European Migration Network

The Practices In Ireland Concerning The Granting Of Non-eu Harmonised Protection Statuses

John Stanley
Corona Joyce
Emma Quinn

The Economic and Social Research Institute

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EUROPEAN MIGRATION NETWORK

THE PRACTICES IN IRELAND CONCERNING THE GRANTING OF NON-EU HARMONISED PROTECTION STATUSES

JOHN STANLEY
CORONA JOYCE
EMMA QUINN

2010

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John Stanley is a barrister practising in immigration and refugee law. Corona Joyce is Policy Officer of the Irish National Contact Point of the European Migration Network located within the Economic and Social Research Institute (ESRI). Emma Quinn is a Research Analyst at the ESRI and National Coordinator of the Irish National Contact Point of the European Migration Network.

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The opinions presented in this report are those of the Irish National Contact Point of the European Migration Network and do not represent the position of the Irish Department of Justice and Law Reform or the European Commission Directorate General Home Affairs.

The authors are solely responsible for the content and any errors contained therein.

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ABBREVIATIONS AND IRISH TERMS

AHTU	*Anti Human Trafficking Unit*
Dáil	*Parliament, Lower House*
DETE	*Department of Enterprise, Trade and Employment (known as Department of Enterprise Trade and Innovation from 2010)*
DJELR	*Department of Justice, Equality and Law Reform. Government Ministry responsible, inter alia, for asylum, international protection, and removal. With effect from 2nd June 2010, the Department of Justice, Equality and Law Reform became the Department of Justice and Law Reform*
EEA	*European Economic Area*
EURODAC	*The Eurodac system enables Member States to identify asylum applicants and persons who have been apprehended while unlawfully crossing an external frontier of the Community by comparing fingerprints.*
Gardaí/Garda Síochána	*Police*
GNIB	*Garda National Immigration Bureau. The Garda National Immigration Bureau is the office of the Garda Síochána that carries out deportations, border control and investigations related to illegal immigration and trafficking in human beings.*
IBC/05	*Irish Born Child Scheme 2005*
ICCL	*Irish Council for Civil Liberties*
ICI	*Immigrant Council of Ireland*
IGO	*Intergovernmental Organisation*
IHRC	*Irish Human Rights Commission*
INIS	*Irish Naturalisation and Immigration Service. An office within the Department of Justice, Equality and Law Reform responsible for the administration of asylum, immigration, citizenship and visas.*
IOM	*International Organization for Migration*
IRC	*Irish Refugee Council*
ISPCC	*The Irish Society for the Prevention of Cruelty to Children Leave to Remain Ministerial grant regularising legal status in the State and providing the beneficiary with temporary residency. Often referred to as 'humanitarian leave to remain'.*

MDU	*Ministerial Decisions Unit*
MRCI	*Migrant Rights Centre Ireland*
Oireachtas	*Parliament, both houses*
OMI	*Office of the Minister for Integration*
ORAC	*Office of the Refugee Applications Commissioner.* *The Commissioner is a person required by legislation to carry out the functions of a first instance refugee status decision maker in the Irish asylum process.*
RAT	*Refugee Appeals Tribunal. Appellate body in the Irish asylum process*
RIA	*Reception and Integration Agency*
RLS	*Refugee Legal Service*
Tánaiste	*Deputy Prime Minister*
Taoiseach	*Prime Minister*
UNHCR	*United Nations High Commissioner for Refugees*
UNICEF	*The United Nations Children's Fund*

EXECUTIVE SUMMARY

This study outlines the legal statuses in Ireland in respect of international protection subject to European law, and those that arise solely from Irish domestic law. The most important EU Directive for the purpose of this study is Council Directive 2004/83/EC. This Directive is often referred to as the 'Qualification Directive' because it sets out what is required under EU law for someone in a Member State to qualify as a refugee (Article 2(c) of the Directive) or as someone eligible for subsidiary protection (Article 2(e) of the Directive).

The other Directive of relevance to this study is Directive 2001/55/EC, which is often referred to as the 'Temporary Protection Directive'; it sets out who qualifies as a 'Displaced Person' in need of temporary protection (Article 2(c) of that Directive). Refugee Status, Subsidiary Protection, and Temporary Protection are the international protection statuses covered, and provided for, by EU law. Those seeking international protection in an EU Member State who gain one of these statuses are accorded certain rights for which the Directives provide minimum standards. These statuses may be considered to be the EU 'harmonised' protection statuses under EU law.

People seeking protection who attain a status with lower guarantees whether, for example, for humanitarian reasons or due to the principle against *non-refoulement*, are accorded rights determined by a Member State's domestic law. Such statuses, which are not provided for by EU law, may be said to be non-EU harmonised statuses. The current study outlines and compares the EU harmonised and non-harmonised protection statuses currently in operation in Ireland.

Protection Statuses Granted in Ireland

Irish legislation provides for refugee status and subsidiary protection in line with Council Directive 2004/83/EC. The Directive is currently complied with in Ireland by the

European Communities (Eligibility for Protection) Regulations, 2006 (S.I. No. 518 of 2006) and the Refugee Act, 1996 (as amended). Ireland is bound by Council Directive 2001/55/EC of 20 July 2001 which provides for Temporary Protection status, and the Immigration, Residence, and Protection Bill 2008[1] contains provisions to comply with that Directive. The only non-EU harmonised statutory mechanism

[1] At the time of writing this report, the Immigration, Residence and Protection Bill, 2008 was before the Oireachtas at Committee Stage, and the subject of proposed amendments. The Bill was subsequently withdrawn, and a new bill, the Immigration, Residence and Protection Bill 2010 was presented to the Dail on 29 June 2010. At the time of writing this update, the 2010 Bill is before the Dail at Committee Stage. The new Bill is similar to the 2008 Bill, and references in this report to matters proposed by the 2008 bill can, broadly speaking, be taken to apply to the legislation currently before the Dail. Like the 2008 Bill, its 2010 counterpart proposes, *inter alia*:

