Irish Human Rights and Equality Commission

Recommendations on the General Scheme of the International Protection Bill 2015

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Coimisiún na hÉireann um Chearta
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Irish Human Rights and Equality Commission

1. Introduction

The Irish Human Rights and Equality Commission ('the Commission') was established by the Irish Human Rights and Equality Commission Act 2014 ('2014 Act').[1] The Commission has a statutory remit to protect and promote human rights and equality in the State, to promote a culture of respect for human rights, equality and intercultural understanding, to promote understanding and awareness of the importance of human rights and equality, to encourage good practice in intercultural relations and to work towards the elimination of human rights abuses and discrimination.[2] The Commission is tasked with reviewing the adequacy and effectiveness of law, policy and practice relating to the protection of human rights and equality, and with making recommendations to Government on measures to strengthen, protect and uphold human rights and equality accordingly.[3]

The Minister for Justice and Equality referred the General Scheme of the International Protection Bill 2015 ('General Scheme of the 2015 Bill') to the Commission pursuant to section 10(2)(c) of the 2014 Act, requesting the Commission to consider the human rights and equality implications of the General Scheme. The aim of the proposed legislation is to reform the law relating to the system for the determination of applications for refugee and subsidiary protection, and to give further effect to a range of European Union Directives.[4] The Commission also notes and welcomes the pre-legislative scrutiny process that has been announced by the Minister for Justice and Equality in conjunction with the Oireachtas Committee on Justice, Equality and Defence, and considers that the human rights and equality elements of the legislative proposal outlined here should be considered by the Committee in this context.[5] The Commission recognises the skill and expertise of the many civil society organisations working on this issue in Ireland.[6]

The legislative framework governing the granting of international protection, which includes refugee protection and subsidiary protection, is a fundamental part of ensuring a humane and human rights compliant system for the protection of individuals in Ireland where they are subject to persecution or other serious harms in their countries of origin. The Commission recalls that the law in this area has been subject to diverse law reform proposals in recent years and that the human right implications of these diverse legislative

[1] The Irish Human Rights and Equality Commission Act 2014 merged the former Irish Human Rights Commission and the former Equality Authority into a single enhanced body.
[2] Section 10(1)(a)–(e) of the 2014 Act.
[3] Section 10(2)(b) and section 10(2)(d) of the 2014 Act.
[4] Council Directive 2004/83/EC (Asylum Qualification Directive), Council Directive 2005/85/EC (Asylum Procedures Directive) and Council Directive 2001/55/EC (Temporary Protection Directive).
[5] Department of Justice and Equality, 'Minister Fitzgerald publishes General Scheme of the International Protection Bill to reduce waiting times for asylum applicants' 25 March 2015 [press release]. Last accessed from http://www.justice.ie/en/JELR/Pages/PR15000082 on 20 May 2015.
[6] See, for example, Irish Refugee Council (2015) *Comments on the General Scheme of the International Protection Bill 2015*; Children's Rights Alliance (2015) *Initial Submission on the General Scheme of the International Protection Bill 2015*; Women's Aid (2015) *Submission on the General Scheme of the International Protection Bill 2015*.

proposals have been the subject of recommendations, including by the former Irish Human Rights Commission (IHRC).[7] Most recently, in December 2014, the newly created Irish Human Rights and Equality Commission issued a *Policy Statement on the System of Direct Provision in Ireland*, in which it made recommendations in relation to the need for reform of the legislative framework for asylum applications and on the direct provision system more generally.[8]

The Commission notes that one of the most significant and welcome reforms envisaged by the General Scheme of the 2015 Bill is the introduction of a single procedure allowing for assessment of all aspects of a protection claim, with the intention that this streamlined procedure will facilitate a more efficient asylum and subsidiary protection determination process.[9] The Commission hopes that this will go some way towards reducing the prolonged delays in the asylum adjudication process that have led to long periods of residence in direct provision centres.[10] The Commission further notes a number of other positive elements in the General Scheme that reflect the recommendations issued by the Commission in respect of previous legislative proposals in this field, demonstrating the impact of the Commission's legislative review function. Reflecting the previous recommendations by the Commission in specific areas, the General Scheme of the 2015 Bill proposes a more prescribed application of exclusion orders that will facilitate fuller access to the protection system;[11] the proposal for 'safe third country' designation which would have restricted access to the protection system for applicants from those countries contained in previous legislative proposals has been removed;[12] and some positive developments relating to the credibility assessment of

[7] In 2008, the former Irish Human Rights Commission (IHRC) produced *Observations on the Immigration, Residence and Protection Bill*. 59 key recommendations were made on 24 different areas of the 2008 Bill. See IHRC *General Observations on the Immigration, Residence and Protection Bill* 2008 (March 2008). Last accessed from http://www.ihrec.ie/publications/list/observations-on-the-immigration-residence-and-prot/ on 30 April 2015. A further written submission was made on the Immigration, Residence and Protection Bill 2008 focussing on provisions of the relating to the designation of 'safe countries of origin' and 'safe third countries'. See IHRC *Further Submission on the Immigration, Residence and Protection Bill 2008 "Safe Countries of Origin" and "Safe Third Countries"* (July 2008). Last accessed from http://www.ihrec.ie/publications/list/further-submission-on-the-immigration-residence-an/ on 30 April 2015.

[8] IHREC *Policy Statement on Direct Provision* (December 2014). Last accessed from http://www.ihrec.ie/publications/list/ihrec-policy-statement-on-direct-provision/ on 30 April 2015. Members of the Commission also recently met with the Government-appointed 'Working Group on the Protection Process' which is chaired by former Judge Dr Bryan McMahon.

[9] See IHRC *General Observations on the Immigration, Residence and Protection Bill 2008* (March 2008). The IHREC recently reiterated its call for the introduction of a single procedure in its Policy Statement on Direct Provision (December 2014).

[10] See IHREC *Policy Statement on Direct Provision* (December 2014). See in particular pp.14-17 in relation to the effects on family life and on children.

[11] In its 2008 Observations, the IHRC expressed concern that the provision for the Minister to restrict access to the protection system by issuing exclusion orders in the interests of public security, public policy or public orders was not compatible with the fundamental principle of non-refoulement. See IHRC General Observations on the Immigration, Residence and Protection Bill 2008 (March 2008) at pp.28-33.

[12] In both its *General Observations on the Immigration, Residence and Protection Bill 2008* and *Further Observations on the Immigration, Residence and Protection Bill* 2008, the IHRC expressed serious concern at the proposed provisions on "safe third countries" which would restrict access to the asylum process. See IHRC

applicants have been integrated into the General Scheme, although the Commission has some outstanding concerns in this context outlined below.[13] The Commission is pleased to note the positive uptake of its recommendations in this new legislative framework, and recommends that the Government give further serious consideration to the human rights and equality implications outlined below in this important area of law that has potentially profound impacts on a vulnerable category of individuals.

The Commission has a number of both general and specific recommendations in respect of the General Scheme of the 2015 Bill which are derived from the human rights and equality legal framework as defined in section 2(1) of the 2014 Act.

General Analysis and Recommendations

2. Explicit references to international human rights law

The Commission welcomes the fact that the long title of the General Scheme provides that the purpose of the Bill will be to give further effect to the Convention Relating to the Status of Refugees 1951 ('Refugee Convention') and the accompanying 1967 Protocol. The Commission notes that Head 44 of the General Scheme prohibits the return or expulsion of a person to a jurisdiction where his or her life or freedom would be threatened on certain grounds, or where there is a serious risk that he or she would be subject to the death penalty, torture or other inhuman or degrading treatment or punishment. The Commission notes that the long title and Head 44 do not explicitly refer to the obligations of the State under the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'), the United Nations Convention Against Torture ('CAT'), the International Covenant on Civil and Political Rights ('ICCPR') and the United Nations Convention on the Rights of the Child ('UNCRC') in relation to the prohibition against refoulement as defined by those international instruments.

The Commission recommends that the long title of the 2015 Bill, as published, should specify that the objective of the Bill is to give effect to the State's international obligations

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General Observations on the Immigration, Residence and Protection Bill 2008 (March 2008) at pp.53-55 and IHRC *Further Submission on the Immigration, Residence and Protection Bill 2008 "Safe Countries of Origin" and "Safe Third Countries"* (July 2008).

[13] In its General Observations on the Immigration, Residence and Protection Bill 2008, the IHRC recommended that matters that are extraneous to determining the core issues in a protection claim such as the applicant's travel route, the applicant's delay in submitting an application for protection and the applicant's compliance with the conditions of their protection entry permit should not be taken into consideration in a credibility finding. These grounds are not included in the credibility assessment provided for by Head 26 of the General Scheme of the 2015 Bill (although it should be noted that matters such as travel route are listed as factors justifying designation by the Minister as a prioritised application pursuant to Head 67).

in relation to the prohibition against refoulement[14] in line with the obligations of the State under the ECHR, CAT, the ICCPR and the UNCRC.

3. Opting into and Transposition of EU law in a manner that promotes human rights

The General Scheme of the 2015 Bill proposes to repeal and replace the European Communities (Eligibility for Protection) Regulations 2006 which transposed the Qualification Directive into Irish law.[15] It also proposes to repeal and replace the European Communities (Asylum Procedures) Regulations 2011 (SI No.51 of 2011) and the Refugee Act 1996 (Asylum Procedures) Regulations 2011 (SI No. 52 of 2011) which gave further effect to the Procedures Directive in Irish law.[16] Ireland has not opted into the Recast Qualification Directive[17] or the Recast Procedures Directive[18] and so is not bound by either of these measures. Additionally, Ireland has not opted into the Reception Conditions Directive and the Recast Reception Conditions Directive.[19] Head 54 of the General Scheme of the 2015 Bill also gives effect for the first time in Irish law to the Temporary Protection Directive.[20]

In general, the Commission encourages the State to transpose EU Directives in a manner that does not reduce the level of standards already applied by Ireland in the area of protection law.[21] The European Court of Human Rights ('ECtHR') has observed that,

> Where States establish international organisations, or mutatis mutandis international agreements, to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States

[14] Refoulement is the return of a person, in any manner whatsoever, to a country where their life or freedom will be threatened, or where there are substantial grounds for believing that they will be exposed to serious harm, or torture, inhuman and degrading treatment.
[15] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection.
[16] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for the granting and withdrawing of refugee status.
[17] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).
[18] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).
[19] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (Reception Conditions Directive) and Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (Recast Reception Conditions Directive).
[20] Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.
[21] As was previously stated in the IHRC, Observations on the Scheme 2006, p. 19 and IHRC General Observations on the Immigration, Residence and Protection Bill 2008 (March 2008) at pp.34-35.

were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution.[22]

Moreover, where more favourable standards of protection are contained in EU Directives than is currently provided for under Irish law, the Commission considers such standards should be adopted and fully transposed into Irish law to ensure Ireland is meeting the minimum EU standards in the area of international protection.

