Report on an Enquiry into the Treatment of a Visitor Refused Leave to Land in the State

January 2009

IHRC

IRISH HUMAN RIGHTS COMMISSION

AN COIMISIÚN UM CHEARTA DUINE

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Preface

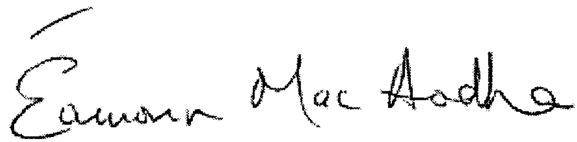
One of the functions of the Irish Human Rights Commission is to conduct enquiries. It may do this of its own volition or at the request of any person who considers the conducting of such an enquiry to be necessary or expedient for the performance of certain other specified functions of the Commission.

This is a report on the second enquiry conducted by the Irish Human Rights Commission.[i] It relates to the important issue of immigration control at the State's ports and in particular the law and practice as it operates in Ireland. It relates specifically to the expectation of a complainant, who was a visitor to Ireland, that by applying for and obtaining a visitor's visa at an Irish diplomatic mission in his home country of Pakistan, he would be allowed to enter and visit the country. The complainant was in fact refused leave to land when he arrived in Ireland and was ultimately removed from the State. The report considers the facts surrounding the complainant's refusal of leave to land and removal and makes recommendations for improvements in the relevant procedures.

I wish to acknowledge the substantial work carried out on the enquiry and in the preparation of the report. In this regard, I would like to record my thanks to the Commission staff in the Enquiries, Legal Services and Administration Division who worked on this report. In addition, I would like to acknowledge the assistance of Gráinne Mullan BL in assisting the Commission with parts of the draft report in late 2007.

I would further like to acknowledge the co-operation of the Department of Justice, Equality and Law Reform, the Department of Foreign Affairs, An Garda Síochána, the Irish Prison Service and the Governor of Mountjoy Prison with the Commission in the conduct of this enquiry. It is our common endeavour to secure human rights protection in the State. An enquiry is not intended to be an adversarial process and the current enquiry process is testimony to that fact. In a case such as the present, it is designed to identify whether there are any

deficiencies in the law and/or practice relating to human rights and, if so, to suggest ways in which those deficiencies may be remedied. I hope this report fulfils these purposes.



Éamonn Mac Aodha
Chief Executive

Chapter 1 General Introduction

Those arriving in the State

1.1 In recent years, Ireland has seen a large increase in the numbers of persons visiting the State and migrating to live in the State.[1] At the same time, the numbers of asylum-seekers arriving each year have decreased.[2]

1.2 It is recognised that the increase in persons both visiting the State and migrating to live in the State has brought substantial benefits to Ireland.[3] However, the increased number of visitors and migrants has occurred within a legislative framework which was arguably designed to deal with a smaller number of persons.[4] In relation to visa applications to visit the State, the increase in applications in recent years has occurred in the context of the limited number of personnel available to determine visa applications in the Department of Justice, Equality and Law Reform ("Department of Justice") in conjunction with the Department of Foreign Affairs and Irish Embassies and Consulates abroad.

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[1] According to the Central Statistics Office, the total migration to the State was 60,000 in the year ending April 2003, 58,500 in the year ending April 2004, 84,600 in the year ending April 2005, 107,800 in the year ending April 2006 and 109,500 in the year ending April 2007 (the 2007 figures are preliminary). *See "Population and Migration Estimates April 2007"* (with revisions to April 2003 to April 2006), 18 December 2007, Central Statistics Office, Cork. The Commission is assuming that the Central Statistics Office statistics for a year ending April refers to a year ending on 30 April, and are therefore directly comparable to the Office of the Refugee Applications Commissioner monthly statistics on asylum applications (*see* footnote 2 below).

[2] The total number of asylum applications were 11,698 in the year ending April 2003, 6,048 in the year ending April 2004, 4,712 in the year ending April 2005, 4,182 in the year ending April 2006 and 4,218 in the year ending April 2007. *See "Office of the Refugee Applications Commissioner: Monthly Statistics"*, Department of Justice Dublin, April 2002, April 2003, April 2004, April 2005, April 2006 and April 2007. The Commission calculated these figures on the basis of the Office of the Refugee Applications Commissioner monthly statistics.

[3] *See* the Irish Naturalisation and Immigration Service ("INIS") observation that the contribution which immigrants make to Irish society is substantial, particularly in enriching society through diversity: INIS, *"Outline policy proposals for an Immigration and Residence Bill: A discussion document"* Department of Justice, Dublin, 2005, at p. 7. *("Outline policy proposal"). See also* comments of the Minister for Justice at the launch of the Immigration, Residence and Protection Bill 2008: "many migrants make an important contribution to the Irish economy and to Irish society generally"; Press Release by the Department of Justice, 29 January 2008.

[4] *See* INIS, *Outline policy proposals.*, at p. 7.

1.3 It is recognised that the Irish immigration system is generally the first contact which a foreign national[5] has with Ireland and constitutes an important "first impression" of the State.[6]

1.4 In recent years, the law governing immigration control has been regularly updated through Immigration Acts.[7] However, the basic thrust of the law remains the same, deriving from the Aliens Act 1935 ("1935 Act") and the Aliens Order 1946 ("the Aliens Order")[8]: individuals may be refused entry to the State at the border on the decision of an officer duly designated by the Minister for Justice, Equality and Law Reform ("Minister for Justice"). As such, Immigration Officers have wide discretion in deciding who is granted and who is refused entry into the State.

1.5 This enquiry focuses upon the experience of the complainant when measured against the relevant law and practice in the State. It then examines the extent to which that law and practice governing immigration control at the State's ports complies with Ireland's human rights obligations.

The nature of an enquiry

1.6 The Irish Human Rights Commission ("the Commission") may, at its discretion, decide to conduct an enquiry into any relevant matter at the request of any person who considers the conducting of such an enquiry to be necessary or expedient for the performance of any of the following functions of the Commission, namely:

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[5] The term "foreign national" is used throughout this report to mean any person who is not a citizen of Ireland or a European Union ("EU") country. The nationals of EU Member States are effectively exempted from immigration control by virtue of the European Communities (Aliens) Regulations 1977 (S.I. No. 393 of 1977), as amended. Their position in not relevant to the subject-matter of this enquiry.

[6] *Supra* fn 4.

[7] The Immigration Act 1999 (No 22/1999); the Illegal Immigrants (Trafficking) Act 2000 (No. 29/2000); the Immigration Act 2003 (No, 26/2003); the Immigration Act 2004 (No. 1/2004) and the Immigration, Residence and Protection Bill 2008.

[8] The Aliens Act 1935 (No. 14/35) and the Aliens Order (S.I No 395/1946).

- to keep under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights;

- to consult with such national or international bodies or agencies having a knowledge or expertise in the field of human rights as it sees fit;

- either of its own volition or on being requested to do so by the Government, to make such recommendations to the Government as it deems appropriate in relation to the measures which the Commission considers should be taken to strengthen, protect and uphold human rights in the State;

- to promote understanding and awareness of the importance of human rights in the State and, for those purposes, to undertake, sponsor or commission, or provide financial or other assistance for research and educational activities.[9]

1.7 The enquiry function of the Commission is therefore not free-standing. It serves as an aid to the performance of the other four specified functions.[10]

1.8 It is also important to appreciate that, in the exercise of its enquiry function, the Commission does not act as an adjudicatory body. It does not decide on the merits of a particular alleged violation of human rights; nor is it for the Commission to afford a remedy to a person or persons who believe that their human rights have been violated. When a matter is brought to its attention, it may however enquire into the matter in order to carry out one or more of the other four specified functions. For example, on foot of an enquiry, it may make recommendations to the Government for the strengthening of human rights in the State, or it may conduct an enquiry to aid it in a review of practice in the State relating to the protection of human rights.[11]

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[9] Sections 8(f) and 9(1)(b) of the Human Rights Commission Act, 2000. The other four specified functions are set out in Sections 8(a), (c), (d) and (e) of the Act.

[10] *See* further for an explanation of the enquiry function of the Commission, Appendix 2 of the Commission's *Annual Report 2003*.

[11] The competence of the Commission to conduct an enquiry is circumscribed by the Human Rights Commission Act, 2000, and the Commission has adopted guidelines in respect of the exercise of the discretion afforded to it by the Act: *see* Appendix 1.

Chapter 2 Background to the Enquiry

The request for an enquiry

2.1 The person who requested the Commission to conduct this enquiry ("the complainant"), B.A., is a Pakistani national currently resident in Pakistan. The complainant lives in Pakistan with his family and runs a number of businesses. He was referred to the Commission by the Irish Penal Reform Trust on foot of an incident which occurred at Dublin Airport in January 2003. On 13 January 2003, an Immigration Officer at Dublin Airport had refused the complainant leave to land in the State despite the fact that the complainant had in his possession a valid visitor's visa to enter the State, which he had applied for and been granted by the Honorary Consul in Karachi, Pakistan.

2.2 The complainant provided documentation to the Commission in support of his claim that he was arrested and detained at Dublin Airport and subsequently taken with other persons to Mountjoy Prison in Dublin. There he was imprisoned overnight in a holding cell with three other persons. On the morning of 14 January 2003, the complainant was removed from the prison to Dublin Airport by members of An Garda Síochána whence he was forcibly removed from the State on foot of a Removal Order after an Immigration Officer placed him on an aircraft bound for the United Kingdom ("UK"). The complainant stated that he was further removed from the UK to Kuwait where he was detained and from Kuwait to Pakistan. He did not arrive back in Pakistan until 16 January 2003. He further stated that on foot of his passport being stamped with the refusal/ removal order, he had been detained and interrogated by the respective authorities in the UK, Kuwait and Pakistan and that he had been badly treated as a suspect in Pakistan. The complainant stated that since the incident in question, he has not travelled abroad.

2.3 The complainant informed the Commission that he had applied for and received from the Honorary Consul in Karachi, a three month visa to visit Ireland

in late 2002. The granting of the visa by the Honorary Consul in Karachi, was separately confirmed by the Irish Embassy in Tehran. Documentation indicated that the visitor's visa (or "Visit Visa") was then stamped on his passport.

2.4 The complainant informed the Commission that he arrived in Dublin Airport on 13 January 2003 on foot of this visa but was refused leave to land by an Immigration Officer. The complainant informed the Commission that the Immigration Officer provided him with two notices which he forwarded to the Commission.

2.5 The first notice stated that leave to land was refused to him on the basis that the Immigration Officer had reason to believe that the complainant had, with "intent to deceive", sought to enter the State for a purpose or purposes other than those expressed by him. The said notice also stated that the complainant would be detained in Mountjoy Prison until such time, being as soon as practicable, as he could be removed from the State.[12] The second notice was to the Governor of Mountjoy requesting the release of the complainant as arrangements for his removal from the State had been made.

2.6 The complainant was removed from the State the following morning.

2.7 The complainant further contended that, in the course of being refused leave to land, three pages of his passport were marked by an Immigration Officer with "cross lines"[13] and that this caused him to be unduly delayed for a total period of 4 days by immigration officials in third countries (the UK and Kuwait) during his transit back to Pakistan, where he arrived on 16 January 2003. In this regard, the complainant informed the Commission that he considers that he may now face unnecessary difficulties in travelling to other countries from Pakistan due to his passport being so stamped/ marked.

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[12] Garda Síochána notice under the 1935 Act, 13 January 2003.
[13] Letter from the complainant to the Department of Justice, 30 June 2003.

2.8 The complainant indicated that he suffered tension and "mental torture" during this time and thereafter, that he had been unable to contact his family and that both he and his family, including his elderly mother, suffered anxiety as a result. In being refused entry to Ireland, the complainant informed the Commission that he suffered economic loss, having paid Rs 90,500 (approximately €1,534.85)[14] for the "ticket and visa fee and other expenses". In June 2003, the complainant had requested of the Department of Justice that he be recompensed this sum and had complained about the spoiling of his passport due to the "cross lines" that were drawn on it.

2.9 Since that time, the complainant has made continued representations to the Irish authorities seeking an explanation as to what occurred and why it occurred. He also seeks financial redress from the State. To date, no redress has been offered by the State.

Issues raised

2.10 The issues raised by the complainant thus related to how the law and practice relating to immigration control are applied in the State and whether they respect human rights standards. The relevant domestic law governing immigration and border control is that set out in the 1935 Act (as amended), the Aliens Order (as amended) and the Immigration Acts 2003 and 2004.[15] At the time of the incidents brought to the Commission's attention by the complainant, the Immigration Acts 2003 and 2004 were not yet in force. The relevant practice refers to the processes followed by State officials in applying the law to persons seeking to enter the State and covers the areas of administrative decisions to allow or refuse leave to land, administrative detention and the forced removal of persons from the State. Issues also arise in connection with the treatment of persons such as the complainant by State officials, including whether the conditions of detention or the conditions of removal may involve ill-treatment or

[14] On 10 December 2002, the date the visa was issued, 90,500 Pakistani rupees was equivalent to approximately €1,534.85.
[15] *See* Chapter 4, Background to the Aliens Act 1935 (as amended) and the Immigration Acts.

may not fully respect the dignity of the individual. Issues arise as to whether any prohibited discrimination (whether direct or indirect) on grounds of nationality or other status may occur. Finally, issues arise in relation to the remedies available to the complainant.

2.11 Members of An Garda Síochána have extensive rights of arrest and detention at common law. Members of An Garda Síochána may be appointed as Immigration Officers by the Minister for Justice. An Immigration Officer is granted discretion under the law to allow or refuse a person leave to enter the State. Further, the decision to allow or refuse a person leave to enter the State takes place in the course of an interview conducted at the ports of entry to the State, of which Dublin Airport is the busiest port.[16]

Consideration of the enquiry request

2.12 In July 2004 the complainant confirmed that his request to the Commission was that it conduct an enquiry into the matter.

2.13 Before taking a decision on the enquiry request, the Commission sought to satisfy itself in relation to a number of matters. It engaged in detailed correspondence with the complainant to check a number of assertions made by him. It asked for copies of the relevant visa application forms, copies of the complainant's passport, copies of his correspondence with the Honorary Consul in Karachi and copies of any associated documentation. It sought information on previous visa applications made by the complainant and of previous and subsequent international travel made by him.

2.14 The Commission also asked the complainant whether he had utilised any complaint mechanisms in respect of his grievance. The complainant indicated he had complained promptly to the Honorary Consul in Karachi and provided a copy of his correspondence with the Honorary Consul which indicated that this was

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[16] Members of An Garda Síochána are deployed at Dublin Airport as Immigration Officers.

the case (the complainant had made substantially the same complaint to the Consul as he subsequently made to the Commission). In addition he sought financial redress for the harm he contended had been visited upon him. The Honorary Consul's reply to the complainant in February 2003 (which had been approved by the Department of Foreign Affairs) drew the complainant's attention to the first paragraph of the form "Ireland Visa Information" which accompanies the visa application form and the statement:

> The granting of an Irish visa is, in effect, only a form of pre-clearance. It does not grant permission to enter Ireland. Immigration Officers have authority to grant or deny admission. Visa holders are subject to normal immigration control at the port of entry.' Unquote [*sic*]. We are therefore unable to assist you in this regard.[17]

A later letter from the Embassy in Tehran referred the complainant to the relevant State complaints mechanisms which were stated to be the Garda Síochána Complaints Board or the Minister for Justice.[18]

2.15 The complainant confirmed that he had written to the Department of Justice but claimed that he received no reply. He stated that he did not complain to the Office of the Ombudsman ("Ombudsman") (however, the Ombudsman has no competence to receive immigration-related complaints).[19]

2.16 At this stage the Commission sought further information from the Department of Foreign Affairs and was directed to the Irish Embassy in Tehran. Both the Consular Section in the Department and the Embassy confirmed that the relevant diplomatic presence in Pakistan was indeed the Honorary Consul in

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[17] Letter from the Honorary Consul in Karachi to the complainant, 21 February 2003.

[18] This is contested strongly by the complainant who stated that he did not receive any such communication.

[19] The Ombudsman is not permitted under the Ombudsman Act 1980 (as amended) to investigate allegations of maladministration in immigration or Garda-related complaints. A similar situation now pertains to the Ombudsman for Children under the Ombudsman for Children Act 2002. Accordingly, there is no reference by the Oireachtas under the Tribunal of Inquiries Act 1921 (as amended) and no statutory body other than the Commission had within its remit the power to conduct an enquiry into an immigration-related matter. Since May 2007, the Garda Síochána Ombudsman Commission has been examining complaints of Garda "misbehaviour" (breaches of discipline). *See* Chapter 4 Background to the Aliens Act 1935 (as amended) and the Immigration Acts, para 4.29.

Karachi. The Embassy also confirmed that the Honorary Consul reports to the Embassy in Tehran and that the Consulate can issue visas once they have been approved in either Tehran or in Dublin. In the instant case, the Embassy informed the Commission that the complainant's visa had been approved in Dublin and issued in Karachi; that the stated purpose of the journey was "to see Ireland" and that the complainant was granted a visitor's visa on that basis.

2.17 Before proceeding to take a decision on the request for an enquiry, the Commission reviewed the information supplied to it by the complainant and the Department of Foreign Affairs. It also identified a number of human rights issues raised by the request.

2.18 The Human Rights Commission Act of 2000 provides:

> In this Act (other than Section 11), "human rights" means-
>
> (a) the rights, liberties and freedoms conferred on, or guaranteed to, persons by the Constitution, and
>
> (b) the rights, liberties or freedoms conferred on, or guaranteed to, persons by any agreement, treaty or convention to which the State is a party.[20]

2.19 On a preliminary review of the matters raised by the enquiry request, it seemed that a number of rights guaranteed to persons by international conventions to which the State is a party were relevant to the situation of the complainant.[21]

2.20 It thus appeared that:

- the complainant was a businessman who had applied for and received a visitor's visa to come to Ireland;
- as part of that process, the complainant had been asked to provide information on himself, including his financial situation and the purpose of

[20] Section 2 of the Human Rights Commission Act, 2000.

[21] *See further* below Chapter 7, Relevant International Human Rights Standards.

his trip. He had also been asked and had responded to the question of where he would stay in Ireland;

- the complainant had been granted a visa on the basis that the stated purpose of the journey was "to see Ireland";
- when the complainant arrived at Dublin Airport he was refused leave to enter the State on the basis that he, with "intent to deceive" sought to enter the State for a purpose other than that expressed by him. He was arrested, detained and imprisoned overnight in a prison with a number of other persons. He was forcibly removed from the State the following day and only arrived back in Pakistan some days later;
- when he complained and sought an explanation and redress, he was referred to standard wording in a Visa information form and was also informed that if he wished to complain he should write to the Minister for Justice or to the Garda Síochána Complaints Board;
- the complainant's treatment by the State potentially raised a number of human rights issues under international agreements to which the State is a party.

Chapter 3 The Decision to Conduct the Enquiry and the Conduct of the Enquiry

The decision to conduct the enquiry

3.1 On 18 January 2005, having considered the nature of the enquiry request, the law on the matter, the responses to the Commission's queries, the human rights issues involved and its legislation and guidelines, the Commission decided to accede to the request for an enquiry. It was of the view that conducting an enquiry could be considered expedient for the performance of three of its functions, as specified in the Human Rights Commission Act 2000, namely:

- to keep under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights; and
- to make such recommendations to the Government as it deems appropriate in relation to the measures which the Commission considers should be taken to strengthen, protect and uphold human rights in the State; and
- the promotion of understanding and awareness of the importance of human rights in the State.

3.2 The terms of reference of the enquiry were:

- to enquire into the circumstances in which the complainant applied for and received a visa to visit Ireland;

- to enquire into the circumstances of the refusal of leave to land in the State to the complainant and his subsequent detention and removal from the State, including his return via third countries to his home country;

- to enquire into the impact of the complainant's detention and removal from the State on him and on his family;
- to enquire into the legal bases, rationales and justifications advanced for the decisions to refuse the complainant leave to land and to detain and remove him from the State;
- to enquire into what information was communicated to the complainant in relation to the refusal of leave to land in the State to him and to his subsequent detention and removal from the State and the manner of communication of the above information to the complainant; and
- to enquire into the legal and practical safeguards for persons in relation to refusal of leave to land in the State, to the detention of persons refused leave to land in the State and to consequent removal from the State.

Procedure

3.3 The Commission's founding legislation provides that, for the purposes of an enquiry, the Commission may require a person to furnish relevant information, documents and things to it and, where appropriate, require such person to attend before it for that purpose.[22] It also provides that an enquiry may be conducted in public or in private as the Commission, in its discretion, considers appropriate,[23] and that, subject to the provisions of the legislation, the procedure for conducting an enquiry shall be such as the Commission considers appropriate in all the circumstances of the case.[24]

3.4 The Commission decided that the enquiry would be held in private and that its outcome would be made public. The main rationale for holding a private rather than a public enquiry was that it appeared to the Commission that the facts of the case were not substantially in dispute and that an enquiry conducted in

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[22] Section 9(6) of the Human Rights Commission Act, 2000.
[23] *Ibid.* Section 9(12).
[24] *Ibid.* Section 9(13).

private with its results being made public would be an appropriate procedure to adopt. It was considered that this would meet the Commission's operational value that, in carrying out its functions, it will ensure accessibility, openness and accountability.[25]

3.5 The procedure adopted in the enquiry, as slightly amended in June 2005, is set out at Appendix 2.

The conduct of the enquiry

3.6 In February 2005, the Commission notified the complainant and the following statutory bodies of the enquiry: An Garda Síochána, the Department of Justice, the Department of Foreign Affairs, the Governor of Mountjoy Prison and the Irish Prison Service.

3.7 In March 2005, the Commission put additional questions to the complainant and wrote to the five statutory bodies outlining the enquiry's procedure. It put a number of detailed questions to those bodies in relation to the issues raised by the complainant. A deadline of 42 days for responses was suggested. The Commission put 6 questions to the complainant, 12 questions to An Garda Síochána, 10 to the Department of Foreign Affairs, 13 to the Department of Justice, 19 to the Governor of Mountjoy Prison and 8 to the Irish Prison Service.

3.8 Between the months of April and June 2005, the Commission received detailed responses from the complainant and all five bodies. In July 2005, after reviewing the replies received, the Commission sought further clarifications or additional information. At that time, 11 additional questions were put to the complainant, 9 additional questions were put to An Garda Síochána, 8 additional questions were put to the Department of Foreign Affairs, 7 to the Department of Justice, 4 to the Governor of Mountjoy Prison and 3 to the Irish Prison Service.

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[25] *See* the Commission's Strategic Plan 2007-2011, p. 17.

Responses were received from four of the bodies between the months of August and September 2005, while one body responded in January 2006.

Information sought from the statutory bodies

3.9 The questions put to the Department of Foreign Affairs focused on the responsibility for decision-taking on visa applications between the Department of Foreign Affairs and its overseas missions and the Department of Justice, in addition to requesting relevant documentation relating to the complainant's visa application in 2002 and his complaints since 2003. In addition, the Commission sought information on the numbers who applied for and were granted visitor visas in 2002, the breakdown of successful and unsuccessful applicants by nationality, how information is communicated to visa applicants and how complaints and/ or claims for compensation are dealt with. Finally, it sought information on relevant guidelines to decision-makers on visa applications and it asked for any relevant documentation or agreements with other States in relation to removal of persons from the State.

3.10 The questions put to An Garda Síochána related to whether all Immigration Officers are members of the force and the legal basis for, and role of members of, An Garda Síochána acting as Immigration Officers. The Commission also enquired as to the extent of Immigration Officers' powers of decision-making, arrest, detention and removal of foreign nationals from the State, whether members of An Garda Síochána accompany persons refused leave to land out of the State's jurisdiction and the number of removals from the State effected in 2003.

3.11 The Commission asked An Garda Síochána specific questions in relation to its members involved in the case, including questions as to the sequence of events on 13 and 14 January 2003. The Commission requested relevant documentation relating to the decision to refuse leave to land and the complainant's arrest, transport, imprisonment, release and removal from the State.

It also asked into whose custody the complainant was handed at the airport and his last contact with a member of An Garda Síochána.

3.12 Finally, the Commission requested information in relation to a study carried out by An Garda Síochána in May and June 2006 on a small coterie of "visa required" visitors to the State who were granted leave to land during that period. In addition, the Commission sought clarification of the legal basis for the practice of crossing passport pages of those refused leave to land in the State.

3.13 The questions put to the Department of Justice focused on where the responsibility lay for visa decisions taken by overseas missions and the Department's inter-relationship with both the Department of Foreign Affairs and An Garda Síochána, in particular the Garda National Immigration Bureau. Also sought was information relating to the legal basis for decisions taken to refuse persons leave to land, detention, removal from the State and the locus of detention. In addition, information was sought concerning those nationalities requiring visas in 2002, those nationalities refused leave to land in 2003, their treatment, applicable safeguards and applicable protocols in relation to removal from the State of persons refused leave to land.

3.14 The questions put to the Governor of Mountjoy Prison focused on the circumstances involved in the complainant's committal to the prison on the night of 13 January 2003 and his removal from the prison the following morning; the treatment of the complainant and other foreign nationals detained in his cell by virtue of being refused leave to land in the State, relevant protocols, and the conditions in the holding cell. Disaggregated information was also sought on the nationalities of persons detained by virtue of being refused leave to land in 2003 and the length of that detention.

3.15 The questions put to the Irish Prison Service focused on the choice of prison and the interaction with members of An Garda Síochána or Immigration Officers in such situations of detention. Also sought was disaggregated

information on the conditions and protocols governing such detainees, the numbers of foreign nationals detained in prisons in 2003 and the length of their detention.

3.16 Further questions were then put to the complainant following the responses received from the five statutory bodies.

3.17 The responses to all questions put to statutory bodies and to the complainant were comprehensive.

3.18 Following the analysis of the responses from the various bodies, clarity was sought in late 2005 to early 2006 in relation to the following issues:

3.19 Additional questions put to the Department of Foreign Affairs sought further clarification in relation to a number of matters, including whether the Department of Foreign Affairs had taken the visa decision in the case under a Delegated Sanction arrangement with the Department of Justice and questions concerning the complainant's earlier visa application in 2001. Information was also sought as to whether there had been any communication between the Honorary Consul and either the Department of Foreign Affairs or the Department of Justice or Immigration Officers in relation to a question of accommodation in Ireland which had been put to the complainant at visa application stage.

