time of the initial and substantive interviews.**

As a recent Government sponsored report pointed out, there is a lack of consistency in translation and interpretation services across government and a lack of regulation.<sup>74</sup> It is welcome that ORAC, for its part, has developed guidelines on the use of interpreters with UNHCR and its interpretation service provider, but this guidance has not been published and therefore cannot be assessed. **It is recommended that guidance be consulted on and published regarding translation and interpretation in the protection context, particularly regarding interpreting standards at interviews, and that a transparent framework for regulation of translation and interpretation services be put in place – including regarding the standards and qualifications of those involved.**

A number of stakeholders interviewed for this study expressed concern at the use of telephone interpreting. While it is appreciated that this occurs in the case of rarer languages, **it is never acceptable for the substantive interview to use telephone interpreting and this practice should end.**

#### GETTING THE RECORD STRAIGHT: AUDIO RECORDING

At present, neither the initial nor the substantive

interview is audio-recorded by ORAC. Further, it is ORAC's practice to refuse to allow an applicant to record his or her interview. Instead, a written record must be kept by the interviewer. It is also the practice of ORAC to ask the applicant to sign every page of the record to confirm its accuracy, but the record is not a verbatim one. However, even if all applicants had the confidence to object and to refuse to sign each page, this safeguard would not be adequate. First, errors in interpretation may not be noted. Second, omissions may not be noted. For example, an applicant may not realise that a particular assertion that he or she made at interview was material and may therefore not object to its omission. If the interviewer does not hear or remember that assertion and on that basis rejects the applicant's claim, the applicant will have no way of proving that he or she did in fact make the assertion.

In Britain, an applicant has the right to audio record interviews if he or she does not have legal representation or his or her own interpreter present at the interview.<sup>75</sup> However, while the presence of a lawyer at the interview may be a help in proving omissions in the record, it will not help to identify errors in interpretation.

#### EXAMPLE

In *H v MJELR* the applicant Mr H had been refused asylum. He challenged this refusal and ORAC settled the case. He then made a fresh application for asylum. He wrote in advance to ask that the interview be taped and, failing that, offered to tape it himself.

ORAC refused to tape the proceedings – and also refused to allow the applicant to tape them. This double refusal was upheld by the High Court. The case is on appeal to the Supreme Court.

<sup>73</sup> See e.g. s.23(12) (examinations at point of entry of persons seeking to make protection applications), s.73(4) (interviews of protection applicants), s.85(5) (oral hearings before the Tribunal). It is accepted that the duty appears to be more extensive in ss.74(4) and (5) regarding the substantive interview. But this encourages the conclusion that only a lesser standard is required in other contexts.

<sup>74</sup> See *Developing Quality Cost Effective Interpreting and Translating Services for Government Service Providers in Ireland*, National Consultative Committee on Racism and Interculturalism, 2008.

<sup>75</sup> *Regina (Dirshe) v Secretary of State for the Home Department* [Court of Appeal] [2005] 1 WLR 2685.

While the High Court has ruled that audio recording is not legally obliged, it is clearly good practice.<sup>76</sup> It is also affordable. In 2002, 252 audio-video recording systems were purchased for the Garda Síochána at €3.7 m.<sup>77</sup> Only a small fraction of that quantity of equipment would be required by ORAC. Further, the price for audio only equipment would be less and installation costs for such equipment would be low. Of course, costs would rise if all audio recordings had to be transcribed, but this should not be routinely necessary.

Audio recording of interviews is standard in some other countries – such as Canada, Sweden and Germany. It also serves as a protection for the interviewer and applicant alike. **It is therefore recommended that the Bill require that initial and substantive interviews be audio recorded.**

#### TIME TO GATHER EVIDENCE

Compiling evidence, particularly medical reports, can take time. This is particularly true of specialist reports, for example regarding torture or trauma. By contrast, ORAC is committed to determining prioritised protection applications in 17 to 20 days.<sup>78</sup>

Some practitioners interviewed for this survey said that they overcame difficulties in this regard simply by not advising clients to submit applications until reports had been obtained. That avoided the difficulty of having to negotiate extra time to get reports before the substantive interview. However, under the Bill being illegally in the State will be a crime and those caught may be summarily deported with no adequate safeguards to prevent refoulement.<sup>79</sup> Delay in submitting applications may also adversely affect credibility.<sup>80</sup>

**Whether an application is prioritised or not, applicants must be granted enough time to assemble their cases and gather evidence, including medical reports and country of origin information. Clear guidance to this effect should be published.** The time required will of course vary according to the circumstances of the case. For example, the length of time for specialist medical reports will commonly be longer than for ordinary medical reports.

#### COUNTRY OF ORIGIN INFORMATION

The Refugee Documentation Centre (RDC) is part of the Legal Aid Board. It provides a country of origin research service to UNHCR, RLS, ORAC, RAT, and the Department, as well as to solicitors and barristers associated with those organisations. However, RDC does not provide a research service for other organisations in the field, such as NGOs, or for solicitors and barristers not associated with the above organisations, although they are free to use its library service. **It is recommended that RDC consider the terms on which NGOs and barristers and solicitors not associated with the above organisations might access the research services of the RDC.**

The RDC approach of having a single organisation providing country of origin information equally to those involved in the protection system is a model of good practice. Where problems more commonly arise is where other inadequate country of origin information is used, where country of origin information is used selectively, or where country of origin information simply is not averted to by decision makers at all. There are many examples of this arising both at interview and at Tribunal level.<sup>81</sup>

<sup>76</sup> See *H v MJELR* [2006] IEHC 355 – which is also the case referred to in the example above.

<sup>77</sup> See Report of the Comptroller and Auditor General on Garda Interview Recording Schemes, December 2002.

