

# NGO Coalition Briefing Paper on the IMMIGRATION, RESIDENCE & PROTECTION BILL 2010

## INTRODUCTION & CONTEXT

Ireland's immigration system is based on the issuing of temporary residence permits, many granted at the discretion of the Minister for Justice, without clearly defined rules or rights. Lack of clear rules and decision-making based on discretion creates the conditions under which applications can take years, literally, to process. Ireland's protection system is also fraught with lengthy delays in decision-making and lack of transparency. The result is costly and inefficient immigration and protection systems that can cause enormous hardship for the people involved. Lack of transparency in the immigration and asylum decision-making processes has created an over-reliance on the courts for adjudication.

Over the past 10 years, Irish governments have sought to overhaul Ireland's immigration and protection systems. We acknowledge the work that has been done so far in this regard. Three versions of the Immigration, Residence and Protection (IRP) Bill were produced each, we believe, with very serious short-comings. The current Government has re-introduced the IRP Bill 2010 at Committee Stage and foreshadowed significant amendments. This represents an opportunity for a new approach to immigration and protection that will address previously identified flaws, such as, lack of transparency, lack of fairness, inefficiency and costly reliance on the courts.

This NGO coalition has set out briefly below key areas of suggested reform. Each of the NGOs in the coalition is happy to provide more details about these and other issues that fall under their remit.

## KEY ISSUES IN THE 2010 BILL

### TRANSPARENCY & CLARITY

The IRP Bill 2010 fails to set out the rules upon which people can enter and remain in the State. Instead, many decisions would be dependent on the discretion of the Minister for Justice and Equality who is also empowered to make wide-ranging supplementary regulations at a later date which will not be subject to proper parliamentary scrutiny. In line with the principle of certainty in law, the Bill should set out, in primary legislation, clear provisions regarding the rights, entitlements and obligations of migrants in the State. To ensure transparency, migrants should be able to access their files in immigration and asylum related decisions under the Freedom of Information Act 1997-2003. It is important to note that immigration and protection legislation has a differential impact on men and women. These issues need to be addressed in the revision of the IRP Bill.

### SUMMARY REMOVAL

The IRP Bill 2010 would allow someone who is in the State without permission to be removed without notice. In contrast, the current system provides an individual 15 working days to make representations to the Minister setting out why he/she should be allowed to remain in the State. Those reasons can include situations such as threats of violence, trafficking, exploitation, family and medical grounds and other humanitarian considerations. The new Bill would take away this basic provision and create the conditions under which vulnerable migrants and those in need of protection may be removed without having had access to justice and fair procedures. The 15-day provision needs to be retained.

The Bill also effectively moves the decision-making power in relation to removals from the Minister to immigration officers and members of An Garda Síochána. The Bill proposes that immigration officers and members of An Garda Síochána are given powers to make decisions in respect of a person's fundamental rights and the principle of non-refoulement, a principle in international law that concerns the protection of refugees from being returned to places where their lives or freedoms could be threatened. This is a deeply flawed situation, considering

that immigration officers and members of An Garda Síochána will not have the legal expertise to assess the humanitarian and protection needs of a person who is liable to summary removal under the legislation. This is a very dangerous, fundamental shift of powers that needs to be addressed.

### ACCESS TO JUSTICE

It is fundamental to the rule of law that all individuals subject to administrative decisions should have access to effective remedies, including access to an independent appeals body or, if necessary, to the courts. The provisions of the IRP Bill fall considerably short in this regard and consideration should be given to the following:

#### (A) Independent Appeals Mechanism

The 2010 Bill provides for a Protection Review Tribunal (PRT), which will replace the Refugee Appeals Tribunal. However, the proposed PRT has significant shortcomings and is not independent. Its members are appointed by the Minister, not an independent body, appeals are routinely heard in private, hearings are allocated by the chairperson whose guidance to the members is not available, decisions are not published and members are not required to have any experience in international protection law or practice. In addition, the PRT will not be able to hear appeals except on the grounds of asylum or subsidiary protection. The legislation does not provide any independent appeal mechanism for other human rights or immigration-related decisions.