3.20 In relation to An Garda Síochána, the Commission sought clarification of some additional facts, including whether the Immigration Officer had before him any information relating to the complainant's September 2002 visa application and visa grant. It asked what was meant by international custom and practice in relation to the removal of persons from the State and whether any relevant rules or principles of international law were relevant in this regard. Having considered responses from all bodies, the Commission asked An Garda Síochána if it could disaggregate the number of persons removed from the State in 2003 by nationality, by place of detention and by duration of detention. In relation to the

ground under the Aliens Order under which the complainant was refused leave to land (namely "intention to deceive"), the Commission asked if it could be informed of the proportion of persons refused leave to land in the first two weeks of 2003 (1-14 January) on that ground.

3.21 The Commission further asked how the preferred place of detention for persons refused leave to land was determined, the extent to which such detention may occur in Garda Stations as opposed to prisons or other places of detention and what administrative or judicial safeguards were in place in relation to detention periods.

3.22 Additional information was sought from the Department of Justice on a number of points, including further questions regarding the legal basis for the refusal of leave to land, the composition of Immigration Officers from various Departments and the legal basis for their appointment. In addition, information was sought as to the legal basis for the Department of Justice's decision-making authority in relation to visa applications and for its Delegated Sanction arrangement with the Department of Foreign Affairs. Finally, the Department of Justice was asked about the prescribed places of detention for those refused leave to land, any relevant safeguards and any redress available for persons refused leave to land who are aggrieved.

3.23 The additional questions put to the Governor of Mountjoy focused on further details concerning the treatment of the complainant at the prison on the night of 13 January 2003 and the communication of information on facilities, services and legal rights to persons detained after refusal of leave to land in the State.

3.24 The additional questions put to the Irish Prison Service focused on the languages in which information on facilities and services is communicated to prisoners, whether and how advice as to legal rights is communicated to those

refused leave to land in the State, and further questions as to the choice of prison for male and female prisoners in such situations of detention.

3.25 The complainant responded in July 2005 and responses were received from the five statutory bodies over the coming period: An Garda Síochána (August 2005), the Department of Foreign Affairs (January 2006), the Department of Justice (August and September 2005), the Governor of Mountjoy Prison (August 2005) and the Irish Prison Service (September 2005). The responses of the complainant and the five bodies were taken into account in compiling this final report.

3.26 During 2006 the Commission continued to correspond with the complainant. Unfortunately, due to its small staff and its ongoing commitments in relation to its first enquiry report, work on the second enquiry was suspended until late 2007. A draft report was compiled by March 2008 and was sent, minus any conclusions and recommendations, to the complainant and to the five statutory bodies for any views they may have thereon prior to finalisation of the report.

3.27 All statutory bodies replied on time. The complainant and three of the respondent bodies sent substantive responses during May and June 2008. Further clarification was sought from An Garda Síochana in relation to various matters they referred to in their initial response of May 2008 and their final response was received in June 2008. The Irish Prison Service and the Governor of Mountjoy Prison indicated that they had no comments to make on the draft report. All the responses received were taken into account in compiling this final report.

3.28 This report is being concurrently submitted to the complainant and the five statutory bodies. The report is available on request from the Commission's offices (Jervis House, Jervis Street, Dublin 1 (tel 01 858 9601)) and is also available on the Commission's website (www.ihrc.ie).

Chapter 4 Background to the Aliens Act 1935 (as amended) and the Immigration Acts

Immigration control in Ireland

4.1 It has long been recognised that States are entitled to regulate the entry into their territory of foreign nationals, although this prerogative must be considered in the context of any relevant international obligations on the State.[26] This general principle is reflected in Irish law and practice. Thus, the Irish courts have taken the view that immigration control is in the interests of the common good, the social order and external relations with other States.[27] On this basis, foreign nationals, as a general rule, have no right or entitlement to enter the State unless such a right is provided for in domestic law.[28]

4.2. The State's power to regulate the entry of foreign nationals to the State is one which can be regulated by the legislature. Indeed, the Oireachtas has chosen

[26] *See* for example, the dictum of McGuinness J in *VZ v. Minister for Justice, Equality and Law Reform* [2002] 2 IR 135: "This "inherent element of State sovereignty over national territory" should, however, be held in balance against the domestic and international obligations which the State has accepted in its role as a signatory to the Geneva Convention", at p.156. *See further* Chapter 7 on Relevant International Human Rights Standards.

[27] The policy behind immigration control has often been discussed by the Irish courts. In *Osheku v. Ireland* [1986] IR 733 , Gannon J stated that "[t]he control of aliens which is the purpose of the Aliens Act 1935 is an aspect of the common good related to the definition, recognition, and the protection of the boundaries of the State ... [t]hat it is in the interests of the common good of a State that it should have control of the entry of aliens, their departure, and their activities and duration of stay within the State ... [t]he integrity of the State constituted as it is of the collective body of its citizens within the national territory must be defended and vindicated by the organs of the State and by the citizens so that there may be true social order within the territory and concord maintained with other nations in accordance with the objectives declared in the preamble to the Constitution" at p.746. This statement has been quoted with approval by the Supreme Court in a number of cases. *See In the matter of Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360 ("*In re the Illegal Immigrants (Trafficking) Bill 1999*"); *FP v. Minister for Justice, Equality and Law Reform* [2002] 1 IR 164; *and AO and DL v. Minister for Justice, Equality and Law Reform* [2003] 1 IR 1. In *Lobe and Others v. Minister for Justice, Equality and Law Reform* [2003] IESC 1, Murray J (as he then was) stated that the State's control of immigration "...arises in the interests of the common good which includes the maintaining of true social order within its territory and concordance in its relations with other nations..." at p.186. "Social order" in this context may be understood as including countering threats to national security.

[28] This general rule is subject to certain exceptions in relation to UK, EU and European Economic Area ("EEA") nationals and those persons recognised as refugees. These groups are not relevant to the subject-matter of the enquiry.

to regulate immigration control by way of primary (statutes) and secondary (statutory instruments) legislation.[29] However, it has been recognised that the current regime is unsatisfactory and that a single legislative code setting out comprehensive procedures for the various stages of the immigration process is desirable.

4.3 In January 2003, the relevant statute was the 1935 Act, as supplemented by statutory instruments. Under the 1935 Act, the Minister for Justice, may by order (an "aliens order") do a number of things, including the following:[30]

Table A

- prohibit foreign nationals from landing in or entering into the State;
- impose restrictions and conditions on foreign nationals landing in or entering into the State, including restrictions on the places where landing or entry may take place;
- prohibit foreign nationals from leaving the State;
- impose restrictions and conditions on foreign nationals in respect of leaving the State including limiting such leaving to particular places or particular means of traveling;
- require such persons to comply, while in the State, with particular provisions as to registration, change of abode, travelling, employment, occupation, and other like matters.

[29] At the time of the refusal of leave to land examined in this case (January 2003), the main legislation governing immigration control was the 1935 Act, as supplemented by the Aliens Order (as amended), the Immigration Act 1999 and the Illegal Immigrants (Trafficking) Act 2000. Since the time of the refusal of leave to land examined in this case, the Government has introduced the Immigration Act 2003 (No. 26/2003) and the Immigration Act 2004 (No 1/2004).
[30] Section 5(1) the 1935 Act.

4.4 Successive Ministers made aliens orders, which operated as the primary law in the area.[31] The law in relation to refusal of leave to land and any subsequent detention and removal is now governed by the Immigration Acts 2003 and 2004.[32]

Visa applications

4.5 Tourists may apply to visit the country on tourist visas unless they are exempted by reason of nationality. Those tourists who come from a visa-required country require a visitor visa.[33] People may apply for visitor visas in Irish Embassies or Consulates. Responsibility for decisions on visa applications is shared between the Department of Justice and the Department of Foreign Affairs. While certain categories of applications for visas may be decided by the relevant

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[31] There have been a total of 74 aliens orders made under the 1935 Act. Section 5(1)(e) of the 1935 Act had enabled the Minister to make provision, by way of an "aliens order" for the exclusion or deportation of foreign nationals from the State. Also Article 13(1) of the Aliens Order provided that the Minister could, if he considered it conducive to the public good, make an order requiring a foreign national to leave and to remain thereafter out of the State. In 1999, the Supreme Court ruled that it was unconstitutional for the Minister of Justice to have the power to provide for the exclusion or deportation of foreign nationals by means of secondary legislation (an order) when the principles and policies she or he should act upon were not set out in the 1935 Act: *See Laurentiu v. Minister for Justice, Equality and Law Reform [1999] 4 IR 26 ("Laurentiu v. Minister for Justice").* To ensure that the *status quo ante* was maintained, the Oireachtas passed the Immigration Act 1999 which provided that nearly every Ministerial order under Section 5 of the 1935 Act made before the passing of the Immigration Act 1999 was to have the same legal effect as an Act. Section 2 of the Immigration Act 1999 excluded certain specified orders and provisions. The constitutionality of this legislation was later confirmed by the Supreme Court in *Leontjava v. Director of Public Prosecutions* [2004] 1 IR 591. (The Supreme Court did however hold that Article 5(6) of the Aliens Order which provided for the imposition of a condition requiring an alien to leave the State after a specified period has elapsed was *ultra vires* Section 5(1)(b) and (d) of the 1935 Act as there was no indication in the wording of Section 5(1)(b) and (d) that the Oireachtas had intended to allow the Minister to attach such a condition or to confer such a power on any other person, for example, an Immigration Officer.)

[32] Section 4 of the Immigration Act 2004 now governs refusal of leave to land and Section 5 of the Immigration Act 2003, as amended by Section 16(8) of the Immigration Act 2004, sets out the law in relation to detention and removal following refusal of leave to land. Although the Aliens Order has never been repealed, the Department of Justice informed the Commission that the State only operates in practice under the Immigration Act 2004. The Department of Justice also stated that it is its intention to revoke the Aliens Order. *See* Section 131(a) of the Immigration, Residence and Protection Bill 2008 which proposes to repeal the 1935 Act and subsequent Acts.

[33] Pakistan became a visa-required country by virtue of the Aliens (Amendment) Order 1987 (S.I. No. 340/1987), along with Bangladesh, Ghana, India and Nigeria. At the time of this report, a visa fee is payable by visa-required nationals. Under Section 13 of the proposed Immigration, Residence and Protection Bill 2008, deposits, bonds and guarantees may be required of visa applicants. Section 10 of the Bill provides for "visa-exempt foreign nationals".

Embassy or the Department of Foreign Affairs, which has legislative authority under the Ministers and Secretaries Act 1924, most decisions are referred from the Department of Foreign Affairs to the Department of Justice for decision.[34] The delegation of functions between the Department of Justice and the Department of Foreign Affairs is thus a matter of practice only.[35] Once a decision is made in relation to a visa application, this decision is communicated to the individual concerned via the relevant Embassy or Consulate or by the Consular section of the Department of Foreign Affairs.

4.6 The precise legal basis for the involvement of the Department of Justice in such decisions is not clear although it is arguable that the Department of Justice is exercising an aspect of the Minister's general executive powers in relation to the control of immigration referred to above.[36] It is also arguable that the

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[34] Section 1(xi) of the Ministers and Secretaries Act 1924 (No. 16/1924) states that the Department of Foreign Affairs shall exercise all powers, duties and functions in connection with the granting of passports, and visas for passports. However, the Commission was informed that in practice, visa applications are made to the relevant Irish Embassy or Consulate Post abroad (or if none exists, to any Irish Embassy or Consulate or to the Department of Foreign Affairs in Dublin), and the authority to decide whether to grant a visa is shared with the Department of Justice save for example, visa applications from senior officials in foreign Governments, diplomats, senior business people, clergy, persons prominent in cultural, educational and scientific fields and from the holders of certain types of valid work permits. As advised by the Department of Justice, a document known as the "Delegated Sanction to Issue Visas" was drawn up by the Department of Foreign Affairs in consultation with the Department of Justice in December 2000. Otherwise, visa applications are referred to the Immigration and Citizenship Division of the Department of Justice.

[35] The division of labour between various departments in relation to visa applications has evolved in the absence of legislation. However, the proposed Immigration, Residence and Protection Bill 2008 would introduce a statutory framework for the issue and revocation of visas, as stated in the explanatory memorandum to the Bill. According to the Department of Justice, Ireland's capacity to deal with visa applications in the relevant Embassies is hampered by a number of factors, including the rapid rise in the number of visas in recent years, the limited network of Irish Embassies and Consulates, the lack of a comprehensive computerised database linking the Department of Justice operation with that in the Embassies themselves, and also the fact that personal interviews with persons who wish to come to the State are not conducted on a systematic basis. *See* Department of Justice, *Ireland – Visa Frequently Asked Questions*, 24 January 2007, available at http://www.inis.gov.ie Applicants for a visa are informed that certain applications may have to be referred to the Department of Justice.

[36] The Department of Justice advised the Commission that in deciding whether or not to issue a visa the Minister for Justice was engaging in the lawful exercise of the executive powers of the State relating to the management of entry migration. It cites *In re the Illegal Immigrants (Trafficking) Bill 1999, Osheku v. Ireland*, and *Pok Sun Shum v. Minister for Justice, Equality and Law Reform* [1986] ILRM 593 ("*Pok Sun Shum v. Ireland*"). Section 8 of the Immigration, Residence and Protection Bill 2008 proposes to formalise the Minister's power, also providing

Department of Justice has authority under the 1935 Act which as noted gives the Minister for Justice power to make orders affecting the entry into, and residence, of foreign nationals in the State.[37] As noted, the Aliens Orders concern such general matters as those nationalities which are required to have a visa rather than necessarily relating to how the decision to grant any such visa is to be made.[38]

Immigration Officers

4.7 Immigration Officers are the State officials who take decisions as to whether to grant or deny entry into Ireland at the State's ports. Typically the Immigration Officer interviews persons seeking leave to enter the State by asking a number of questions from a booth located at an Airport or in a separate interview room.[39] In addition, Immigration Officers may interview persons at ports or on trains or buses in proximity to the border of the State or increasingly in Northern Ireland.[40]

4.8 Immigration Officers are appointed by the Minister for Justice.[41] The Department of Justice confirmed to the Commission that both members of An Garda Síochána and officials from its Immigration and Citizenship division are

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that the visa-holder "is permitted to be present at a frontier of the State for the purpose of seeking permission to enter the State...".

[37] Section 5 of the 1935 Act.

[38] *See* Aliens (Amendment) Order 1975 (S.I. No. 128/1975), Aliens (Amendment) Order, 1987 (S.I. No. 340/1987), Aliens (Visas) (No.2) Order, 2001 (S.I. No. 248 of 2001), Aliens (Visas) Order, 2002 (S.I. 178/2002), Aliens (Visa) (No.2) Order 2002 (S.I. 509/ 2002).

[39] An Garda Síochána informed the Commission that the Garda National Immigration Bureau ("GNIB") was established in May 2000, and specifically assumed responsibility for the immigration control function at Dublin Airport in late 2002.

[40] Information received from the Northern Ireland Human Rights Commission.

[41] In 2003, this was governed by Article 16(1) of the Aliens Order. Such appointments are now governed by Section 3 of the Immigration Act 2004. Sections 3(4) and (5) of this Act provide that a person appointed as an Immigration Officer before the commencement of the Immigration Act 2004 shall be deemed to have been appointed under the Immigration Act 2004 and to be able to perform all functions granted prior to the enactment of the Immigration Act 2004. *See* proposed Immigration, Residence and Protection Bill 2008, Sections 114 and 134.

appointed as Immigration Officers, although it appears that only members of An Garda Síochána are deployed at ports or airports on immigration-related duties.[42]

4.9 Immigration Officers appointed under the Aliens Order have the power to enter any vessel, and to detain and examine any person arriving at any port in the State who is reasonably supposed to be a foreign national. They are empowered to require the production of any documents by a person and also have other powers and duties as may be conferred upon them by or under the Aliens Order.[43]

Refusal of leave to land

4.10 Although foreign nationals may require a visa to enter the State, a visa only entitles them to present themselves for entry at the border. Although this point may not be widely understood, a visitor visa does not entitle a foreign national to enter the State.[44]

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[42]Article 16(1) of the Aliens Order provides that an Immigration Officer shall be appointed by the Minister, and that the Minister may arrange with the Revenue Commissioner for the employment of Officers from Customs and Excise. Under Section 3(1) of the Immigration Act 2004 that the Minister may appoint "such and so many persons as he or she considers appropriate...to perform the functions conferred on immigration officers". The Department of Justice was unable to supply figures as to the number of Department officials who had been appointed Immigration Officers under the Aliens Order, although it did confirm the number of such Officers who had been appointed under the Immigration Act 2004. Customs and Excise Officers may be appointed Immigration Officers under the Aliens Order and it would appear such appointments are made by way of a general arrangement with the Revenue Commissioners rather than pursuant to individual warrants of appointment.

[43] Article 16(3) of the Aliens Order provides that Immigration Officers "shall have such other powers and duties as are conferred upon them by or under this Order, or as may be directed from time to time by the Minister for giving effect to this Order". Examples of such powers are the power to arrest and detain any person who has been refused leave to land, the power to attach conditions as to the duration of stay and the engagement in business permitted to a foreign national granted leave to land. *See* Articles 5(2), 5(4) and 5(6) of the Aliens Order, as inserted by Article 3 of the Aliens (Amendment) Order 1975. The exercise by Departmental officials of the duties and powers given to the Minister under the 1935 Act was approved by the Supreme Court in *Tang v. Minister for Justice, Equality and Law Reform* [1996] 2 ILRM 46 *("Tang v. Minister for Justice")*.

[44] As noted "[t]he granting of an Irish visa is, in effect, only a form of pre-entry clearance. It does not grant permission to enter Ireland. Immigration Officers have authority to grant or deny admission. Visa holders are subject to normal immigration control at the port of entry." Letter from the Honorary Consul in Karachi to the complainant, 21 February 2003. *See* Chapter 2, Consideration of the Enquiry Request, para. 2.14. An Garda Síochána also brought to the attention of the Commission a recent judgment confirming this point. A copy of the judgment was not available at the time of writing this report: *Emmanuel Omatayo James & Ors v The Minister for Justice, Equality and Law Reform*, Unreported, High Court, 23 May 2008.

4.11 In 2003, at the time of the event at issue, citizens of some countries required a valid Irish visa in order to be allowed enter Ireland, while citizens of other countries were exempt from this requirement.[45] Accordingly, nationals of Pakistan had to apply for a visa to visit or transit Ireland. Certain safeguards must be followed where an Immigration Officer refuses leave to land. The Immigration Officer must inform the person concerned in writing of the grounds for refusal "as soon as may be".[46] The criteria to refuse leave to land are set out in Table B.[47]

Table B

The criteria under Article 5(2) are:
(a) the foreign national is not in a position to support himself or herself or any accompanying dependants; (b) the foreign national does not possess a valid employment permit; (c) the foreign national suffers from one of a number of specified diseases or disabilities; (d) the foreign national has been convicted of an offence punishable by imprisonment of at least one year; (e) the foreign national does not possess a valid Irish visa, and is the citizen of a country which requires a visa; (f) there is a deportation order against the foreign national, an order excluding him from the State or a decision by the Minister for Justice that he remain out of the State for the public good; (g) the foreign national has been prohibited from entering the State by order of the Minister under the Aliens Act 1935;[48]

[45] *Supra.* fn 34. *See further* the Immigration Act 2004 (Visas) (No, 2) Order 2006 (S.I No. 657/2006) sets out the most recent list of those countries whose citizens are visa-exempt and those whose citizens require a transit visa. *See* Section 8 of the Immigration, Residence and Protection Bill 2008.

[46] Article 5(3) of the Aliens Order, as inserted by Article 3 of the Aliens (Amendment) Order (1975). This is also provided for under Section 4 (4) of the Immigration Act 2004.

[47] Article 5(2) of the Aliens Order, as inserted by Article 4 of the Aliens (Amendment) (No. 2) Order 1999 (S.I 24/1999). Article 5(7)(a) of the Aliens Order, as inserted by Article 3 of the Aliens (Amendment) Order (1975) relates to foreign nationals arriving from Great Britain or Northern Ireland. In addition, it should be noted that since the time of the refusal to land examined in this case, the Immigration Act 2004 was enacted, and Section 4 of this Act now sets out similar criteria to those contained under Section 5(2) of the Aliens Order. *See further* Chapter 6 Refusal of Leave to Land.

[48] The Minister may so prohibit entry pursuant to Section 5(1)(a) the 1935 Act.

(h) the foreign national belongs to a class of persons prohibited from entering the State by order of the Minister under the Aliens Act 1935;[49]

(i) the foreign national is not in possession of a valid passport or other document which establishes his identity to the Immigration Officer's satisfaction;

(j) the foreign national intends to travel to Great Britain or Northern Ireland and would not qualify for admission there if he or she was not coming from the State;

(k) the foreign national, having arrived in the State as a seaman or member of a crew of a ship or aircraft has remained in the State without the permission of an Immigration Officer after the departure of the ship or aircraft in which he arrived;

(l) that the foreign national would pose a threat to national security or his or her presence would be contrary to public policy;

(m) that there is reason to believe that the foreign national, with intent to deceive, seeks to enter the State for a purpose other than that expressed by him.

4.12 As can be seen from the list, the criteria are quite broad and permit a wide ranging discretion to the Immigration Officer who takes decisions on behalf of the State. There is a wide range of grounds upon which refusal of leave to land may be made.[50] The Department of Justice confirmed that Immigration Officers have a wide discretion in relation to refusal of leave to land and informed the Commission that there are no circulars or guidelines issued by it pertaining to the interpretation of these grounds, including in relation to ground (m) above.[51]

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[49] *Ibid.*

[50] The proposed Immigration, Residence and Protection Bill 2008 further expands the grounds for refusing leave to land in the State. For examples see, *inter alia*, Section 27(1), subsections (b),(n),(o) and (q), which extend to matters such as the possibility that the applicant and their dependents might become a burden on the State; the fact that previous costs in relation to removing the person from the State have not been discharged; that the person holds a false Irish residence permit, and where the entry of the person is contrary to a regulation adopted by the Minister for the purpose of maintaining the integrity of the immigration regime. The Commission has separately expressed concern in relation to the amount of discretion in decision making accorded to Immigration Officers. *See, "Observations on the Immigration, Residence and Protection Bill 2008"*, March 2008, Irish Human Rights Commission, Dublin.

[51] The Department confirmed that this was the case by virtue of Article 5 of the Aliens Order. In *Kanaya v. Minister for Justice, Equality and Law Reform* [2000] 2 ILRM 503, a challenge to the delegation of powers by the Minister for Justice to Immigrations Officers was unsuccessful. The challenge argued that the discretionary powers afforded to Immigration Officers to grant or refuse leave to land on the grounds were so wide and unfettered as to be *ultra vires* the power of the Minister, as conferred by the 1935 Act. However, this decision occurred before the decision of the Supreme Court in *Laurentiu v Minister for Justice*, which ruled that it was unconstitutional for the Minister for Justice to have the power to provide for the exclusion or deportation of foreign nationals by means of secondary legislation (an order) when the principles and policies she or he could act upon were not set out in the 1935 Act.

4.13 However in exercising his or her discretionary powers it is clear that the Minister for Justice, and any Immigration Officers acting on his or her behalf, must act in accordance with the powers granted to him or her by the Oireachtas and must act fairly and in accordance with the legal principles of "natural justice".[52] Further if the Minister for Justice adopts a policy in the area, the Immigration Officer must not apply that policy in a way that inhibits their exercising their discretion properly or which produces a decision unsupported by the evidence.[53] A refusal of leave to land may also be invalid if it is based on a mistake of fact.[54]

4.14 Finally, it should be noted that a decision to refuse a person leave to land does not constitute a bar on future admission to the State. The Department of Justice informed the Commission that persons who have been refused leave to land may present themselves again at a subsequent date for admission, for example, if the reason for the initial refusal no longer applies.

Arrest and transport to a place of detention

4.15 A foreign national who has been refused leave to land may be arrested by an Immigration Officer and held in any of a number of places of detention specified in the Aliens Order as amended.[55] A person detained in this manner may be detained only until such time (being as soon as practicable) as she or he is removed from the State and the detention cannot exceed eight weeks.[56] This

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[52] Natural (or constitutional) justice lays down a number of principles of procedural fairness that must be present if a decision is not to be considered *ultra vires. See dicta* of Hamilton CJ in *Tang v. Minister for Justice,* and Costello J in *Pok Sun Shum v. Ireland.*
[53] *Mishra v. Minister for Justice* [1996] 1 IR 189.
[54] *Gulyas v. Minister for Justice* [2001] 3 IR 216.
[55] Article 5(4) of the Aliens Order, as inserted by Articles 3 of the Aliens Order 1975. An Immigration Officer or a member of An Garda Síochána may arrest such a person. Although the powers are conferred on all Immigration Office, including Officials from the Department of Justice and from Customs and Excise, the Department of Justice informed the Commission that in practice, only members of An Garda Síochána are deployed at airports.
[56] At the time of the incident complained of, this eight week time-limit was not explicit under the Aliens Order. However in *Ji Yoa Lau v. Minister for Justice, Equality and Law Reform* [1993] 1 IR 116, the High Court interpreted the Aliens Order so as to ensure that the term "as soon as being practicable" does not exceed a period of two months. After that period, the custody of a foreign national refused leave to land in the State would be deemed unlawful. Currently Article 5(3)(a) of

detention must be kept under review and ended if new facts or circumstances come to light which show that it is no longer necessary. This requirement to keep the detention under review exists independently of any application made by the person concerned.[57]

4.16 An Garda Síochána informed the Commission that in circumstances where same day removal of a person who has been refused leave to land is not practicable, it is normal practice to bring the person to a place of detention as soon as possible. The length of such detention is stated to be usually one night, unless an appropriate flight is unavailable or there is a problem with travel documentation. The decision as to which place of detention is to be used is one made by the Immigration Officer (member of An Garda Síochána) under whose warrant the person was detained, in consultation with the Irish Prison Service.

4.17 The preferred place of detention is stated to be determined by the interval between refusal of leave to land and removal from the State and the balance of convenience for the person concerned. The Commission was informed that where the detention is for a short period Garda stations may be used but where the period of detention is likely to be longer than 18-24 hours prisons are used.[58] The Irish Prison Service advised the Commission that the same protocols which

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the Immigration Act 2003 provides that a person refused leave to land cannot be detained in the State for longer than eight weeks, in aggregate. The Immigration, Protection and Residency Bill 2008, includes this eight week time-limit, under Section 55(5).

[57] *See In re the Illegal Immigrants (Trafficking) Bill 1999* "...an executive power of detention must not be unnecessarily exercised. Even if the power is properly exercised in the first instance, the relevant executive authority must be vigilant to ensure that detention be brought to an end, if having regard to new circumstances or discovery of new facts or of some other reason, it is no longer necessary. This should be done independently of any application in that regard of the person concerned."