- A single procedure for dealing with matters of international protection, i.e., both refugee status and subsidiary protection, designed to comply with the State's obligations under Council Directive 2004/85/EC and Council Directive 2004/83/EC, notwithstanding that the latter directive is not referred to in the Bill's long title (part VII).
- Provisions to comply with Council Directive 2001/55/EC of 20 July 2001 providing Temporary Protection status that are similar to those in the 2008 Bill (s. 114).
- Provisions for protection of suspected victims of trafficking, including provisions reflecting the terms of Council Directive 2004/81/EC, and similar to the analogous provisions in the 2008 Bill, and including provision for a sixty, rather than a forty-five day recovery and reflection period (s. 139).
- Provisions for judicial review of decisions in the international protection and immigration processes. The report notes, however that, currently, the validity of certain decisions in relation to international protection in Ireland can only be challenged by way of the special rules for judicial review under the 2000 Act, and that the Immigration, Residence and Protection Bill, 2008 extended rules similar to those in the 2000 Act to all decisions made in the asylum and immigration processes set out under the new legislation. The 2010 Bill, by contrast, specifies the decisions under the proposed legislation that can only be challenged by way of judicial review, while also providing that the Minister may extend the special rules to any act, decision or determination under the proposed legislation (ss. 133 & 167).

Public debate continues on many matters arising from the proposed legislation, principally on whether the proposed provisions adequately deal with the protection for victims of trafficking, summary deportation, and claims that the Bill does not provide for effective remedies.

in Ireland designed specifically for protection is the programme refugee status provided for in the Refugee Act, 1996.

Prior to enactment of legislation in 2006 to comply with the provisions of Council Directive 2004/83/EC in relation to subsidiary protection, Ireland had no statutory scheme specifically for subsidiary protection. Instead, those seeking protection who did not satisfy the criteria for a declaration of refugee status could make representations to the Minister for Justice, Equality and Law Reform pursuant to section 3 of the Immigration Act, 1999 (as amended) regarding why they ought not to be deported from the State. While there is no explicit power to grant leave to remain under section 3 of that Act, if the Minister decides not to issue a deportation order and grants leave to remain, it is generally referred to as being done under the provisions of section 3 of the Immigration Act, 1999 (as amended). Whether this mechanism has been used since the introduction of EU harmonised provisions for subsidiary protection is unknown. Nonetheless, it should be noted that any person now arriving in the State seeking to be granted international protection will have his or her asylum claim examined by the Refugee Applications Commissioner, separately, if necessary, by the Refugee Appeals Tribunal and subsequently, if necessary, by a representative of the Minister in the context of subsidiary protection.

Section 4 of the Immigration Act, 2004, and sections 17(6) and 21(7) of the Refugee Act, 1996 (as amended) provide mechanisms for the Minister for Justice, Equality and Law Reform to grant permission to be or to remain in the State. The Minister has also exercised discretion to make administrative schemes granting leave to remain.

The Immigration, Residence and Protection Bill, 2008 proposes that a foreign national whom a member of the Garda Síochána, with reasonable grounds, believes to be a victim of trafficking, or who has provided a statement in writing to the Minister to the effect that he or she is a victim of trafficking, would be permitted to be present in the State for a sixty day 'recovery and reflection period'.

Procedures Followed

Ireland does not currently have a single procedure for dealing with matters of international protection. Such a procedure is proposed by the published Immigration, Residence and Protection Bill, 2008. The 2006 Regulations were introduced as an interim measure to comply with the State's obligations

under Directive 2004/83/EC, pending finalisation of the Immigration, Residence and Protection Bill. Currently, in order to apply for subsidiary protection in Ireland, an applicant must first have applied for, and have been denied, a declaration of refugee status.

Asylum applicants who gain access to the territory can apply for international protection pursuant to the Refugee Act, 1996 (as amended). The Refugee Applications Commissioner considers a claim at first instance, and the Refugee Appeals Tribunal, an independent appellate body, has jurisdiction either to set aside or affirm the Commissioner's recommendation. The Minister for Justice, Equality and Law Reform is vested with the power to give an applicant a statement in writing declaring that he or she is a refugee.

When an asylum applicant has been refused a declaration of refugee status, the Minister issues the applicant with a proposal to deport. At this point the Minister also informs the applicant of his or her right to make an application for subsidiary protection pursuant to the European Communities (Eligibility for Protection) Regulations, 2006 (S.I. No. 518 of 2006). There is no appeal from a negative subsidiary protection decision, and in the event that the Minister refuses the application, the Minister will then proceed to consider whether or not to make the deportation order, and will consider matters pursuant to section 3 of the Immigration Act, 1999 (as amended).

Cases considered under section 3 of the Immigration Act, 1999 are considered on their individual merits. Consideration of any such application includes consideration of the principle of *non-refoulement*, the State's relevant international obligations, and Constitutional and fundamental rights. Following this, the Minister for Justice, Equality and Law Reform decides whether or not the applicant should become the subject of a deportation order. The Minister does not advise the successful applicant of the specific reasons for the grant of leave to remain, while an unsuccessful applicant will be furnished with an examination of file setting out the reasons for the deportation order.

Rights Provided

Refugees generally have the same rights and privileges as Irish citizens, including rights in respect of residence, employment, medical care, social welfare, travel, access to the courts, freedom of religion, religious education of children, and access to trade unions. Refugees also have the right to apply for family reunification. Non-Irish national persons are typically

entitled to apply for citizenship after five years of lawful residence in the State. This requirement can be waived at the Minister's discretion in the case of refugees. Current policy requires refugees to have resided in the State for three years.