<sup>78</sup> ORAC Strategic Statement, 2007-2009. There are three countries prioritised at present: Croatia, Nigeria and South Africa.

<sup>79</sup> Compare s.54 of the Bill to s.3 of the Immigration Act, 1999, which will be repealed.

<sup>80</sup> See s.76(d) of the Bill and s.11B(d) of the Refugee Act, 1996.

<sup>81</sup> See, also, for example *D.V.T.S. v Minister for Justice, Equality and Law Reform & Anor* [2007] IEHC 305, challenging a RAT decision.



## EXAMPLES

In *A v MJELR* an ORAC decision maker had relied on country of origin information that was taken from Wikipedia. Wikipedia is an online encyclopaedia which can be edited by anybody. There is therefore no guarantee of its accuracy or reliability. The High Court granted leave to the applicant to challenge the decision. (Unreported, High Court, Herbert J, 8 May 2008)

In *S v RAC*, the applicant was a minor refused refugee status. Four separate country of origin reports were submitted in that case by the applicant which, according to the judge, “graphically depicted” a deterioration in the human rights situation in the country of origin for minority members, such as the applicant, in 2005. ORAC, however, pointed to a 2004 report on the country – but the judge found that this was not up to date since the human rights situation had deteriorated in 2005. ORAC also pointed to two pages of a 2005 report which noted the Government’s willingness to make reforms which were not directly related to current position of minorities. But those two pages also noted the unwillingness of the police to provide protection to minorities. No reasons were given why the other three reports submitted by the applicant which showed a deterioration in the human rights situation were rejected. The judge concluded that she had “no difficulty whatsoever” in granting the applicant leave to challenge the ORAC decision on grounds that it lacked reasons, had not relied on up to date information and was perverse. (Unreported, High Court, Irvine J, 21 November 2008).

In a different case also entitled *S v RAC*, the applicant was a minor who had been raped in South Africa and subsequently applied for refugee status in Ireland. Her application was refused. It was not disputed that she had been raped. However, ORAC stated:

“Equal rights for women are guaranteed by the constitution and promoted by constitutionally mandated Commission on Gender Equality. Laws such as the Maintenance Act and the Domestic Violence Act are designed to protect women in financially inequitable and abusive relationships.”

These sentences were direct quotes from a UK Home Office report, although this was not disclosed.

Also, the sentences that followed were not quoted. They stated:

“These laws, however, do not provide the infrastructure necessary for implementation. Discriminatory practices and customary law remain prevalent, as does sexual violence against women and minors. 40% of rape survivors and girls are under 18 (sic). The Criminal Law (Sexual Offences) Amendment Bill, introduced to Parliament in 2003 seeks to widen protection for sex crime victims, but human rights groups say that it does not go far enough.”

The UK report also cited a US report which referred to societal attitudes and lack of infrastructure, resources and training for law enforcement officials hampering the implementation of domestic violence legislation and to the number of women filing complaints representing only a fraction of those suffering abuse and stating that doctors, police officers and judges often treated abused women badly. McMahon J found that ORAC had been selective in use of country of origin information. McMahon J also found that a conclusion that the applicant may possibly have had other motives for coming to Ireland other than fleeing persecution had “very little basis” in the interview and “came dangerously close to speculation.” The judge also held that the interview did not take full account of the fact that she was a vulnerable minor. (She had had a miscarriage four weeks earlier). (Unreported, McMahon J, 11 July 2008)

**Attention must always be paid to the quality and reliability of country of origin information. It should never be used selectively or disregarded and should always be up to date. Where there are contradictory country of origin reports, reasons should be given for preferring one over the other. Where ORAC disagrees with country of origin information put by the applicant that is significant and relevant, this should be disclosed so that the applicant may comment on it. It is noted that ORAC intends to address issues regarding the use of country of origin information in the context of its proposed training on the single procedure.**

A particular problem is the lack of availability of country of origin information for certain social



groups. For example, while there may be ample information on the political situation in a country, often there can be difficulty accessing information regarding the position of women both in law and in practice.<sup>82</sup> **Every effort should be made to gather country of origin information for all social groups.** That information should in particular consider the availability of state protection and the reasonableness of internal flight for those groups. **Where, for example, statistical data on the incidence of persecution against certain social groups is not available, then alternative forms of information should be considered,** such as the testimonies of other members of that social group to NGOs or international organisations.<sup>83</sup>

### MEDICAL EVIDENCE

Medical evidence is on occasion submitted which indicates torture.<sup>84</sup> Such medical reports typically use the terminology of the Istanbul Protocol on torture.<sup>85</sup> It defines key terms such as “consistent with torture” and “highly consistent with torture.” In some cases, decision makers have appeared confused as to the meaning of these terms.<sup>86</sup> **It is important that decision makers are familiar with the Istanbul Protocol and understand the meaning of all its key terms.**

As with country of origin information, **proper weight should be given to medical reports and they should not be used selectively or disregarded.** **If medical evidence is rejected, a rational explanation should be given for this.**<sup>87</sup>

<sup>82</sup> See Researching country of origin information on gender and persecution in the context of asylum and human rights claims, Briefing prepared by the Refugee Women’s Resource Project at Asylum Aid for the Eurasil Workshop, May 2007.

<sup>83</sup> See, e.g., UNHCR, Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees HCR/GIP/02/01, 7 May 2002, Point 36, x.

<sup>84</sup> Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (“the Istanbul Protocol”), submitted to the UN High Commissioner for Human Rights on 9 August 1999.

<sup>85</sup> As well as those terms listed above, see the definitions of “typical of”, “diagnostic of” and “not consistent with” at para 186 of the Protocol.