The legislation should be amended to provide for independent appeals for both protection and immigration decisions. An appropriate appeals system does not consist of internal review by a more senior officer and should involve the following: appointments by an independent committee, appointment of legally qualified and experienced decision-makers and publication of decisions to ensure the establishment of precedent.

#### (B) Judicial Review

The absence of a mechanism for dealing with a variety of appeals by an independent body (e.g. against refusal of a visa to join family resident in Ireland; refusal to renew residency; revocation of refugee status; the making of a deportation order or issuing of a removal notice) means that in appropriate cases administrative decisions can only be challenged by judicial review.

The IRP Bill 2010 proposes to limit the time allowed to lodge an application for judicial review for all decisions made pursuant to the legislation to 14 days. It would also curtail the High Court's power to extend this time

period. This could be unconstitutional and in breach of Ireland's international human rights obligations. The Bill also proposes that, if a judicial review application is considered 'vexatious or frivolous', costs may be awarded against the applicant's legal representative. These proposals are extremely discriminatory and do not apply to any other persons bringing any type of legal action in the courts. These measures have the potential to severely undermine an individual's access to the courts to determine an issue related to fundamental human rights. The existing possibility that a losing party can be made to pay for court proceedings is sufficient without the need for additional measures aimed only at those representing migrants and refugees.

### INTERNATIONAL PROTECTION

Ireland is a signatory to various international conventions including the UN Convention on Refugees and elements of what are known as the Common European Asylum System, notably the Dublin II Regulation (which determines which EU state is responsible for considering an asylum application), the Qualifications Directive (which introduces the concept of 'serious harm' and provides for 'subsidiary protection') and the Procedures Directive (which outlines the minimum standards which apply to consideration of asylum claims and the procedures for withdrawing refugee status). The Bill introduces a 'single protection procedure' in which an asylum and subsidiary protection claim will be considered together at the outset. This brings a welcome answer to the delay in the current system of split applications.

Without significant procedural protections in place which counter the assumption that those seeking international protection in Ireland are not in fact 'genuine refugees', the single procedure will simply lead to quicker refusals which will continue to be challenged in the Tribunal and the higher courts, re-introducing the delay and the costs of lengthy court proceedings.

Ireland was referred to the Court of Justice of the European Union by the European Commission for failure to pass the Procedures Directive into domestic legislation. If the Bill fails to implement procedures for the fair and impartial determination of protection claims, it will not satisfy the needs of those who fear persecution or serious harm to have their claims properly determined. Furthermore, there is a critical need for gender sensitivity in asylum processes in Ireland to provide equal treatment and protection for women. In addition, female asylum applicants may disclose gender-based violence that amounts to persecution late in the asylum process, due to shame connected with sexual trauma or cultural barriers, which can harm their cases and ultimately deny them protection. Many jurisdictions have

gender guidelines to ensure that women's claims are properly assessed under the Refugee Convention.

Finally, there is a risk that people in need of protection will be refused entry to the state under vague and ill-defined phrases such as 'public policy'.

#### ▶ PROTECTING VICTIMS OF TRAFFICKING

The Government cannot combat trafficking of persons unless victims of trafficking are given adequate protection in a way that recognises their particular vulnerability. In line with Ireland's international obligations, the legislation should ensure that victims of trafficking must be formally identified when reasonable grounds exist to suspect they are victims of crime, irrespective of their nationality or current immigration status, including whether they have applied for protection. Such provisions should include a recovery and reflection period and temporary residency based on humanitarian grounds, independent of the ability or willingness of the trafficked person to co-operate with law enforcement authorities. The current 60-day 'reflection and recovery' period in the Bill may not be sufficient to enable either the individual victim or the law enforcement agencies to decide how to proceed; flexibility is required.

