

Universal Periodic Review: Ireland

Submission by the

Immigrant Council of Irelandⁱ

to the

**12th Session of the UPR Working Group
in October 2011**

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21st March 2011

1. Administration of justice and the rule of law – access to independent appeals for immigration/naturalisation decisions

The current system for the administration of immigration and naturalisation decisions, including the refusal of visas, leave to land and residence permits, is based on ministerial discretion. This, in conjunction with a lack of clear rules and guidelines, gives rise to lengthy delays and inconsistencies in decision-making and results in the need to challenge many of these decisions in the High Court. The ICI believes the establishment of an independent appeals mechanism to include immigration and naturalisation decision would an effective legal remedyⁱⁱ that provides transparency to the decision-making process and could be more cost effective than the current over-reliance on the courts. The ICI's view has been echoed by the UN Human Rights Committee in its Concluding Observations on Ireland's compliance with the ICCPR in 2008.ⁱⁱⁱ

Currently, people seeking to challenge decisions refusing them permission to remain in the State or permission to enter the State – for example for the purpose of family reunification or the preservation of the family unit – are effectively forced to seek judicial review of that decision by the High Court instead of accessing an independent appeals tribunal. The ICI believes that access to justice for migrants already is limited in that the High Court, as part of judicial review proceedings, is not in a position to review the merits of a case and cannot deal with questions of fact. Unlike an expert administrative tribunal, the High Court does not have the power to alter or vary an administrative decision.

Furthermore, the Office of the Ombudsman has observed that there has never been any good reason why prisons and all issues relating to immigration, refugees, asylum seekers and naturalisation have remained outside the Ombudsman's jurisdiction. *“For other national Ombudsman Offices these areas have always been a central element of the overall jurisdiction. In the absence of access to the Ombudsman, asylum seekers in particular are left with no alternative other than the High Court when they are unhappy with how they have been treated”*.^{iv} More than half of all judicial review applications (749 applications in 2009) are asylum and immigration related.

RECOMMENDATIONS:

- 1.1. Establish an independent appeals mechanism to include immigration and naturalisation decisions to provide more effective, transparency and cost-effective decision-making**
- 1.2. Extend the remit of the Ombudsman to include prisons, asylum, immigration and naturalization decisions**

2. Right to privacy, marriage and family life – lack of right to family reunification for those who are not recognised refugees/EEA nationals

Family reunification is a major source of immigration internationally and a major issue of concern to migrants and Irish citizens in Ireland due to the absence of a formal application process, apart from recognised refugees and EU citizens. There is a lack of clarity regarding which family members may be admitted to the State, the conditions under which family reunification may be granted and the length of time it takes to process applications. The wide discretion of the Minister with regard to granting of family reunification has led to inconsistencies and a lack of transparency in the decision making process. The ICI believes migrants' rights to private and family life should be spelt out clearly in primary law.

Given the fundamental importance of family life to all of society, Irish legislation should provide a clear entitlement for Irish citizens and legal residents to be joined by immediate family members, including

spouses or partners and minor children. Discretionary provisions should allow for the admission of other family members, such as parents and dependent adult children, on certain conditions.

The fact that Irish citizens do not have a statutory right to be joined by non-Irish family members in Ireland is referred to as ‘reverse discrimination’ in comparison to the rights that apply to other EU citizens under the EU Free Movement Directive (2004/38EC).

RECOMMENDATION

2.1. Introduce statutory provisions providing a right to family reunification in Ireland for Irish citizen and legally resident migrants

3. Rights of the Child – issues regarding Irish citizen children and their right to access to the care & company of both parents/constructive expulsion etc.

The ICI is most concerned that the personal rights of the Irish citizen children, including the right to live in the State and to be reared and educated with due regard to their welfare, are not adequately protected by the State.