<sup>86</sup> See *DVTS v Minister for Justice* [2007] IEHC 305 and *M v Minister for Justice* [2008] IEHC 130, both challenging RAT decisions.

<sup>87</sup> See *Khazadi v Minister for Justice* Unreported, High Court, Gilligan J, 19 April 2007 (ex tempore).



# The burden of proof and the benefit of the doubt

The Bill recognises that while the burden of proof is on the applicant, the Minister has a shared duty, in cooperation with the applicant, to assess all the relevant elements of the protection application.

However, in line with the UNHCR handbook, there should be a shared duty not merely to evaluate but also to ascertain all the facts.<sup>88</sup> This is important, because there will often be matters which the Minister is better placed to ascertain, such as up to date country of origin information. **It is recommended that the Bill be amended to reflect the shared duty on the applicant and the Minister to ascertain all the facts.**

The Bill provides that where aspects of the applicant's claim are not supported by documentary evidence, those aspects will not need to be substantiated where all of the following conditions are met:

- the applicant has made a genuine effort to substantiate his or her application,
- all relevant elements at the applicant's disposal have been submitted and a satisfactory explanation regarding any lack of other relevant elements has been given,
- the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case,
- the applicant has applied for protection at the earliest possible time, except where an applicant demonstrates good reason for not having done so, and the general credibility of the applicant has been established.<sup>89</sup>

While this complies with the Qualification Directive, it does not comply with the UNHCR Handbook which makes clear that the benefit of the doubt should be given:

<sup>88</sup> See the UNHCR Handbook at para 197.

<sup>89</sup> See s.63(8) and s.75(1).

“when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant’s general credibility. The applicant’s statements must be coherent and plausible and must not run counter to the generally known facts.”<sup>90</sup>

This is broader. Unlike the Bill, it does not specifically require that the applicant justify any absence of evidence or the late submission of an application. **It is recommended that the Bill be amended to comply with the UNHCR Handbook on the benefit of the doubt.**

The Bill does not replicate the provisions of the Refugee Act on the standard of proof.<sup>91</sup> This is not a particular concern since the Bill itself makes clear that in the case of subsidiary protection substantial grounds must be shown while in the case of refugee status a well founded fear must be shown and, moreover, Irish caselaw has confirmed that the standard of proof is less than the civil balance of probabilities.<sup>92</sup> **However, it will be important that clear guidance is consulted on and given to ORAC staff on the standard of proof.** In conformity with UNHCR guidance, Irish caselaw has also made clear that an applicant who demonstrates that he or she suffered past persecution is entitled to a legal presumption of a well founded fear of future persecution, which may be rebutted in the context of an individualised analysis.<sup>93</sup> **It is important that any guidance is equally clear that past persecution gives rise to a rebuttable presumption that the applicant has a well founded fear of future persecution.**

### TACKLING A PERCEIVED “CULTURE OF DISBELIEF”

Many of those interviewed for this report expressed concern about a perceived “culture of disbelief.”

The comparatively low Irish recognition rate, while not conclusive, is consistent with the existence of such a culture. Many also acknowledged that the role of an interviewer was complex and stressful – and also that the lack of frontloading made their job more difficult by providing fewer opportunities for errors or misunderstandings to be resolved.

It is hard to blame the perception of a “culture of disbelief” on interviewers when the Refugee Act obliges them to consider thirteen separate matters when assessing the credibility of an applicant, all of which are matters from which negative inferences would be drawn.<sup>94</sup> Some are matters largely irrelevant to the substance of a protection claim – such as whether an explanation has been given for how an applicant arrived in the State or whether he or she notified the Minister of a change of address.

In a welcome move, the new Bill makes consideration of these matters optional, not mandatory.<sup>95</sup> But many of these are about the credibility of the *applicant*, rather than about what should be considered – the credibility of the *application*. **It is recommended that the Bill be amended to make clear that it is the application, not the applicant, that should be credible. Factors that are irrelevant to the credibility of the application should not be considered** – such as whether the applicant complied with requirements to live in State provided accommodation.

A particular concern of practitioners is that any failure to raise matters at the outset can be fatal to a protection claim. As the courts have made clear, **the interviewer must consider any explanation offered by the applicant as to why he or she did not raise matters material to his or her claim at the outset and explain why if those reasons are believed not to be credible.**<sup>96</sup> Applicants may

<sup>90</sup> See para 204.

<sup>91</sup> See currently s.11A of the Refugee Act, 1996.

<sup>92</sup> See in this regard *RKS v Refugee Appeals Tribunal and Others* [2004] IEHC 436 (regarding future persecution).

<sup>93</sup> See *OLR v Refugee Applications Tribunal* [2003] WJSC-HC11163.

<sup>94</sup> See s.11 of the Refugee Act, 1996.

<sup>95</sup> See s.76 of the Bill.

<sup>96</sup> See *Z v Minister for Justice, Equality and Law Reform & Anor*, Unreported, High Court, Clarke J, 26/11/2004 (Leave).

have failed to raise issues because – for example - they did not appreciate that they were relevant or, in some cases, were afraid to mention them.

In a number of cases brought to court, clear reasons have not been given for a finding that an applicant lacked credibility.<sup>97</sup> In other cases, applicants have been found to lack credibility on matters that were minor or peripheral to their core claim.<sup>98</sup> **Where negative findings as to credibility are made, these should always be fully reasoned, and negative findings should not be drawn on the basis of peripheral matters only.**

**When interviewing and assessing credibility, it is also recommended that the Bill require that regard be had to the specific situation of vulnerable persons such as children and victims of torture or sexual violence.** The Bill obliges regard to be had to such factors in other contexts – and there is no reason why there should not be a similar duty in this context also.<sup>99</sup>

It is important that those who carry out interviews have always applied for the post and therefore have demonstrated their desire to do the job, given its very demanding nature. It is also desirable that they come from a range of backgrounds. **For that reason, it is recommended that insofar as possible there be open public recruitment for interviewers.** Given the legal nature of the work, recruitment should particularly target lawyers, although it is not recommended that recruitment should be confined to lawyers alone.

