



CHURCH of IRELAND GENERAL SYNOD
CHURCH in SOCIETY COMMITTEE

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

Introduction

The Church in Society Committee of the General Synod of the Church of Ireland seeks to identify, contribute to, challenge and develop areas of living today where the mission of the Church can be active and the love of God shared. It does so by seeking an informed understanding of the societies in which we live and aims as much to listen as to speak and to be informative and practical in the fruit of its work. The Church in Society Committee is authorised to issue statements and reports in its name. The following submission has been produced by the Church in Society Committee and will be presented to the Church of Ireland General Synod.

This document has been submitted subsequent to the deadline set by the Joint Committee on Justice, Equality, Defence and Women's Rights. We apologise for any inconvenience that delay might cause, and would ask for understanding as the short notice given- only two full working days passed between the receipt of the invitation to make a submission and the deadline set to deliver it- was not sufficient for an adequate appraisal of such an important piece of legislation.

Terminology

As the Immigration, Residence and Protection Bill 2007 is set to regulate the State's approach to immigration and the international asylum process, replacing as it does five previous Acts the earliest of which dates back to 1935, and given the myriad of complex issues that realisation throws up, impinging as it does upon human rights law and the general litigation process, accuracy in the language used is of critical importance.

Bearing such consideration in mind, a certain anomaly arises in that the word 'nationality' is used throughout the Bill in terms of a legal status (i.e. something akin to citizenship), yet the only time it is defined it is done so in the broader terms of a political or social concept (something much more proximate to a sense of shared identity).

Defining nationality is an ongoing debate in academic circles. While that debate remains very much open, common practice is to set aside the lexical approach (i.e. how should we use these words) in favour of a prescriptive approach (i.e. how do we intend to use these words in this instance). The problem emerges in this Bill in that the definition provided

sits incongruously with the use of the word throughout the Bill. In section 65(1), nationality is laid out thusly:

65.—(1) The Minister or, as the case may be, the Tribunal, shall take the following into account when assessing the reasons for persecution:

[...]

(c) the concept of nationality shall not be confined to citizenship or lack thereof but shall in particular include membership of a group determined by its cultural, ethnic, or linguistic identity, common geographical or political origins or its relationship with the population of another State;

While this passage explicitly states that nationality is broader than the legal status of citizenship and may reach to something more akin to a sense of community, section 67(1) assumedly intends that the word be used with its much more limited intention:

67.—(1) A person shall cease to be a refugee if he or she—

(a) has voluntarily re-availed himself or herself of the protection of the country of nationality,

(b) having lost his or her nationality, has voluntarily reacquired it,

(c) has acquired a new nationality, and enjoys the protection of the country of his or her new nationality,

Both these sections are based on the European Communities (Eligibility for Protection) Regulations 2006, which were issued for the purpose of giving effect to Council Directive 2004/83/EC. The same incongruity is to be found in that Directive in the English text- the relevant articles being 10 and 11:

Article 10

Reasons for persecution

1. Member States shall take the following elements into account when assessing the reasons for persecution:

[...]

(c) the concept of nationality shall not be confined to citizenship or lack thereof but shall in particular include membership of a group determined by its cultural, ethnic, or linguistic identity, common geographical or political origins or its relationship with the population of another State;

[...]

Article 11

Cessation

1. A third country national or a stateless person shall cease to be a refugee, if he or she:

(a) has voluntarily re-availed himself or herself of the protection of the country of nationality; or

- (b) having lost his or her nationality, has voluntarily re-acquired it; or
- (c) has acquired a new nationality, and enjoys the protection of the country of his or her new nationality;

It is notable that while this wording has carried from Council Directive 2004/83/EC through the European Communities (Eligibility for Protection) Regulations 2006 and to the Bill currently under discussion, the initial Directive read in different Community languages has different meanings and serves to highlight the nuances at play.

In German *Nationalität* (nationality) is said not to be confined to *Staatsangehörigkeit* (citizenship) in the same manner as the English-language passage, however it continues to state that a person's refugee status is rescinded upon their voluntary re-acquiring lost *Staatsangehörigkeit*, not lost *Nationalität*. A similar distinction is made in the Danish, Italian and Polish texts. For the sake of clarity and consistency it might be beneficial to either replace references to nationality as a legal status with the word 'citizenship', or to redefine the meaning of nationality for use in the Bill.

