

Advice of the Ombudsman for Children on
the Immigration, Residence and Protection Bill 2008

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Published by Ombudsman for Children's Office
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ISBN 978-1-907074-03-5

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1. Introduction

The Immigration, Residence and Protection Bill was published on 24 January 2008. Its purpose is to restate and modify certain aspects of the law relating to the entry into, presence in and removal from the State of certain foreign nationals, including those in need of protection from the risk of serious harm or persecution.

The Bill was referred by the Dáil to the Select Committee on Justice, Equality, Defence and Women's Rights on 21 February 2008 for its consideration. Subsequent to this, on 13 March 2008, the Oireachtas Joint Committee on Justice, Equality, Defence and Women's Rights wrote to the Ombudsman for Children with an invitation to forward any observations on the Bill to it.

The comments in this submission have been made in response to that invitation and pursuant to section 7(4) of the Ombudsman for Children Act, 2002 which provides that the Ombudsman for Children may give advice on any matter relating to the rights and welfare of children, including the probable effect on children of the implementation of any proposals for legislation.

The list of issues addressed below is not exhaustive and I have confined my comments to the issues of greatest concern to my Office. For more detailed observations on the principal issues raised below, I would refer the Committee to:

- my report to the UN Committee on the Rights of the Child on the occasion of the examination of Ireland's second periodic report under the UN Convention on the Rights of the Child;
- my advice on the Criminal Law (Trafficking in Persons and Sexual Offences) Bill, 2006;
- my submission on the National Action Plan Against Trafficking in Human Beings; and
- the baseline research carried out by Dr Ursula Kilkelly on behalf of my Office on the barriers to the realisation of children's rights in Ireland.¹

As I am aware that the Committee has received detailed comments on the full range of issues contained in the Bill from other statutory bodies such as the Irish Human Rights Commission (IHRC), the Office of the United Nations High Commissioner for Refugees (UNHCR) and NGOs working in this field, I have endeavoured to be as succinct as possible.

¹ All four documents can be accessed at www.oco.ie

In preparing these comments, I have been guided by the main international standards in this area, especially the United Nations Convention on the Rights of the Child (CRC)². My recent submission to the Oireachtas Committee on the Constitutional Amendment on Children stressed the importance of four general principles, derived from the CRC, which should govern law and policy relating to children in Ireland, namely:

- the right to non-discrimination;
- the right for a child's best interests to be a primary consideration in matters which affect him or her;
- the right to family or appropriate care; and
- the right for a child to be heard in all matters affecting him or her, with his or her views being given due weight in accordance with the child's age and maturity.

I believe that these principles should also be reflected in our immigration and protection legislation and consider the passage of this Bill through the Houses of the Oireachtas to be a good opportunity to incorporate the principles of the CRC at domestic level.

While there are some positive aspects of this Bill, my principal concern is that it does not sufficiently take account of the particular vulnerability of children and of the need to provide them with special assistance and protection. Children who seek protection in this State – especially separated children seeking asylum and child victims of trafficking – are among the most vulnerable in our society and face multiple barriers to the realisation of their rights. A general provision should be included in the Bill to the effect that children's best interests shall be a primary consideration at all times and in all decisions affecting them. I consider that the Bill should also state that an appropriately trained, independent guardian shall be appointed to each separated child to represent those interests. Many of the difficulties faced by separated children stem from the absence of such a guardian who can support and inform the child, as well as liaise with the relevant State agencies.

² UN Convention on the Rights of the Child, adopted by United Nations General Assembly resolution 44/25 of 20 November 1989. Other key human rights standards relevant to the Bill include UNHCR/Save the Children's Separated Children in Europe Programme: Statement of Good Practice (2004) and the United Nations Committee on the Rights of the Child's General Comment No 6 on the treatment of unaccompanied and separated children outside their country of origin, CRC/GC/2005/6 (2005).

Another concern I have is that there is no alternative status, distinct from refugee status or subsidiary protection, which would be available to children on humanitarian grounds in order to make sure that they are not denied the protection of the State simply because they do not fit the strict criteria for protection laid down in the Bill. This would include, for example, child victims of trafficking who might not satisfy the conditions for refugee status or subsidiary protection but are nonetheless in need of special assistance and protection.³

It should be noted that a Constitutional Referendum on children's rights is proposed for early 2009. Steps should be taken to ensure that this Bill complies fully with the general principles of the CRC so as to avoid any possible conflict with a future amended Constitution.