People who are granted subsidiary protection are entitled to receive the same medical care and services and the same social benefits as those to which citizens are entitled. They are entitled to seek and enter employment, to carry on any business, trade or profession in the State in the same manner as an Irish citizen, are entitled to the same access to education and training in the State as Irish citizens, and are generally entitled to the same rights of travel in or to or from the State, other than to their country of origin. A person who has been found eligible for subsidiary protection may apply to the Minister for permission to be granted to a member of his or her family to enter and to reside in the State. In contrast with the situation in respect of refugees, there is no legislative provision providing the Minister with discretion to waive the five-year residency condition in respect of people who are granted subsidiary protection.

Programme refugees are generally entitled to the same rights and privileges as other declared refugees in the State. Pursuant to section 24 of the Refugee Act, 1996 (as amended), programme refugees are extended the same medical assistance, social benefits, access to education and training, and access to the labour market as Convention refugees, and may also apply for citizenship after three years in the State. Programme refugees do not have an explicit statutory right to apply for family reunification, but, in practice, have been treated in the same manner in this respect as Convention refugees.

The rights of those with leave to remain status are not defined in legislation and instead vary depending on personal circumstances and current circumstances in the State, including economic factors. The duration of leave to remain in the State is discretionary. Those granted leave to remain have no statutory entitlement to be granted family unification. Persons with leave to remain are entitled to access to third level education in the same manner as citizens. They must be legally resident in the State for five years before they are eligible to apply for naturalised citizenship.

National Opinions on the Granting of Protection

There has been much public debate on the disparity in rights between those with EU harmonised protection statuses, programme refugees, and those granted leave to remain in the

State particularly in relation to the lack of a statutory right for family unification for the latter categories of people. There has also been debate on the need for protection for victims of trafficking to be placed on a statutory footing. Recently, debate relating to Ireland's compliance with EU laws has centred on the draft legislation in the Immigration, Residence and Protection Bill, 2008.

When implemented, the Immigration, Residence and Protection Bill will overhaul Irish protection law. Analysis and comments on the Bill have focused on access to the State for those seeking protection; provisions for detention of those seeking protection in the State while pending an entry permit; detention of irregular migrants; summary removal from the State of non-Irish nationals; the existence of an independent first instance refugee status determination body; the existence of an independent immigration appeals mechanism; publication of refugee status decisions; the nature of a proposed reflection and recovery period; and temporary residency for victims of trafficking. While there has been significant criticism of aspects of this Bill, the decision to overhaul existing fragmented legislation has generally been welcomed, as has the decision to introduce a single procedure for the first time into Irish legislation.

Conclusions

In Ireland, persons with protection needs will typically have their claims considered under (i) the Refugee Act, 1996, (ii) the European Communities (Eligibility for Protection) Regulations, 2006, and (iii) section 3 of the Immigration Act, 1999. Accordingly, any person who arrives in the State seeking international protection status will have his or her claim examined at first instance by the independent Refugee Applications Commissioner, separately by the independent Refugee Appeals Tribunal and then, if a claim for subsidiary protection is made, by a representative of the Minister for Justice, Equality and Law Reform. Leave to remain may be granted either for reasons relating to international protection, or for purely discretionary reasons. While the rights of refugees, including non-EU harmonised programme refugees, and those who qualify for subsidiary protection are set out in legislation, the lesser rights of those with leave to remain are not and vary from case to case.

1. INTRODUCTION

1.1 General Introduction

The Commission *Policy Plan on Asylum Communication* (COM (2008) 360[2]) identified three important trends in the granting of asylum. One of these is an ever-growing percentage of applicants granted subsidiary protection or other kinds of protection status based on national law, rather than refugee status according to the Geneva Convention.

The Commissioner's *Impact Assessment* (SEC (2008) 2029[3]) notes that increasingly people are seeking protection for reasons not foreseen in the traditional refugee regime, whether for compassionate, humanitarian, or medical reasons; as a result of environmental changes in the country of origin; or because of the principle of *non-refoulement*.

The Commission has noted that more and more people are being protected with 'residual' statuses, often of precarious nature, as well as the concomitant risk of the amplification of differences across the EU in terms of practices, procedures and decision-making process for granting protection, due to the fact that the alternative forms of protection have emerged without any coordination, and are evolving. The proliferation of such diversity in national practices may appear to be incompatible with the often-stated objective of harmonising asylum policy in the EU.

In this context, the *Policy Plan on Asylum* states that it is important to pay attention to subsidiary and other forms of protection. This is the focus of this study in relation to Ireland. The current study outlines the different protection statuses in

[2] Available from http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX: 52008DC0360:EN:NOT.

[3] Available from http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX: 52008SC2029:EN:NOT. For summary (in a number of Member State languages) see http://eur-lex.europa.eu/LexUriServ/LexUri Serv.do?uri=CELEX: 52008SC2030:EN:NOT.

Ireland in respect of both the statuses covered by European law, and those that arise solely from Irish domestic law. The most important EU Directive for the purpose of this study is Council Directive 2004/83/EC. This Directive is often referred to as the 'Qualification Directive' because it sets out what is required under EU law for someone in a Member State to qualify as either a refugee (Article 2(c) of the Directive) or someone eligible for subsidiary protection (Article 2(e) of the Directive).

According to the Geneva Convention of 1951, a refugee is a person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned before, is unable or, owing to such fear, unwilling to return to it. Within an EU context, this refers specifically to a third country national or stateless person within the meaning of Article 1A (above) of the Geneva Convention and who is authorised to reside as such on the territory of a Member State and to whom Article 12 (Exclusion) of Directive 2004/83/EC does not apply[4].