Concern over the terminology used is not just limited to the interchangeability, or otherwise, of 'nationality' and 'citizenship'. For instance, in section 65(1)(a), ethnicity would appear to be referred to as a subset of race while the specialised literature on such issues would tend to use ethnicity as the umbrella term under which race features as a subset. While such considerations might seem pedantic and of little relevance to the operability of the Bill as worded, it is important to preserve terms for their proper use. In the area of international protection and human rights law, when clarity is lacking time is lost seeking agreement on who qualifies as a legitimate applicant for protection, for example, or in the most extreme cases on what qualifies as a genocide. As lives can be, and often are, lost in that delay, we must seek to be precise with the language we use.

Ministerial Discretion

Ministerial discretion is a constant theme throughout the Bill, and has been cited as a concern by several commentators.¹ The Irish Human Rights Commission warns that:

Many provisions in the 2008 Bill provide that the Minister, or those working on his behalf, can apply, or as the case may be, refuse to apply various provisions of the 2008 Bill on grounds of security of the State, public policy, public good or public health. The IHRC is concerned that these broad ranging categories are subject to wide interpretation and could give rise to arbitrary decision-making.

[...]

In order to satisfy the requirements of proportionality, the scope of Ministerial discretion and the manner of its exercise must be defined with sufficient clarity to

¹ See especially The Irish Human Rights Commission, *Observations on the Immigration, Residence and Protection Bill 2008*, March 2008, available from <http://www.ihrc.ie>, 4, 25-31. See also The United Nations High Commissioner for Refugees, *Comments on the Immigration, Residence and Protection Bill 2008*, March 2008, 9, paragraph 36, available from <http://www.unhcr.org>; and the statements by the Roman Catholic Irish Bishops' Conference, available from <http://www.catholiccommunications.ie/Pressrel/12-march-2008.html>.

provide the individual with protection against arbitrary interference. In particular, adequate and effective safeguards as to the exercise of discretion must be in place.²

We would urge the Committee to consider the recommendations of bodies such as the Irish Human Rights Commission with all due gravity. In addition, where it is decided that the exercise of Ministerial discretion is necessary to the implemental nature, survival and usefulness of the Bill, and where such discretion is general in its application rather than specific to an individual or group, we would recommend that the provision of reason should be employed as a legitimising tool.

Sections such as section 15(1), which obliges the Minister to provide a failed visa applicant with the reason that their application failed, as long as such notice does not impinge upon public security or public policy; and section 79(4), which obliges the Minister upon request to provide a protection applicant whose application cannot be processed within six months with an estimated timeframe within which their application should be determined; are welcome examples of providing applicants with reasons for or information on the decisions and delays that affect their applications. Such transparency serves to alleviate perceptions, real or imagined, that there are inequalities weighing against certain applicants or that there is a general indifference on the part of state officials. Such steps thereby enhance public confidence and will protect state officials from unfair castigation.

However, in general areas where the Minister is entitled to use discretion, say by making an order to extend the amount of biometric information that a foreign national must submit upon the order of an official, there is no obligation to provide a reason for that decision. Under section 125(4), the Minister is obliged to lay before each House of the Oireachtas notice of such orders, but not the reasons for them. A requirement to set down reasons for, alongside notice of, such orders would further engender confidence in the immigration and protection systems and stave off concern that Ministerial discretion might be used unduly.

Family Reunification

Section 50 is most welcome in that it provides a formal structure for family reunification for those who have been granted protection. However, the process of family reunification for foreign nationals outside of the protection system is much less clear. According to section 127(4):

127.—(4) The Minister may under *subsection (2)(b)* specify such conditions as he or she considers appropriate, including conditions—

[...]

(g) relating to the extent to which the foreign national may enjoy family reunification in the State,

² Irish Human Rights Commission, *Observations on the Immigration, Residence and Protection Bill 2008*, 28, 30-31.

There is little else to explain what entitlements or routes to family reunification will be put in place. As such, a foreign national can only have the vaguest sense of the possibility of enjoying family reunification in their host country.

While embedding a formal mechanism for family reunification within the immigration system is undoubtedly a complicated procedure, it is not one without precedent. Indeed, Council Directive 2003/86/EC (on the right to family reunification) has been adopted by all but three members of the European Union- Denmark, Ireland and the United Kingdom. There is much room for improvement on this front, and other countries' systems provide ready templates for adaptation to the Irish setting.