Below is a list of the discrete issues dealt with in this submission, which generally follows the sequence in which the substantive issues emerge in the Bill:

- rights of dependents of non-protection applicants;
- age determination;
- detention;
- the protection application process;
- children deemed part of parents' applications;
- family reunification;
- data collection; and
- trafficking.

³ See comments below regarding victims of trafficking.

2. Rights of dependents of non-protection applicants

While the bulk of my comments in this submission relate to children in need of the State's protection, there are many children in Ireland affected by this Bill whose parents have residence permission but are not protection applicants.

Sections 36 and 37 deal with the entitlements of the dependents of those with long-term residence and qualified long-term residence respectively, while section 127 provides that the Minister may set conditions for residence, including the extent to which non-Irish nationals and their dependents may access publicly funded services.

I am concerned at the extent of Ministerial discretion provided for in the Bill. While there may be a presumption that in exercising his discretion in setting conditions for residence in the State the Minister will have regard to the requirements of the Constitution and Ireland's international obligations, it is worth emphasising that children's constitutional rights – including the right to free primary education – and their rights under the CRC are not dependent on their nationality.

I recommend that an explicit requirement for the Minister to have regard to those standards – especially the best interests principle contained in the CRC – when making such regulations be included in the Bill.

3. Age determination

The UN Committee on the Rights of the Child has held that in ambiguous cases where it is unclear if an unaccompanied or separated child is less than 18 years old, the presumption should be that he/she is a child⁴. The Committee has also recommended that:

- age determination procedures should take into account psychological maturity as well as physical appearance;
- the process should be safe, child – and gender-sensitive;
- the process should respect the bodily integrity of the child; and
- the process should be carried out with due respect to the child’s dignity⁵.

Ideally, such an assessment should be carried out by a multidisciplinary group of professionals with appropriate expertise and familiarity with the child’s ethnic/cultural background⁶.

Sections 24, 58 and 73 of the Bill only make reference to the opinion of immigration officers and members of An Garda Síochána in deciding whether an individual is to be treated as a child under the Bill. There is no mention of what happens if age is disputed or of a requirement for those officers to give the benefit of the doubt to a person who may be under 18 years of age.

These sections of the Bill fall short of the international standards mentioned above. As regards the benefit of the doubt, this is especially important when a child presents to an immigration officer at a port of entry, where there is unlikely to be a multidisciplinary group at hand to attempt an initial assessment. Giving the benefit of the doubt will not obviate the need for a more accurate age assessment later but simply recognises the need to err on the side of caution in relation to protecting children.

⁴ General Comment No 6 of the UN Committee on the Rights of the Child, p 11.

⁵ Ibid.

⁶ UNHCR/Save the Children Statement of Good Practice p 18.

The importance of having an age assessment procedure along the lines mentioned above flows from the disparity in the level of protection afforded to adults and children respectively. Not only are children entitled to the protection of the Child Care Acts – though there are difficulties with the current system in place for separated children – but there are also greater protections in relation to immigration related detention.

I recommend that explicit provision be made in the Bill for age determination procedures to be carried out in accordance with international standards such as General Comment No 6 of the UN Committee on the Rights of the Child and that children be given the benefit of the doubt in relation to their age.

4. Detention

I welcome the fact that the Bill does contain a prohibition of the detention of children in certain circumstances but I have concerns regarding the qualifications of that prohibition and other situations in which children might be detained. Separated children should not be detained for immigration related reasons and the Bill should explicitly state the principle that, where a child is detained, it should only be as a measure of last resort and for the shortest possible period of time, in line with Article 37 of the CRC and section 96 of the Children Act, 2001.

Although section 58 states that section 55 (the provision of the Bill relating to the arrest and detention of foreign nationals for the purpose of their removal from the State) does not apply to children, this prohibition is subject to certain conditions. If those conditions are violated, a child can be detained and there are no time limits or safeguards mentioned in relation to such an occurrence in the Bill.

