



# Immigration Detention & Border Control in Ireland

Revisiting Irish Law, Policy and Practice



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**Mission Statement:**  
Enable migrants and ethnic minorities to access justice and human rights and work to achieve a just, inclusive and equal society.



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# Foreword

Mark Kelly

Brussels, February 2018

## Acknowledgements

We would like to take this opportunity to thank all of the individuals and organisations who have worked with us in the compilation of this report. Firstly, a very special thank you to our former Senior Legal Officer Claire Cumiskey, who first expressed an interest in tracking the increasing numbers of refusals of leave to land and initiating research as a follow up to Mark Kelly's seminal work in 2005 on immigration relation detention in Ireland. Although she has since left Nasc, Claire's interest in highlighting immigration detention and border control are the main reason this report exists.

Secondly, we must thank the initial researcher Jane Mulcahy, who conducted a considerable amount of desk research, including initiating an extensive number of FOI and PQ requests to collect statistical data on immigration detention and refusals of leave to land. She also went through a lengthy ethics process with the Irish Prisons Service to secure access to interviews with detainees, and subsequently conducted 10 interviews with people while they were in immigration detention – sometimes only overnight – so she often had to make her way up to Cloverhill Prison from Cork with only a few hours notice in order to interview someone.

Thirdly, we would like to thank Tommy O'Donoghue, a barrister in law, who did extensive work in compiling the final document, researching and documenting the international and national legal provisions relating to immigration related

detention and generally compiling all of the pieces of research into a comprehensive document.

Fourthly, we have to thank Emily Cunniffe, who – two years after the initial research was conducted – embarked on a series of additional interviews and data collection, to bring the research up to date. She also worked extensively to incorporate all of the new data into the report and reform it into its existing shape. She was supported in these efforts by Nasc intern Maria Bateson, who also designed the cover art and the invitation to the report launch.

We also must thank the various contributors to the report, most importantly detainees and former detainees who agreed to tell us their stories in the hopes that this report can bring about much needed policy and legislative change in relation to immigration detention and border control. Also the organisations and agencies we were in touch with, who are referenced in detail in the methodology section of the report. In particular, we extend our thanks to: Liam Thornton, Siobhán Mullally, Deirdre Malone, Mark Kelly, Enda O'Neill, Hilary Harmon, Catherine Cosgrave, and Karin Wieland

Final thanks must go to our incredible funders, to the St. Stephens Green Trust for their patience in the delivery of the work and to the Ireland Funds without whose support we would have been unable to complete this work.

In early 2005, three of Ireland's leading non-governmental organisations – the Immigrant Council of Ireland, the Irish Penal Reform Trust and the Irish Refugee Council – came together to tender for original research on immigration-related detention, which I was fortunate to be commissioned to undertake.

When published in November 2005, the resulting research report, *Immigration Related Detention in Ireland*, generated some significant publicity.

Writing in the *Irish Times*, Carol Coulter captured the essence of the report's finding that "the rights accorded to certain categories of people held for immigration-related reasons fall short of international human rights standards. These rights include the right to inform a third party of one's detention; to have access to a lawyer and a doctor; the right to appeal against the legality of the detention; and the right to information about rights in a language understood by the detainees. While these rights exist for detained asylum seekers and for those held on remand for immigration-related offences, they do not exist for those refused permission to land and who are held pending their return, or for those held pending deportation, who only have the formal right to appeal the legality of their detention. As they do not have the right to information about their rights in a language they understand, or access to legal advice, the report questions the practical usefulness of the formal right to appeal".

Thirteen years later, I was happy to be asked by another of our leading NGOs – Nasc – to write a foreword to this follow-up research report. Initially, I was quite pleased to learn that the work that I had undertaken more than a decade ago had provided a useful baseline for a new comparative study. However, it has been rather more disconcerting to discover from reading this report that, at least in some of the key areas that I had criticised in 2005, very little has changed. This is especially the case as regards respect for the rights of the thousands of people "refused leave to land" at Ireland's ports (and, in particular, at Dublin Airport) every year. My research had focused predominantly on immigration-related detention in prisons, while noting the significant number of people stopped at our borders and held pending their removal from the State. In more recent years, that number has increased sharply and this new report provides a welcome focus on the need for enhanced protection of the basic rights of this potentially vulnerable group.

In certain other respects, Ireland has a record on immigration-related detention of which it can be reasonably proud. Some European states have made closed, carceral centres the cornerstone of their (anti-) immigration policies, in at least one instance going so far as to make detention the only entry

point to their asylum system. That has never been the case in Ireland, where deprivation of liberty for immigration-related reasons has been the exception, rather than the rule. Indeed, one of the positive findings of this report, as compared to my 2005 research, is that the annual number of persons held in Irish prisons for immigration-related reasons has halved and that they are generally kept for only a few days (compared to the much more extended stays that I had found).

Nonetheless, persons who are neither suspected nor convicted of a criminal offence should *never* be kept in a prison. Ideally, alternatives to detention should be found. This new research restates the standard of the European Committee for the Prevention of Torture (CPT) that if people are deprived of their liberty for immigration-related reasons, they should be kept in specially-designed centres offering material conditions and a regime appropriate to their legal status and staffed by suitably-qualified personnel. Last year, the CPT published a new "factsheet" on immigration-related detention<sup>1</sup>, based on its experience of hundreds of visits throughout the 47 member States of the Council of Europe, setting out a detailed set of standards that should be respected in all immigration detention centres.

The standards of the CPT formed the bedrock of my 2005 research, as they do for this new study because they build, in a practical way, on legal principles found in a wide range of international human rights instruments, including the European Convention on Human Rights, the Council of Europe Committee of Ministers' Twenty Guidelines on Forced Return and relevant United Nations treaties. The normative framework is perfectly clear; the remaining challenge is to ensure that it is fully implemented.

This report makes a much-needed contribution to our current knowledge about immigration-related detention in Ireland, once again highlighting significant gaps between principles and practice. It should be read as a clarion call to civil society organisations, the Irish Human Rights and Equality Commission and agencies of the state to take concerted action to ensure that Ireland's immigration-related detention practices will finally meet its international human rights obligations.

**Mark Kelly** is an international human rights lawyer who has served as the Executive Director of the Irish Council for Civil Liberties, Acting President of the Irish Human Rights Commission, Acting Chair of the Equality Authority and Acting Chief Commissioner of the Irish Human Rights and Equality Commission (IHREC) (Designate) before being appointed as a Commissioner of IHREC by the President of Ireland in November 2014. He is currently Vice-President of the Council of Europe's European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).

## List of Acronyms

Central Statistics Office	<b>CSO</b>
Committee on the Elimination of Racial Discrimination	<b>CERD</b>
European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment	<b>CPT</b>
European Convention on Human Rights	<b>ECHR</b>
European Union Agency for Fundamental Rights	<b>FRA</b>
Garda National Immigration Bureau	<b>GNIB</b>
Human Rights Consultants	<b>HRC</b>
International Protection Office	<b>IPO</b>
Irish Human Rights and Equality Commission	<b>IHREC</b>
Irish Naturalisation and Immigration Service	<b>INIS</b>
Irish Prison Service	<b>IPS</b>
Jesuit Refugee Service	<b>JRS</b>
Office of the Refugee Applications Commissioner	<b>ORAC</b>
United Nations Convention Against Torture	<b>UNCAT</b>
United Nations High Commissioner for Refugees	<b>UNHCR</b>

## Introduction

On 18th July 2017, Paloma Aparezida Silva-Carvalho, a 24-year-old Brazilian woman, was detained at Dublin Airport, while trying to enter the country for a visit. Immigration officers believed that Ms. Aparezida Silva-Carvalho was entering Ireland with the intention to work without a permission and she was consequently refused leave to land.

Ms. Aparezida Silva-Carvalho was previously in Ireland in 2016 when she lived and worked for a family in Galway as an au pair, and she was returning to Ireland to visit this family. Although Brazilians are not required to apply for a visa prior to entering the country for a visit, Ms. Aparezida Silva-Carvalho was refused leave to land and detained at Dublin Airport. She was then transferred to Dóchas women's centre at Mountjoy Prison. Ms. Aparezida Silva-Carvalho spent the night in the Dóchas centre, but was subsequently granted leave to remain in the State for 10 days through a discretionary decision by the Minister for Justice and Equality following significant media attention.

Two years earlier, in July 2015, Walli Ullah Safi, a 21-year-old Afghan national, was arrested following his discovery without identification papers on the side of a motorway in Naas. Mr. Safi was subsequently detained in Cloverhill Prison in Dublin for violating the Immigration Act 2004 in failing to produce identification papers. Walli Ullah Safi had only just arrived in Ireland following a three-month journey from Afghanistan. The final leg of this journey was in a container truck travelling from Calais, France to Ireland. In his court case, Mr. Safi stated he came to Ireland having fled persecution and insecurity in Afghanistan. After less than two weeks in Cloverhill prison, Mr. Safi was violently assaulted during a riot by a prison gang. He was kept captive, had his face slashed and his arm broken. He subsequently applied for asylum and was released.

## Introduction

This report emanates from our interest in immigration detention and border control in Ireland, and our concerns at the lack of transparency and accountability in those two areas. The catalyst for this report was our sense of increasing numbers of people being refused leave to enter the State and a lack of transparency about the reasons for those refusals, and whether or not people being refused were being offered an opportunity to claim asylum in the State. We also were aware that not much information was available on immigration related detention since Mark Kelly's seminal work on the issue published in 2005,<sup>2</sup> and we wished to revisit the issue over a decade later. On the basis of these two interests, we sought funding from St Stephen's Green Trust and in 2015 commissioned a researcher to conduct desk-based research and interviews with detainees, as well as other key stakeholders. Difficulties in attaining the necessary qualitative and quantitative data required to publish our initial findings pushed the timeline back considerably, and we were forced to secure a number of additional interviews between 2015 and 2017 to supplement the initial researcher's work. This report therefore is an examination of immigration related detention since the 2005 research was conducted, as well as a more detailed look at the issue of refusals of leave to land at ports of entry and the issue of transparency and accountability in border management.

Ms. Aparezida Silva-Carvalho<sup>3</sup> and Mr. Safi's<sup>4</sup> experiences detailed overleaf highlight the fundamental inappropriateness of placing immigration detainees in prisons and raise questions about the transparency around immigrant detention in Ireland.

Ireland has faced significant international criticism, most notably from the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in its 2006, 2010 and 2017 reports, in recent years for its treatment of immigration detainees. Unfortunately, despite recommendations made by the United Nations Committee Against Torture (UNCAT), the UN Human Rights Committee and other international human rights bodies, Ireland continues the practice of placing individuals detained for immigration-related purposes who have not been convicted of any crime in penal facilities.

The only legal analysis of immigrant detention in Ireland to date was conducted in 2005 by the Human Rights Consultants, commissioned by the Irish Refugee Council, Immigrant Council of Ireland and the Irish Penal Reform Trust. The purpose of this report is to assess the development, if any, in legal frameworks in relation to immigrant detention in Ireland and their application in the 13 years since that report was published. In this report, detention for immigration purposes is defined as "detention without

a conviction, and usually takes place in order that a further administrative measure can take place (i.e. deportation or expulsion)."<sup>5</sup>

The primary categories of detainees to be considered will be:

- a. People refused permission to land, meaning individuals whose entry into the state is stopped at ports or borders and are detained pending their removal;
- b. People held in detention pending deportation, whose prospective compliance with a deportation order is questionable; and
- c. Protection applicants who are perceived to have contravened specific provisions of immigration and/or protection legislation.

While statistically the number of people detained for immigration related offences in Ireland is relatively low, particularly as compared to other European countries,<sup>6</sup> it is notable that information about this group of people is difficult to access. This points to a lack of transparency and accountability within the immigration detention process.

In a recent investigation by Mary Raftery-funded investigative journalist Maresa Fagan into immigration enforcement in Ireland, she found that between 2008 and 2016, a total of more than 28,000 individuals were refused entry to Ireland, and approximately one third of this group came from Brazil, China, South Africa, Nigeria and Albania.<sup>7</sup> Worryingly, the number of people refused has been steadily increasing every year – according to the Eurostat figures compiled by Fagan, it has doubled between 2013 (1,935) and 2016 (3,950). According to data provided through a Parliamentary Question, in 2016 alone, 4,127 individuals were refused leave to land and 408 individuals were detained in prisons for immigration-related reasons.<sup>8</sup> Of those placed in detention, 22 individuals subsequently sought to apply for asylum.<sup>9</sup>

Some of the primary reasons for why an individual may be refused leave to land include: that there is reason to believe the individual intends to enter the State for purposes other than those they have expressed, that the individual is not in possession of a valid Irish visa and is not exempt from this requirement, that the person concerned is not in possession of a valid passport or other equivalent document, or that the individual intends to travel to the UK and would not otherwise qualify if they had travelled directly to the UK.

By publishing this report, Nasc seeks to assess whether the system and processes in place have developed and improved since 2005. This report builds on the Human

Rights Consultant Report from 2005 and the Jesuit Centre Europe's DEVAS Report on Becoming Vulnerable in Detention (2010), which captured the voices and experiences of nine female detainees at the Dóchas Centre.<sup>10</sup>

This report comes at a critical moment in immigrant detention in Ireland. Ireland is set to open its first immigrant detention centre in 2018 at Dublin Airport,<sup>11</sup> and Ireland is now in the process of opting into the EU Recast Reception Conditions Directive<sup>12</sup> which will obligate Ireland to refrain from placing applicants for international protection in prisons<sup>13</sup>. The report aims to document the current legal frameworks and their application relating to immigration-related detention, and outline the treatment of detainees for immigration related offences. In doing so, this review seeks to encourage improved transparency within the immigrant detention system and see Ireland adhere to fundamental protections and norms in the treatment of detainees.

## Outline of the Report

This report examines domestic legal rules and practice in the light of international human rights standards and relevant EU law, detailing the gaps that exist. The research employs statistical information from the Irish Prison Service (IPS), Irish Naturalisation and Immigration Service (INIS), the Garda National Immigration Bureau (GNIB), the Office of the Refugee Applications Commissioner (ORAC) / the International Protection Office (IPO), the Central Statistics Office (CSO), and other available sources, in addition to interviews with individuals who have experienced the realities of immigration-related detention in Ireland.

The report explores the factors that influence decision-making vis á vis the detention of immigrants including asylum seekers and people facing deportation, documenting best practice, as well as instances of problematic treatment of individuals, where found to exist. The project also examines the role of legal practitioners and makes the case for greater recourse to alternatives to detention in the immigration context.

The report sheds important light on:

- a. International obligations relevant to immigration related detention in Ireland, including non-custodial alternatives,
- b. The current policy and practice of detaining migrants who are refused permission to land, in prisons, Garda Stations and airports.

The research makes several recommendations for reform, many of which build upon those outlined in the 2005 HRC

Report, the Irish contribution to the 2010 DEVAS Report, the regular reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and recommendations made in the wider European context by the European Union Agency for Fundamental Rights (FRA) 2014 Report on Fundamental Rights at Airports and the Odysseus Network's 2015 publication Alternatives to Immigration and Asylum Detention in the EU.

Nasc's recommendations are aimed at strengthening the rights and procedural safeguards in the immigration detention context and call for the development of non-custodial procedural safeguards in this jurisdiction.

Despite the apparent low numbers of people detained for immigration reasons in recent years, particularly in prisons, it is nonetheless hoped that this report will have a significant domestic impact, and is envisioned as a useful resource for other NGOs with an interest in the area, as well as policy makers, legal practitioners and academics.

## Research Methodology

The research for this report was interdisciplinary and combined both quantitative and qualitative methods. The quantitative research was primarily desk research, and included an examination of relevant research and domestic and international legislation and case law, as well as collection of statistics on numbers of people detained from a variety of sources, which are detailed below.

The qualitative research consisted of semi-structured interviews with key stakeholders in the immigration and asylum field, as well as interviews with male immigration detainees at Cloverhill prison, Dublin. The evidence from the interviews is discussed in detail in Chapters Four and Five.

### Detainee Interviews

A total of ten detainees were interviewed at Cloverhill prison, between the 7<sup>th</sup> of May 2015 and the 13<sup>th</sup> of July 2015.

The nationalities of the 10 detainees interviewed at Cloverhill were as follows: Brazilian, Democratic Republic of Congo, Hong Kong (x 2), Mongolia, Pakistan, Romanian<sup>14</sup>, Somali, Sudan and Syria. All names have been changed to protect their identities. Accord Translations provided interpretation services in Mongolian, Cantonese and Romanian/Russian languages. Three additional interviews were carried out with former detainees from Somalia and Sierra Leone and a final interview was carried out with an individual detained at Cork Airport

It was originally envisaged that interviews would be

conducted with 10–15 detainees, including female detainees at the Dóchas Centre. Access to immigration detainees at Cloverhill prison, the Dóchas Centre and Cork prison was granted by the Prison Research Ethics Committee of the IPS in April 2015. The researcher attended these three prisons in early May of 2015 to discuss the project with senior staff and to gain insights into the prisons' experience of immigration related detention. Owing to the low numbers of immigration detainees across the Irish prison estate on any given day<sup>15</sup>, and the fact that they are generally removed quickly<sup>16</sup> if detained on foot of a refusal of leave to land, it unfortunately did not prove possible to arrange interviews with detainees in Dóchas Centre.

To supplement these detainee interviews, four additional interviews were carried out in late 2016 and 2017 with Nasc clients who had experienced detention. One further interview was carried out with an individual detained at Cork Airport. Ms. Karin Wieland, member of the family for whom Ms. Aparezida Silva-Carvalho, the Brazilian woman detained in July 2017 and referenced at the beginning of this chapter, worked for as an au pair. This report relies closely on the detainee survey formulated by Mark Kelly in his 2005 study on immigration-related detention as the basis for designing the interview questions used in this research.<sup>17</sup> The benefits of adopting the HRC questions were that they had been tried and tested with the relevant population and had previously passed the IPS Research Ethics Committee.

### Key Stakeholder Interviews

Interviews were conducted with key stakeholders in the Irish Office of the United Nations High Commissioner for Refugees (UNHCR) and the Irish Human Rights and Equality Commission (IHREC), officials in INIS and ORAC, and lawyers specialising in immigration and asylum law. Interviews were also conducted with representatives of the Immigrant Council of Ireland and the Children's Rights Alliance. The Inspector of Prisons, the Governors of Cloverhill Prison and the Dóchas Centre and an Assistant Chief Officer at Cork Prison were also interviewed for this report. Unfortunately it was not possible to arrange an interview with representatives of GNIB.

NGOs with an interest and experience in the area, including the Irish Refugee Council, Spirasi, Doras Luimni, the Jesuit Refugee Service, the Immigrant Council of Ireland, and Anti-Deportation Ireland were also consulted during the research process.

## Chapter Summary

In examining immigration-related detention in Ireland, the following chapters assess the legal framework for immigrant detention and developments since the last detailed report on the detention of immigrants in Ireland in 2005. Chapter 2, "Legal and Human Rights Frameworks for Immigration Detention and Border Control" assesses the international and domestic legal frameworks of immigration-related detention. Chapter 3 presents an overview of the most recent statistics on immigration-related detention. Chapters 4 and 5 detail "Border Control in Policy and Practice" and "Immigration Detention in Policy in Practice", utilising the data from interviews with detainees and key stakeholders to address how the legal frameworks are applied in practice. Chapter 5, "Concluding Observations and Recommendations" makes key recommendations on approaches to immigration related detention and border control in Ireland moving forward.

## Chapter Endnotes

- 1 Available for download at: <https://www.coe.int/en/web/cpt/standards#immigration>
- 2 Kelly, Mark. Immigration-related detention in Ireland, Research report for the IRC, IPRT and ICI. Human Rights Consultants. November 2005. <https://idcoalition.org/wp-content/uploads/2009/06/irc-detention-report-2005.pdf>. Nasc wishes to thank Mark Kelly for his kind permission to use his 2005 HRC detainee survey as the basis for the research tool used to interview detainees for this research.
- 3 Minihan, Mary. Detention of Brazilian woman 'unusual' and 'draconian'. The Irish Times, 20 July 2017. <https://www.irishtimes.com/news/politics/detention-of-brazilian-woman-unusual-and-draconian-1.3161490>; Also Cillian Sherlock, 'It was awful' – young au pair strip-searched and jailed after arrest at Dublin Airport, Irish Independent, 20 July 2017: <https://www.independent.ie/irish-news/it-was-awful-young-au-pair-stripsearched-and-jailed-after-arrest-at-dublin-airport-35951490.html>.
- 4 Maeve Sheehan, A migrant's trek to Ireland via Calais, Irish Independent, 9 August 2015: <https://www.independent.ie/irish-news/a-migrants-trek-to-ireland-via-calais-31437355.html>; Afghan man found on roadside is given bail, Irish Independent, 7 August 2015: <https://www.independent.ie/irish-news/courts/afghan-man-found-on-roadside-is-given-bail-31433720.html>
- 5 Kelly, Mark. Op. cit. 2005, p. 2.
- 6 Global Detention Project: Europe. <https://www.globaldetention-project.org/regions-subregions/europe>.
- 7 Fagan, Maresa. 'More than 28,000 non-EU citizens refused entry since 2008'. Irish Times. 12 February 2018. <https://www.irishtimes.com/news/social-affairs/more-than-28-000-non-eu-citizens-refused-entry-since-2008-1.3388429>, accessed 23rd February, 2018.
- 8 Fitzgerald, Frances in response to Deputy Thomas Pringle. Parliamentary Questions Nos. 73–76. Dail Eireann Debate. Vol. 940, No. 1. 22nd February 2017. <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2017022200074?opendocument#WRF00100>, accessed 23rd February, 2018. Worryingly, the figures provided by the Department of Justice for 2016 differ from the Eurostat figures (which are given to Eurostat by the Irish Government). We discuss the issues with data collection and monitoring in more detail in Chapter 3.
- 9 Office of the Refugee Applications Commissioner. 'Summary Report of Key Developments in 2016.' 2017. p.6. [http://www.orac.ie/website/orac/oracwebsite.nsf/page/AJNR-ANKJS815175322-en/\\$-File/Summary%20Report%20of%20Key%20Developments%20in%202016.pdf](http://www.orac.ie/website/orac/oracwebsite.nsf/page/AJNR-ANKJS815175322-en/$-File/Summary%20Report%20of%20Key%20Developments%20in%202016.pdf),
- 10 Kelly, Mark. Op. cit. 2005; Jesuit Refugee Centre, Europe. 'Becoming Vulnerable in Detention. Civil Society Report on the Detention of Vulnerable Asylum Seekers and Irregular Migrants in the European Union.' 2010. p. 238. <http://www.jrsromania.org/fisiere/JRS%20Europe%20Becoming%20Vulnerable%20In%20Detention%20June%202010.pdf>. Accessed 23rd February, 2018.
- 11 Minihan, Mary and Hennigan, Tom. 'Work on Dublin Airport Immigration Detention Centre to Begin.' The Irish Times. 28th July 2017. <https://www.irishtimes.com/news/politics/work-on-dublin-airport-immigration-detention-centre-to-begin-1.3169079>, accessed 23rd February, 2018.
- 12 Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), 29 June 2013, OJ L 180/96 –105/32; 29.6.2013, 2013/33/EU (hereinafter Recast Reception Conditions Directive.)
- 13 Article 10 of the Recast Reception Conditions Directive states that the, "[D]etention of applicants shall take place, as a rule, in specialised detention facilities." For further discussion of the detention provisions contained in the Recast Reception Conditions Directive, please see chapter 2.
- 14 This person stated he was Ukrainian-born Romanian, travelling on a Romanian passport who did not speak Romanian.
- 15 In 2015 the daily average number of detainees across the prison estate was 4. Irish Prison Service Annual Report 2015, at p. 23, available at [http://www.irishprisons.ie/wp-content/uploads/documents\\_pdf/12232-Irish-Prison-Service-AnnualReport2015-v7-2.pdf](http://www.irishprisons.ie/wp-content/uploads/documents_pdf/12232-Irish-Prison-Service-AnnualReport2015-v7-2.pdf). This represents a decrease from 2014 when the daily average number of detainees was 6 [http://www.irish-prisons.ie/images/pdf/ar2014\\_english.pdf](http://www.irish-prisons.ie/images/pdf/ar2014_english.pdf) at p. 19. Usually within 2–3 days according to correspondence with Prison Service authorities.
- 17 See Kelly, M. (2005), p. 64.

# Chapter 2

## Legal and International Human Rights Frameworks for Immigration Detention

## Introduction

Immigration-related detention is governed by both domestic and international law. A detailed and thoughtful analysis of the applicable provisions was presented by Kelly in his 2005 report<sup>1</sup>. This chapter will examine changes in the legal system since 2005 and their effect on the area of immigration-related detention, most notably the International Protection Act 2015 and the Recast Reception Conditions Directive. Although at time of writing, the Recast Reception Conditions Directive is not yet in force, the Minister for Justice and Equality has indicated that it is likely to be in force by June 2018.<sup>2</sup> Thus, the domestic legislation in the detention of international protection applicants will be considered against the requirements of the Recast Reception Conditions Directive.

This chapter will first outline the international human rights standards pertaining broadly to immigration-related detention as well as providing a brief overview of international bodies' and organisations' criticisms of Ireland's system. The latter part of the chapter will examine relevant domestic legislation and the provisions of the Recast Reception Conditions Directive and how that will impact on the detention of applicants for international protection. The detention of minors will then be examined separately.

## International Law

The rights protected by the European Convention on Human Rights (ECHR) are afforded to non-nationals who are on the territory or under the jurisdiction of a state party. In addition, provisions of the revised European Social Charter (ESC) may in some cases apply to all migrants. Principles of equality and non-discrimination are universally recognised in international and European legal instruments with unacceptable grounds for discrimination being race, colour, sex, sexual orientation, language, religion, political and other opinion, national or social origin, property, birth or other status<sup>3</sup> including while entering a member state. Third country nationals deprived of their liberty for immigration purposes "should be guaranteed adequate conditions and access to health and adequate food".<sup>4</sup> It should be noted that the right to a fair trial guaranteed in Article 6.1 ECHR does not apply to proceedings relating to the entry, stay and deportation of aliens.<sup>5</sup>

Article 5.1 of the ECHR provides for "the right to liberty and security of person" and states that a person shall not be deprived of their liberty save in certain circumstances and "in accordance with a procedure prescribed by law". Article 5.1(f) ECHR provides for "...the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into a country or of a person against

whom action is being taken with a view to deportation or extradition".

The ECHR does not require the detention of migrants to be a measure of last resort and the European Court of Human Rights (ECtHR) has accepted that an asylum seeker may be detained in the short-term for the purposes of efficiently processing their case.<sup>6</sup>

Of note is the EU Returns Directive,<sup>7</sup> wherein Article 17 provides rules relating to detention conditions for all third-country nationals detained. It states that detention "shall take place as a rule" in specialised detention facilities. Where this proves impossible and prison accommodation is used, relevant detainees shall be kept separate from ordinary prisoners. The Returns Directive protects the rights of detainees to contact lawyers, NGOs, family members and consular authorities, to obtain medical attention and to be provided with information relating to their rights. While Ireland has not signed up to the Returns Directive, it stands as an informative example of what should be considered a minimum standard.

Similar requirements are outlined in the Recast Reception Conditions Directive, however, as it pertains only to the detention of international protection applicants, it is discussed later in this chapter.