In that regard, the Commission notes that Ireland has opted out of the Reception Conditions Directive and the Recast Reception Conditions Directive, both of which establish minimum standards for the reception of asylum seekers.[23] As the Commission noted in its *Policy Statement on Direct Provision*,[24] the Recast Reception Conditions Directive requires that reception conditions should not impair the private or family life of asylum seekers, that families should be housed together as far as possible, that asylum seekers should have an adequate standard of living, that they are protected from violence and from threats to their physical and mental health, and that they have access to healthcare.[25] The Recast Reception Conditions Directive specifically requires that asylum seekers be granted a limited right to work where first-instance decisions have not been made within nine months.[26] It also provides for procedural rights for asylum seekers when appealing a decision by a Member State to refuse support, as well as the right to access legal assistance for such support or welfare benefits.[27]

The Commission notes that the right to work in Head 47 of the General Scheme does not apply to protection applicants nor to potential victims of trafficking. [28] The right to work is clearly limited to persons who have been recognised as refugees or eligible for subsidiary protection. This is reinforced by Head 15(3)(b) of the General Scheme, which provides that a person who has been granted permission to enter and remain in the State for the purposes of applying for international protection 'shall not seek, enter or be in employment (including self-employment) or engage for gain in any business, trade or profession…'.

In line with the principle that EU Directives set out minimum standards, the Commission considers that existing higher standards in Irish law should not be undermined. Rather

[22] *TI v United Kingdom*, Admissibility Decision 7 March 2000, Application no. 43844/98.
[23] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.
[24] IHREC *Policy Statement on Direct Provision* (December 2014) at p.13.
[25] Directive 2013/33/EU, Articles 7.1, 12 and 17–19.
[26] Directive 2013/33/EU, Article 15.
[27] Directive 2013/33/EU, Article 26.
[28] Article 12(4) of the Council of Europe, *Council of Europe Convention on Action Against Trafficking in Human Beings*, 16 May 2005, CETS, which requires that victims shall be authorised to have access to the labour market.

than adopting a minimalist approach, best practice standards such as those advocated by the United Nations High Commissioner for Refugees (UNHCR) should be adopted in the 2015 Bill.

The Commission reiterates its recommendation that Ireland opt in to the Recast Reception Conditions Directive. The Commission also recommends that serious consideration is given to allowing Direct Provision residents to work and access education and training to prepare them for seeking employment once they leave the Direct Provision system.

4. Human Rights and Discrimination Proofing Executive Discretion and Decisions

Section 3(1) of the European Convention on Human Rights Act 2003 ('2003 Act') provides that, subject to any statutory provision or rule of law, every organ of State should carry out its functions in a manner which complies with the State's obligations under the ECHR and its associated Protocols. 'Organ of the State' includes any body through which any of the legislative, executive or judicial powers of the State are exercised.[29] Also, section 42(1) of the 2014 Act stipulates that a public body shall have regard to the need to eliminate discrimination, promote equality of opportunity and protect the human rights of the persons to whom it provides a service.[30]

A key principle of the jurisprudence of the ECtHR is that 'domestic law must afford a measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by the Convention'.[31] The ECtHR has stated that in matters affecting fundamental rights it would be contrary to the rule of law for a legal discretion granted to the executive to be expressed in terms of an unfettered power without stipulating adequate and effective safeguards.[32]

The Commission notes that in the General Scheme of the 2015 Bill, the terms 'national security', 'public policy', 'public good' and 'public health' are deployed in numerous instances to grant the Minister for Justice and Equality discretion in relation to a diverse range of decisions that have implications for protection applicants and their family members. For example, Head 36A(2) authorises the Minister to refuse an application for permission to remain in the State on the basis of 'considerations of national security and public order'. Head 48(3) proposes to permit the Minister not to renew permission to reside

[29] Excluding the President, the Oireachtas or either House of the Oireachtas or a Committee of either such House or a Joint Committee of both such Houses or a Court.
[30] Section 2(1) of the Irish Human Rights and Equality Commission Act 2014 defines a 'public body' as a government department, local authority, the HSE, a university or institute of technology or education and training board or any other state agency.
[31] *Al-Nashif v. Bulgaria*, Judgment of 20 June 2002, (2003) 36 EHRR 37, para. 137.
[32] *Ibid*. See also *Malone v. United Kingdom*, Judgment of 2 August 1984, (1985) 7 EHRR 14, para. 68.

in the State on the basis of 'national security or public order'. In the context of the issuance of travel documents, Head 49(2)(c) provides that the Minister can refuse to issue a travel document on the grounds that it would not be in the interests of national security, public security, public health or public order or that it would be contrary to public policy. In the context of family reunification for family members of qualified persons, the Minister can refuse to grant permission to a family member of a qualified person to enter and/or reside in the State on the basis of national security or public policy pursuant to Head 50(7)(a) and Head 51(6)(a). The Commission is of the view that where Ministerial discretion is retained over various aspects of protection-related decisions, there is concern that these broad-ranging categories may be subject to wide interpretation and could give rise to arbitrary decision-making. In the context of equality and non-discrimination within decision-making, the ECtHR has stated that a difference of treatment is discriminatory if it has no objective or reasonable justification; if it does not pursue a legitimate aim; and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved by the difference in treatment.[33]

In its General Comment No. 30, the UN Committee on the Elimination of Racial Discrimination ('CERD Committee') stipulates that States should 'ensure that immigration policies do not have the effect of discriminating against persons on the basis of race, colour, descent, or national or ethnic origin'.[34] Notably, in its first examination of Ireland in 2005, the CERD Committee noted the reported occurrence of discriminatory treatment against people seeking asylum when they are entering Ireland.[35] The CERD Committee recommended that Ireland review its security procedures and practices at entry points with a view to ensuring that they are carried out in a non-discriminatory manner.[36] In its second examination of Ireland in 2011, the CERD Committee expressed concern at the lack of legislation proscribing racial profiling by An Garda Síochána and other law enforcement personnel. The Committee noted with regret reports that many non-Irish people are subjected to police stops, and are required to produce identity cards, a practice which has the potential to perpetuate racist incidents and the profiling of individuals on the basis of their race and colour. The Committee recommended that the State party adopts legislation that prohibits any form of racial profiling, a practice which has the danger of promoting racial prejudice and stereotypes against certain racial groups in the State party. [37]

The Commission notes that in light of section 3(1) of the 2003 Act and section 42 of the 2014 Act, human rights and non-discrimination should form an integral part of protection decisions and should be central to the practice of immigration officers and members of the Garda Síochána tasked with undertaking the functions outlined in the proposed 2015 Bill.

[33] *Fretté v France* (2004) 38 EHRR 438, para. 34.
[34] CERD Committee, General Comment 30, Discrimination Against Non-Citizens, 1 October 2004, para. 9.
[35] CERD Committee, Concluding Observations on Ireland, 14 April 2005, CERD/C/IRL/CO/2, at para. 16.
[36] Ibid.
[37] CERD Committee, Concluding Observations on Ireland, 10 March 2011, CERD/C/IRL/CO/3-4 at para.18.

The discretion of those charged with these decisions should be exercised in a manner that accords with the standards of equality before the law and the jurisprudence of the European Court of Human Rights under Article 14 of the ECHR, combined with the other Articles of the ECHR. Any difference in treatment between applicants who belong to the same category should be based on reasonable and objective criteria, and should be proportionate to the legitimate aims of immigration policy.

The Commission recommends that to strengthen existing legislative obligations under the 2003 Act and the 2014 Act, a non-discrimination clause be inserted into the Bill when published, as one of the general principles governing the operation of the protection system and the powers contained in the Bill. Such a clause should be a stand-alone non-discrimination provision which covers the grounds prohibited under the ECHR[38] or under domestic equality legislation.[39]

5. Children and Vulnerable Persons

The Commission welcomes Head 52 of the General Scheme of the 2015 Bill which is titled 'Situation of vulnerable persons and children'. Head 52 provides:

> (1) In the application of Heads 47, 48, 49, 50 and 51 due regard shall be had to the specific situation of vulnerable persons such as persons under the age of 18 years (whether or not accompanied), disabled persons, elderly persons, pregnant women, single parents with children under the age of 18 years, victims of human trafficking, persons with mental disorders and persons who have been subjected to torture, rape, or other serious forms of psychological, physical or sexual violence.
>
> (2) In the application of Heads 47, 48, 49, 50 and 51 in relation to a child under the age of 18 years the best interests of the child shall be a primary consideration.[40]

These Heads concern the right to work, right to access education, right to receive medical care and social welfare, right of residence and right to travel; permission to reside in the

[3838] Article 14 of the European Convention on Human Rights states that enjoyment of ECHR rights should 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.

[39] Employment Equality Acts 1998-2011 and the Equal Status Acts 2000-2012, namely gender; civil status; family status; sexual orientation; religion; age; disability; race or membership of the Traveller community ground – people who are commonly called Travellers and who are identified.

[40] Head 47 concerns the rights of persons granted refugee status or subsidiary protection status, for example the right to work, right to access education, right to receive medical care and social welfare, right of residence and right to travel; Head 48 concerns permission to reside in the State; Head 49 concerns travel documents; Head 50 concerns permission to enter and reside in the State for family members of persons with refugee status or subsidiary protection status where those family members are outside of the State; and Head 51 concerns permission to reside in the State for family members of persons with refugee status or subsidiary protection status where those family members are present in the State (whether lawfully or unlawfully).

State; travel documents; permission to enter and reside in the State for family members of persons with refugee or subsidiary protection status.[41]

While welcoming the focus on vulnerable persons contained in these provisions, the Commission notes that, in general, the best interests principle only applies to children who have already been granted refugee status or subsidiary protection (ie. it does not apply to unaccompanied minors).[42] The best interests principle contained in Head 52(2) therefore has no general application to children who are going through the refugee and/or subsidiary determination process.[43]

The Commission notes, pursuant to Article 42A, that the Constitution affirms the natural and imprescriptible rights of all children and provides that the State protect and vindicate those rights through its laws. In instances where children seeking international protection are in the care of the State, or are unaccompanied minors, the best interests of the child shall be the paramount consideration. Article 3 of the UN Convention on the Rights of the Child states that 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'

The Commission recommends that the best interests of the child should be a primary consideration in respect of all aspects of the 2015 Bill when published, not just in the limited context of children who have been granted refugee status or subsidiary protection status. A general provision should be inserted into the 2015 Bill to the effect that in all decisions relating to children in the operation of the 2015 Bill, the best interests of the child will be a primary consideration. Child friendly procedures should also be gender sensitive.