Section 58(3) also provides that, if an immigration officer or member of An Garda Síochána detains the parent/guardian of a child under section 55, the HSE shall be informed as soon as practicable. It does not state what will happen to the child in such a situation or what principles will govern decisions made about the child. Furthermore, I consider that the requirement to inform the HSE "as soon as practicable" is too weak a formulation, given the seriousness of the situation. This section should be amended to address this lack of clarity and reflect the principle contained in Article 9 of the CRC which requires States Parties to ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine that such separation is necessary for the best interests of the child.

Section 70 of the Bill provides for the possible detention of a protection applicant upon arrival in the State, pending the issuing of a protection application entry permit. There is no prohibition of the detention of children under this section. Section 24 of the Bill does state that the HSE shall be notified of the arrival of a separated child and that the Child Care Acts 1991-2007 shall apply but there is no guarantee of the timeframe in which this will happen. In the absence of a nationwide 24 hour, 7 day a week social service, my concern is that the child may be detained while awaiting the intervention of the HSE.

I believe that separated children should not be detained for immigration related reasons and that, if a child's parent/guardian is detained upon arrival in or prior to removal from the State, decisions relating to the child should be made in the best interests of that child.

5. The protection application process

Article 20 of the CRC requires States to provide special assistance and protection to children deprived of their family environment and Article 22 further provides that children seeking refugee status receive appropriate protection and humanitarian assistance. I welcome certain changes to the protection application process which recognise children's particular needs and vulnerability (such as the possibility of dispensing with an oral hearing provided for in section 85) but remain concerned at other elements of the protection application process. I do not propose to dwell on this issue, however, as it has been dealt with in considerable detail by others, including the UNHCR⁷.

In all decisions made about the child, the best interests of the child should be a primary consideration. In matters concerning child protection issues, the best interests of the child should be the primary consideration, in line with the CRC and the Child Care Act, 1991. In order to guarantee that that is the case, I regard it as being essential that all those interviewing children be trained adequately to deal appropriately and sensitively with their applications.

A related issue is that of credibility. Sections 63 and 74 should make explicit reference to the need to take into account the vulnerability of child applicants and the manner in which they express themselves when assessing credibility.

Finally, I consider that the rules and guidelines of the Protection Review Tribunal should be publicly available and that its decisions should be published (with due regard to the requirement for anonymity) to guarantee that the best interests of children have been taken into account in the decision-making process.

⁷ See UNHCR, Observations on the Immigration, Residence and Protection Bill (2008), Part 3 (iv) and 3 (vii).

6. Children deemed part of parents' application

Section 73(13) of the Bill provides that parents with dependent children who apply for protection will be deemed to have applied on behalf of the children too. This provision is problematic because it may prevent the consideration of individual asylum applications from the children in question. Such a position does not sit well with section 64(2)(f) of the Bill which recognises the existence of gender, and child-specific forms of persecution which may be considered as bases for protection applications. Given that the gender ground may not be applicable to a parent/guardian and that the child-specific ground by definition cannot be invoked by an adult, it is conceivable that an adult applicant may not have a valid protection claim but that his or her child might. In such a situation, it is unreasonable to deny the opportunity to children to make applications in their own right and, if those applications are successful, for their parents to be granted derivative protection if their own applications are unsuccessful.

7. Family reunification

Article 10 of the CRC requires that applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification be dealt with in a positive, humane and expeditious manner. While section 50 of the Bill does provide for the right to family reunification in respect of those who have been granted either refugee status or subsidiary protection, I believe that the provision is not entirely consistent and that it is not properly child – and family-focused.

Under the terms of Section 50, where the applicant for family reunification is a child, the child has a right to reunification with one or both of his or her parents (marital status unspecified). If, however, the principal applicant is the child's parent, that individual has a right to reunification with the child but not with the child's other parent, when the other parent is not his or her spouse. This presents the possibility that the reunification rights of the same family unit could be fundamentally different depending on who makes the application and the marital status of the parents.

As mentioned above, a child in relation to whom a protection declaration is in force has the right to have one or both parents join him or her in Ireland. Siblings, however, are regarded as dependent members of the family and can be reunited with the child in question only at the Minister's discretion. This means in practice that the Minister might be obliged to give residence permission to one or both parents but could deny such residence rights to siblings, leaving the parents of the children in an obviously invidious position and further allowing for the differential treatment of similar family units based on what member of the family makes an application.