Subsidiary Protection refers to the protection given to a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15 of 2004/83/EC, and to whom Article 17(1) and (2) of 2004/83/EC do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.[5]

The other Directive of some relevance to the current study is Directive 2001/55/EC, which is often referred to as the 'Temporary Protection Directive'. Refugee Status, Subsidiary Protection, and Temporary Protection are the international protection statuses covered by and provided for by EU law. Those seeking international protection in the EU who attain one of these statuses are accorded certain rights for which the

[4] Article 2 (c) of Council Directive 2004/83/EC.
[5] Council Directive 2004/83/EC (Article 2(e)).

Directives provide minimum standards. These statuses may be considered to be the EU 'harmonised' protection statuses under EU law, although the actual implementation of the statuses and the rights they provide may vary from Member State to Member State.

Those receiving protection statuses with lower guarantees, whether for example, for humanitarian reasons or due to the principle against *non-refoulement*, are accorded rights determined by the domestic law of a Member State. Such statuses, which are not provided for by EU law, may be said to be non-EU harmonised statuses. The current study outlines and compares the EU harmonised and non-harmonised protection statuses currently in operation in Ireland.

1.2 Purpose of the Study

Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (i.e. the 'Qualification Directive') contains a set of criteria for qualifying for refugee or subsidiary protection status and sets out the rights attached to each status. The Directive seeks to introduce a harmonised regime for international protection in the EU. The aim of this current study is to analyse the different national practices concerning the granting of non-EU harmonised protection statuses. For the purposes of this study, non-EU harmonised protection statuses are defined as including all forms of relevant statuses excluding that of refugee and subsidiary protection as defined under Directive 2004/83/EC. Programme refugee status is the only Irish national status designed solely to deal with protection needs that is not governed by EU legislation. This study analyses both this status, and other Irish practices that may be used to regularise the legal status of an individual seeking protection in the State.

The study is intended as to provide an overview of policy and legislation in the area of non-EU protection statuses and to serve as a reference tool for those working in the areas of asylum and international protection in Ireland, in order that the different processes in Irish law and practice, specifically EU and non-EU harmonised, may be distinguished and better understood. As the study aims to serve as a reference resource, its primary focus is on law and practice. It does not explore deeper policy issues or debates.

A similar report is to be produced by other European Migration Network (EMN) National Contact Points (NCPs). As with all EMN outputs, a synthesis report will subsequently be compiled that will draw together the findings of individual studies and provide a comparative overview of the different national statuses on an EU-wide level.

The study is structured as follows. This first Chapter sets forth the purpose of the study and outlines the methodology used and any difficulties encountered in undertaking the study. Chapter 2 outlines the different regularising protection statuses currently being granted in Ireland, and distinguishes between statuses covered by EU legislation and national statuses not covered by EU law. The legal origin, definition, and framework of each status are explained, as are related policy matters. Any differences between appeal possibilities, public order issues, and exclusion clauses are addressed, as is whether a particular status is grounded on fixed criteria or on discretion.

Chapter 3 outlines the procedures followed for each protection status identified at national level for both the granting of protection and afterwards. This section also describes the rights attached to each of the statuses. Chapter 4 outlines available statistical data on the statuses discussed in previous chapters. Chapter 5 outlines the opinions expressed in Irish public debate on the granting of protection and the various statuses. Any arising matters are also summarised. Some concluding observations from the study are summarised in Chapter 6.

1.3 Methodology

The current study is based on primary legal sources, namely Irish primary and secondary legislation and regulations, EU legal instruments, and Irish jurisprudence. The study also draws from previous ESRI research contained in the *Handbook on Immigration and Asylum in Ireland 2007,*[6] as well as other secondary sources including interviews and correspondence with representatives of key government agencies. Interviews with officials and service providers from the Irish Naturalisation and Immigration Service (INIS) of the Department of Justice, Equality and Law Reform took place as

[6] This Handbook may be downloaded from http://www.esri.ie/research/research_areas/migration/european_migration_network/

part of this study. Desk research was also undertaken, including much use of the INIS website which provides detailed organisational and procedural information relevant to the subject.[7] In addition, several other organisations, institutions and individuals kindly provided specific information and comments on earlier drafts of the study.

1.4 Data Issues

Certain constraints regarding the analysis of relevant data occurred during the writing of this study. While records and statistics in respect of asylum, subsidiary protection and programme refugees in Ireland are generally available and are provided in Chapter 4, detailed records and statistics in respect of grants of temporary leave to remain are not available. For example, there are no available records in respect the nationality of those granted leave to remain, or regarding whether *non-refoulement* was an issue in the grant of leave to remain. Information with respect to those granted a 'reflection and recovery' period due to human trafficking concerns was also limited at the time of writing.

[7] www.inis.gov.ie

2. PROTECTION STATUSES GRANTED IN IRELAND

2.1 Introduction

The main protection statuses currently granted under Irish law are refugee status, subsidiary protection and programme refugee status. Refugee status and subsidiary protection are covered by the protection statuses set out in Council Directive 2004/83/EC, the 'Qualification Directive'.[8] By contrast, programme refugee status is rooted in Irish domestic legislation. Ireland initially opted not to participate in the adoption of Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (i.e. the 'Temporary Protection Directive'), but subsequently requested that it take part in the Directive, and by decision 2003/690/EC of 2 October 2003, the Directive was deemed to apply to Ireland. While administrative procedures may satisfy Ireland's obligations under the Directive, there is no domestic legislation currently giving effect to the Directive's provisions. The Immigration, Residence, and Protection Bill, 2008 contains provisions that are intended to comply with the Directive.