In order to strengthen the integration of the best interests of the child in the legislative framework, the Commission recommends that the 2015 Bill, when published, should

[41] Head 47 concerns the rights of persons granted refugee status or subsidiary protection status, eg right to work, right to access education, right to receive medical care and social welfare, right of residence and right to travel; Head 48 concerns permission to reside in the State; Head 49 concerns travel documents; Head 50 concerns permission to enter and reside in the State for family members of persons with refugee status or subsidiary protection status where those family members are outside of the State; and Head 51 concerns permission to reside in the State for family members of persons with refugee status or subsidiary protection status where those family members are present in the State (whether lawfully or unlawfully).

[42] With the exception of Head 23 'Medical examination to determine the age of unaccompanied minor'. and Head 33, 'Applicants who are unaccompanied minors'

[43] Note, however, that there are two other instances where the best interests of the child is referred to in the General Scheme of the 2015 Bill, namely Head 23 concerning medical examination to determine the age of unaccompanied minors and Head 33 concerning applicants who are unaccompanied minors (limited to social workers and interviewers preparing the report for the Minister under Head 35); see Section 8 of this opinion, below.

require the publication of guidelines to assist officials in their decision-making relating to children.

Generally, the Commission recommends that guarantees of attention to particular vulnerabilities should apply throughout the asylum process, in addition to borders and points of entry. The Commission recommends that the 2015 Bill, when published, should require the publication of guidelines which make reference to gender, to sexual orientation and gender identity to assist officials in their decision-making.

Specific Analysis and Recommendations

6. Unaccompanied Minors

As noted above, Head 52 of the General Scheme of the 2015 Bill provides that the best interests of the child shall be a primary consideration, but only in the application of Heads 47, 48, 49, 50 and 51. This effectively limits the application of the best interests principle, for the most part, to children who have been granted refugee status or subsidiary protection status and does not fully encompass unaccompanied minors.

In the context of medical examinations to discern the age of unaccompanied minors, Head 23(1) provides that where the Minister is of the opinion, following general statements or other relevant indications, that there are doubts concerning the age of an applicant, the Minister may arrange for the use of a medical examination to determine the age of the applicant.[44]

The Commission notes that the term 'medical examination' is not defined in the General Scheme of the 2015 Bill. However, medical examinations in the context of age assessment may include magnetic resonance tomography, bone and dental assessment, and radiological testing.[45] The use of such techniques has been criticised where the use of medical examinations in those circumstances might be said to conflict with the best interests of the child.[46] Any measures employed on age assessment should confine the use of medical and

[44] Head 23(2) provides that a medical examination shall be performed with full respect for the applicant's dignity, shall be the least invasive examination and shall be carried out by qualified medical professionals; Head 23(3) provides that consent for a medical examination must be obtained from either the applicant, the adult who is taking responsibility for their care and or a person appointed by the Child and Family Agency; Head 23(4) states that the Minister shall ensure that the applicant must be informed of the possibility of a medical examination, its methods and possible consequences and those of refusal to take part; and Head 23(5) provides that the best interests of the child shall be a primary consideration in the application of this Head.

[45] European Union Agency for Fundamental Rights (FRA) Separated, asylum-seeking children in European Union Member States: Summary Report (2010).

[46] See Separated Children in Europe Programme (SCEP), which notes 'these techniques often do not take into account ethnic variations, they are based on reference materials that for the most commonly used tests are out of date, and generate a margin of error that makes them too inaccurate to use.' SCEP Thematic Group on Age Assessment (May 2011) at p.4.

other exams for establishing the age of individuals to last-resort measures where there are grounds for serious doubt as to the age of the applicant and other approaches have failed to establish the age of the person in question.[47]

The Commission recommends that any provisions in the 2015 Bill which relate to medical examinations to determine the age of an applicant should comply with international best practice in this area.[48]

Head 33, titled 'Applicants who are unaccompanied minors' makes reference to the best interests of the child in specific provisions, which the Commission welcomes.[49] However, the Commission notes that the best interests principle is not a universal or general principle that will apply to the entire protection determination process for unaccompanied minors. Rather, the Minister is required to consider the best interests of the child as primary in three contexts. First, the Minister shall ensure that the social worker appointed to make the protection application on behalf of the child has an opportunity to inform the child of the nature of the process, including the personal interview. The social worker will also be permitted to attend the interview and ask questions or comments. Second, the Minister shall ensure that the personal interview is conducted by a person who has knowledge and expertise of working with children and an ability to provide such services in a child sensitive manner and third, the report to the Minister on the first instance application must be prepared by a person who has knowledge of working with children. The Commission notes that Head 33 does not include a duty to ensure that a Tribunal Member with knowledge and

[47] See Separated Children in Europe Programme (SCEP) Position Paper on Age Assessment in the Context of Separated Children in Europe (2012) and SCEP Statement of Good Practice (4th Revised Edition, 2009).

[48] Good practice guidelines suggest that a number of measures should be employed in such assessments. Age assessments should be multi-disciplinary in nature and undertaken by independent professionals who are a) independent (whose role is not in potential/conflict with the interests of the child), b) with appropriate expertise (adequately trained) and c) familiar with the child's ethnic and cultural background. Procedures should be conducted in a gender sensitive manner and should balance physical, developmental, psychological, environmental and cultural factors. A margin of error should be allowed to each exam and always indicated clearly. Informed consent should be gained from the child. An independent guardian should be appointed and have oversight of the procedure. The procedure, outcome and consequences of the assessment should be explained to the individual in a language that s/he understands. The outcomes of the assessment should be presented in writing. There should be a procedure to appeal against the decision and support provided to do so. In cases of doubt, the person claiming to be under 18 year old should be treated as a child. An individual should be allowed to refuse to undergo an assessment of age where specific procedure would be an affront to their dignity or where the procedure would be harmful to their physical or mental health. A refusal to undergo certain procedures should not prejudice the assessment of age or the outcome of the application for protection. Any age assessment should undertaken in a timely fashion. See Separated Children in Europe Programme, Statement of Good Practice (4th Revised Edition, 2009).

[49] Head 33 provides that where an application for international protection is made on behalf of a child, the Minister shall, taking the best interests of the child as a primary consideration, ensure that the person appointed by the Child and Family Agency is given the opportunity to inform the child about the meaning and possible consequences of the personal interview under and how to prepare himself or herself for it, and that the same person is allowed to be present at the personal interview and to ask questions or make comments. The Head also states that the personal interview is conducted by a person who has the necessary knowledge of the special needs of minors, and the report together with the determination of the Minister under Head 35 is prepared by a person with the necessary knowledge of the special needs of minors.

expertise of working with children is assigned to any such appeal, nor that the representative of the Minister appearing at such appeal would have any knowledge and expertise of working with children.

The Commission recommends that the best interests of the child principle should be articulated as a general principle that should govern all elements of the protection determination process for unaccompanied minors in the Bill when published.

The Commission recommends that the Bill should include an obligation to ensure that a Tribunal Member with knowledge of the special needs of minors is assigned to any appeal, and that the representative of the Minister appearing at such appeal would have such knowledge.

Head 12 is titled 'applications for international protection' and provides that any person who is over 18 years of age may make an application for international protection on his or her own behalf, or that of another person in their care who is under the age of 18 years.[50]

Article 9 of the UNCRC provides that a child shall not be separated from his or her parents against their will, except where such separation is in the best interests of the child. Article 11 of the UNCRC requires the State to take measures to combat the illicit transfer and non-return of children abroad. Article 22 of the UNCRC requires the State to take appropriate measures to ensure that a child who is seeking refugee status, whether accompanied or unaccompanied, receives the appropriate protection and humanitarian assistance during that process to ensure that they enjoy the full range rights contained in the UNCRC.

UNHCR and Save the Children have issued detailed standards in relation to best international practice for the treatment of unaccompanied children seeking asylum or separated children outside their country of origin.[51] Moreover, the Committee on the Rights of the Child, has published a specific General Comment on this issue.[52] These sets of international standards detail the practical steps that States should take both at the initial entry stage and in the protection determination process to ensure that the best of interests of the child is a primary consideration, in compliance with Article 3 of the UNCRC. The key

[50] Head 12(1) states that subject to Head 21, any person who is over the age of 18 years and who is at the frontier of the State or who is in the State (whether lawfully or unlawfully) may make an application for international protection on his or her own behalf, or that of another person who is under the age of 18 years. Head 12(4) states that subject to Head 21, where it appears to the Child and Family Agency, on the basis of information available to it, that an application for international protection should be made on behalf of a child in respect of whom the Agency is providing care and protection it shall arrange for the appointment of an employee of the Agency or such other person as it may determine to make an application on behalf of the child.

[51] UNHCR EXCOM Conclusions Refugee Children and Adolescents (1997) and UNHCR and Save the Children Statement of Good Practice (2004).

[52] Committee on the Rights of the Child General Comment No. 6, Treatment of Unaccompanied and Separated Children Outside Their Country of Origin CRC/GC/2005/6, (September 1, 2005).

requirements stipulated under these international standards when an unaccompanied minor presents at the frontier of the State or is found to have entered the State are as follows:[53]

(i) An unaccompanied child is a person who is under the age of eighteen years and who is separated from both parents and other relatives and is not being cared for by an adult who by law or custom has responsibility to do so.[54]

(ii) Because of his or her vulnerability, an unaccompanied child seeking protection should never be refused access to the territory.

(iii) An unaccompanied child should never be detained for reasons related to their immigration status.

(iv) Specific identification procedures for unaccompanied children should be established immediately upon arrival at ports of entry or as soon as their presence in the country becomes known to the authorities.

(v) If an assessment of the child's age is necessary, this should be conducted in a scientific, safe, child- and gender-sensitive manner by a person with the relevant expertise.

(vi) All interviews with the child should be conducted in an age-appropriate and gender-sensitive manner, in a language the child understands.

(vii) A guardian or advisor should be appointed to the child as soon as the unaccompanied or separated child is identified.[55]

(viii) The views and wishes of separated children should be sought and taken into account whenever decisions affecting them are being made.

(ix) In cases where children are involved in asylum procedures or administrative or judicial proceedings, they should be provided with legal representation.

In its Concluding Observations on Ireland's second periodic report under the UNCRC in September 2006, the UN Committee on the Rights of the Child recommended that the State take necessary measures to bring its policy, procedures and practice into line with its international obligations regarding the treatment of unaccompanied children or children separated from their parents.[56]

As it currently stands, the Commission is concerned that the General Scheme of the 2015 Bill does not take all necessary measures to bring Ireland's policy, procedures and practice

[53] Save the Children, Statement of Good Practice (2004), pp. 12-25. See also IHRC General Observations on the Immigration, Residence and Protection Bill 2008 (March 2008) at pp.70-72.