I believe that this approach does not respect the spirit of Article 10 of the CRC and that the Section should be amended to address the inconsistencies highlighted above.

As regards those who have residence permits but who have not been granted refugee status or subsidiary protection, Section 127(4)(g) simply provides that the Minister may specify conditions concerning the extent to which he or she may enjoy family reunification. In exercising this discretion, the Minister should have regard to the terms of Article 10 as outlined above.

In relation to children who are reunited with family members outside this jurisdiction, great care should be exercised in order to ensure that a proper assessment has been undertaken of the circumstances in which the child will find himself or herself upon return and that the best interests of the child are a primary consideration in reaching a decision regarding that return.

8. Data collection

While the gathering of personal information about children can be necessary and, in the case of separated children, prove to be useful if they go missing, the authorities should exercise great caution in gathering those details and I echo the concerns of the Irish Human Rights Commission in relation to biometric information⁸.

The principles guiding such information gathering should be:

- seeking consent;
- obtaining the absolute minimum necessary;
- informing the individuals in question about why the information is being gathered, what information is retained and who has access to it; and
- non-disclosure to third parties.

As regards the provision in Section 108 relating to the gathering of biometric information, I would query why the requirement for the presence and consent of parents/guardians only applies to those under the age of 14.

⁸ Irish Human Rights Commission, Observations on the Immigration, Residence and Protection Bill 2008 (March 2008), pp 107-110.

9. Trafficking

The CRC requires States Parties to take all appropriate measures to prevent child trafficking and further requires that all appropriate steps be taken to promote physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation, or abuse⁹. The Council of Europe Convention on Action Against Trafficking in Human Beings – of which Ireland is a signatory – also deals extensively with the protection needs of victims of trafficking¹⁰.

I have dealt with the issue of trafficking and victim protection in some detail in my comments on the General Scheme of the Criminal Law (Trafficking in Persons and Sexual Offences) Bill, 2006 and the National Action Plan on Trafficking in Human Beings¹¹ and will confine my remarks here to the aspect of the legislative framework dealt with by the Immigration, Residence and Protection Bill. In general terms, I consider that this section does not adequately take account of the particular vulnerability of child victims of trafficking.

Although the Bill does provide for a 45 day recovery and reflection period for victims of trafficking, it makes subsequent temporary residence contingent on assistance in criminal investigations and proceedings against traffickers. This means that a child trafficked into Ireland who is not entitled to either refugee status or subsidiary protection within the meaning of the Bill cannot lawfully be present in the State beyond the 45 day recovery and reflection period, unless he or she assists in the criminal proceedings against traffickers. While some child victims of trafficking may be willing and able to assist the authorities in this manner, I regard it as unreasonable to make such assistance a requirement for temporary residence for a child. Moreover, it is unlikely that such a small period of time would allow a child to recover from his or her ordeal and for the authorities to find a durable solution in the best interests of the child.

⁹ See in particular Articles 35 and 39.

¹⁰ Parts III and V of the Council of Europe Convention on Action Against Trafficking in Human Beings contain the most comprehensive protection provisions of the international legal instruments which I have reviewed. Protection measures are also provided for in Article 8 of the Optional Protocol to the UN Convention on the Rights of the Child on the sale of children, child prostitution and child pornography; Articles 6, 7 and 8 of the Palermo Protocol to the UN Convention on Transnational Organised Crime; Article 7 of the EU Council Framework Decision on combating trafficking in human beings; and Article 9 of the EU Council Framework Decision on combating the sexual exploitation of children and child pornography.

¹¹ *Supra*, n.1. The two documents referred to discuss victim protection in detail, including many practice issues that are not immediately relevant to a consideration of primary legislation.

Article 14 of the Council of Europe Convention requires that the residence permit for child victims of trafficking, where legally necessary, be issued in accordance with the best interests of the child. I do not consider the provision as currently drafted to satisfy that criterion and therefore recommend that explicit provision be made for a longer recovery and reflection period and temporary residence for child victims of trafficking on humanitarian grounds that is not contingent on their assistance with criminal investigations and proceedings.

In addition, I consider that in identifying suspected victims of trafficking, the Bill should require that members of An Garda Síochána be assisted by other professionals with expertise in dealing with child victims of trauma.