### Criticism of Ireland's detention facilities

Ireland's detention facilities and its practice of detaining immigration-related detainees in prisons and Garda Stations has long received international criticism. Some of the most striking criticism has come from the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). The CPT has consistently expressed its disapproval of the Irish practice of placing immigration detainees in prisons and called on Ireland to review arrangements for accommodating immigration detainees. In its 2015 and 2006 reports on Ireland, it stated that,

"[A] prison is by definition not a suitable place in which to detain someone who is neither suspected nor convicted of a criminal offence. In those cases where it is deemed necessary to deprive persons of their liberty for an extended period under aliens legislation, 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"<sup>8</sup>.

Similar sentiments were expressed in the Committee's 2017 report<sup>9</sup>.

In 2008 the UN Human Rights Committee (HRC) report on Ireland's compliance with the International Covenant on Civil and Political Rights (ICCPR) stated that it was "concerned about the placement of persons detained for immigration-related reasons in ordinary prison facilities together with convicted and remand prisoners and about their subjection to prison rules. The HRC recommended that alternative forms of accommodation be prioritised.

Similar calls were made by the Committee on the Elimination of Racial Discrimination (CERD) in 2005 and by the UN Committee against Torture (CAT) in 2011 and 2017.

In its Immigration Detention Factsheet<sup>10</sup>, the CPT has given general guidance on the type of centre that might be deemed appropriate for immigration purposes, noting that care should be taken in the design and layout of the premises to avoid as far as possible any impression of a carceral environment. The CPT also recommends that a wide range of activities should be available to detainees including language classes, cookery classes, outdoor exercise, radio/television and newspapers/magazines, as well as other appropriate means of recreation (e.g. board games, table tennis). The CPT recognises that staff should be carefully selected and trained and should have relevant language skills, interpersonal communication and cultural sensitivity skills. The CPT states that it is important that staff be taught to recognise possible symptoms of stress reactions displayed by detained persons (whether post-traumatic or induced by socio-cultural changes) and to take appropriate action.

As will be detailed further later in this chapter, the statutory lists of prescribed places for detention in Ireland remain largely prisons and Garda stations. Garda stations and the authorised prisons possess few of the features identified by the CPT as appropriate for accommodating immigration detainees, nor do Gardai or Prison Officers necessarily possess the desired attributes, skill sets, or indeed training to holistically attend to the needs that may present.

The UN High Commissioner for Refugees, Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention (UNHCR 2012 Detention Guidelines) list and discuss possible alternatives, including the use of sureties and bail bonds, community supervision arrangements, reporting conditions and directed residence.

Ireland responded to the most recent CPT report and its criticisms of the current position by stating:

"Plans are being progressed for the provision of a dedicated immigration detention facility at Dublin Airport – the

main point of entry to the State which is expected to be in place in 2016."<sup>11</sup>

Prior to this, in response to a parliamentary question on the provision of a dedicated immigration detention facility in July 2016, the Minister for Justice and Equality stated:

"Plans are being progressed for the provision of a dedicated immigration detention facility at Dublin Airport...This redevelopment will be completed as soon as possible within the next 12 months and will replace the existing Garda Station at the airport, provide office accommodation for Gardai and civilians as well as providing a modern detention facility."<sup>12</sup>

The Minister for Justice and Equality provided a further update in February 2017:

"I am informed by An Garda Síochána that the proposal for the redevelopment of Transair House at Dublin Airport to meet the requirements of both a Garda station and a facility for Garda National Immigration Bureau (GNIB) have been agreed between Garda management and the Office of Public Works (OPW). The OPW is currently engaged with the Dublin Airport Authority in relation to the planning application for these works with a view to work commencing as soon as possible"<sup>13</sup>

Thus, while Ireland makes plans to construct a dedicated detention facility, it is hoped that the international criticism and recommendations put forward by the CPT are taken into account to ensure full compliance with international laws and best practice.

## Domestic legal provisions

The law relating to administrative detention in Ireland can be found across a number of statutes. Immigration and Protection Law generally in Ireland developed in an ad hoc, piecemeal fashion and the relevant provisions are complex and interwoven across a number of statutes, mainly: The International Protection Act 2015 (the 2015 Act), the Immigration Act 1999 (as amended) (the 1999 Act), the Illegal Immigrants (Trafficking) Act 2000 (as amended) (the 2000 Act), The Immigration Act 2003 (as amended)

(the 2003 Act), and the Immigration Act 2004 (as amended) (the 2004 Act), as well as subsequent amendments and regulations. The most notable change in the legal framework covering immigration-related detention since 2005 is the arrival of the 2015 Act which repealed and replaced the detention provisions for asylum seekers contained in the Refugee Act, 1996 (as amended) (the 1996 Act).

The legal basis for the detention with the corresponding rights of detainees and the provision for their detention will be considered under the broad headings below:

- (a) Detention following refusal of permission to land
- (b) Detention pending deportation
- (c) Detention of protection applicants

### Detention following refusal of permission to land in the state

Upon arrival in the state all non-nationals are required to present to an immigration officer and apply for permission to land by virtue of Section 4(2) of the 2004 Act. Rights only accrue, and a minimal degree of oversight is triggered, when an individual is detained following a refusal of permission to land. Section 4(3) of the 2004 Act (as amended) sets out extensive grounds, both subjective and objective, for refusing an individual permission to land, namely that a non-national:

- (a) is not in a position to support himself or herself and any accompanying dependents;
- (b) intends to take up employment in the State but is not in possession of a valid employment permit;
- (c) suffers from any one of the following conditions:
  1. diseases subject to International Health Regulations adopted by the World Health Organisation;
  2. tuberculosis in an active state or showing a tendency to develop syphilis;
  3. other infections or contagious parasitic diseases in respect of which specific provisions are in operation to prevent the spread of such diseases from abroad;
  4. drug addiction;
  5. profound mental disturbance, i.e., manifest conditions of psychotic disturbance with agitation, delirium, hallucinations or confusion.
- (d) has been convicted (whether in the State or elsewhere) of an offence that may be punishable under the law of the place of conviction by imprisonment for a period of one year or by a more severe penalty;
- (e) is not exempt from the requirement to have an Irish visa, and is not the holder of a valid Irish visa;

- (f) is the subject of-
  1. a deportation order,
  2. an exclusion order, or
  3. a determination by the Minister that it is conducive to the public good that he or she remain outside the State;
- (g) is not in possession of a valid passport or other equivalent document, issued by or on behalf of an authority recognised by the Government, which establishes his or her identity and nationality;
- (h)
  1. intends to travel (whether immediately or not) to Great Britain or Northern Ireland, and
  2. would not qualify for admission to Great Britain or Northern Ireland if he or she arrived there from a place other than in the State;
- (i) having arrived in the State in the course of employment as a seaman, has remained in the State without the leave of an immigration officer after the departure of the ship in which he or she so arrived;
- (j) is a person whose entry into, or presence in, the State could pose a threat to national security or be contrary to public policy;
- (k) is a person in respect of whom there is a reason to believe that he or she intends to enter the State for purposes other than those which he or she has expressed to the immigration officer;
- (l) is a person to whom leave to enter or leave to remain in a territory (other than the State) of the Common Travel Area (within the meaning of the *International Protection Act*) applied at any time during the period of 12 months immediately preceding his or her application, in accordance with subsection (2), for permission,
  - (i) travelled to the State from any such territory, and
  - (ii) entered the State for the purpose of extending his or her stay in the said Common Travel Area regardless of whether or not the person intends to make an application for international protection.

Once permission to land has been refused for any of the above stated reasons, a person can be arrested by a member of the Garda Síochána or immigration officer and detained by virtue of Section 5(2) of the 2003 Act. There is no requirement under this section to seek the approval of the Court prior to detention. The decision to detain rests solely with an immigration officer or a member of the Garda Síochána. The stated purpose of detention under this section is to effect the removal of the person "as soon as practicable"<sup>14</sup> from the state. Section 5(3)(a) provides that persons cannot be detained for a period in excess of 8 weeks in aggregate.

Section 5(1) of the 2003 Act also provides for the detention for the purpose of removal for non-nationals whom an immigration officer or a member of then Garda Síochána, with reasonable cause suspects has been unlawfully in the state for a continuous period of less than three months. Again, here there is no requirement to seek the prior approval of the courts and the period is capped at 8 weeks in aggregate. These provisions do not apply to those aged under 18.<sup>15</sup> The 8 week limit on detention does not include any period spent on remand or any periods spent awaiting the final outcome of any action brought to challenge the lawfulness of their detention. As Kelly notes, this means that those seeking to challenge the validity of their detention could "in principle [be] lawfully detained for periods considerably in excess of 8 weeks"<sup>16</sup>. It must also be noted that the 2004 Act also introduces two criminal offences, which are: failure to present to an immigration officer<sup>17</sup> and landing at an unapproved port<sup>18</sup>, both of which are punishable upon conviction of a term not exceeding 12 months. Protection applicants are not explicitly exempt from these provisions although in practice it would seem that they are not enforced for this group<sup>19</sup>.

### Places of detention

If a person over 18 years of age is refused permission to land and is detained under Section 5(2) of 2003 Act, he or she may be held in any authorised place of detention under the Immigration Act, 2003 (Removal Places of Detention) Regulations, 2005. This includes "every Garda Síochána station" in addition to Castlerea Prison, Cloverhill Prison, Cork Prison, Limerick Prison, The Midlands Prison, Mountjoy Prison, Saint Patrick's Institution, The Training Unit- Glengarriff Parade and Wheatfield Prison.

The courts have found that if a person is held in a place that is not a prescribed place of detention as described in the legislation that detention and any subsequent detention will be held unlawful. In the case of *Ni v. Garda Commissioner* [2013] IEHC 134 the High Court, relying on the judgment of the Supreme Court in *Kadri v. Governor of Cloverhill Prison* [2012] IESC 27, held that legislation that gave powers to restrict personal liberty required a strict interpretation and therefore airport facilities were not prescribed places for the purpose of detention under Section 5(2)(a) of the Immigration Act 2003. Mr. Ni, on his arrival in Ireland from Paris, was refused leave to land. He was detained in Dublin Airport for five hours to facilitate his removal on a flight later that day to Paris. When members of the Garda Síochána attempted to escort him on board the flight to Paris, Mr. Ni objected so strongly to his removal that the captain of the plane refused to have him on board. Mr. Ni was then taken by Gardaí to Clontarf Garda Station, an approved place of detention. The court found that the original detention at Dublin Airport was unlawful and

by continuation of the original unlawful detention, the subsequent detention at Clontarf Garda Station was also then determined to be unlawful.

Two subsequent High Court judgments have clarified the scope of the decision in of *Ni v. Garda Commissioner* and established that detention in a place that is not a prescribed place of detention, may be permitted if there is no intention to detain an individual for an extended period of time. In *Kristo v. Governor of Cloverhill Prison* [2013] IEHC 218, Mr. Kristo, an Albanian national, arrived in Ireland with a travel document and was refused leave to land. He was detained at Dublin Airport for over two hours while authorities sought to make arrangements to obtain his passport. MacEochaidh J distinguished Mr. Kristo's case from the judgment in *Ni*. In *Ni*, "there was no intention at any point until the disturbance occurred to remove him from the airport and to bring him to a prescribed place under warrant of detention... In this case, contrastingly, the purpose of the applicant's presence in Dublin Airport following his arrest was related exclusively to assisting the applicant with making arrangements to obtain his passport."

In *Ganyiu v. Governor of Cloverhill Prison* [2013] IEHC 511 Mr. Ganyiu, a Nigerian national who had been issued with a deportation order in Ireland, travelled to the UK where he was arrested, detained and then returned to Ireland under the provisions of the Dublin Regulations. Mr. Ganyiu was arrested and refused leave to land on his arrival in Ireland, however, several hours elapsed before he was taken from the airport to Cloverhill Prison. As a result of a series of unforeseen contingencies, there was no vehicle available until 1.30pm to transport Mr. Ganyiu. Hogan J distinguished from his own judgment in *Ni*, holding that there was never any intention to detain Mr. Ganyiu at Terminal 2 for any extended period of time and "Mr. Ganyiu would have been transported much sooner to Cloverhill Prison but for events amounting to *force majeure* which prevented the escort unit arriving sooner."

A further exception to the requirement that detainees should only be held in authorised places of detention was carved out by the 2015 Act. Section 5(2)(a)(ii) of the 2003 Act was inserted by Section 80 of the 2015 Act and authorises detention for a period or periods each not exceeding 12 hours in a vehicle for the purposes of transporting a person to a port to facilitate removal, or within the port of removal itself.

### Review of detention

A person refused permission to land may apply within 14 days of the refusal for a judicial review of the decision under Section 5 of the Illegal Immigrants (Trafficking) Act 2000, which permits the immigration officer's decision to be reviewed by the courts.

Detention may additionally be challenged by way of *habeas corpus* application to the High Court under Article 40.4 of *Bunreacht na hEireann*.

Under Section 5(4) of the 2003 Act, where a challenge to the validity of removal from the State is being heard, the court hearing it, may, on application determine whether the person shall continue to be detained or shall be released. Any order for release may be subject to such conditions as are considered appropriate.

As regards the lawfulness of immigration-related detention under Section 5(2) of the 2003 Act, Article 5(1)(f) of the ECHR expressly permits such detention, stating that a State may carry out “the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or a person against whom action is being taken with a view to deportation or extradition”. Such detention must however be accompanied by appropriate safeguards, including the right for a detained person “to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful”<sup>20</sup>.

In 2005, Kelly observed that under Irish law detainees have a right to review their detention in theory, but that people detained under Section 5(2) are not told that they have the right to bring such proceedings. The failure to communicate this vital information is likely to render the right ineffective in practice<sup>21</sup>.

### **Rights of detainees**

The next section examines the rights of detainees including the right not to be held incommunicado. Immigration legislation is generally silent on the rights of those detained for immigration-related purposes. As detailed below, generally rights are triggered at the point at which the detainee is transferred to prison.

#### **Right not to be held incommunicado**

Under Section 5(2) of the 2003 Act, detainees are not expressly afforded a right to notify a person of their choice of their situation. If a person detained under Section 5(2) of the 2003 Act is transferred to a prison, their treatment is regulated by the Prison Rules, 2007<sup>22</sup>. Rule 5(1) states that any such person is entitled to be “facilitated in informing, as soon as is practicable, either a family member or such other person as he or she may nominate of his or her committal, readmission or transfer and the name and address of the prison in which he or she is, for the time being, being held.”

Furthermore, Rule 16(1) states that foreign nationals shall be provided with the right to contact a consul. Rule 16(1) also provides asylum

seekers with the means to contact the United Nations High Commissioner for Refugees (UNHCR) or the Representative in Ireland of the High Commissioner, and national or international authorities and organisations whose principal object is to serve the interests of refugees or stateless persons or to protect the civil and human rights of such persons.

#### **Right to a lawyer**

People detained for immigration reasons under Section 5(2) of the 2003 Act do not have immediate right of access to legal advice. However, once transported to a prison, immigration detainees have the same right to legal advice as all other prisoners, as indicated by the Prison Rules, 2007. Rule 16(1) states that a foreign national “shall be informed in particular of his or her entitlements under Rule 38 in relation to legal visits”.

Under Rule 38(1) detainees are entitled to receive a visit from a legal advisor “at any reasonable time for the purposes of consulting in relation to any matter of a legal nature in respect of which the prisoner has a direct interest”.

Rule 38(3) states that a prisoner may “at the discretion of the Governor receive a visit at any reasonable time from a legal adviser or from any other person approved of by that legal adviser who is assisting in making preparations on behalf of a party to proceedings before the courts whether criminal or civil in nature.”

#### **Right of access to information**

The CPT has stated that “immigration detainees should be systematically provided with a document explaining the procedure applicable to them and setting out their rights. This document should be available in the languages most commonly spoken by those concerned”<sup>23</sup>.

Under Section 4 (4) of the 2004 Act, where a non-national is refused permission to land under Section 4 (3), that person “shall as soon as may be inform the non-national in writing of the grounds for the refusal”. The notice is produced in English. An interpreter may be obtained to translate if necessary.

Under Rule 13 of the Prison Rules, 2007, upon admission to prison all prisoners should “be given an explanatory booklet outlining his or her entitlements, obligations, and privileges” under the rule.

Rule 14 provides that the Governor of the prison shall “as soon as may be after the admission of a prisoner on

committal to the prison concerned, meet that prisoner, and satisfy himself or herself that the prisoner has been informed of and understands, his or her obligations, entitlements and privileges under these rules, and shall further ensure that details of any matters of significance to which the prisoner may draw his or her attention are recorded”.

#### **Right of access to medical care**

No express provision exists guaranteeing access to medical care for non-nationals detained following refusal of permission to land in the state.

Rule 11(1) of the Prison Rules, 2007 provides that every prisoner, including immigration detainees refused permission to land, will be examined by a doctor on the day of admission to the prison. Rule 11(2) provides that if a doctor is not available, a staff nurse will provide a preliminary medical screening, followed by a full examination on the first scheduled visit of the prison doctor.

Rule 33(1) provides that every prisoner is entitled to “the provision of healthcare of a diagnostic, preventative, curative and rehabilitative nature...that is, at least, of the same or a similar standard as that available to persons outside prison who are holders of a medical card”.

### **Detention pending removal**

Sections 3 (1)(A) and 5 (1) of the Immigration Act 1999 provide for the detention of persons subject to deportation orders. Under section 3 (1)(A), a person the subject of a deportation order may be detained “for the purpose of ensuring his or her deportation from the state”. Section 5(1) of the 1999 Act was inserted by section 78 of the 2015 Act and provides that:

Where an immigration officer or a member of the Garda Síochána, with reasonable cause suspects that a person against whom a deportation order is in force–

- (a) has failed to leave the State within the time specified in the order,
- (b) has failed to comply with any other provision of the order or with a requirement in a notice under section 3(3)(b)(ii)<sup>24</sup>,
- (c) intends to leave the state and enter another state without lawful authority,
- (d) has destroyed his or her identity documents or is in possession of forged identity documents, or
- (e) intends to avoid removal from the State,

the officer or member may arrest the person without warrant, and a person so arrested may be taken to a place referred to in subsection (3) and detained in the place in accordance with that subsection.

Under Section 5(8)(a) of the 1999 Act, detention of a person under Section 5 is limited to a period or periods of 8 weeks in aggregate.

The Irish courts have continuously held that there must be a concluded intention to deport before there can be valid detention under Section 5<sup>25</sup>, and that it is an abuse of power to detain where it is clear that deportation cannot be carried out within 8 weeks<sup>26</sup>.

Section 5(8)(b) states that this 8 week period shall not include any time during which the detainee is remanded in custody pending a criminal trial or serving a sentence of imprisonment, time in a vehicle in transit to a port for the purpose of deportation, or any time during which proceedings challenging the deportation order are in being.

Once the 8 week threshold has been reached, Section 5(9) of the 1999 Act provides that a person arrested and detained under these provisions may only continue to be detained with the authorisation of a District Court judge, a possibility introduced by the amendments made by the 2015 Act. It is notable that the legislation does not provide for an upper limit as to the length of time a person may be detained once the detention has been authorised by the District Court.

The provisions in the 1999 Act relating to detention do not apply to people under the age of 18<sup>27</sup>.

### **Places of detention**

Individuals detained pending deportation may be held in any authorised place of detention under the Immigration Act, 1999 (Deportation) Regulations, 2005. This includes every Garda Síochána station, Castlerea Prison, Cloverhill Prison, Cork Prison, Limerick Prison, the Midlands Prison, Mountjoy Prison, Saint Patrick’s Institution, the Training Unit and Wheatfield Prison.

Section 5 of the 1999 Act was amended by Section 78 of the 2015 Act. Under Section 5(3), lawful detention extends to any vehicle for the purposes of transporting a detainee to a port for the purposes of executing their deportation, and the port itself. Such detention should not exceed 12 hours.

Furthermore, under Section 5(4) a person detained for the purpose of deportation may be placed on a vehicle which is about to leave the State and deemed to be in lawful custody whilst so detained and until the vehicle leaves the State.

### **Review of detention**

A detainee may bring proceedings to challenge the validity of their deportation. Section 5(7) of the 1999 Act states that where such proceedings are underway, “the court

hearing those proceedings or any appeal therefrom may, on application to it, determine whether the person shall continue to be detained or shall be released”, subject to any conditions it considers appropriate.

Individuals detained pending deportation may challenge the validity of their detention by way of *habeas corpus* application to the High Court under Article 40.4 of *Bunreacht na hEireann*.

Similarly to detention following refusal of permission to land, the lawfulness of immigration-related detention under the 1999 Act, is expressly permitted by Article 5.1(f) of the ECHR which states that a State may carry out “the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or a person against whom action is being taken with a view to deportation or extradition”. Again, such detention must be accompanied by appropriate safeguards, including the right for a detained person “to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful”<sup>28</sup>.

In 2005, Kelly criticised the lack of information available to detainees and suggested that this may render the right ineffective<sup>29</sup>. Little has changed in the intervening years.

### **Rights of detainees**

#### **Right not to be held incommunicado**

Those detained under Section 5 of the 1999 Act do not have an explicit right to notify a person of their choice of their detention.

Detainees are generally transferred promptly to an authorised prison, at which point the Prison Rules, 2007 apply and permit communication.

Where a person is to be detained under Section 5 of the 1999 Act for longer than a few hours, our research suggests that, in practice, he or she will generally be transferred quickly to one of the authorised prisons. At this point, under Rule 5(1) a detainee will have a right to contact a person of their choice as well as the right to contact their consul.

#### **Right to a lawyer**

While people detained under Section 5 have no express right of access to a lawyer, the courts have held that there is a constitutional presumption that a person detained under the Act has the right to obtain legal advice on arrest<sup>30</sup>.

Additionally, once a detainee is situated in a prescribed prison, Rules 16 and 38 of the Prison Rules, 2007 will apply.

#### **Right of access to information**

Under section 3(3)(a) of the 1999 Act, the only written notification issued to people detained pending deportation are the letters they are sent from the Minister for Justice and Equality informing them of the Minister's intention to deport them, and any subsequent confirmation by the Minister of the decision to deport under Section 3(3)(b) of the same Act. Where “necessary and possible, the person shall be given a copy of the notification in a language that he or she understands” in respect of both written notifications.

#### **Right of access to medical care**

The 1999 Act does not explicitly state that people detained pending deportation have access to medical treatment.

If a detainee is held in a prescribed prison, Rules 11 and 33 of the Prison Rules, 2007 will apply.

### **Detention of protection applicants**

The UNHCR 2012 Detention Guidelines specify that conditions of detention of asylum seekers must be humane and dignified, and the special circumstances of individuals must be taken into account<sup>31</sup>.

In the following examination of domestic legislation, the domestic legislation will be referenced against these standards where relevant. The detention of protection applicants is currently regulated by Section 20 of the 2015 Act. The 2015 Act replaced the 1996 Act when it was commenced on 31<sup>st</sup> December 2016. Any variations or changes apprehended in the new legal regime will be highlighted and considered here. The provisions of the Recast Reception Conditions Directive (as they relate to the rights of detainees) which Ireland is in the process of opting into will also be considered here.

Under Section 20(1) of the 2015 Act, an immigration officer or a member of the Garda Síochána may arrest an applicant without warrant if that officer or member suspects, with reasonable cause, that the applicant

- (a) poses a threat to public security or public order in the State,
- (b) has committed a serious non-political crime outside the State,
- (c) has not made reasonable efforts to establish his or her identity,
- (d) intends to leave the State and without lawful authority enter another state,
- (e) has acted or intends to act in a manner that would undermine
  - (i) the system for granting persons international protection in the State, or
  - (ii) any arrangement relating to the Common Travel Area,

- or
  - (f) without reasonable excuse
    - (i) has destroyed his or her identity or travel document, or
    - (ii) is or has been in possession of a forged, altered or substituted identity document,
- and an applicant so arrested may be taken to and detained in a prescribed place.

Article 8 of the Recast Reception Conditions Directive establishes the conditions under which an applicant for protection may be detained. An applicant for protection may be detained

- (a) in order to determine or verify his or her identity or nationality,
- (b) in order to determine those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant,
- (c) in order to decide on the applicant's right to enter the territory,
- (d) when he or she is detained subject to a return procedure under the Returns Directive (Ireland is however not a party to the Returns Directive),
- (e) when protection of national security or public order so requires;
- (f) in accordance with Article 28 of the Dublin III Regulations<sup>32</sup>.

Conclusion 44 of the UNHCR Executive Committee (Excom) addresses the detention of asylum seekers and states that, as a general rule, asylum-seekers should not be detained except 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.<sup>33</sup>

#### **Power to arrest without warrant**

Section 20(1) of the 2015 Act represents a very significant expansion of the powers of detention possessed by the Irish authorities in the immigration sphere. The Irish Refugee Council (IRC) stated in their recommendations on the International Protection Bill, 2015 that, “The power to arrest without warrant is only given by An Garda Síochána in a number of limited circumstances, including where a person is suspected of having committed an arrestable offence that carries a penalty of five years or more or in the case of suspected drinking and driving under the Road Traffic Acts. Section 20(1) as currently formulated in the Bill would put certain immigration related offences on a par with those which IRC considers unacceptable.”<sup>34</sup>

#### **Substituted identity document**

Prior to the entry into law of the 2015 Act, the relevant provisions referred to forged or altered documents. Whilst Section 20(18) offers a definition of a substituted identity document, whether or not a document is substituted is a highly subjective decision with no oversight, and one which confers wide discretionary powers on immigration officers.

It should be noted that the UNHCR 2012 Detention Guidelines caution that “[A]sylum-seekers who arrive without documentation because they are unable to obtain any in their country of origin should not be detained solely for that reason. Rather, what needs to be assessed is whether the asylum-seeker has a plausible explanation for the absence or destruction of documentation or the possession of false documentation, whether he or she had an intention to mislead the authorities, or whether he or she refuses to cooperate with the identity verification process.”

#### **Extended periods of detention**

Section 20(2) of the 2015 Act provides that any individual detained under Section 20(1) must be brought “as soon as practicable” before a District Court judge. Where the judge is satisfied that Section 20(1) applies in relation to the applicant, they may be detained for a period of 21 days. This represents a further expansion of the powers to detain. Section 9(10)(b) of the 1996 Act permitted only detention for a period of 10 days. Under Section 20(10) if a District Court Judge is satisfied that Section 20(1) applies, the judge may extend the detention by subsequent periods not exceeding 21 days<sup>35</sup>, potentially for an indefinite period. Again, this is a significantly longer than the renewable periods of ten days provided for under the 1996 Act.<sup>36</sup>

This report recommends that the 2015 Act be amended to introduce a defined limit on the number of times that a period of detention may be renewed.

#### **Arrest without warrant for failure to comply with conditions**

Section 20(9) provides that a member of the Garda Síochána may arrest without warrant and detain a person who they believe has failed to comply with a condition of their release imposed by the District Court under 20(3) (b). While the power given to the Garda Síochána to arrest without warrant is new, the 1996 Act gave similar powers of detention to members of the Garda Síochána.

#### **Prioritisation of protection applications**

Under Section 20(17) of the 2015 Act, immigration officers and members of the Garda Síochána are obliged to notify the Minister for Justice and Equality, and if relevant the International Protection Appeals Tribunal, of the detention

or release of a person under Section 20. Moreover, Section 20(18) provides that, when the Commissioner or the Tribunal receives such a notice, steps must be taken to prioritise that person's protection application, ensuring that it is "dealt with as soon as may be".