[58] An Garda Síochána also confirmed to the Commission, that currently, at the request of the Irish Prison Service, Cloverhill Remand Prison is the preferred place of detention for men who following their refusal of leave to land have been deemed necessary to detain. If a woman has been refused leave to land at Dublin port, Rosslare port or close to the border she is detained at the Dóchas Centre, Mountjoy Prison and if refused leave to land at Cork port or at Shannon airport she is generally accommodated in Limerick Prison. The Department of Justice also indicated that the Irish Naturalisation and Immigration Services is in ongoing discussions with the Irish Prison Service in relation to the development of separate purpose built detention facility for "immigration offenders" at the proposed new prison at Thornton Hall. It is not clear whether this would also be used for persons, such as the complainant, who are refused leave to land at the point of entry to the State, as the term "immigration offenders" would not normally be associated with such persons.

pertain to the transfer of persons refused leave to land are also applied to prisoners under sentence or remand warrant.[59]

Removal from the State

4.18 After imprisonment, a foreign national refused leave to land is removed from the State by being transferred to a port by An Garda Síochána. As noted, the foreign national who is detained after refusal of leave to land shall remain detained until she or he is removed from the State.[60] The Assistant Governor of Mountjoy Prison informed the Commission that when a foreign national detained under the 1935 Act is being removed, a member of An Garda Síochána comes to the main gate of the prison with a release order which is examined by the Assistant Chief Officer of the prison to ensure that it is in order. The member of An Garda Síochána then executes the back of the warrant in writing. The foreign national is then discharged into Garda custody. It would appear that in so doing An Garda Síochána is purporting to act further to the 1935 Act and the Aliens Order. In practice it appears that members of An Garda Síochána accompany some but not all persons who are refused leave to land out of the jurisdiction, depending on the circumstances of the case and the views of the aircraft or ship concerned.[61]

4.19 For example, a foreign national coming from a place other than Great Britain and Northern Ireland who has been refused leave to land can be removed from the State by carrier removal on the ship or aircraft on which she or he arrived

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[59] The Irish Prison Service did however inform the Commission that a draft protocol was being developed by the Immigration and Citizenship Division of the Department of Justice in relation to procedures to be adopted when a person detained in custody on immigration matters subsequently applies for refugee status.

[60] Article 5(5) of the Aliens Order, as inserted by Aliens (Amendment) Order 1975. This has been revoked by Section 13 of the Immigration Act 2003. Currently, Section 5 of the Immigration Act 2003 governs the laws concerning the removal from the State of persons refused leave to land. *See* Section 54(1) of the proposed Immigration, Residence and Protection Bill 2008 which provides that "where it appears to an immigration officer or a member of An Garda Síochána that a foreign national is unlawfully present in the State or at a frontier of the State, the officer or member may remove the foreign national from the State" and Section 54 (2) which proposes to grant wide powers in relation to which State the person should be returned to.

[61] *See further* Chapter 6, The Impact of the Law and Practice on the Complainant and Others.

(or any ship or aircraft belonging to the same owners or agents), as the ship or aircraft is liable to transport that person to the country they arrived from or to their country of nationality.[62] However the ship or aircraft is not liable to transport the foreign national if a period of two months has elapsed since the date of the foreign national's arrival in Ireland.[63]

4.20 An Immigration Officer or a member of An Garda Síochána may place a foreign national coming from a place other than Great Britain and Northern Ireland who has been refused leave to land on board the ship or aircraft on which he or she arrived in the State (or any ship or aircraft belonging to the same owners) any time within one month of the arrival of the foreign national.[64] Finally, an Immigration Officer may request that the master of a ship or aircraft detain any passenger who is a foreign national (coming from a place other than Great Britain or Northern Ireland) who has been refused leave to land.[65] The Department of Justice suggests that where an Immigration Officer accompanies a person who has been refused leave to land on an aircraft they do so "at the behest of the captain" by virtue of what it described as "International custom and practice"; despite the fact that the aircraft is at that time still in Irish territory.[66]

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[62] In *Fakih v. Minister for Justice, Equality and Law Reform* [1993] 2 IR 406 O'Hanlon J held that the fact that the applicants in that case had set foot in the UK before coming to the State was not sufficient to convert their status into that of foreign nationals arriving in the State from Great Britain or Northern Ireland; rather when the applicants were returned to the State from the UK they were still in the course of their travels from Lebanon to Ireland so that Immigration Officers were entitled to deal with them as foreign nationals arriving from a place other than Great Britain or Northern Ireland.

[63] Article 7(7) Aliens Order, which was revoked by the Immigration 2003 Act. Currently, the "Liability of Carriers" is provided for under Section 2 of the Immigration Act 2003.

[64] Article 7(8) Aliens Order. This can be exercised by a member of An Garda Síochána acting as an Immigration Officer or as an "ordinary" member of An Garda Síochána (unlike the powers relating to the decision whether to refuse leave to land under Article 5 which can only be exercised by those members of An Garda Síochána who have also been appointed as Immigration Officers). This power can be exercised even if there has been an imprisonment or prosecution since the refusal of leave to land. Article 7(8) has been revoked by the Immigration Act 2003.

[65] Article 7(9) Aliens Order. Part 6 of the Immigration, Protection and Residence Bill, 2008 intends to provide for "Removal from the State".

[66] Letter from An Garda Síochána to the Commission, 19 May 2005.

Safeguards

4.21 As the State has such wide powers to control the entry to and activities of foreign nationals in its territory, foreign nationals may be the subject of legal measures which could not be applied to citizens.[67] However this does not mean such persons are without the protection of the law. At a minimum, foreign nationals have a right to require that any measures taken against them by the State do not violate constitutional guarantees, including those relating to personal rights.[68]

4.22 A number of avenues of potential redress exist where a person feels aggrieved when they have been refused leave to land and detained. However the efficacy of some of these options will depend upon the extent to which an aggrieved person has access to adequate legal assistance.

4.23 First, a foreign national can challenge the refusal of leave to land by applying (within 14 days of the refusal) for judicial review of the decision. This allows the legality of the Immigration Officer's decision to be reviewed by the courts.[69] In theory such applications can be made even if the applicant is no longer in the jurisdiction.[70]

4.24 Secondly, any person who feels a detention is unlawful may challenge such detention by way of an application for *habeas corpus*. A *habeas corpus* application can be made personally if the applicant is aware that such a

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[67] *In re the Illegal Immigrants (Trafficking) Bill 1999*, the Court considered the constitutional status of foreign nationals and it was stated "...in the sphere of immigration, its restrictions or regulations, the foreign national or alien constitutes a discrete category of persons whose entry, presence and expulsion from the State may be the subject of legislative and administrative measures which would not, and in many of its aspects, could not, be applied to its citizens."

[68] *Ibid.*

[69] Section 5 of the Illegal Immigrants (Trafficking) Act 2000. This application for judicial review must be on notice to the State respondent(s).

[70] In *Adebayo v. Commissioner of An Garda Síochána* [2006] 2 IR 298 the Supreme Court considered the conditions under which a person may be deported, if they have instituted judicial review proceedings.

possibility exists. An application for *habeas corpus* is dealt with by the High Court at the first available opportunity.[71]

4.25 Thirdly, in relation to conditions of detention in prisons, persons who are detained after being refused leave to land are treated in the same manner as remand prisoners.[72] According to the Irish Prison Service, this means that they are kept separate from persons awaiting trial or convicted of offences, and have the same rules applied to them relating to food, clothing, bedding, visits and communications. In addition, the Prison Governor shall see all committals at "an early opportunity" after their admission.[73] The Irish Prison Service stated that prisoners who are seen by the Governor are advised as to free legal aid (presumably in relation to criminal proceedings) and other such matters and prisoners can request legal aid forms on the daily Governor's parade.[74]

4.26 Fourthly, in relation to conditions of detention in Garda stations, the member in charge of a Garda station has a duty to inform an arrested person that he or she is entitled to consult a solicitor.[75] The member in charge is further obliged to inform a foreign national that they are entitled to communicate with

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[71] The right of *habeas corpus* is provided for in Article 40.4 of the Constitution. Article 40.4.2 provides: "Upon complaint being made by or on behalf of any person to the High Court or any judge thereof alleging that such person is being unlawfully detained, the High Court and any and every judge thereof to whom such complaint is made shall forthwith enquire into the said complaint…". *In re the Illegal Immigrants (Trafficking) Act 1999*, the Supreme Court confirmed that the right extends to foreign nationals.

[72] As advised by the Irish Prison Service. The treatment of prisoners on remand or awaiting trial is set out in Rules 189 to 213 of the Rules for the Government of Prisons 1947 (S.I No. 320/1947). Rule 189(d) specifically applies these rules to foreign nationals not under sentence who are detained under the Aliens Order. These rules have been replaced by Prisoner Rules 2007(S.I 252/2007), pursuant to Section 35 of the Prison Act 2007 (No 10/2007).

[73] Rule 15(2) of the Rules for the Government of Prisons 1947. The Irish Prison Service informed the Commission that such visits normally occur in the morning. The Irish Prison Service also stated that this requirement might not be fulfilled if persons were committed in the afternoon, evening or at night and subsequently released into Garda custody for removal from the State later that day, or, early the next day. Further, persons committed at those times who were transferred to hospital immediately on, or after committal and then released into Garda custody immediately on their return from hospital might also fall outside such visits.

[74] *See* Chapter 6, The Impact of the Law and Practise on the Complainant, Conditions of Detention, para 6.13.

[75] Regulation 8(1) of the Criminal Justice Act, 1984 (Treatment of Persons In Custody in Garda Síochána Stations) Regulations, (S.I. 119/1987) ("the 1984 Regulations").

their Consulate.[76] In addition, regulations provide for medical treatment and the keeping of records in Garda stations, "among other matters".[77]

4.27 Fifthly, a person refused leave to land may in theory complain to the Minister for Justice. However, the Department of Justice confirmed that there are no express provisions in law or practice for redress to be afforded to such a person even where the State, on review of the matter, feels it may be appropriate to offer an apology or other form of redress, such as an *ex gratia* payment. Accordingly, while such remedies may theoretically be available, they would appear highly unlikely and no *ex gratia* payment has ever been made.

4.28 Sixthly, a person refused leave to land may complain about the conduct of a member of An Garda Síochána to a complaints body. In 2003, this referred to the Garda Síochána Complaints Board.[78] Since 2006, a person refused leave to land can complain to the Garda Síochána Ombudsman Commission, but only if this complaint relates to the actions of a member of An Garda Síochána rather than consideration of immigration procedures *per se*.[79]

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[76] Regulation 14(1) of the 1984 Regulations.

[77] Regulation 6 of the 1984 Regulations concerns custody records and Regulation 23 of the 1984 Regulations provides for "other matters to be recorded"; such as, visits, correspondence concerning and made by the person in custody, meals given to the person in custody and when the custody ended.

[78] This was only permitted if the relevant conduct came within the remit of the Board. The Board could consider complaints relating to improper conduct (conduct which could result in a member being charged with a criminal offence) or conduct which would constitute a breach of discipline (including, for example, neglect of duty or abuse of authority, such as arresting a person without good reason). It is unclear whether this remit would extend to cover complaints about the manner in which a member of An Garda Síochána exercised discretion in refusing leave to land. This complaints process did not extend to Immigration Officers who were not members of An Garda Síochána.

[79] The Garda Síochána Ombudsman Commission ("GSOC"), was established under The Garda Síochána Act (2005) (No. 20/2005). The GSOC can consider complaints of Garda "misbehaviour" which is defined to mean conduct constituting an offence or a breach of discipline (effectively the same type of conduct that the Garda Síochána Complaints Board could investigate). A time-limit of 6 months to make a complaint to the GSOC applies. The GSOC can also of its own initiative investigate any matter that appears to indicate that a member of An Garda Síochána has committed an offence or behaved in a manner that would justify disciplinary proceedings, or investigate any Garda members practice, policy or procedure with a view to reducing the incidence of related complaints.

4.29 Another complaints body is the Office of the Ombudsman which was established to examine complaints about the administrative actions of certain State bodies. However, it is not permitted to investigate allegations of maladministration in immigration or Garda-related matters.[80]Also, the Office of the Ombudsman will not investigate matters which are before the courts.[81]

4.30 Seventhly, the Department of Justice also provided as an example of a "safeguard" the fact that members of its Immigration and Citizenship Division are available to members of An Garda Síochána acting as Immigration Officers for the purposes of "consultation" in relation to their powers of refusal of leave to land, arrest, detention and removal from the State.

Additional safeguards since events at issue

4.31 Since the enactment of the Immigration Act 2003 in late 2003 the detention and removal of foreign nationals is now governed by Section 5 of that legislation, as stated. This provides certain additional safeguards concerning children who may not be arrested and detained in certain specified places, while the Health Service Executive must be notified where a child is in custody. Persons who are detained for the purposes of removal from the State may not be detained for more than eight weeks in total. However, the Ombudsman for Children's remit does not extend to investigating children in detention.[82]

4.32 The Immigration, Residence and Protection Bill 2008 proposes to consolidate immigration law into a single statutory code. The Commission has examined the safeguards in this Bill pursuant to its legislative review function.[83]

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[80] *See* Section 5(e)(iii) and Part 2 of the First Schedule, of the Ombudsman Act (1980), as amended. A similar situation pertains in relation to the Ombudsman for Children under Section11(1)(e) and Part 2 of the First Schedule of the Ombudsman for Children Act 2002.
[81] *See* Section 5(a)(i) of the Ombudsman Act (1980), as amended.
[82] Section 11(1)(e) and Part 2 of the First Schedule of the Ombudsman for Children Act 2002 (No. 22/2002).
[83] *See, "Observations on the Immigration, Residence and Protection Bill 2008"*, March 2008, Irish Human Rights Commission, Dublin.

4.33 Finally, the European Convention on Human Right Act 2003 places further indirect obligations on the organs of the State in relation to Ireland's international obligations under that Convention. The States obligation under that Convention will be explored in more detail in Chapter 7 below.

Chapter 5 The Treatment of the Complainant

The visa application

5.1 In the course of the enquiry, it transpired that the complainant had previously applied for a visitor visa to come to Ireland in 2001. This application was referred from the Honorary Consul in Karachi to the Department of Justice in Dublin.[84] The Department of Justice refused the application and a letter of refusal was issued to the complainant on 21 May 2001.

5.2 The complainant applied again the following year for a visitor visa to come to Ireland. His application in August 2002 was again made to the Honorary Consul in Karachi which again referred the matter to the Department of Justice for consideration. This time the Department of Justice approved the application for a three month visitor visa in December 2002, valid from 10 December 2002 to 9 March 2003.

5.3 Unfortunately a copy of the May 2001 letter of refusal for the first visa application could not be produced by the Department of Foreign Affairs for comparison purposes.[85] A copy of the standard letter of refusal was, however, provided.

5.4 In applying for a visitor's visa in 2002, the complainant filled in a standard Application for Visa form which was produced to the Commission. This application form is dated 12 September 2002 and provided the following documentation in addition to a bank draft to the sum of 1,700 Rupees (being the application fee):[86]

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[84] "Visitor visa" applications are not applications subject to the "Delegated Sanction Agreement" with the Department of Foreign Affairs.

[85] The Department of Foreign Affairs advised the Commission that the documentation relating to visa applications is only held by overseas Missions for two years.

[86] On 10 December 2002, the date the visa was issued, 1,700 Pakistani rupees was equivalent to €28.83.

- Original passport;
- Bank balance certificate;
- Business certificate;
- Income certificate;
- Property certificate;
- Income tax exemption certificate;
- Marriage certificate;
- Children registration certificate;
- Police clearance certificate.[87]

5.5 The application form contains a picture of the complainant and relevant details, although certain questions were not answered. In other respects, the details provided tended to be somewhat sketchy. For example, under "Occupation" the complainant wrote "Business Man"; against the question "Purpose of journey" it was stated "To see Ireland". For "How do you propose to maintain yourself in Ireland?..." the complainant indicated "Any suitable hotel". For "Address of destination in Ireland (in detail)" he wrote "Dublin".

5.6 In his application, the complainant correctly indicated that he had previously applied for and been denied a visa. He also indicated that he would not be accompanied by any family members.

5.7 In addition, he provided further information in the cover letter concerning a business partnership in which he was engaged and references to previous visits to Abu Dhabi and Malaysia. The letter also stated "...I want to visit to your country only for 15 days – all the expenses will be made from my own pocket [sic]".

5.8 The Honorary Consul issued a receipt for fee paid and it appears that it may have telephoned the complainant on 30 September 2002 insofar as a

[87] As per the list provided by the complainant along with his application. In the copies of the documents enclosed by the complainant, the business certificate is entitled "Existing certificate". That which the complainant refers to as a "Children registration certificate" is entitled "Birth Registration Certificate".

subsequent letter from the complainant indicated that a bank statement and a hotel reservation had been requested of him. This letter is quite instructive and is reproduced here:

> Sir/ Madam,
>
> The bank statement of the application has already sent to your office if not available another statement original of my account are enclose here with for further necessary action
>
> (2) It is know every person that in [placename] there are no credit card system. In this connection I contact the hotels of Dublin but he demanded credit card for issuance hotel reservation the credit card system or not available with out credit card he does not issue hotel reservation there for S.No.2. Demanded may please be dropt As and when the visa was issue. The applicant will be adjusting himself in any suitable hotel please.[88]

5.9 Thus, before his visa application was considered by the Irish authorities, the complainant had addressed the question of whether he had a hotel reservation and had pointed out that as he had no credit card, he could not reserve a hotel, but that he intended to find "any suitable hotel" after arriving in Dublin. This statement is significant in view of the fact that the lack of any hotel reservation was one of the matters referred to by the Immigration Officer in the reasons why the complainant was subsequently refused leave to land in the State in January 2003.

5.10 As stated, the complainant's visa application was approved by the Department of Justice on 4 December 2002 and his passport was returned to him from the Honorary Consul in Karachi with the visitor visa duly affixed to it in a letter dated 10 December 2002.

5.11 The Department of Foreign Affairs pointed out that in January 2002 the *Ireland Visa Information* form was provided to the complainant prior to his September 2002 visa application. It is clearly stated therein that the grant of a visa is a pre-clearance document only and does not grant permission to enter

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[88] Letter from complainant to the Honorary Consul in Karachi, undated.

Ireland.[89] The Department of Foreign Affairs and An Garda Síochána also confirmed to the Commission that no communication protocols exist between the grant of a visitor visa and the interview by Immigration Officers at Irish ports when the visitor arrives. An Garda Síochána confirmed that in the present case, no information was available to the Immigration Officer at Dublin Airport regarding the complainant's visa application, other than that appearing on the visa sticker in the complainant's passport. Thus the fact that the complainant had been asked and had addressed in writing the question of hotel accommodation and the purpose of his trip to Ireland was not communicated to the Immigration Officer interviewing the complainant on arrival in the State. It was pointed out by An Garda Síochána, that even if the Immigration Officer had access to the information that the complainant provided when applying for the visa, this would not necessarily have prevented the Immigration Officer asking the same questions again to determine the veracity of the information provided by the complainant:

> With regard to some information submitted to the visa issuing authority, it is, in fact, not possible to test its veracity at the time it is submitted and this requires verification at the time of arrival in the State. For example a person can indicate an intention to reside or avail of accommodation at a particular premises following arrival in the State and provide supporting documentation, such as a receipt for payment of a booking deposit, but subsequently cancel the relevant booking.[90]

5.12 Commenting on the inherent contradiction in the visa process, the complainant wrote:

> 4. That the visa information (pamplet) is only formalities and not requirements for the purpose if the Immigration Officer is authorized to deny an person having allotted visa then what is the need of embassy, correspondence and visits. Then whole process may be through Immigration Officer so that the timing struggle for

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[89] This was pointed out to the complainant by the Honorary Consul in Karachi in a letter of 21 February 2003 following his forcible return to Pakistan in early 2003. That letter advised that applicants are informed by means of an information leaflet that the granting of an Irish visa is in effect a form of "pre-entry clearance" which does not per se grant permission to enter Ireland, and that Immigration Officers have the authority to grant or deny admission into Ireland. *See* the Ireland Visa Information document issued by the Department of Foreign Affairs, para 19, January 2002 and the so-called "wrap-around sheet" which is typically enclosed with the Irish visa application form. *See* new provision in Section 8 of the Immigration, Residence and Protection Bill 2008. *Supra.*, fn 37.

[90] Letter from An Garda Síochána to the Commission, 12 May 2008.

affairing [sic] visa through embassy is saved. Such visa must be granted by the embassy after approval of the Immigration Officer so in such a way the person requesting for visa should have not put in so much financial losses troubles beside mental torture.[91]

Refusal at Dublin Airport

5.13 The complainant states that he flew from Islamabad to Kuwait on 12 January 2003 and from Kuwait to London Heathrow on the following day. According to An Garda Síochána, the complainant arrived in Dublin Airport on 13 January 2003 at approximately 11.15 p.m. on British Midland Flight No BD 135 from London Heathrow, having transited through Islamabad and Kuwait.[92] He had in his possession a valid three month visitor's visa duly affixed to his passport. He presented at Immigration Pier C stating he was coming to Ireland for a holiday for ten to eleven days but that he had no accommodation booked for his stay. He had one piece of luggage and £920STG in his possession.

5.14 He was interviewed by a member of An Garda Síochána, duly appointed and acting as an Immigration Officer who provided him with a Notice stating that leave to land was being refused to him on the basis that the Immigration Officer had reason to believe that the complainant had, with *"intent to deceive"*, sought *"to enter the State for a purpose or purposes other than those expressed by you"*. This ground of refusal was provided for under Section 5(2)(m) of the Aliens Order (as amended).

5.15 A handwritten note of the interview and the decision to refuse leave to land is recorded as refusal number 145/03 in a Refusals Book kept at Dublin Airport. The note record states:

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[91] Letter from complainant to the Commission, 7 July 2003.

[92] Since the complainant entered into the State from Great Britain, it may appear that the powers of removal under Article 7 of the Aliens Order would not apply to the complainant, as these allow for the removal of persons coming from a place outside the State other than Great Britain or Northern Ireland. However, in *Fakih v. Minister for Justice, Equality and Law Reform*, it was held that in cases where a foreign national transits through the UK to Ireland from elsewhere, Immigration Officers are entitled to deal with them as foreign nationals arriving from a place other than Great Britain or Northern Ireland. See Chapter 4, Removal from the State, para 4.19.

Subject arrived at Immigration Pier C from London Heathrow and stated he was coming for a holiday to Ireland. He had good English and stated he was staying for 10/11 days. He had no accommodation booked in Ireland. He had no friends or contacts in Ireland. He had £920 sterling in his possession.

He came into the Airport from the flight amongst a group of Pakistani nationals already working here.

I found it very difficult to believe that subject was in fact a genuine tourist. He has no contacts in Ireland and appeared to be at a loss to explain exactly why he is in Ireland.

The complainant's version of the interview was thus:

> He said to me in hursh [sic] language that where you will stay and have your relatives/friends in Ireland. So I said no-sir I will stay in any suitable hotel and there is one of my relatives or friends. I further told to the officer that you may please be asked from your consulate because all the questions already answered are available in my first visa application...[93]

Subsequently the complainant elaborated when asked to describe the precise sequence of events:

> ... upon arriving at the Dublin Airport the Immigration Officer presented me a form to fill in where in one point was where to stay in Dublin I replied "Any suitable Hotel" the second question was any relative in Dublin? The reply was "No" He then verbally asked to show him money if any. I presented 1100 pounds on the spot for required 10 days. His attitude harsh & without specking [sic] any thing he sent me to the jail...[94]

5.16 The Notice to refuse leave to land included advice that the complainant would be detained in Mountjoy Prison before being removed from the State "as soon as practicable". [95] According to the complainant, his luggage was taken from him and was returned to him the following day on his removal from the State. However, An Garda Síochána could not confirm whether or not the complainant had luggage with him or whether it was removed and subsequently returned to

[93] Letter from complainant to the Commission, 7 July 2003.
[94] Letter from complainant to the Commission, 9 December 2003.
[95] An Garda Síochána provided the Commission with a sample refusal letter under the Aliens Act 1935. It was noted that the sample letter made provision for notification of the reason for the refusal of leave to land as determined by the relevant Immigration Officer, but did not state that the person would be detained in a secure facility pending removal from the State.

him. A different Immigration Officer and member of An Garda Síochána signed a Detention Order addressed to the Governor of Mountjoy Prison.

Detention in Mountjoy Prison

5.17 The complainant was thus arrested and transported to Mountjoy Prison along with three other persons by a member of An Garda Síochána. He arrived at the prison at approximately 11.45 p.m. on 13 January, as recorded by the prison authorities. This suggests that the interview and arrest time at Dublin Airport was short, since the complainant had arrived in Dublin Airport at approximately 11.15 p.m. The detention order that had been signed at the airport by an Immigration Officer was addressed to the Governor directing that the complainant be detained at the prison pending the making of arrangements for his removal from the State. On entering the prison the complainant was reportedly given a copy of an information booklet containing information on the available facilities and services, although the complainant alleges that he never received this booklet.[96] The Assistant Chief Officer in charge of the prison read the immigration detention warrant to the complainant, took his committal details and took him into detention. He was asked to hand over valuables for safekeeping which he did apart from his money which he concealed on his person. Prison records show that the complainant surrendered his watch for safekeeping.

5.18 The complainant was reportedly searched and offered a shower in the prison. He was reportedly weighed and measured and allowed to remain in his own clothes. The Assistant Governor of Mountjoy informed the Commission that this was because staff would have been advised that the complainant was due to be returned to the Airport early the following morning. He was reportedly interviewed by a member of the medical staff and removed to B Base Class in the prison where new committals are reportedly initially accommodated.

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[96] The Assistant Governor of Mountjoy confirmed that the complainant could have spoken to the Assistant Chief Officer if he had any queries on the night of his committal in relation to the rights laid out in the information booklet.

5.19 The Assistant Governor of Mountjoy informed the Commission that the complainant was offered tea, milk and buns for supper "which is the normal procedure at such a later hour."[97] He also noted that although the complainant was offered supper after 11.45 p.m. on 13 January 2003 and breakfast prior to 5.45 a.m. on 14 January 2003, there was "no facility for a special diet as it was so late at the time of his committal and so early at the time of his discharge."[98] The complainant reports that he was offered a sandwich which he refused.

5.20 The complainant was placed in a cell with the other three detainees transported from the Airport at the same time. These prisoners appear to have been similarly refused leave to land in the State and were due to be forcibly removed from the State the next day. There was reportedly a toilet and wash hand basin in the cell for the prisoners' use.[99] However, the complainant stated that the cell comprised bedding on the floor and stated he was unable to eat due to anxiety.