We are particularly concerned about the constructive expulsion of Irish citizen children who are effectively being ‘driven away’ from their country of nationality, Ireland, for their entire childhood because many are left with no other choice but to accompany their parent or parents who are subject to deportation.^v

This issue will have to be addressed as a matter of urgency, particularly in light of the recent decision of the CJEU in the case of *Zambrano v Office national de l’emploi*,^{vi} which confirmed that the rights of EU citizen children come directly from Article 20 TFEU on citizenship of the Union, including the right to live in their country of nationality, the right for their third country parents to live with them in their country of nationality and the right to a work permit for the third country national parents.^{vii}

RECOMMENDATION:

- 3.1. Protect the personal rights of Irish citizen children of migrant parents, including the right to live in the State and to be reared and educated with due regard to their welfare**
- 3.2. Ensure that Irish citizen children are not ‘constructively expelled’ from the State**

4. Women’s Rights – migrant women suffering domestic violence (independent permits, access to refuges and necessary welfare payments)

As set out above, current immigration legislation does not provide a statutory right to family reunification and there are no provisions for the granting of independent residence permits for family members after a specified time, nor does Irish law currently contain a ‘*domestic violence concession*’ providing for the granting of independent residence permits to those whose permits were originally granted on the basis of their family relationship with an abusive partner.

While the Minister for Justice, Equality and Defence does in many cases exercise his discretion to grant residence permits to those having escaped abusive relationships, we remain concerned that this is not based on a right on the part of the migrant women concerned. In fact, the website of the Irish Naturalisation and Immigration Service states in relation to those who are resident in Ireland on the basis of a marriage to an Irish national, that “*there are no rights of retention of residence in the event of*

separation/divorce^{viii}. Similarly those in a ‘de-facto relationship’ with Irish and non-EEA nationals are informed that “*there are no rights of retention of residence in the event of separation*”.^{ix}

We are concerned that in this situation many migrant women remain in abusive relationships for fear of losing their right to reside in Ireland and with that, possibly, access to their legally resident and/or Irish citizen children. Furthermore, due to the ‘*habitual residence condition*’ many women who have escaped a violent relationship find themselves unable to access social support services and women’s refuges as, without an independent permit having been granted to them, they do not fulfill the necessary requirements under Section 246 of the Social Welfare Consolidation Act 2005^x.

RECOMMENDATION:

- 4.1. Introduce, as a matter of urgency, legislative measures to ensure that migrant and asylum seeking women who suffer domestic abuse will have access to secure immigration status and the necessary welfare benefits, including access to women’s refuges**

5. Trafficking

The ICI is concerned that the recovery & reflection period of 60 days^{xi} is unnecessarily short. Victims of trafficking will often be highly traumatised and may not recover sufficiently within 60 days to make an informed decision about whether to participate in an investigation and/or prosecution.

We are deeply concerned that, a temporary residence permit may only be issued in circumstances where the Minister is “*satisfied that it is necessary for the purposes of allowing the suspected victim to continue to assist the Garda Síochána or other relevant authorities in relation to any investigation or prosecution arising in relation to the trafficking*”. This will not allow the victim to remain in Ireland in order to pursue a civil action against traffickers and it fails to provide an avenue to residence on humanitarian grounds for victims who are too traumatised to return to their country of origin. Overall, victims of trafficking are left in a situation of passivity by not allowing them to make applications for recovery and/or protection residence permits. Instead, the impetus for granting these permits must come from either the Garda Síochána or the Minister. The ICI does not believe that this process will assist the victims in their long-term recovery and re-integration and that it might perpetuate their victimisation.

Additionally, the ICI remains concerned that minimum standards required by the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* are not met.