Interviewing children requires special skills – but training of itself is not enough: **it is also important that only those who volunteer for work with children are considered for such positions.**

Interviewers also need training. It is welcome that ORAC provides in house training, and has sought the assistance of UNHCR in the past. But there is

the scope to go further. **It is recommended that, in association with a university, a one month intensive course in refugee studies be created. This should be undertaken by all interviewers, but also be open to students and those working outside government with those seeking protection.** Further, as recommended above, there should be consultation on and publication of training materials used by ORAC staff.

Applications must be assessed individually. But it is hard to do so after years of hearing people's stories – many of which will be similar. For that reason **it is recommended that interviewers, whether recruited openly or otherwise, be considered for transfer after three years unless there are good reasons why this should not be done.** The views of interviewers themselves should be an important part of this process. It may be that many interviewers will move on anyway, for example through promotion opportunities. The foregoing recommendation is nonetheless necessary to avoid a situation where the most able get promoted out of the job, leaving others behind.

### MONITORING PERFORMANCE

All good institutions put in place proper procedures for monitoring performance. It is welcome that ORAC commissions questionnaires on whether interviewers were satisfied with their interviews, and also that these disclose high rates of satisfaction. However, these questionnaires have obvious limitations. Some applicants may be reluctant to give a negative assessment of their interview, fearing that it might influence the determination of their applications. More fundamentally, all applicants are asked about what they thought about the interview before they know its outcome and have had the chance to see how the points they have made have been considered. For that reason, **applicants should also be surveyed after they have been notified of the decision at first instance on their application.**

<sup>97</sup> See, e.g., *VM v Michelle O'Gorman* [2005] IEHC 363 and *DMS v Minister for Justice, Equality and Law Reform* [2005] IEHC 395.

<sup>98</sup> See, e.g., *HY v Refugee Appeals Tribunal* [2007] IEHC 274.

<sup>99</sup> See s.49(6) of the Bill.



The current survey is also limited in that it does not assess in any depth *why* applicants are satisfied or dissatisfied. That is why **qualitative research should be undertaken to find out why applicants feel satisfied or dissatisfied with the first instance process.**

Assessing the subjective views of applicants is only one part of monitoring performance. It is more important still to assess the quality of the single procedure, especially the quality of decisions taken. ORAC has involved UNHCR in the past in work to improve Ireland's protection system. **It is recommended that UNHCR be engaged to assess the quality of the single procedure when implemented, report publicly and make recommendations for improvement where needed.** In addition, the independent research recommended on page 16 could usefully be conducted by UNHCR.

Finally, it is important that when things go wrong, there are mechanisms to put them right. An appeals process is only part of that. It is welcome that ORAC also has a published complaints process. But an entirely internal complaints process may not command confidence. **It is recommended that the complaints process involve an independent element to make sure that complaints are properly investigated, to undertake investigations of complaints of serious irregularities and to ensure that where shortcomings are identified, this is followed up with training or, where appropriate, disciplinary action.**

It is widely accepted that Ombudspersons are essential for good administration. It is worrying therefore that some immigration issues appear to be excluded from the remit of the Ombudsman, as well as the Ombudsman for Children.<sup>100</sup> The precise scope of those exclusions is not fully clear and the Government has suggested that they are simply to avoid duplication in decision making.<sup>101</sup> If that is their sole purpose, they in fact

serve no purpose: the relevant Ombudsmen have no statutory authority to perform the functions of ORAC or the Minister, but rather only to scrutinise how they perform their functions. **It is therefore recommended that the statutory exclusions of immigration and protection matters from the remit of the Ombudsman for Children and the Ombudsman be removed.** After all, ensuring good administration and promoting the best interests of children is as important in the field of protection as it is in any other, if not more so.

<sup>100</sup> See s.5(1)(e)(i) of the Ombudsman Act, 1980, and s.11(1)(e)(i) of the Ombudsman for Children Act 2002.

<sup>101</sup> See the remarks of Minister of State Hanifin in the Seanad Éireann Debates on the Ombudsman for Children Bill, 2002, Second Stage, on 21 February and 27 February 2002, (Volume 169, Cols. 503 and 540).





NO RE-ENTRY



# Preventing refoulement and protecting rights

It is beyond the scope of this report to discuss the general provisions of the Bill. However, some provisions should nonetheless be mentioned since they impact fundamentally on how people access the single procedure or whether there is proper protection against refoulement.

## CARRIERS' LIABILITY

Section 28 of the Bill makes it an offence for a carrier - such as an airline or a bus company - to bring into the country a person without a valid travel document or, if required by law, a visa.<sup>102</sup> It is no defence for a carrier to show that it believed that a person intended to make an application for protection or was in need of protection. Indeed, under the Bill a carrier can be prosecuted even if the person's application for protection in Ireland is subsequently successful. By contrast, as the law currently stands, it appears that a carrier could not be prosecuted for bringing into the country a person entitled to protection under the Geneva Convention.<sup>103</sup>

People fleeing persecution frequently will not have valid travel documents, let alone visas. If as a result of Irish laws on carriers' liability they are prevented from travelling to Ireland before their protection claims are ever considered, Ireland's obligations under the Geneva Convention will be effectively undermined - and the people concerned may be returned to their countries of origin where they may be placed in real danger. The fairness of Ireland's protection system also becomes academic if those in need of protection cannot in fact access it. For these reasons, **it is strongly recommended that a defence be inserted into the Bill to protect carriers who have reason to believe that a person travelling to the State intends to make an application for protection or is in need of protection.**

<sup>102</sup> Section 28 of the Bill. A passport would be a valid travel document, for example.