[8] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

Prior to enacting legislation to comply with the provisions of Council Directive 2004/83/EC in relation to subsidiary protection, Ireland had no statutory scheme for subsidiary or complementary protection. Instead, individuals who required international protection, but who did not satisfy the criteria for a declaration of refugee status, made representations to the Minister for Justice, Equality and Law Reform pursuant to section 3 of the Immigration Act, 1999, regarding why they ought not to be deported from the State. Section 3 of the 1999 Act provides that the Minister for Justice, Equality and Law Reform may make a deportation order in respect of someone subject to, *inter alia*, the principle of *non-refoulement*. As discussed later in the text, the Minister for Justice, Equality and Law Reform also has discretion to grant temporary leave to remain in the State.[9] Notwithstanding the transposition of the pertinent provisions of Council Directive 2004/83/EC, section 3 of the Immigration Act, 1999 continues to function to ensure that an individual with an international protection need is not removed from the State. Section 4 of the Immigration Act, 2004 and section 17(6) of the Refugee Act, 1996 (as amended) provide mechanisms for the Minister for Justice, Equality and Law Reform to grant someone with protection needs permission to, respectively, be or remain in the State. The Minister has also exercised an inherent jurisdiction in this regard.

Since 10 October 2006 international protection issues are specifically dealt with in the course of the asylum and subsidiary protection processes. Prior to that date they were specifically dealt with within the context of the asylum process.

2.2 EU Harmonised Protection Statuses in Ireland

Irish legislation provides for refugee status and subsidiary protection in line with Council Directive 2004/83/EC.[10] With regard to temporary protection status, as noted earlier, Ireland

[9] Section 3 of the 1999 Act is silent regarding the Minister's powers if a decision not to deport is taken. Section 3 does not provide that leave to remain must be granted. Neither does it provide on what basis it should be granted. Conditions attached to any permission granted vary from case to case. The decision made under section 3 of the Immigration Act, 1999 is the decision not to deport.

[10] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (i.e. the 'Qualification Directive').

initially opted out of Council Directive 2001/55/EC, but subsequently did opt in to the Directive. There were almost 2,700 applications for asylum lodged in 2009. The recognition rate for asylum applications has been between 8.7 and 10.5 per cent in the years 2004-2008. Almost 2,090 applications were made for subsidiary protection in 2009. In that year 677 determinations were made, of which 24 were positive. In December 2009 almost 3,000 subsidiary protection applications were yet to be determined. Chapter 4 provides more detailed statistics.

2.2.1 REFUGEE STATUS

Definitions & Qualifying Criteria

Article 2(c) of Council Directive 2004/83/EC[11] (known as the 'Qualification Directive') sets out who qualifies as a refugee. The Directive is currently complied with in Ireland by the Refugee Act, 1996 (as amended),[12] and the European Communities (Eligibility for Protection) Regulations, 2006 (S.I. No. 518 of 2006). The definition of refugee status, under Irish domestic law, is as per section 2 of the Refugee Act, 1996 (as amended):

> *In this Act 'a refugee' means a person who, owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country; or who, not having a nationality and being outside the country of his or her former habitual residence, is unable or, owing to such fear, is unwilling to return to it, but does not include a person who—*
>
> *(a) is receiving from organs or agencies of the United Nations (other than the High Commissioner) protection or assistance,*

[11] *Ibid.*

[12] It should be noted that the Refugee Act, 1996, though it has been the subject of considerable amendments, has not been amended in light of Directive 2004/83/EC. The Immigration, Residence and Protection Bill, 2008 proposes a new statutory scheme to comply with the Directive's provisions.

(b) is recognised by the competent authorities of the country in which he or she has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country,

(c) there are serious grounds for considering that he or she—

(i) has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes,

(ii) has committed a serious non-political crime outside the State prior to his or her arrival in the State, or

(iii) has been guilty of acts contrary to the purposes and principles of the United Nations.

Section 1 of the Refugee Act, 1996 qualifies the refugee definition in relation to the grounds of particular social group, providing that 'membership of a particular social group' includes membership of a trade union and also includes membership of a group of persons whose defining characteristic is their belonging to the female or the male sex or having a particular sexual orientation.

Regulation 5 provides for matters that must be taken into account by a protection decision maker for the purposes of making a protection decision:

(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application for protection, including laws and regulations of the country of origin and the manner in which they are applied;

(b) the relevant statements and documentation presented by the protection applicant including information on whether he or she has been or may be subject to persecution or serious harm;

(c) the individual position and personal circumstances of the protection applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;

(d) whether the protection applicant's activities since leaving his or her country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for protection as a refugee or a person eligible for subsidiary protection, so as to assess whether these activities will expose the applicant to persecution or serious harm if returned to that country;

(e) whether the applicant could reasonably be expected to avail himself of the protection of another country where he or she could assert citizenship.

Regulation 5(2) provides that the fact that a protection applicant has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, shall be regarded as a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated, but compelling reasons arising out of previous persecution or serious harm alone may nevertheless warrant a determination that the applicant is eligible for protection.

Regulation 5(3) provides that where aspects of the protection applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation when:

(a) the applicant has made a genuine effort to substantiate his or her application;

(b) all relevant elements at the applicant's disposal have been submitted and a

satisfactory explanation regarding any lack of other relevant elements has been given;

(c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case;

(d) the applicant has applied for protection at the earliest possible time, (except where an applicant demonstrates good reason for not having done so); and

(e) the general credibility of the applicant has been established.

Exclusion from & Revocation of Refugee Status

Section 2 of the Refugee Act, 1996 (as amended) substantially transposes the exclusion clauses from the 1951 Geneva Convention relating to the Status of Refugees: [13]

[13] Note that Article 1D of the 1951 Convention is incompletely transposed in section 2 of the Refugee Act, 1996.

[A refugee]… *does not include a person who—*

(a) is receiving from organs or agencies of the United Nations (other than the High Commissioner) protection or assistance,

(b) is recognised by the competent authorities of the country in which he or she has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country,

(c) there are serious grounds for considering that he or she—

(i) has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes,

(ii) has committed a serious non-political crime outside the State prior to his or her arrival in the State, or

(iii) has been guilty of acts contrary to the purposes and principles of the United Nations.