RECOMMENDATION:

- 5.1. Adopt legislative and other measures ensuring minimum assistance, including at least: appropriate housing, counseling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand, medical, psychological and material assistance, employment, educational and training opportunities, consideration of the special needs of children, including appropriate housing, education and care as well as measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered**
- 5.2. End the exclusion of victims of trafficking who have made an application for international protection from the granting of recovery & reflection periods and, most importantly, temporary residence permits**

6. Right to work and to just and favorable conditions of work

Section 8 of the Employment Permits Act provides that an employment permit facilitates the employment of a foreign national in the State in a particular economic sector for the duration of the permit's validity. However, State policy has been to continue to issue an employment permit for a specific position with a particular employer for all types of employment permits.^{xii}

The Act provides for a Ministerial power which allows him or her to refuse the issuance of a new permit in the first twelve months of a permit being issued. The ICI is concerned that no statutory exception is provided for in the cases of exploitation and in such circumstances, a solution for the permit-holder is dependent on the existence of an alternative offer of employment, the job not being excluded from the 'eligible job categories'^{xiii}, being full-time and paying at least €30k per annum as well as an employer willing to apply for a permit. Allowing for mobility within an economic sector, as actually provided for in the relevant legislation, would alleviate this problem.

RECOMMENDATION:

6.1. Implement existing legislating which provides for mobility within an economic sector and work permit holders should have the freedom to change employers to any job on the eligible category list

6.2. Introduce adequate legal remedies to ensure that exploited workers employed at embassies can assert their rights and have their grievances heard

7. Right to health

Entitlement to health services in Ireland is primarily based on residency and means. Any person, regardless of nationality, who is accepted by the Health Services Executive (HSE) as being ordinarily resident in Ireland is entitled to either full or limited access to public health services.

A person deemed ordinarily resident can access state-subsidised health care services and apply for a means-tested medical card. A non-EEA national is regarded as '*ordinarily resident*' if they can satisfy the health authority that they intend to remain in Ireland for a minimum of one year. If a person is not deemed to be ordinarily resident, the health authority may apply the full charge for the service provided or provide urgent necessary treatment at a reduced rate or without charge.^{xiv} In practice, this excludes many migrants, in particular, undocumented migrants, including children, from an entitlement to access medical treatment other than emergency care.

The Irish government does not seem to be prepared to grant permission to remain in the State to undocumented migrants, including children, who have health needs, even in a situation where they are at risk of dying upon return to their countries of origin.^{xv} The ICI is concerned that medical personnel working within the HSE are on occasion assuming the role of immigration officers before agreeing to provide treatment to migrants.

RECOMMENDATION:

7.1. Respect all migrants' right to the enjoyment of the highest attainable standard of physical and mental health in accordance with Article 12.1 of the ICESCR, irrespective of their immigration status. We recommend that all migrants in the State, irrespective of their immigration status, should be entitled to preventive, curative, rehabilitative health services, essential drugs and appropriate mental health treatments.^{xvi}

8. Right to education

The majority of primary and second level schools in Ireland are denominational and remain at least partially in the control of religious bodies. In spite of recommendations by the UN CERD Committee^{xvii} and the UN Human Rights Committee^{xviii} the State has failed to amend an aspect of the Equal Status Acts 2000-2008 that allows religious institutions to give preference to people who share their religious ethos in areas such as employment, as well as admittance to schools. Given that the majority of schools in Ireland are under the aegis of one religion, Roman Catholicism, children of other or no faiths have been denied enrolment because the schools can legally deny them access citing their '*Catholics first enrolment policy*'.

If a migrant child has not been naturalised or granted a Stamp 4^{xix} permit by the time they reach third-level education age, they are generally required to pay international student fees to continue their studies. In some cases, colleges will decide that, if an applicant has resided in Ireland for a number of years, they may qualify for a lower level of fees. However, this practice is not universal and varies from college to college and occurs at the institution's discretion. Other obstacles to access to education for young migrants include the fact that they are often not eligible to apply for college scholarships distributed by local authorities and that many scholarships are tied to proficiency in the Irish language.^{xx}

RECOMMENDATION:

- 8.1. Support the broader establishment of non-denominational or multi-denominational schools
- 8.2. Provide more investment in intercultural education and peer-led education
- 8.3. Review the structure of third-level education tuition fees to ensure people with an established immigration history are not excluded by prohibitive costs

9. Minorities – anti-racism

In what has been seen as an attack on the human rights infrastructure of the State, bodies such as the Equality Authority, the Irish Human Rights Commission (hereafter, IHRC) and the National Consultative Committee on Racism and Interculturalism (NCCRI) all faced disproportionately large funding cuts with the latter finding itself closed down altogether. The only independent national racist incident recording point in the State provided for by the NCCRI has not been replaced and funding has not been made available to NGOs working with Black and minority ethnic groups to continue the work, which we believe is particularly critical in these times of economic strife.