Long-term Residents

The proposed long-term residence permit outlined in section 36 is a positive development that will provide a secure and assured status for foreign nationals whose residence in Ireland is a long-term commitment. There are, however, some outstanding issues where further clarification would be welcome.

While the holder of a long-term residence permit is entitled under section 36(6)(a) "to the same rights of travel in or to or from the State as those to which Irish citizens are entitled", the validity of a long-term residence permit is not protected against continuous absence from the State for more than one year. Section 36(3) states:

36.— (3) The validity of the long-term residence permission granted under *subsection (1)* shall not be affected by absence from the State of the holder for a continuous period of less than one year.

The extent to which the holder of a long-term residence permit enjoys freedom to travel, without jeopardising their ability to return to the State legally with their long-term residence permit still in force, therefore remains unclear. Is their right to remain continuously outside of the State capped at one year, and how is such a limit juxtaposed with "the same rights of travel [...] to which Irish citizens are entitled"?

Application Process for Protection

Policies that encourage integration- a constant theme throughout this Bill- must be underwritten by practices that ensure efficient and, as far as practicable, speedy processing of applications made by those already in the state (i.e. those applying for protection). A common complaint directed at the current asylum process is the delay in determining applications. The damage that can be inflicted by a protracted and seemingly unending application process must be recognised. Months and years spent in asylum centres, frustrated by a ban on employment and with only a negligible amount of spending money for personal use encourages the institutionalisation of a person within the system and can permanently damage that person's ability to integrate themselves into Irish society upon their application being granted. Given that such people have often fled their country of origin after traumatic experiences, the risk to the mental health of the individual is considerable. A system designed to protect those who have suffered must not be allowed to further damage such people, and the delay and obfuscation that exists in

the current system has undoubtedly resulted in such further damage to legitimate applicants for protection.

That is why clauses such as section 72, which ensures that the cases of those in detention will be prioritised, and section 79(4), which obliges the Minister upon request to provide a protection applicant whose application cannot be processed within six months with an estimated timeframe within which their application should be determined, are so welcome as they provide a formal and visible structure for processing applications with clear lines of prioritisation and the provision of information for those whose cases are delayed. The necessary resources must also be committed to make sure that the new structures and procedures provided for in this Bill work to an optimal standard of fairness and efficiency.

As important as speed is however, the fundamental necessity of due process must be born in mind. The concerns expressed by the United Nations High Commissioner for Refugees on the manner on which this Bill impinges upon the principle of equality of arms,³ and the Irish Human Rights Commission's concerns about the limitations placed upon judicial review,⁴ must be considered so that protection applicants are afforded a fair and just hearing in addition to having their applications processed expeditiously.

Transparency

Under section 93(12), the chairperson of the Protection Review Tribunal is required to submit a report to the Minister who must lay it before each House of the Oireachtas. While this offers some level of transparency it falls far short of providing access to past decisions of the Tribunal. Such a course of action has been recommended by the United Nations High Commissioner for Refugees and the Irish Human Rights Commission,⁵ and the benefits of such action are plain. A public record of Tribunal decisions would allow observers to gauge the consistency of the Tribunal's decisions and would protect the reputation of the Tribunal from unfair criticism. Even if a public record is considered unworkable, a record of the Tribunal's decisions should at least be placed before an independent body for the purpose of oversight.

A critical part of assessing an application for protection is determining whether the applicant's country of origin is safe or not. Section 63(1) indicates the key role that the country of origin plays:

63.—(1) The following matters, in so far as they are known, shall be taken into account by the Minister or, as the case may be, the Tribunal for the purposes of

³ The United Nations High Commissioner for Refugees, *Comments on the Immigration, Residence and Protection Bill 2008*, 23-24, paragraphs 91, 94.

⁴ The Irish Human Rights Commission, *Observations on the Immigration, Residence and Protection Bill 2008*, 55-62.

