

Submission to the CEDAW General Discussion on “Access to Justice”

January 2013

Introduction

The Immigrant Council of Ireland (ICI) wishes raise a number of issues with a view to ensuring that migrant women and their family members have full and equal access to justice in line with Ireland’s obligations under the Convention on the Elimination of Discrimination against Women (CEDAW). We hope that our submission to the CEDAW General Discussion on “Access to Justice” will assist the work of the Committee on this most important matter.

The ICI is a non-governmental organisation with charitable status and was established in 2001 to develop innovative responses to Ireland’s changing society. The ICI works with and for immigrants in promoting their rights through information, advocacy and awareness. The organisation advocates on behalf of migrants and their families for immigration reform. Strategic litigation is also used to support the ICI’s priorities for change, prioritising legal and policy change within the immigration context.

Since opening, the ICI has supported migrant women who are undocumented, victims of domestic violence as well as victims of trafficking. We also represent legally resident migrants seeking a change of status, family reunification or access to long-term residence or citizenship. The number of women who have turned to us directly or that have been referred to us by other service providers for support is steadily increasing.

1.) Lack of provision for autonomous residence permission for dependent family members, including victims of domestic violence

Based on our experience of supporting migrant women Ireland, the ICI has identified the lack of provision for autonomous status for family members of Irish nationals as well as of legally resident migrants as the greatest barrier and complication for migrant women, particularly in situations of domestic violence. There are no legislative or administrative provisions for family members of third-country nationals to be granted an independent residence card on completion of a certain period of residence or for them to retain residence in the event of certain changes in family circumstances such as separation arising from relationship breakdown, divorce, death or departure of the family member from the from the State.

Third-country national family members must notify the Irish Naturalisation and Immigration Service of any changes in their personal circumstances and seek permission to remain and, if necessary, to vary the conditions of residence from those when first granted entry to and residence in the State. Such applications are made under section 4(7) of the *Immigration Act 2004* and are granted at the discretion of the Minister for Justice and Equality. Whilst it is reported that such applications are often responded to positively, there is no legislation regarding such applications or any criteria to be fulfilled (Domestic Violence Coalition, 2012).¹ However, the Minister for Justice and Equality has stated in this regard that *'[...] in respect of domestic violence, where the victim is seeking immigration status independent of that of the perpetrator, the current system places no legal impediment in the way of dealing with such issues in a sympathetic manner and in fact this is what happens in practice'* (Shatter, 2012).

While legislation in relation to this issue is still lacking, in July 2012, in response to repeated lobbying by organisations such as the ICI, the INIS published information guidelines on its website that detail the immigration authorities' approach to situations where relationship breakdown occurs as a result of domestic violence.

2.) Lack of an independent appeals mechanism for the review of immigration decisions

An issue affecting migrant women seeking independent residency status in the same way as those applying for family reunification, regularisation or extensions of residence permits, is the lengthy delays in decision-making and inconsistencies, leading to challenges of those decisions. These phenomena have led to the so-called *'Asylum List'* in the High Court having a backlog of some 1,000 cases.² The ICI believes that it is therefore crucial that the Government honours its commitment in the Programme for Government 2011-2016³ to *"introduce comprehensive reforms of the immigration, residency and asylum systems, which will include a statutory appeals system"*.

The establishment of an independent appeals mechanism would provide transparency to the decision-making process and could also be more cost efficient than the current system. Furthermore, an independent appeals mechanism to deal with immigration decisions is the only way to ensure access to fair procedures and effective remedies for migrants and their family members seeking to challenge decisions affecting their human rights as protected under the European Convention on Human Rights and Fundamental Freedoms (ECHR), in particular Articles 3 (prohibition of torture) and Article 8 (right to family life), as required by Articles 6 (right to a fair trial) and 13 (right to an effective remedy) of the Convention.

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 a more efficient 'Immigration Appeals Tribunal' which, unlike the High Court, would also have the power to alter or vary an administrative decision. The ICI

¹ Domestic Violence Coalition Briefing Note on "Granting of 'independent' residence permits to migrants who experience domestic violence", March 2012.