### Places of detention

The International Protection Act (Places of Detention) Regulations 2016 provides a list of authorised places of detention. These places are all Garda Síochána stations and Castlerea Prison, the Central Mental Hospital, Cloverhill Prison, Cork Prison, Limerick Prison, the Midlands Prison, Mountjoy Prison, Saint Patrick's Institution, the Training Unit at Glengarriff Parade and Wheatfield Place of Detention.

The detention of asylum seekers in prisons, amongst the general prison population, in Ireland is contrary to the UNHCR 2012 Detention Guidelines which state that "[T]he use of prisons, jails, and facilities designed or operated as prisons or jails, should be avoided."

Article 10 of the Recast Reception Conditions Directive provides that detention of protection applications "shall take place, as a rule, in specialised detention facilities. Where a Member State cannot provide accommodation in a specialised detention facility and is obliged to resort to prison accommodation, the detained applicant shall be kept separately from ordinary prisoners..." Once Ireland has successfully completed the opt-in process to the Recast Reception Conditions Directive, Ireland's current practices of detaining international protection applicants in prisons and amongst the general prison population will fall foul of Article 10.

### Review of detention

Like all other people in detention, detained asylum seekers have a right to lodge a *habeas corpus* application under Article 40.4.4 of the Constitution challenging the legality of their detention under the 2015 Act.

Protection Applicants must be brought before a judge as soon as practicable after being detained. They must then be brought before a judge within 21 days of their last appearance for so long as they remain in detention. If the judge is not satisfied that the grounds for detention set out in Section 20(1) apply, the detainee may be released subject to whatever conditions are considered appropriate<sup>37</sup>. However as noted above in an earlier discussion of Section 20(3), there is no upper limit on number of times the period of detention may be renewed which leaves open the prospect of indefinite detention.

If an immigration officer or a member of the Garda Síochána comes to be of opinion that none of the

paragraphs of Section 20(1) apply in relation to the detainee, that detainee must, as soon as practicable, be brought before District Court judge<sup>38</sup>.

Article 9(3) of the Recast Reception Conditions Directive, also contains review protections for detained international protection applicants. The Directive provides that Member States shall provide "for a speedy judicial review of the lawfulness of detention". Article 9(5) states provides for the review of detention at reasonable periods of time when detention is of a prolonged duration, when relevant circumstances arise or when new information becomes available.

### Rights of detainees

#### Right not to be held incommunicado

Section 20 of the 2015 Act and the Prison Rules, 2007 contain legal safeguards relevant to detained asylum seekers. Under Section 20(14) a detained protection applicant has the right to have notification of his or her detention, the place of his or her detention and every change in that place sent to the High Commissioner and to another person reasonably nominated by the detained person for that purpose. Section 20(15) provides that the relevant immigration officer or Garda shall, without delay, inform the person or cause him or her to be informed, in a language that he or she may reasonably be supposed to understand of this right.

Article 10(3) of the Recast Reception Conditions Directive states that "Member States shall ensure that persons representing the United Nations High Commissioner for Refugees (UNHCR) have the possibility to communicate with and visit applicants in conditions that respect privacy."

When detained protection applicants are committed to prison they have the same rights as all other prisoners to contact a third person "as soon as is practicable" under Rule 5(1) as discussed in detail above in relation to people detained under Section 5(2) of the 2003 Act, and enjoy the same visitation rights, access to phone calls and writing letters as remand prisoners under the Prison Rules, 2007. Under Rule 35(3), protection applicants, as unconvicted prisoners, are entitled "to receive one visit per day from relatives or friends of not less than 15 minutes in duration on each of six days of the week, where practicable, but in any event, on not less than on each of three days of the week."

Similarly, Article 10(4) of the Directive states that "Member States shall ensure that family members, legal advisers or counsellors and persons representing relevant nongovernmental organisations recognised by the Member State concerned have the possibility to communicate with and visit applicants in conditions that respect privacy."

#### Right to a lawyer

Under Section 20(14) the right of a detained asylum seeker to consult with a lawyer is clear. It provides that the relevant immigration officer or Garda shall, without delay, inform the person or cause him or her to be informed, in a language that he or she may reasonably be supposed to understand, of their entitlement to consult a legal representative. The detainee is also entitled to and to the assistance of an interpreter for the purposes of consultation and court appearances.

Rule 16(1) of the Prison Rules, 2007 provides that a foreign national shall be provided with the means to contact a consul and, in addition, an asylum applicant shall be provided with the means to contact:

- (a) the United Nations High Commissioner for Refugees or the Representative in Ireland of the High Commissioner, and
- (b) subject to such limitation as to numbers as the Governor may reasonably impose, national or international authorities and organisations whose principal object is to serve the interests of refugees or stateless persons or to protect the civil and human rights of such persons.

Rule 16(2) expressly states that people to whom paragraph (1) applies "shall be informed in particular of his or her entitlements under Rule 38 in relation to legal visits."

Under Rule 38(1) prisoners, including detained asylum seekers are "entitled to receive a visit from his or her legal adviser at any reasonable time for the purposes of consulting in relation to any matter of a legal nature in respect of which the prisoner has a direct interest, and any such visit shall take place within the view of, but out of the hearing of a prison officer."

Rule 38(2) states that a prisoner may, "at the discretion of the Governor receive a visit at any reasonable time from a legal adviser or from any other person approved of by that legal adviser who is assisting in making preparations on behalf of a party to proceedings before the courts whether criminal or civil in nature." Rule 38(3) makes provision for interpretation services to be provided for legal visits.

The Recast Reception Conditions Directive mandates that "procedures for access to legal assistance and representation shall be laid down in national law."<sup>39</sup> Article 9(6) details the requirement that detainees shall be provided with free legal assistance and representation in any proceedings concerning the judicial review of the detention order however Member States are also given the

power to place monetary or time restrictions<sup>40</sup> on access to free legal assistance.

#### Right of access to information

Section 20(15) of the 2015 Act places an obligation on the relevant immigration officer or Garda to inform a detained applicant

- (a) that he or she is being detained under this section,
- (b) that he or she shall, as soon as practicable, be brought before a court which shall determine whether or not he or she should be committed to a place of detention or released pending a determination of his or her application for international protection,
- (c) of his or her entitlements under subsection (14)<sup>41</sup>, and
- (d) that he or she is entitled to leave the State at any time during the period of his or her detention and, if he or she indicates a desire to do so, he or she shall, in accordance with subsection (13), be brought before a court as soon as practicable, and the court may make such orders as may be necessary for his or her removal from the State.

Section 20(15) is broadly in line with the requirements of Article 9(4) of the Recast Reception Conditions Directive which states that "detained applicants shall immediately be informed in writing, in a language which they understand or are reasonably supposed to understand, of the reasons for detention and the procedures laid down in national law for challenging the detention order, as well as of the possibility to request free legal assistance and representation."

Regarding the provision of information to detained asylum seekers in prison, by virtue of Rule 13 of the Prison Rules, 2007, upon admission to prison, a detained protection applicant should "be given an explanatory booklet outlining his or her entitlements, obligations, and privileges" under the rule. Rule 13 applies to all prisoners, including detained asylum seekers, regardless of when they are committed to prison – i.e. late at night, or whether the duration of their stay is a matter of hours.

According to Rule 14 of the Prison Rules, 2007:

"The Governor shall, as soon as may be after the admission of a prisoner on committal to the prison concerned, meet that prisoner, and satisfy himself or herself that the prisoner has been informed of,

and understands, his or her obligations, entitlements and privileges under these Rules, and shall further ensure that details of any matters of significance to which the prisoner may draw his or her attention are recorded.”

The practice in Rules 13 and 14 of the Prison Rules, 2007 are again broadly in line with Article 10(5) of the Recast Reception Conditions Directive which states that “Member States shall ensure that applicants in detention are systematically provided with information which explains the rules applied in the facility and sets out their rights and obligations in a language which they understand or are reasonably supposed to understand.”

Rule 16(1) of the Prison Rules, 2007 provides that a foreign national shall be provided with the means to contact a consul and, in addition, an asylum applicant shall be provided with the means to contact the UN High Commissioner for Refugees of their representative in Ireland and organisations working to promote the interests and human rights of refugees. In particular, Rule 16(2) requires that people to whom paragraph (1) applies “shall be informed in particular of his or her entitlements under Rule 38 in relation to legal visits.”

#### **Right of access to medical care**

The 2015 Act does not explicitly state that detained protection applicants have access to medical treatment.

If a detainee is held in a prescribed prison, Rules 11 and 33 of the Prison Rules, 2007 will apply.

The Recast Reception Conditions Directive provides more detailed guarantees on meeting the health needs of protection applicants including protection applications in detention. Particular consideration is given to vulnerable persons<sup>42</sup>. Article 11(1) explicitly requires that the health, including mental health, of applicants in detention who are vulnerable person shall “be of primary concern to national authorities”. Member States are obliged to ensure that regular monitoring and adequate support “taking into account their particular situation, including their health” is made available to vulnerable persons.

More generally, the Recast Reception Conditions Directive provides a framework for meeting the health needs of all protection applicants. Article 19(1) requires Member States to provide emergency care and essential treatment of illnesses and of serious mental disorders. Article 19(2) requires the provision of appropriate mental health care where needed. Article 25 requires Member States to ensure that survivors of rape, torture or other serious acts of violence receive the necessary treatment (including medical and psychological treatment or care) for the damage caused by such acts.

## **The legal provisions relating to the detention of minors**

The detention of minors for immigration-related reasons is not provided for under Irish legislation. In this instance, Ireland provides a greater level of protection and comfort to minors (in circumstances where it is accepted that a person a minor) than is the European or even the international norm. Article 37 of the UN Convention on the Rights of the Child severely restricts the detention of children stating that “[t]he arrest, detention or imprisonment of a child shall be in conformity of the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.” Under Article 27 of the Returns Directive, detention of minors is in fact permitted “as a measure of last resort and for the shortest appropriate period of time”.

The legal basis for the detention of minors and the provision for their detention will be considered under the broad headings below:

- (a) Detention following refusal of permission to land
- (b) Detention pending deportation
- (c) Detention of protection applicants

### **Detention following refusal of leave to land**

Section 5(2)(b) of the 2003 Act states that the rules in relation to the detention of individuals refused permission to land shall not apply to persons under 18 years of age.

Section 5(2)(c) states that if the immigration officer or a member of the Garda Síochána carrying out the detention has reasonable grounds for believing that a person is not under the age of 18 then the provisions of Section 5(1) will apply.

### **Detention pending deportation**

Section 5(6)(a) of the 1999 Act states that the rules in relation to detention pending deportation shall not apply to persons under 18 years of age.

Section 5(2)(c) states that if the immigration officer or Garda Síochána carrying out the detention has reasonable grounds for believing that a person is not under the age of 18 then the provisions of Section 5(6)(b) will apply.

### **Detention of protection applicants**

Section 20(6) of the 2015 Act states that the rules in relation to detention shall not apply to persons under 18 years of age. However, there is the possibility that a minor may be detained if a dispute arises as to their age and whether they are a minor. Similarly, Section 20(7) of

the 2015 Act provides that a protection applicant who claims to be a minor but whom two members of the Garda Síochána or immigration officers have reasonable grounds for believing is an adult, that person will be detained as an adult. The provision provides that where only one Garda or immigration officer has such a belief, then an examination to determine age under Section 25 of the 2015 Act can be carried out. Refusal to undergo the examination means that they will be deemed to be an adult. The nature of such an examination is not clarified in the legislation. Of further concern is the fact that the final determination of age for the purposes of detention is made by an immigration officer or member of the Garda Síochána in opining that they have reasonable grounds for so believing. It is unclear from the legislation what amounts to reasonable grounds.

The Children’s Rights Alliance in their Initial Submission on the General Scheme of International Protection Bill 2015<sup>43</sup> described this provision as being “of grave concern” and noted that it is a breach of the UN Committee on the Rights of the Child’s General Comment No.6 which provides that in cases of uncertainty as to an individual’s age, the individual shall be given the benefit of doubt and be considered a child.<sup>44</sup>

The Recast Reception Conditions Directive also has implications in relation to minors in that minors can be detained under Article 11(2) as “a measure of last resort and after it having been established that other less coercive alternative measures cannot be applied effectively.” Once a minor is detained, “all efforts shall be made to release the detained minors and place them in accommodation suitable for minors”. Article 11(3) states that unaccompanied minors shall be detained only in “exceptional circumstances” however, contains an absolute prohibition on the detention of unaccompanied minors in prison accommodation.

This report recommends that Ireland maintains its current position and does not implement a practice of detaining minors for immigration-related purposes. Although the detention of minors is permissible under the framework of the Recast Reception Conditions Directive, that does not require Ireland to introduce provisions to provide for this possibility. It should be noted that the Directive provides for minimum standards. Recital 28 of the Directive states that Member States have the power “to introduce or maintain more favourable provisions for third-country nationals and stateless persons who ask for international protection from a Member State.”

## **EU Recast Reception Conditions Directive**

On the 21<sup>st</sup> November 2017, Minister for Justice and Equality Mr. Charlie Flanagan, TD announced that Ireland will opt into the recast Recast Reception Conditions Directive. On the 24<sup>th</sup> January 2017 the Oireachtas endorsed the Government’s proposal to opt-in to the Recast Reception Conditions Directive. Once the opt-in process is complete, the Directive will have far reaching-consequences for protection applicants and, in particular, the detention of protection applicants. The impact that the Directive will have in the detention conditions of international protection applicants has already been outlined above. The most far reaching consequence of the Directive will be the requirement for the State to provide a specialised detention facility for detaining protection applicants<sup>45</sup>. In practice the State will no longer be permitted, as a rule, to detain protection applicants in prisons and Garda Stations. In the exceptional circumstances where this occurs, protection applicants must be accommodated separately to the general prison population.

While the discontinuation of the practice of detaining international protection applicants in prison will be welcomed in the Irish context, there are some circumstances in which Ireland already exceeds the protections provided by the Directive namely Ireland’s current prohibition on the detention of minors. As stated above, Ireland should continue to ensure that no minor protection applicants subjected to detention.

Furthermore, it cannot be overstated that although Article 8 of the Directive permits the detention of international protection applicants, detention should not become standard practice. Recital 20 of the Directive is clear that detention should be “a measure of last resort and may only be applied after all noncustodial alternative measures to detention have been duly examined.” This report recommends that there is no change to Ireland’s practice of not systemically detaining protection applicants.

## **Other recommendations**

It is notable that Ireland’s domestic legislation does not provide for a right of appeal for those refused leave to land in the State. A non-national who is refused leave to land, on the basis of what may be a subjective determination by an immigration officer, has no recourse to a legal remedy other than initiating judicial review proceedings. As will be detailed in Chapter 4, interviewees who were detained following refusal of leave to land were oftentimes confused about why they had been refused or felt that they had not been provided with an adequate opportunity

to explain their circumstances. Even if these interviewees had been able to overcome significant obstacles including language barriers and lack of access to private legal representation to initiate judicial review proceedings on their behalf, judicial review is not concerned with merits of the decisions made, but rather with the decision-making process.

Ireland is somewhat of an outlier amongst our European neighbours in not providing a right of appeal to non-nationals refused leave to land and this report recommends that a statutory right of appeal to an independent body against a refusal of leave to land decision should be introduced in Irish law. Ireland is not a signatory to the Schengen agreements however the appeal provisions contained therein are instructive. Article 13(3) of the Schengen Border Code provides that where third country nationals refused entry permission they shall have the right to appeal in accordance with national law and a written indication of contact points able to provide information on representatives competent to act on behalf of the third-country national in accordance with national law must also be given to the third-country national. Although lodging such an appeal shall not have suspensive effect on a decision to refuse entry, where the appeal concludes that the decision to refuse entry was ill-founded, the person concerned will be “entitled to correction of the cancelled entry stamp, and any other cancellations or additions which have been made, by the Member State which refused entry.”

The Fundamental Rights Agency (FRA) in its 2014 report, Fundamental rights at airports: Border checks at five international airports in the European Union<sup>46</sup>, identified a promising practice relating to complaints at Schiphol airport, whereby a poster explaining customs officers’ gate checks is located in plain view of where passengers disembark and enter the lounge gate, explaining in simple language and diagrams the customs check at the gate. The poster also gives information about how to complain and provides an internet address for more information. FRA suggests that border police could replicate this practice for immigration-related checks. This suggestion could easily be adopted at Irish ports of entry.

## Conclusions

Criticism of the Irish immigration detention system has in the past largely related to the lack of an immigration detention infrastructure. The implementation of the 2015 Act has added to that legal framework, as will the Recast Reception Conditions Directive. It is notable however that recent Irish legislation has become more regressive in certain respects. The 2015 Act increased the permissible periods of detention for international protection applicants

from 10 days to 21 days<sup>47</sup> and expanded the grounds under which a person may be refused leave to land in the State<sup>48</sup>.

These developments in Irish law are not altogether surprising given that the broader European response to increased migration flows in recent years has been to increase the use of detention. The European Council on Refugees and Exiles (ECRE) has raised concerns that Member States have made “questionable reading of applicable legal standards with a view to legitimising a more systematic and extended use of detention of asylum seekers.”<sup>49</sup> In its March 2017 Renewed Action Plan on Returns<sup>50</sup>, the European Commission advocated a greater reliance on detention as a deterrent for migrants and endorsed maintaining detention for as long as is permitted as long as there is a reasonable likelihood of removal. This has been roundly criticised by NGOs and Civil Society Groups<sup>51</sup>.

It would be a matter of very grave concern if Ireland were to follow this trend and to consider using detention as a deterrent. It has already been recommended in this chapter that Ireland maintains its current, more favourable practice of refraining from detaining migrants systematically and its current statutory prohibition on the detention of minors for immigration-purposes. This is a widely held view in Ireland amongst both national NGOs and human rights organisations who have called on the State to consider the use of alternatives to detention. Although a full examination of alternatives to detention is outside the scope of this report, the comments of the Irish Human Rights and Equality Commission (IHREC) and the Jesuit Refugee Service (JRS) are instructive in this regard. IHREC has repeatedly called for greater use of alternatives to detention such as sureties so as to reduce unnecessary detention of people for immigration reasons<sup>52</sup>, while JRS has also advocated for exploring alternatives to detention, stating that “non-custodial alternatives would allow for significant savings in financial terms, and would avoid the substantial human costs which are imposed on those detained.”<sup>53</sup>

## Chapter Endnotes

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- 13 Parliamentary Question No: 77, 22 February 2017 available at <https://www.kildarestreet.com/wrans/?id=2017-02-22a.116&s=speaker%3A314#g117.q>
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- 19 Global Detention Project, Ireland Immigration Detention Profile, January 2017 available at <https://www.globaldetentionproject.org/countries/europe/ireland>
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- 24 Aliens Legislation in “The CPT Standards”, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), document CPT/Inf/E (2002) 1 – Rev. 2004, p. 42.
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- 35 Irish Refugee Council, Recommendations on the International Protection Bill 2015, November 2015, p. 26 available at <http://www.irishrefugeecouncil.ie/wp-content/uploads/2015/11/IRC-Recommendations-on-International-Protection-Bill-2015-Final.pdf>
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- 38 Section 20(3) 2015 Act
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- 40 Article 9(10) of the Recast Reception Conditions Directive
- 41 Article 9(7) of the Recast Reception Conditions Directive
- 42 Section 20(14) provides for the rights to consult a legal representative, the assistance of an interpreter and to have a notification sent to the High Commissioner and another nominated person.
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- 53 See JRS submission, Submission to the Joint Committee on Justice, Defence and Equality on the General Scheme of the International Protection Bill, para. 3.3 at p. 189 of the Houses of the Oireachtas, Joint Committee on Justice, Defence and Equality *Interim Report on Pre-legislative Scrutiny Report of the General Scheme of the International Protection Bill* July 2015, available at <http://www.oireachtas.ie/parliament/media/committees/justice/Interim-Report--Appendices--Int-Protection.pdf> See also Quinn, E. *The Immigration, Residence and Protection Bill 2008: Well-Founded Fears? Working Notes*, November 2008, available at <http://www.workingnotes.ie/item/the-immigration-residence-and-protection-bill-2008-well-founded-fears>

## Statistics on Immigration-Related Detention and Border Control

Using data published or provided by GNIB, the Irish Prison Service, ORAC and INIS, this section aims to give as comprehensive a statistical overview as possible on immigration related detention within the following categories:

- a) refusals of permission to land or enter the territory;
- b) the detention of people in prison for immigration purposes;
- c) the places of applications for asylum; and
- d) deportations

The collection of statistics for this report was particularly challenging, especially in relation to refusals of entry to the State, which is discussed in more detail below. We had to rely on a variety of different sources, with sometimes differing statistical breakdowns, and have done what we can to compile comprehensive statistical data where possible in light of the information available.

The lack of available statistics and the difficulties accessing information when requested speaks to the lack of transparency around the issue of immigration related detention in Ireland, and the urgent need to improve recording and monitoring of detention for immigration reasons, to ensure greater accountability in decisions to detain.

In a Mary Raftery-funded investigation by journalist Maresa Fagan for a report on immigration enforcement in Ireland, she found that statistics on immigration-related detention were available through Eurostat.<sup>1</sup> The data available on Eurostat is provided by the Irish government. It is therefore of concern that the responses we received to many Parliamentary Questions and FOI requests was that this data was not available or could not be compiled. It is additionally worrying that data available on Eurostat, for example in relation to refusals of leave to land, differ from the data provided by the Department of Justice through Parliamentary Questions.

## Refusals of permission to land

During the course of this research it proved difficult to access reliable, disaggregated statistics on refusals of permission to land and the numbers of people detained as a consequence. Despite several attempts to acquire detailed disaggregated data through a Freedom of Information Request,<sup>2</sup> a European Freedom of Information Request,<sup>3</sup> multiple Parliamentary Questions on the subject,<sup>4</sup> and direct requests to INIS<sup>5</sup> and GNIB, data of this level was not forthcoming.

Part of the difficulty of getting such detailed data, for example relating to age, gender, country of origin and reasons for refusal, appears to stem from the data processing methods of the relevant State agencies.<sup>6</sup> Presumably, data is gathered on all nationalities, but State agencies appear to be reluctant to disseminate full data as it would require an allocation of resources. Instead, the response of the Department of Justice has been to provide the total number of people refused permission to land, in addition to listing the “top five” nationalities so refused.<sup>7</sup> The provision of additional breakdowns, for example by nationality, are generally not provided on the basis that it would require a ‘disproportionate expenditure of time and resources’ or to protect the identities of asylum seekers in line with Ireland’s protection legislation.<sup>8</sup>

For example, in response to a series of Parliamentary Questions in February 2017, the Minister for Justice and Equality stated that a total of 4,127 people were refused permission to enter the State in the period 1 January to 31 December 2016. This figure includes 396 persons who were subsequently permitted to enter after making an application for asylum.<sup>9</sup> A breakdown of “top five” nationalities was provided in this response, which were: Brazilian – 533; Albanian – 446; South African – 329; United States – 266 and Pakistan – 180. However, no disaggregation of persons who were refused and subsequently claimed asylum was provided as the Minister stated that she has “a legal obligation to protect the identity of all asylum seekers in accordance with the International Protection Act”<sup>10</sup>.

The problem with this approach to data collection and publication in the immigration and asylum context is that it gives rise to a worrying information gap. In particular, it makes it hard to determine whether Ireland is complying with its non-refoulement obligation since people may be refused permission to land from “refugee generating” countries, such as Syria, and will not make it into this top five list.<sup>11</sup> Their removal will, therefore, not be a matter of public record, nor will the reasons for such refusals. There is a clear need for the publication of more transparent figures of refusals of permission to land giving details of country of origin information and reasons for refusal on a periodic basis.

Through the combination of data we have compiled via Parliamentary Questions, information provided by INIS and GNIB, as well as recent statistics compiled from Eurostat by Maresa Fagan, we have been able to determine the following statistical breakdown for refusals of leave to land.

Table A outlines the total number of refusals of permission to land, including the number subsequently permitted to claim asylum from 2011 to 2016.

**Table A: Total Number Refusals of Permission to Land between 2011 and 2016, including number subsequently permitted to claim asylum**

Date	Total no. refusals of permission to land	Total no. permitted to enter under Refugee Act 1996	%
2011	2,768	234	8.45
2012	2,397	158	6.59
2013	2,041	170	8.32
2014	2,615	221	8.45
2015	3,680	290	7.88
2016	4,127	396	9.59

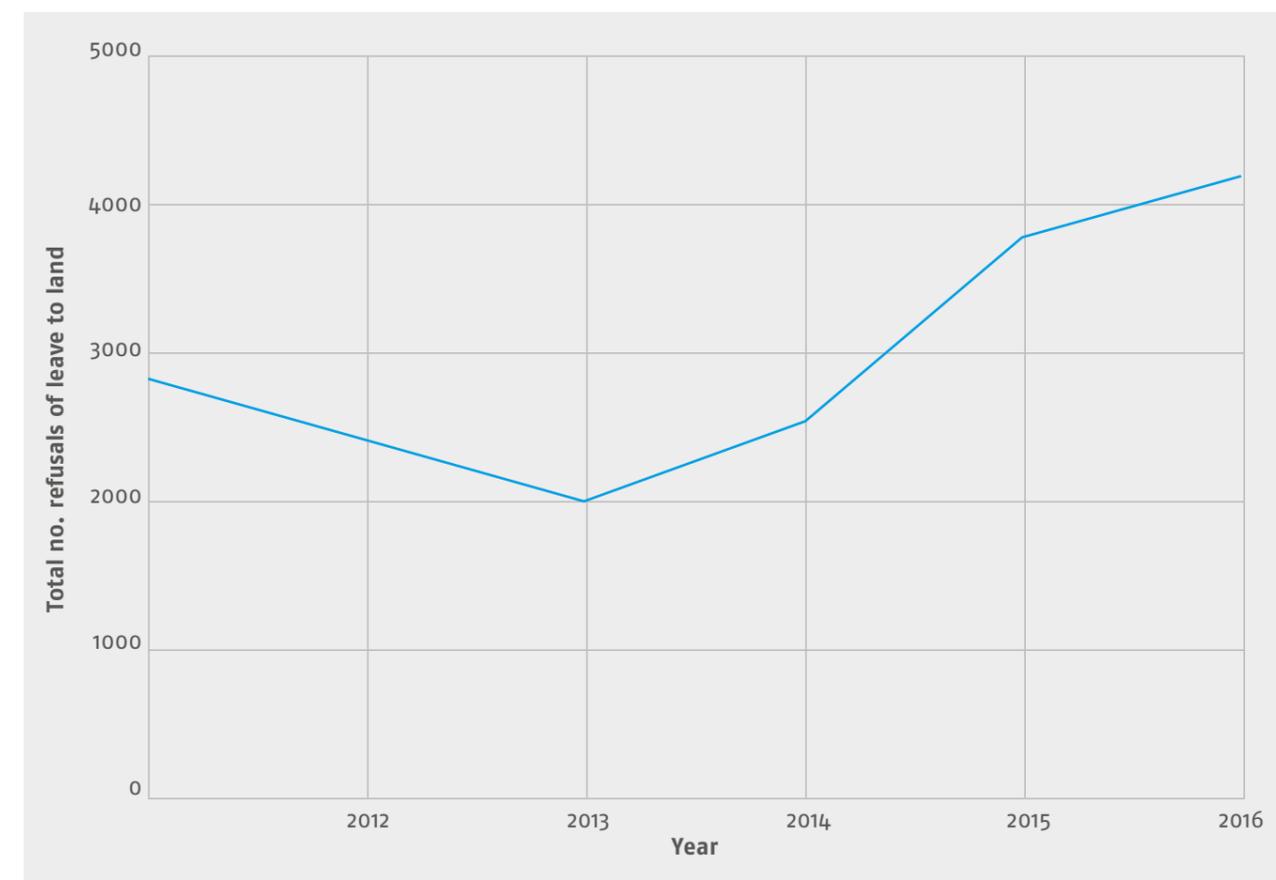


Table A shows a 49% increase between 2011 and 2016 in the number of refusals, as well as a 69% increase in numbers subsequently permitted entry through an application for asylum. Maresa Fagan notes in her analysis of Eurostat data that between 2008 and 2016, over 28,000 people have been refused leave to land at Irish air, land and sea borders, and that the number of people refused entry has been steadily increasing – in fact doubling – since 2013.<sup>12</sup> Coupling the steady increase in numbers with an even more significant increase in the numbers of those initially refused who subsequently claimed asylum, it becomes quite clear how important transparency is in ensuring accountability

for decision makers when they are making decisions to refuse and/or detain.