> I was kept in my own clothes and in the room there was a foam on the floor for me I was served with some sand witch [sic], which I could not even taste because of the unexpected situation of arresting and imprisonment I was provided with no information whatsoever about this treatment.
>
> *Letter from complainant to the Commission, 7 April 2005.*

Removal from the State

5.21 On 14 January 2003, the member of An Garda Síochána who had accompanied the complainant to the prison arrived at Mountjoy Prison at 5.00 a.m. with a Release Order. The complainant was discharged into his custody at approximately 5.45 a.m. and transported to the Airport. He was placed on an aircraft bound for the UK by the Immigration Officer and placed in the custody of

[97] Letter of Assistant Governor of Mountjoy to the Commission, 29 April 2005.
[98] *Ibid.*
[99] The Assistant Governor also mentioned that on committal the complainant had the option of a shower and use of the toilet in reception. In addition, he reported that no exercise or recreational facilities are available to new inmates at the hour that the complainant was admitted.

the Captain of the aircraft. The aircraft left the State shortly after 6.00 a.m. that morning.

5.22 The complainant provided the Commission with flight transit stubs which document his flights to Ireland and back to Pakistan. As stated, once in the control of the Captain of the aircraft on the morning of 14 January 2003, he was removed to the UK on flight BM1 at 6.05 a.m. In Heathrow London the complainant was reportedly detained and interrogated by authorities, possibly on the basis of the markings on his passport. He was placed on flight KU101 at 7.40 p.m. that evening (14 January 2003) to Kuwait where he was reportedly detained and questioned by the Kuwaiti authorities until the following evening (15 January 2003). The complainant was placed on flight KU201 to Karachi at 11.15 p.m. on 15 January 2003 where he was further detained and questioned by the Pakistani authorities and claims to have been badly treated. From Karachi he flew to Islamabad on 16 January 2003. He then had to travel back to his home town of Mingora, approximately 160 miles from Islamabad.[100] In all the round trip including periods in detention in four countries lasted five days as the complainant indicated:

> My departure was on 12.01.2003 from my home to Islamabad on 13.01.2003 I flew from Islamabad to Kuwait on the some date [sic] 13.01.2003 from Kuwait to Ethrow Airport [sic] and proceeded from their to Dublin.
>
> At Dublin I spent the night in Montjoy Prison [sic] on 14.01.2003 I was returned to Ethrow Airport [sic] where I was interviewed for a long time. Thus I was sent to Kuwait on the some date [sic] 14.01.2003.
>
> On 15.01.03 my journey was from Kuwait to Karachi and on 16.01.2003 from Karachi to Islamabad thus making the whole journey for 5 days from 12 to 16.01.2003...
>
> ... In Pakistan I was detained at Karachi Airport badly treated as a suspected person. Then after my arrival at home I found the whole family in a great tension because of their not knowing my where about for 5 days. Also when I told my story of return and the sending of Jail, the whole family was shocked because sending to Jail in our society is a black spot on the honour of ones and family.
>
> My mother was in an a Hardable tension [sic] which resulted into a permanent health

[100] Information obtained at http://maps.live.com.

problem of Hypertension.

Photocopy of 07.03.2005 and medical [report] of my mother attached...

Letters from the complainant to the Commission, 21 August 2004 and 7 April 2005.

5.23 A medical report dated 18 January 2003 relating to the complainant's mother was produced to the Commission in 2005 which diagnosed his mother as suffering from infection and hypertension on that date in January 2003.

5.24 The complainant claimed that, in the course of being refused leave to land, three pages of his passport were marked by the first Immigration Officer with "cross lines" and that this caused him to be detained and interrogated in the UK, Kuwait and Pakistan during his transit back to that country.[101] The complainant stated that he considered he would face unnecessary difficulties in travelling to other countries from Pakistan due to his passport being so stamped/ marked. It appears that the complainant has not in fact travelled to any other country from Pakistan since being forcibly returned from Ireland. His reasons are thus:

As for my apply for travel/visa to any country on my crossed/stomped [sic] passport is concerned, I have determined not to apply any where unless I have been allowed Dublin. Because if I was so much teased and torture. Questioned and interviewed on 14.01.2003 on Ethrow Airport [sic], Kuwait Airport and as well Karachi Airport inspite of the fact that my passport was clear what will be my position if I show my this doubious [sic], crossed, stamped passport.

Therefore, unless my case has not been cleared [sic] regarding Dublin, which is my first choice as well, I will apply no where...

Letter from complainant to the Commission 28 April 2004.

5.25 An Garda Síochána explained that the practice is based on 1989 'Guidelines on Immigration Procedures' issued by the Department of Justice and

[101] Letter from complainant to the Department of Justice, 30 June 2003. In this letter, the complainant queried whether it is legal in Ireland to "spoil" a passport in the manner that he states his international passport was "spoiled".

that this practice has now been given a legislative basis in Section 4(1) of the Immigration Act 2004. In relation to this practice An Garda Síochana indicated that the marking of the passport is quite deliberate:

> Often the inscription is placed in such a manner that it will penetrate a number of pages in a passport, because persons refused leave to land will often tear out a page which contains information about a refusal before attempting another illegal entry to a jurisdiction.

It is noted by the Commission, however, that Section 4(1) of the legislation states:

> Subject to the provisions of this Act, an immigration officer may, on behalf of the Minister, give to a non-national a document, or place on his or her passport or other equivalent document an inscription, authorising the non-national to land or be in the State (referred to in this Act as "a permission").

5.26 It would thus appear that Section 4(1) in fact only relates to authorisations to land or to be in the State rather than a negative decision to refuse leave to land in the State.[102]

Complaint

5.27 On 18 January 2003 the complainant wrote the first of a number of letters of complaint addressed to the Irish authorities in a letter sent to the Honorary Consul in Karachi.

This letter stated:

> ... It is regretted to say that your Immigration Officer in Dublin Airport cancelled/ refused my visa ... It is very great injustice on humanitarian basis. He was saying that you provide sponsor letter, or hotel reservation. In this connection the applicant has already explain in his application that there is no one of the applicant. 2ndly hotel reservation will be done in Dublin in any suitable hotel. I also Showed [sic] pounds 1,100 on the spat [sic]. Further I said That [sic] I will be stay in Dublin for 10 days approximately I further requested them that an the basis [sic] of application the visa was issued and all the

[102] Section 4(6) Immigration Act 2004, also refers to placing an inscription on a passport by an Immigration Officer, but this only relates to recording conditions to the permissions to land or be in the State rather than a refusal to land in the State.

relevant question answered are available in the same application as desired by you. But then he refused my visa…

Letter from complainant to Commission 18 January 2003.

5.28 The complainant was subsequently advised by letter from the Embassy of Ireland, in Tehran that he could make a complaint to the Minister for Justice or to the Garda Síochána Complaints Board.[103] The complainant confirmed that he had written to the Department of Justice but had received no reply.

[103] This is contested strongly by the complainant who stated that he did not receive any such communication. *See* Chapter 2, Background to the Enquiry Request, para 2.14, fn 18.

Chapter 6 The Impact of the Law and Practice on the Complainant and Others

General

6.1 The maintenance and security of its borders is clearly a valid concern of the State. One of the purposes of the current enquiry is, however, to review the adequacy and effectiveness of law and practice in the State. This requires an examination of whether the law and practice in the State in relation to immigration control is adequate and effective to ensure the human rights of persons affected by immigration control practice and procedure, while also taking into account the State's legitimate responsibilities in respect of its borders. The key question is whether the treatment of the complainant was indicative of the general treatment of persons seeking entry to the State in like circumstances?

Visitor visa applications

6.2 According to the Department of Foreign Affairs, in 2002, 128,000 applied for visas to enter the State, of which 105,000 visas were issued. The Department further provided figures of visa applications and grants for the period 2001 to 2004 as outlined in the Table below:

Table C

Year	Total Applications	Issued
2001	78,000	61,000
2002	103,000	89,000
2003	146,000	120,000
2004	176,000	144,000

6.3 As can be seen from the Table, the numbers of persons applying for and receiving visas to enter the State doubled in two years, from 2001 to 2003. The

Department of Foreign Affairs was unable to disaggregate the figures by category type (for example visitor visas as opposed to business visas) in that period. Nor was it able to disaggregate the figures for 2002 by nationality. It did indicate to the Commission that it was planned to introduce an automated visa application and tracking system ("AVATS") and that nationality would be one ground under which information would be disaggregated. The Department of Justice further confirmed that the new AVATS system is being introduced on a 'phased basis' and that once fully operational it will be a comprehensive database of visa decisions worldwide, allowing Immigration Officers to have access to the background information on visa decisions, and will also reportedly be able to record visa decisions by nationality.[104] The Department of Foreign Affairs also confirmed that the system would allow Immigration Officers to have access not only to information recorded at the time the person made their application for a visa, but also any subsequent notable communication in relation to same. However the Department of Foreign Affairs also indicated that the availability of this information to Immigration Officers was dependent on resourcing from the Department of Justice. At the time of writing this report there was no clear indication when the system would fully come into operation.

6.4 Separately the Department of Foreign Affairs provided the Commission with the standard visa refusal letter that it issues to persons refused a visa. This letter simply informs an applicant that their visa has been refused and explains that they may contact the Visa Officer in the Immigration and Citizenship Division of the Department of Justice if they wish to know the reason(s) for the refusal, while they may apply to the Visa Appeals Officer of the same Division if they wish to appeal the decision.[105]

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[104] The Department of Foreign Affairs informed the Commission that the system would be web-based.

[105] The Department of Foreign Affairs also explained that information relating to visa applications is communicated either orally (by telephone), in writing, or in person by the Department of Foreign Affairs' overseas Missions or Consulates.

Refusal of leave to land

6.5 As previously noted, Immigration Officers have the power to refuse leave to land to a person even if they are in possession of a valid visa.[106] Immigration Officers can refuse leave to land on the basis of a broad range of criteria.[107] The Department of Justice further informed the Commission that there are no circulars or guidelines issued by it pertaining to the interpretation of the grounds under Article 5(2) of the Aliens Order.[108] In relation to how Immigration Officers arrive at decisions to refuse or grant leave to land in the State, An Garda Síochána indicated that Immigration Officers are largely dependent on their knowledge and experience:

> It is important to understand the knowledge which immigration officers have with regard to the deception which immigrants engage in with a view to creating an impression that they are *bona fide* visitors, when, in fact, they intend to remain illegally in the State.[109]

6.6 At the time of the incident, the subject matter of this report, the reasons for the refusal of leave to land were recorded in a refusals book maintained at Dublin Airport. An Garda Síochána indicate that this book has now been replaced as part of the GNIB Information System ("GNIB IS"); a database that provides for the details of persons refused leave to land to be recorded, including a comments section where the reasons for the refusal may also be recorded. It was further indicated by An Garda Síochána that if an issue arises after an entry is made on the GNIB IS regarding the subject matter of the entry, an audit trail exists in respect of the time the entry was made and any documentation produced by the system such as a refusal of leave to land notice.[110]

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[106] *See* Chapter 4, Refusal of Leave to Land, para 4.10 to para 4.14. *See* new provision in Section 8 of the Immigration, Residence and Protection Bill 2008. *Supra.* fn 37.
[107] *Ibid.*
[108] The Department of Justice confirmed that this was the case by virtue of Article 5 of the Aliens Order. Letter from Department of Justice to the Commission, 25 April 2005.
[109] Letter from An Garda Síochána to the Commission,12 May 2008.
[110] *Ibid.*

6.7 As previously noted, a difficulty arises insofar as there may be a gap in communication between the various bodies involved in the decision-making process on entry to the State. The Immigration Officer who takes the decision rarely has information available to him or her regarding the circumstances in which a person presenting at the border was granted a visitor visa. As was pointed out by An Garda Síochána, some information submitted at the time of making an application for a visa may only be tested for veracity at the time the person arrives at the point of entry to the State.[111]

6.8 In the present case, the complainant was refused leave to land in the State on the basis that he had an "intention to deceive" under Article 5(2)(m) of the Aliens Order as amended.[112] "Intention to deceive" permits wide discretion to an Immigration Officer as the ground would appear to involve a subjective interpretation of a person's motives. It is one of two "new" grounds inserted into the Aliens Order since 1999.[113] Both grounds are vague and have been, for the most part, retained in the Immigration Act 2004. An Garda Síochána advised that in the first two weeks of 2003 (1 to 14 January 2003), of fifteen grounds available to the Immigration Officers, persons were refused leave to land in eleven of 116 cases where "intention to deceive" was the primary ground. This may suggest that some of the other refusals were made on multiple grounds under Article 5(2).

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[111] *See* Chapter 5, The Treatment of the Complainant, para 5.11.

[112] Since the time of the refusal to land examined in this case, the Immigration Act 2004 was enacted, and Section 4 of this Act now sets out similar criteria to those contained under Section 5(2) of the Aliens Order, as amended, in relation to the "refusal of leave to land". It is noted that Section 4(3)(k) of the Immigration Act 2004, does not use the term "intent to deceive", which is the term used in the Alien's Order. Instead, Section 4(3)(k) has the criterion that there is reason to believe that the foreign national intends to enter the State for the purposes other than those expressed by the foreign national. However, "intent to deceive" may be seen as implicit in the new provision. Further, Sections 5(2)(g) and 5(2)(h) which both refer to prohibitions from landing by Ministerial Order under the Aliens Order, are not included in Section 4 of the Immigration Act 2004. While the Aliens Order has not been revoked, the Department of Justice informed the Commission that in practice the State operates under the Immigration Act 2004. Section 4(3)(k) of the Immigration Act 2004 has been restated under Section 27(1)(m) of the Immigration, Protection and Residency Bill 2008.

[113] The other ground is provided for under Section 5(2)(l) of the Aliens Order, as amended. This criterion provides for where "an alien's entry into, or presence in, the State would pose a threat to national security or would be contrary to public policy." This is now covered by Section 4(3)(j) of the Immigration Act 2004 and is provided for under Section 27(1)(l) of the Immigration, Protection and Residency Bill 2008.

6.9 According to An Garda Síochána, 4,827 persons were refused leave to land in the State in 2003. The Department of Justice informed the Commission that it was unable to disaggregate this figure by place of detention, by duration of detention or by nationality, as there were no easily accessible computer records to do so. Similarly, the Irish Prison Service, the Assistant Governor of Mountjoy and An Garda Síochána were unable to assist. Accordingly, it is not possible to enquire further into the practice in the State relating to where or how long those persons were detained. [114]

6.10 An Garda Síochána was in a position to furnish the nationalities of those refused leave to land in 2003. The main nationalities which comprise this figure of 4,827 are set out in Table D which records, in descending order, those nationalities refused leave to land in the State during 2003 in excess of 100 persons. Full figures for the year are set out in Appendix 3. In total, 71 persons from Pakistan were refused leave to land in the State in 2003, ranking its nationals as thirteenth in the list of those refused leave to land in that period.[115]

TABLE D

Nationality	Numbers refused leave to land
Polish	560
Lithuanian	484
Brazilian	408
Nigerian	387
South African	268
Romanian	261

[114] An Garda Síochána informed the Commission that with the introduction of a computerised Garda National Immigration System, a database will be maintained which, *inter alia*, records the details of persons refused leave to land, thus replacing the manual refusals books as referred to earlier in this report. *See* Chapter 5, The Treatment of the Complainant para 5.15.
[115] Other nationalities refused leave to land in excess of Pakistan nationals were Estonia (85), India (85), Moldova (78), Ukraine (84). Letter from An Garda Síochána to the Commission, 9 August 2005.

Latvian	247
Chinese	114
Czech	160

It is presumed that these figures do not include asylum seekers, noting that asylum seekers may travel undocumented or on visitor or business visas when fleeing persecution.[116]

Prescribed places of detention

6.11 In 2003, there were a number of prescribed places of detention in the State.[117] The Commission was informed by An Garda Síochána that the decision as to where to detain a person refused leave to land is made by the member of An Garda Síochána under whose warrant the person is detained in consultation with the prison authorities, and that Garda stations are not generally used "unless the detention period is of short duration".[118]

6.12 An Garda Síochána informed the Commission that the preferred place of detention:

> is determined by the interval between removal and refusal and the balance of convenience for the person concerned, taking into account operational considerations. Where detention is for a short period a Garda Station may be used. Where the period is likely to be longer than 18-24 hours prisons are used. Currently where detention in prison is necessary for male persons refused leave to land in Dublin Airport, Cloverhill Remand Prison is used at the request of the Irish Prison Service. In the case of females the Docus [sic] Centre at Mountjoy is used. At the time of the incident under enquiry, Mountjoy Prison was the available lawful option in Dublin, other than certain designated Garda Stations.[119]

[116] An Garda Síochána also provided details of two studies which were carried out in 2007 to record details of persons granted leave to enter the State. Both studies reportedly concerned a cohort of Brazilian nationals. According to An Garda Síochána the first study concerned 187 Brazilian nationals granted leave to land in the State. While the second study concerned 173 Brazilian nationals also granted leave to land in the State. According to An Garda Síochána, of the first study all remain unaccounted for. In relation to the second study 61 remain unaccounted for.
[117] *See* Appendix 4, Prescribed Place of Detention, Fourth Schedule of Aliens Order, as amended. The Fourth Schedule was revoked by Section 13 of the Immigration Act 2003.
[118] Letter from An Garda Síochána to the Commission, 9 August 2005. *See also* Chapter 4, Background to the Aliens Act (as amended) and the Immigration Acts, para 4.17.
[119] *Ibid.*

6.13 As noted earlier, the Irish Prison Service confirmed that male persons refused leave to land in the State are now routinely detained at Cloverhill Prison and that female persons refused leave to land are detained at the Dóchas Centre at Mountjoy or at Limerick Prison. The Department of Justice separately indicated that they are in ongoing discussions with the Irish Prison Service in relation to a purpose built detention facility for "immigration offenders" at the proposed new prison at Thornton Hall in North County Dublin. In the context of the present report it is unclear whether the term "immigration offender" encompasses persons such as the complainant who have not been convicted of an immigration offence, but have been refused leave to land in the State on an administrative basis.

Conditions of detention

6.14 It appears that in 2003 the information given to foreign national prisoners on their entitlements consisted of a general information leaflet and that this leaflet was available in English only.[120] Since 2003, there appear to have been some improvements in the number of languages in which information is provided.[121] The Commission was informed that in all of the prisons, information is given as to services, facilities and legal advice, although only some of this information is available in languages other than English. It was further informed that provision is made in all of the prisons for contacting solicitors, organisations or Embassies that may provide legal assistance, including the provision of telephone credits, while interpreting services are also stated to be provided. The Irish Prison Service

[120] The Assistant Governor of Mountjoy informed the Commission that a new committal is seen by the Governor the day after his committal and if he has any queries or requests the committal may raise them at that stage. If necessary a foreign national's Embassy can be contacted or an interpreter can be employed.

[121] According to the Irish Prison Service, the general information leaflet provided to male prisoners committed to Cloverhill Prison is available in English, French, Spanish, Arabic, Chinese and Russian. There are also posters in English, French, Spanish and Arabic listing the contact details for local Free Legal Aid Centres. The information booklet given to female prisoners on committal to the Dóchas Centre, Mountjoy and Limerick Prison are reportedly available in English only. In the Dóchas Centre, the committal details form is reportedly provided in twelve languages.

advised that attempts to meet the requirements of any cultural minority would always be made whenever possible.[122]

6.15 As noted earlier, the member in charge of a Garda station must inform a foreign national detained at that station that they are entitled to consult a solicitor and to communicate with their consul. There are also regulations in relation to conditions of detention, medical treatment and the keeping of records in Garda stations.[123]

Removal from the State

6.16 As previously noted, it is the practice that persons refused leave to land are removed from the State on the next passenger flight by the carrier concerned to the airport of origin of the passenger. According to An Garda Síochána, detention exceeds one night only where flights are not available or there is a travel documentation problem. In addition, the Commission was informed that such refused passengers take priority and that "the fact that a flight might already be full does not prevent the person travelling".[124]

6.17 It is likely that this practice of carrier removal is replicated in terms of onward return flights to the country of origin as occurred in the complainant's case.

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[122] The Irish Prison Service advised that persons committed to Cloverhill Prison are also provided with an information booklet entitled "Racism, Harassment and Bullying Policy Statement" and stated that plans were underway to provide a presentation on interculturalism and inappropriate behaviour to all prisoners in Cloverhill. A similar booklet and presentation are given to all trainee Prison Officers and new staff are subject to an induction programme which includes training in intercultural awareness. In addition, the catering section accommodates different religious requirements. Similarly, the Assistant Governor of Mountjoy informed the Commission that the complainant was free to engage in religious observance in his cell and that if he had seen the Governor, he could have made any special requests regarding religious observance. In the present case the cramped conditions in the prison cell raise questions of the efficacy of the facilities referred to.

[123] *See* Chapter 4, Background to the Aliens Act 1935 (as amended) and the Immigrations Acts, para 4.26.

[124] Letter from An Garda Síochána to the Commission, 9 August 2005.

6.18 The powers of removal are effected either by Immigration Officers (mostly members of An Garda Síochána) or by members of An Garda Síochána not Immigration Officers as governed by Article 7(9) of the Aliens Order.[125] The Commission was advised that members of An Garda Síochána accompany some but not all persons who are refused leave to land out of the jurisdiction. The decision whether or not to accompany a person is taken on an individual basis. When asked to expand, An Garda Síochána confirmed first that every State on occasion escorts persons refused leave to land onboard aircraft. An Garda Síochána stated that in general there are three reasons for such escorts:

a) The medical/mental state of the person concerned;
b) Security of the aircraft, if the person is considered to be at risk of disorderly behaviour by either law enforcement officials or the captain; and
c) The person has only transited air-side from the airport he/ she arrived in the state from and must be placed on another aircraft at a hub airport.[126]

6.19 An Garda Síochána indicated that the power to detain a person on an aircraft was governed by the provisions of Article 7(9) of the Aliens Order. It advised that where Immigration Officers accompany a person refused leave to land onto an aircraft they do so at the behest of the captain by virtue of what An Garda Síochána referred to as "international custom and practice".[127] When subsequently asked what was meant by this term, An Garda Síochána advised that the term "refers to what actually occurs in these circumstances as a matter of fact".[128]

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[125] *Supra*. fn 61.
[126] Letter from An Garda Síochána to the Commission, 9 August 2005. The normal procedure is that cabin crew are informed that a person is being placed on the aircraft for removal from the State and the person concerned is placed in the custody of the aircraft. Letter from An Garda Síochána to the Commission 19 May 2005.
[127] *Ibid*.
[128] Letter from An Garda Síochána to the Commission, 9 August 2005.

Chapter 7 Relevant International Human Rights Standards

7.1 Although it is well-established in international law that a State has the right to control the entry of foreign nationals into its territory, this is subject to its international obligations.[129] Furthermore all persons who are present in the State are entitled to certain human rights guarantees, regardless of the manner in which they entered the State.[130]

7.2 At least five international human rights standards are relevant to the matters considered in this enquiry.[131] They are:

- the right to freedom from arbitrary detention;
- the right to be free from inhuman or degrading treatment or punishment;
- the right to private life and to be treated with humanity and respect;
- the right to equality before the law and non-discrimination in the enjoyment of rights; and
- the right to an effective remedy where a violation of rights occurs.

The right to freedom from arbitrary detention

7.3 The State is party to two international agreements which provide for or regulate the right of everyone to freedom from arbitrary detention, one at the universal level and one at the European regional level.

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[129] *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, Judgment of 28 May 1985, (1985) 7 EHRR 471 ("*Abdulaziz and Others v. The United Kingdom*"), at para. 67. An example of a treaty obligation which modifies the State's general right is that contained in the Convention relating to the Status of Refugees 1951 ("1951 Convention") which requires States to provide protection to those who come within the convention definition of "refugee". One of the protections provided by the 1951 Convention is the guarantee in Article 31 that Contracting States shall not impose penalties on refugees simply because they have entered the State illegally. However under Article 1F of the 1951 Convention a person can be excluded from refugee status for a number of reasons and thus these protections may be withdrawn from such a person. On a regional level, Article 3(2) of Protocol 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") provides that no one should be deprived of the right to enter the territory of a State of which he is a national.

[130] This refers to entering the territorial jurisdiction of the State.

[131] Information on the agreements, treaties and conventions to which Ireland is a party are available on the IHRC's website, www.ihrc.ie and at www.unhchr.ch.

7.4 At the regional level, Ireland is party to the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR").[132] Article 5 of the ECHR provides that:

> 1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
> ...
> f the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
>
> 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
> ....
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
>
> 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

7.5 The exception contained in Article 5(1)(f) whereby a person may be detained in order to prevent unauthorised entry will be interpreted narrowly in order to preserve the aim and purpose of Article 5, namely to ensure that no one is arbitrarily deprived of their liberty.[133]

7.6 Thus in an immigration context a person may be detained in accordance with Article 5 provided this is done:

> (a) to prevent a person effecting an unauthorised entry into a country; or
> (b) with a view to removing a person from a country.

7.7 For the purposes of this enquiry, the former ground is more important, since the European Court of Human Rights ("the European Court")[134] has held

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[132] The State ratified the ECHR on 25 February 1953.
[133] *Quinn v. France*, Judgment of 22 March 1995, (1995) 21 EHRR 529, at para. 42.
[134] The ECHR created two organs to ensure its observance: namely the European Commission of Human Rights ("the European Commission") and the European Court of Human Rights ("the European Court"). Since the entry into force of Protocol No. 11 to the ECHR in November 1998, the European Commission has been abolished with the European Court now comprising

that until a person has been granted leave to land, she or he has not "effected" an authorised entry.[135] Detention of persons refused leave to land need not be a "necessary" means to the end of preventing unlawful entry; all that is required is that detention "be carried out in good faith ... closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate ... and the length of the detention should not exceed that reasonably required for the purpose pursued".[136] In addition, the European Court can find the detention of a person refused leave to land lawful under Article 5(1)(f) even in cases where the underlying decision to expel the person violates the ECHR.[137]

7.8 In order for detention to be lawful under Article 5(1), it must be "in accordance with a procedure prescribed by law". The European Court has held that this law must be adequately accessible and sufficiently precise requiring clear criteria for detention.[138] Detention must not be arbitrary, and in considering whether this requirement has been met the European Court will have regard in particular to the safeguards provided by the national system.[139]

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chambers and a Grand Chamber. Ultimate supervision of the ECHR is exercised by the Council of Europe's Committee of Ministers. The European Court can consider and deliver judgments on individual complaints to it deemed admissible, it can seek to secure friendly settlements in cases and it can deliver advisory opinions at the request of the Committee of Ministers: see new Section II of the ECHR as provided by Protocol No. 11 (ETS No. 155).