⁵ The United Nations High Commissioner for Refugees, *Comments on the Immigration, Residence and Protection Bill 2008*, 24, paragraph 94; and The Irish Human Rights Commission, *Observations on the Immigration, Residence and Protection Bill 2008*, 81-82.

determining a protection application under *section 79* or deciding an appeal under *section 88*:

(a) all relevant facts as they relate to the country of origin at the time of making a determination in respect of the application, including laws and regulations of the country of origin and the manner in which they are applied;

The process of declaring a country, or part of a country, as being safe is laid out in sections 102 and 103. However, at no stage is the process of declaring a country, or a part of a country, as being safe opened up to scrutiny. In the United Kingdom the Home Office has in place a database that is public and that can be consulted.⁶ This allows an applicant, or his or her legal team, to assess the evidence that will be used in determining whether a country, or part of it, is safe. On such assessment information might be found to be incomplete or out of date. However, with no consultable database the ability of a protection applicant to contest that their country of origin is, or has, a safe territory is limited considerably. To allow protection applicants to contest inaccuracies in the reference material or the databases used by the Minister, that reference material or those databases must be open to scrutiny. Provision for the publication of such material would greatly enhance the transparency of the application process for protection, and would further assure people that standards are being applied evenly and fairly and are being kept up to date.

Marriage

So far as section 123 seeks to prevent marriage being used as a mechanism to subvert the immigration process, it is to be welcomed. The institution of marriage is debased by those who employ it to undermine legal restrictions. Marriage must be regarded in its proper place as a unitative and relational commitment between two people, not as a tool to cut through legal difficulties. However, where marriage is in place the right to that unitative relationship must be upheld and that brings with it geographical proximity as a critical concern. This has repercussions for the issue of family reunification (discussed above).

We recognise that balancing these concerns is not legislatively easy, especially in cases where the marriage is registered in another jurisdiction. But we do feel that everything possible must be done to uphold marriage and the repercussions that flow from it, and we recognise that warding off 'sham' marriage is part of that process.

However, the extent of Ministerial discretion afforded in the Bill on this issue- the Minister has to grant an exemption for any marriage involving a foreign national who does not hold entry permission for the purpose of the intended marriage or residence permission- does seem unnecessary. Stated criteria under which the Minister would have to permit a marriage would perhaps offer a more balanced approach: such an approach being mapped out according to a human rights perspective by the Irish Human Rights Commission.⁷ These criteria could both protect the institution of marriage- if they are

⁶ The database can be observed at http://www.homeoffice.gov.uk/rds/country_reports.html#countries

⁷ The Irish Human Rights Commission, *Observations on the Immigration, Residence and Protection Bill 2008*, 20-21.

framed around marriage in its proper context as a genuine union and not a facilitative process; and empower the individuals concerned- so that they may determine themselves within the confines of those criteria whether they should commit to such a union. Thereby, where a couple meet the set criteria, the Minister might require notification but his or her permission would not be required.

There is an outstanding issue in section 123 upon which we seek clarification. Section 123(5-6) states that:

(5) A person to whom application is made in relation to the solemnisation of a proposed marriage between parties, one or each of whom is a foreign national, shall require the production by that, or as the case may be, each party of evidence of—

(a) notification by him or her or them in accordance with *subsection (2)(a)*, and

(b) possession by him or her or them of an entry or residence permission in accordance with *subsection (2)(b)* or exemption granted to him or her or them under *subsection (3)*.

(6) The person referred to in *subsection (5)* shall, if the party or each party on whom that person has imposed a requirement under that subsection does not comply with it—

(a) refuse the application referred to in that subsection, and

(b) immediately inform the Minister of that refusal and the reasons for it.

According to the new marriage regulations as set out in the Civil Registration Act 2004, legal documents are assessed by a civil registrar who issues a Marriage Registration Form to be presented by the couple to the solemniser (in the context of the Church of Ireland, a clergyperson). A question arises in section 123(5-6) as to whether the “person to whom application is made in relation to the solemnisation of a proposed marriage” is the civil registrar, or the clergyperson in his or her role as a solemniser.

If section 123(5-6) is intended to refer to the solemniser, or to be inclusive of the solemniser, a major problem arises under section 123(6)(b), which requires the “person” to “immediately inform the Minister” if the relevant residence documents are not produced. As legally-recognised solemnisers of marriage, clergy are bound to act according to the civil marriage laws as well as the Church’s own canon law and that is well established and accepted. However, if clergy are also bound to report to the Minister when a couple cannot produce documents affirming the legal status of one or both of them, the ability of the clergy to act pastorally and in confidence for such people, on any level, will be destroyed. Such a requirement is clearly unacceptable on that basis.

We seek affirmation that section 123(5-6) refers to civil registrars, not solemnisers. If there is any ambiguity on this point, we would ask that this passage be re-drafted to make it clear that solemnisers are under no duty to report to the Minister a failure to present residence documents when inspecting a couple for marriage.