In mid-April 2015, in response to a Parliamentary Question on the number of persons that were denied entry at Dublin and Dun Laoghaire ports and Cork, Shannon and Dublin airports from 2013 onwards, then Minister for Justice and Equality provided the information in the following table (Table B).<sup>13</sup> Since 2015, we have acquired additional data up to the end of 2016, including data from Eurostat provided by Maresa Fagan, on the number of people refused entry broken down by port of entry.

**Table B: Number of persons denied entry to the State<sup>14</sup>**

Port of entry	2013	2014	2015 (01/01/2015 to 31/03/15)	2016
Dublin Port	58	80	21	142
Dun Laoghaire Port	7	1	0	1
Cork Airport	97	102	14	113
Shannon Airport	2	36	12	56
Dublin Airport	1,425	1,907	496	3370
Rosslare	NA	NA	NA	98
<b>TOTALS</b>	<b>1,589</b>	<b>2,126</b>	<b>543</b>	<b>4,127</b>

Note that Dublin Airport, as the port of entry with the highest traffic, also has the most significant numbers of persons refused entry. In Chapter 4, we conduct a thorough analysis of Dublin Airport as a case study for border control management and immigration detention, based on information provided through interviews, and identify significant gaps in good practice that are worrying given the numbers who travel through Dublin Airport, and in particular the numbers refused entry.

With regard to country of origin information, GNIB compiled a list of the top 15 nationalities refused permission to land from 2010 to 2014 and a list of the top five countries

from which people refused permission to land were subsequently permitted to enter the country under the Refugee Act, 1996. While the "other" category is by far the largest in both tables (C and D), the first table below (Table C) shows that in 2010–2012, Brazilians were the nationals most frequently refused permission to land, while in 2013 and 2014 they were the second most refused nationals. China and South Africa have been in the top five list for the last five years, while Albania has featured in the top five every year since 2011 and topped the list in 2014. Nigeria has also placed highly in the list every year since 2010. Of particular concern is that Afghanistan has been in the top 10 list in 2010, 2011, 2013 and 2014.

**Table C: Nationality of persons refused permission to land**

2010	#	2011	#	2012	#	2013	#	2014	#
Brazil	362	Brazil	262	Brazil	235	South Africa	184	Albania	257
China	219	Bolivia	230	South Africa	150	Brazil	167	Brazil	189
Nigeria	161	China	199	China	138	Nigeria	102	South Africa	171
South Africa	131	South Africa	139	Bolivia	123	Albania	94	China	151
Bolivia	117	Albania	129	Albania	112	China	93	Malawi	114
Malaysia	115	Nigeria	106	Nigeria	92	America	81	Nigeria	114
Afghanistan	104	Afghanistan	100	America	85	Pakistan	69	America	108
America	102	America	89	Malawi	68	Afghanistan	64	Pakistan	102
India	80	Malaysia	62	Pakistan	63	Malawi	62	Ukraine	78
Pakistan	77	Malawi	58	Malaysia	58	Bolivia	59	Afghanistan	77
Egypt	55	India	54	India	58	Somalia	54	Bolivia	62
Zimbabwe	49	Pakistan	54	Somalia	55	Malaysia	43	Malaysia	51

Ukraine	44	Ukraine	51	Zimbabwe	37	Zimbabwe	41	Somalia	46
Somalia	44	Somalia	48	Afghanistan	36	India	34	India	33
Sudan	39	Zimbabwe	47	Ukraine	33	Ukraine	32	Zimbabwe	33
Other	1011	Other	906	Other	896	Other	692	Other	808
<b>Total</b>	<b>2710</b>	<b>Total</b>	<b>2534</b>	<b>Total</b>	<b>2239</b>	<b>Total</b>	<b>1871</b>	<b>Total</b>	<b>2394</b>

Maresa Fagan's recent analysis of Eurostat data shows that of the over 28,000 people refused entry between 2008 and 2016, one third (9,355) came from Brazil, China, South Africa, Nigeria and Albania. According to Fagan, "more Brazilian citizens were turned away by immigration services than any other nationality during this nine-year period."<sup>15</sup>

The list also includes significant numbers of people being refused from countries where there is ongoing conflict or political instability, including Afghanistan, Somalia, Sudan, Malawi and others. Fagan also notes in her investigation that since 2008, over 2000 people have been refused entry from 'areas of concern' including Afghanistan, Somalia, Eritrea, Syria, Iran, Iraq and Libya. While the reasons for refusal have not been documented, it is essential that people arriving from conflict zones are given every opportunity to engage with asylum procedures. Fagan also notes an increasing number of people with unknown citizenship refused leave to land in Ireland – almost

doubling from 180 in 2014 to 335 in 2016. This trend is not evident across the rest of the EU where refusals of entry to people with unknown citizenship has remained consistent.

To see an increase in the numbers of people being refused entry, in particular people emanating from conflict zones or with unknown citizenship, is particularly worrying, especially in the context of the global refugee crisis and the growing numbers of forcibly displaced people around the world. It is critical that border management officials take all necessary steps, including the provision of information, legal advice and interpretation services, to ensure that the Irish state is fulfilling its international obligation of *non-refoulement*.

Table D shows that the top five list of nationalities subsequently granted entry permission to access the asylum system included Zimbabwe, China, Nigeria, South Africa, the Congo, Malawi and Pakistan.

**Table D: Nationality of applicants of asylum subsequent to refusal of permission to land at a port of entry to the state**

2010	#	2011	#	2012	#	2013	#	2014	#
China	168	China	103	Zimbabwe	23	Zimbabwe	48	Zimbabwe	50
Nigeria	23	Zimbabwe	28	Congo	26	Congo	28	Congo	21
South Africa	18	South Africa	11	Nigeria	13	South Africa	12	South Africa	18
Iran	14	Nigeria	11	Malawi	10	Nigeria	10	Pakistan	15
Zimbabwe	11	Malawi	10	Pakistan	10	Malawi	10	Iran	15
Other	87	Other	71	Other	76	Other	62	Other	102
<b>Total</b>	<b>321</b>	<b>Total</b>	<b>234</b>	<b>Total</b>	<b>158</b>	<b>Total</b>	<b>170</b>	<b>Total</b>	<b>221</b>

Although requested through several channels, we found it difficult to obtain statistical data on reasons for refusal of leave to land. According to information provided by INIS during the course of this research, in addition to information already in the public domain, the most common reasons people are refused leave to land are as follows:

1. That there is reason to believe that the person intends to enter the State for purposes other than those expressed by the non-national concerned;
2. The person is not in possession of a valid Irish visa and is not exempt from this requirement;

3. The person concerned is not in possession of a valid passport or other equivalent document; or
4. The person concerned intends to travel (whether immediately or not) to the UK and would not qualify for admission had they come directly to the UK.<sup>16</sup>

Maresa's Fagan's analysis of Eurostat data reveals that false or invalid visas or permits were the main reason for refusals, accounting for 70% of all refusals between 2008 and 2016.<sup>17</sup> It is recognised in the 1951 Geneva Convention (as outlined in the previous chapter) that displaced people often are unable to acquire official travel or identify documents and often travel clandestinely to seek safety – this cannot be held against people who arrive at a port of entry in an attempt to seek international protection.

Without disaggregated data on reasons for refusal, it is difficult to understand how border management decision making is being monitored to ensure the quality of decisions to refuse. Given our obligations under the 1951 Convention on *non-refoulement*, and with no opportunity for a person to appeal a decision to refuse, it is critical that reasons for refusal are documented and decision making is monitored.

## Immigration detainees in Irish Prisons 2007– the present

According to the Irish Prison Service Annual Report 2014, there were 407 committals to prison that year involving 390 individual immigration detainees, which means that some people were detained on more than one matter or charge relating to immigration.<sup>18</sup> The average daily number of immigration detainees in 2014 was 6.<sup>19</sup> In 2015, there were 342 committals to prison that year in respect of immigration issues involving 335 detainees. The average daily number of immigration detainees in 2015 was 4.<sup>20</sup> In 2016, there were 421 committals involving 408 detainees and the average daily number of detainees was 5.<sup>21</sup>

The Irish Prison Service first published their Annual Reports online in 2007. That year there were 1,145 immigration detainees, representing an increase of 3% over the 1,113 persons detained in 2006. The average daily number of detainees was 24, with 16 men in Cloverhill Prison, 4 women in the Dóchas Centre and 1 person held in Cork Prison, Limerick Male Prison, the Midlands and Arbour Hill.<sup>22</sup> Thus, the number of detainees across the Irish prison estate has declined from 1,113 in 2006 to 408 in 2016 (see Table E below).<sup>23</sup>

**Table E: Immigration detainees in Irish Prisons**

Year	No. of detainees in prison	Daily Average No.
2006	1,113	?
2007	1,145	24
2008	961	17
2009	699	10
2010	459	11
2011	395	10
2012	385	8
2013	374	13
2014	390	6
2015	335	4
2016	408	5

Source: Irish Prison Service Annual Reports 2007–2016

While it is welcome that the numbers of people detained for immigration related reasons in Ireland has remained quite low, and that it has been decreasing, given the discussion above detailing an increase in refusals of leave to land, this would suggest that many people detained following a refusal of entry are being detained in other places, such as at airports or other ports of entry or in Garda Stations – none of which have appropriate facilities to support people and ensure that their rights are accessible while they await removal. It also begs the question of how these forms of immigration detention are documented and monitored.

During the course of this research, a spokesperson from Cloverhill prison stated that most detainees stay in prison for one to two days. This information accords with the findings of the JRS–Europe's 2010 report on Ireland, where the period of detention for most immigration detainees is three days, or less.<sup>24</sup>

On the 24th of June 2015, the Irish Prison Service Statistics Unit provided the researcher with the following disaggregated information in respect of the 407 committals in 2014. Table F documents the reasons why people were subjected to immigration related detention. The two main grounds were failing to have a valid passport (183 committals) and failing to have a valid visa (173 committals). The reason for detention in 8 cases could not be determined, as it was not recorded on the warrant.

**Table F: Offence Description**

MSO Offence Description	Total
Alien	23
Alien failing to have valid passport	183
Alien failing to have valid visa	173
Alien failing to produce registration certificate, etc.	15
Attempt to commit an indictable offence	1
Not recorded/blank application	8
Failure to comply with provisions of a notice under section 14(1) of the Immigration Act, 2004	2
Interfere/obstruct an officer	1
Organise etc. Illegal immigrants/asylum seekers to enter the State	1
<b>Total</b>	<b>407</b>

Table G reveals that Cloverhill Prison, the principal remand prison for males in Ireland, had the most immigration-related committals (273) in 2014. The prison with the next highest number of committals (76) was the Dóchas Centre, the main female prison in Ireland. Cork Prison had a total of 25 committals for immigration reasons in 2014.

**Table G: Committal Prison**

Committal Prison	Total
Castlerea Prison	2
Cloverhill Remand Prison	273
Cork Prison	25
Limerick Prison (F)	6
Limerick Prison (M)	21
Mountjoy Prison (the Dóchas Centre) (F)	76
Mountjoy Prison (M)	3
Wheatfield Place of Detention	1
<b>Total</b>	<b>407</b>

According to Table H, the largest number of committals for both genders was in the 30 to < 40 age group: 31 committals (out of a total of 82) in respect of females and 112 committals (out of a total 325) for males. In the 18 to < 21 age group there were 4 female committals and 26 male committals, while in the 50+ category there were 9 committals for both males and females. For both males and females, the majority of detainees fall in the 30<40 age bracket.

**Table H: Age Group by Gender (2014)**

Gender	Age Group on Committal	Total
Female	18 < 21	4
	21 < 25	18
	25 < 30	10
	30 < 40	31
	40 < 50	10
	50 +	9
<b>Female Total</b>		<b>82</b>
Male	18 < 21	26
	21 < 25	43
	25 < 30	90
	30 < 40	112
	40 < 50	45
	50 +	9
<b>Male Total</b>		<b>325</b>
<b>Grand Total</b>		<b>407</b>

In conjunction with the nationality data on refusals of permission to land from GNIB, Table I is most illuminating in breaking down the 407 committals on immigration matters according to nationality. The largest number of committals involved Albanians (n=71) followed by Chinese nationals (n=62), Nigerians (n=28) and Pakistani nationals (n=27). The number of committals from likely "high grant"<sup>25</sup> countries (in terms of protection applications), such as Syria (n=2), Afghanistan (n=17), Iraq (n=3), Iran (n=6) and the Sudan (n=6) is worth closer examination.

**Table I: Nationality of Committals (2014)**

Nationality	Total	Nationality	Total
Afghanistan	17	Libyan	1
Albanian	71	Lithuanian	13
Algerian	7	Malawian	4
American	2	Malaysian	4
Bangladeshi	2	Mauritanian	2
Bolivian	2	Mauritius	3
Brazilian	17	Mexican	2
Bulgarian	2	Moldovan	4
Cameroon	1	Mongolian	1

Canadian	1	Moroccan	1
Chad	1	Namibian	1
Chilean	1	Nepalese	1
Chinese	62	Niger	3
Colombian	1	Nigerian	28
Congolese	8	Norwegian	3
Czech	1	Other	2
Dutch	1	Pakistani	27
Egyptian	2	Palestinian	1
Equatorial Guinean	1	Polish	9
Eritrean	2	Romanian	5
Finn	1	Russian	6
Georgian	4	Senegalese	1
Ghanaian	1	Sierra Leonean	1
Greek	3	Slovenian	1
Indian	3	Somalian	12
Iranian	6	South African	4
Iraqi	3	Spanish	2
Irish	2	Sri Lankan	1
Italian	3	Sudanese	6
Japanese	1	Syrian	2
Korean North	4	Taiwanese	1
Korean South	1	Tanzanian	2
Kosovan	1	Ugandan	1
Kuwaiti	1	Ukrainian	10
Lebanese	1	Uruguayan	1
Liberian	1	Venezuelan	3
<b>TOTAL</b>			<b>407</b>

Additional information supplied through Eurostat data compiled by journalist Maresa Fagan shows that, between 2012 and November of 2017, the top 5 nationalities detained for immigration related reasons were: Albanian (280), Chinese (212), Brazilian (173), Pakistani (157) and Nigerian (126).<sup>26</sup>

The statistics supplied by the Irish Prison Service show that while detention numbers for immigration matters vary, they are generally low. People from a wide variety of nationalities – including refugee generating countries – are subject to detention in Irish prisons, most commonly

for failure to have a valid visa or valid passport, or for failure to produce a registration certificate. Presumably, the first two grounds arise frequently in the refusal of permission to land context, but failure to produce a passport and/or failure to produce a registration certificate may also arise in the case of undocumented migrants who somehow come to the attention of Gardaí, for example if stopped while driving and required to produce a passport and registration certificate on demand under Section 12 of the Immigration Act, 2004.<sup>27</sup> This is again worrying in the context of a rising number of international protection applicants, for whom, as recognized in International Law, the ability to access official identify and travel documents can be limited if they are fleeing violence and/or persecution.

## Places of Applications for Asylum

According to the Annual Reports of the Office of the Refugee Applications Commissioner (ORAC), available online since 2001, the majority of asylum seekers lodge their application directly at the ORAC office, ranging from a high of 89.1%<sup>28</sup> to a low of 75.4% in 2001.<sup>29</sup> It appears that people seeking international protection are not declaring that they have come to Ireland to seek such protection at the relevant airport, although the reasons for this are unknown. Table 0 shows the places of application for asylum from 2011 to 2016. The 2015 report notes that 35 persons in places of detention indicated a wish to apply for asylum in 2015, which constituted 1% of all applications received in 2015. This represents a small decrease on the rate of 1.5% for the same category in 2014, continuing a trend visible in the table below. Of these applications 17 were interviewed in places of detention during 2015<sup>30</sup>. A total of 22 persons in detention requested asylum in 2016, which amounts to 1% of all applicants<sup>31</sup> for that year.

**Table 0: Place of Application for Asylum (%)**

Year	ORAC	Airport	Prison	Other
2011	77.7	15.7	5.8	0.8
2012	77.8	16.1	5.2	0.9
2013	77.9	19.3	2.5	0.2
2014	82.5	14.6	1.5	1.3
2015	88.2	9.2	<1	2.7
2016	74.9	22.7	<1	2.4

Source: ORAC Annual Reports

Since 2006 ORAC has published statistics relating to asylum applications received from people detained in prison on immigration grounds. In 2006, 5% (n = 243) of applications came from places of detention,<sup>32</sup> rising to 9.7% (n = 385) in 2007.<sup>33</sup> In 2012, applications from places of detention accounted for 5.2% (n = 50 of 956)<sup>34</sup> of total asylum applications,<sup>35</sup> falling to a low of 1% (n=35 of 3,276) in 2015<sup>36</sup>.

While it is clearly rare for an application for asylum to commence from prison, this would have been Walli Ullah Safi's situation as outlined in the Introduction. Prison was effectively his first opportunity to ask to claim asylum and be given advice, information and support to lodge an asylum application. According to the 2015 ORAC Annual Report, it prioritised asylum applications received from people in detention in accordance with the Refugee Act, 1996: "The preliminary interview in these cases took place within three working days of their date of application in so far as possible<sup>37</sup>. As noted in Chapter 2, Sections 20(17) of the International Protection Act, 2015 require immigration officers and members of the Garda Síochána to notify the Minister for Justice and Equality, and if relevant the International Protection Appeals Tribunal, of the detention or release of an applicant for international protection and section 20(18) states that such applications shall be "dealt with as soon as may be".<sup>38</sup> In most cases, when an application for asylum is lodged and the initial interview has been conducted, a person will be offered accommodation in Ireland's asylum reception system – 'direct provision' and will leave detention.

According to the spokesperson from ORAC interviewed for this research, in the rare circumstances where asylum applications are processed to finality in prisons, they most likely involve undocumented migrants who suddenly came to the attention of the authorities and made asylum application when threatened with imminent deportation. 2007 marked a high point of asylum applications being "processed to finality" in prison, with 98 such applications out of a total of 385 lodged in prison. Since then the numbers of applications processed to finality in prison have been falling, as have the numbers of applications lodged in prison. In 2012, 7 out of 50 asylum applications (less than 30%) commenced in prison were processed to finality there.

## Detention Prior to Deportation

The challenges discussed above in relation to obtaining detailed statistics on refusals of permission to land were replicated in relation to detaining prior to deportation. In response to a request for statistics in tabular form relating to the number of persons who were detained prior to their removal from the State on foot of a deportation

order, including their age, gender and nationality, the length of their detention and the place of their detention, for the years 2010 to 2014, the former Minister for Justice and Equality, Deputy Frances Fitzgerald stated that the information could not be supplied in the manner requested, because the "veracity and reliability" of the statistics in that form could not be guaranteed, and that compiling that data would have a "significant impact" on staff being able to complete their normal day to day work of processing cases.<sup>39</sup>

## Conclusion

Although the numbers being refused entry to the State and detained in Ireland for immigration related reasons is relatively low, access to reliable disaggregated data on the different types of immigration relation detention, the reasons for such detention, and breakdowns by nationality, gender, age, etc. help to build a clearer picture of detention in Ireland.

The overall lack of reliable data points to an urgent need for more transparency in immigration detention and border control, and accountability for decision makers in detailing why someone is refused and/or detained, where, and for how long. Such transparency would help to ensure that people who are being refused are not at risk when being returned, that those who are being detained are only being detained as a last resort, and to further ensure that those who are being refused and/or detained are being given an opportunity to claim asylum if that is their intention.

## Chapter Endnotes

- 1 Maresa Fagan, A nation of welcomes? Assessing the Republic of Ireland's record on asylum and immigration, The Detail, 12 February 2018: <https://www.thedetail.tv/articles/a-nation-of-welcomes-assessing-the-republic-of-ireland-s-record-on-asylum-and-immigration>
- 2 The initial refusal by the FOI unit of the Department of Justice on the 12th of February 2015 was due to the fact GNIB, as a sub-division of An Garda Síochána, were outside the FOI framework at the time of the request. The appeal of this refusal was rejected on the 24th of June 2015 on the basis that "The information you are seeking is not held by this Department," in line with Section 15(1)(a) of the *Freedom of Information Act*.
- 3 A letter dated 15 February 2015 from the EU Home Borders Unit advised that Article 13 of the Schengen Border Code (Regulation 562/2006) required member states to compile information relating to border control and to submit this yearly to Eurostat. Although Ireland did not sign up to Schengen, certain border information on Ireland is available on Eurostat.
- 4 For example, see Questions Nos. 453 to 455 by Pádraig Mac Lochlainn, 24th March 2015, available at <https://www.kildarestreet.com/wrans/?id=2015-03-24a.894>.
- 5 During a meeting with INIS officials on the 16th April 2015 certain data was furnished to the researcher about refusals of permission to land. Much of this information was already in the public domain by way of Parliamentary Questions.
- 6 In March 2015, Deputy Pádraig Mac Lochlainn sought comprehensive information from the Minister for Justice and Equality on the number of persons refused leave-to-land at all ports of entry; the reason they were refused in each case; the age, gender and nationalities of the persons refused, not just the top five nationalities; and the countries to which they were returned, for the years 2010 to 2014. Following on from that general question, Deputy Mac Lochlainn requested information on the number of persons who were detained following a refusal of leave-to-land for the same period; their length of detention, place of detention, age, gender and nationality and if they were subsequently removed from the State. He also sought the number of persons refused leave-to-land who subsequently applied for asylum at each port of entry for the years 2010 to 2014 and their age, gender and nationality. The Minister stated that given the time constraints it was not possible to get the information requested, assuring Deputy Mac Lochlainn that although she would try to supply him with the requested information in due course, "it is possible that some of the information will not be available in the form requested by Deputy and/or could only be obtained by the disproportionate expenditure of time and resources relative to the information sought."
- 7 See for example Question No: 584 by Deputy Ciarán Lynch, 28th January, 2014, available at <https://www.kildarestreet.com/wrans/?id=2014-01-28a.1293&s=refused+leave+to+land#g1294.q> In response to Question No. 33440 by Derek Nolan, 9th July 2013, the then Minister for Justice and Equality, Deputy Alan Shatter, later wrote to Deputy Nolan informing him that in 2011 2,768 non-nationals were refused permission to land, 234 of whom were later permitted to enter the State having made an application pursuant to the Refugee Act, 1996. The five principle nationalities of persons refused permission to land in 2011 were China (301 people), Brazil (265 people), Bolivia (232 people), South Africa (151 people), and Albania (134 people). In 2012, 2,397 non-nationals were refused permission to land, 158 of whom were later permitted to enter the State having made an application pursuant to the Refugee Act, 1996. The five principle nationalities of persons refused permission to land in 2012 were Brazil (235 people), South Africa (156 people), China (143 people), Bolivia (123 people), and Albania (120 people). During the first 6 months of 2013, 967 non-nationals were refused permission to land, with 234 of those permitted to enter the State having made an application pursuant to the Refugee Act, 1996. The five principle nationalities of persons refused permission to land in the first 6 months of 2013 were Brazil (90 people), South Africa (84 people), China (60 people), Nigeria (53 people), and Albania (46 people). Letter to Deputy Nolan furnished by INIS during the course of this research.
- 8 See Questions No. 453-455 by Deputy Pádraig Mac Lochlainn, 24th March 2015, available at <https://www.kildarestreet.com/wrans/?id=2015-03-24a.894&s=refusals+of+leave+to+land#g895.q> The Minister for Justice did furnish Deputy Mac Lochlainn with additional information in writing on the 6th of May 2015 in response to the refusals of permission to land questions. However, due to the "disproportionate expenditure of time and resources relative to the information sought", the precise detail requested could not be delivered. Deputy Mac Lochlainn's assistant kindly forwarded this correspondence to Nasc by email on 3rd July 2015.
- 9 PQ Nos 73-76 in response to Deputy Thomas Pringle 22 February 2017 available at <https://www.kildarestreet.com/wrans/?id=2017-02-22a.110>
- 10 Ibid.
- 11 There is evidence of Syrians being refused permission to land from Parliamentary Questions over the last number of years. See, for example, Question from Deputy Mary-Lou McDonald, 29th January 2013, available at <https://www.kildarestreet.com/wrans/?id=2013-01-29a.1101&s=syrians#g1102.q>, which states that 11 Syrians were refused permission to land in 2012, 3 of whom were subsequently allowed to enter the State having made an application pursuant to the Refugee Act, 1996 (as amended). See also Question 912 by Deputy Sean Crowe on 9th June 2015, available at <https://www.kildarestreet.com/wrans/?id=2015-06-09a.2242&s=deportations#g2243>. Where Minister for Foreign Affairs, Charlie Flanagan stated: "Ireland regards the protection of refugees as a core human rights priority. The Syrian conflict, which has displaced millions of Syrians, including over 4 million refugees, is the gravest such problem internationally. Ireland has committed €1M in humanitarian assistance to the victims of the Syrian conflict. Ireland has also accepted 128 refugees fleeing Syria in previous years and is committed to accepting a further 220 during 2015 and 2016. Furthermore, 114 applicants for admission to Ireland under the Syrian Humanitarian Admission Programme have been accepted, many of whom are already in the state. All refugee cases are marked by tragedy and the threat of violence. ... We urge all States to uphold their international legal obligations to protect refugees and asylum-seekers, in this and all other cases of persons seeking refuge from the Syrian conflict."
- 12 Maresa Fagan, More than 28,000 non EU citizens refused entry since 2008, The Irish Times, 12 February 2018: <https://www.irishtimes.com/news/social-affairs/more-than-28-000-non-eu-citizens-refused-entry-since-2008-1.3388429>.
- 13 Question No. 328 by Thomas P. Broughan, 15th April, 2015 available at <https://www.kildarestreet.com/wrans/?id=2015-04-15a.905&s=ports+of+entry#g906.q> The Minister noted that these figures are provisional and subject to change.
- 14 Table up to 2015 provided in PQ response to Thomas Broughan. The Minister's response to a follow up question submitted on 2 November 2016 revealed that between 1 January 2015 and 20 September 2016 a total of 5,946 people were refused permission to enter at Dublin, Rosslare and Dun Laoghaire ports and Cork, Shannon and Dublin Airports, no breakdown by port of entry was provided. Table is supplemented with additional statistical information for 2016 provided by the Minister in response to Parliamentary Questions 73-76 by Deputy Thomas Pringle 22 February 2017 available at <https://www.kildarestreet.com/wrans/?id=2017-02-22a.110>. Eurostat data is not broken down by port of entry.
- 15 Maresa Fagan, Republic of Ireland's record on immigration enforcement prompts calls for greater transparency, The Detail, 12 February 2018: <https://www.thedetail.tv/articles/republic-of-ireland-s-record-on-immigration-enforcement-prompts-calls-for-greater-transparency>.
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- 25 See Smyth, "Refugee recognition rate draws concern" 25th May 2011, available at <http://www.irishtimes.com/news/refugee-recognition-rate-draws-concern-1.580936>, where the Department of Justice is reported as informing the UN Committee against Torture that there had been a drop in asylum claims from "high grant" countries such as Iraq and Afghanistan. See also Maresa Fagan, Republic of Ireland's record of granting asylum below EU average, The Detail, 12 February 2018: <https://www.thedetail.tv/articles/republic-of-ireland-s-record-of-granting-asylum-below-eu-average>.
- 26 Fagan, Republic of Ireland's record on immigration enforcement prompts calls for greater transparency, The Detail, 12 February 2018: <https://www.thedetail.tv/articles/republic-of-ireland-s-record-on-immigration-enforcement-prompts-calls-for-greater-transparency>
- 27 See Section 12 of the Immigration Act, 2004, as amended by section 34 of the Civil Law (Miscellaneous Provisions) Act 2011 12.-(1) Every non-national present in the State (other than anon-national under the age of 16 years) shall produce on demand—
  - (a) a valid passport or other equivalent document, issued by or on behalf of an authority recognised by the Government, which establishes his or her identity and nationality, and
  - (b) in case he or she is registered or deemed to be registered under this Act, his or her registration certificate.(2) (a) A non-national who contravenes this section shall be guilty of an offence.  
section, it shall be a defence for the person to prove that, at the

Border Control in Policy and Practice

## Introduction

This chapter examines how the legal framework laid out in Chapter 2 is applied in practice at Irish ports of entry. The chapter is based on desk research and interviews conducted with individuals with direct experience in accessing or attempting to access the territory<sup>1</sup> and representatives from INIS. We consider whether practice and procedure in this area has improved since 2005, notwithstanding legislative inaction.<sup>2</sup>

We begin with an assessment of practices at Irish ports of entry with a particular focus on Dublin Airport, the largest entry point for non-nationals arriving in Ireland. We separately outline the experiences of protection applicants seeking to enter the state to claim asylum. It should be noted that a significant portion of this chapter examines experiences of those who were refused leave to land as the majority of our data and interviews are sourced from individuals in this situation, and the largest proportion of the cases experienced detention as a result of refusal of entry.