[135] *Saadi v. The United Kingdom* ("*Saadi v. The United Kingdom, 2008*"), Judgment of 29 January 2008, at para. 65.

[136] *Saadi v. The United Kingdom, 2008,* at paras 72 and 74. This can be contrasted with the situation of a person who is authorised to be at large in a country where deprivation of liberty, to be lawful, requires a reasonable balance to be struck between the interests of the individual and those of society. *See Saadi v. The United Kingdom* at para. 44.

[137] *See Chahal v. The United Kingdom*, Judgment of 15 November 1996, (1997) 23 EHRR 413 ("*Chahal v. The United Kingdom*") at paras 107, 112. 117 and 132-133. In this case, even though the European Court found that the decision to expel the applicant was contrary to Article 3, nonetheless his detention for six years pre-deportation was permissible under Article 5(1)(f) (although contrary to other aspects of Article 5).

[138] *Amuur v France*, Judgment of 25 June 1996, (1996) 22 EHRR 533, at para. 50. In that case concerning the holding of asylum-seekers at a so-called "international zone" at a French airport while their asylum claims were being processed, the European Court held that neither a 1982 decree nor a ministerial circular constituted a "law" of sufficient "quality" to satisfy Article 5(1).

[139] *Dougoz v. Greece*, Judgment of 6 March 2001, (2002) 34 EHRR 1480 ("*Dougoz v. Greece*"), at para. 54. However, even the existence of certain flaws in a detention order will not necessarily render the concomitant period of detention unlawful within the meaning of Article 5(1). *See Benham v. The United Kingdom*, Judgment of 10 June 1996, (1996) 22 EHRR 293, at paras 46-47. This will be true, in particular, if the putative error is immediately detected and redressed by

7.9 One such safeguard relates to the length of detention. Detention of a person under Article 5(1)(f) with a view to his or her removal from the State will only be lawful if the steps towards removal are being pursued with due diligence and the removal can be effected within a reasonable time.[140] However, national authorities cannot consciously mislead persons about the purpose of detention in order to make it easier to detain them and/or facilitate or improve the effectiveness of a planned expulsion.[141]

7.10 Another safeguard is that the place and conditions of detention must be appropriate to the type of detention involved.[142] Thus the European Court found unlawful the detention of a minor in a closed detention centre in conditions which were the same as for adults and which had not been adapted to take account of the person's position of extreme vulnerability as an unaccompanied foreign minor.[143]

7.11 A third safeguard is that a person who is deprived of their liberty must be informed, in a language which they understand, of the reasons for this detention (under Article 5(2)).[144] This must be done promptly though not necessarily in its entirety at the moment of arrest.[145] Whether this requirement has been satisfied

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the release of the persons concerned. *See*, *Slivenko v. Latvia*, Judgment of 9 October 2003, (2004) 39 EHRR 24 ("*Slivenko v. Latvia*"), at para. 149.

[140] *Slivenko v. Latvia*, at para. 146.

[141] *Conka v. Belgium*, Judgment of 5 February 2002, (2002) 34 EHRR 54 ("*Conka v. Belgium*") at paras 18-23 and 42-44. The applicants were sent a notice requesting them to present at a police station "to enable the files concerning their applications for asylum to be completed". However when they arrived they were presented with an order to leave the country along with a decision for their removal from the State and their detention for that purpose. The European Court held that such a "ruse" was contrary to the aim and purpose of Article 5.

[142] There must be some relationship between the ground of permitted detention and the place and conditions of detention. *Aerts v. Belgium*, Judgment of 30 July 1998, (2000) 29 EHRR 50, at para. 46.

[143] *Mayeka v. Belgium*, Judgment of 12 October 2006, at paras 103-105.

[144] *Van der Leer v. The Netherlands*, Judgment of 21 February 1990, (1990) 12 EHRR 567, at paras 25-28. This requirement is necessary so as to enable a person, if they so decide, to apply to a court to challenge the lawfulness of their detention, as provided for under Article 5(4).

[145] *Fox, Campbell and Hartley v. The United Kingdom*, Judgment of 30 August 1990, (1990) 13 EHRR 157 ("*Fox, Campbell and Hartley v. The United Kingdom*"), at para. 40; *Conka v. Belgium*, at paras 50-52. In that case, the European Court found no violation of Article 5(2) where the applicant was given broad reasons for his detention when he was detained, and written reasons were supplied two days later. *Fox, Campbell and Hartley v. The United Kingdom*, concerned

will depend upon the circumstances of each case but a person must receive sufficient information so as to be able to apply to a court for a review of the lawfulness of detention as provided for in Article 5(4).[146]

7.12 A fourth safeguard is that the requirement under Article 5(4) that detention must be subject to a prompt and regular review by a court which can properly review the legality of the detention. The European Court has repeatedly held that the right contained in Article 5(4) must be neither theoretical nor illusory but practical and effective.[147] In addition, the question of speed of review of detention must be assessed in the light of the circumstances of the case, although in principle, the State must organise its procedures with the minimum of delay.[148] The review of the detention must be "wide enough to bear on those conditions which, according to the Convention, are essential for the lawful detention of a person".[149] So for example, the European Court will hold that Article 5(4) has been violated if there is no court which can examine the national security reasons

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detention under Article 5(1)(c) of the ECHR and the applicants were given reasons for their arrest within a maximum of seven hours after arrest, which the European Court accepted as "prompt"; paras 41-43. However, in *Saadi v. The United Kingdom*, 2008, it was held that a delay of 76 hours in providing reasons for detention was not compatible with the requirement of the provision that such reasons should be given promptly,paras 84-85. In *Shamayev v. Georgia and Russia*, Judgment of 12 April 2005, at para. 416, a violation was found where the applicants who had been detained pending extradition were not given any information for the first four days' detention.

[146] So if the surrounding context makes it clear why a person is being detained the failure of the person effecting the detention to state specifically the reason for the detention will not result in a violation of Article 5(2); see *Fox, Campbell and Hartley v. The United Kingdom*, at paras 40-41.

[147] *See RMD v. Switzerland*, Judgment of 26 September 1997, (1999) 28 EHRR 224 ("*R.M.D. v. Switzerland*"), at para. 51, *Mayzit v. Russia*, Judgment of 20 January 2005 ("*Mayzit v. Russia*"), at para. 5.

[148] *Mayzit v. Russia*, at para. 6. *See also Sarban v. Moldova*, Judgment of 4 October 2005, at para. 14; *Rehbock v. Slovenia*, Judgment of 28 November 2000, at para. 2,; *R.MD v. Switzerland*, at para. 10. *Affaire Picaro c. Italie*, Judgment of 9 June 2005, unreported, at para. 26; and *Affaire Rapacciuolovc. Italy*, Judgment of 19 May 2005. unreported.

[149] *Chahal v. The United Kingdom*, at para. 127. This must be determined in the light not only of domestic law, but also of the text of the ECHR, the general principles embodied therein and the aim of the restrictions permitted by Article 5(1). See *Weeks v. The United Kingdom*, Judgment of 2 March 1987, (1987) 10 EHRR 293 ("*Weeks v. The United Kingdom*"), at para. 57.

upon which the applicant's detention is based.[150] In addition, the right of review by a court must include minimum procedural guarantees for a detainee.[151]

7.13 The European Court will not demand that a prisoner apply for a review of detention in circumstances where such a remedy would prove ineffective because he or she may be removed from the jurisdiction in question at any moment. In such circumstances, the European Court may consider that the prisoner has exhausted all effective domestic remedies even without making an application for a review of detention.[152] However, in a case where the remedy of *habeas corpus* is available but has not been availed of, the European Court will not find a violation of Article 5(4), provided that the remedy of *habeas corpus* examines not only procedural requirements but also the reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention.[153] The requirement in such cases for the detainee to pursue *habeas corpus* exists even for periods of detention as short as four days and six hours.[154] In addition, the European Court has ruled that where persons are released after a very short period, it is not for the European Court to rule in the abstract as to whether, had they been detained for a longer period, "the remedies available would or would not have satisfied the requirements of [Article 5(4)]".[155]

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[150] *Chahal v. The United Kingdom*, at paras 132-133. The European Court held that in the circumstances neither the UK *habeas corpus* procedure nor judicial review was sufficient for the purposes of Article 5(4). As a result of this decision the Special Immigration Appeal Tribunal was established in the UK.

[151] Depending on the circumstances, these may include, for example, the right to an oral hearing, the right to adversarial proceedings and access to adequate legal advice and assistance where necessary. *See* for example, *Golder v. The United Kingdom*, Judgment of 21 February 1975, (1979-80) 1 EHRR 524, at para. 33, *De Wilde v. Belgium*, Judgment of 18 June 1971, (1979-80) 1 EHRR 373, at paras 60-61, and *Weeks v. The United Kingdom*, at paras 65-67.

[152] Thus, in *RMD v. Switzerland*, the European Court found against an applicant who had been moved between several Swiss cantons and complained he could not apply for a review of his detention. The European Court held that the applicant was in too great a position of legal uncertainty, since he might be moved at any moment to a new jurisdiction where his application for review of his detention would need to be taken again, paras 42 to 55.

[153] *Brogan and Others v. The United Kingdom,* Judgment of 29 November 1988, at paras 64-65.

[154] *Ibid*, at paras 11-22.

[155] *Fox, Campbell and Hartley v. The United Kingdom*, at para. 45.

7.14 A fifth safeguard is that under Article 5(5), anyone who has been deprived of their liberty contrary to Article 5 shall have an enforceable right to compensation. The application for compensation must be ruled upon in a binding decision by a court.[156] The remedy must be available where the ECHR right has been breached, so that any domestic system which does not allow for compensation where Article 5 has been breached even though the detention may be lawful under domestic law, will result in a violation of Article 5(5). The European Court will find a breach of Article 5(5) if there is no enforceable right to compensation at domestic level for breach of a Convention right *per se*.[157]

7.15 At the universal level, Ireland is party to the International Covenant on Civil and Political Rights ("ICCPR").[158] Article 9 of the ICCPR provides:

> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
> 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
> ....
> 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
> 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

7.16 Thus, the guarantees contained in Article 9 of the ICCPR are similar in nature to those provided by Article 5 of the ECHR although it does not set out an exhaustive list of circumstances in which detention is justified. In its General Comment No.8 of 1982,[159] the Human Rights Committee ("HRC"), which monitors the implementation of the ICCPR, confirmed that Article 9 applies to all

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[156] *Fox, Campbell and Hartley v. The United Kingdom*, at para. 46.
[157] *DG v. Ireland,* Judgment of 16 May 2002, (2003) 35 EHRR 33, at paras 86-89.
[158] The International Covenant on Civil and Political Rights ("ICCPR") was ratified by Ireland on 8 December 1989.
[159] See HRC, General Comment No. 8, *Right to liberty and security of persons*, sixteenth session, 1982.

detentions including cases relating to immigration control.[160] Whilst the HRC does not condemn the notion of immigration detention, it will be concerned if a person is not afforded any individual consideration with regard to the need to detain him or her pending deportation. Thus, in *A. v. Australia*[161], the HRC ruled that a State's detention was arbitrary where "the State party has not advanced any ground particular to the author's case". Such detention could be considered arbitrary if it is not necessary in all the circumstances of the case (which will include consideration of the concept of proportionality).[162] In this regard it is arguable that Article 9 of the ICCPR jurisprudence provides more protection than Article 5 of the ECHR.

7.17 The HRC has also stated that if detention is used, for reasons of public security, it must not be arbitrary, and must be based on grounds and procedures established by law; reasons must be given and court control of the detention must be available as well as compensation in the case of a breach.[163]

7.18 In relation to the Article 9(2) requirement that a detained person must be informed of the reasons for his or her arrest, the HRC has held that it is not sufficient to be informed that one is being arrested "under prompt security measures without any indication of the substance" of the reasons for the arrest.[164] One must be properly informed, in one's own language, of the reasons for any arrest.[165]

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[160] The Human Rights Committee (HRC) is charged with monitoring the implementation of the ICCPR by virtue of Article 28 of the ICCPR and performs this function through the adoption of General Comments on the ICCPR's provisions, examination of periodic State reports under Article 40 and consideration of alleged human rights violations under Optional Protocol 1 to the ICCPR: see Part IV of the ICCPR.
[161] *A. v. Australia*, 3 April 1997, fifty-ninth session of the HRC, Suppl. No. 40(A/52/40), para. 9.2. Similarly, it has ruled that remand in custody pursuant to lawful arrest must not only be lawful but reasonable and necessary in all the circumstances. *See Van Alphen v. The Netherlands*, 23 July 1990, at para. 5.8.
[162] *Ibid.*
[163] *See* HRC, General Comment No. 8, *Right to liberty and security of persons*, sixteenth session (1982), at para. 4.
[164] *Drescher Caldas v. Urugua,* 21 July 1983, nineteenth session of the HRC, Communication No. 43/1979, para. 13.12.
[165] *Griffin v. Spain*, 4 April 1995, fifty-third session of the HRC, Communication No. 493/92, at para. 9.2. See also *Hill and Hill v. Spain*, Communication No. 526/1993, unreported.

7.19 In relation to the Article 9(4) requirement to keep detention under review, the HRC has held that every decision to keep a person in detention should be open to review "periodically" so that the grounds justifying the detention can be assessed. In addition, detention should not continue beyond that period for which the State can provide appropriate justification. The HRC assesses the question of what constitutes excessive delay in reviewing detention on a case by case basis.[166] It has held that incommunicado detention for three days, during which time it was impossible for the prisoner to challenge the lawfulness of their detention, breached Article 9(4).[167] However, a period of fifty hours during which no challenge to the detention was possible was held not to violate Artilce 9(4).[168]

7.20 Six points of relevance to this enquiry may be made on the basis of these international human rights provisions:

7.21 First, no one shall be deprived of their liberty save in certain prescribed circumstances.

7.22 Secondly, persons refused leave to land may be detained in order to prevent their unauthorised entry into a country or with a view to their removal.

7.23 Thirdly, any such detention must be in accordance with a law which is sufficiently precise and accessible.

7.24 Fourthly, detainees must be informed of the reason for their detention.

7.25 Fifthly, detainees must be able to challenge their detention before a court or equivalent body which can properly review the legality of the detention. However, the European Court will not examine this requirement in the abstract in circumstances where the detention ceases after a very short period of time.

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[166] *Torres v. Finland*, 2 April 1990, thirty-eigth session of the HRC, Communication No. 291/1988, unreported, at para. 7.3.
[167] *Hammel v. Madagascar*, Communication No. 155/1983 unreported.
[168] *Potorreal v. Dominican Republic*, 5 November 1987, thirty-first session of the HRC, Communication No. 188/1984, unreported.

7.26 Sixth, persons who are wrongly deprived of their liberty have an enforceable right to compensation.

The right to be free from inhuman or degrading treatment or punishment

7.27 The State is party to four international agreements which provide for freedom from inhuman or degrading treatment or punishment, two at the universal level and two at the European regional level.

7.28 At the regional level, Article 3 of the ECHR provides:

> No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

7.29 The European Court has consistently held that persons detained by the State are entitled to certain minimum standards. No exception to this principle is allowed. However Article 3 is only relevant where there is a certain minimum level of severity, and this will depend on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim.[169]

7.30 In relation to conditions of detention, the European Court has stressed that in order for Article 3 to be engaged, the suffering and humiliation involved must go beyond that inevitable element of suffering or humiliation inherent in detention.[170] When assessing conditions of detention the European Court will take account of the cumulative effect of these conditions as well as any specific

[169] *Ireland v. The United Kingdom*, Judgment of 18 January 1978, (1980) 2 EHRR 25. *See also Tyrer v. The United Kingdom,* Judgment of 25 April 1978 (1979-80) 2 EHRR 1, where the European Court found that birching as a punishment in schools on the Isle of Man was degrading but not inhuman punishment: "... in order for a punishment to be "degrading" and in breach of Article 3 (art. 3), the humiliation or debasement involved must attain a particular level and must in any event be other than that usual element of humiliation referred to in the preceding subparagraph. The assessment is, in the nature of things, relative: it depends on all the circumstances of the case and, in particular, on the nature and context of the punishment itself and the manner and method of its execution."; at para 30.

[170] *See* for example, *Poltoratskiy v. The Ukraine*, Judgment of 29 April 2003, (2004) 39 EHRR 916.

allegations of ill-treatment made by the detainee. Further, Article 3 may be breached depending on the intention of the detaining authorities or on the effect of the detention.[171]

7.31 Accordingly, in *Peers v. Greece*,[172] the European Court ruled that conditions of detention constituted degrading treatment even though there was no intention to humiliate the prisoner. The European Court ruled that the prison conditions "diminished the applicant's human dignity and aroused in him feelings of anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical or moral resistance".[173] In that case, the prisoner had been sleeping on a blanket with no sheets or pillow during the hottest period of the year and had to use the toilet in the presence of another inmate and be present while the toilet was being used by his cell-mate. The European Court placed particular emphasis on the latter factor, along with the duration of the prisoner's detention, the lack of adequate physical movement, poor ventilation and the absence of a window in the cell, in finding a violation of Article 3.[174]

7.32 Article 3 also contains the procedural obligation that State authorities must carry out a thorough and effective investigation into any allegation of ill-treatment contrary to Article 3.[175]

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[171] *See Iwanczuk v Poland* Judgment 15 February 2002, unreported and *Price v United Kingdom*, Judgment of 10 July 2001, (2001) 34 EHRR 1285.
[172] *Peers v. Greece*, Judgment of 19 April 2001, (2001) 33 EHRR 1192.
[173] *Ibid.*, at para. 75.
[174] *Ibid.*, at paras 2-6, 10-13. See also *Price v. The United Kingdom* at para. 30. In that case, the prisoner had a physical disability as a result of thalidomide. The European Court ruled that Ms. Price's Article 3 rights had been infringed in a situation where the applicant was "dangerously cold, risk[ed] developing sores because her bed [wa]s too hard or unreachable, and [wa]s unable to go to the toilet or keep clean without the greatest of difficulty".
[175] *See, Assenov and Others v. Bulgaria*, Judgment of 28 October 1998, where the European Commission held that Article 3 read in conjunction with the State's general duty under Article 1 of the ECHR "...to 'secure everyone within their jurisdiction the rights and freedoms defined in [the] Convention', requires by implication that there should be an effective official investigation.", at para 102. This was subsequently cited by the European Court in *Sevtap Veznedaroglu v. Turkey*, Judgment of 11 April 2000, (2000) 33 EHRR 1412, at para. 32.

7.33 Article 3 may also be violated where the deportation or expulsion of a person would expose him or her to a real risk of inhuman or degrading treatment or punishment in the proposed country of destination.[176]

7.34 Finally, racial discrimination may breach Article 3 if the treatment falls within the concept of inhuman or degrading treatment.[177] A complaint of discriminatory treatment can give rise to a separate issue under Article 3 of the ECHR, irrespective of the relevance of the Article 14 of the ECHR provision on discrimination examined below.[178] However this may be difficult to establish as a matter of fact.[179]

7.35 The second international agreement of relevance at the regional level is the European Convention for the Prevention of Torture ("ECPT").[180] The ECPT was adopted in order to strengthen the protection against torture or inhuman or degrading treatment or punishment contained in Article 3 of the ECHR by non-judicial means of a preventive character based on visits. Article 1 of the ECPT provides:

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[176] *Soering v. The United Kingdom*, Judgment of 7 July 1989, (1989) 11 EHRR 439.

[177] *See East African Asians v. The United Kingdom,* Commission Report of 14 December 1973, *("East African Asians v. The United Kingdom")* This was recently cited in *Moldovan and Others v. Romania (No.2),* Judgment of 12 July 2005, (2007) 44 EHRR 302, at para 111.

[178] *Cyprus v. Turkey*, Judgment of 10 May 2001, (2002) 35 EHRR 731 ("*Cyprus v. Turkey*") at para 315. The European Court concluded it was not necessary to consider whether there has been a violation of Article 14 of the ECHR taken in conjunction with Article 3 in respect of Greek Cypriots living in Northern Cyprus, since a violation of Article 3 had been found.

[179] In *Abdulaziz and Others v. The United Kingdom*, the applicants, who were lawfully settled in the UK, could not be joined by their non-national husbands. The European Court held that the difference in treatment on grounds of their nationality did not involve any contempt or lack of respect on the part of the UK for the personality of the applicants but was simply designed to achieve legitimate immigration purposes. See also *Nachova and Others v. Bulgaria*, Judgment of 6 July 2005, (2006) 42 EHRR 933 at para 91. However, in *Cyprus v. Turkey*, the European Court found that discriminatory treatment against Greek Cypriots amounted to degrading treatment where it included restrictions on freedom of movement, the practice of religion and on the ability to bequeath property. In that case, it was prohibited to bequeath property to next of kin unless they also lived in northern Cyprus. There was also a lack of secondary-schools in the north and the denial of the right of children educated in the south to reside in the north at sixteen in the case of males and eighteen in the case of females. Since a special importance should be attached to racial discrimination, the European Court considered it "might, in certain circumstances, constitute a special affront to human dignity", at para. 305. The previous case was *East African Asians v. The United Kingdom* endorsed in *Cyprus v. Turkey.*

[180] Ireland ratified the Convention on 14 March 1988.

> There shall be established a European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ... The Committee shall, by means of visits, examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment.

7.36 The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT") is the supervisory body to the ECPT and is mandated under Article 12 to submit a General Report of its activities to the Committee of Ministers of the Council of Europe, which is published. From these General Reports, the CPT has compiled a set of general standards based on the substantive issues which it pursues when carrying out its visits to places of deprivation of liberty.[181]

7.37 As part of the CPT standards, it has noted that detention in an ordinary police detention facility should be kept to an absolute minimum. It has also set out necessary safeguards during detention, including the right to contact with the outside world, access to a lawyer and a doctor, and the right of immigration detainees to be informed of their rights without delay and in a language they understand. In relation to the use of prisons for immigration detainees, the CPT stated:

> Even if the actual conditions of detention for these persons in the establishments concerned are adequate - which has not always been the case - the CPT considers such an approach to be fundamentally flawed. A prison is by definition not a suitable place in which to detain someone who is neither convicted nor suspected of a criminal offence.[182]

7.38 At the universal level, Article 7 ICCPR provides:

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[181] *See* CPT, "*The CPT standards: "Substantive" sections of the CPT's General Reports"*, Council of Europe, Strasbourg, 2002. The CPT's recent reports on Ireland are 2007 and 2002, respectively.

[182] *Ibid*, at p. 40-41, see also, p. 42 on "safeguards during detention". The CPT went on to state that even though it might be appropriate to hold an immigration detainee in prison in exceptional cases because of a known potential for violence or a need for in-patient treatment, "such detainees should be held quite separately from prisoners, whether on remand or convicted". It also noted that in cases where it is deemed necessary to deprive persons of their liberty for an extended period under aliens legislation, such persons should be accommodated in centres specifically designed for that purpose, offering suitable material conditions and suitably qualified personnel. The CPT noted that such an approach is "increasingly being followed in Parties to the Convention".

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

7.39 In its General Comment No. 20 of 1992,[183] the HRC confirmed that the prohibition against torture or prohibited ill-treatment contained in Article 7 ICCPR allows of no limitation. It covers acts which cause physical as well as mental suffering. In order to ensure the effective protection of detained persons, detainees should be held in places officially recognised as places of detention and the names of the detained person and the places of detention, as well the names of persons responsible for their detention, should be kept in registers readily available and accessible to those concerned. Provisions should also be made against incommunicado detention and there should be prompt and regular access to doctors and lawyers.[184]

7.40 Another international agreement, which is relevant at the universal level is the UN Convention against Torture and all Forms of Cruel, Inhuman and Degrading Treatment or Punishment (UNCAT). Article 2 provides:

(1) Each State Party shall take effective legislative, administrative or other measures to prevent acts of torture in any territory under its jurisdiction.
(2) No exceptional circumstances what so ever, whether a state of war or a threat to war, internal political stability or any public emergency may be evoked as a justification of torture.
(3) An order from a superior officer or a public authority may not be invoked as a justification of torture.

7.41 This absolute prohibition also includes "acts of cruel, inhuman, or degrading treatment or punishment" [ill-treatment] as inserted by Article 16(1) of UNCAT.[185] UNCAT also covers specific obligations of a State to prevent torture

[183] *See* HRC, General Comment No. 20, *Prohibition of torture, cruel, inhuman or degrading treatment or punishment*, forty-fourth session (1992).
[184] *Ibid.*, at para.11.
[185] The Committee Against Torture's General Comment No 2, *The Implementation of Article 2 by State Parties* holds that "the obligation to prevent torture in article 2 is wide-ranging, The

or ill-treatment, with particular regard for persons who have been deprived of their liberty. The Committee against Torture (the relevant treaty monitoring body) has made recommendation relating to specific guarantees for persons deprived of their liberty, adding that this list is not exhaustive:

> Such guarantees include, inter alia, maintaining an official register of detainees, the rights of detainees to be informed of their rights, the right to promptly receive independent legal assistance, independent medical assistance, and to contact relatives, the need to establish impartial mechanisms for inspecting and visiting places of detention and confinement, and the availability to detainees and persons at risk of torture and ill-treatment of judicial and other remedies that will allow them to have their complaints promptly and impartially examined, to defend their rights, and to challenge the legality of their detention or treatment.[186]

7.42 The UNCAT also provides that States should ensure that education and information regarding the prohibition of torture or ill-treatment are included in the training of law enforcement personnel and public officials and other persons who may be involved in the custody, interrogation or treatment of a person subjected to any form of arrest detention or imprisonment. And further holds that States must ensure prompt investigations into allegations of torture or ill-treatment.

7.43 As with Article 3 of the ECHR, States must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country.[187]

7.44 Six points of relevance to this enquiry may be made on the basis of these international human rights provisions:

7.45 First, persons must not be subjected to torture, inhuman or degrading treatment or punishment. No exception to this principle is allowed.

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obligations to prevent torture and other cruel, inhuman or degrading treatment of punishment article 16 (1) are interdependent, indivisible and interrelated.", at para 3.

[186] *Ibid.* para 13.

[187] *Ibid.*, para.9.

7.46 Secondly, treatment which might otherwise be lawful may be deemed inhuman or degrading if motivated by racial discrimination.

7.47 Thirdly, persons deprived of their liberty are entitled to certain minimum standards of detention, including those detained by virtue of immigration law and practice.

7.48 Fourthly, where it is deemed "necessary" under international standards that a person who has been refused leave to land be detained, that detainee should be accommodated in appropriate centres rather than be detained in prisons.

7.49 Fifthly, Immigration Officers or Prison Officers who may be involved in the custody, interrogation or treatment of a person subjected to any form of arrest, detention or imprisonment, must receive appropriate education and training, as required by UNCAT.