<sup>103</sup> See by contrast s.2(9) of the Immigration Act, 1999.

### S.79(2)(C) RESIDENCE PERMISSIONS

Section 79(2)(c) of the Bill allows the Minister to give a residence permission to a person who is not entitled to protection in the State, whether to comply with the rule against *refoulement* or otherwise. There are a number of points that should be made in this regard.

**First, clear guidance should be issued to officials dealing with the single procedure on the circumstances where a person would be entitled to a residence permission on non-*refoulement* grounds.** Examples of this would include:

- *where a person is excluded from both refugee status and subsidiary protection but nonetheless would face refoulement if returned to his or her country of origin and no other country is willing to accept the person.* For example, if a person committed serious non political crime outside Ireland prior to admission as a refugee or a crime against peace, a war crime or a crime against humanity he or she would be excluded from both refugee status and subsidiary protection. If such a person would nonetheless face, for example, a real risk of serious harm or his or her life or freedom would be threatened on any Geneva Convention grounds, he or she would be entitled to a residence permission if no other country were willing to accept him or her;<sup>104</sup>
- *where a person does not qualify for refugee status and is excluded from subsidiary protection but would nonetheless face refoulement if returned to his or her country of origin and no other country is willing to accept him or her.* For example, a person might not qualify for refugee status because persecution on Geneva Convention grounds cannot be shown. That same person might be excluded from subsidiary protection because he or she has committed a serious crime. If nonetheless

the person would face, for example, a real risk of serious harm if returned to his or her country of origin and no other country is willing to accept the person, then a residence permission would have to be granted;

- *where a person is excluded from or does not qualify for refugee status, and does not qualify for subsidiary protection but would nonetheless face refoulement in the country to which deportation is proposed, and no other country is willing to accept the person.* This would occur if a person was not persecuted on Geneva Convention grounds or was excluded from Geneva Convention protection, and did not qualify for subsidiary protection because the real risk of torture or inhuman or degrading treatment was not in the *country of origin*.<sup>105</sup> For example, the country of origin may refuse to accept the person, and Ireland or the country of origin may propose instead deporting the person to some third country where the person would face a real risk of torture or inhuman or degrading treatment.<sup>106</sup>

**This guidance, if not the Bill itself, should also make clear that *refoulement* may be direct or indirect.** It is not permissible to send a person to a country if that country would, in turn, forward the person on to some other country where there is a real risk of inhuman or degrading treatment.<sup>107</sup>

**Second, separate guidance should be issued on when a person would be entitled to a residence permission on grounds unrelated to protection or non-*refoulement* as a matter of domestic law.** On balance, it is recommended that this guidance should not be administered by those considering the protection claim, but by INIS staff considering immigration matters generally. There are two reasons why this seems preferable.

<sup>104</sup> See Articles 12 and 17 of the Qualification Directive, Articles 1D to 1F of the Geneva Convention and s.66 of the Bill on exclusions and s.52 of the Bill defining *refoulement*.

<sup>105</sup> See limb (b) of the definition of serious harm in s.61(1) of the Bill.

<sup>106</sup> This would qualify under limb (c) of the definition of *refoulement* in s.52.

<sup>107</sup> So, for example, Article 31 of the Geneva Convention prohibits *refoulement* "in any manner whatsoever."



First, expecting those dealing with protection also to deal with other rights issues may overburden those staff. Second, INIS staff dealing with immigration matters will have to be familiar with other rights issues anyway.

Examples of where a residence permission would be required on these grounds include:

- *where the deportation itself could amount to inhuman or degrading treatment even though it did not meet the definition of refoulement.* This could occur if the conditions of the deportation, as opposed to the conditions in the country of origin were inhuman or degrading – for example, if a person was very seriously ill and it would be inhuman to expect the person to travel.<sup>108</sup> Another example of where a temporary residence permission should issue would be where adequate arrangements were not in place for sending a vulnerable person to his or her country of origin, such as a child;<sup>109</sup>
- *where a residence permission may be necessary in order to comply with family rights under Article 8 ECHR or the Constitution;*<sup>110</sup>
- *where a residence permission may be necessary in order to comply with other ECHR or Constitutional rights* – for example equality,<sup>111</sup> the right to a fair hearing or the right to freedom of religion;<sup>112</sup>
- *where deportation would violate Irish administrative law,* for example because it would be unreasonable.

**Further, this separate guidance should also cover cases where, in accordance with Ireland’s international law commitments, a person would be**

**entitled to a residence permission.** It is assumed that the Minister would not wish to deport in circumstances where this would breach international human rights instruments to which Ireland is a signatory, even if they are not binding in Irish law – such as the Council of Europe Convention on Action against Trafficking in Human Beings, which – for example – prohibits the deportation of child victims of trafficking if it is not in their best interests.<sup>113</sup> **Equally, this separate guidance should also cover situations where issuing a residence permission would be necessary to comply with international good practice.** For example, a separated child may be entitled to remain in the State to comply with the Separated Children in Europe Programme Statement of Good Practice.<sup>114</sup>

**Finally, this separate guidance should make clear that the Minister has discretion to award residence permissions on purely humanitarian grounds and provide guidance on how that discretion should be exercised.** Of course, an inflexible policy should be avoided – and each case should be considered on its own merits.