² <http://www.irishtimes.com/newspaper/ireland/2012/1017/1224325338894.html>

³ <http://www.socialjustice.ie/sites/default/files/file/Government%20Docs%20etc/2011-03-06%20-%20Programme%20for%20Government%202011-2016.pdf>

believes the establishment of an independent Immigration Appeals Tribunal could save money and would, if designed in a way that would make challenges of the procedure through High Court proceedings unlikely, provide for a more efficient and cost-effective immigration system.

Furthermore, the ICI would advocate for the 14-day time limit within which judicial review proceedings have to be initiated in the majority of immigration decisions to be extended. The short time limit severely restricts migrants' access to justice. In most other areas of the law, people have three months, exceptionally six months, to make an application to the High Court. The ICI would view the current time limit as unfair and unreasonable and feels supported by the views of the Law Reform Commission expressed in its 2004 *'Report on Judicial Review Procedure'*⁴ where it recommended that the relevant section of the Illegal Immigrants (Trafficking) Act 2000 be amended to increase the fixed time limit on applications to apply for judicial review of limited type of decisions to 28 days.

3.) No legal aid for those seeking to challenge immigration decisions

The ICI believes that the provision of legal advice and representation to migrants and their family members on immigration law matters is currently not available at the level it should be, leaving vulnerable people, including migrant women, in situations where they are not able to access legal services or are trying to pay solicitors' fees at a level beyond their means.

While the majority of those contacting the ICI for information and support would in fact qualify for legal aid pursuant to the Civil Legal Aid Act, 1995, this is not accessible to them in practice due to lack of funding available to the Legal Aid Board to provide these services as well as lack of training provided to Legal Aid Board solicitors to provide specialist immigration advice and representation. While the website of the Board states that *"the Refugee Legal Service (RLS) is a specialised office established by the Legal Aid Board to provide confidential and independent legal services to persons applying for asylum in Ireland"* and a full service is provided to those seeking international protection in Ireland, the statement on the Board's website that *"legal aid and advice is also provided in appropriate cases on immigration and deportation matters"*,⁵ is not a reality in practice.

4.) Access to justice for victims of human trafficking

According to the website of the Legal Aid Board, the Board "provides legal services on certain matters to persons identified by the Garda National Immigration Bureau (GNIB) as 'potential victims' of human trafficking under the Criminal Law (Human Trafficking) Act 2008".⁶

The ICI believes that the fact that victims of trafficking can only access State funded legal services in Ireland after having been identified by the immigration police as 'potential victims', is most problematic and fails to observe the State's obligations under the compliance with their obligations under EU and international human rights law. For example, the current procedures are not in line with Article 12(2) of *Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims* it that it fails to ensure that victims of trafficking in human beings have access without delay to legal counselling, and, in accordance

⁴ The Law Reform Commission, Report on Judicial Review Procedure (LRC71-2004), 2004.

⁵ http://www.legalaidboard.ie/lab/publishing.nsf/Content/Refugee_Legal_Service

⁶ http://www.legalaidboard.ie/lab/publishing.nsf/Content/Human_Trafficking_Legal_Advice_and_Aid

with the role of victims in the relevant justice system, to legal representation, including for the purpose of claiming compensation.

5.) Legal safeguards against refusal of entry

The ICI believes that any future immigration legislation must seek to remedy the fact that currently, an appeal against the refusal of entry to the State is not provided for in existing legislation and procedure. In 2011 alone, 2,719 individuals from countries such as China, Brazil, Bolivia, South Africa, Albania and Nigeria⁷ were refused leave to land at airports and other ports of entry to the State. We have advocated for a right to appeal refusal of entry in situations where such decision may affect Constitutional and human rights and we are concerned that while a refusal of entry may also arise in situations where a person has obtained a visa prior to travelling to Ireland, those who are visa required nationals have at least access to a non-statutory visa appeals mechanism within the Irish Naturalisation and Immigration Service. The refusal of entry does also affect otherwise privileged foreign nationals, for example nationals of the United States of America, South Africa or Brazil, who are not visa required and who are not in a position to obtain any type of pre-entry clearance.