[54] Separated children are children who have been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives. These may include children accompanied by other adult family members.

[55] This recommendation was also made by the CERD Committee, Concluding Observations on Ireland, 10 March 2011, CERD/C/IRL/CO/3-4 at para.22.

[56] Committee on the Rights of the Child, Concluding Observations on Ireland (2006) CRC/C/IRL/CO/2, at para.65.

regarding the treatment of unaccompanied children or children separated from their parents into line with international standards. For example, Head 12(1) allows an application for asylum to be made on behalf of a child who is at the frontier of the State or who is in the State (whether lawfully or unlawfully) by a person over the age of 18 years where that person is taking responsibility for the care and protection of the person who is under the age of 18 years. The General Scheme is silent as to the duty on an immigration officer to satisfy himself or herself as to the nature of the relationship between the adult claiming responsibility for the child.[57] The omission of an equivalent provision from the General Scheme of the 2015 Bill is potentially in breach of Article 11 of the UNCRC. The General Scheme also omits a provision which will support children in submitting an individual application for protection, if they wish, in keeping with Article 22 of the UNCRC.

In relation to Head 12 of the General Scheme of the 2015 Bill, the Commission recommends that the provisions of the Bill should integrate the following recommendations:

- **An unaccompanied child or a separated child should never be refused entry to the State.**
- **Clear definitions should be included of an unaccompanied child and a separated child in line with the General Comment of the Committee on the Rights of the Child, the Save the Children guidelines and UNHCR guidelines.**
- **Until proven otherwise, a person shall be assumed to be under the age of 18 years.**
- **A guardian or advisor should be appointed to all unaccompanied or separated children, whether or not they have made a protection application.**
- **Specific provisions should be included for dealing with suspected cases of child trafficking, by setting out sufficient safeguards to identify and prevent child trafficking at the frontiers of the State.**
- **Children should be given an opportunity to submit applications for protection on their own behalf, if they wish.**

7. Family Reunification and the Right to Private and Family Life

Family reunification should be dealt with in a positive, humane and expeditious manner, in order to ensure full compliance with Article 8 of the ECHR which requires respect for private and family life. A 'best interests of the child' assessment should form an integral part of the family reunification determination process where children are involved, in accordance with Article 10 of the UNCRC.[58]

[57] This is in contrast to section 24 of the 2008 Bill which provided that where a child is accompanied by an adult who is not the child's parent, an immigration officer could verify with the accompanying adult that he or she was taking responsibility for the child.

[58] See IHRC Observations on the Immigration, Residence and Protection Bill 2008 (March 2008) at pp.88-91.

Head 50 of the General Scheme of the 2015 Bill provides for permission to enter and reside in the State for family members of qualified persons (namely persons with refugee status and subsidiary protection). This proposes to replace the provisions relating to family reunification in section 18 of the Refugee Act 1996 and Regulation 16 of the European Communities (Eligibility for Protection) Regulations 2006. Family members are defined in Head 50(8) as follows: (a) where the sponsor is married, his or her spouse (provided that the marriage is subsisting on the date the sponsor made an application for international protection in the State), (b) where the sponsor is a civil partner, his or her civil partner (provided that the civil partnership is subsisting on the date the sponsor made an application for international protection in the State), (c) where the sponsor is, on the date of the application under paragraph (1), under the age of 18 years and is not married, his or her parents and their children who, on the date of the application are under the age of 18 years and are not married, or (d) a child of the sponsor who, on the date of the application, is under the age of 18 years and is not married.

The Commission welcomes the extension of family reunification to siblings of a child refugee or person with subsidiary protection status, which is a positive proposal to amend existing law. This expansion in the definition of family members eligible for family reunification is in keeping with Articles 17 and 23 of the ICCPR and Article 8 of the ECHR.[59] It also reflects the UNHCR's call for States to recognise and respect the 'essential right' of refugee families to unity.[60] The Commission notes however that in accordance with the jurisprudence of the ECtHR, in addition to the relationship between siblings, the relationship between grandparents and grandchildren, and uncle and nephew are all potentially within the scope of "family life" depending on the specific circumstances of the case and the strength of the emotional ties between the individuals.[61]

Where the right to respect for family life under Article 8 is triggered, Article 14 of the ECHR further requires that the enjoyment of the rights and freedoms in the ECHR shall be secured without discrimination on any ground. Article 1 of the ECHR similarly requires the State to secure to *everyone* within its jurisdiction the rights and freedoms defined in Section I of the Convention. The prohibition against discrimination under the ECHR applies to both direct and indirect discrimination.[62]

The Commission notes that Head 50(6) proposes to amend existing law to limit family reunification for spouses and civil partners to cases where the marriage or civil partnership

[59] Article 8 of the ECHR guarantees the right to respect for family life. Any interference with this right must be in accordance with the law, necessary in a democratic society and in pursuance of the legitimate aims listed in the ECHR. See *Sunday Times v. United Kingdom*, Judgment of 26 April 1979, (1979-80) 2 EHRR 245.
[60] UNHCR Resettlement Handbook (Geneva, November 2004); UNHCR Guidelines on Reunification of Refugee Families (1983) and the UNHCR Excom Conclusions of the UNHCR Executive Committee on Family Reunification (October 21, 1981).
[61] *Moustaquim v. Belgium*, Judgement of 18 February 1991, (1991) 13 EHRR 802.
[62] *Abdulaziz, Cabales, and Balkandali v. United Kingdom*, Judgement of 28 May 1985, (1985) 7 EHRR 471, para. 72.

was subsisting on the date of the application for international protection. In contrast, section 18 of the Refugee Act 1996 and Regulation 16 of the European Communities (Eligibility for Protection) Regulations 2006 currently require that the relationship is subsisting on the date of the application for family reunification.

In light of the lengthy time periods between an original application for international protection and the stage at which an individual may be granted status, which have been a core feature of the system to date, this proposal potentially excludes family ties that are formed during the time period after the initial application for international protection and a final decision. While Head 51 provides for the grant of permission to reside in the State for family members who are already in the State, whether lawfully or unlawfully, this is a separate and discretionary process resulting in temporary permission to reside, rather than a permanent status grounded in recognition of the right to family life. The Commission is concerned that the proposed reduction in the scope of family reunification to those persons with a marriage/civil partnership subsisting at the time when an application for international protection was made, may diminish the enjoyment of the right to family life for a specific category of protection applicant in a manner that raises questions of compatibility with Articles 8 and 14 of the ECHR.[63] Provision should be made for the recognition of relations that are not registered civil partnerships or marriages, given that, for many protection applicants who are same-sex couples, relationship recognition in these forms is not available in their countries of origin.

Head 50(1) proposes that a qualified person will be entitled to apply for permission to be granted to a member of his or her family to enter and reside in the State within 12 months of the grant of refugee status or subsidiary protection status. The imposition of a twelve month limitation period on the right to apply for family reunification may result in a breach of family rights in some cases. There does not appear to be any provision in the General Scheme for extension of the twelve month limitation period in any circumstances. The Commission is concerned that in specific circumstances a time bound period for applications for family reunification may be incompatible with the right to respect for family life under Article 8 of the ECHR and/or Article of the 10 of the UNCRC, particularly where there are genuine reasons for the failure to make the application within twelve months.

[63] See ECtHR cases of *Mugenzi v. France* (application no. 52701/09), *Tanda-Muzinga v. France* (no. 2260/10) and *Senigo Longue and Others v. France* (no. 19113/09), concerning the difficulties encountered by applicants, who themselves were either granted refugee status or lawfully residing in France, in obtaining visas for their children so that their families could be reunited. In each case, the Court held unanimously that there had been a violation of Article 8, right to private and family life, stating that the procedure for examining applications for family reunification should have regard to the applicants' refugee status on the one hand and the best interests of the children on the other, in order to safeguard interests as guaranteed by Article 8 of the Convention.

The Commission recommends that consideration should be given to the range of family relationships to which Article 8 of the ECHR can apply in the context of this legislative proposal.

In the absence of a rationale for limiting family reunification to marriages/civil partnerships subsisting when the protection application is made, the Commission recommends that the existing law which applies family reunification to spouses and civil partners where the marriage or civil partnership was subsisting on the date of the application for family reunification, should be retained in the new legislative framework.

The Commission recommends that the 12 month limitation within which applications for family reunification should be removed, or alternatively, that the Bill when published include provision for extension of this time limit where good and sufficient reasons exist, in order to ensure the legislation complies with the right to family life for applicants and their family members.

Head 50(2) provides that the Minister shall investigate applications for family reunification including investigation as to the identity of family members, relationship with the sponsor, domestic circumstances etc. Head 50(4) states that subject to paragraph (7), if the Minister is satisfied that the person who is the subject of the application is a member of the sponsor's family, the Minister shall give permission in writing to the person to enter and reside in the State. Head 505) provides that a permission given under subhead (4) shall cease to be in force if the person to whom it is given does not enter and reside in the State by a date specified by the Minister when the permission is granted. There is no provision in the General Scheme for an extension of the time period specified by the Minister for a family member to enter the State on foot of a permission granted where good and sufficient reasons exist. This could potentially result in a breach of family rights under Article 8 ECHR and/or Article 10 UNCRC.

The Commission recommends that the Bill when published should include provision for an extension of this time limit where good and sufficient reasons exist, in order to ensure the legislation complies with human rights obligations in respect of families and children.

8. Victims of trafficking

As noted above under the heading of 'Children and Vulnerable Persons,[64] Head 52 of the General Scheme of the 2015 Bill is titled 'Situation of vulnerable persons and children', and provides that due regard should be had to the specific situation of vulnerable persons which also include victims of trafficking.[65]

[64] See section 5 above pp. 9-10.
[65] Heads 47, 48, 49, 50 & 51 relate to the content of international protection. See footnote 33 above.