It is acknowledged from the outset that a state's ability to control entry at its borders is a fundamental exercise of sovereignty. However, it is equally important to note that persons seeking to enter the state are entitled to be treated in a manner that respects their fundamental human rights and dignity as human persons. Immigration controls must be proportionate, carried out in a fair and transparent manner, and in full compliance with the rule of law.

What is apparent throughout this chapter is that practice and procedures in immigration and border control have not significantly changed since 2005. Not only are there discrepancies and inconsistencies in the application of the law, but also, and more fundamentally, an individual who may be detained for immigration-related purposes is only expressly afforded basic rights and safeguards once they have been admitted to a prison, where they fall within the Prison Rules.

## Access to the Territory – Ports of Entry

In Ireland, there are three types of ports of entry into the State: airports, sea ports and via land, crossing the border shared with Northern Ireland. Every person arriving in the State, including the holder of a visa, is obliged, pursuant to the provisions of Section 11(2) of the Immigration Act, 2004, to provide to an Immigration Officer information in such manner as an Immigration Officer may reasonably require for the purposes of the

performance of his or her functions and to make a decision as to whether or not leave to land, that is, permission to enter the State, can be granted.

There are 12 grounds upon which an Immigration Officer may refuse an individual leave to land. These grounds are set out in Section 4(3)(a) to (l) of the Immigration Act, 2004 and detailed in Chapter 2. When a person is refused leave to land at a port of entry, a written notice of refusal identifying the relevant ground or grounds is handed to them.

The most common reasons people are refused to land are as follows:

- That there is reason to believe that the person intends to enter the State for purposes other than those expressed by the non-national concerned;
- The person is not in possession of a valid Irish visa and is not exempt from this requirement;
- The person concerned is not in possession of a valid passport or other equivalent document; or,
- The person concerned intends to travel (whether immediately or not) to the UK and would not qualify for admission had they come directly to the UK.<sup>3</sup>

As addressed in Chapter 3, between 2008 and 2016, over 28,000 individuals were refused leave to land and the most common reason for being refused was false or invalid visas or permits to enter the State.<sup>4</sup>

Of the 10 detainees interviewed at Cloverhill Prison for this research, 8 had been refused leave to land at Dublin Airport, and two were in Cloverhill Prison pending their removal from the State following a Deportation Order.

Of the 8 individuals refused leave to land, four were refused both because they were deemed to be unable to support themselves<sup>5</sup> and because their reasons for entering the State were not believed by the authorities<sup>6</sup>. Two were detained due to the absence of valid documentation<sup>7</sup>, one of whom subsequently applied for asylum at Cloverhill having had his request to apply for asylum refused at the airport due to problems with his passport. One individual was detained because of a lack of documentation as well as having been previously deported from the State<sup>8</sup>. One detainee was refused solely on the basis that his reasons for entering the State were not believed.

### Basic Safeguards and Human Rights Standards

As addressed in Chapter 2, the laws surrounding detention are complex and ultimately afford very few rights to an individual refused permission to land at

a port of entry. The following section presents the basic safeguards that should be met following refusal of leave to land and analyses to what extent, if at all, these safeguards are being met at Irish ports of entry. These safeguards include: the right to not be held incommunicado; access to legal representation; access to medical attention; access to information on reasons for detention and rights once in detention; and the right to pursue a review.

The list of basic safeguards presented below derives primarily from recommendations of the European Committee on the Prevention of Torture (CPT) on the basic safeguards at the initial stages of deprivation of liberty,<sup>9</sup> and Kelly's 2005 report,<sup>10</sup> as well as the EU Returns Directive,<sup>11</sup> and applicable International Human Rights Treaties<sup>12</sup>.

### Right Not to Be Held Incommunicado

Individuals facing detention for immigration-related purposes should not be prevented from informing, within a reasonable time frame, a person of their choice of the detention measure.<sup>13</sup> The CPT recommends that all individuals detained for immigration-related purposes should have the right "to be able to inform a relative or third party of one's choice about the detention measure", a right "greatly facilitated if irregular migrants are allowed to keep their mobile phones during deprivation of liberty or at least to have access to them."<sup>14</sup> Nonetheless, in Irish law, under Section 5(2) of the Immigration Act, 2003, detainees are not expressly afforded a right to notify a person of their choice of their situation.

Back in 2005, the then Head of the Garda National Immigration Bureau (GNIB) stated that people facing detention following a refusal of permission to land at an airport may be allowed to make telephone calls if this is "absolutely necessary".<sup>15</sup> He also claimed that persons held in the custody of the GNIB under Section 5(2) were occasionally permitted to make calls, but he confirmed that people detained on these grounds "have no absolute right to inform anyone of their situation and that, unless they ask, they will not be informed that they may do so."<sup>16</sup>

Several detainees held under Section 5(2) who were interviewed as part of Kelly's 2005 research stated that they were not informed of, or offered the possibility to notify someone about, their detention. They did, however, confirm that when they asked to notify someone, the relevant GNIB members granted their request without delay.<sup>17</sup>

6 of the 10 detainees interviewed at Cloverhill for this research complained about the confiscation of their mobile phones at ports of entry and their subsequent

inability to contact anyone, despite repeated requests. It was only upon committal to prison that a number of those detained were able to contact an individual of their choice. Of the five additional interviewees, two of the three who were detained for long periods reported that they were provided with contact and visitation opportunities only once they had left Dublin Airport.

Since no interview could be secured with GNIB during the course of this research, it is unknown if GNIB policy has changed for the better or worse since 2005. Nonetheless, the practice of confiscating mobile phones reported by those interviewed indicates continued inconsistencies around detainees' communication rights.

In 2005, Kelly recommended that the law should be changed to provide that persons detained under Section 5(2) have the right to inform a person of their choice of their situation from the outset of their detention.<sup>18</sup> This recommendation remains valid thirteen years later. In the EU Returns Directive,<sup>19</sup> Article 16 provides that third-country nationals in detention shall be allowed on request to establish in due time contact with legal representatives, family members and competent consular authorities. While Ireland has not opted into this Directive it nonetheless provides a comparative example and is instructive in detailing minimum standards and safeguard.

### Access to Legal Representation

An individual detained following refusal of leave to land should have access to legal counsel in a private setting on matters relating to their detention. The CPT recommends access to legal representation as a basic right for people about to be deprived of their liberty. This right should "include the right to talk with a lawyer in private, as well as to have access to legal advice for issues related to residence, detention and deportation."<sup>20</sup> In Irish law, people detained for immigration reasons under Section 5(2) of the 2003 Act do not have immediate right of access to legal advice.

In Kelly's 2005 report, the then Head of the GNIB stated that while access to a lawyer might be facilitated upon request, persons detained under Section 5(2) of the 2003 Act are neither asked if they require legal advice, nor informed that they may request it. Indeed, none of Kelly's interviewees requested access to a lawyer, and they confirmed that they had not been offered, nor had they received, access to a lawyer.

Despite the fact that over a decade has elapsed since Kelly's report, from the outset of detention, there remains no legal obligation to offer, or inform detainees of the right to request legal advice. This is the case irrespective of where they are detained.

In our research, **only one of the 8 detainees** interviewed at Cloverhill prison who had been refused leave to land availed of a legal representative. This lawyer was contacted from prison and not directly upon refusal at the airport. None of the other 7 detainees met with a lawyer or expressly stated an intention to meet with a lawyer.

One detainee from the Democratic Republic of Congo was refused leave to land at Dublin Airport having previously been deported from Ireland in 2013 following a failed application for asylum. When he asked the immigration officer whether he could notify a friend and his solicitor from the airport, his request was refused.

Access to a lawyer is a critical right that must be ensured in every instance of border control and immigration-related detention. It ensures that the individual receives independent advice on their situation and it encourages greater accountability for the decisions made by immigration officers at ports of entry.

### ***Access to Medical Attention***

People subject to immigration-related detention should have unrestricted access to medical treatment and information, regardless of where they are detained. The CPT recommendations state that “all newly arrived detainees should be promptly examined by a doctor or by a fully-qualified nurse reporting to a doctor.”<sup>21</sup> As addressed in Chapter 2, no express provision exists to guarantee access to medical care for those detained following refusal of permission to land.

In 2005, Kelly recommended that in the interest of preventing mistreatment, the right to obtain medical treatment from the outset of immigration-related detention, in other words starting at the port of entry, should be enshrined in law.

In Kelly’s interview with the then Head of the GNIB in 2005, he was informed that those detained by GNIB under Section 5(2) of the Immigration Act, 2003 may be granted access to medical care if it is “obvious” that they require medical attention, but they would not be asked if they needed medical attention, or informed that a doctor could be called for them. The detainees held under Section 5(2) who Kelly interviewed said they were not asked if they required attention while in the custody of the GNIB and had only been seen by a doctor on the day following their committal to prison.

None of the 8 detainees refused leave to land expressed that they requested medical assistance when they were refused at Dublin Airport. One Congolese national, interviewed after his release from Cloverhill Prison, stated that at no point was he asked if he needed medical

attention or the assistance of a doctor upon refusal of leave to land. The medical examination only took place once he had been admitted to Blanchardstown Garda Station (he was later admitted to Cloverhill Prison). One South African national interviewed after having entered the asylum system following refusal of leave to land stated that at no point was he offered medical assistance or examined, despite having requested a medical examination.

Access to medical attention or the assistance of a doctor is a basic safeguard which should be offered immediately to all individuals detained upon refusal of leave to land.

### ***Access to information on rights and reasons for detention***

The CPT recommends that all individuals detained should be informed of the procedures and their rights following refusal of leave to land in a manner in which they can be reasonably expected to understand. The CPT states that these individuals “should be systematically provided with a document explaining the procedure applicable to them and setting out their rights in clear and simple terms. This document should be available in the languages most commonly spoken by the detainees and, if necessary, recourse should be had to the services of an interpreter.”<sup>22</sup>

At Irish ports of entry, when a person is refused leave to land, a written notice of refusal, identifying the relevant ground or grounds is handed to them. Currently, this written notice is in English. All 8 detainees interviewed who were refused leave to land at Dublin Airport appeared to know the reasons for the refusal. At the same time, 5 claimed that they were not told why these reasons applied to them nor of the procedures that applied to them as a result. Two of the detainees reported that they refused to sign the notification telling them that they would be removed following a refusal of leave to land. However, they were still detained so it is unclear what the ramifications are for not signing the notification.

In 2005, the then Head of the GNIB told Kelly that no other written information was provided to those refused permission to land either about their detention under Section 5(2) of the Immigration Act, 2003, or their rights.<sup>23</sup>

Of those interviewed at Cloverhill during this research, only 2 detainees who were refused leave to land the day before the interview were able to clearly recount information about a number of their rights, relating to phone calls, visits and complaints which they received that morning.

To ensure that detainees are made aware of their

rights and how to exercise them, Kelly recommended the drafting and distribution of the type of document described by the CPT to all those detained under Section 5 (2) of the Immigration Act 2003, enumerating all the rights identified above. However, thirteen years on, the CPT’s recommendations remain unimplemented and no such document has been furnished to people detained under Section 5 (2). The inaccessibility of clear, understandable information fails to guarantee that detainees’ rights are enacted and protected in Ireland.

### ***Access to Translation Services***

The provision of information of reasons for refusal of leave to land and of the rights of the individual in question must be provided in a language the third-country national may reasonably be presumed to understand. The language requirement is referenced both in the CPT recommendations on access to rights, and in the EU Returns Directive in Article 12 (2), which requires immigration officers to provide information, inclusive of legal remedies, in a language the third-country national understands or can reasonably be expected to understand.<sup>24</sup> In domestic legislation, the right to the assistance of an interpreter is provided for protection applicants in Section 20 of the International Protection Act, 2015.

In an interview at Cloverhill Prison, two men from Hong Kong who were detained following refusal of leave to land at Dublin Airport, stated that they had serious difficulties communicating with immigration officers and in understanding the procedures they were subject to. They stated that this was due to their inability to speak English and the fact that immigration officers failed to secure an interpreter in the correct language. The men were provided with a Mandarin-speaking interpreter by phone at the airport. They spoke Cantonese. One of the men said he understood a little bit of Mandarin, but could not express himself well in the language, while the other man understood nothing. It is worth noting that the availability of quality interpreters, particularly in relation to detained protection applicants, has been a consistent and ongoing issue.

The two men from Hong Kong were stopped at passport control. As nationals of Hong Kong there was no requirement for them to have a visa for Ireland.

“I told them we were here to study English and I showed them the letter. It was for a one-year English course in Dublin. The officers told us ‘you need to have €1,000 in the bank’. They don’t believe about the course. It only cost €100 for the year and was just part-time, 3 hours a week. They

just didn’t believe us. Basically, we feel that because we have no English, they can do what they want, they don’t have to explain anything.”

Four other detainees interviewed for this research from Sudan, Somalia, Syria and Brazil were not offered any interpretation services at Dublin Airport. Although, these detainees had a good level of English and reported that they were able to communicate well with the immigration officers, it is concerning that they were not at least offered the services of an interpreter in the relevant language following the decision to refuse leave to land.

The offer of interpretation should be made in all such cases to ensure that the individual in question understands the grounds of their refusal, and the procedure following said refusal, including information on if, and where, they will be detained.

### ***Access to a Right of Appeal Following Refusal of Leave to Land***

In Irish law, the right to appeal or seek review of a decision of refusal of leave to land is, in theory, granted under Section 5 of the Illegal Immigrants (Trafficking) Act 2000 and Section 5 (4) of the Immigration Act, 2003. An applicant can also challenge the refusal by way of *Habeas Corpus*. In practice, however, exercising the right to review is not an accessible right for those refused leave to land.

In 2005, Kelly observed that individuals detained under Section 5(2) of the 2003 Act are not informed that they have the right to bring such proceedings. The failure to communicate this vital information is likely to render the right ineffective in practice.<sup>25</sup> Furthermore, as contacting legal representation is not a right of those refused leave to land, renders this right effectively redundant.

If an individual seeks a review of the decision to refuse leave to land and their subsequent detention, the venue for review proceedings is in the High Court. This is typically a time-consuming process and can often result in an individual being detained for significant periods of time. According to Catherine Cosgrave, Senior Solicitor with the Immigrant Council of Ireland, pursuing High Court proceedings is extremely prohibitive for individuals, particularly with regard to cost and time.<sup>26</sup> In our interview with Cosgrave, she described one such High Court case:

“One of the cases that I had in the High Court years ago was in relation to an immigration officer who exercised his discretion to refuse entry on the grounds that the person who

claimed they were coming here for study purposes did not have sufficient English to undertake to course of study. That might be okay if they were coming here to study Veterinary Sciences... But he was coming here to attend an English language course.

The decision of the immigration officer was [ultimately] quashed. So, yes, great, a positive outcome. But, really should this be heard in the High Court? Is there no interim forum where that could be dealt with? At a minimum it is going to cost a couple of hundred euros to issue the court proceedings and even if things were dealt with as accelerated proceedings [they are still slow] ... So, you get a positive decision in the end but what happened in the two-year period between being refused and getting a positive outcome? Were they in detention or were they not in detention in this time? Do they lose time at a critical point in their life where they wanted to gain English language skills to gain a career somewhere else?"<sup>27</sup>

With the sole venue of review proceedings being the High Court, reviews are highly unlikely to take place and result in a grave financial and temporal burden – not only on the individual but also on the State and its resources. With few High Court proceedings pursued following refusal of leave to land, there is not only a concerning lack of recourse for individuals refused but also a resultant lack of accountability for the wide powers of discretion available to and exercised by immigration officers. There is an urgent need for the establishment of clear right of appeal against a decision to refuse leave to land, before an interim court in which such cases can be heard and processed within a short time frame, coupled with a clear complaints mechanism at ports of entry. Even if the individual does not wish to pursue court proceedings, a complaints mechanism would ensure the individual had access to some form of recourse and that immigration officers would be held more accountable for the discretionary decisions they make and the potential severity of the consequences of this decision, namely a deprivation of liberty.

A decision to detain a non-national under Section 5(2) of the Immigration Act, 2003 made by an immigration officer or a member of the Garda Síochána is only subject to an internal review by their superior. When interviewed for this research, the Head of Border Management at INIS (in charge on the civilianised areas of border control at Dublin Airport) stated that every refusal of leave to land decision made by an Immigration Officer at Dublin Airport will be reviewed by their shift supervisor, who will be

a Civil Servant of Executive Officer Grade. The Executive Officer will either affirm the refusal or authorise entry. If leave to land is refused and an issue arises as to whether the person needs to be detained under Section 5(2), a member of GNIB will arrest the person on warrant, or in the case of a protection applicant without warrant and bring him or her to a place of detention. According to the Head of Border Management at INIS, civilianised immigration officers at Dublin Airport have no power to detain people refused leave to land.

The basic safeguards laid out in the CPT recommendations and other international treaties, as well as those addressed in Kelly's 2005 report, serve as a benchmark for best practice in the treatment of those refused leave to land. Currently, both in Irish law and in practice, there is a serious lack of protections for those detained following refusal of leave to land. The absence of these fundamental protections runs contrary to the principles of natural justice and creates a disproportionate imbalance between the State's right to control its borders and the rights of individuals who fall foul of immigration law and policy. The devastating personal consequences of the lack of any basic right to appeal or review a decision to refuse leave to land came into sharp focus when Paloma Aparecida Silva Carvalho, a 24-year-old Brazilian national who came to Ireland to visit the family that she worked as au pair for, was refused leave to land at Dublin Airport. She was strip-searched and subsequently detained in Dóchas Prison.<sup>28</sup> Her only crime was the desire to spend a few weeks with her former employers and their family.

### Assessment Upon Arrival

In performing their immigration duties, personnel at GNIB or the new civilianised immigration officers are required to make efforts to verify the information of individuals who present at the border. According to the then Minister of Justice and Equality, Mr. Dermot Ahern, with reference to the Immigration Act, 2004, personnel are expected to make every effort "to verify information supplied to them by persons making application for permission to enter the State."<sup>29</sup> Similarly, the Head of Border Management at INIS, stated that the immigration officer on duty would "do a lot of work" and make "a lot of enquiries" in order to verify the information of an individual presenting at the border.

Nonetheless, many of those interviewed for this research reported that not every effort was made by the acting immigration officer to verify their information, nor was all information taken into account before a final decision was made. In the cases of the Brazilian detainee and the two Hong Kong detainees interviewed in Cloverhill Prison, the reasons given by immigration officers for the refusal of leave to land were under Section 4 of the Immigration

Act, 2004: that they were unable to support themselves under Section 4 (a), and that they wanted to gain entry to Ireland for reasons other than those expressed to them Section 4 (k).

The account of the two Hong Kong nationals demonstrates a flaw in assessing adequate means under Section 4 (a). According to their account, they were told by immigration officers that they needed to have €2,000 in an Irish bank account. However, as they had just arrived in the country for the first time, they did not have any Irish bank account. One of these individuals stated:

"They didn't allow us to prove we had some funds. I told them we had money in Hong Kong. I can't give the certificate now, because it is in China. How do you know I don't have enough funds, if you don't give me a chance to show you, if you don't give me time?"

The Brazilian detainee had previously resided legally in Ireland for 3 years. He studied English in Dublin for one year and then photography for a further two years, costing him €10,000 per annum. Upon arrival at Dublin Airport, he was questioned about his means of support. He said: "They asked me if I had money in my Irish account and I said no, it's empty because I don't live here since last year." He told them he had ample means of supporting himself, offering to show them bank statements from his other accounts, including an account in Romania where he had resided in the past, and his visa travel card, funded by his father.

However, the immigration officers refused to look at any evidence of his means in non-Irish bank accounts. According to him, they were only interested in the sum of money in his Irish account.

"They asked if I had cash. They opened my wallet. I didn't have cash. I always get money at the ATM after landing at an airport."

One South African national interviewed after he had entered the asylum process stated that he was also questioned on his financial circumstances by immigration officers at Dublin Airport. This individual was entering Ireland to attend a post-graduate course in Dublin. He stated that upon arrival at the airport he had sufficient funds in several bank accounts as well as cash with him, but this was not deemed sufficient by immigration officers.

"They said they wanted me to withdraw 2000

euros. Then, I put the card [into the ATM Machine]. I tried to withdraw 2000 euros and the card declined saying you have exceeded the maximum limit for the day. Then, a woman, the tall lady among the officials said, 'You know very well that you cannot withdraw 2000 euros, the maximum you can take is 600 euros.' I said, 'Okay, if it is 600 euros, then I can withdraw 600 euros there.' I extracted the card. When I plugged it in, the 600 euros came out. They were not pleased."

With the prevalence of internet banking in today's world, in these cases it should have been possible for the immigration officers in question to quickly establish whether the above individuals were capable of supporting themselves. The fact that the detainees interviewed claim that no attempt was made to accurately verify their means strongly suggests that "every effort" was not made by the immigration officers to establish the truth of the men's claims about their personal finances. A conclusion was therefore reached without fair or adequate assessment of all the evidence. Where evidence is offered, including online access to a foreign bank account revealing a bank balance in the local currency, it should be incumbent on the deciding immigration officer to fully assess this evidence in order to accurately verify the financial status of the individual.

### Verification via Portable Electronic Devices

The confiscation of detainees' mobile phones is relevant in this regard, since most modern phones are smartphones with the ability to join the airport Wi-Fi system. Thus, it is now possible to access relevant documentation, including e-bookings, bank accounts etc. if requested by the immigration officer. Even if routine seizures of phones from people refused leave to land can be justified by the State, individuals facing a refusal of leave to land because they cannot satisfy an immigration officer, should not be hindered by the State in establishing the veracity of their claims. If this means that immigration officers have to provide people with free internet access following the confiscation of their mobile phones, then this should be facilitated in a timely manner. Otherwise the determination that a person has insufficient funds has not necessarily been verified to the fullest extent, and becomes a subjective criterion, devoid of any convincing evidence.

Facilitating people with access to the internet and a phone could, at least in some cases, assist immigration officers to confirm the information supplied by people presenting at the border. This could only be a positive development if it would enable the immigration officer to do important fact checking, whilst empowering the person in question to adduce proof of his or her travel

purposes, financial means etc. Thus, more comprehensive efforts need to be made by immigration officers in verifying the information of an individual intending to enter the State before they are refused leave to land.

## Access to the Protection Procedure and Border Control

Article 31 of the UN Convention relating to the Status of Refugees provides that

“Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence”<sup>30</sup>

This is in clear recognition of the fact that refugees may be unable to attain the requisite travel documentation or visa to permit them to enter a state to seek protection and often have to resort to travelling in an irregular and clandestine manner. Article 31 requires States not to punish those who travel in this manner.

In the Irish context, there is a risk that international refugee law and immigration law can be conflated, and those seeking refuge can become subject to immigration controls at the point of entry. In 2016, 4,127 individuals were refused permission to land at out ports of entry. Of that number only 396 were subsequently permitted to enter the asylum process. Given that we are in the midst of the largest refugee crisis since the Second World War, it would appear that on its face these figures are somewhat low. As stated previously, we encountered difficulties in attaining a full list of countries of origin of those refused permission to land. The 2014 figures, as outlined in Chapter 3, provide a useful insight as nationals from conflict zones such as Afghanistan (77), Somalia (46), and Ukraine (78) were all refused permission to land. Also, of concern are the 808 people that come from countries classified as “other”. Whilst it is accepted that we cannot definitively state that some of these individuals Ireland to seek protection, it does however raise the spectre of *refoulement*.

### Identification of Protection Applicants at the Border

According to the European Union Agency for Fundamental Rights (FRA) report, *Fundamental Rights at Land Borders*,<sup>31</sup> if there are indications that a person wishes to seek

international protection at an airport, border guards are duty bound to provide information on asylum. The FRA research states that protection applicants are primarily expected to identify themselves as such. However, according to the Frontex Common Core Curriculum, which lays out basic training standards for border guards of EU member states, immigration officers should be capable of identifying implicit asylum requests, as well as those that are clearly articulated.<sup>32</sup> To do so, immigration officers require sophisticated training to develop the skills to identify persons in need of protection.

Under Article 2(b) of the Asylum Procedures Directive<sup>33</sup>, an application for international protection includes a request from a third-country national or a stateless person who “can be understood to seek refugee status or subsidiary protection status”. Article 3(a) of the Schengen Borders Code<sup>34</sup>, as revised by Regulation 610/2013, requires Member States to act in full compliance with the 1951 Convention Relating to the Status of Refugees, particularly the principle of *non-refoulement*, (which is the principle of not forcing refugees or protection applicants to return to a country in which they are liable to be subjected to persecution). While Ireland is not a party to the Asylum Procedures Directive or the Schengen Borders Code, it is signatory to the 1951 Refugee Convention and the subsequent Protocol of 1967. The Convention and amending Protocol have been transferred into Irish Law in the form of the Refugee Act, 1996 and the International Protection Act, 2015. Immigration Officers are therefore bound to honour the provisions, including the central tenet of *non-refoulement*.