7.50 Sixthly, persons may not be deported, extradited or expelled if to do so would expose them to a real risk of torture, inhuman or degrading treatment or punishment.

The right to private life and to be treated with humanity and respect

7.51 The State is party to two international agreements which provide for the right to private life and to be treated with humanity and respect, one at the universal level and one at the European regional level.

7.52 At the regional level, Article 8 of the ECHR provides for the right to respect for one's private life:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

7.53 Under Article 8 of the ECHR, a State must ensure that persons are detained in appropriate conditions.[188] The European Court has accepted that interferences with the "physical and moral integrity" of a person may give rise to a breach of the Article 8 right to respect for private life.[189] This is a lower threshold than that under Article 3.

7.54 Article 8(1) refers to "the right to *respect* for ... private and family life..." which goes further than merely requiring the State not to 'interfere' with a right, importing clear notions of negative and positive obligations on State Parties. Where a law fails to meet the test that it ensures positive protection of private and family life, it may violate Article 8(2), without any need to examine the limitations contained in Article 8(2).[190] However, where an interference by the State comes within the scope of Article 8(1), the European Court will consider whether the interference is justified by reference to Article 8(2). In this, it will have particular regard to the quality of the law at issue and whether the measure in question (such as the detention and the conditions thereof) represents a proportionate means to a legitimate end.[191]

7.55 The European Court has emphasised that the procedural safeguards available to the individual are "especially material" in determining whether a State

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[188] *See Ciorap v. Moldova*, Judgment of 19 June 2007, at paras 107, 118; *Dickson v. The United Kingdom*, Judgment of 4 December 2007, (2006) FCR 1, at paras 65-68.
[189] *See Bensaid v. The United Kingdom*, Judgment of 6 February 2001, (2001) 33 EHRR 10, at para. 46; *Stubbings and others v. The United Kingdom*, Judgment of 22 October 1996, (1997) 23 EHRR 213, at para. 61.
[190] *Marckx v. Belgium*, Judgment of 13 June 1979, (1979-1980) 2 EHRR 330, at para. 30.
[191] In relation to the quality of the law, the European Court has held that the law must be accessible and formulated in a way that a person can reasonably foresee the consequences which a given action will entail: *Halford v. the United Kingdom*, Judgment of 27 May 1997, (1998) 24 EHRR 523, at para. 49; *Copland v. The United Kingdom*, Judgment of 3 April 2007, at para. 46. In relation to the test as to whether the measure represents a proportionate means to a legitimate end, see *Silver v. The United Kingdom*, Judgment of 25 March 1983, (1983) 5 EHRR 347, at para. 97.

has remained within their margin of appreciation under Article 8. In particular, the European Court will examine whether "the decision-making process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8".[192]

7.56 In *Domenichini v. Italy* the European Court noted that it is impossible to attain absolute certainty in the framing of a law defining the scope of discretion, and such an approach would lead to excessive rigidity. However, the European Court also stated that it will not accept a discretion that has been drafted too widely or that does not "indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities".[193]

7.57 In terms of the type of factors that need to be included in defining the scope of such discretion, the European Court held in *Keegan v. The United Kingdom*[194] that it would "assess in particular whether the reasons adduced to justify such measures were relevant and sufficient and whether there were adequate and effective safeguards against abuse".[195]

7.58 At the universal level, Article 10 of the ICCPR provides:

> 1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
> ...
> 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

7.59 Article 10 of the ICCPR obliges States to treat all persons in detention with humanity and with respect for their dignity. In its General Comment No.21 of 1992,[196] the HRC confirmed that this article applies to all persons in detention,

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[192] *Connors v. The United Kingdom*, Judgment of 27 May 2004 (2005) EHRR 9, at para., 83.
[193] *Domenichini v. Italy*, Judgment of 21 October 1996 at para 32-33.
[194] *Keegan v. The United Kingdom*, Judgment of 18 July 2006,(*"Keegan v. The United Kingdom"*).
[195] *Ibid.*, at para. 31.
[196] *See* HRC, General Comment No. 21, "*Humane treatment of persons deprived of liberty*", forty-fourth session (1992).

including those detained by way of the immigration process. The guarantees in Article 10 are not dependent on the State's resources and must be applied without distinction of any kind, such as race, colour, sex, national or social origin, birth or other status.[197] Article 10 requires that certain minimum conditions of detention be guaranteed by States and treatment which may not breach Article 7 may nonetheless violate Article 10.[198] Prisoners should enjoy all the ICCPR rights subject to the restrictions that are unavoidable in a closed environment. There are positive duties placed on the State to guarantee these rights, including the adequate training of prison personnel and the provision of information to detainees so that they can ensure that their rights are being respected.

7.60 The Article 10 jurisprudence has established that it is important that accused persons are segregated from convicted persons,[199] and also that children should be segregated from adults.[200] In addition, it is important that a prisoner be treated with sufficient respect for his inherent dignity as a person.[201] There is some authority for the proposition that a prisoner's right to information concerning himself or herself exists regardless of whether that information would have a specific consequence for the victim in a given case.[202]

7.61 In addition, it is important to note that inadequate record keeping may result in a State being unable to refute allegations of breaches of Article 10. An example of the evidential consequences of a State's failure to keep adequate prison records is found in *Hill and Hill v. Spain*. In that case, the HRC concluded that the State's inadequate prison records did not refute the prisoners' claim that they were not fed for 5 days.[203]

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[197] *Ibid.*, para.4.
[198] *See* for example *Griffin v. Spain*, Communication No. 493/1992.
[199] *Dieter Wolf v. Panama*, 26 March 1992, forty-fourth session of the HRC, Communication No. 289/1998, at para 6.8.
[200] *Damian Thomas v. Jamaica*, 8 April 1999, sixty-fifth session of the HRC, Communication No. 800/1988.
[201] *Juan Fernando Terán Jijón v. Ecuador,* 26 March 1992, forty-fourth session of the HRC, Communication No. 277/1988, at para. 5.2.
[202] *See* separate concurring opinion of Mrs. Cecilia Medina in the case of *Zheldukov v. Ukraine*.
[203] *Hill and Hill v. Spain*, 2 April 1997, fifty ninth session of the HRC, Communication No. 526/1993, at para. 13.

7.62 The HRC has also indicated that, in order to comply with Article 10 of the ICCPR, States must attempt to apply the relevant United Nations (UN) standards applicable to the treatment of prisoners, including the UN codes, the Standard Minimum Rules for the Treatment of Prisoners 1957.[204] These "soft law" rules include the following principles[205]:

(i) accommodation for detainees should meet minimum standards of health, including in relation to appropriate bedding;[206]
(ii) untried prisoners should be kept separate from convicted prisoners;[207]
(iii) prisoners shall on admission be provided with written information about the regulations governing the treatment of prisoners of his category and all such other matters as are necessary to enable him to understand both his rights and his obligations and to adapt himself to the life of the institution;[208]
(iv) prisoners shall have the opportunity each weekday of making requests or complaints to the director of the institution or his deputy;[209]
(v) prisoners who are foreign nationals shall be allowed reasonable facilities to communicate with the diplomatic and consular representatives of the state to which they belong; [210]
(vi) all valuables belonging to a prisoner shall be placed in safe custody and on his release all such articles shall be returned to him.[211]

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[204] *Ibid.*, para. 5. The following instruments have been described by the HRC as defining the requirements of the ICCPR right of detainees to be treated humanely (Article 10): *"Standard Minimum Rules for the Treatment of Prisoners, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment"* and *"United Nations Rules for the Protection of Juveniles Deprived of their Liberty". See Mukong v. Cameroon*, Communication No. 458/2001, at para. 9.3; *Potter v New Zealand*, Communication No. 632/95, at para. 6.3.
[205] The term "soft law" refers to quasi-legal instruments which do not have any legally binding force, or whose binding force is weaker than the binding force of traditional law.
[206] "Standard Minimum Rules for the Treatment of Prisoners" (1957), Rules 10 and 19. Rule 19 states that "Every prisoner shall, in accordance with local or national standards, be provided with a separate bed, and with separate and sufficient bedding which shall be clean when issued, kept in good order and changed often enough to ensure its cleanliness."
[207] *Ibid.*, Rule 8.
[208] *Ibid.*, Rule 35.
[209] *Ibid.*, Rule 36.
[210] *Ibid.*, Eule 38.

7.63 Four points of relevance to this enquiry may be made on the basis of these international human rights provisions:

7.64 First, persons deprived of their liberty are entitled to be treated with dignity and respect, including respect for their private life.

7.65 Secondly, if a person is detained, certain rights accrue, including those relating to minimum standards of health, keeping untried prisoners separate from convicted prisoners, information on a prisoner's rights and obligations, communication with the director or deputy director of the prison, communication with diplomatic and consular representatives and safe custody of valuables.

7.66 Thirdly, where administrative detention occurs, domestic law must indicate with reasonable clarity the circumstances in which a discretion to detain conferred on the public authorities is to be exercised.

7.67 Fourthly, there are procedural safeguards in relation to any interference with a person's right to respect for their dignity in detention, including that any discretion given to the authorities to interfere with the right must be drafted with precision.

The right to equality before the law and non-discrimination in the enjoyment of rights

7.68 Three international agreements to which the State is party contain equality and non-discrimination provisions of relevance to this enquiry, two at the universal level and one at the regional, European level.

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[211] Except in so far as he has been authorized to spend money or send any such property out of the institution, or it has been found necessary on hygienic grounds to destroy any article of clothing. The prisoner shall sign a receipt for the articles and money returned to him. *Ibid.*, Rule 43.

7.69 At the regional level, Article 14 of the ECHR provides that:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

7.70 This Article prohibits discrimination only in the enjoyment of the rights set out in the ECHR and its Protocols. It is not a free-standing guarantee of non-discrimination.[212]

7.71 Not all differences of treatment are prohibited under Article 14 of the ECHR:

> [T]he principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 ... is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.[213]

7.72 Therefore the European Court asks the following questions in deciding whether there has been a breach of Article 14:

(i) whether the matter falls within the ambit of a substantive ECHR right;

(ii) whether a difference of treatment on the basis of status can be demonstrated;

(iii) whether any difference of treatment pursues a legitimate aim; and if so

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[212] Protocol 12 to the ECHR will introduce such a free-standing right not to be discriminated against, but this protocol is not yet, at the time of writing, in force. Note also that under Article 14 the other "substantive" right does not necessarily have to be breached in order for there to be a violation of Article 14, so that in this way, Article 14 can be said to have an autonomous meaning.

[213] *"Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium (Merits),* Judgment of 23 July 1968, (1968) 1 EHRR 252 ("*Belgian Linguistics case*"), at para. 10.

(iv) whether the measure in question is proportionate to the aim. The latter test includes an examination of whether the difference of treatment extends beyond the State's "margin of appreciation".[214]

Whether the matter falls within the ambit of a substantive ECHR right

7.73 The European Court has held that "there can be no room for [the] application [of Article 14] unless the facts at issue fall within the ambit of one or more" of the substantive provisions of the ECHR and its Protocols.[215] On the other hand, if the European Court finds that the other substantive right has been breached it will often decide not to go on and consider Article 14, on the basis that it would serve "no useful legal purpose" to do so.[216] In line with general international law, the ECHR does not guarantee the right to enter any country that is party to the ECHR.[217] Therefore a refusal of leave to land *per se* will not engage Article 14. However if the State's immigration laws affect rights which are guaranteed by the ECHR such as the right to liberty, right to respect for one's private or family life or the right to be free from inhuman or degrading treatment, Article 14 is potentially engaged.

Whether a difference of treatment on the basis of status can be demonstrated

7.74 Article 14 prohibits discrimination on certain non-exhaustive grounds such as sex race, language or religion. Although Article 14 lists certain prohibited grounds, this list is non-exhaustive, as indicated by the words "on any ground such as....". Thus for example the European Court held that discrimination on the grounds of sexual orientation was a concept "undoubtedly covered by Article

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[214] Under the case-law of the European Court a certain "margin of appreciation" is allowed to national authorities in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. The scope of the "margin of appreciation" will vary according to the circumstances, the subject-matter and its background.
[215] *Abdulaziz and Others v. The United Kingdom*, at para. 71.
[216] *Dudgeon v. The United Kingdom*, Judgment of 22 October 1981, (1982) 4 EHRR 149, at para. 69. See also *Saadi v. The United Kingdom*, 2006, at para. 57.
[217] *East African Asians v. The United Kingdom*, at paras.184 to 187.

14".[218] The European Court appears to view discrimination on certain grounds as being more serious than others, so that more "weighty reasons" would be needed to justify such difference in treatment.[219] These grounds include sex, religion, legitimacy, sexual orientation, nationality and race.[220]

7.75 Article 14 covers direct discrimination, where the difference in treatment between a member of one group and a member of another group is clear (for example between a woman and a man), and indirect discrimination, where the same requirement applies to both groups but a significant number of one group cannot comply with the requirement in question.[221] Therefore if a policy or general measure has a particularly negative effect on one group, it may be considered discriminatory even if it is not specifically aimed at that group.[222]

7.76 The most relevant grounds for this enquiry would appear to be race, colour and national or social origin. However, it should be noted that at times the European Court will simply compare persons in analogous situations without specifying the particular prohibited ground upon which a difference in treatment has occurred.

7.77 Although race is one of the prohibited grounds for which the European Court requires weighty reasons to justify differences in treatment, a difference in treatment on the grounds of race or colour may be difficult to establish. In the

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[218] *Salguiero da Silva Mouta v. Portugal*, (final) Judgment of 21 March 2000, (2001) 31 EHRR 1055, at para. 28.

[219] For example, the European Court has stated that because the advancement of the equality of the sexes is a major goal in the Member States of the Council of Europe, "very weighty reasons would have to be advanced before a difference of treatment on the grounds of sex could be regarded as compatible with the Convention"; *see Abdulaziz and Others v. The United Kingdom*, at para. 78.

[220] *See* Clare Ovey and Robin C.A. White, *The European Convention on Human Rights*, 4th ed., Oxford University Press, Oxford, 2006 at p.426. Note the comments of the European Court in *Timishev v. Russia*, Judgment of 13 December 2005, (2007) 44 EHRR 776 ("*Timishev v. Russia*") where it states that "racial discrimination is a particularly invidious kind of discrimination and in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction." at para. 56.

[221] *See*, for example, *Thlimmenos v. Greece*, Judgment of 6 April 2000, (2001) 31 EHRR 411, at para. 44.

[222] *DH and others v. Czech Republic*, Judgment of 7 February 2006 (2006) 43 EHRR 923 at para. 46.

case of *Abdulaziz and Others v. The United Kingdom*,[223] the European Court ruled that the fact that immigration rules for people outside the EU and the Commonwealth affected fewer white people than others did not make them racist in character. The European Court took the view that the greater impact on non-white people was due to the fact that among those wishing to immigrate, certain ethnic groups outnumbered others. The rules made no distinction on the ground of race. While a Contracting State could not implement "policies of a purely racist nature", to give preferential treatment to its nationals or to persons from countries with which it had the closest links did not constitute "racial discrimination".

7.78 It is arguable however that given the European Court's more recent jurisprudence in relation to indirect discrimination, and also given that the European Court has become increasingly suspicious of discrimination based on race this aspect of the European Court's judgment in this case might be decided differently today. [224]

Whether the difference in treatment pursues a legitimate aim

7.79 Once the applicant has shown that there has been a difference in treatment on a prohibited ground, it is for the respondent State to show that there is a reasonable and objective justification for this treatment. The European Court will therefore consider whether the treatment pursues a legitimate aim. Not every difference in treatment is prohibited by Article 14. If the difference in treatment has an objective and reasonable justification, namely, it pursues a legitimate aim and is proportionate to that aim, it will not result in a violation of Article 14. Often the aim(s) invoked by the State are accepted as legitimate, account being taken of democratic principles, but, occasionally, an aim is rejected. In *Abdulaziz and others v. The United Kingdom,* the European Court readily accepted the Government aim of protecting the labour market[225] as legitimate but rejected the

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[223] *Abdulaziz and Others v. The United Kingdom*, at paras. 84-86.
[224] *See* for example *Timishev v. Russia* and the decision of the Grand Chamber in *DH v. The Czech Republic.*
[225] *See Abdulaziz and others v. The United Kingdom,* at para. 78.

argument that the aim of advancing public tranquillity was served by the distinction drawn in immigration rules between husbands and wives.[226]

Whether the measure in question is proportionate to the aim pursued

7.80 The State must show that the measures taken were *in fact* needed and must support this with evidence. However States enjoy a certain margin of appreciation. The European Court takes the view that the national authorities are in principle in a better position to determine what measures are necessary to implement any particular law or policy. The width of this margin of appreciation given to a State will depend on the facts of the particular case but as noted, it is likely to be narrower when particularly suspect grounds of discrimination are in issue, including nationality and, arguably, race.[227]

7.81 It can be difficult to establish that a law or practice is discriminatory. However recent decisions of the European Court indicate more flexibility.[228] In *DH v. Czech Republic*,[229] the applicants argued that Czech laws relating to specialised schools resulted in the segregation of Roma children from mainstream education in practice.[230] The Grand Chamber of the European Court[231] stressed that Roma people required special protection as a vulnerable group, noting that, as Roma, the applicants may have difficulty proving

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[226] *Ibid.*, at para. 91.

[227] *Inze v. Austria*, Judgment of 28 October 1987, (1988) 10 EHRR 394.

[228] The European Court had previously held that statistics are not of themselves sufficient to show that a practice is discriminatory. *Jordan v. UK*, Judgment of 4 May 2001, (2003) 37 EHRR 2.

[229] *Supra*, fn 223.

[230] This was argued with reference to Article 14 taken in conjunction with the right to education contained in Article 2 of Protocol 1. The applicants cited statistics and international reports such as the reports of the European Commission against Racism and Intolerance on the Czech Republic indicating the low level of participation by Roma children in "mainstream schools".

[231] The Grand Chamber of the European Court is composed of seventeen judges, who include, as *ex officio* members, the President, Vice-Presidents and Section Presidents. The Grand Chamber deals with cases that raise a serious question of interpretation or application of the ECHR, or a serious issue of general importance. A Chamber may relinquish jurisdiction in a case to the Grand Chamber at any stage in the procedure before judgment, as long as both parties consent. Where judgment has been delivered in a case, either party may, within a period of three months, request referral of the case to the Grand Chamber. Where a request is granted, the whole case is reheard *See*: www.echr.coe.int.

discriminatory treatment. [232] It ruled that even without statistical evidence, an applicant might establish a "rebuttable presumption", which would then mean that it would be up to the State to show that the difference in treatment is not discriminatory.[233]

7.82 It appears that where a difference in treatment is based "exclusively or to a decisive extent" on race or ethnic grounds, no possible justification can be given by a State.[234] The European Court also rejected the notion in *DH v. Czech Republic* that an applicant could consent to being subjected to racial discrimination, in view of "the fundamental importance of the prohibition of racial discrimination", as it would be "counter to an important public interest".[235]

7.83 At the universal level, the ICCPR contains a guarantee of equality in Article 26 that is not limited to the enjoyment of the rights covered by the ICCPR, in contrast to Article 14 of the ECHR. It requires non-discrimination in any area of the law. To the extent that a matter is regulated by the law, that law must not discriminate between persons. It applies to any law, whether or not the law in

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[232] *DH v. The Czech Republic*, Judgment of the Grand Chamber, at para. 186.

[233] The Grand Chamber stated that "...[it]considers that when it comes to assessing the impact of a measure or practice on an individual or group, statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the *prima facie* evidence the applicant is required to produce. This does not, however, mean that indirect discrimination cannot be proved without statistical evidence. Where an applicant alleging indirect discrimination thus establishes a rebuttable presumption that the effect of a measure or practice is discriminatory, the burden then shifts to the respondent State, which must show that the difference in treatment is not discriminatory..." *Ibid.*, at paras 188-189. It noted that in the reports submitted by the applicants the respondent State had accepted that Roma children were "vastly overrepresented" in these special schools, even if the exact percentage was difficult to establish. This constituted sufficiently reliable and significant statistical evidence. In that particular case, even though the Czech Government's aim was to provide a solution for children with special needs, and they had taken steps to rectify the problems within the system, the danger that the test results for deciding whether a child should attend a special school were not analysed in a way that took account of the special characteristics of Roma children meant that the measures were not proportionate to their aim. At para 196-204.

[234] In *Timishev v. Russia*, the European Court stated: "[N]o difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures"; at para. 58.

[235] *Ibid.*, at para. 204.

question relates to a right protected under an international agreement. [236] Article 26 provides:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

7.84 In its General Comment No.18 of 1989 ("General Comment No.18"),[237] the HRC, clarified the scope of "discrimination" under Article 26 of the ICCPR. It made it clear that this equality guarantee is an autonomous right, and is not linked to the enjoyment of the other rights secured by the ICCPR.[238] It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. When legislation is adopted by a State Party, its content should not be discriminatory. Nor should the application of the legislation be discriminatory. Difference of treatment is assessed by reference not merely to the purpose of the law in question, but also to the impact or effect of the law. Both direct and indirect discrimination are prohibited.

7.85 General Comment No.18, also recognises that not all difference of treatment constitutes discrimination (para. 13):

> [T]he Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.[239]

7.86 Accordingly, the test applied by the HRC in considering Article 26 complaints is to inquire:

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[236] *See Zwaan-de Vries v. The Netherlands*,9 April 1997, twenty-ninth session of the HRC UN Doc. Supp. No.40 (A/42/40) ("*Zwaan-de Vries v. The Netherlands*") and the HRC, General Comment No. 18, *Non-discrimination*, thirty-seventh session (1989) 10 November 1989, at para. 12 ("HRC General Comment No. 18").
[237] *Ibid.*
[238] HRC General Comment No. 18, at para. 12.
[239] *See* also *Zwaan-de Vries v. The Netherlands* , at para. 13.

(i) whether there was any difference of treatment between categories of person based on the ground of a person's status; and if so,

(ii) whether the criteria for such differentiation were reasonable and objective and whether the aim was to achieve a purpose which is legitimate under the ICCPR.

Whether there was any difference of treatment between persons based on status

7.87 The HRC will consider first whether there has been a difference in treatment based on status, such as race, colour, sex, etc or "other status". The latter has been interpreted quite broadly and includes for example distinctions based on nationality.[240]

Whether the difference of treatment was reasonably and objectively justified

7.88 The test employed by the HRC to determine whether a difference in treatment is justified is similar to that employed by the European Court in relation to Article 14 of the ECHR. A difference of treatment may be justified if the measure in question has an aim which is legitimate.[241] There must also be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. However, in contrast to the European Court, the HRC's consideration of the proportionality of any difference of treatment has tended to be somewhat summary in nature.[242]

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[240] *Gueye v France*, 6 April 1989, thirty-fifth session of the HRC, Communication No. 196/1985.

[241] *See* Manfred Nowak, "*UN Covenant on Civil and Political Rights: CCPR Commentary*" N.P. Engel, Kehl/Strasbourg/Arlington, 1993, at p. 473, cited by Lester and Joseph, p. 586. in *Obligation of Non Discrimination* in A. Lester and S. Joseph, in "*International Covenant on Civil and Political Rights and United Kingdom Law*" (1995) ed. by D. Harris and S. Joseph, Oxford, 1995, pp. 563-596.

[242] In *Zwaan-de Vries v. The Netherlands*, the HRC considered that a subsequent change to the law in the Netherlands was an acknowledgement that the difference of treatment in that case could not be said to be based upon reasonable grounds, para. 14. Also, in *Kavanagh* v. *Ireland*, 28 November 2002, sixty sixth session of the HRC, Communication No . 819/1998. The HRC found that the refusal of the relevant authority to give reasons for a certain practice meant that a decision to try the person by a certain procedure could not be said to be based upon reasonable and objective grounds, para. 10.3. In contrast, in *Blom v Sweden,* 4 April 1988, thirty second session of the HRC, Communication No. 191/1985, a distinction between state subsidies for

7.89 In determining whether the criteria for discrimination are reasonable and objective the HRC has proceeded on a case by case basis. Although it ruled in one case that an international agreement that gives preferential treatment to nationals of a State Party to that agreement might constitute a reasonable and objective ground for differentiation,[243] it later held that this was not a general rule, and that each case had to be examined on its own facts.[244] The latter case, *Karakurt v. Austria*,[245] involved the prohibition of non-EEA nationals from holding positions on bodies known as work-councils which were designed to promote staff interests and supervise compliance with work conditions. The HRC stated that in light of the purposes of the work-councils it was not reasonable to base a distinction between "aliens" and EEA nationals concerning their capacity to stand for election to the councils, which was a close and natural incident of employment.[246]

7.90 The second international agreement of relevance at the universal level is the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).[247] Article 2(1) of CERD provides:

> (a)States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:
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> Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to en sure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;
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> ....
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> (c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;
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> ....

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students at private schools and students at public schools was found to be reasonable and objective. At para. 10.3.

243 *Van Oord v The Netherlands*, 14 August 1997, sixtieth session of the Human Rights Commission, Communication No 658/1995., at para 8.5.

244 *Karakurt v. Austria*, 29 April 2002, seventy fourth session of the HRC, Communication No. 965/2000, at para 8.4.

245 *Ibid.*

246 *Ibid*, at para 8.4.

247 Ratified by Ireland on 29 December 2000.

Article 5 provides:

> In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:
>
> (a) The right to equal treatment before the tribunals and all other organs administering justice;
>
> ....

Finally, Article 6 provides:

> States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

7.91 The CERD does not apply to distinctions between citizens and non-citizens but rather applies where States in their laws distinguish between groups other than their own citizens, based on nationality. In *BMS v. Australia*[248] the monitoring body of CERD, the Committee on the Elimination of Racial Discrimination, held that a quota system for doctors trained overseas did not discriminate on the basis of race or national origin, as it was applied equally to all foreign-trained doctors regardless of their race or national origin. [249]

7.92 Six points of relevance to this enquiry may be made on the basis of these international human rights provisions:

7.93 First, not all differential treatment constitutes discrimination.

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[248] *BMS v. Australia*, 10 May 1999, fifty-fourth session of the HRC, Communication No. 8/1996 (CERD), at para 9.2.

[249] The Committee on the Elimination of Racial Discrimination (CERD) is the body of independent experts that monitors implementation of the Convention on the Elimination of All Forms of Racial Discrimination by its State Parties.

7.94 Secondly, differential treatment is prohibited if it is based on a particular ground and has no reasonable and objective justification.

7.95 Thirdly, objective and reasonable justification is assessed by reference to whether the differential treatment pursues a legitimate aim and whether it draws a fair balance between the interests of the particular individual and the interests of society.