In 2010, Ireland signed and ratified the Optional Protocol to the United Nations Convention against Transnational Organised Crime to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children ('Palermo Protocol')[66] and the Council of Europe Convention on Action against Trafficking in Human Beings ('Warsaw Convention').[67] These instruments represent internationally agreed minimum standards in relation to the actions required to combat and respond to human trafficking.[68] Ireland also has obligations to prevent trafficking and to provide support services to victims of trafficking under the *2011 EU Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims*. The legislative framework on human trafficking in Ireland is outlined in sections 1 to 4 of the Criminal Law (Human Trafficking) Act 2008 (as amended by the Criminal Law (Human Trafficking) (Amendment) Act 2013). However, in the recent case of *P v. The Chief Superintendent of the Garda National Immigration Bureau, the DPP, Ireland and the Attorney General*,[69] in which the Commission appeared as *amicus curiae*, O'Malley J. held that the current administrative scheme for the identification and protection of victims of human trafficking is 'inadequate in terms of the transposition of the EU Directive'.[70] In addition to this ruling, the IHREC notes the recommendations of the Council of Europe's Group of Experts on Action against Trafficking in Human Beings (GRETA) that the Irish Government should place the protection of victims of trafficking on a statutory footing.[71] GRETA has also highlighted the lack of access to adequate remedies for victims, including compensation and recommended that appropriate measures should be put in place.[72] GRETA, as well as the UN Human Rights Committee in 2014, has expressed concern at the placement of victims of trafficking in Direct Provision centres where they may be placed at further risk of harm.[73]

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[66] UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000.

[67] Council of Europe, *Council of Europe Convention on Action Against Trafficking in Human Beings*, 16 May 2005, CETS 197. Ireland has not yet ratified the Optional Protocol to the UN Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.

[68] See IHRC General Observations on the Immigration, Residence and Protection Bill 2008 (March 2008) at p.100.

[69] *P. v The Chief Superintendent of the Garda National Immigration Bureau, the DPP, Ireland and the Attorney General* [2015] IEHC 222. In this case, the applicant had spent almost three years in detention in the Dóchas Centre, much of that time waiting for a decision on her application to be recognised as a victim of human trafficking. See IHREC, 'IHREC calls for immediate action to protect victims of human trafficking following High Court Judgment', [press release], 15 April 2015, last accessed from http://www.ihrec.ie/news/2015/04/15/ihrec-calls-for-immediate-action-to-protect-victim/ on 21 May 2015.

[70] Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims

[71] GRETA (2013) Report concerning the Implementation of the council of Europe Convention on Action against Trafficking in Human Beings in Ireland: First Evaluation Round, Strasbourg: Council of Europe, paras. 69 and 259.

[72] Ibid., paras 206-214.

[73] Ibid., p.46; UN Human Rights Committee (2014) Concluding Observations on Ireland's Fourth Periodic

Part II of the Palermo Protocol predominantly concerns victims of trafficking and requires that States secure the privacy and identity of victims, in particular by ensuring legal proceedings relating to trafficking are made confidential. In addition, States should consider adopting measures to provide for the physical, psychological and social recovery of victims, in particular through the provision of housing, counselling and information, medical, psychological and material assistance and employment, education and training opportunities; and States should endeavour to secure the physical safety of trafficked persons in their territory.[74]

Article 12 of the Warsaw Convention recommends that States secure standards of living capable of ensuring adequate subsistence for victims of trafficking, including appropriate and secure accommodation, psychological and material assistance, access to emergency medical treatment for victims, translation and interpretation services, access to counselling and information on legal rights; and access to education for children.

Article 11 of the UNCRC places an express obligation on States to adopt measures 'to combat the illicit transfer and non-return of children abroad'. The UNCRC also requires States to take measures with a view to preventing the abduction of, sale of, or trafficking of children. In its Concluding Observations on Ireland's Second Periodic Report in September 2006, the Committee on the Rights of the Child recommended that Ireland put in place comprehensive measures for the physical and psychological recovery of child victims of trafficking including the provision of shelter, counselling and medical care.[75]

In the 2015 General Scheme, the proposed requirement to have due regard to the specific situation of vulnerable persons such as victims of human trafficking in Head 52(1), while welcome and important, only applies to persons who have been granted refugee status or subsidiary protection. The requirement to have due regard to the specific situation of victims of trafficking therefore has no application where an alleged victim of trafficking is engaged in the refugee or subsidiary determination process.

More recently, in its *Policy Statement on Direct Provision*, the Commission expressed concern at the lack of protection for vulnerable persons within the system of Direct Provision, and recommended that victims of trafficking be accommodated in appropriate single gender facilities with access to a range of necessary support services, in keeping with the State's obligations of prevention and obligations to provide support services to victims

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Report, CCPR/C/IRL/CO/4, at para. 20.

[74] UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000.

[75] Concluding Comments of the Committee on the Rights of the Child on Ireland's Second Periodic Report, CRC/C/IRL/CO/2, para. 77.

under the Warsaw Convention and the 2011 EU Directive.[76] The Commission notes its concern that these recommendations are not reflected in the General Scheme of the 2015 Bill.

The Commission notes that the Department of Justice and Equality has initiated a consultation on its *Second National Action Plan to Prevent and Combat Human Trafficking in Ireland* 2015. In this context new legislation in relation to trafficking may be required in relation to the identification of potential victims of trafficking and provision of supports, and to facilitate a move away from conflating the issues of trafficking and protection more generally.[77] In the interim period however, in order to ensure an adequate response on the part of the State to victims of trafficking, and to ensure compliance with the Palermo Protocol, the Warsaw Convention[78] and the 2011 EU Directive in relation to the rights of victims of trafficking, the Commission recommends the insertion of a number of additional provisions in the 2015 Bill to bring Ireland's law into compliance with minimum international standards, including:

- **Health care provision for victims of trafficking, including sexual health care and psychological support;**
- **Material assistance for victims of trafficking in the immediate term, including access to secure housing and economic assistance that does not include Direct Provision accommodation;**
- **Access to the labour market, to vocational training and education for victims of trafficking;**
- **Access to adequate information in relation to the legal situation of victims and their options for remaining in the State, through the medium of a translator where required;**
- **Free legal advice, particularly for the purpose of seeking compensation and legal redress; and**
- **Child-specific provisions for child victims, including access to education and access to suitable, safe accommodation.**

9. Applicants from a Country of Origin where Internal Protection Applies

Head 30 of the General Scheme proposes to deal with the issue of internal relocation. Head 30(1) states that the Minister, or the Tribunal, may determine that an applicant is not in

[76] IHREC Policy Statement on Direct Provision (December 2014), recommendation no.5.
[77] The Commission notes the Department of Justice and Equality's consultation in June 2015 on a new National Action Plan for Trafficking.
[78] Council of Europe, *Council of Europe Convention on Action Against Trafficking in Human Beings*, 16 May 2005, CETS 197, in its explanatory note at para. 146, states that the assistance for victims of trafficking outlined in Article 12 of the Convention applies to all victims, including those who have not been granted residence.

need of international protection if in a part of the applicant's country of origin the applicant (a) has no well-founded fear of being persecuted or is not at real risk of suffering serious harm, or (b) has access to protection against persecution or serious harm, and he or she can safely and legally travel to and gain admittance to that part of the country and can reasonably be expected to settle there. In examining whether an applicant has a well-founded fear of being persecuted or is at real risk of suffering harm, or has access to protection against persecution or serious harm in a part of the country of origin in accordance with paragraph (1), the Minister or Tribunal shall have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant in accordance with Head 25.[79] Head 30(3) states that the Minister or the Tribunal shall ensure that precise and up-to-date information is obtained from relevant sources, such as the UN High Commissioner for Refugees and the European Asylum Support Office.

The UNHCR has made it clear from the criteria outlined in its *Guidelines on International Protection: Internal Flight or Relocation Alternative* that an assessment of the internal flight alternative is a complex one which is dependent on the personal situation and characteristics of the applicant.[80] The Guidelines also state that consideration should be given to whether the applicant would be able to lead a normal life in the relocated area, without undue hardship.[81] The UNHCR has noted that a country may not be considered safe if only a part of that country is deemed safe.[82]

The UNHCR has also noted that this category of applicant should not be dealt with in an accelerated manner.[83] The Guidelines state that, in keeping with **'**[b]asic rules of procedural fairness', the applicant should be given notice that their application may be subject to a consideration of relocation measures. The Guidelines also require that the applicant be given an opportunity to provide arguments as to why internal relocation may not be

[79] Head 25 provides for the assessment of facts and circumstances in relation to a protection application, including at Head 25(5)(c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm.

[80] UNHCR, Guidelines on International Protection: Internal Flight or Relocation Alternative within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, HCRGIP/03/04, 23 July 2003. See also *Salah-Sheekh v. The Netherlands,* Application no. 1948/04, in which the Netherlands Government proposed to return an unsuccessful asylum applicant to return to a "relatively safe" part of Somalia. The ECtHR held that as a precondition for relying on an "internal flight" alternative, certain guarantees have to be in place, namely: the person to be expelled must be able to travel to the "safe area" and gain admittance and settle there.[80] Failing these conditions, an issue under Article 3 may arise.

[81] UNHCR, Guidelines on International Protection: Internal Flight or Relocation Alternative within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, HCRGIP/03/04, 23 July 2003, at para. 23.

[82] Ibid., at paras. 13-16.

[83] Ibid., at para. 36.

suitable in their particular case.[84] The UNHCR Guidelines are also clear on the matter of 'Burden of Proof', stating that the use of relocation should not lead to any additional burdens on those seeking protection.[85]

In the General Scheme of the 2015 Bill, Head 30(1) expressly refers to the need to consider whether the person can safely and legally travel to and gain admittance to that part of the country and can reasonably be expected to settle there. Head 30(2) requires that regard be had to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant.[86] The Commission welcomes these inclusions, but is concerned that the designation of 'safe part' of a country of origin may have implications for a person's application for protection. A presumption that the internal flight alternative is not available where the agent of persecution is the State itself is not reflected in the General Scheme of the 2015 Bill. Nor does the General Scheme include a specific requirement, in cases where the agent of persecution is a non-State agent, that there must be an assessment as to whether there is a risk that the non-State actor will persecute the applicant in the proposed area. Head 30 does not specify that the applicant will be afforded an opportunity, by way of an oral hearing for example, to explain his or her personal circumstances and provide arguments as to why consideration of an alternative location may, in his or her case, be either not relevant or that the proposed area may be unsuitable.

The Commission recommends Head 30 be amended to expressly include a presumption that internal relocation is not available where the agent of persecution is the State, and to specifically require protection decision-makers to consider, in cases of non-State agents of persecution, whether there is a risk that the non-State actor will persecute the applicant in the proposed area.

The Commission considers that in light of the complex nature of an assessment concerning an applicant's ability to relocate to a 'safe part' of their country of origin, the applicant should be provided with the opportunity to give a full explanation of his or her circumstances by way of an oral hearing on appeal. This category of applicant should not be dealt with in an accelerated manner.