By not providing an appeal mechanism against the refusal of entry, Ireland would continue to be out of line with developments in the majority of EU Member States who – through the *Community Code on the rules governing the movement of persons across borders*⁸ – are obliged to provide a right to appeal to persons refused entry.

The ICI believes that independent monitoring of forced returns, including the return of those refused leave to land, is essential to ensure the protection of human and Constitutional rights in the context of deportations and removals from the State. The establishment of an independent monitoring body in a statutory framework would not only ensure rights compliance but also transparency and sustainability of the process. In this context, the ICI notes the Minister's decision in January of this year to introduce an *'Immigration Control Pilot Project'*⁹ at Dublin Airport, which was to see Departmental staff assigned to immigration control duties at the airport. It was planned that these staff members will work in association with Gardaí in the context of reducing Garda numbers, continued commitment to the civilianisation of appropriate tasks, and the need to look afresh at how public services are delivered. The ICI would welcome the opportunity to engage with the Minister on this pilot and would welcome the opportunity to participate in a consultation with stakeholders as part of the monitoring and review of the pilot prior to the drafting of recommendations.

6.) Barriers to public interest litigation

Public Interest Litigation is extremely difficult in Ireland. The biggest barrier to litigating a public interest point is the cost of the case. Of their nature, these cases are challenging existing law and practice and, because they are without any true precedent, the outcome of such cases is uncertain. Even where free legal services are provided to women seeking to challenge an

⁷ Nationals from Brazil, Bolivia and South Africa are not required to have a visa to travel to Ireland (see: [http://www.inis.gov.ie/en/INIS/\(List%20of%20Countries\)%20S.I.%20417%20of%202012%20Schedule%201.pdf/Files/\(List%20of%20Countries\)%20S.I.%20417%20of%202012%20Schedule%201.pdf](http://www.inis.gov.ie/en/INIS/(List%20of%20Countries)%20S.I.%20417%20of%202012%20Schedule%201.pdf/Files/(List%20of%20Countries)%20S.I.%20417%20of%202012%20Schedule%201.pdf))

⁸ Article 13(3), Regulation (EC) No 562/2006 of 15 March 2006, establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L105/1, 13.4.2006.

⁹ <http://www.inis.gov.ie/en/INIS/Pages/Immigration%20in%20Ireland%202011%20%E2%80%93%20a%20year-end%20snapshot%20%E2%80%93%20major%20changes%20and%20more%20to%20follow>

immigration decision in Ireland, they risk – if they are not successful – that the costs of the case are awarded against them and these costs could be up to a six figure sum. For example, €100,000 and more to be awarded against an unsuccessful litigant in a case that was heard over a few days would not be unusual. With the average income of women in Ireland estimated at only 73% of that of men, this issue presents an even higher barrier to access to justice for women than it does for men.

An additional barrier to public interest litigation is the fact that ‘class actions’ are not permitted in Irish law. Very often, women who are seeking immigration permissions for themselves or family members are vulnerable at many levels and, in the area of immigration law, entirely dependent on decision making based on the discretion of the Minister for Justice and Equality. Class actions would allow a larger group of people all of women, suffering the same injustice, to combine in one case, reducing their exposure to the risk of having to pay the State’s legal fees.

Additionally, NGOs working with and for migrant women in Ireland do not have locus standi in the Irish courts to bring a case on behalf of a vulnerable group. While this barrier to public interest litigation has been successfully challenged by the Irish Penal Reform Trust (IPRT) in the High Court,¹⁰ this matter remains under appeal and the organisation runs a high risk to its assets in bringing this very important challenge.

For further information contact:

Hilkka Becker
Senior Solicitor
hilkka@immigrantcouncil.ie

¹⁰ IPRT & Others v Governor of Mountjoy Prison & Others [2005] IEHC 305.