### Direct Experiences of Protection Applicants at the Border

During the course of this research, when asked directly whether a prospective protection applicant has to use a specific form of wording such as “I want to seek protection/asylum”, the Head of Border Management at INIS was very clear that no such precise wording would be necessary. Any words that would convey a person’s fear or deep reluctance to return to their home country would be entertained by the relevant immigration officer. A related query as to whether lay Immigration Officers are instructed that they are under a positive duty to seek to identify potential refugees was met by silence. The Head of Border Management stated that “for the most part it will be language”, meaning someone would have to indicate a desire to apply for asylum, though as stated about they do not have to use precise, legalistic wording to convey this desire. Another INIS employee stated that “the ORAC trainers are very experienced in protection matters and know how to explain it to new staff. The new recruits do have knowledge of the steps, e.g. what will happen with ORAC, etc.”

One detainee interviewed while in Cloverhill Prison who was refused leave to land at Dublin Airport wished to seek asylum in Ireland. He travelled from Sudan on an Eastern European passport and was refused leave to land on the basis that it was not a valid passport. He felt that the immigration officers he encountered were not receptive to his side of the story.

“ I said, I want to seek asylum. They said no, because of the passport. They didn’t want to listen. They said ‘Yes, yes sit down there.’ I answered things, but they didn’t listen. They didn’t want to know about my situation, my country.”

This experience was echoed by an interviewee who was initially detained in 2009 but whose detention has since ended. He stated that he expressed a desire to apply for asylum at Dublin Airport but that the officers at the airport did not engage with him. Eight hours later, he was transferred to a Garda station, where he was asked if he wished to apply for asylum. This is a particularly worrying account and runs counter to the assurances given by the INIS staff member interviewed. In the absence of independent monitoring at our main airports and ports of entry is difficult to ascertain if all potential protection applicants are given access to our asylum procedures or if they are getting returned at the border if they fall foul of our immigration laws.

The FRA report notes that information provision is central to the identification of people in need of protection and that Article 8 of the Asylum Procedures Directive obliges Member States “to provide information on asylum to persons in transit zones when there are indications that

they may wish to make an asylum application”.<sup>35</sup> In a migratory context, indications of a desire to apply for asylum may emerge at different stages and it is, therefore, crucial that identification efforts are maintained at all stages of the immigration process from gate checks to non-admittance and temporary holding.<sup>36</sup> Indeed, as noted by the FRA report they often arise during investigations into “inaccurate or missing travel documents”.

In the case of one of the detainees interviewed during this research who wanted to seek asylum, his initial request to apply for the asylum arose when he was refused permission to land for travelling on a passport deemed to be invalid. The fact that the immigration officers dealing with this individual would not entertain his asylum application at the border on the grounds that he was travelling on an invalid passport was arguably in breach of Ireland’s duties under the 1951 Refugee Convention. An interview under Section 8 of the then Refugee Act, 1996 should have been conducted once he said he wanted to seek asylum, which would have involved informing him of his right to legal advice and to contact the UNHCR under subsection 8(1)(b) of the 1996 Act.

Moreover, the fact that efforts were made in this individual’s case to remove him under Section (5)(a) of the Immigration Act, 2004 gave rise to a real possibility of *refoulement*. Ultimately, he refused to sign the written notification consenting to his removal under Section (5)(g) of the Immigration Act, 2004, and it was apparently then that a decision was made to detain him, first in a Garda station, and finally at Cloverhill Prison. Assuming that the immigration officer believed in good faith that this individual’s detention was deemed necessary to establish his true nationality, it is submitted that the appropriate piece of legislation to authorise such detention was Section 9(8)(f) of the Refugee Act, 1996 on the basis that the person “without reasonable cause has destroyed his or her identity or travel documents or is in possession of forged identity documents.”

During this research, the Head of Border Management at INIS stated that it is envisaged that civilian immigration staff at Dublin Airport would carry out Section 8 interviews under the Refugee Act, 1996 regarding a person’s potential refugee status in due course. As of April 2015, the existing 32 civil service staff had not yet conducted these interviews, with GNIB continuing to attend to these matters when they arose. With the commencement of the International Protection Act, 2015, and the introduction of a more onerous screening process for the initial admissibility interview, we assume that INIS staff have been fully trained by the International Protection Office to conduct this initial screening and are currently carrying out these interviews in Dublin Airport.

## CHILDREN

When a child presents at a port of entry, accompanied or unaccompanied, immigration officers should be sufficiently trained to interview and interact with children, including training in children's rights. According to Hilary Harmon, Child Refugee Project Manager at the Children's Rights Alliance, the training of immigration officers to deal with minors and vulnerable individuals needs to occur at all levels of the immigration system, starting with immigration officers. In interview Harmon stated, "Immigration officers should be trained in child friendly justice and child friendly methods of interviewing children." The training of officers needs to occur not only in the interviewing of children but within a wider framework of assessing vulnerability and requires sufficient training to interview and assess individuals who would be deemed 'vulnerable', be they victims of trafficking or unaccompanied children, among others.

## Age Assessments

Age assessments are conducted at ports of entry to determine whether or not an individual should be treated as an adult or as a child in the application of the law. These assessments are conducted by immigration officers through a series of questions following which it is at the officer's discretion to determine the approximate age of the individual presenting. Comprehensive training of immigration officers and Garda, and mechanisms to ensure best practice, would ensure vulnerable individuals and children are appropriately and sufficiently assessed and treated according to their rights and protections.

Further concerns arise with regard to the environment in which children and vulnerable individuals are interviewed and assessed. There is a need to ensure that airports and with them, the spaces where interviews are conducted and spaces detention, are child-friendly. This concern is not only for unaccompanied minors, but also for those that arrive with guardians.

Thus, despite movements towards civilianising the airport and improving the training of officers, there remain concerns about the adequacy of this training, particularly in the case of interviewing and assessing vulnerable individuals and children, and the environment in which this takes place.

## Immigration and border control practices case study: Dublin Airport

The following section addresses the immigration procedures and protocol followed by immigration officers at Dublin Airport. As Ireland's busiest port of entry, with 27.9 million individuals passing through the airport in 2016, Dublin Airport makes for a strong case study.<sup>37</sup> Additionally, the majority of decisions of refusal of leave to land in Ireland occur at Dublin Airport and it is where the Department of Justice and Equality has focused most of its attention in their updating of border controls and immigration in Ireland. This increased attention can be seen both in the recent civilianisation of Dublin Airport, which has not occurred at any other port of entry in Ireland, and in their commitment to construct a detention facility at the airport. The commitment, and now obligation under the Reception Conditions Directive, upon the state to provide a separate facility for immigration detainees provides a good opportunity to right the wrongs of our current detention regime by introducing clear rights and safeguards in line with international human rights norms and best practice for those who are detained. The rights provided in the Prison Rules 2007 provide a good starting point and must apply in this context.

The following section firstly addresses the challenges raised by the recent civilianisation of Dublin Airport's border control operation; and secondly assesses the safeguards within border policy at the airport in relation to European and International best practice.

### Civilianisation of Dublin Airport: Potential Challenges

The border control function at Dublin Airport has latterly been civilianised, in a process commenced by then Minister for Justice and Equality, Frances Fitzgerald, in 2014 and completed in October 2017.<sup>38</sup> This means that the operation of passport control booths has been transferred from GNIB staff to civil servants from INIS of Clerical Officer (CO) and Executive Officer (EO) rank,<sup>39</sup> with the primary aim of returning Gardaí to core policing tasks.

At the time of interview with the Head of Border Management in 2015, it was envisaged that by the end of that year that there would be 80 lay Immigration Officers at Dublin airport, covering both Terminal 1 and Terminal 2. In February 2017, the Minister for Justice and Equality stated in response to a parliamentary question that there were 68 civilian staff with 19 additional officers taken on that month undergoing training. It was predicted that they would be deployed by April 2017. At that time, the

frontline immigration checks in Terminal 1 and the transit area of Terminal 2 at Dublin Airport were undertaken by civilian staff<sup>40</sup>. In response to a later Parliamentary Question in November 2017, Minister Charlie Flanagan noted that the civilianisation process in both Terminal 1 and Terminal 2 had now been completed, however he did not state the final number of INIS staff in the airport.<sup>41</sup>

The civilianising process raises a number of important issues, especially with regard to the training of immigration officers with a particular focus on human rights, Ireland's obligations under the Geneva Convention 1951, and the potential consequences of immigration decisions in terms of refusals of leave to land and *refoulement*.

Prior to civilianisation of border control operations, the Garda on passport duty recommending refusal of leave to land would consult with his/her Duty Sergeant about the decision and the latter would sign off on the refusal, or not, as the case may be. With civilianisation, the Head of Border Management stated that COs will make the initial decision. He or she will then have to consult with his or her supervisor, an EO. The supervisor will either agree and sign off on the decision or disagree with it and grant leave to land. The supervisor's decision will generally be final, although he/she will consult with GNIB where leave to land is refused, for example to arrange removal or detention, if necessary.

### Challenge: Training of Civil Servants in Border Control Positions

In an interview with the Head of Border Management at INIS in 2015, he recognised that immigration officers are "the first face of official Ireland" and must meet a high, professional standard. As the first point of contact, INIS staff must be provided with specialised training in human rights issues and in identifying vulnerability (such as people seeking international protection or victims of trafficking).<sup>42</sup> According to the Head of Border Management at INIS in 2015, training and recruitment<sup>43</sup> would be the "two key issues going forward" in the civilianisation process.

In terms of training, all new lay immigration officers at Dublin airport spend 2 weeks participating in classroom training, followed by 5 weeks on-the-job training and mentoring. The classroom training is controlled by INIS, with training officers from the UK, from the Gardaí, ORAC (now IPO) and Customer Relations (the IPA). INIS appreciates the need for "more specialised training", and the Head of Border Management envisaged at the time of interview in 2015 that refresher training may take place once a year.

At the time of interview with Head of Border Management

in 2015, there had been no involvement by the UNHCR in training, although “the very experienced and competent ORAC trainers did receive UNHCR training from the Dublin office”. Based on more recent communications received from the UNHCR office in Dublin, we understand that they have since (in 2017) delivered intensive training over 5 sessions to 86 INIS recruits on human rights in a refugee context, including child specific training in conjunction with Tusla. This is a most welcome development, particularly in the light of Section 13 (1) of the International Protection Act, 2015 where immigration officers are required to conduct a detailed preliminary interview prior to an applicant gaining access to the protection procedure.

The ‘on-the-job’ component of immigration officer training involves “mentoring and reverse mentoring”. This means that for the first part of the airport training, new recruits will sit in the passport booth with an experienced staff member, seeing how he or she handles various situations.

“The second portion of this training will see the new recruit manning the booth, putting what he/she has learnt into practice, with the experience staff member observing matters and giving feedback on the recruit’s performance. After a minimum of 5 weeks mentoring (it could be longer if more mentoring is deemed necessary for a particular individual), the new recruit will be left alone to man the passport booth, carrying out the initial front-line check. Since Dublin airport deals with approximately 22 million visitors a year, over the 5-week on-the-job training period, a new recruit will be exposed to many thousands of travellers before they are entrusted with manning a booth alone.”

While civilianisation in and of itself is not necessarily an issue, it does present potential problems if civilianised staff are not properly and expertly trained, and if they are not perceived to be at a grade where frontline decision making may impact a person’s opportunities to seek protection or result in someone being detained when it is not absolutely necessary to do so. In addition, the civilianisation process – confined as it is to Dublin Airport for the moment – creates a two-tiered system, where one type of decision making regime is operating at Dublin Airport and another is operating at all other ports of entry. This potentially makes accountability in decision making even more difficult to track across all Irish ports of entry

## Safe-guarding human dignity at ports of entry: lessons for Ireland from the FRA Report

The 2014 EU Fundamental Rights Agency (FRA) Report, *Fundamental Rights at Airports: border checks at five international airports in the European Union*,<sup>44</sup> investigated border control practices at five busy European airports, namely Frankfurt am Main in Germany, Schiphol in the Netherlands, Charles De Gaulle in Paris, France, Fiumicino in Rome, Italy and Manchester in the United Kingdom. As part of the research, immigration officers at the airports in question were surveyed about their role and responsibilities, including about how proactive they were in identifying potential refugees, the training they had received on protection issues, trafficking, interacting with children, etc.

The FRA Report contains some very helpful and practical recommendations relating to holding facilities for people detained at airports, access to food and water, training and the conduct of searches with a focus on gender sensitivity, proportionality and the incremental escalation of searches. The key recommendations include:

- Border management authorities should ensure that adequate office space and waiting areas are available to facilitate the professional conduct of border checks;
- Where passengers are confined to transit areas for immigration reasons, border management staff are encouraged to ensure that adequate overnight facilities are available or, in case of emergency, folding beds are distributed;
- Holding rooms at the airport should accommodate men and women in separate wards and need to be appropriate for families;
- Arrangements need to be in place for people who remain in transit zones for longer periods to be provided with water, culturally appropriate food, and hygiene items when these are not covered by the airline;
- Border management authorities should clearly define ‘professionalism’ of interaction with passengers, which should be understood to include, at a minimum, respect and responsiveness to passenger questions. Such professionalism should be included in training courses;
- To further encourage professional conduct in difficult situations, border management authorities may consider revising instructions and training on effective de-escalation;
- In line with Article 15(1) of the revised Schengen Borders Code, border management authorities are encouraged to maintain, or increase offers of foreign language courses in order to better enable officers to

resolve cases early on, respond to questions and effectively identify protection needs;

- EU Member States are encouraged to formulate further guidance on the rules for searches during second-line checks, including at least the same safeguards that apply to searches of suspected criminals;
- Border management authorities should ensure that searches of persons are carried out by same-sex officers and in a gender-sensitive manner;
- Border management authorities should encourage officers’ sensitivity to passengers’ concerns and ensure that separate facilities for men and women are available and sufficient women officers are on duty and trained in conducting searches;
- Before undergoing a search, passengers should receive an explanation of the procedure and, unless a crime is being investigated, the purpose of the search;
- Border guards carrying out searches for immigration purposes should receive training and practical guidance on the proportionality, incremental escalation and conduct of such searches, including gender sensitivity, in line with the Common Core Curriculum, the common standards for basic training of border guards prepared by Frontex.<sup>45</sup>

While these recommendations are in no way binding on Ireland, they help to identify best international practice in this field, and can serve as a roadmap for immigration officers at Irish ports of entry in ensuring they are operating at the highest standards. This will also ensure we are operating in compliance with European norms in relation to immigration detention and border control. This is particularly critical given the Government’s intentions to build detention facility at Dublin Airport.

## Conclusion

Although the number of individuals being refused leave to land at Irish ports of entry continues to rise significantly each year, the rights and protections, and the transparency around decisions on refusals of leave to land, have not improved since 2005.

The rights recommended by the CPT and Kelly – to not be held incommunicado, to access legal representation, to access medical attention, to receive information on rights and reasons for refusal and to seek a review – are still not enshrined in law or in practice in Ireland. The failure to recognize such rights raises concerns that Ireland is not in compliance with international human rights conventions.

The research presented above raises further concerns about the adequacy of the training received by immigration officers at ports of entry, with particular regard to the

consistency of this training, as well as the compliance of Ireland with international refugee law, particularly in relation to the international obligation of *non-refoulement*. There is an urgent need to ensure officers are sufficiently competent in verifying information, making discretionary decisions and conducting interviews with a wide variety of individuals, including children. In addition, stronger monitoring protocols need to be implemented to ensure consistency and transparency at all ports of entry.

## Chapter Endnotes

- 1 The detainee interviews were conducted under the legislative regime in place prior to the enactment of the International Protection Act 2015 and are assessed against the legislation applicable at the time of their detention.
- 2 At the time of writing, no interview with a representative of GNIB had been secured, despite having made the request at the outset of the research in January 2015 and having been in repeated contact with the Head of Research and Analysis at Garda Headquarters.
- 3 See for example Question No. 474 by Deputy Derek Nolan, 22nd January 2013, available at <https://www.kildarestreet.com/wrans/?id=2013-01-22a.926&s=refused+leave+to+land#g927.q>
- 4 Maresa Fagan, More than 28,000 non-EU citizens refused entry since 2008, The Irish Times, 12 February 2018: <https://www.irishtimes.com/news/social-affairs/more-than-28-000-non-eu-citizens-refused-entry-since-2008-1.3388429>
- 5 Section 4(3)(a) Immigration Act 2004
- 6 Section 4(3)(k) Immigration Act 2004
- 7 Section 4(3)(g) Immigration Act 2004
- 8 Section 4(3)(f)(i) Immigration Act 2004
- 9 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), “Factsheet: Immigration Detention,” March 2017 <https://rm.coe.int/16806bf12>
- 10 Kelly 2005
- 11 Directive 2008/115/EC of the European Parliament and of the Council 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals
- 12 UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III); Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950
- 13 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), “Factsheet: Immigration Detention,” March 2017 <https://rm.coe.int/16806bf12>; Directive 2008/115/EC of the European Parliament and of the Council 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals; Kelly 2005.
- 14 19th General Report on the CPT’s activities, paragraph 82. Accessible here: [http://hudoc.cpt.coe.int/eng#{"CPTSectionID":\["p-standards-inf-2009-27-part-en-3"\]}](http://hudoc.cpt.coe.int/eng#{)
- 15 Kelly 2005, p. 22.
- 16 Ibid.
- 17 Kelly 2005, p. 23.
- 18 Kelly 2005

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- 19 Directive 2008/115/EC of the European Parliament and of the Council 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals
- 20 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), "Factsheet: Immigration Detention," March 2017 <https://rm.coe.int/168066fbf2>; Directive 2008/115/EC of the European Parliament and of the Council 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals; Kelly 2005.
- 21 19th General Report on the CPT's activities, paragraph 82.
- 22 19th General Report on the CPT's activities, paragraph 84.
- 23 Kelly 2005, p. 25.
- 24 Although Ireland is not signatory to the returns Directive, as stated previously, it provides a good benchmark for practice and policy at Ireland's borders and in the treatment of third-country nationals.
- 25 Kelly 2005, p. 21.
- 26 Interview with Catherine Cosgrave, 12 December 2017.
- 27 Ibid.
- 28 See further, Ceimin Burke, 'We cried all the way home': family devastated as former au pair detained in Mountjoy, *The Journal.ie*, 20 July 2017: <http://www.thejournal.ie/brazilian-woman-imprisoned-threatened-deportation-3506216-Jul2017/> accessed 24/02/2018.
- 29 See the response of the then Minister for Justice, Mr Dermot Ahern to Question No. 74 by Deputy Roisin Shortall, 2nd October 2008, available at <https://www.kildarestreet.com/wrans/?id=2008-10-02.764.0&s=section+4%283%29+of+the+immigration+Act+2004#g766.0.r>.
- 30 UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137
- 31 European Union Agency for Fundamental Rights (FRA), *Fundamental rights at land borders: findings from selected European Union border crossing points* (2014), available at: <http://fra.europa.eu/en/publication/2014/fundamental-rights-land-borders-findings-selected-european-union-border-crossing>.
- 32 Frontex Common Core Curriculum, 2007. Subject 1.7.7. The Common Core Curriculum for EU border guards was developed in 2006-2007. See <http://frontex.europa.eu/news/common-training-standards-for-the-eu-border-guard-services-1NyLhR>. We note that in late 2017, Frontex updated its Core Curriculum, however we were not able to access the document; see <http://frontex.europa.eu/pressroom/news/frontex-updates-key-training-document-for-eu-border-and-coast-guard-officers-oPQSoz>. See also Frontex, *Fundamental Rights Training for Border Guards* (2013), available at: [http://frontex.europa.eu/assets/usualtsa/Publications/Training/Fundamental\\_Rights\\_Training\\_for\\_Border\\_Guards1.pdf](http://frontex.europa.eu/assets/usualtsa/Publications/Training/Fundamental_Rights_Training_for_Border_Guards1.pdf).
- 33 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.
- 34 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code)
- 35 FRA Report (2014), p. 51.
- 36 FRA Report (2014), p. 52.
- 37 Aviation Statistics, CSO statistical release, 18 April 2017 <http://www.justice.ie/en/JELR/Pages/PR15000472>. Process completed 2nd October 2017, see Charlie Flanagan's response to PQ <http://www.parliamentary-questions.com/question/49235-17/>
- 39 According to the *Civil Service: Real Careers, Real Opportunities* manual, the Clerical Officer (CO) grade is the lowest responsibility civil service grade and the role primarily involves office administration. They would not usually be entrusted with making decisions that may impact on the fundamental rights of others. In the context of border control, COs at Dublin Airport function as frontline immigration officers, conducting passport checks and associated interviews. They are therefore entrusted with immense responsibility and discretionary power in determining eligibility for international protection, granting or refusing leave to land, and making recommendations on immigration-related detention. Executive Officers (EOs) are also not typically decision-makers in the civil service either. The Civil Service describes the EO position as "a trainee management role", which encompasses both project management and, after initial training, staff management.
- 40 Parliamentary Question No: 78, 22 February 2018, available at <https://www.kildarestreet.com/wrans/?id=2017-02-22a.120&s=speaker%3A314#g121.q>
- 41 <http://www.parliamentary-questions.com/question/49235-17/>
- 42 This is training that is happening with GNIB: <https://www.esri.ie/pubs/RS38.pdf> - page 39. GNIB indicated that a continuous professional development training course entitled 'Tackling Trafficking in Human Beings: Prevention, Protection and Prosecution' is now led by the Bureau, with input from the International Organisation for Migration (IOM). The course aims to alert operational personnel to the existence of trafficking and to enable them to identify potential or suspected victims. These courses involve input from TUSLA on separated children and unaccompanied minors. In the period 2006-October 2014 a total of 931 persons had undertaken this training.
- 43 Another challenge presented by the civilianisation of border management is a high turnover of staff due to unfavourable working hours when compared with civil service norms. INIS officers usually operate within standard civil service working hours, i.e. between 9am and 5pm. However, the border control unit "is trying to facilitate a 24/7 service" at the airport. A further challenge identified by the Head of Border Management is that the work as an immigration officer entails shift-work, which inevitably leads to "wear and tear on people". In this regard, INIS expects a high level of staff turnover. This high turnover will, naturally have training implications, i.e. there will be a need not only for refresher training for those who stay, probably on an annual basis, but additionally, frequent full training for new recruits.
- 44 FRA Report 2014
- 45 Frontex Common Core Curriculum, 2007

## Introduction

In this chapter we will examine the detention regime in Ireland for immigration related reasons, including following a refusal of permission to land, detention of protection applicants and detention pending deportation, in light of our research findings. In the first section we will examine places of detention in Ireland, both formal and informal. We then look at the direct experiences of both migrants and protection applicants who were interviewed as part of this research and assess if the rights afforded were adequately protected. We briefly touch on the experience of female detainees drawing from previous research undertaken as it was not possible to interview any female detainees for this research. Finally we will briefly explore the experiences of persons who were detained pending deportation.

## Places of Detention – Formal and Informal

As noted in the previous section, people refused permission to land in Ireland can be detained in a Garda station or in a prison on the sole authority of an immigration officer or a member of the Gardaí, without the need for any judicial approval of detention. In addition to individuals refused leave to land, other cases in which an individual can be detained for immigration-related purposes include individuals detained pending their removal from the State. This includes “every Garda Síochána station” in addition to Castlerea Prison, Cloverhill Prison, Cork Prison, Limerick Prison, The Midlands Prison, Mountjoy Prison, Saint Patrick’s Institution, The Training Unit and Wheatfield Prison. The designated places of detention in the immigration context are provided for by way of a Statutory Instrument<sup>1</sup>. As discussed previously the continuing Irish practice of holding immigration detainees in penal institutions is a subject of international criticism.

### Informal Detention – Airports

The detention of individuals at Dublin Airport pending their removal from the State raises concerns with regard to the consistency of this practice, who is returned on the next available flight, and the adequacy of facilities at the airport for detention. Our research shows that people can often spend long periods of time and are effectively detained in the airport despite the fact that it is not a designated place of detention. Given the absence of legal safeguards and basic rights, such as access to a lawyer, medical treatment, lack of a real and substantial review of a decision, these detained in the airport, especially those held for protracted periods of time, are effectively detained in a no man’s land and in a setting that sits outside the law.

In response to a query about whether detention occurs at Irish airports, and if so in what conditions, the Head of Border Control at INIS stated: “There is always a desire on our part, and on the Guards’ part not to detain someone.” He stated he did not think GNIB detained anyone at the airport as there was insufficient space. He added that: “certain categories of persons will not be detained pending removal, if it can’t be arranged in a few hours, for example pregnant women and families with young children..., a Section 14 notice will be served under the 2004 Act, requiring them to reside at a particular place or sign on with Gardaí.” This type of arrangement was described by another INIS representative as a kind of “open custody” and is not for “a high-risk individual”.

Notwithstanding these comments, it is clear from interviews with detainees during this research that some people who are refused leave to land are, indeed, detained at ports of entry pending their removal. This may be merely for an hour or two until they can be placed on the next available flight back to the country from which their flight to Ireland originated. In answer to Parliamentary Questions on refusals of leave to land in 2015, then Minister Frances Fitzgerald stated:

“In general, it is the practice to remove persons from the State on the next available flight or ship. In keeping with standard practice in other jurisdictions, some individuals are escorted to their country of origin or to a connecting hub. In the case of persons refused permission to enter the State at ports of entry, scheduled commercial aircraft and ferries are used to effect removals.”<sup>2</sup>

However, our research suggests that people awaiting removal can be detained for longer periods at Irish airports and indeed, some detainees appear not to have been put on the next available flight, despite being aware that there were several flights back to their airport of origin that day, and in two cases having offered to pay for their own fare.

During the course of this research, one man interviewed at Cloverhill Prison who was refused leave to land at Dublin Airport stated that he was held at the airport from early in the morning until 10pm that night, when he was transferred to a Garda station. He spent one night at the Garda station and was committed to Cloverhill Prison the following day. He travelled via the United Arab Emirates from his home country in the Sudan on an Eastern European passport and was detained at the airport when he refused to sign the notification of refusal of leave to land under Section 4 of the Immigration Act, 2004.

A man interviewed following the end of his detention, reported that when he arrived in Dublin Airport in 2009 he was detained for eight hours at the airport. Although he said he wished to apply for asylum this was not facilitated by officers at the airport. He stated that the airport did not provide a translator, lawyer or an opportunity to contact anyone.

A young Somali man was held for 5 hours at the airport before being transferred to Cloverhill Prison. He was refused leave to land because immigration officers at Dublin Airport did not believe he was in Ireland as a tourist, despite his being scheduled to fly back to the Scandinavian country where he had refugee status two weeks later.

The two men from Hong Kong were refused leave to land at Dublin Airport and held there from 11pm until 10 am the following day. They were given food and water in the morning, but: “We had to ask. They didn’t offer. We complain the room was too cold. When we complain, they ask us if we eat something.”

As regards their sleeping conditions at the airport, they said they had to sleep on hard chairs and no blankets were provided. Even though they travelled from Hong Kong via London and were told they would be removed to London, they had been detained for more than 48 hours at the time of interview. The two detainees did not understand why they were not sent back to London immediately: “You have no right to lock us up. We didn’t do anything wrong. You already locked me up 50 hours.”