There has been no continuation or follow-on to the National Action Plan Against Racism 2005-2008 and consequently Ireland is lacking an integrated, strategic mechanism for government action to respond to racism. Without these bodies and strategies, Ireland is deprived of national leadership, vision and a focal point for anti-discrimination and anti-racism measures as well as a forum for national debate on these matters.

RECOMMENDATIONS:

- 9.1. Tackle racism and xenophobia as a national priority through education and awareness raising initiatives and monitoring of racist incidents nationally.
- 9.2. Introduce legislative reform to allow the judiciary to consider racist motivation an aggravating factor when determining appropriate sentencing

ENDNOTES

ⁱ See ANNEX 1 for a short description of the Immigrant Council of Ireland

ⁱⁱ Article 2 ICCPR

ⁱⁱⁱ The Committee stated that Ireland “should also introduce an independent appeals procedure to review all immigration-related decisions. Engaging in such a procedure, as well as resorting to judicial review of adverse decisions, should have a suspensive effect in respect of such decisions”, Concluding Observations by the UN Human Rights Committee on Ireland, 30 July 2008, para. 19 UN Doc: CCPR/C/IRL/CO/3. This was echoed by the UN Committee on the Elimination of Racial Discrimination in March 2011 which expressed concern “at the failure by the State party to provide for an independent appeals tribunal considering that the remit of the Office of the Ombudsman does not extend to asylum and immigration matters (para. 20 UN Doc: CERD/C/IRL/CO/3-4 advance unedited version – see:

http://www2.ohchr.org/english/bodies/cerd/docs/co/Ireland_AUV.pdf

^{iv} <http://www.ombudsman.gov.ie/en/OtherPublications/StatementsandStrategyDocuments/February2011-DevelopingandOptimisingtheroleoftheOmbudsman/Name,13555,en.htm>

^v There has been a series of Supreme Court rulings regarding the status of parents of Irish citizen children in the State. In the 1990 case of *Fajujonu v. Minister for Justice and another* ([1990] 2 IR 151) the Court clarified that “(...) parents who are not citizens and who are aliens cannot, by reason of their having as members of their family children born in Ireland who are citizens, claim any constitutional right of a particular kind to remain in Ireland, they are entitled to assert a choice of residence on behalf of their infant children, in the interests of those infant children.” However, in that case, the Court held that the reason which would justify the removal of the family from the State would have to be “a grave and substantial reason associated with the common good”. According to the Supreme Court in its subsequent judgment of *Bode (A Minor) v. Minister for Justice, Equality and Law Reform & ors.* ([2007] IESC 62, <http://www.bailii.org/ie/cases/IESC/2007/S62.html>), the constitutional and Convention rights of Irish citizen children and their families are “appropriately considered in the context of representations pursuant to Section 3 of the Immigration Act, 1999 – after receipt of a notice of the Minister’s intention to issue a deportation order”. In the later cases of *Dimbo v. Minister for Justice, Equality & Law Reform* ([2008] IESC 25, 1st May 2008, <http://www.courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/1f5ba1e481dfb88f8025743c003bcda0?OpenDocument>) and *Oguekwe v. Minister for Justice, Equality & Law Reform* ([2008] IESC 26, 1st May 2008, <http://www.courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/7bffd7ef88fb6c4e8025743c003d12d4?OpenDocument>), the Supreme Court confirmed that the Minister must exercise his power to issue deportation orders “in a manner which is consistent with and not in breach of the constitutionally protected rights of persons affected by the order”. The Court also recognised that “the power of the Minister is further constrained by the provisions of (...) the European Convention on Human Rights Act 2003”. Denham J. – delivering the unanimous judgment of the Supreme Court – held that “the Minister should deal expressly with the rights of the child in any decision. Specific reference to the position of an Irish born child of a foreign national parent is required in decisions and documents relating to any decision to deport such foreign national parent”.