It is noteworthy that section 2(c) of the 1996 Act provides that an applicant is excluded from being a refugee where there are serious grounds for considering that he or she participated in the commission of the acts or crimes mentioned in section 2(c) of the Act, while Regulation 12 of the European Communities (Eligibility for Protection) Regulations, 2006 (S.I. No. 518 of 2006) provides that an applicant is excluded from being a refugee if he or she has instigated or otherwise participated in the commission of the acts or crimes mentioned in section 2(c) of the 1996 Act. [14]

The primary legislative basis for revocations is set out in section 21 of the Refugee Act, 1996 (as amended), which includes provisions essentially transposing the cessation clauses from Article 1C of the 1951 Convention:

(1) Subject to subsection (2), if the Minister is satisfied that a person to whom a declaration has been given—

(a) has voluntarily re-availed himself or herself of the protection of the country of his or her nationality,

(b) having lost his or her nationality, has voluntarily re-acquired it,

[14] C.f. Article 17(2) of Council Directive 2004/83/EC.

(c) has acquired a new nationality (other than the nationality of the State) and enjoys the protection of the country of his or her new nationality,

(d) has voluntarily re-established himself or herself in the country which he or she left or outside which he or she remained owing to fear of persecution,

(e) can no longer, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, continue to refuse to avail himself or herself of the protection of the country of his or her nationality,

(f) being a person who has no nationality is, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, able to return to the country of his or her former habitual residence,

(g) is a person whose presence in the State poses a threat to national security or public policy ('ordre public'), or

(h) is a person to whom a declaration has been given on the basis of information furnished to the Commissioner or, as the case may be, the Tribunal which was false or misleading in a material particular,

the Minister may, if he or she considers it appropriate to do so, revoke the declaration.

A refugee who has been notified of a revocation proposal may, within 15 working days of the issue of the notification, make representations in writing to the Minister. The Minister is obliged to consider any such representations before deciding the matter, and is required to send a notice in writing to the person of his or her decision and its reasons. The person concerned may appeal to the High Court against the decision of the Minister to revoke a declaration within 15 working days from the date of the notice. The Court may, as it thinks proper, on the hearing of the appeal, confirm the decision of the Minister or direct the Minister to withdraw the revocation of the declaration. The person concerned cannot be required to leave the State before the expiry of the aforesaid 15 working days period, or until the determination of any High Court appeal. Under section 21(7) of the 1996 Act, the Minister may, at his or her discretion, grant permission in writing to a person in respect of whom a declaration has been revoked to remain in the State for such

period and subject to such conditions as the Minister may specify in writing.[15]

Officials of the Department of Justice, Equality and Law Reform have stated that, on a practical level, the elements of section 21 most likely to be invoked are section 21(1)(a) and (d), where evidence exists that a declared refugee has either returned voluntarily to his/her country of origin; section 21(1)(g), where national security or public policy issues exist; or section 21(1)(h), where evidence exists that a declared refugee has given false or misleading information to support their asylum application or appeal. [16]

Pursuant to section 17(2)(a) of the Refugee Act, 1996 if the Minister for Justice, Equality and Law Reform considers that in the interest of national security or public policy it is necessary to do so, he or she may order in writing that the rights accruing to a declared refugee do not apply and may require the person to leave the state. The Minister may order the person to leave the State on not less than 30 days notice and specify removal details, including temporary detention or restraint of the person.[17] There is no statutory appeal against a decision made pursuant to section 17(2)(a) of the Act. Officials of the Department of Justice, Equality and Law Reform have indicated that provision is not

[15] This provision may therefore itself provide permission to remain to a person with international protection needs, notwithstanding the revocation of the declaration of refugee status.

[16] *Ibid.*

[17] 17(2)(a). If the Minister considers that in the interest of national security or public policy ('ordre public') it is necessary to do so, he or she may by order—

(i) provide that sections 3, 9 and 18 shall not apply to a person specified in the order, being a person to whom a declaration has been given, and

(ii) require the person to leave the State and the order shall specify the measures to be taken for the purpose of the removal of the person from the State including where necessary the temporary detention or restraint of the person.

(b) A person with respect to whom an order under paragraph (a)(ii) is made shall not be required to leave the State before the expiry of 30 days from the date of the making of the order.

(c) Where the Minister has made an order under the said paragraph (a)(ii) in respect of a person, he or she shall send a copy of the order to the person, the High Commissioner and the applicant's solicitor (if known).

thought to have been invoked to date, and that it is difficult to envisage circumstances in which the provision could be applied.[18]

Regulation 11(1) of the European Communities (Eligibility for Protection) Regulations, 2006 (S.I. No. 518 of 2006) provides the Minister with a power to refuse to grant or renew or to revoke a declaration of refugee status where there are reasonable grounds for regarding the person at issue as a danger to the security of the State, or where the person, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the State. Regulation 11(2) of the 2006 Regulations provides that where a person to whom a declaration has already been given misrepresented or omitted facts (including through the use of false documents) and this was decisive for the granting of the declaration, or where a person to whom a declaration was given should have been excluded, the Minister may revoke or refuse to renew the declaration. No appeal is legislated for in relation to decisions made pursuant to Regulation 11.

Section 17(4) of the Refugee Act, 1996[19] provides what amounts to a further exclusion clause in respect of applicants already recognised as refugees:

> *The Minister shall not give a declaration to a refugee who has been recognised as a refugee under the Geneva Convention by a state other than the State and who has been granted asylum in that state and whose reason for leaving or not returning to that state and for seeking a declaration in the State does not relate to a fear of persecution in that state.*

With respect to applicants for international protection who are nationals of EU Member States, Ireland applies the EU Treaty Protocol on asylum for nationals of Member States of the European Union. The Protocol essentially provides that applications for declarations of refugee status from EU nationals shall be inadmissible for processing by another EU Member State

[18] As indicated by staff members of the Department of Justice, Equality and Law Reform interviewed during the course of this study.