One South African man who was detained following refusal of leave to land reported a similar experience of the airport detention conditions. “They did not give me water. When I wanted to go to pee, they would have to escort me to the toilet to pee and then I had to knock for them to open. That’s when I knew that I was in danger. That I had been arrested. I was then escorted back to the cubicle room and they locked me up in the room.” Two hours after arriving at the airport, he was transferred to a nearby Garda Station where he remained for seven hours until he was brought to the IPO to submit his application for asylum.

An experienced immigration lawyer, Angel Bello Cortes, interviewed for this research raised the issue of unnecessary detention of persons refused leave to land during interview. In his view, the failure to remove people as quickly as possible and instead subjecting them to the trauma of detention in an Irish prison – even if only for a day or two – was one of the biggest issues in the immigration-related detention context. If people are going to be removed,

he believed, the humane thing to do is to do it swiftly. Whilst we agree with this lawyer’s contention in principle, the absence of a right to appeal a decision comes into focus here, as a safeguarding measure, we would recommend that those refused leave to land should be afforded the option of an appeal, if they do not wish to avail of an appeal then swift return would, indeed, be the more humane option.

Four of the detainees refused leave to land who were interviewed at Cloverhill Prison expressed a strong desire for their swift removal. In the case of the Somali man with refugee status in a Scandinavian country, there was no flight back to the Scandinavian country from which he had travelled to Ireland that day. He was told he might be removed two days later, on Thursday. He offered to buy his own ticket back home but was informed “that’s not how it works”.

Another detainee, from Ukraine, flew on his Romanian passport (considered a fake by immigration authorities) from Bucharest and had a return flight booked for 10 days later.

“It is my first time in prison. I am very frightened. There have been many flights every day. Why is it taking so long? For three days I am here.”

It is of serious concern that individuals detained as a result of a refusal of leave to land are not always returned on the earliest flight to their airport of origin or a connecting hub. This, as a result, means that these individuals can inappropriately be detained in prisons pending their removal from the state for varying periods of time. If there are other reasons that a person’s removal cannot be affected as soon as possible, this needs to be communicated to the individual as soon as that decision is made and in a language which they can reasonably be expected to understand.

Our research found that people who are detained for longer periods following their ‘unauthorised presence in the State’<sup>3</sup> appear to be more likely to be taken directly to one of the designated prisons (even if they only spend brief periods of time there), rather than to a Garda Station. 5 of the 8 interviewees refused leave to land were brought directly to Cloverhill Prison from Dublin airport. 3 detainees spent a night at a Garda station before being transferred to Cloverhill Prison. One of these detainees had already spent all day, from 8am until 10pm, detained at the airport. Of the five additional interviews carried out, four subjects had been detained in Dublin Airport. Of these, three were taken from the airport to Garda Stations, two of whom were subsequently transferred to Cloverhill Prison, while one was transferred directly to Cloverhill.

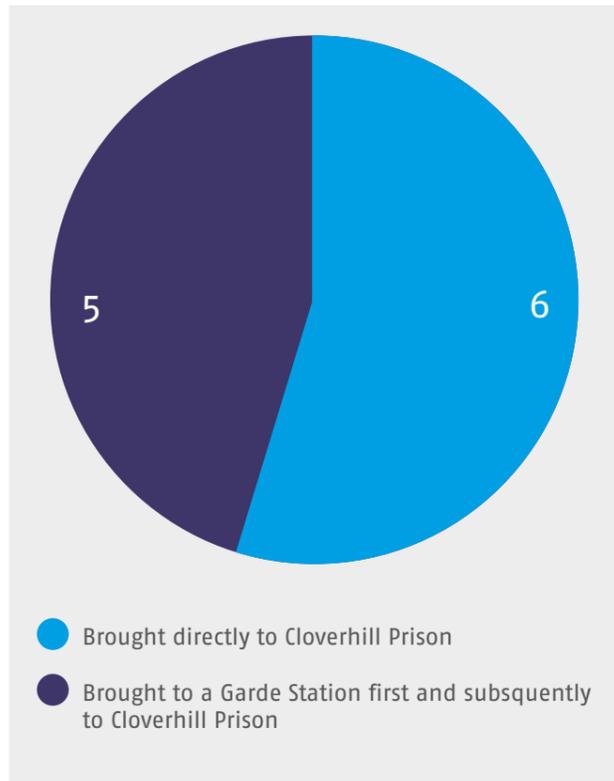


Figure 5.1: Detainee Journeys to Cloverhill Prison (data from interviews conducted with detainees in Cloverhill and from three of the five additional interviews with individuals following detention in Cloverhill)

During the course of this research, a spokesperson at Cloverhill Prison stated that it was not unusual for people detained on immigration grounds to be brought by GNIB to Cloverhill after midnight, only to be collected again at 4am for removal purposes. Such short stays were described as putting a burden on prison resources in terms of processing requirements.

### Places of detention

Ireland is one of the few countries in the EU that detains individuals for immigration-related purposes in criminal facilities, including Garda Stations and prisons.<sup>4</sup> As mentioned previously, Ireland has received significant criticism from human rights organisations and international human rights bodies for the use of criminal facilities. In 2005, Kelly was critical of the fact that the revised list of places of detention authorised by the Minister for Justice, Equality and Law Reform in February 2005 “still consists exclusively of Garda Síochána stations and prisons.”<sup>5</sup>

Thirteen years on, the places of detention remain unchanged. Garda stations and the authorised prisons possess few of the features identified by the CPT as appropriate for accommodating immigration detainees,

nor do Gardaí or Prison Officers necessarily possess the desired attributes, skill sets, or indeed training to effectively attend to the needs that may present. Although, the Department of Justice has announced its intention to establish a purpose-built immigration detention facility at Dublin Airport by 2018, this has yet to be completed.<sup>6</sup>

Both of the cases highlighted at the beginning of this report – Walli Ullah Safi and Paloma Aparezida Silva-Carvalho – illustrate why prisons are not appropriate places to accommodate immigration detainees. In Walli Ullah Safi’s case, he was the victim of a physical assault in the midst of a prison riot which left him in hospital.

In an interview with Ms. Karin Wieland, mother of the family for whom Ms. Aparezida Silva-Carvalho worked for as an au pair, Ms Wieland notes in particular the inappropriateness of prison in the context of refusal of entry:

“

And obviously, once you step inside a prison in Ireland, you abide by the rules of prison. So, you are treated like any other criminal...You can understand that that is really inappropriate and against EU current standards.... It struck me that Paloma really wasn’t in the right environment. There was a high level of criminality in there. Several things happened while she was in there. She was offered drugs in her own cell. She was offered ecstasy. Which was probably an act of kindness of the prisoners seeing as how Paloma described being so shocked. She couldn’t speak, and she couldn’t stop crying. The prisoners compared skin colour, openly questioned whether she was mad in front of her. There was food taken by hand from her plate because she couldn’t eat. Paloma describes being very, very frightened, that she felt afraid for her safety from other inmates. It might sound pathetic if you’re used to that environment regularly, but she wasn’t a criminal. ”

The inappropriateness of prisons as a venue for immigrant detention is further highlighted in the testimonies by detainees. The Congolese man detained in Cloverhill for a total of **2 months** reported that during his time in prison the rooms were overcrowded: he was the fourth individual in a room for three, and as a result, he slept on a mattress on the floor. He also reported high levels of violence in the prison. He said he stayed away from Irish prisoners as a “fight always broke out” and instead, stayed with other third-country nationals in the prison.

Another Somali individual who was detained in Cloverhill Prison for a total of 1 month and 4 days following refusal of leave to land at Dublin Airport also reported high levels of violence in prison. He stated that he got hit on the back of his head in the prison pool room and that “if you don’t speak English, they play with you.”

One man from Pakistan in Cloverhill Prison awaiting deportation also reported high levels of violence in the prison. He began a job in catering in the prison kitchens, but he described the job as precarious as “there were no cameras, it was easier to take you down. There were many knives. There were misunderstandings. Someone tried to bully me. I am a peaceful person. I don’t look for fights.”

These experiences of violence within Cloverhill Prison are not dissimilar to the experience of Walli Ullah Safi, whose experience was described at the start of this report. Walli Ullah Safi had been in Cloverhill Prison for two weeks when a prison riot broke out. Mr. Safi was held hostage and violently assaulted.<sup>7</sup>

While there is not scope here to discuss the conditions of prisons in Ireland more generally, and it is certainly not the intention of this report to further demonise criminality in prisons, it is worth noting that the substandard conditions in Irish prisons have been highlighted in numerous reports in recent years, in particular by the Irish Prison Visiting Committees<sup>8</sup> and the Irish Penal Reform Trust.<sup>9</sup> Prisons as well as Garda Stations are inappropriate venues in which individuals neither convicted of, nor facing, criminal charges should be detained. The troubling current conditions of prisons in Ireland further compounds the inappropriateness of these venues.

### Rights of Immigration Detainees in Prisons

Rights for immigration detainees only accrue when they are committed to a prison, as rights under the Prison Rules, 2007, are triggered (these rights are outlined in detail Chapter 2). The following section will assess the same basic safeguards examined in the previous chapter,

which include: the right to not be held incommunicado, access to legal representation and the right to submit a review, access to medical attention, and access to information on reasons for detention and rights once in detention.

We again stress that it is of serious concern that the only space in which an individual detained for immigration-related purposes can exercise basic rights and safeguards is upon committal to a prison, despite not having committed or been accused of a criminal act.

It should be noted that these rights afforded to the individual are not granted for those detained in a Garda Station, where an individual detained for immigration-related purposes is in the same legal limbo as their detention at a port of entry, where they are afforded few basic rights and safeguards.

### Right to Not Be Held Incommunicado

Under the Prison Rules, 2007, an immigrant detainee committed to prison has the right to inform a family member or nominated contact as soon as practicable. In addition, foreign nationals committed to prisons also have a right to contact a consul. Nonetheless, many of those detained expressed that they faced significant difficulties in trying to communicate with their elected contact.

As stated by the spokesperson from Cloverhill Prison, regardless of the time of day or night that an immigration detainee is committed, or the duration of his/her stay, “an officer would offer to make a call for them if they wanted”.

This statement did not accord with the experience of detainees refused leave to land who were interviewed for this research. One detainee in Cloverhill Prison stated that the prison would only permit prisoners to call allocated landlines in Ireland. He was consequently unable to assign a lawyer as a phone number, since he only had a mobile phone number for her.

A detainee from the Democratic Republic of Congo interviewed in relation to this report stated that he had the opportunity to phone a friend about his detention at Cloverhill. However, it took 4 days before the phone numbers he wished to use were made accessible to him. Such a long delay in enabling him to exercise his right to notify a third party of his situation is particularly problematic since most immigration detainees spend only 2-3 days in detention.

The two men from Hong-Kong, when queried about whether they had been able to contact their friends in Ireland, they said “no, because we only make a petition for a telephone card tomorrow. They seized the number of our friend in Ireland. They seized our phones.” Upon

committal the men were not asked if they wanted to contact someone to notify them of their situation, or if they were asked, the men didn't understand due to the language barrier, and the fact that a Cantonese-speaking interpreter was not arranged. Further to this, they stated that they were not informed of their right to contact the Embassy of China in Dublin.

Of the total of 8 individuals detained at Cloverhill Prison following refusal of leave to land, 5 of them expressly reported that they were not offered the opportunity to contact an individual of their choice.

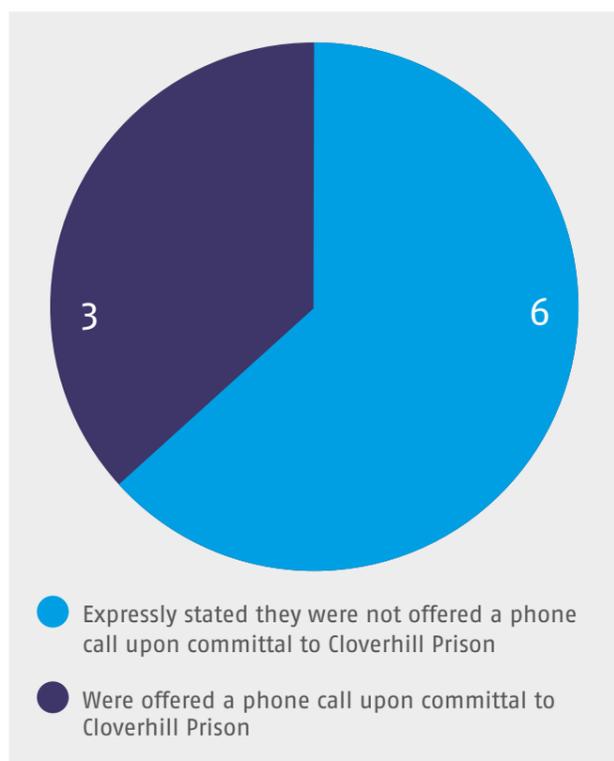


Figure 5.2: Ability to contact an individual of choice upon committal to Cloverhill Prison

Returning to the interview with Karin Wieland in the case of Paloma Aparecida Silva-Carvalho, she stated that one of the key issues for them was their inability to contact Paloma whilst she was detained. Ms. Wieland stated,

“The communication channel, in terms of informing us of what was happening to Paloma, was minimal. This was because we are not direct family, i.e. close family. As soon as Paloma was detained, we received one attempted phone call which we answered within a 5 to 10-minute period. We were sent to a centralized line that they insisted that they had never heard of Paloma and that Paloma had never been

entered into their system... In the time that it took us to even find out that Paloma had been detained, Paloma was already on her way to a prison. Can you imagine someone travelling all that way and they are in your care? A young 24-year-old woman.”<sup>10</sup>

These difficulties continued when Ms. Wieland tried to contact Dóchas Centre at Mountjoy Prison, despite Paloma giving the contact details of Ms. Wieland's family as her contact in Ireland.

It is troubling that a majority of the individuals interviewed who were committed to Cloverhill Prison following refusal of leave to land were not offered the ability to contact a person of their choice upon committal to the prison. This demonstrates that in practice, the right to not be held incommunicado is not upheld in the detention of individuals for immigration-related purposes. Compounding this are the obstacles an individual face in trying to communicate with their person of choice once they have been offered the opportunity to call, such as the requirement that the number be a landline.

#### Right of Access to Legal Representation and to submit a review

Related to the right to not be held incommunicado is the right to access to legal representation and to submit a review. Although not included in the Immigration Acts, the Prison Rules, 2007 stipulate that every individual committed to prison should be informed of their entitlement to legal representation and the ability to receive a visit from a legal adviser at any time.

In an interview with a spokesman at Cloverhill Prison during the course of this research, he stated that, upon committal, “If they wanted a call made to a solicitor it would be made but anyone detained at the airport and brought here probably would not have a solicitor.” However, since the prison does not appear to have a list of solicitors who could be contacted in this regard and is precluded from recommending any particular solicitor, the detained person will not be able to exercise their right to access legal advice unless they already have a solicitor in Ireland, which is highly unlikely since most of them are detained as soon as they land and they may not have been to Ireland previously.

As stated by the spokesman from Cloverhill Prison, it would not be until their meeting with the Governor that they would have their rights explained to them, “but this would not happen for a person that was only in for a few hours and not in the prison the following morning.” Thus, for those detained in prison for short periods of time, which is in a majority of the cases of individuals detained following refusal of leave to land, their ability

to contact a legal representative is seriously impeded by prison procedures. This not only demonstrates a violation of the individual's rights, but also demonstrates the inappropriateness of prison as a venue for individuals detained for immigration-related purposes.

Only one of the 8 detainees interviewed at Cloverhill Prison who had been refused leave to land availed of a professional legal representative with a view to challenging the legality of his removal order. None of the other 7 detainees met with a lawyer or intended to meet with a lawyer.



Figure 5.3: Access to Legal Representation of Detainees in Cloverhill Prison

If an individual who has been detained wishes to review that decision, the case has to enter high court proceedings which can be difficult to initiate and once initiated, can entail long waiting periods until the case is resolved. According to Catherine Cosgrave, Senior Solicitor for the Immigrant Council of Ireland, the current review proceedings for individuals detained for immigration-related reasons are inadequate. Cosgrave states, that

“while there are maximum periods of time that you can be held in detention, that clock effectively stops ticking while you challenge that decision...It's also very problematic because Judicial Review is only in the high court which

can be extremely prohibitive for people. When you look at some of the case law that has emerged, it shines a light on the inadequacy of the High Court as a forum for doing these things there, and whether there should instead be access to some form of independent tribunal.”<sup>11</sup>

In the case of Paloma Aparecida Silva-Carvalho, a solicitor was contacted to instigate Judicial Review proceedings in the High Court against the decision to deport Paloma following the refusal of entry to the State. In the interview conducted with Karin Wieland, she expressed frustration with the obstacles they faced in connecting Paloma with a solicitor and subsequently getting the case to the high court to be reviewed.<sup>12</sup> According to Ms. Wieland, Paloma's court case was ultimately unsuccessful as a result of a lack of time to gather evidence for the case. Ms. Wieland stated that even though they had secured a solicitor to act on Paloma's case, they continued to face obstacles and delays upon visiting Paloma shortly after she was detained.

“They made it very difficult for us to get into the prison and there was massive delay in getting the papers to Paloma to be signed and to make the necessary phone calls... There was only one pen in the room and we had literally 10 minutes to get the papers signed that would allow Paloma to consent to the legal representation. I very politely asked the prison guard if we could borrow her pen for a few minutes. She was very obnoxious in her behaviour. She stalled us in getting the pen... I then said, “Look we need to contact the solicitor.” She [the prison guard] then told me that you are not allowed to phone mobile phone numbers, it had to be an office number. I said it's already in court. So, she stalled us another 5 minutes. [Upon leaving the room] The prison guard at the desk, who was actually quite supportive, couldn't believe that we hadn't been allowed to make a phone call, and, immediately, he made a phone call.”

Thus, not only do detainees face difficulties in contacting a lawyer but may also face huge obstacles in asserting their rights before the courts as was cogently stated by Catherine Cosgrave above.

Kelly's findings in 2005 on access to review of a decision do not appear to have changed in the 13 years since the publication of that report. This is profoundly worrying as it suggests there is very little accountability for decisions made at borders for detaining people on the basis of a refusal of entry. In Ms. Aparecida Silva-Carvalho's case, it was only with significant pressure placed on the Minister by the family she was intending to visit, and the

public outcry that came from media attention to the case, that resulted in her removal from detention and permission to enter the State. How many detainees on the basis of refusal are removed from the State without ever even knowing their rights to review? How many immigration detainees are refused entry, detained and then removed from the State, who had arrived for the purposes of claiming asylum and were never given that opportunity?

### **Right of Access to Medical Attention**

While there is no express provision to guarantee the right of access to medical care for those detained for immigration-related purposes, under the Prison Rules, 2007, every individual detained should be examined by a doctor upon admission to the prison and have access to a similar level of healthcare to that which exists outside of prisons.

None of the three detainees interviewed during this research who spent a night at a Garda station were offered medical treatment.

All of the 8 detainees who were committed to prison following a refusal of leave to land were seen by a doctor either on the day of their committal, or the next day.

Detainees interviewed who did see a doctor reported that the medical examination involved questioning the detainee about his general health, including his mental health and any suicide attempts, disease history, medications etc. The physical examination involved taking the person's temperature and blood pressure.

The detainee from the Democratic Republic of Congo who was refused leave to land confirmed that a doctor examined him on the day of his committal to Cloverhill Prison. He had been detained for almost two weeks at the time of the interview and was seen by a doctor on one other occasion, apart from the initial medical screening. The Sudanese detainee reported that he received diabetes medication from the nurse at Cloverhill three times daily.

Detainees who arrive at prison late at night, only to leave 3 or 4 hours later will not be examined by a medical practitioner, unless a medical intervention is a matter of urgency.

People subject to detention on immigration grounds should have access to medical treatment, regardless of where they are detained, i.e. at an airport for a few hours, overnight at a Garda station, or at a prison for several days.

### **Access to information on reasons for detention and rights once in detention**

In both the Immigration Act, 2004 and the Prison Rules, 2007, those detained for immigration-related purposes should be provided with information on their rights, entitlements and obligations and the reasons for their detention as soon as practicable.

Only two detainees who were refused leave to land the day before interview were able to clearly recount information about a number of their rights, relating to phone calls, visits and complaints which they received that morning. According to a spokesperson for Cloverhill Prison, for individuals detained for only a number of hours, they would not typically meet with the governor nor have their rights explained to them.

Regarding information on reasons for detention, all 8 of the detainees interviewed in Cloverhill Prison following refusal of leave to land expressed that they did not understand the full reasons for their detention nor of the procedures followed in their situations.

All immigration detainees committed to prison following a refusal of leave to land should be given a copy of the governing prison rules in a language they can reasonably be expected to understand. The reasons for their detention and the procedure followed whilst in detention, not only with regard to Prison Rules, but also with respect to removal from the State, should be clearly explained to the individual.



### **Women detained for immigration related reasons**

In the course of this research it was not possible to secure any interviews with female detainees at the Dóchas Centre.

During its 2010 research on immigration related detention for the DEVAS report on *Becoming Vulnerable in Detention*, the Jesuit Refugee Service Europe interviewed 9 female detainees at the Dóchas Centre and found that the lack of information experienced by all of the women interviewed, as regards the general prison rules, asylum procedures and access to legal representation, the outcome of their detention and the deportation process caused a great sense of vulnerability, anxiety and isolation in the women.

The report stated (pp. 243-244):

“The prison authorities have developed an A4 sheet outlining information on how the prison operates including mealtimes, availability of classes and services, access to telephone calls and visiting times. It does not appear that these brief guidelines are translated into other languages. All of the women reported that they had received no information – either written or oral – regarding the rules of the centre upon arrival. Instead, they watched what others did and followed them.”

Accordingly, the JRS report recommended that prison staff should ensure that each detainee upon arrival is informed of the rules of the centre in a language that they understand.

The Governor of the Dóchas Centre stated that there were very few immigration detainees at the prison any more. The researcher understood that if, and when, women are committed to prison on immigration matters they usually learn about their rights, including their right to contact a solicitor and how to access the asylum process from other prisoners, rather than from prison staff or the Governor. They would not be told by the prison that they could challenge the legality of their detention, or the validity of the decision to remove them from the State.

The researcher emailed the Governor of the Dóchas centre seeking clarification about information provision for newly committed immigration detainees and the Governor responded as follows:

“We give all committals a booklet about their rights published by the Irish Penal Reform Trust. We would not be allowed to recommend any solicitor to any committal. As part of our committal interview, we ask each woman if she has a solicitor, and advise her that she may phone a solicitor should she wish to do so. I would not tell any committal that they could challenge the validity of their detention, whether an alien or a committal from court. Each time a woman is committed she will have either a committal warrant or a detention order, which I would understandably assume legally commits them into custody.”

## Detention of protection applicants

As evidenced in Chapter 3, in 2008, 5.8% of all applications for asylum were submitted from prisons in Ireland. In 2015, this figure had dropped to under 1%, with 35 individuals submitting applications from prison. While this decrease suggests that an individual's intentions to seek asylum are potentially being heard before they are committed to prison, it remains concerning that individuals continue to submit applications after having been committed to a prison. It should also be noted that it is not the general policy of the Irish Government to detain protection applicants and in general, once an application for protection is submitted, any immigration charges are often dropped.

We would however recommend that the governing legislation, the International Protection Act, 2015 be amended to include a section stating that people cannot be detained for the sole reason that he/she is a protection applicant. Both the UNHCR 2012 Detention Guidelines<sup>13</sup> and the EU Recast Reception Conditions Directive<sup>14</sup> state that, if detention is used, the asylum seeker must be held in a specialised detention facility, and should this not be possible, they should be detained separately from ordinary prisoners. This is currently not the practice in this jurisdiction.

As outlined in Chapter 2, since the introduction of the International Protection Act, 2015, the detention of protection applicants is provided for under Section 20 of this Act. It is permitted to detain an asylum applicant under Section 20 for a host of reasons, as detailed previously. Section 20 is harsher than its predecessor Section 9 of the Refugee Act in two key ways. Firstly, it gives Immigration Officers and the Gardaí increased powers of arrest as they can now arrest and detain a Protection Applicant without warrant. As the Irish Refugee Council<sup>15</sup> notes, "this is a significant and unnecessary expansion of the state's power to detain". They also highlight the fact that the power to arrest without warrant is only given in limited circumstances including for offences that carry a 5-year sentence. Secondly, the periods of detention before a person has to be brought before the courts has over doubled, going from 10 to 21 days. This significantly increases the risk of arbitrary detention and is a disproportionate and unreasonable interference with a person's right to liberty. We would recommend that Section 20 be amended to bring the provisions back in line with Section 9 of the Refugee Act and restore the rights that have existed for almost 2 decades.

### Detention at Ports of Entry

During the course of this research, we interviewed five individuals who expressed a wish to apply for asylum at

the border and were subsequently detained. Two of these individuals were interviewed during their detention in Cloverhill Prison. Of these two, one Sudanese national who travelled to Ireland on an Eastern European passport, was refused leave to land under Section 4(3) (g) and subsequently detained at Cloverhill Prison under Section 5(2) of the Immigration Act, 2003. He claimed that the immigration officers would not entertain an asylum application from him due to his invalid passport.

"They gave me a paper saying I'm agreeing to go back home and I refused to sign it. I said, "I want to seek asylum." They said no, because of the passport. They didn't want to listen. They said "yes, yes sit down there." I answered things, but they didn't listen. They didn't want to know about my situation, my country."

Given that he expressed his want to seek asylum, the more appropriate legislative provision under which to detain him with a view to establishing his nationality would have been Section 9(8)(f) of the then Refugee Act, 1996<sup>16</sup> rather than the Immigration Act, 2003. The application of an immigration provision in the context of a person who entered the state to seek protection runs the risk of criminalizing protection applicants and in this case clearly breaches Article 31 of the Convention Relating to the Status of Refugees, which provides that refugees should not be penalised for irregular entry.

The second person interviewed in Cloverhill, had been refused leave to land at Dublin Airport. He stated that he expressed his wish to apply for asylum at the airport. He had previously lived in Ireland for several years and was eventually deported following an unsuccessful asylum application. Following his repatriation, he stated that he was imprisoned for a month on the basis of an alleged plot to overthrow the regime. He said he had a newspaper article mentioning his disappearance and imprisonment, but that it was in his luggage which was still at the airport. The man was refused leave to land under Section 4(3)(f) on the basis of having previously been deported. An additional reason for his refusal was ground (g) because he failed to produce a valid passport. He reported that he had travelled on a friend's passport but did not produce it at passport control because he knew this would be a criminal offence. He gave the immigration officers his correct name but once they saw from the GNIBIS system he had previously lived in Ireland and had been deported, he was detained to facilitate his removal from the State. He was in the process of applying for asylum again from Cloverhill Prison at the time of interview.

An individual who has previously been deported from the State continues to have to right to seek asylum in Ireland. There are no articles in the Refugee Act, 1996, the International Protection Act, 2015, or, indeed, the Geneva Convention for Refugees of 1951, which precludes an individual from claiming asylum even if they have previously been deported from the State.

Immigration and GNIB officers at ports of entry need to be sufficiently trained to recognize an asylum seeker when they present at the border and to apply the relevant rights and protections under the International Protection Act, 2015 to ensure that protection applicants are not arbitrarily deprived of their liberty.

### Places and Length of Detention

Asylum applicants who are detained are held in the same conditions and facilities as other individuals detained for immigration-related purposes, that is in prisons and Garda stations. An individual detained under the International Protection Act, 2015 (and previously, the Refugee Act, 1996) can be detained for 21 days, a time period which can be renewed following a court appearance. As with other individuals detained for immigration-related purposes, this detention takes place in a prison.