^{vi} *Zambrano v Office national de l’emploi* (Belgium), Case No. C-34/-09, 8th March 2011, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009J0034:EN:HTML>

^{vii} This issue was also addressed in the case of *Zhu and Chen v. Secretary of State for the Home Department*, Case C-200/02, 19th October, 2004, where the ECJ held that “a refusal to allow the parent, (...), who is the carer of a child [who has a] right of residence, to reside with that child (...) would deprive the child’s right of residence of any useful effect”. In the words of the ECJ: “(I)t is clear that enjoyment by a young child of a right of residence necessarily implies that the child is entitled to be accompanied by the person who is his or her primary carer and accordingly that the carer must be in a position to reside with the child in the host Member State for the duration of such residence”; see also: <http://www.immigrantcouncil.ie/media/press-releases/462-high-court-grants-leave-to-apply-for-judicial-review-in-case-of-constructive-deportation-of-an-irish-child>

^{viii} <http://www.inis.gov.ie/en/INIS/Pages/WP07000024>

^{ix} <http://www.inis.gov.ie/en/INIS/Pages/WP07000278>

^x As amended by Section 30 of the Social Welfare and Pensions Act 2007 and Section 15 of the Social Welfare and Pensions (No. 2) Act 2009

^{xi} <http://www.inis.gov.ie/en/INIS/Administrative%20Immigration%20Arrangements%20for%20the%20Protection%20of%20Victims%20of%20Human%20Trafficking%20-%20March%202011.pdf/Files/Administrative%20Immigration%20Arrangements%20for%20the%20Protection%20of%20Victims%20of%20Human%20Trafficking%20-%20March%202011.pdf>

^{xii} Department of Enterprise, Trade and Innovation, *Employment Permit Arrangements, Guide to Work Permits, May 2010, p. 3; Guide to Green Card Permits, August 2010, p. 4*

^{xiii} <http://www.deti.ie/labour/workpermits/elements/ineligible.htm>

^{xiv} See section 45(1) and section 47A of the Health Act 1970 (as amended by the Health (Amendment) Act 1991). For further information see: HSE Medical Card National Assessment Guidelines 2009 available on http://www.hse.ie/eng/services/Find_a_Service/entitlements/Medical_Cards/mcgpvcguidelines.pdf.

^{xv} Irish Times, 30th January 2010 – see: <http://www.irishtimes.com/newspaper/ireland/2010/0130/1224263433925.html>

^{xvi} See para. 17 of General Comment No. 14 (2000) on ‘The right to the highest attainable standard of health’ (Article 12 of the ICESCR).

^{xvii} Concluding Observations of the UN Committee on the Elimination of Racial Discrimination, 14 April 2005, para. 18 UN Doc: CERD/C/IRL/CO/2. This was reiterated by the Committee in its Concluding Observations in March 2011:

“Recognising the ‘intersectionality’ between racial and religious discrimination, the Committee reiterates its previous concluding observations (CERD/C/IRL/CO/2) and recommends that the State party accelerates its efforts to establish alternative non-denominational or multi-denominational schools and to amend the existing legislation that inhibits students from enrolling into a school because of their faith or belief. The Committee further recommends to the State party to encourage diversity and tolerance of other faiths and beliefs in the education system by monitoring incidents of discrimination on the basis of belief (para. 26 UN Doc: CERD/C/IRL/CO/3-4 advance unedited version – see:

http://www2.ohchr.org/english/bodies/cerd/docs/co/Ireland_AUV.pdf)

^{xviii} Concluding Observations by the UN Human Rights Committee on Ireland, 30 July 2008, para. 22 UN Doc: CCPR/C/IRL/CO/3

^{xix} <http://www.inis.gov.ie/en/INIS/Pages/Stamps>

^{xx} http://www.immigrantcouncil.ie/images/stories/pdfs/Children_briefing_paper041110.pdf