S.83(1) provides that the Minister shall not grant a residence permission under s.79(2)(c) unless there are “compelling reasons” to permit the foreign national to remain in the State. **Guidance should make clear that compliance with Ireland’s domestic law and international law commitments, including Ireland’s commitments not to refoule a person, are by definition compelling reasons.** Further, the test of compelling reasons should not be understood to impose an additional standard of proof beyond that required, for example, in s.53 of the Bill, which prohibits refoulement.

<sup>108</sup> By analogy with *D v UK* (1997) 24 EHRR 423 – although this dealt with treatment in the country of origin.

<sup>109</sup> See, e.g., *Mayeka and Mitunga v Belgium*, Application no. 13178/03, 12 October 2006.

<sup>110</sup> See, e.g., for the factors of which account can be taken when assessing whether Article 8 would be breached *Guel v Switzerland*, Application No. 23218/94, 19 February 1996, *Boultif v. Switzerland* (2001) 33 EHRR 1179. As regards the Irish Constitution see, e.g., *Fajajonu v Minister for Justice* [1990] 2 IR 151.

<sup>111</sup> See, in the field of extradition law, *McMahon v Leahy* [1984] 1 IR 525.

<sup>112</sup> See e.g. *R (Ullah) v Special Adjudicator* [2004] UKHL 26.

<sup>113</sup> See Council of Europe Convention on Action against Trafficking in Human Beings (Warsaw, 16.V.2005), Council of Europe Treaty Series - No. 197.

<sup>114</sup> See UNHCR/Save the Children, Separated Children in Europe Programme, Statement of Good Practice, 3rd edition, (2004), especially at Article 13.

S.83(2)(a) provides that in determining whether compelling reasons exist in a particular case the Minister must consider whether the presence of the applicant in the State would give the applicant an “unfair advantage compared to a person not present in the State but in otherwise similar circumstances.” **The Bill should be amended to clarify that where a person is entitled to a residence permission to comply with Ireland’s domestic law or international law commitments, no such unfair advantage arises.** After all, adherence with Irish law or international law commitments should not be viewed as conferring an unfair advantage.

S.83(2)(b) states that the Minister in determining whether compelling reasons exist shall not be obliged to take into account factors in the case that do not relate to reasons for the applicant’s departure from his or her country of origin or that have arisen since that departure. **Guidance should make clear that s.83(2)(b) cannot derogate from the obligation to comply with Irish domestic law requirements such as the statutory duty to prevent refoulement in the Bill as well as the duty to comply with the Convention and the obligation to comply with the Constitution.**

It is a matter of concern that an application for protection is the *only* procedure under the Bill that allows a person unlawfully in the State to regularise his or her position.<sup>115</sup> It is true that the Minister from time to time claims to have an executive power to issue residence permissions. But it is not clear that this power in fact exists, or – failing that – will survive the passing of the Bill.<sup>116</sup> There is the real danger, therefore, that the protection system will end up dealing with

immigration matters that it is not designed to handle. In some circumstances, it can be the human right of a person unlawfully in the State to remain here, or at least to have his or her family rights considered.<sup>117</sup> The Minister may also wish to regularise the position of immigrants on humanitarian grounds. There should also be a clear statutory procedure, separate to the procedures for protection applications, under which this can be done. **In order to preserve the integrity of the protection system, to protect the human rights of immigrants and to allow discretion to be exercised on humanitarian grounds for immigrants, the Bill should provide a statutory procedure for regularising the position of persons unlawfully in the State that is separate to the single procedure for protection applications.**

No appeal lies to the Protection Review Tribunal of a decision to grant a residence permission under s.79(2)(c).<sup>118</sup> However, a single procedure for protection should logically have a single appeals procedure. **Therefore it is recommended that it should be possible to appeal a refusal to grant a residence permission on grounds that a person would otherwise be refouled.** Should the Minister agree to establish an appeals mechanism for immigration matters, then it should be possible to appeal to it a refusal to grant a residence permission on grounds unrelated to protection or non-refoulement.

## SUMMARY DEPORTATION

One of the most important changes being brought about by the Bill is the introduction of summary deportation. This allows a person illegally in the country to be arrested by a Garda and deported without notice.<sup>119</sup> There are strong grounds for

<sup>115</sup> With the possible exception of a victim of trafficking – see s.124 of the Bill – although this section does not lay down a clear procedure for such persons.

<sup>116</sup> As regards the survival of an executive power in an area for which legislation has been passed see in Ireland *Department of Agriculture v Rooney* [1920] 1 IR 176; *Egan v MacReady* [1921] 1 IR 265; *Laurentiu v Minister for Justice, Equality and Law Reform* [1999] 4 IR 26, especially at pp 63 and 93. As regards the situation in Britain see e.g., *Attorney General v. De Keyser’s Royal Hotel Ltd* [1920] AC 508; *Laker Airways Ltd v Department of Trade* [1977] QB 643 (CA); *R v Secretary of State for the Home Department ex p Northumbria Police Authority* [1989] QB 26 (CA); *R v Secretary of State for the Home Department ex p Fire Brigades Union* [1995] 2 AC 513. Also, there is a lack of clarity about how and when this power will be exercised and to whom applications should in practice be made and by whom decisions will in practice be taken.

<sup>117</sup> As regards the ECHR see *Sisojeva v Latvia* (2006) 43 EHRR 33 and the Grand Chamber judgment of 15 January 2007, Application No. 60654/00. As regards the Constitution see *Fajujonu v Minister for Justice* [1990] 2 IR 151.

<sup>118</sup> This is currently not provided for. See s.81(7) of the Bill.

<sup>119</sup> See s.54 of the Bill.

believing that this is unconstitutional.<sup>120</sup> Further, no administrative mechanism has been put in place to ensure that a person is not refouled. As a result, the possibility of a person being returned to a country where he or she may be tortured must be significantly increased. In view of this, **it is strongly recommended that the provisions of the Bill introducing summary deportation be withdrawn.**

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<sup>120</sup> See *Bode v Minister for Justice* [2007] IESC 62, *Oguekwe v Minister for Justice* [2008] IESC 25.