10. Applicants from a Safe Country of Origin

Head 31 proposes to amend the existing legislative framework in relation to applicants from a 'safe country of origin'. This head provides that the designation of a country as a safe

[84] Ibid., at para. 35.
[85] Ibid., 23 July 2003, paras. 33-35.
[86] This reflects recommendations contained in the IHRC General Observations on the Immigration, Residence and Protection Bill 2008 (March 2008) at pp.52-53.

country of origin under Head 66 may only be applied in respect of an applicant where, (a) the country is the country of origin of the applicant, and (b) the applicant has not submitted any serious grounds for considering the country not to be a safe country of origin in his or her particular circumstances, and in terms of his or her eligibility for international protection.

Head 66 of the General Scheme provides for designation of safe countries of origin, stating that the Minister may designate a country as a safe country of origin. Specifically the Minister shall take account of the extent to which protection is provided against persecution or mistreatment in a designated country based on a range of sources of information from relevant bodies and the designation of safe countries of origin shall be kept under regular review.

When designating 'safe countries of origin', the UNHCR has noted that States must take account of the international refugee instruments and the international human rights instruments that they have ratified, such as the obligation to prevent refoulement under Article 3 of the ECHR, Article 33 of the Refugee Convention, and the principle that all persons should be entitled to access a protection system as outlined within the UNHCR Handbook.[87] States should also have access to independent and verifiable information on respect for rule of law, the implementation of international human rights accords and also the country's record of not producing refugees.[88]

The UNHCR has stated that the notion of a safe country of origin may be utilised as a procedural tool for the prioritised and/or accelerated examination of applications, in carefully circumscribed situations.[89] In this regard, the UNHCR has also stated that it is critical that each case is examined on its individual merits, and that each applicant should have an opportunity to rebut the presumption of safe of country of origin, on the basis of their individual circumstances. The Commission is concerned that the designation of 'safe countries of origin' may have implications for a person's application for protection. Such a designation may include *inter alia* where a national of a safe country makes an application for protection, the applicant is subject to a rebuttable presumption that the country is 'safe' or that their application deemed inadmissible or rejected as manifestly unfounded.

The designation of safe countries may also create a presumption of safety, impacting upon the burden of proof, particularly under Head 31(b) which states that the designation of a

[87] UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, HCR/IP/4/Rev.3, (re-issued 2011), paras.190, 192 and 195.
[88] UNHCR, 'Asylum Processes (Fair and Efficient Asylum Procedures)' in *Global Consultations on International Protection* (31 May 2001), p. 9, para. 39.
[89] UNHCR, *Summary of UNHCR's Provisional Observations on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status* (March 2005), p. 4. UNHCR*, Comments on the Immigration, Residence and Protection Bill 2008* (March 2008), p. 20, para. 77.

country as safe may be applied in respect of applicants only where 'the applicant has not submitted any serious grounds for considering the country not to be a safe country of origin'.

However, individual examinations of a claim for protection must take place and the duty to ascertain the facts is the task of both the applicant and the examiner of the claim. Where lists of safe countries of origin are being drawn up, the process for the drafting of these lists should be responsive to changing circumstances within the country of origin and applicants from these countries must have an effective opportunity to rebut any presumption in relation to the safety of the country based on his or her particular circumstances.

The Commission considers that the following safeguards should be included, in the Bill as published, to ensure the correct designation of a safe country of origin:

1. **The actual situation on the ground within the designated safe country of origin should be kept under constant review. Such States must enforce international human rights instruments rather than simply sign and ratify these instruments.[90]**
2. **There should be an individual assessment of each claim from designated safe countries of origin and an opportunity for an individual to rebut the presumption of safety.[91]**
3. **In the review of designated safe countries, a timeframe for what constitutes 'regular review' should be stipulated, with publicly available information around the criteria for the determination of what might prompt and inform such a review.**

11. Exclusion Clauses

Head 9 of the General Scheme proposes to provide for exclusion from refugee status in line with the provisions of the Refugee Convention. Heads 9(1) to (3) replicate Articles 1D, 1E and 1F of the Refugee Convention relating to exclusion clauses, and the relevant Articles of the Qualifications Directive. In accordance with these Articles, people are excluded from being granted refugee status on the basis that the person can access surrogate protection and is therefore not in need of protection,[92] or on the basis of their engagement in serious non-political crimes.[93]

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[90] UNHCR, 'Asylum Processes (Fair and Efficient Asylum Procedures)' in *Global Consultations on International Protection* (31 May 2001), p. 9, para. 39.

[91] Ibid. at p. 12, point (d).

[92] Head 9(1)(b) replicates Article 1E of the Refugee Convention in excluding from refugee status those with de facto nationality of another country. This is in accordance with Article 1A of the Refugee Convention and Article 12(1)(b) of the Qualification Directive.See generally UNHCR Note on the Interpretation of Article 1E of the 1951 Convention relating to the Status of Refugees and Hathaway The Law of Refugee Status (Butterworths 1992) at pp.212-213

[93] Head 9(2) replicates Article 1F of the Refugee Convention insofar as it contains three categories of persons who are excluded from refugee status on the basis of their behaviour. The threshold for exclusion under Head 9(2) is set out at Head 9(3), namely 'where there are serious reasons for considering' that the person has incited or otherwise participated in the crimes or acts referred to. 'Serious non-political crimes' are defined in

Head 11 sets out four circumstances in which a person is excluded from being eligible for subsidiary protection: having committed a crime against peace, a war crime, or a crime against humanity; having committed a serious crime; being guilty of 'acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations'; or posing a danger to the community or to the security of the State.

Exclusion clauses are of concern insofar as UNHCR has stated:

> As with any exceptions to provisions of human rights law, the exclusion clauses need to be interpreted restrictively. As emphasised in paragraph 149 of the Handbook, a restrictive interpretation and application is also warranted in view of the serious possible consequences of exclusion for the applicant.[94]

While there are some similarities with the grounds for exclusion from refugee status, it is clear that exclusion from subsidiary protection goes further in a number of significant respects. Head 11(1)(b) excludes from subsidiary protection those who have committed a serious crime; while exclusion from refugee status expressly limits this ground to serious *non-political* crimes, this limitation does not apply to exclusion from subsidiary protection. The Commission notes that this broader category of exclusion from subsidiary protection is derived from Article 17(1)(b) of the Qualification Directive. The Commission is concerned that the failure to require any consideration of the political nature of the crime, or to engage in a balancing or proportionality exercise before determining exclusion, could give rise to arbitrary decision-making which could result in breaches of human rights.

The Commission considers that the decision to issue an exclusion order against a person where they apply for subsidiary protection may amount to a serious interference with that person's human rights, particularly under Articles 3, 5 and 8 of the ECHR and effectively impedes their access to the protection system. The Commission recommends that the exclusion clauses in respect of applicants for refugee status should be mirrored for applicants for subsidiary protection in the 2015 Bill when published.

Head 2 of the General Scheme as including 'particularly cruel actions, even if committed with an allegedly political objective'. This definition, which is based on Article 12(2)(b) of the Qualification Directive, has drawn criticism on the basis that it goes beyond the wording of Article 1F, and 'arguably gives rise to a distinct, expanded and self-standing definition of exclusion on the basis of commission of a serious non-political crime'. See Hugo Storey 'EU Refugee Qualification Directive: A Brave New World?' (2008) 20(1) International Journal of Refugee Law 1 at p. 10.

[94] UNHCR *The Exclusion Clauses: Guidelines on their Application* (December 1996) at para.8.

12. Deportation Orders and Permission to Remain

Head 45 provides for the making of deportation orders. Head 45(1) states that subject to Head 43A and 44, the Minister for Justice and Equality may make a deportation order directing a person to leave the State within a specified period of time and remain thereafter outside the State.

The General Scheme of the 2015 Bill maintains the existing approach pursuant to section 3 of the Immigration 1999 insofar as a deportation order is automatically of lifelong effect. This does not allow for the duration of a deportation order to be adjusted to meet the requirements of proportionality in individual cases. In *Sivsivadze v. Minister for Justice* the applicants contended that the automatic lifelong exclusion imposed by a deportation order was disproportionate, and therefore in breach of Article 8 of the ECHR. This submission was rejected by Kearns J.,[95] but it should be noted that the decision is under appeal.

Deportation orders may not be executed immediately due to a variety of complex reasons.[96] However, in the Commission's *Policy Statement on Direct Provision in 2014*, it was noted that some of those who are not granted any form of protection can continue to live in Direct Provision indefinitely, as they may have been issued with deportation orders which cannot be executed, for a variety of reasons.[97] The Commission recommended that those who are the subject of deportation orders which cannot be implemented are given leave to remain and the State should give serious consideration to settling any cases which are subject to delay in High Court proceedings.[98]

Head 45(5) states that a person who, but for the operation of the prohibition on refoulement in Head 44, would be the subject of a deportation order under this Head shall be given permission to reside in the State. Head 45(5) thus imposes a positive duty on the Minister to grant permission to remain in the State to a person who cannot be deported because the life or freedom of that person would be threatened in the country of origin for reasons of race, religion, nationality, membership of a particular social group or political opinion, or, where in the opinion of the Minister, there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment in the country of origin.

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[95] *Sivsivadze v. Minister for Justice,* [2012] IEHC 244.

[96] The person themselves may have chosen to voluntarily return home without reference to the authorities; a person may be evading deportation and not cooperating with the authorities or there may be difficulties and delays in obtaining travel documents from the consular offices of the country involved. Cases of families tend to be considered together and the same can often apply when it comes to enforcement of Deportation Orders with some family members awaiting determination of their case holding up others in the process.

[97] IHREC Policy Statement on Direct Provision (December 2014) notes at p.5 that '[a]t the end of January 2014, there were 4,466 persons with an outstanding Deportation Order. However, many of these are several years old and may have very little chance of enforcement. 868 residents of Direct Provision have been issued with Deportation Orders accounting for 20.5% of residents.

[98] IHREC Policy Statement on Direct Provision (December 2014) at p.18.

The Commission notes this is a welcome provision in the extent that this addresses the situation of some of those persons who cannot be deported. However, there remain a number of persons outside the scope of this provision. For example, some people cannot be deported for practical reasons, such as a lack of identity documents, the country of origin refusing to accept the return of the person, or the inability to safely transport people to that country because of an ongoing conflict or security risk.[99] Head 45 does not address people in this category. The Commission considers this issue could be addressed by amending Head 45 to include a duty to review a deportation order which has not been implemented within a specified period of time, in order to require the Minister to consider the viability of the proposed deportation and whether, in all the circumstances, the person ought to be granted permission to remain. This might be assisted by including a requirement for the Garda National Immigration Bureau to report to the Minister, on an annual basis, on those deportation orders which have not yet been implemented.

The Commission recommends the Bill as published include a duty on the Minister to review unimplemented deportation orders, as reported, within a specified period of time in order to determine whether the person the subject of the order can in fact be deported at all, or whether that person ought to be granted permission to remain. This would avoid a recurrence of the situation currently prevailing whereby some people remain in Direct Provision for many years, yet without permission to reside in the State and all of the benefits that flow from such permission such as the right to work, the right to travel and the right to access social welfare.