7.96 Fourthly, discrimination based on certain grounds will be particularly suspect, and in relation to racial discrimination there may be no possible justification for such differential treatment.

7.97 Fifthly, it may be difficult to prove that differential treatment amounts to racial discrimination although this will be easier where statistics support the claim being made.

7.98 Sixthly, differential treatment may be prohibited even where it has no discriminatory purpose, if it has a disproportionate and unjustified adverse effect on members of a particular group.

The right to an effective remedy where a violation of rights has been found

7.99 As has been examined in relation to the international human rights standards explored in this Chapter, the State is obliged to vindicate international convention rights by means of an effective remedy. Two international agreements to which the State is a party contain general provisions guaranteeing the right to an effective remedy for convention rights violations, one at the international level and one at the regional, European level.

7.100 At the regional level, Article 1 of the ECHR provides that:

> The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

In addition, Article 13 of the ECHR provides that:

> Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

7.101 Article 13 may be engaged where an arguable breach of an ECHR right is made.[250] The European Court analysis of Article 13 has been summarised in the case of *Doran v. Ireland*, where the European Court held that Article 13 requires a domestic remedy to deal with the substance of an "arguable complaint".[251] The scope of the State's obligations under Article 13 varies depending on the nature of the applicant's complaint; however, the remedy required by Article 13 must be "effective" in practice as well as in law. In addition, particular attention should be paid to, *inter alia*, the speediness of the remedial action itself, "it not being excluded that the adequate nature of the remedy can be undermined by its excessive duration".[252]

7.102 While the authority which provides an effective remedy need not be judicial,

> if it is not, its powers and the guarantees are relevant in determining whether the remedy before it is effective. In addition, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may, in principle, do so". Finally, a remedy available to a litigant at domestic level may be effective if they "[prevent] the alleged violation or its continuation, or [provide] adequate redress for any violation that [has] already occurred.[253]

7.103 The remedy before the national authority should concern both the determination of the claim and any redress.[254] Where a respondent government cannot put forward an example of the application of the remedy offered to a case

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[250] *Klass and others v. Germany*, Judgment of 6 September 1978, at para 64, *See* also *Silver and others v. The United Kingdom*, Judgment of 25 March 1983, (1983) 5 EHRR 347, at para. 113.
[251] *Doran v. Ireland,* Judgment of 31 July 2003, at para. 55.
[252] *Ibid.*, at paras 56-57.
[253] *Ibid.*
[254] *Silver v. United Kingdom*, at para. 113.

similar to the one put forward by the applicant, they are unlikely to satisfy the European Court that there is an effective remedy available.[255]

7.104 In the *Conka* case, the European Court held that the scope of States' obligations under Article 13 "varies depending on the nature of the applicant's complaint". However, the European Court went on to note that the remedy:

> must be 'effective' in practice as well as in law. The 'effectiveness' of a 'remedy' within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the 'authority' referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective. Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so.[256]

7.105 While Article 5(5) makes special provision for compensation for a breach of Article 5(1) to 5(4), Article 13 provides the general guarantee of an effective remedy for any violation. However, where the essence of the principal complaint is the absence of an appropriate remedy required by another provision of the ECHR, such as Article 5(4), it is unnecessary to consider Article 13.[257]

7.106 At the international level, Article 2(3) of the ICCPR provides that:

> Each State Party to the present Covenant undertakes:
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

[255] See for example *Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria*, Judgment of 19 December 1994, (1995) 20 EHRR 56, at para.53.
[256] *Conka v. Belgium*, at para. 75. This case concerned the expulsion of foreign nationals, and it was held that in order to be an effective remedy, a process may need to prevent the execution of measures contrary to the Convention. This means that it is not compatible with Article 13 for measures relating to an expulsion to be put into effect before the national authorities have examined their compatibility with the Convention.
[257] See *De Wilde, Ooms and Versyp v. Belgium*, Judgment of 18 June 1971 (1971) 1 EHRR 373. See also Ovey & White , *The European Convention on Human Rights*, 4th Edition, Oxford University Press, 2006, at pp. 155, 460-461.

(c) To ensure that the competent authorities shall enforce such remedies when granted.

7.107 In its General Comment No. 31 of 1980, the HRC noted that Article 2(3) requires that individuals have accessible and effective remedies to vindicate those rights that are appropriately adapted so as to take account of the special vulnerability of certain categories of person, in particular children. It also requires that States Parties make reparation to individuals whose ICCPR rights have been violated. Where appropriate, reparation can involve *inter alia*, restitution, guarantees of non-repetition and changes in relevant laws and practices. In relation to measures to prevent a recurrence, the HRC emphasized the need for measure beyond a victim-specific remedy. The HRC will also place emphasis not only on formal laws but also on how they are implemented in practice.

7.108 Four points of relevance to this enquiry may be made on the basis of these international human rights provisions:

7.109 First, the State is obliged to provide an effective remedy to an individual where an arguable claim of the breach of a right under the ECHR or ICCPR is raised.

7.110 Secondly, in order for a remedy to be effective, it must be accessible and available in practice as well as in theory. A remedy may be effective under ECHR jurisprudence when taken in conjunction with other remedies even where it would not be sufficient in isolation.

7.111 Thirdly, the body providing a remedy need not be judicial, but it must provide a remedy of value to the complainant.

7.112 Fourthly, a remedy may deal with preventing the recurrence of a more general problem, as well as with providing compensation or, in the case of an ongoing violation, a halt to the measures that violate the rights of the complainant.

Chapter 8 Analysis

A Summary of the facts

8.1 A perceived injustice arising from a visitor's arrest, imprisonment and forcible removal from the State as a result of a decision by an Immigration Officer was drawn to the Commission's attention by a Pakistani national. He had wished to visit the country, had applied twice for a visa and was granted a visa on the second occasion. When he arrived in the State for a holiday, he was refused permission to enter the State, was imprisoned, sharing a cell in questionable conditions with three other foreign nationals. The following morning he was forcibly removed from the State.

8.2 At the time of the incident in 2003, the relevant Irish legislation primarily comprised of Ministerial instruments known as Aliens Orders. They provided that visas could be granted by the Department of Foreign Affairs. An administrative arrangement results in most decisions being taken by the Department of Justice. Immigration Officers, usually members of An Garda Síochána are appointed to decide who is to be refused or granted leave to land in the State. The criteria employed was set out in the Aliens Orders at the relevant time.

8.3 Since 1999, the Aliens Order permitted members of An Garda Síochána and other officers acting as Immigration Officers at the State's ports, wide discretion to refuse visitors, in possession of valid visas, leave to land in the State on a number of grounds including the grounds of a "threat to national security", "public policy" and "intention to deceive".

8.4 In relation to visitors from Pakistan, since 1987, Pakistan nationals had been required to obtain a visitor's visa in advance of arriving in the State. As with other visa-required nationalities, the visa did not guarantee an entry to the State, although this fact may not have been entirely appreciated by visitors.

8.5 The Commission enquiry revealed that there is no established practice of communication of information relating to visa application decisions between Irish officials granting visas to foreign visitors and Irish Immigration Officers refusing foreign visitors leave to land at Dublin airport, although it appears this situation may be remedied through the future introduction of the AVATS system. Prior to travelling to Ireland, the complainant had clarified with the Honorary Consul in Karachi that he was unable to book any hotel accommodation in Dublin in advance, owing to the lack of a credit card system in the area where he lived. The fact that he had no hotel accommodation booked was part of the reason cited by the Immigration Officer in refusing him leave to land in the State on the basis that he had an "intention to deceive". An Garda Síochána suggested that it would have been "highly unusual" for a person to arrive for the first time in a country late at night without any arrangements made, but this begs the question as to how a visitor, with no credit card and no relatives in the country, such as the complainant, could have arranged accommodation before arrival.

8.6 Having spent a substantial sum of money and time on the understanding that his explanation concerning the credit card and accommodation had been accepted, the complainant could rightly ask why he was being penalised in relation to the same matter by another State official.[258]

8.7 On arrival in the State on 13 January 2003, the complainant was imprisoned in a cell in Mountjoy Prison with three other detainees who had been refused leave to land at the Airport. The complainant states that he was given no information about his imprisonment once he arrived at the prison, although he was given a notice informing him of his imprisonment and imminent removal from the State and may or may not have been given a copy of an information booklet. According to the complainant, the cell comprised bedding on the floor. He was

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[258] It is noted that the Immigration Officer did record his reasons for refusing leave to land including the lateness of the hour of arrival, the fact that the complainant had no accommodation booked, that he had no friends or contacts in Ireland, his financial resources; factors which may have led the Immigration Officer to the conclusion that the complainant may not have been a genuine tourist. Also it has been pointed out by An Garda Síochána that certain matters can only be verified when a person presents at immigration control, rather than at the time they are granted a visa.

unable to eat due to anxiety at his unexpected situation. The prisoners were expected to share a toilet and wash hand basin located in the cell.

8.8 On 14 January 2003, the complainant was removed from the State by being placed in the custody of the Captain of an aircraft bound for the UK. On his journey home, he was reportedly detained and interrogated by authorities in London, Kuwait and Karachi, possibly on the basis of crossed marks on his passport made by the Immigration Officer at Dublin airport. The legal basis for making such crossed marks, which appear to be a deliberate policy of the State, remains unclear. He provided documentation showing that he arrived in his own home on 16 January 2003, meaning that the round trip, including the periods in detention in four countries, lasted five days.

8.9 The complainant indicated that his detention during these five days had caused great anxiety to his family, who were unaware of his whereabouts. He felt his honour had been besmirched because of his imprisonment. The complainant indicated that his elderly mother suffered from infection and hypertension on his return to Pakistan.

8.10 The complainant informed the Commission that he has not travelled to other countries since the above-mentioned incidents, due to the marks on his passport. After communicating with the Honorary Consul in Karachi, he was reportedly advised to contact the Department of Justice or the Garda Síochána Complaints Board. The complainant stated that he had written to the Department of Justice but had received no reply.

8.11 In the course of the enquiry, the Commission could not obtain disaggregated data concerning category types and nationalities granted visas to enter the State. It could not obtain disaggregated data relating to the place and duration of detention of persons refused leave to land in the State in 2003. However, it was provided with the main nationalities refused leave to land in 2003 and with the number of cases where the ground that a foreign national had an

"intention to deceive" was the primary reason given for a refusal of leave to land in the first two weeks of the year.

8.12 The Commission was informed that prisons are still used to detain persons refused leave to land in the State and that they are the preferred place of detention where the period of detention is likely to be longer than 18 to 24 hours duration rather than Garda stations. However, An Garda Síochána informed the Commission that detention exceeds one night only where flights are not available or there is a travel documentation problem.

8.13 The Commission was informed that An Garda Síochána's practice is to accompany some, but not all, persons refused leave to land onto an aircraft. Detainees are accompanied at the behest of the Captain by virtue of what An Garda Síochána referred to as "international custom and practice". This appears to refer to a practice which exists between airlines and An Garda Síochána.

B Application of relevant international human rights standards to the facts

The right to freedom from arbitrary detention

8.14 In order for detention to be lawful under Article 5(1) of the ECHR, it must be "in accordance with a procedure prescribed by law". The arrest of the complainant at Dublin Airport on 13 January 2003 and his subsequent detention in Mountjoy Prison was "prescribed by law" insofar as it was provided for under Article 5(2)(m) of the Aliens Order. His arrest and detention was for the purpose of "prevent[ing] his effecting an unauthorised entry" as permitted under Article 5(1)(f) of the ECHR. However, detention under that provision will only be lawful if the steps towards removal are pursued with diligence and the removal occurs shortly. The complainant's removal from the State on the morning of 14 January 2003 was within seven hours of his arrival and accordingly this requirement was satisfied in his case.

8.15 The European Court has held that the law authorising detention must be adequately accessible and sufficiently precise requiring clear criteria for detention for it to comply with Article 5. In the current case, the law is to be found under an Aliens Order provision which is not as accessible as primary legislation.[259]

8.16 The Aliens Order contains 15 grounds upon which an Immigration Officer may refuse a person leave to enter the State. Of these fifteen grounds, the ground used in this case was that of "intention to deceive" which was the primary ground used in eleven of 116 refusals in the first two weeks of 2003. This criterion is one of two new criteria introduced into law since 1999. Further, this ground is based primarily on the subjective evaluation of the Immigration Officer. In the present case the ground was based, in part, on the fact that the complainant could not satisfy the officer about his hotel accommodation. This question had previously been put to, and answered by, the complainant before he was granted his visa in Pakistan. The Immigration Officer did not know that this question had been put to the complainant by an Irish official and answered by him (in a similarly vague fashion) at an earlier time. Accordingly, there must be some doubt as to whether the law and its application were sufficiently precise and accessible to meet the standards of Article 5(1) of the ECHR. This is despite the fact that the State has undoubtedly a wide "margin of appreciation" in relation to decisions concerning immigration control.

8.17 The European Court has held that detention will not be arbitrary where there are adequate safeguards provided by the national system. The safeguards for immigration detention in Irish law are as set out in Chapter 4 and it is questionable whether they are sufficiently precise to guard against unlawful detention. Under Irish law, detention must not exceed eight weeks. However,

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[259] The Commission has welcomed the fact that the proposed Immigration, Residence and Protection Bill 2008 attempts to consolidate immigration law into a single statutory code; however, the Commission has expressed concern that there are a broad range of areas in the proposed Bill where the human rights of immigrants and protection of applicants are not fully protected and upheld to the level required by the international human rights treaties which Ireland has ratified, while additional safeguards are further required under a number of the Bill's provisions. *See "Observations on the Immigration, Residence and Protection Bill 2008",* Irish Human Rights Commission, March 2008, Dublin.

this is in and of itself no safeguard against arbitrariness. There is no automatic review of the Immigration Officer's decision, nor any oversight of decision-making by an independent Office such as the Ombudsman. An Garda Síochána indicate that Immigration Officers base many of their decisions on their experience and practice rather than precise legal criteria. In the present case, however, the shortness of the complainant's detention suggests that it was not arbitrary under Article 5(1)(f) in light of the jurisprudence of the European Court.

8.18 A detainee must be informed of the reason for his or her detention under Article 5(2) of the ECHR. It is clear that in the current case, the complainant was informed of the reason for his detention in the signed form provided to him. Accordingly, this aspect of the right to liberty was complied with.

8.19 Under Article 5(4) of the ECHR, detention must be subject to a prompt and regular review by a Court which can properly review the legality of the detention. Furthermore, the European Court may find a violation of Article 5(4), where the remedy of *habeas corpus* only examines the procedural requirements of the detention and not the legitimacy of the purpose pursued by the arrest and the ensuing detention. The requirement in such cases for the detainee to have his or her detention reviewed (whether pursuant to a *habeas corpus* or other application) exists even for periods of detention as short as four days and six hours but not where persons are released after a very short period. The European Court will not demand that a prisoner be afforded the opportunity to apply for a review of detention in circumstances where such a remedy would prove ineffective on account of the person's imminent removal from the State. Accordingly, as the complainant was only detained for seven hours, Article 5(4) does not appear to be applicable to his situation.

8.20 However, where persons refused leave to land are detained in the State over a minimum period of time, it is questionable whether the right to have a prompt review of one's detention is available. While theoretically available - in the form of *habeas corpus* or judicial review applications - there is no automatic

review of detention after a certain number of days and it is unclear how a detainee is informed of the right to challenge his or her detention prior to being removed from the State. In addition, it is questionable whether either *habeas corpus* or judicial review examines the legitimacy of the purpose pursued by the arrest and the ensuing detention in addition to the procedural requirements of the detention itself.

8.21 Finally, persons who are wrongly deprived of their liberty contrary to Article 5 have an enforceable right to compensation under Article 5(5) of the ECHR. In the present case, there were no meaningful remedies by way of compensation available to the complainant. He was removed from the State before being able to challenge his detention before a court or equivalent body. However, given the fact that due to the shortness of his detention, the complainant's treatment would not appear to have breached Article 5 of the ECHR, the right to compensation may not have arisen.

8.22 Nonetheless, the Commission is concerned that immigration detainees whose Article 5 ECHR rights may be breached under the current law have no possibility for recourse to compensation under Article 5(5) as the remedy of *habeas corpus* does not include a right to compensation. Apart from a possible *ex gratia* payment by the Minister for Justice (which has never been employed), there would appear to be no other effective remedy available under Irish law.

8.23 The guarantees contained in Article 9 ICCPR are similar in nature to those provided by Article 5 ECHR and as such for the most part a similar analysis pertains to that undertaken under the ECHR.

8.24 For detention not to be arbitrary under Article 9(1) it must be based on grounds and procedures established by law and this occurred in the complainant's case. Similarly, he was informed of the reasons for his arrest under Article 9(2) while his short detention meant that Article 9(4) is not in issue as is the case with Article 9(5).

The right to be free from inhuman or degrading treatment or punishment

8.25 Under Article 3 of the ECHR, immigration detainees are entitled to certain minimum standards of detention and must not be subjected to torture or inhuman or degrading treatment or punishment.

8.26 In the current case, the complainant was imprisoned in a small cell which comprised bedding on the floor. He was clearly in a distressed state, being unable to eat due to anxiety at his unexpected situation. He was expected to share a toilet and wash hand basin located in the cell for the period of his imprisonment there.

8.27 The European Court has held that conditions of detention may constitute degrading treatment even though there is no intention to humiliate the prisoner. The test is whether there is a certain minimum level of severity in the treatment and this will depend on all the circumstances of the case including the duration of the detention, and its physical and mental effects. Prison conditions should never diminish a prisoner's human dignity to such an extent as to constitute degrading treatment. The European Court has placed particular emphasis on a prisoner having to use a toilet in the presence of another inmate, and be present while the toilet is used by the cell-mate, when assessing whether certain treatment violates Article 3.

8.28 In the current case, the length of the complainant's detention and the conditions of his detention suggest that the minimal level of severity prohibited under Article 3 of the ECHR would not appear to have been reached. In relation to mental suffering, the fact that the complainant's imprisonment in and of itself brought shame on his family's honour is unlikely to give rise to issues under Article 3, insofar as the European Court has held that in order for Article 3 to be engaged, the suffering and humiliation involved must go beyond that inevitable element of suffering or humiliation inherent in detention.

8.29 The European Court has held that treatment which might otherwise be lawful may be deemed inhuman or degrading if motivated by racial discrimination. In the current case, there was no indication that the complainant's treatment was motivated by racial discrimination. Further, the complainant was not at risk of *refoulement* when removed from the State, notwithstanding his questioning and treatment in third countries and in Pakistan arguably on account of the marks enscribed on his passport by the Immigration Officer.

8.30 The CPT standards require that, in order to prevent prohibited ill-treatment under the ECPT, a number of safeguards must be present during detention, including the right of immigration detainees to be held separately from remand or convicted prisoners. While this occurred in the current case, it is unclear whether it occurs in all situations. The standards further require that the immigration detainee have contact with the outside world, access to a lawyer and a doctor, and the right to be informed of their rights without delay and in a language they understand. It is questionable that the complainant was afforded all these rights, although the shortness of his detention would be taken into account. Further, the CPT has stated that immigration detainees should not be detained in prisons but should be accommodated in appropriate centres. Due to the shortness of his detention, the complainant's detention in Mountjoy Prison would not appear to breach this standard.

8.31 Similar considerations apply to the prohibition of torture or cruel, inhuman or degrading treatment or punishment under Article 7 of the ICCPR and Article 2 of the UNCAT as under Article 3 of the ECHR. Under Article 16 of the UNCAT, Immigration Officers and prison officers must receive appropriate education and information regarding the prevention of torture or ill-treatment of persons in custody.

The right to private life and the right to be treated with humanity and respect

8.32 The detention and treatment in detention of the complainant came within the scope of Article 8(1) of the ECHR insofar as it interfered with the right to respect for his private life. The question is whether his treatment was justified under Article 8(2). The European Court has held that where administrative detention occurs pursuant to an officer's discretion, domestic law must indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities so as to ensure appropriate protection to the person.

8.33 In the complainant's case, given the nature and shortness of his detention, it is likely that his treatment was justifiable under Article 8(2) of the ECHR.

8.34 Under Article 10 of the ICCPR, immigration detainees should enjoy all relevant rights subject to the restrictions that are unavoidable in a closed environment. They should be segregated from convicted persons as occurred in the present case.

8.35 Under Article 10 of the ICCPR, immigration detainees should have sufficient information on their rights and obligations, communication with the director or deputy director of the prison, communication with diplomatic and consular representatives and safe custody of valuables. In the current case, there is dispute as to whether the complainant was provided with an Information booklet on available facilities and services on his arrival in Mountjoy prison (he claims he was not). He was reportedly offered a shower and allowed to remain in his clothes while being weighed. He was reportedly interviewed by medical staff. Due to his short detention period, he did not meet the Governor or Deputy Governor. He was not afforded the right to communicate with a diplomatic and consular representative. He was provided with safe custody of his valuables although the money on his person appears to have gone undetected. Some of the

requirements were met under Article 10 of the ICCPR, but there must be some doubt as to whether the complainant's rights thereunder were fully respected.

8.36 More generally, it is questionable whether immigration detainees who spend considerable time in detention have the minimum standards required under Article 10 respected. There is the right to adequate written information in a language the person understands about the regulations governing the treatment of immigration detainees and all such other matters as are necessary to enable the person to understand both his rights and his obligations and to adapt to the life of the institution. In addition to being provided with a separate bed, and with separate and sufficient bedding, there should be proper facilities for special diets, religious observance and cultural expression which is available in practice as well as in principle. Immigration detainees should not be imprisoned but accommodated appropriately.

The right to equality before the law and non-discrimination in the enjoyment of rights

8.37 For Article 14 of the ECHR to be engaged, the matter must first fall within the ambit of a substantive ECHR right. In the complainant's case, it is clear that his rights under Article 8 of the ECHR are engaged.

8.38 The next question is whether a difference of treatment on the basis of the complainant's status can be demonstrated. Discrimination may be direct (where there is an intention to discriminate) or indirect (where there is no intention to discriminate but a "neutral" measure results in discrimination). There are two instances in which a difference of treatment on the basis of the complainant's nationality or race may have occurred: first, in relation to his refusal of leave to land in the State and second, in relation to his treatment in prison and removal from the State. Although the precise legal basis for the Department of Justice's decision to grant the complainant a visa is unclear, the grant of the visa itself is not at issue here.

8.39 Within the category of persons arriving in the State seeking to visit the country in January 2003, foreign nationals arrived in two main categories: those nationalities who were visa-required and those nationalities who were visa-exempt. The complainant, being a national of Pakistan, was in the former category. However, even within those categories, it is clear from the figures produced by An Garda Síochána that nationals of both categories were refused leave to land in the State during 2003.

8.40 Within the category of visa-required nationals, it is arguable that the complainant was treated differently to a person from a different nationality granted leave to land in the State on 13 January 2003.

8.41 It is likely that a difference of treatment between different nationalities in relation to immigration control will be treated as a legitimate aim under Article 14 of the ECHR.

8.42 The question then turns to whether the measure in question is proportionate to the aim pursued. The measure in question was refusal of leave to land, arrest, detention and removal. The aim was to control immigration at the State's port, (which includes considerations such as a threat to national security, public policy or an intention to deceive), and to remove the person refused leave to land swiftly.

8.43 The State has a wide "margin of appreciation" in relation to immigration control. Suspect grounds for discrimination include difference of treatment based on nationality and race. Further, the absence of proper record keeping in terms of disaggregated data may result in a finding by the European Court of indirect discrimination as even without statistical evidence substantiating a claim, an applicant might establish a "rebuttable presumption", which would then put the onus on the State to show that the difference in treatment was not discriminatory. The requirement to maintain good records in order for the State to demonstrate

that no discrimination has occurred may thus be enhanced where the person is in a vulnerable position such as an immigration detainee.

8.44 It is possible that the Immigration Officer who refused the complainant leave to land treated him differently from another visa-required person granted leave to land on 13 January 2003 and that the difference in treatment was on the basis of national or racial discrimination. However, there is no evidence to suggest that the refusal was motivated by national or racial discrimination.

8.45 On one level, it is surprising that a person who obtained a visitor's visa on the basis of information supplied by him, should be later refused leave to land as a visitor by the application of a vague criterion predicated in part on a reason referencing the refusal to the same information previously supplied. However, in the present case, when compared to other nationalities refused leave to land in 2003, the fact that 71 Pakistan nationals were refused leave to land during the year does not suggest there may have been discrimination based on nationality or race in refusing the complainant leave to land. It is further noted that other Pakistani nationals were on the same flight as the complainant but were not refused leave to land. Further, the other persons refused leave to land and transported to Mountjoy Prison with the complainant were not nationals of Pakistan. Accordingly no direct national or racial discrimination appears to have occurred.

8.46 In relation to indirect discrimination, the question arises as to whether the 1988 Aliens Order, which obliged Pakistani nationals to be visa-required in entering the State, resulted in the complainant or other persons in a similar situation from being discriminated against.

8.47 Under the 1987 Aliens Order, a number of other nationalities also became visa-required, namely nationals from Bangladesh, Ghana, India and Nigeria. In any event, An Garda Síochána statistics show that being visa-required is not conclusive – persons from visa-exempt countries were also refused leave to land

during 2003, including nationals from EU States. Furthermore, those nationalities with the greatest numbers refused leave to land in the State that year came from a number of continents, although it is noted that the State was unable to disaggregate the number of visa applications and grants by nationality which would have assisted in forming a more accurate picture. Accordingly, no indirect national or racial discrimination appears to have occurred.

8.48 There is no suggestion of direct or indirect discrimination of the complainant in relation to his treatment in detention or removal from the State (although the facilities for religious and cultural observance were questionable). These were the direct consequences of his refusal of leave to land in the State.

8.49 Although the complainant does not appear to have suffered prohibited discrimination, there must be some doubt as to whether the data collection and data disaggregation available to the State would allow it to defend itself from future unsubstantiated claims of national or racial discrimination. In this regard, the Commission notes that the State authorities were unable to disaggregate requested data by nationality (visa grants: Department of Foreign Affairs), by place of detention, duration of detention or by nationality regarding those refused leave to land in the State in 2003 (Department of Justice, Irish Prison Service, Governor of Mountjoy). An Garda Síochána was in a position to provide disaggregated data in relation to those nationalities refused leave to land in 2003. It was also in a position to disaggregate the grounds for refusal for the first two weeks of the year. The Department of Justice has indicated that the new AVATS system will resolve the problem. However this remains to be seen as the system was not yet operating at the time of writing this report.