# Summary Of Recommendations

## PROTECTION STATISTICS IN IRELAND

1. In the interests of transparency, it is recommended that full statistics on judicial reviews commenced against each of the bodies involved in administering the immigration system be published, including data on:
  - against whom the cases were taken;
  - if settled, the stage at which settlements were reached (pre-leave or post leave) and the time after initiation of proceedings and before any hearing that they were settled;
  - if not settled, the outcome of cases;
  - the type of the cases; and
  - the legal costs involved.
2. The State should abandon its practice of insisting routinely on confidentiality clauses in settlements on asylum and immigration matters, while ensuring that the identity of applicants is protected.
3. It is recommended that the Minister commission independent comprehensive research into the reasons why the Irish protection recognition rate is lower than the EU average (perhaps conducted by UNHCR). This research should, in particular:
  - examine over a number of years the extent to which this is or is not solely a function of variations in the countries of origin of applicants;
  - identify the countries for which Ireland's recognition rate is particularly different;
  - identify what issues may be causing the

differential, such as possible differences in interpretation of country of origin information and/or a possible culture of disbelief; and

- make appropriate recommendations.
4. In view of the differences in recognition rates throughout the EU, the Government should support any future EU initiatives to improve the quality of first instance decision making on an EU wide basis.
  5. In view of the high level of judicial reviews being settled, the associated costs, and the risk that the problem could get worse with the added demands of a complex single procedure, the Government should accept the need for fundamental reform to improve the quality of decision making at first instance.

## FRONTLOADING

6. It is recommended that the ORAC and RLS group examining frontloading introduce the concept, having regard to the results of the Solihull project.
7. The Minister should be under a duty to provide information about the application process, insofar as practicable, before the application is submitted. The Bill should also require that applicants be informed of their right not only to consult a solicitor but also to apply for legal aid.
8. Applicants should be clearly advised to seek legal advice at the earliest possible stage and, above all, before they fill out the questionnaire.
9. Whatever deadlines are set for submission of documents by the applicant should be



clearly drawn to the applicant's attention and should allow the applicant sufficient time, including time to consult a lawyer.

10. Every applicant should be able to have legal advice tailored to his or her case, in particular when filling out the questionnaire required as part of the protection application process. To this end, the resources of RLS should be reviewed fundamentally in order to ensure that it can provide early legal advice.
11. Before the substantive interview the legal representative and the interviewer should meet to define the issues in dispute and the evidence required.
12. The legal representative should attend the substantive interview. His or her primary task should be to ensure that the applicant is able to put forward all relevant aspects of his or her claim. To this end, the legal representative should be able to present the issues of fact and law arising and to ask questions.
13. After the interview has concluded, the legal representative and the interviewer should meet to assess whether there are any further issues outstanding and the applicant should be allowed to submit further information or documents without any adverse finding as to his or her credibility being necessarily made.
14. Reducing the number of follow up interviews should remain a performance indicator and not become a goal in and of itself. With good advance preparation, the number of callbacks can be expected to decline but they will still be necessary on occasion, not least to ensure fair procedures.
15. Legal advice and representation should continue to be provided by qualified lawyers only at this time, with caseworkers continuing to provide support to them where appropriate.
16. Possible moves by the EU towards frontloading on a European basis are welcome and should be supported by the Government.

#### MANAGING THE PROCESS OF CHANGE TRANSPARENTLY

17. The working group on frontloading should be expanded to involve NGOs in the field.
18. It is recommended that the Minister provide reassurance that protection applications will be determined impartially under the new single procedure.
19. It is recommended that all existing guidelines on the protection process be published and, further, that there be consultation on their revision to take account of the single procedure and any other points that consultees may raise.
20. It is particularly important to consult on and publish guidelines covering all aspects of the procedure for vulnerable groups such as victims of sexual violence, trafficking or torture; children - especially separated children; traumatised persons and people with mental health issues. These should comply with any relevant UNHCR guidance.
21. In line with best practice in other jurisdictions, guidelines should also be consulted on and published regarding all groups that may be subject to persecution. Again, these should comply with any relevant UNHCR guidance. In particular, Ireland should adopt comprehensive gender guidelines.

22. Guidelines should also be consulted on and published with regard to internal flight. These guidelines should make clear that internal flight must not be used as a ground to deny an application for protection where it is not reasonable to expect the applicant to travel to or stay in the allegedly safe area. In considering this, not only should the general conditions prevailing in the area be considered, but also the personal circumstances of the applicant.
23. All guidelines should be reviewed every two years to ensure that they are appropriate in the light of experience and properly applied. The outcome of any such reviews should also be supplied to UNHCR.
24. The importance of responding to EU and ECHR caselaw should be explicitly recognised in ORAC's Strategy Statement and appropriate steps taken to ensure that this happens.

## ENSURING FAIR PROCEDURES

### Language issues

25. It is recommended that the Bill require that information be given in a language that the protection applicant understands.
26. It is recommended that an interpreter should be provided whenever necessary to ensure that the applicant understands. Further, an interpreter should always be provided when requested at the time of the initial and substantive interviews.
27. It is recommended that guidance be consulted on and published regarding translation and interpretation in the protection context, par-

ticularly regarding interpreting standards at interviews, and that a transparent framework for regulation of translation and interpretation services be put in place – including regarding the standards and qualifications of those involved.