[19] Staff members of the Office of the Refugee Applications Commissioner consulted during the course of this study have stated that while the Commissioner has invoked this provision in the relatively recent past, they are of the view that the main exclusion clause provisions are contained in section 2 of the Refugee Act, 1996 under the definition of 'Refugee'. (Correspondence, November 2009).

except in exceptional circumstances. These exceptions essentially flow from failure to meet obligations relating to respect for human rights and the rule of law under the European Convention on Human Rights and the EU Treaties. Representatives of the Refugee Applications Commissioner have stated that the Commissioner will not accept asylum applications from EU nationals in light of the application of the Protocol.[20]

2.2.2 SUBSIDIARY PROTECTION

Definition & Qualifying Criteria

The European Communities (Eligibility for Protection) Regulations, 2006 (S.I. No. 518 of 2006) came into force in Ireland on 10 October 2006. These Regulations were intended to comply with Council Directive 2004/83/EC,[21] which sets out, *inter alia*, who qualifies as being eligible for subsidiary protection. Regulation 2(1) of the 2006 Regulations provides the criteria for eligibility for subsidiary protection. An applicant for subsidiary protection is required to show, *inter alia*, substantial grounds for believing that he or she, if returned to his or her country of origin, would face a real risk of suffering serious harm. Regulation 2(1) defines serious harm as consisting of (a) the death penalty or execution, (b) torture or inhuman or degrading treatment or punishment, or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of armed conflict. There is no requirement that an applicant show a nexus to a civil or political right or ground, as required for a declaration of refugee status pursuant to section 2 of the Refugee Act, 1996 (as amended). The Regulations' provisions setting out the criteria relevant to the consideration of facts and circumstances, noted above in relation to refugee status, apply equally to applications for subsidiary protection.

[20] Correspondence with staff members of the Office of the Refugee Applications Commissioner (November 2009).

[21] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (i.e. the 'Qualification Directive').

In *H & D v Minister for Justice, Equality and Law Reform*[22] the Court found that Council Directive 2004/83/EC imposed higher standards than those previously in operation in respect of the obligations on the Minister for Justice to ensure that people in need of international protection are not *refouled*. In particular, the Court found that the definition of torture that the Minister had to consider prior to the transposition of the Directive was narrower than that contained in Article 15 of the Directive.[23] The Court also found that the limitation present in the protection from *refoulement* of section 5(1) of the Refugee Act, 1996, that the threat be on account of an applicant's race, religion, nationality, membership of a particular social group or political opinion, was not present in Article 15 of the Directive, and that with regard to the definition of serious harm in Article 15, it did not appear that consideration of the *non-refoulement* provision in section 5 of the Refugee Act, 1996 would result in the Minister having considered in every case matters that he was now obliged to consider under Article 15's definition of serious harm.

In *N & Anor v The Minister for Justice Equality and Law Reform*,[24] the Irish High Court stated that the primary focus in an application for subsidiary protection is any risk which the appellant alleges he or she is subject to upon return to his or her country of origin considered in light of the situation at hand in terms of peacefulness and the functionality of ordinary protection in that state. The Court also stated that subsidiary protection was a right to be enjoyed under Irish law by non-citizens rather than a discretionary power of the Minister. With regard to the issue as to what constitutes 'serious harm' the Court concluded that the regulations focus on attacks or threats by human agency and that matters such as health and welfare were not within the remit of the Regulations.

Exclusion from and Revocation of Subsidiary Protection

Regulation 13 of the European Communities (Eligibility for Protection) Regulations, 2006 provides for exclusion from subsidiary protection:

[22] Unreported, High Court, 27 July 2007.

[23] Previously the definition of torture was limited to acts or omissions done or made or at the instigation of, or with the consent or acquiescence of, a public official (Section 186 of the Criminal Justice Act, 2006 (as amended))

[24] Unreported, High Court, 25 April 2008.

(1) A person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that he or she—

(a) has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) has committed a serious crime;

(c) has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations; or

(d) constitutes a danger to the community or to the security of the State.

(2) Paragraph (1) applies also to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein.

(3) A person may be excluded from being eligible for subsidiary protection if he or she has, prior to his or her admission to the State, committed one or more crimes, outside the scope of paragraph (1), which would be punishable by imprisonment had they been committed in the State, and left his or her country of origin solely in order to avoid sanctions resulting from these crimes.

Regulation 14 of the European Communities (Eligibility for Protection) Regulations, 2006 provides for revocation of or refusal to renew subsidiary protection:

(1) The Minister shall revoke or refuse to renew a permission granted to a person under Regulation 4 where—

(a) subject to paragraph (2), the circumstances which led to the granting of the permission have ceased to exist or have changed to such a degree that protection is no longer required;

(b) the person should have been or is excluded from being a person eligible for subsidiary protection under Regulation 13(1) or (2); or

(c) misrepresentation or omission of facts, whether or not including the use of false documents, by the person were decisive for the granting of subsidiary protection status.

(2) In determining whether paragraph (1)(a) applies, the Minister shall have regard to whether the change of circumstances referred to in that provision is of such a significant and non-temporary nature that the person granted subsidiary protection no longer faces a real risk of serious harm.

(3) The Minister may revoke or refuse to renew a permission granted under Regulation 4(4) where the person concerned should have been excluded from being eligible for subsidiary protection in accordance with Regulation 13(3).

(4) Section 3 of the 1999 Act shall apply in relation to a proposal to revoke or to refuse to renew a permission granted under Regulation 4(4).

Applicants do not have a right to appeal unsuccessful subsidiary protection decisions. The High Court plays a supervisory role by way of judicial review. See Chapter 3 for further discussion regarding this procedure.