In an interview with the Cloverhill spokesman, he stated that GNIB is chiefly responsible for the detention of these individuals and not the prison. He stated, "If a detainee is released because they apply for asylum we do not know the conditions. They only arrive with a release order for us, it is then up to the GNIB to explain conditions to a person who is released as we do not know the conditions. If a detainee applies for asylum we still send the application to ORAC and GNIB. That is where the involvement of the prison ends... once they are released from prison that ends our involvement." Not only is it concerning that there is an ostensible disconnect between prisons and the GNIB, but also it is apparent that prison guards are not sufficiently trained to deal with detained asylum seekers.

Given the inappropriateness of the facilities and the insufficient training of prison staff with regard to asylum, it is troubling that a number of individuals interviewed for this report were held in prisons for prolonged lengths of time. A Somali national interviewed following his release from Cloverhill Prison, was detained at Dublin Airport in December 2008. He informed that he expressed his desire to seek asylum at the airport, through an interpreter on the phone, but he was subsequently detained following a refusal of leave to land. This individual was held in Cloverhill Prison for 2 months and 4 days. During that time, he communicated to another prisoner that he wished to apply for asylum, who then

informed a prison officer who brought him to an office to take his fingerprints. He was visited by ORAC after three weeks in detention. It was only immediately after his fourth court appearance, and the appointment of a lawyer for this last court appearance, that he was released from prison. Following this, he immediately presented at the ORAC offices to submit an application for asylum. Upon applying for Irish citizenship years later, his application was deferred due to the recorded immigration offences he committed on first entering Ireland.

A Congolese national interviewed following his release from Cloverhill, informed that when he presented at Dublin Airport in December 2009, he expressed his intent to seek asylum in Ireland. He said that the Officer stated that he could not apply for asylum because he had travelled from Belgium. This individual was held in prison for two months. One month into his detention he was visited by ORAC, but it was not until his last court case, in which there was no lawyer present, that he was released from prison after stating his intentions to seek asylum. When released, he had to ask a man who released at the same time how to get to the ORAC offices. He then took a bus to Baleskin, the initial reception centre for people who have just lodged an application for international protection.

Similar to the above to examples, Walli Ullah Safi, whose account was described in earlier chapters, was also held in Cloverhill Prison for several weeks. It was not until his third court appearance that he was released and permitted to submit his application for asylum.

The above three individuals were held in prison facilities alongside convicted and remand prisoners, despite having not committed a criminal act in the state. It is of serious concern that for each of these men, their release from prison and the acceptance of their applications for asylum only occurred after a prolonged period in prison and several court cases.

In an interview with an ORAC spokesperson, he confirmed that asylum applications are rarely commenced in prison, with those who express a desire to access the asylum system generally released from detention within a few days of their committal to present at ORAC in person to apply for asylum. Under Section 20(9) of the International Protection Act 2015, if the would-be asylum seeker does not present at the International Protection Office, he or she may be in breach of the terms of his or her release and may be subject to a further period of detention. The spokesman further stated that in the rare circumstances where asylum applications are processed to finality in prisons, they most likely involve undocumented migrants who suddenly came to the attention of the authorities

and made asylum application when threatened with imminent deportation.

Whereas before, there was a high number of asylum applications submitted from prisons in Ireland (5.8% of all applications), the Governor of Cloverhill prison stated that immigration detainees who expressed a desire to apply for asylum in Ireland were now released within 2–3 days of their arrival at that prison in what is a “timing issue” rather than a policy shift. Thus, although the figure of applications for asylum has decreased significantly between 2008 to 2016, it would still appear that asylum seekers who have been unable to submit an application are still be detained in detention facilities that are, by definition, inappropriate. In addition, although the applications for asylum for those detained may no longer be submitted from prison, there is still a period of several days during which a protection applicant is held in prison before being released to present at ORAC/IPO.

### Rights of Detained Protection Applicants

The rights afforded to a protection applicant once detained are very similar to those of all other individuals detained for immigration-related purposes. It is clear that, like all immigration detainees, the key rights are afforded through the Prison Rules, 2007.

Representatives of the Dóchas Centre and Cloverhill Prison stated that immigration detainees would not be routinely informed that they have a right to access legal advice upon admission to prison. New detainees would not usually be asked if they wished to seek asylum and would not generally be asked if they wanted to contact their Consul, the UN High Commissioners for Refugees or NGOs working in the immigration or refugee field. Conversations with senior staff in Cloverhill Prison, the Dóchas Centre and Cork Prison suggest that asylum seekers are not routinely provided with a written document containing their general rights, nor are they given specific oral information about their special rights as asylum seekers within the prison, rather they will have to learn what they can from other prisoners.

In relation to access to legal representation, the spokesperson of Cloverhill stated that they do not have a list of solicitors specialising in immigration or asylum law. The Sudanese asylum seeker mentioned above stated that while he was detained overnight at a Garda Station, the Gardaí phoned a lawyer for him at 11pm, telling the lawyer that there was “a big problem” with his passport. “Then the lawyer didn’t want to speak to me”. He said he never asked to phone a friend, or family member or a lawyer at the prison. The Governor asked him if he wanted to apply for asylum and he showed the researcher a letter from ORAC received two days previously notifying him that his application had been received and

ORAC would visit him at prison within 3–5 working days in the event that he was not released from detention in the meantime.

As mentioned in previous chapters, Ireland recently announced it will opt-in the EU Recast Reception Conditions Directive 2013/33/EU. This directive provides additional safeguards for protection applicants, limiting the grounds for detention and requiring that Member States can only detain applicants for as “short a period as possible”. Critically, protection applicants will have to be held in separate facilities to those of ordinary prisoners. The Directive importantly also offers a complaints procedure through which individuals can submit complaints to European Courts in what, to some degree, may encourage greater transparency and accountability.

Nonetheless, the continued practice of detaining protection applicants in prisons, much like for other individuals detained for immigration related purposes, remains inappropriate. Interviews with key stakeholders and individuals detained reveal insufficient training both at ports of entry and in prisons with regards to asylum seeker rights and procedures for submitting a case. The lack of information on the rights of asylum seekers and adequate legal representation are unacceptable. It is also of serious concern that some protection applicants are held in prison for long periods of time prior to release and currently there is no upper limit on periods of detention. This, coupled with the additional powers of arrest given to Immigration Officers and the Gardaí demonstrates a clear imbalance between the State’s right to regulate its borders and control immigration with the individual’s right to liberty and to seek protection under the European Convention on Human Rights.

## Detention pending removal

Two pre-deportation detainees were interviewed for this research, one of whom, a Pakistani national, had previously spent 8 months detained at Cloverhill Prison under Section 5(1) of the 1999 Act, during which time he challenged both his imminent deportation and his detention. He was successful in a High Court challenge of his detention.

The other pre-deportation detainee interviewed, a Mongolian national, had been living as an undocumented migrant in Ireland for eight years and was issued with a deportation order on the steps of Cloverhill Prison following a bail application for minor criminal offences.

### Places of detention

The list of places of detention pending removal in the 2005 regulations has not changed. Kelly’s criticisms in 2005 – and our own in the section above – remain valid.

### Review of detention

While in theory Irish law provides opportunities for appeal and review of detention, the limited information received by detainees renders the majority of these options moot. In 2005, Kelly noted this difficulty, and we have discussed this in more detail in the section above relating to detention based on refusal of entry. Unfortunately, it remains an issue across all areas of immigration related detention.

### Right not to be held incommunicado

The Mongolian detainee interviewed, who had a partner and child in the State, confirmed that he was permitted to contact his partner from Cloverhill Prison and that he was entitled to visits from her.

### Right of access to a lawyer

The two pre-deportation detainees interviewed indicated that they were not permitted access to legal advice at the time of their arrests. However, both detainees were by the time of interview represented by legal professionals. It could be argued that by virtue of having had a presence in the State prior to detention, detainees pending deportation were in a somewhat better position to those detained for refusal of leave to land, but not enough interviews were able to be collected to truly bear this out in evidence.

### Right of access to medical care

Both detainees interviewed had been examined by medical professionals. The Pakistani national received a medical examination on committal, while the Mongolian national was examined by a nurse the day of his committal and by a doctor the following day.

### Right of access to information about the reasons for detention / information on rights

Neither of the two pre-deportation detainees interviewed were provided with a written document containing their general rights. They did not refer to the provision of any specific oral information regarding their rights as immigration deportees within the prison.

## Conclusion

Since Kelly’s report in 2005, there have been very few changes to the provision and recognition of rights of individuals detained for immigration-related purposes. Prisons continue to be used as a place of detention for individuals detained for immigration-related purposes, facilities which are by unsuitable for individuals who have not committed a criminal act in the state. It is therefore of further concern that the only spaces in which individuals detained for immigration-related purposes have rights, such as the right to not be held

incommunicado or the right to information about reasons for their detention, is within prisons under the Prison Rules, 2007. In detention in airports and other ports of entry, as well as Garda stations, these rights are not granted to individuals detained.

Although the figure for the number of applications for asylum from prison has significantly decreased since 2005, individuals seeking asylum are still be detained and their desire to seek asylum and their rights are not being sufficiently recognized from the moment of their arrival in the State through to their stay in prisons.

In the following chapter we present key recommendations to ensure that our detention laws and policies as they pertain to both protection applicants and immigrants seeking to enter the state, adequately respect the basic human rights of those who are seeking to enter the state but fall foul of our immigration controls.

## Chapter Endnotes

- 1 S.I. No. 666/2016 – International Protection Act 2015 (Places of Detention) Regulations 2016.
- 2 Question No.456 by Deputy Pádraig MacLochlainn, 24 March 2015, available at <https://www.kildare-street.com/wrans/?id=2015-03-24a.899&s=refus-als+of+leave+to+land#g900.q>.
- 3 Section 5(2) Immigration Act 2004
- 4 Global Detention Project, “European Union”, accessible at: <https://www.globaldetentionproject.org/organisations-alliances/european-union-eu>
- 5 Kelly, 2005 p21
- 6 Mary Minihan and Tom Hennigan. “Work on Dublin Airport Immigration Detention Centre to begin.” *The Irish Times*, 28 Jul 2017. Available at: <https://www.irishtimes.com/news/politics/work-on-dublin-airport-immigration-detention-centre-to-begin-1.3169079>
- 7 Michelle Hennessey, “Asylum seeker horribly beaten in Cloverhill Prison is Afghan man found at side of 2motorway,” *The Independent*, 30 July 2015. Available at: [http://www.thejournal.ie/prisoners-cloverhill-riot-2243491-Jul2015/?utm\\_source=shortlink](http://www.thejournal.ie/prisoners-cloverhill-riot-2243491-Jul2015/?utm_source=shortlink)
- 8 Prison Visiting Committee Annual Reports, Department of Justice and Equality, released January 2018, available at: [http://www.justice.ie/en/JELR/Pages/Prison\\_Visiting\\_Committee\\_Annual\\_Reports\\_2016](http://www.justice.ie/en/JELR/Pages/Prison_Visiting_Committee_Annual_Reports_2016)
- 9 Irish Penal Reform Trust, “‘Behind the Door’: Solitary Confinement in the Irish Penal System,” 3 February 2018. Available at: <http://www.iprt.ie/solitary-confinement>
- 10 Interview with Karin Wieland, 12 December 2017
- 11 Interview with Catherine Cosgrave, Immigrant Council of Ireland, 12 December 2017
- 12 Interview with Karin Wieland, 12 December 2017
- 13 UN High Commissioner for Refugees, Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers (2012)
- 14 Directive 2013/33/EU of the European Parliament and of the Council, Article 10
- 15 Irish Refugee Council, Recommendations on the International Protection Bill 2015 November 2015 <http://www.irishrefugee-council.ie/wp-content/uploads/2015/11/IRC-Recommendations-on-International-Protection-Bill-2015-Final.pdf> accessed 25/02/2018
- 16 Now replaced by Section 20(1)(f) of the International Protection Act 2015.  
Section 9(8)(f) of the Refugee Act, 1996 states that an individual seeking asylum can be detained if they “without reasonable cause...destroyed his or her identity or travel documents or is in possession of forged identity documents.”

# Chapter 6

## Concluding Observations and Recommendations

## Conclusion

While internationally, and particularly in Europe, immigration related detention appears to be on the rise, on the whole, Ireland is not operating an immigration detention regime like those found in other jurisdictions, for instance the UK. The numbers of people being detained in Ireland for immigration related reasons is low and is in fact decreasing annually. Although this is certainly welcome, as we have argued throughout this report and in line with criticisms emanating from such bodies as the CPT, prison is a fundamentally inappropriate place for people being detained for immigration related reasons.

In contrast, in relation to immigration enforcement and border control, the numbers of people being refused entry to the State and detained – in some cases in places other than prisons, for instance Garda stations or at Dublin Airport – on foot of that refusal has increased significantly year on year since 2008. This increase is particularly concerning, especially when combined with the lack of transparency about decisions to refuse entry, the lack of an appeals mechanism, and issues relating to accessing the rights and basic legal safeguards that are afforded to those who are refused a permission to land.

Given the global context of humanitarian crisis and record numbers of displaced people across the globe, it is essential that Ireland ‘gets it right’ when it comes to immigration detention and border control. In doing so, Ireland can better ensure that people’s rights are being respected and promoted, that decision making is operating under international best practice, and that Ireland is living up to its international obligations to provide international protection and does not run the risk of *refoulement* in decisions to refuse entry to the State.

It is clear from this analysis of the legal framework, and the statistical and ethnographic evidence presented here, that very little has changed in the context of immigration related detention and border control practices in Ireland since Mark Kelly’s report in 2005. No significant legislative improvements to ensure access to justice and rights for those refused entry or detained for immigration related reasons have been implemented, and there are no monitoring mechanisms in place to ensure transparency and accountability in decision making across immigration detention and enforcement. Our interviews with detainees found issues with border control practices in relation to refusals of leave to land, including officers not verifying information, lack of access to asylum procedures, long periods of time detained in

Dublin Airport, failures to offer access to communication with family or legal advice, and other issues which put question marks over people’s ability to access basic to rights and legal safeguards when entering the territory.

Certainly, opting in to the Recast Reception Conditions Directive, and the guarantees it provides around the issue of detention of protection applicants, will ensure Ireland better aligns with European best practice. Opting in to the Recast Procedures Directive, a recommendation made by the McMahon Working Group in 2015<sup>1</sup>, would also further ensure this by bringing Ireland under the entire Common European Asylum System. However, changes to this system are also on the horizon, and given the increase in immigration controls and securitisation internationally, it is important that Ireland does not ‘race to the bottom’ either. We have an opportunity to go beyond the minimum standards required in the opt in process to ensure that people’s human rights in the context of detention are vindicated. The establishment of a specific detention facility in Dublin Airport and the roll out of civilianisation in border control require this.

Mark Kelly’s recommendations on immigration detention in 2005 continue to stand, as do the recommendations made by the European Committee for the Prevention of Torture (CPT) in 2006 2015 and 2017, and the UN Human Rights Council in 2016. We call on the Government to urgently implement their recommendations and those we highlight in detail below.

## Key Recommendations

### 1. Access to rights and legal safeguards

Highlighted throughout this report and in Kelly’s 2005 report was the clear absence of any basic rights and safeguards available to persons who are refused leave to land and are facing a deprivation of their liberty. In line with the both the CPT recommendations and the recommendations in Kelly’s report, we would recommend that the following rights be afforded to such persons:

1. The right not to be held incommunicado
2. Access to interpreter services
3. Access to a lawyer
4. Access to information on rights and reasons for a decision to detain
5. Access to medical treatment

Our interviews with detainees showed without a doubt that, for those refused leave to land, access to rights

and legal safeguards seemed to only be guaranteed once someone entered prison and fell under the Prison Rules. Given the Government’s intentions to construct a detention facility in Dublin Airport, it must be guaranteed that those refused leave to land and detained in Dublin Airport, or any other place of detention, have access to all the rights and legal safeguards that they otherwise would have had in a penal context.

### 2. Access to asylum procedure at ports of entry

Given an increasing number of refusals of leave to land, it is critical that people are given an opportunity at the border to access the asylum procedure. This includes receiving information about the asylum process, and access to legal advice and interpretation services if necessary.

All ports of entry in Ireland should be obliged to participate in an awareness raising campaign in conjunction with INIS, GNIB, the UNHCR and the IPO, whereby pertinent information relating to asylum and other important immigration matters is communicated to arriving passengers. There should be posters aimed at potential asylum seekers on walls – approaching passport control, in toilets, near ATMs, Information points and other strategic locations – urging them to make themselves known to immigration officers, explaining the basic procedure and assuring them that there will be no negative repercussions for them if they do declare their intention to seek asylum at the border. There should also be posters advertising the services of specialist legal firms and non-governmental organisations which provide advice and advocacy services to immigrants and asylum seekers.

We would also recommend that legal representatives and NGOs be given access to the transit zones at ports of entry so that they can provide advice and support to people who may find themselves in a precarious position, i.e. facing removal on the next flight, or committal to prison for an immigration-related offence.

### 3. Appeals mechanism for refusals of leave to land

As discussed throughout this report, opportunities to take a judicial review of a refusal of entry are limited. An appeals mechanism should be made available to people who are refused entry if they believe the decision was made in error. This also provides an additional safeguard for potential protection applicants, providing an additional opportunity for a

person to access the asylum process, and thus ensuring that there is no risk of refoulement. A statutory right of appeal to an independent body against a refusal of leave to land decision should be introduced in Irish law without delay.

### 4. Airport monitoring

Given the increased numbers of people who are refused leave to land in Ireland coupled with the experiences of the research participants outlined in this report, we would echo the Irish Refugee Council’s recommendation that an independent oversight and monitoring mechanism be established at our large points of entry such as Dublin Airport, such borders to ensure human rights and equality obligations are observed by the Irish authorities at the point of entry. Such monitoring would also ensure that all protection applicants are granted access to the territory to lodge an application for protection. This role could be led by an independent authority such as IHREC.

### 5. Guidance on refusals of leave to land

We would echo concerns raised in this report by Catherine Cosgrave, Senior Solicitor with the Immigrant Council of Ireland, that some of the grounds for refusals of leave to land are subjective, and there is currently no guidance available on decision making in relation to refusals of leave to land. It is essential that decisions on refusals are made more transparent. The Department of Justice should publish guidance on how the view of an immigration officer is formed in the context of decisions on refusal of entry and decisions to detain, to improve transparency and accountability in decision making.

### 6. Proper data collection and disaggregation

There is a need for greater transparency around the decision-making process regarding decisions of leave to land. Central to this transparency is need for GNIB and INIS to periodically publish disaggregated statistical data on immigration detention and border enforcement, about the age, gender, country of origin, reasons for refusal, subsequent application for asylum, number of deportation orders carried out, among other statistics.

The most challenging aspect of the research and preparation behind this report was collecting relevant data. Nonetheless, the research by Maresa Fagan into Eurostat data reveals that information on immigration-related detention and border management is collected by the Irish State for submission to the EU and is therefore available for access by Ministers and GNIB and

INIS representatives. Yet, when key stakeholders were pressed for more detailed and specific information the general response is that providing it would require a disproportionate expenditure of time and resources. If a regular process for the periodic release of data were put in place it would negate this disproportionality.

To enhance transparency and accountability around the decision-making process, immigration officers should be obliged to record (a) the stated reason for the non-national's travel to Ireland and (b) the suspected real reason for such travel in the view of the immigration officer. Senior staff at GNIB and INIS should routinely examine the data gathered in this regard and publish statistics on the most common stated reasons versus the most common suspected real reasons for travel, upon which basis a refusal of leave to land was made.

## 7. Training of Immigration Officers

We noted in this report that the civilianisation process in Dublin Airport could present issues in the context of border control and immigration detention, primarily in the context of ensuring that INIS staff receive a high level training on human rights in a refugee context, in verifying information, in assessing vulnerabilities and in child friendly practices. We welcome the involvement of UNHCR and Tusla in delivering training to INIS staff in Dublin Airport and would recommend that this continue and be evaluated and updated over time. This training should also continue to be rolled out for GNIB staff who operate as immigration officers in other points of entry.

It would also be helpful in the recruitment of new immigration officers, if the FRA manual on border control practices was utilised in recruitment, in particular that experience in other languages was prioritised.

## 8. Civilianisation of border staff

There currently does not appear to be any movement towards extending the civilianisation process beyond Dublin Airport, which creates a two-tiered system in border control. The civilianisation of immigration officers at ports of entry, once begun, should now be completed so that all ports of entry are utilising the same border regime. This will help streamline training and ensure accountability and transparency across all of Ireland's borders.

## 9. Language Issues

Where there is a significant language barrier at the

border, the immigration officer should arrange for an interpreter in the language of the person immediately. If it becomes apparent during the interview that interpretation has been provided in the wrong language, efforts should be made to rectify the situation by securing the correct interpretation without further delay.

Where a person stopped for detailed questioning at the border can speak English competently, the immigration officer should offer the services of an interpreter where a refusal of leave to land and/or immigration-related detention is being considered in order to ensure that the person understands the reasons for such a decision and the applicable procedures.

Where a person is refused leave to land in addition to the written notification informing them of the reason(s) for the refusal, the responsible immigration officer should also take care to explain the consequences of that decision, including whether the person will be detained pending removal, and if so where (e.g. a prison) and for roughly how long. The person should also be informed of the fact that all their belongings will be held at the airport until they are removed.

## 10. Access to an effective remedy: the need for a complaints mechanism at ports of entry

Currently, at Irish ports of entry, there is no complaints mechanisms in place to allow individuals to express concerns or to challenge border practices or the discretionary decisions of immigration officers. In addition to the implementation of an appeals mechanism mentioned above, there need to be remedies that do not necessarily legally challenge treatment, but rather raise concerns or complaints about the decision or about treatment. There is therefore a need for a simple, efficient and transparent complaints system at every port of entry.

In the wider context, immigration officers are the first face of official Ireland and work in a customer inter-facing role, dissatisfied customers should have the means of making a complaint about their treatment in a timely manner at the airport. While it would be open to dissatisfied travellers at Dublin airport, including non-nationals refused leave to land, to make a complaint about their treatment at the hands of an immigration officer after the fact about an employee of INIS or GNIB, they would first have to know that the immigration officer was a member of An Garda Síochána, or a civil servant employed by INIS. Outside of Dublin airport, immigration officers will

continue to be members of GNIB, so complaints about individual GNIB members should be directed to An Garda Síochána or the Garda Síochána Ombudsman Commission (GSOC).

In terms of the ability of GNIB, INIS and indeed Fáilte Ireland to monitor consumer satisfaction at Irish airports and ports, and to respond to and learn from bad practices or mistakes made, complaint forms in the most common languages should be made available in a box on the wall at various locations, including before and after passport control and indeed in any waiting area or room at the port of entry where a person may be detained.

## 11. Detention as a last resort

Immigration detention should only be used as a last resort, once all other possible remedies or options are exhausted. Ireland should continue its practice of not detaining minors (under the age of 18) for any reason.

## 12. Detention Facilities

Prisons are not suitable locations for the detention of people for immigration related offences. It shows a disregard for the safety and wellbeing of immigration detainees. The cases of Walli Ullah Safi and Paloma Aparecida Silva-Carvalho detailed at the beginning of this report, and other cases detailed in Chapter 5, serve to highlight the dangers inherent in this policy.

While we welcome the announcement by the Government of a purpose-built facility for immigration detention at Dublin Airport, this facility must be developed in line with international best practice, in particular with the CPT recommendations, in ensuring that people's access to justice and rights are being safeguarded and promoted. This includes introducing a proper inspections regime for the facility. We would recommend that any new facility should not be penal or punitive in nature and should be in with the recommendations of the CPT and include the following: a) wide range of activities should be available to detainees including language classes, cookery classes, outdoor exercise, radio/television and newspapers/magazines, as well as other appropriate means of recreation (e.g. board games, table tennis). All that staff should be carefully selected and trained and should have relevant language skills, interpersonal communication and cultural sensitivity skills. Staff should have taught to recognise possible symptoms of stress reactions displayed by detained persons (whether post-traumatic or induced by socio-cultural changes) and to take appropriate action.

## 13. Ratify the Optional Protocol to the Convention Against Torture (OPCAT)

Ireland signed the Optional Protocol to the Convention Against Torture (OPCAT) in 2007, but have yet to ratify it. The Optional Protocol introduces a system of national and international monitoring of places of detention with a view to preventing ill-treatment. Given the State's commitment to build an immigration detention facility in Dublin Airport, and given our above recommendations in relation to that facility, we believe it is critical that Ireland immediately ratify the OPCAT, to assist the State in preventing torture and other forms of ill-treatment in places of detention.

## 14. Alternatives to Detention

Immigration related detention is costly and largely ineffective in terms of deterring either economic migrants or people seeking international protection from seeking to gain entry to a given country. The purported aims of immigration-based detention could be well met with a non-custodial system.

As noted in Chapter 2, the International Protection Act, 2015 and the Immigration Act, 2003 contain alternatives to detention. Both UNHCR and IHREC have called for greater use of alternatives to detention such as sureties and bail bonds, community supervision arrangements, reporting conditions and directed residence, so as to reduce unnecessary detention of people for immigration reasons, while the JRS has also advocated for exploring alternatives to detention, stating that "non-custodial alternatives would allow for significant savings in financial terms, and would avoid the substantial human costs which are imposed on those detained."

It is certainly the case that greater use can be made of the alternatives to detention already available in Irish law such as residence requirements, reporting conditions and the surrender of travel documents.

## 15. Legislative changes

Based on our analysis of the domestic and international legislative framework for immigration detention and enforcement, we have a number of recommendations pertaining specifically to amending legislation:

- a. Amend Section 20 (1) if the International Protection Act to remove the far-reaching powers of that powers of the Gardaí to arrest without a warrant;
- b. Amend Section 20 (3) a of the International Protection Act to restate the provisions in the

Refugee Act bringing the District Court Power to detain down from 21 to 10 days;

- c. Amend the Immigration Act, 2003 to provide the following basic human rights to those refused leave to land in line with successive recommendations of International Treaty Bodies. The following rights should be included: (1) the provision of the right to not be held incommunicado and to inform a person of choice of one's detention, (2) right to legal representation, (3) the right to access medical attention, (4) access to translation services and (5) access to medical treatment. These rights, and an explanation of the reasons for refusal of leave to land and the procedure followed in these situations should be provided in writing in a language an individual can reasonably be expected to understand as soon as they have been refused;
- d. Ireland should refrain from introducing practices which would allow for the systematic detention of protection applicants and the International Protection Act should be amended to include a provision stating the people will not be detained for the sole purpose of making an application for protection.
- e. The International Protection Act, 2015 should be amended to place a maximum limit on the number of times a District Court may re-authorise the detention of a protection applicant detained under Section 20(1) of that Act.
- f. Ireland should retain its statutory prohibition on the immigration-related detention of minors.

### Chapter Endnotes

- 1 Working Group to Report on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers, Final Report (2015), available at: <http://justice.ie/en/JELR/Report%20to%20Government%20on%20Improvements%20to%20the%20Protection%20Process,%20including%20Direct%20Provision%20and%20Supports%20to%20Asylum%20Seekers.pdf/Files/Report%20to%20Government%20on%20Improvements%20to%20the%20Protection%20Process,%20including%20Direct%20Provision%20and%20Supports%20to%20Asylum%20Seekers.pdf>.

## Notes



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