If a protection applicant has been refused both refugee status and subsidiary protection, Head 36A of the General Scheme sets out the process by which the Minister may consider to grant permission to remain in the State. Head 36A(1) states that the Minister shall examine the reason or reasons presented by the applicant in writing or at the personal interview under Head 32A in relation to why he or she should be given permission to remain in the State.

The factors which must be considered by the Minister in this regard are set out in Head 36A(2).[100] This list reflects some of the factors currently listed in section 3(6) of the Immigration Act 1999 to be considered by the Minister when determining whether to give permission to an applicant to reside in the State. However, some of the factors contained in

[99] At the end of September 2014, 30% of all Direct Provision residents had been served with a Deportation Order or notice of intent to serve one. See IHREC Policy Statement on Direct Provision (December 2014) at p.6.

[100] Namely (a) the family and personal circumstances of the applicant (with particular reference to the right to respect for private and family life under Article 8 of the European Convention on Human Rights); (b) the nature of the applicant's connection with the State, if any; (c) humanitarian considerations; (d) the character and conduct of the applicant both within and (where relevant and ascertainable) outside the State (including any criminal convictions); (e) considerations of national security and public order; and (f) the common good.

section 3(6) of the Immigration Act 1999 are not reflected in Head 36A(2), including the age, employment records and employment prospects of the person concerned.

The Commission recommends that the Bill as published contain a comprehensive list of factors, as per section 3(6) of the Immigration Act 1999, which may be considered by the Minister when determining whether to grant permission to an applicant to reside in the State.

13. Issues on Assessment of Claim and Credibility

Head 25 of the General Scheme concerns the assessment of facts and circumstances in the context of international protection applications. Head 25 provides that it shall be the duty of a protection applicant to submit as soon as reasonably practicable all elements needed to substantiate the application, and to co-operate in the examination of his or her protection application. This duty is shared with protection decision-makers, who must have regard to a wide range of factors set out in Head 25(5) in the assessment of an application, including all facts as they relate to the country of origin at the time of the protection decision, all relevant statements and documents presented by the applicant, the individual position and personal circumstances of the applicant, including factors such as background, gender and age. Head 25(7) provides that, where aspects of the applicant's statements are not supported by the required documentation or other evidence, the aspects will not need confirmation as long as the Minister or Tribunal is satisfied that, among other matters, 'the general credibility of the applicant has been established.'

Head 26 of the General Scheme is titled 'Credibility', and provides:

> The Minister or the Tribunal, as the case may be, shall assess the credibility of an applicant for the purposes of the examination of his or her application or the determination of an appeal in respect of his or her application and in doing so shall have regard to all relevant matters.

As noted by the UNHCR, 'knowledge of conditions in the applicant's country of origin –while not a primary objective – is an important element in assessing the applicant's credibility'.[101] The UNHCR also notes:

> [W]hile the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the

[101] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, HCR/IP/4/Rev.3, 1979 (re-issued 2011), para. 42.

> application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.[102]

In applying the principle of 'benefit of the doubt' in a credibility assessment, the ECtHR has stated:

> The Court acknowledges that, owing to the special situation in which asylum seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when it comes to assessing the credibility of their statements and the documents submitted in support thereof.[103]

The UNHCR considers that credibility assessment is a core element of the protection determination system.[104] It notes that 'untrue statements by themselves are not a reason for refusal of refugee status and/or subsidiary protection status.'[105] As stated by Faherty J. in the recent case of *QSA v Minister for Justice*, '[b]ald assertions that someone is not credible or completely implausible cannot suffice to reject credibility. The dictates of fairness require a specific cogent reason for any stated disbelief.'[106] It is therefore particularly important that the 2015 General Scheme offers sufficient and appropriate guidance for credibility determinations, so as to reduce the risk of refoulement, and facilitate the task of the authorities at the first instance and appeal stages of the determination process. The Commission considers that the key question to be considered is whether the core issues pertaining to the protection claim are credible, not whether the applicant can generally be considered to be credible on the basis of minor matters.

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[102] Ibid. , para. 196.

[103] See *R.C. v. Sweden, no. 41827/07 (Judgment)*, 9 March 2010, para. 50; *N. v. Sweden, no. 23505/09 (Judgment)*, 20 July 2010, para. 53; *F.H. v. Sweden, no. 32621/06 (Judgment)*, 20 January 2009, para. 95.

[104] See UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (COM(2009)551, 21 October 2009); UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (COM(2009)554, 21 October 2009); UNHCR, *Beyond Proof, Credibility Assessment in EU Asylum Systems: Full Report*, May 2013, p.13.

[105] UNHCR, *Beyond Proof, Credibility Assessment in EU Asylum Systems: Full Report*, May 2013, p.216.

[106] *Q.S.A v. The Minister for Justice Equality & Law Reform & ors* [2015] IEHC 238, at para 26. See also the case of *A.A.M.O (Sudan) v. Refugee Appeals Tribunal & anor* [2014] IEHC 49, in which Clark J. outlines the approach taken by a Member of the Refugee Appeals Tribunal Member stating, at para. 23, 'the only conclusion which the Court could draw for the Tribunal's decision not to recommend that the applicant should be declared a refugee is that the Tribunal Member simply did not like the applicant'. The applicant's second hearing also resulted in a negative decision by the Tribunal. An appeal was granted by the third Tribunal Member and the applicant now has refugee status.

The Commission recommends reformulation of Heads 25 and 26 to provide for an assessment of whether the protection claim submitted by the applicant is credible, rather than whether the individual applicant can generally be considered to be credible.

14. Detention of an Applicant

Head 19 of the General Scheme of the 2015 Bill proposes to provide for the detention of an applicant in specific circumstances. Head 19(1) provides that an immigration officer or a member of An Garda Síochána may arrest an applicant and detain him or her in a prescribed place, including a prison or other place of detention. An arrest can take place where an immigration officer or a member of An Garda Síochána, with reasonable cause, suspects that the applicant poses a threat to public security or public order, has committed a serious non-political crime outside the State, has not made reasonable efforts to establish their identity or has destroyed or forged their identity documents. A person detained on these grounds is required to be brought as soon as possible before a judge of the District Court who can authorise detention for 21 days.[107] There is no maximum time limit set for which protection applicants can be detained under these grounds.[108]

Article 5 of the ECHR, as well as Article 9 of the ICCPR, provide that everyone has the right to liberty and security of person and should not be subjected to arbitrary arrest or detention. The Grand Chamber of the ECtHR in *Saadi v. United Kingdom* examined whether it was in compliance with Article 5(1)(f) of the ECHR to detain a protection applicant seeking to claim asylum upon entry to the United Kingdom where his or her claim was assessed to be manifestly unfounded.[109] Detention of an asylum seeker in these circumstances was stated by the UK authorities to be for the purpose of facilitating a quick decision on his asylum claim. The ECtHR held that Article 5(1)(f) permits the detention of a protection applicant in such circumstances, but emphasised that such detention must be free from arbitrariness.[110] The Court stated that the detention must be carried out in good faith, the place and conditions of detention should be appropriate bearing in mind that 'the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country', and the length of the detention should not exceed that reasonably required for the purpose pursued.[111] In this case, the Court considered that the detention regime where the applicant had been held was appropriate because it was a detention centre specifically adapted for asylum seekers with

[107] Detention can be extended for further periods of 21 days pending the determination of the person's protection application.
[108] Head 19(14)-(16) set out the information to be provided to such persons in detention and their entitlement to a solicitor. Head 19(6) provides that subject to subhead (7), the power to detain shall not apply to a person who is under the age of 18 years.
[109] *Saadi v United Kingdom* (2008) 47 EHRR 17.
[110] Ibid., at 75-80.
[111] Ibid., at 74.

various facilities for recreation, religious observance, medical care and legal assistance.[112] The ECtHR found a violation of Article 5(2) because the UK authorities had failed to inform the applicant promptly of the reasons for his detention.[113] Unsolicited reasons for the detention of the applicant were not given to the applicant at any time, and solicited reasons were given 76 hours after the arrest and detention of the applicant.

UNHCR Executive Committee's (Excom) Conclusion 44 specifically addresses the question of the detention of asylum seekers.[114] Excom Conclusion 44 states that, as a general principle, asylum-seekers should not be detained except on a number of limited grounds which must be prescribed clearly in national law. EXCOM Conclusion 44 allows for the detention of asylum-seekers for the purpose of verifying their identity; to determine the elements on which the claim for protection is based; where asylum-seekers have destroyed or used fraudulent identity documents; or to protect national security and public order where there is evidence of criminal antecedents or affiliations.

The European Committee for the Prevention of Torture (CPT Committee) has also set out detailed minimum standards in relation to the detention of immigrants.[115] The CPT Committee considered that the detention of such persons in prisons is fundamentally flawed as 'a prison is by definition not a suitable place in which to detain someone who is neither convicted nor suspected of a criminal offence'.[116] The CPT Committee has stated that where it is deemed necessary to deprive persons of their liberty for an extended period, they should be accommodated in centres specifically designed for that purpose, offering material conditions and a regime appropriate to their legal situation and staffed by suitably qualified personnel.[117] In 2003 and 2007 the CPT Committee called on the Irish Government to review urgently the current arrangements for accommodating persons detained for immigration offences in prisons.[118] A further issue of concern in this regard relates to the issue of detention and children. Head 19(6) of the General Scheme of the 2015 Bill clearly states that persons under the age of 18 shall not be detained. However, Head 19(7) provides that if, and for so long as, an immigration officer or member of An Garda Síochána has reasonable grounds for believing that the person is not under the age of 18 years, the power to detain shall apply in respect of that person.[119]

[112] Ibid., at 78.
[113] *Ibid*, at 81-85.
[114] Executive Committee Conclusion No. 44 (XXXVII) Detention of Refugees and Asylum-Seekers (13 October 1986.)
[115] European Committee for the Prevention of Torture The CPT Standards CPT/Inf/E (2002) 1 - Rev. 2006.
[116] Ibid., at para. 28.
[117] Ibid., at paras.28-29.
[118] CERD Concluding Observations on Ireland's First Periodic Report, para. 15. CPT Report on Ireland 2002, CPT/Inf (2003) 36 para 69; CPT Report on Ireland 2007, CPT/Inf (2007) 40, para. 86.
[119] Head 19(8) provides that where an unmarried person under the age of 18 years is in the custody of another person (whether his or her parent or a person acting in loco parentis or any other person) and that other person is detained under the provisions of this Head, the immigration officer or the member of the Garda