8.50 In this regard, it is noted that the European Court's jurisprudence provides that if a person can establish a rebuttable presumption of discrimination on a suspect ground such as race or nationality, the State may be required to show that the difference in treatment is not discriminatory. Accordingly, the lack of data and record keeping, combined with vague criteria used in decision-making and a

lack of safeguards raises serious doubts as to whether the State is in a position to disprove allegations of racial or national discrimination in certain cases.

8.51 A similar test applies to the consideration of the guarantee of equality before the law and equal protection of the law under Article 26 of the ICCPR as under the ECHR. The question primarily falls to be considered under the first part of the test (whether there was any difference of treatment between persons on the basis of status). While it was arguable that there was a difference of treatment based on nationality in a field regulated by law, it would appear that neither direct nor indirect discrimination on the basis of national, racial or other discrimination arose.

The right to an effective remedy where a violation of rights has been found

8.52 The right to an effective remedy under Article 13 of the ECHR arises where an "arguable complaint" of a breach of a ECHR right is made. In the current case an arguable complaint is made by the complainant.

8.53 The domestic remedy need not be judicial but must be effective in practice as well as in law. It may be that an aggregate of remedies rather than a single remedy is appropriate in a given case. What is required is that it provides adequate redress for any violation that has occurred. Further, the State must put forward an example of the remedy offered to a similar fact situation if it is to satisfy the European Court that an effective remedy exists. Where Article 5 is at issue, it may not be necessary to separately consider the issue under Article 13.

8.54 In the present case, the judicial remedies available were *habeas corpus* or judicial review applications. While theoretically available, in reality they were not available to the complainant. In addition, it is questionable whether they would have examined the legitimacy of the purpose pursued by the complainant's arrest, ensuing detention and removal in addition to the procedural requirements of the detention itself.

8.55 The non-judicial remedies available as advanced by the State were a complaint to the Garda Síochána Complaints Board (regarding the behaviour of the Immigration Officer) or the Minister for Justice (in relation to a theoretical *ex gratia* payment).

8.66 There was no oversight or review of the Immigration Officer's decision to refuse leave to land (which was not based on any circulars or guidelines). There was no independent oversight by the Ombudsman or a similar body. Once the complainant was refused leave to land and detained, his imprisonment and forcible removal from the State were inevitable. Accordingly there must be doubt as to whether the complainant's rights under Article 13 were entirely respected. Further, there must be a doubt as to whether others in a similar situation to the complainant but detained for longer periods of time have access to an effective remedy under Article 13 of the ECHR.

8.57 Under Article 2(3) of the ICCPR, the complainant has the right to accessible and effective remedies to vindicate ICCPR rights. As with the ECHR, ICCPR rights are engaged in the complainant's case. The HRC has taken the view that reparation must be available to individuals whose ICCPR rights have been violated and that this can involve *inter alia*, restitution, guarantees of non-repetition and changes in relevant laws and practices.

8.58 Essentially, the same considerations apply in considering the matter under Article 2(3) of the ICCPR as under the ECHR. There must be doubt as to whether the right to an accessible and effective remedy was available to the complainant. Further, given that the vague criterion of "intention to deceive" remains in law, the fact that there is no effective oversight (whether administrative or judicial) of Immigration Officer decisions or treatment in prison and upon forcible removal and the fact that no compensation was realistic following his removal from the State, it is questionable whether the guarantee of non-repetition and changes to law and practice as required under the ICCPR has been met.

Chapter 9 Conclusions and Recommendations

9.1 A Pakistani visitor perceived an injustice arising from his arrest, imprisonment and forcible removal from the State as a result of a decision by an Immigration Officer to refuse him leave to land in January 2003. After being forcibly removed from the State, he had his passport marked which appears to have led to his detention in three other countries including in his home country of Pakistan. His family and elderly mother in particular suffered anxiety with no information on his situation. Since this time, he has felt unable to travel abroad.

9.2 The visitor had applied for and obtained a visitor's visa to travel to Ireland from the Irish Consulate in Karachi. It transpired there was no communication between the visa application to the Consulate and the Department of Justice and the refusal of leave to land interview conducted by the Immigration Officer at the airport.

9.3 Of course, not all injustice entails a violation of human rights; and it is the task of the Commission, when a complaint is made, to assess whether or not human rights standards have been respected. The Commission has therefore, in line with its statutory remit, confined itself to examining the application of international human rights standards to the situation of the complainant and of other persons in a similar position.

9.4 It has long been recognised that States are entitled to regulate the entry into their territory of foreign nationals and immigration control in Ireland is seen as being in the interests of the common good, the social order and external relations with other States. Immigration control can thus be regarded by human rights standards as serving a legitimate public interest. However, it would appear that international human rights standards have not been entirely respected.

9.5 Firstly, while the right to freedom from arbitrary detention appears to have been for the most part respected in the present case on account of the shortness

of the complainant's detention and the fact that he was given reasons for the detention, there must be some doubt as to whether the law and its application were sufficiently precise and accessible to meet the standards of Article 5(1) of the ECHR and Article 9(1) of the ICCPR. Further, it is questionable whether either *habeas corpus* or judicial review will satisfy the requirements of Article 5(4) of the ECHR or 9(4) of the ICCPR if it does not examine the legitimacy of the purpose pursued by the arrest and the ensuing detention in addition to the procedural requirements of the detention itself. Finally, there would appear to be no meaningful remedies in compensation available to a complainant under Article 5(5) of the ECHR or Article 9(5) of the ICCPR.

9.6 Secondly, in relation to the right to be free from inhuman or degrading treatment or punishment, the length of the complainant's detention and the conditions of his detention appear not to have breached Article 3 of the ECHR or Article 7 of the ICCPR. However, were persons to be detained in similar situations for longer periods of time, the nature of the assessment could change, including in relation to the in-cell sanitation available in this case. In relation to the procedural rights under the ECPT, while the shortness of the complainant's detention in Mountjoy Prison would not appear to breach this standard, it is questionable whether all necessary procedural rights as required by the CPT were afforded to the complainant or others in his situation. Further, the CPT has stated that where immigration detainees are detained for extended periods, they should not be detained in prisons but should be accommodated in appropriate centres.

9.7 Thirdly, in relation to the right to private life and the right to be treated with humanity and respect, the requirements of Article 8 of the ECHR would appear to have been satisfied in the current case. However, there must be some doubt as to whether the complainant or other immigration detainees who spend considerable time in detention have the minimum standards as required under Article 10 of the ICCPR fully respected and ensured.

9.8 Fourthly, in relation to the right to equality before the law and non-discrimination in the enjoyment of rights, it would appear that no direct or indirect national or racial discrimination has occurred in the current case. However, in light of the jurisprudence of the European Court under the ECHR and the HRC under the ICCPR, there must be some doubt as to whether the State is in a position to disprove allegations of racial or national discrimination in certain cases where a rebuttable presumption that discrimination arises and where the State does not have available to it sufficient data collection and data disaggregation information to shield it from such claims. The aggravating factors of the vague criteria used in decision-making and the lack of safeguards against arbitrary decision-making could also be taken into account in assessing any such cases.

9.9 Finally, in relation to the right to an effective remedy where a violation of rights has been found, the lack of safeguards and any oversight apart from a theoretical judicial remedy must place in doubt whether the complainant and others in a similar situation had an effective remedy available to them under Article 13 of the ECHR and Article 2(3) of the ICCPR, particularly when safeguards against repetition cannot be ensured.

9.10 The Commission has on occasion recommended that the Government incorporate particular international human rights agreements into domestic law.[ii] It is recognised that the State is not obliged to incorporate into Irish law all the international human rights agreements to which it is party. However, it is required to give effect to the obligations which it has assumed under these agreements. This places a special onus on the State, when it has not incorporated an agreement, to ensure that the standards guaranteed by it have legal effect in the State.

Recommendations

9.11 The Commission therefore recommends that the relevance of the international human rights standards raised in this report be considered against

current immigration law and practice in the State. Accordingly, the proposed Immigration, Residence and Protection Bill 2008 should be reviewed against this report's recommendations.

9.12 In relation to the grant of visitor visas, the Commission recommends that there be proper delegation for decision-taking to the Department of Justice set out in primary legislation. It recommends that appropriate communication protocols be developed so that an Immigration Officer has appropriate information before him or her concerning an individual's earlier application for a visitor visa. In the absence of such protocols, it is recommended that persons presenting at the State's ports seeking to visit the country should be advised in advance that they should bring a copy of relevant documentation with them to ensure that the absence of specific information does not result in them being mistakenly refused leave to land in the State. In this regard the Commission welcomes the development of the new AVATs system by the Department of Foreign Affairs and the Department of Justice, and recommends that the system is made fully operational as soon as possible, incorporating relevant human rights protections. In this regard the Commission notes that the AVATs system is described as being a world wide web-based system which is capable of storing personal data on individual applicants, and accordingly would recommend that the system be reviewed for its compliance with relevant domestic, EU and international data protection law standards, to ensure that each applicant's right to privacy is fully respected.

9.13 Where leave to land is refused, the practice of "marking" passports should cease given its unclear legal basis, the negative consequences which may arise where the person is being forcibly returned to his or her country through third States and may wish to travel abroad again.

9.14 With regard to the safeguards available for immigration detainees, the Commission recommends that vague criteria such as the "intention to deceive" criterion employed by the Immigration Officer in this case, be removed from the

statute books. It recommends that provision be made for initial review of an Immigration Officer's decision to refuse leave to land in a case by another officer. It further recommends that the decision be subject to oversight by an independent body with the authority to investigate complaints or to undertake own-motion investigations into all immigration-related practices. This would permit both the integrity and the proper administration of the GNIB IS system and the decision making of Immigration Officers to be ensured.

9.15 The Commission also recommends that automatic review of immigration detention occur within three days of initial detention and periodically thereafter. It recommends that the review include an assessment of the purpose and reasons for detention. It recommends that the minimum standards required under Article 10 of the ICCPR and under the CPT be guaranteed in law and that persons refused leave to land in the State should not be detained in prisons. It recommends that provision for compensation and reparation be made in cases of any breaches of the human rights of immigration detainees. It recommends that appropriate disaggregated data be collected concerning all immigration decisions.

9.16 Finally, with regard to the complainant, it may be that a mistake occurred. The Commission recommends that the State acknowledge this possibility in writing to the complainant and recommends that he be reimbursed the cost of his flight to Ireland and the expenses arising.

9.17 The Commission recognises the hurt felt by the complainant and hopes that, in the light of this report, the Government will act speedily to respond appropriately, thereby respecting the dignity and worth of the individual.

Appendix 1

Guidelines for the Conduct of an Enquiry

Guidelines for dealing with requests under Section 9(1)(b) and Applications under Section 10 of the Human Rights Commission Act, 2000[260]

Requests for an Enquiry

Under Section 9(1)(b) of the Human Rights Commission Act, 2000 (the Act), the Irish Human Rights Commission (the Commission) can decide to conduct an enquiry into a relevant human rights matter at the request of any person, subject to certain conditions.[261] Although the Commission has wide discretion in deciding whether to conduct an enquiry or not, it can only do so where the purpose of the enquiry is clearly linked to at least one of the following functions of the Commission, namely:

1. a review of law and practice or
2. the Commission consulting with national or international bodies or agencies or
3. making recommendations to the Government or
4. the promotion of understanding and awareness of the importance of human rights.[262]

If the purpose of an enquiry is not clearly linked to one of these four functions, the Commission cannot conduct an enquiry as to do so would be to act beyond its powers.

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[260] Adopted 29 July 2004.

[261] It should be noted that the criteria under Section 9(1)(b) of the Act are subject to the provisions of the Act and of any amending legislation.

[262] These are the functions outlined in Sections 8(a), (c), (d) and (e) of the Act.

The Commission can also decide to conduct an enquiry into any relevant human rights matter at the request of any person if the Commission considers it necessary or expedient to do so, subject to certain conditions (outlined below). The Commission can only conduct an enquiry if the purpose of the enquiry is clearly linked to one of the four functions outlined above. In conducting an enquiry, the Commission can require persons to furnish relevant information, documentation or things to the Commission and it can require such persons to attend before the Commission for that purpose.[263] An enquiry may be conducted in public or in private as the Commission, in its discretion, considers appropriate and the Commission can determine the procedure for conducting an enquiry.[264]

How does the Commission decide whether to conduct an enquiry?

Under Section 9(1)(b) of the Act, a person can request the Commission to conduct an enquiry into a relevant matter.

The Act sets out strict criteria which the Commission must apply in deciding whether to accede to a request for an enquiry. If a request comes within the jurisdiction of the Commission, the Commission exercises its discretion in conformity with the Act when making a decision whether to conduct an inquiry into a relevant matter. The consideration of a request will ordinarily follow a four-stage process, which is carried out before the decision is made.

Stage 1: Does the subject matter of the request come within the competence of the Commission?

- Is the matter a human rights matter?
- Does the matter come within the jurisdiction of the State?
- Is the purpose of an enquiry clearly linked to either:
  - a review of law and practice or

[263] See Section 9(6) of the Act.
[264] See Sections 9(12) and 9(13) of the Act.

- the Commission consulting with national or international bodies or agencies or
- the making of recommendations to the Government or
- the promotion of understanding and awareness of the importance of human rights

➢ Is an enquiry considered either necessary or expedient for the purpose of the performance of any of the abovementioned Commission functions (Could any of these four functions be otherwise performed in relation to the matter)?

➢ Is the matter one that should be more appropriately referred to another body (eg a court, tribunal or other body which can award redress or grant relief?)

➢ Is the matter before or likely to be before another competent body (in which case the Commission must postpone considering the request)?

Stage 2: Exclusionary provisions

The Act does not allow the Commission to conduct an enquiry under Section 9(1)(b), and requires the Commission to discontinue an enquiry if any of the following circumstances apply, in the opinion of the Commission:

➢ is the matter to which the request relates trivial or vexatious?

➢ is any alleged violation of human rights manifestly unfounded?

➢ has the person making the request an insufficient interest in the matter concerned?

➢ have the human rights issues concerned been addressed and properly and finally determined by a court, tribunal or other person in whom powers are vested to award redress or grant relief in respect of the matter?

The criteria at Stages 1 & 2 must be satisfied in order for the Commission to consider exercising its discretion to conduct an enquiry into a relevant human

rights matter. If these criteria are satisfied, the Commission will consider the following stages:

Stage 3: Issues relating to the specific complaint

- Is the request anonymous?
- Is the information provided by the person seriously inadequate, seriously incorrect or seriously misleading?
- Has the person co-operated with the Commission in relation to the request?
- Would it be very difficult to establish facts accurately due to the lapse of time since the events complained of?
- What are the projected costs of conducting an enquiry?

Stage 4: Strategic test

- Would the enquiry fall within the priority areas of work as identified in Goal 4 of the Commission's *Strategic Plan 2007-2011*?
- Does the request relate to a right which is adequately protected in the State?
- Does the request raise urgent, long-standing or systemic human rights issues?

The Commission may exercise its discretion to conduct an enquiry under Section 9(1)(b) of the Act into a relevant matter notwithstanding that the matter does not conform to all or some of the sub-heads set forth at Stages 3 and 4 above.

Discontinuance

Persons requesting an enquiry should be aware that the Commission reserves the right to rescind the decision to conduct an enquiry and/ or to discontinue the enquiry. For example, if, having decided to conduct an enquiry into a relevant

matter under Section 9(1)(b) of the Act, the Commission, in the light of information coming to its attention (including information which could have been disclosed to the Commission by the person requesting the conduct of the enquiry), considers that it would not have exercised its discretion to conduct an enquiry had it been appraised of such information at the outset, the Commission reserves the right to rescind the decision to conduct an enquiry and/ or to discontinue the enquiry. This right is in addition to that outlined at Stage 2 above.

Appendix 2

Enquiry Procedure

Pursuant to Sections 9(12), (13), (14) and (15) of the Human Rights Commission Act, 2000 ("the Act"), the following procedure will be followed in the course of the enquiry (subject to the need to maintain a degree of flexibility in responding to matters which may arise, as considered appropriate by the Commission):

1) The enquiry will be conducted in private.

2) The enquiry will be inquisitorial and not adversarial in nature. It will be directed towards keeping under review the adequacy and effectiveness of the relevant law and practice in the State relating to the protection of human rights, the making of any appropriate recommendations to the Government and the promotion of understanding and awareness of the importance of human rights in the State. As such, the enquiry will not be directed towards attributing wrong-doing to any person. Nor will the enquiry make any such findings or attribute wrong-doing to any named person.

3) The Commission shall discontinue the enquiry if it is of opinion, or, as the case may be, it becomes, during the course of the enquiry, of the opinion, that -

   (a) the matter to which the request relates ("the matter concerned") is trivial or vexatious or any alleged violation of human rights concerned is manifestly unfounded, or
   (b) the person making the request has an insufficient interest in the matter concerned.

4) Every effort will be made to ensure fairness of procedure, including allowing any relevant person[265] the opportunity to make their views known to the Commission on a matter raised in the course of the enquiry.

5) Upon request from the Commission, any evidence required of a person under Section 9(6) of the Act will be verified in the form outlined in Section 9(8)(b) of the Act; i.e. by signature of a declaration of the truth of his or her answers to any question or questions put to him or her by the Commission (other than a question or questions the answer to which may incriminate the person).

6) Given the private nature of the enquiry, all communications in connection with this enquiry, including the contents of any document, evidence or information produced to the Commission in the course of the enquiry, shall be regarded as confidential and shall not be disclosed to any person unless otherwise authorised by the Commission or required in accordance with law.

7) Every effort will be made to complete the enquiry as expeditiously as possible.

8) The findings of the enquiry will be published.

9) Prior to publication, relevant Sections of the enquiry's draft findings may be forwarded, on a confidential basis, to persons to whom the enquiry directly relates, for any comments they may care to make. The persons contacted will be afforded 28 days, from receipt of the relevant Sections of the enquiry's draft findings, to communicate any such comments to the Commission and any such comments will be taken into account before the findings of the enquiry are finalised and published.

10) This procedure is subject to any further procedure which may be made in the course of the enquiry pursuant to Sections 9(12), (13), (14) and (15) of the

[265] A relevant person includes a person who is named in the course of the enquiry and can include a Government Department, a Statutory Body or an official.

Act and any person wishing to clarify the application of the procedure to them, should in the first instance raise the matter with the Commission's Senior Caseworker.

Dated ______________________

Signed ______________________

CHIEF EXECUTIVE

Appendix 3

Nationalities of those refused leave to land in 2003

Cumulative Monthly Port Refusals (Non- Asylum Seekers)

for the period: 01/01/2003-31/12/2003:	
NATIONALITY:	TOTAL:
Afghan	8
Albanian	28
Algerian	21
American	58
Angolan	28
Argentinian	7
Armenian	1
Australian	25
Austrian	2
Bahamas	1
Bahrainian	1
Bangladeshi	12
Belarusian	8
Belgian	9
Benin	1
Bolivian	13
Bosnian	4
Botswanian	3
Brazilian	408
British	2
British Overseas	32
Brunei	6
Bulgarian	23
Burundian	3
Cameroon	42
Canadian	18
Chadian	1
Chechynan	4
Chilian	1

Port Refusal Statistics Page 1 of 6

Cumulative Monthly Port Refusals (Non- Asylum Seekers)

for the period: 01/01/2003-31/12/2003:	
NATIONALITY:	TOTAL:
Chinese	114
Christmas Islander	1
Columbian	5
Congolese	49
Cook Islander	1
Croatian	66
Cypriot	6
Czech	160
Danish	5
Dominican Rep	1
Dutch	11
Egyptian	19
Equatorial Guinean	1
Eritean	2
Estonian	85
Ethiopian	3
Fijian	1
Finnish	2
French	3
Gambian	7
Georgian	10
German	8
Ghanaian	57
Greek	18
Guinean	4
Honduran	3
Hong Kong	3
Hungarian	73
Indian	85
Indonesian	1

Cumulative Monthly Port Refusals (Non- Asylum Seekers)

for the period: 01/01/2003-31/12/2003:	
NATIONALITY:	TOTAL:
Iranian	13
Iraqi	34
Irish	14
Israeli	10
Italian	13
Ivory Coast	6
Jamaican	18
Japanese	17
Jordanian	11
Kenyan	15
Korean	5
Kosovan	17
Kurdish	1
Kuwaiti	1
Kyrgyzstani	3
Laotian	3
Latvian	247
Lebanese	11
Lesotho	3
Liberian	18
Libyan	3
Lithuanian	484
Malagasy	1
Malawian	15
Malaysian	52
Maldivan	2
Moldovan	6
Mali	2
Maltese	6
Mauritanian	10

Cumulative Monthly Port Refusals (Non- Asylum Seekers)

for the period:
01/01/2003-31/12/2003:

NATIONALITY:	TOTAL:
Mauritian	13
Mexican	5
Moldovan	78
Mongolian	6
Morrocan	9
Motswanian	1
Mozambican	2
Namibian	3
Nauran	3
Nepalese	6
New Zealander	16
Nigerian	387
Norwegian	3
Omanese	1
Other	26
Pakistani	71
Palestine	5
Paraguayan	1
Philippine	21
Pitcairn	1
Polish	560
Portuguese	7
Puerto Rican	1
Qatar	2
Rep of Guinea Bissau	1
Romanian	261
Russian	28
Rwandan	4
Saudi Arabian	3
Senagalese	6

Cumulative Monthly Port Refusals (Non- Asylum Seekers)

for the period:
01/01/2003-31/12/2003:

NATIONALITY:	TOTAL:
Serbian	1
Sierra Leonean	14
Singaporean	2
Slovak	12
Slovenian	3
Somalian	51
South African	268
Spanish	4
Sri Lankan	15
St. Lucian	1
Stateless	6
Sudanese	19
Swazi	6
Swedish	2
Swiss	1
Syrian Arab Rep	8
Taiwanese	2
Tanzanian	2
Thai	5
Togolese	1
Tunisian	1
Turkish	21
Ugandan	12
Ukrainian	84
United Arab Emirate	2
Unknown	60
Uzbekistan	2
Venezuelan	9
Vietnamese	5
Yemenese	3

Cumulative Monthly Port Refusals (Non- Asylum Seekers)

for the period:
01/01/2003-31/12/2003:

NATIONALITY:	TOTAL:
Yugoslavian	3
Zairean	4
Zambian	4
Zimbabwean	48
TOTAL FOR ALL PORTS:	4,827

Appendix 4

Prescribed places of detention in the State

A full list of the approved places of detention at the time of the complainant's arrest was provided to the Commission by the Department of Justice. This reflects the Fourth Schedule to the Aliens Order, as amended up until in January 2003, and is as follows: Cork Prison; Limerick Prison; Mountjoy Prison; St Patrick's Institution, Dublin; Training Unit, Glengarriff Parade; Wheatfield Place of Detention, Dublin; Central Mental Hospital, Dundrum; Bridewell Garda Station, Cork; Bridewell Garda Station, Dublin; Cavan Garda Station; Drogheda Garda Station; Dundalk Garda Station; Dun Laoghaire Garda Station; Ennis Garda Station; Fitzgibbon St Garda Station, Dublin; Galway Garda Station; Killarney Garda Station; Letterkenny Garda Station; Monaghan Garda Station; New Ross Garda Station; Santry Garda Station; Shannon Airport Garda Station; Sligo Garda Station; Store St Garda Station, Dublin; Swinford Garda Station; Togher Garda Station; Waterford Garda Station; Wexford Garda Station.[266]

Section 5(13) of the Immigration Act 2003 (enacted in July 2003) revoked the Fourth Schedule to the Aliens Order, as amended.[267] The Immigration Act 2003 (Removal Places of Detention) Regulations 2003 (S.I. No. 444/2003) prescribed that all Garda Stations were prescribed places of detention and listed a number of other prescribed places of detention, including, for the first time, Cloverhill

266 The Fourth Schedule to the Aliens Order was inserted by the Aliens (Amendment) Order, 1972 (S.I. No. 182/1972). The original schedule was again amended by the Aliens (Amendment) Order, 1975 (S.I. No. 128/1975) and the Aliens (Amendment) Order, 1978 (S.I. 351/1978), before being replaced by the Aliens (Amendment)(No. 1) Order, 1991. This order contained most of the prescribed places of detention contained in the list supplied by the Department. However, the Aliens Amendments (No. 3) Order, 1994 inserted the Central Mental Hospital, Dundrum and the Aliens (Amendment) (No. 5) order inserted Cavan Garda Station, Drogheda Garda Station, Dundalk Garda Station, Dun Laoghaire Garda Station, Monaghan Garda Station, Store Street Garda Station, and Togher Garda Station.

267 Section 5(14) however stated that the detention place of any person detained before the commencement of the Act in a place specified in the Fourth Schedule to the Aliens Order was still authorised.

Prison.[268] This was revoked by the Immigration Act 2003 (Removal Places of Detention) Regulations 2005 (S.I. No. 56/2005), which specified the following list of prescribed places of detention, in addition to all Garda Stations: Castlerea Prison, Cloverhill Prison, Cork Prison, Limerick Prison, The Midlands Prison, Mountjoy Prison, Saint Patrick's Institution, Dublin, The Training Unit, Glengariff Parade, Dublin, Wheatfield Prison, Dublin.

Section 55(2) of the Immigration, Residence and Protection Bill 2008 provides that a foreign national arrested by an immigration officer or member of An Garda Síochána may be detained in a prescribed place.[269] It is possible that if this provision is enacted, a further statutory instrument may list the relevant prescribed places.

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[i] This report has been drawn up pursuant to Sections 13 and 19 of the Human Rights Commission Act, 2000.

[ii] See Submission on the European Convention on Human Rights Bill 2001 to the Joint Oireachtas Committee on Justice, Equality, Defence and Women's Rights, June 2002; Submission to the UN Committee on the Elimination of Racial Discrimination, December 2004; Submission to the UN Committee on the Elimination of Discrimination Against Women, January 2005; Submission to the UN Committee on the Rights of the Child, May 2006; Submission to the UN Human Rights Committee on the Examination of Ireland's Third Periodic Report on the International Covenant on Civil and Political Rights, March 2008. These submissions are available on www.ihrc.ie.

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268 The following places of detention were listed in the Immigration Act 2003 (Removal Places of Detention) Regulations 2003 (S.I. No. 444/2003): Castlerea Place of Detention Central Mental Hospital, Dundrum, Cloverhill Prison, Cork Prison, Limerick Prison, The Midlands Prison, Mountjoy Prison, Saint Patrick's Institution, Dublin, The Training Unit, Glengariff Parade, Dublin, Wheatfield Prison, Dublin.

269 Section 55(2) provides that a person refused leave to land may be detained "(*a*) in a prescribed place, being a prison or other place of lawful detention in the charge of a Governor, an immigration
officer or a member of the Garda Síochána, and (*b*) in the custody there of the Governor, the officer or the member in charge."