28. It is never acceptable for the substantive interview to use telephone interpreting and this practice should end.

### Getting the record straight: Audio recording

29. The Bill should require that initial and substantive interviews be audio recorded.

### Time to gather evidence

30. Whether an application is prioritised or not, applicants must be granted enough time to assemble their cases and gather evidence, including medical reports and country of origin information. Clear guidance to this effect should be published.

### Country of origin information

31. It is recommended that RDC consider the terms on which NGOs and barristers and solicitors not associated with UNHCR, RLS, ORAC, RAT the Department might access the research services of the RDC.
32. Attention must always be paid to the quality and reliability of country of origin information. It should never be used selectively or disregarded and should always be up to date. Where there are contradictory country of origin reports, reasons should be given for preferring one over the other. Where ORAC disagrees with country of origin information

put by the applicant that is significant and relevant, this should be disclosed so that the applicant may comment on it.

33. Every effort should be made to gather country of origin information for all social groups. Where, for example, statistical data on the incidence of persecution against certain social groups is not available, then alternative forms of information should be considered.

#### Medical evidence

34. It is important that decision makers are familiar with the Istanbul Protocol and understand the meaning of key terms.
35. Proper weight should be given to medical reports and they should not be used selectively or disregarded. If medical evidence is rejected, a rational explanation should be given for this.

#### THE BURDEN OF PROOF AND THE BENEFIT OF THE DOUBT

36. It is recommended that the Bill be amended to reflect the shared duty on the applicant and the Minister to ascertain all the facts relevant to a protection claim.
37. It is recommended that the Bill be amended to comply with the UNHCR Handbook on the benefit of the doubt.
38. Guidance on the standard of proof should be consulted on and published. It is important that any guidance be clear that past persecution gives rise to a rebuttable presumption that the applicant has a well founded fear of future persecution.

#### Tackling a perceived “culture of disbelief”

39. It is recommended that the Bill be amended to make clear that it is the application, not the applicant, that should be credible. Factors that are irrelevant to the credibility of the application should not be considered.
40. The interviewer must consider any explanation offered by the applicant as to why he or she did not raise matters material to his or her claim at the outset and explain why if those reasons are believed not to be credible.
41. Where negative findings as to credibility are made, these should always be fully reasoned, and negative findings should not be drawn on the basis of peripheral matters only.
42. When interviewing and assessing credibility, it is also recommended that the Bill require that regard be had to the specific situation of vulnerable persons such as children and victims of torture or sexual violence.
43. It is recommended that insofar as possible there be open public recruitment for interviewers.
44. Only those who volunteer for work with children should be considered for such positions.
45. In association with a university, a one month intensive course in refugee studies should be created. This should be undertaken by all interviewers, but also be open to students and those working outside government with those seeking protection.

46. Interviewers, whether recruited openly or otherwise, should be considered for transfer after three years unless there are good reasons why this should not be done.

#### Monitoring performance

47. Applicants should be surveyed after they have been notified of the decision at first instance on their application. Qualitative research should also be undertaken to find out why applicants feel satisfied or dissatisfied with the first instance process.
48. UNHCR should be engaged to assess the quality of the single procedure when implemented, report publicly and make recommendations for improvement where needed.
49. It is recommended that the complaints process involve an independent element to make sure that complaints are properly investigated, to undertake investigations of complaints of serious irregularities and to ensure that where shortcomings are identified, this is followed up with training or, where appropriate, disciplinary action.
50. The statutory exclusions of immigration and protection matters from the remit of the Ombudsman for Children and the Ombudsman should be removed.

#### PREVENTING REFOULEMENT AND PROTECTING RIGHTS

##### Carriers' liability

51. It is strongly recommended that a defence be inserted into the Bill to protect carriers who have reason to believe that a person travelling to the State intends to make an application for protection or is in need of protection.

#### S.79(2)(c) residence permissions

52. Guidance should be issued to officials dealing with the single procedure on the circumstances where a person would be entitled to a residence permission on non-refoulement grounds.
53. That guidance, if not the Bill itself, should also make clear that refoulement may be direct or indirect.
54. Separate guidance should be issued on when a person would be entitled to a residence permission on grounds unrelated to protection or non-refoulement as a matter of domestic law. On balance, it is recommended that this guidance should not be administered by those considering the protection claim, but by INIS staff considering immigration matters generally.
55. This separate guidance should also cover cases where, in accordance with Ireland's international law commitments, a person would be entitled to a residence permission.
56. This separate guidance should also cover situations where issuing a residence permission would be necessary to comply with international good practice.
57. This separate guidance should make clear that the Minister has discretion to award residence permissions on purely humanitarian grounds and provide guidance on how that discretion should be exercised. Of course, an inflexible policy should be avoided – and each case should be considered on its own merits.
58. Guidance should make clear that compliance with Ireland's domestic law and international law commitments, including Ireland's commit-

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ments not to refoule a person, are by definition compelling reasons within the meaning of s.83.

59. The Bill should be amended to clarify that where a person is entitled to a residence permission to comply with Ireland's domestic law or international law commitments, no such unfair advantage arises.
60. Guidance should make clear that s.83(2)(b) cannot derogate from the obligation to comply with Irish domestic law requirements such as the statutory duty to prevent refoulement in the Bill as well as the duty to comply with the Convention and the obligation to comply with the Constitution.
61. In order to preserve the integrity of the protection system, to protect the human rights of immigrants and to allow discretion to be exercised on humanitarian grounds for immigrants, the Bill should provide a statutory procedure for regularising the position of persons unlawfully in the State that is separate to the single procedure for protection applications.
62. It is recommended that it should be possible to appeal to the Protection Review Tribunal a refusal to grant a residence permission on grounds that a person would otherwise be refouled.

#### SUMMARY DEPORTATION

63. It is strongly recommended that the provisions of the Bill introducing summary deportation be withdrawn.
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# Notes



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