As noted above in relation to unaccompanied minors, the Commission recommends best practice measures around the treatment of children seeking asylum, in the light of Articles 9, 11 and 22 of the UNCRC. Specifically, an unaccompanied child should never be detained for reasons related to their immigration status. This includes detention at the border, for example, in international zones, in detention centres, in police cells, in prisons or in any other special detention centres for young people.[120] Specific identification procedures for unaccompanied children should be established immediately upon arrival at ports of entry, or as soon as their presence in the country becomes known to the authorities.[121]

In relation to the detention of applicants under Head 19, the Commission recommends:

- **The 2015 Bill should provide a specific maximum time limit for detention of refugee and subsidiary protection applicants where they are detained as a measure of last resort in the limited circumstances prescribed.**
- **The power to detain persons suspected to be a threat to public security or public order should apply only where there is evidence to show that the protection applicant has criminal antecedents and/or affiliations which are likely to pose a risk to public security or public order. Prisons or Garda Stations are not suitable places for the detention of protection applicants who have not been convicted of a criminal offence. In the limited circumstances in which it may be permitted to detain protection applicants, such persons should only be detained in centres specifically adapted for their needs and circumstances**
- **Separated children should not be detained for immigration related reasons.[122] If a child's parent or guardian is detained upon arrival or prior to removal from the State, any decision relating to that child should be made in the best interests of the child.[123]**

15. System of Direct Provision

In December 2014, the Commission issued a *Policy Statement on the System of Direct Provision in Ireland*, making recommendations in relation to the legislative framework for asylum applications and on the Direct Provision system more generally.[124]The Commission anticipates the publication of the Report from the Government-appointed 'Working Group

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Síochána concerned shall, without delay, notify the Child and Family Agency of the detention and of the circumstances thereof.

[120] Save the Children, *Statement of Good Practice 2004*, p. 18.

[121]Ibid., p. 15. See above at page XX.

[122] See UN Human Rights Committee General Comment No. 35 on Article 9 (Liberty and Security of Person) of the International Covenant on Civil and Political Rights, CCPR/C/GC/35, regarding the detention of unaccompanied minors seeking asylum, at para. 18.

[123] See pp. 11-15 above.

[124] IHREC Policy Statement on Direct Provision (December 2014). Last accessed from http://www.ihrec.ie/publications/list/ihrec-policy-statement-on-direct-provision/ on 30 April 2015.

on the Protection Process' in relation to recommendations for reform in the system of Direct Provision.

Concerns have been expressed regarding the impact of Direct Provision on the right to respect for family and private life; its compatibility with the best interests of the child; and whether prolonged stays in Direct Provision for many years without the right to work may amount to inhuman and degrading treatment. Concerns have long been expressed by legal activists and civil society organisations about Direct Provision, with frequent calls for reform or abolition.[125]

The Commission reiterates its existing recommendations around the system of Direct Provision, insofar as they may be relevant to the 2015 General Scheme.

16. International Protection Appeals Tribunal

Heads 37-42 of the General Scheme of the 2015 Bill relate to protection appeals to the International Protection Appeals Tribunal ('the Tribunal') which it is proposed will replace the Refugee Appeals Tribunal. Head 37(1) provides for appeals to the Tribunal against a refusal of refugee status or subsidiary protection status. However, there is no right to appeal against a first instance decision by the Minister to refuse permission to remain pursuant to Head 36A. The time limit for submitting an appeal is 15 working days from the date of notification of the Minister's decision.[126]

Head 38(1) states that the Tribunal shall hold an oral hearing where an applicant requests one, or where it is in the interests of justice to do so. However, Head 39(b) provides that the Tribunal is not permitted to hold an oral hearing in respect of an appeal governed by the

[125] FLAC, One Size Doesn't Fit All: A legal analysis of the Direct Provision and dispersal system, ten years on (2009); Cosgrave, Living in Limbo: Migrants' Experiences of Applying for Naturalisation in Ireland (2011); Barry, What's Food Got To Do With It: Food Experiences of Asylum Seekers in Direct Provision (2014); Breen, 'The Policy of Direct Provision in Ireland: A Violation of Asylum Seekers' Right to an Adequate Standard of Housing' 20(4) International Journal of Refugee Law 611, (2008); Arnold, State Sanctioned Child Poverty and Exclusion: The case of children in State accommodation for asylum seekers (2012); Mbugua, Am Only Saying It Now: Experiences of Women Seeking Asylum in Ireland (2010); O'Reilly, 'Dealing with Asylum Seekers: Why Have We Gone Wrong?' 102(406) Studies Magazine 1, (2013); Irish Refugee Council, Direct Provision: Framing an alternative reception system for people seeking international protection (2013); Thornton, 'The Rights of Others: Asylum Seekers and Direct Provision in Ireland' (2014) 3(2) Irish Journal of Community Development (forthcoming); Thornton, 'Direct Provision and the Rights of the Child in Ireland' (2014) 17 (3) Irish Journal of Family Law 67-75; FLAC, Our Voice, Our Rights: a parallel report in response to Ireland's Third Report under the International Covenant on Economic, Social and Cultural Rights (2014); Conlan, Counting the Cost: Barriers to employment after Direct Provision, (2014).

[126] Subject to a shorter period of 10 working days in respect of accelerated appeals procedure pursuant to Head 39.

accelerated appeals procedure. The grounds on which an appeal may be subject to the accelerated appeals procedure are set out in Head 35(4).[127]

Part 10 of the General Scheme of the 2015 Bill relates to the proposed International Protection Appeals Tribunal. Head 55(2) states that subject to subhead (3), the Tribunal shall be (a) inquisitorial in nature, and (b) independent in the performance of its functions.

The rules regarding appointment of Tribunal Members are set out in Heads 55 and 56 of the General Scheme. The General Scheme retains the essential features of the current regime under the Refugee Act 1996, namely, a permanent chairperson and 'such number of other members, appointed either in a whole-time or a part-time capacity' as the Minister for Justice and Equality, with the consent of the Minister for Public Expenditure and Reform, considers necessary for the performance of the functions of the Tribunal. Tribunal Members must have at least five years' experience as a barrister or solicitor, albeit not necessarily in refugee or human rights law. Head 56(4) provides that the Minister shall not appoint the Chairperson or any ordinary members to the Tribunal unless the Public Appointment Service after holding a competition, has selected such person for appointment. However, this provision does not apply to reappointment of either the Chairperson or ordinary Tribunal Members. The term of office for the Chairperson is five years, while the term of office for ordinary Tribunal Members is three years. Head 55(14) provides that members may be removed by the Minister 'for stated reasons', a term which is not defined. This could give rise to concerns regarding arbitrary removal of Tribunal Members and the potential negative impact this could have on the independence of Tribunal Members.

The Commission recommends greater clarity as to the situations in which Tribunal Members may be removed and what may constitute 'stated reasons' in order to secure the independent performance by the individual Members of their functions.

Head 57 sets out the functions of the Chairperson of the Tribunal. Head 57(1) provides that the Chairperson shall ensure that the functions of the Tribunal are performed efficiently and that the business assigned to each member is disposed of as expeditiously as may be consistent with fairness and natural justice. Head 57(2) provides that the Chairperson shall, having regard to the need to observe fair procedures, establish or adopt rules and procedures for the conduct of oral hearings and shall publish any such rules and procedures so established. This is welcome insofar as it increases transparency in the functioning of the Tribunal. Head 57(3) provides that the Chairperson may issue to the members of the Tribunal guidelines on the practical application and operation of the provisions or any particular provisions of this Act and on developments in the law relating to international

[127] That the examination of the application for international protection revealed only issues that are not relevant or are of minimal relevance to the eligibility of the applicant for protection; that the applicant has made inconsistent, contradictory, improbable or insufficient representations; or that the applicant has failed without reasonable cause to make his or her application earlier, having had opportunity to do so.

protection. While this provision might also be welcomed from the point of view of transparency, it is notable that Head 57 does not refer to an obligation on the Chairperson to publish such guidelines.

The Commission recommends the publication of guidelines for applicants to ensure awareness of the practical application and operation of the provisions of the Act. The Commission recommends the publication of similar guidelines on developments in law relating to international protection, in order to ensure that legal representatives are in a position to make representations or submissions on any matters arising.

17. Judicial review

Head 65 of the General Scheme concerns judicial review. The list of decisions, determinations, recommendations, refusals or orders governed by the statutory judicial review procedure set out in section 5(1) of the Illegal Immigrants (Trafficking) Act 2000[128] is to be expanded to include the following decisions, determinations, refusal or orders:

> (a) a determination of the Minister under Head 20(1) that an application for international protection is inadmissible;
> (b) a decision of the Tribunal under Head 20(9)(a) to affirm a determination of the Minister under Head 20(1);
> (c) a refusal by the Minister under Head 21(6) to allow a person make a further or subsequent application for international protection;
> (d) a decision of the Tribunal under Head 21(10)(a) to affirm a determination of the Minister under Head 21(6);
> (e) a determination of the Minister under Head 35(3) to grant or refuse refugee status or to grant or refuse subsidiary protection;
> (f) a determination of the Minister under Head 36A(3) to grant or refuse permission to remain in the State to a person who has been refused refugee status and subsidiary protection status;
> (g) a decision of the Tribunal under Head 42(2) to affirm or set aside the Minister's decision to refuse refugee status or Head 42(3) to affirm or set aside the Minister's decision to refuse refugee status or subsidiary protection status;
> (h) a deportation order under Head 45(1);
> (i) a refusal to revoke a deportation order under Head 45(4); and
> (j) a decision of the Minister to exclude a person from temporary protection under Head 54(3).

The scope of the decisions captured by the statutory judicial review procedure under Head 65 is wider than the original statutory judicial review procedure provided by section 5 of the

[128] As inserted by section 34 of the Employment Permits (Amendment) Act 2014.

Illegal Immigrants (Trafficking) Act 2000 and the more recent amendments by section 34 of the Employment Permits (Amendment) Act 2014. For example, decisions regarding inadmissibility of applications or to exclude a person from temporary protection were not previously captured by the statutory judicial review procedure. The time limit for institution of judicial review proceedings under section 5 of the Illegal Immigrants (Trafficking) Act 2000 was extended from 14 to 28 days by section 34 of the Employment Permits (Amendment) Act 2014.

The Commission has concerns in relation to the extent to which the increase from 14 to 28 days satisfactorily addresses the concerns regarding the impact of time limits on the effectiveness of the judicial review remedy, having regard to the right to an effective remedy under Article 13 ECHR. The Commission recommends that the judicial review period in relation to decisions under the 2015 Bill should be in keeping with the standard judicial review period of three months.