#### ▶ RESPECT FOR FAMILY LIFE

Family reunification is the primary source of immigration internationally and is a major issue of concern to Irish citizens, refugees and migrants in Ireland. In stark contrast to other EU Member States, Ireland does not have national rules regarding family reunification enshrined in primary legislation. Despite some improvements in administrative policies in recent years, there remains a lack of clarity regarding which family members may be admitted or the conditions under which family reunification may be granted. The wide discretion of the Minister with regard to granting of family reunification has led to a lack of transparency and inconsistency in the decision-making process. Processing times of applications vary considerably and can often be very lengthy.

Except for those granted protection, the current draft legislation contains no provisions regarding family reunification for Irish citizens and other migrants. Given the fundamental importance of family life to all in society, the legislation should be amended to address this deficit by providing a clear entitlement for Irish citizens and all legal residents, including those granted protection, to be joined by immediate family members, including spouses/partners and minor children. Provisions should also allow for the admission of other family members beyond the nuclear family, such as dependent parents and dependent adult children or

siblings, on fulfillment of certain conditions and which takes account of situations that families can find themselves in as a result of conflict and displacement

#### ▶ INDEPENDENT RESIDENCE & PROTECTIONS FOR VICTIMS OF DOMESTIC VIOLENCE

In addition to family reunification provisions, the legislation should also clearly set out the associated rights of family members, for example, the right to work, and to be granted autonomous residence permits after a certain period of residence in Ireland or following a change in circumstances, for example, following death, separation and in situations involving domestic violence. Under the current system, residence in such cases is granted on a discretionary basis and there is no published information on the application process or the criteria that apply for individuals in such situations. Accordingly, many victims of domestic abuse do not leave violent situations as there is no clarity regarding their rights and entitlements to access support services or retain their residence.

#### ▶ CHILDREN

Children and young people under the age of 18 are particularly vulnerable by virtue of their age, lack of life experience or quite possibly because they have been exposed to extreme violence and abuse. The 2010 Bill should include measures that recognise that vulnerability. These include the need for decision-makers to give primary consideration to the principle of the best interests of the child, a clear definition of a 'separated child', the appointment of a guardian for separated children, and the ability to make an application for protection even if they come within a family unit.

Children under the age of 16 years are not registered in the State. There is pressing need to introduce a residency status for this group of people and transfer the residency rights of their parents to them. They should be acknowledged as a distinct group and not be deemed international students. As the Bill stands, none of these measures are contained within it, leaving children at risk.

#### ▶ RESPONDING TO EXPLOITATION

Provision in the Bill to renew the residence permissions and protect migrant workers who have become undocumented through no fault of their own is welcomed and needs to be retained. This responds to migrant workers who previously held a residency status for the purposes of employment, but have been subject to exploitation, fraud, deception and abuse.

**PERMANENT RESIDENCE**

The granting of permanent residence status is internationally recognised as best practice for the promotion of integration. Ireland performs particularly weakly in this area compared to other countries internationally. The US and Canada provide permanency options on arrival. Most EU countries have adopted the Long-Term Residence Directive, however Ireland has opted out. The IRP Bill proposals remain weak as there is no permanency option, Long Term Residency involves satisfying vague qualifying criteria, which are considerably more exclusive than the current administrative scheme. If granted, rights and responsibilities remain unspecified. Permanent residence should be available to all categories of legal residents, including those granted protection.

of their residence permission. When an application has been made before the expiry of a residence permit, a clause should be introduced rendering the applicant lawfully resident until the application is finally determined. This would prevent the individual being in breach of employment conditions and eligibility for other statuses such as citizenship or long term residency.

A key issue of concern is the situation relating to undocumented migrants in Ireland. Based on data from the Department of Justice, Equality and Law Reform (DJELR), there are approximately 30,000<sup>1</sup> undocumented people in Ireland today. The re-introduction of the IRP Bill 2010 presents an opportunity for the State to provide a wider framework for the regularisation of undocumented migrants in Ireland.

**UNLAWFUL RESIDENCE & REGULARISATION**

One of the ways in which some individuals can become unlawfully resident, or undocumented, is due to the delays in the processing of their applications for renewal

1. The figure is compiled from DJELR data and based on figures from ICMRD on regularisations in the EU, January 2009.

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