2.2.3 TEMPORARY PROTECTION

Ireland originally did not opt to adopt Directive 2001/55/EC,[25] but subsequently asked to take part. By Decision 2003/690/EC of 2 October 2003, the Directive was deemed to apply to Ireland. Member States were required to ensure domestic legislation complied with the Directive from 31 December 2002. The published Immigration Residence and Protection Bill, 2008 contains provisions proposed to comply with the Directive. The Bill defines temporary protection as 'a procedure of exceptional character to provide, in the event of a mass influx or imminent mass influx of displaced foreign nationals who are unable to return to their country of origin, immediate and temporary protection.'[26] The proposed provision is said to apply to a foreign national to whom, following a Council Decision under Article 5 of the Directive, permission to enter and remain in the State for temporary protection as part of a group of persons has been given by the Government and whose personal data is entered in a register established and maintained for the purposes of this section by the Minister for Justice, Equality and Law Reform.

[25] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (i.e. the 'Temporary Protection' Directive).

[26] Head 48 of the Immigration, Residence and Protection Bill, 2008, as published January 2008.

2.3 National Statuses Not Covered by EU Legislation

2.3.1 PROGRAMME REFUGEE STATUS

Section 24(1) of the Refugee Act, 1996 provides the Irish legislative basis for programme refugee status:

In this section 'a programme refugee' means a person to whom leave to enter and remain in the State for temporary protection or resettlement as part of a group of persons has been given by the Government and whose name is entered in a register established and maintained by the Minister for Foreign Affairs, whether or not such person is a refugee within the meaning of the definition of 'refugee' in section 2 [of the Refugee Act, 1996 (as amended)]

The Office of the Minister for Integration (OMI) has responsibility for the reception and resettlement of persons admitted into Ireland under various Government Decisions.[27] In previous years, this has included such groups as Bosnians and Kosovars who were admitted under emergency evacuation programmes during the 1990s (these programmes ended in 2000 and 2001 respectively). In 1998 the Irish Government began participation in the UNHCR Refugee Resettlement Programme. This decision was taken following approaches by the UNHCR requesting that Ireland would admit, on an annual basis, a number of 'special cases' refugees who do not come under the scope of Ireland's obligations under the 1951 Geneva Convention relating to the Status of Refugees.[28] Under this programme, the Government has agreed to accept a number of people and their close relatives for resettlement. The number of programme refugees arriving in Ireland each year may not correspond directly to the number approved under the programme due to administrative reasons and subsequent arrival in a following year. In 2005, Ireland's agreed intake of programme refugees was increased to some 200 persons. This includes nuclear family members. The rights and entitlements of programme refugees are compared with those of Convention refugees and those with subsidiary protection status or leave to remain in detail in Chapter 3.

[27] Further information regarding the Office of the Minister for Integration is available at www.integration.ie.

[28] For example, such persons may already be refugees in another country but have been unable to find a durable resettlement solution there.

2.3.2 LEAVE TO REMAIN AND SECTION 3 OF THE IMMIGRATION ACT, 1999

Prior to October 2006 Ireland did not have a dedicated legislative scheme for subsidiary or complementary protection. Applicants who were not recognised as refugees and who sought international protection would typically seek protection by making representations against the making of a deportation order.[29] Since the enactment of the Immigration Act, 1999, an important statutory mechanism in this respect has been section 3 of that Act. It should be noted that there is no statutory application for leave to remain provided for under section 3 of the 1999 Act, and the section does not explicitly provide the Minister for Justice, Equality and Law Reform with a power to grant temporary leave to remain.[30] In the years between 1999 and 2009 there have been 3,619 applications for leave to remain granted under Section 3 of the Immigration Act 1999. In December 2009 over 12,000 applications had yet to be decided.

Section 3 of the 1999 Act empowers the Minister to make a deportation order requiring a non-Irish national to leave the State and to remain thereafter out of the State. There are two qualifications to the Minister's power to make such a deportation order. The first makes the Minister's power to make a deportation order subject to the provisions of section 5 of the Refugee Act, 1996 which provides a prohibition on any person

[29] Irish legislation arguably provides other means of regularising the status of such protection applicants in section 17(6) of the Refugee Act, 1996, and section 4 of the Immigration Act, 2004, and the Minister has jurisdiction to set up administrative schemes in order to grant leave to remain at his discretion. In interviews conducted for the purpose of this study, Departmental officials of the Department of Justice, Equality and Law Reform stated that persons with protection needs are considered only under (i) the Refugee Act 1996, (ii) section 3 of the Immigration Act, 1999 and (iii) the European Communities (Eligibility for Protection) Regulations, 2006. This study nonetheless sets out the law with respect to all identified potential means of regularising status for those with protection needs.

[30] C.f. sections 17(6) and 21(7) of the Refugee Act, 1996 (as amended), and section 4 of the Immigration Act 2004. In addition, section 5 of the Aliens Order, 1946 (as amended) provides immigration officers with power to refuse aliens (i.e. people who are neither Irish nor British citizens) leave to land in the State. The Aliens Order, 1946, as originally drafted, gave the Minister for Justice an explicit power to grant leave to remain.

being expelled from the State in any manner whatsoever where, in the Minister's opinion, the life or freedom of that person would be threatened on account of the matters set out in that section. The Minister would have no power to make a deportation order in respect of someone if the Minister is of the opinion that the person under consideration was likely to be subjected to a serious assault.

Section 3(1) contains the provision giving the Minister power to order a non-Irish national to leave, and thereafter remain out of, the State, subject to the prohibition of *refoulement* in section 5 of the Refugee Act, 1996 (as amended):

> *3.- (1) Subject to the provisions of section 5 (prohibition of refoulement) of the Refugee Act, 1996, and the subsequent provisions of this section, the Minister may by order (in this Act referred to as 'a deportation order') require any non-national specified in the order to leave the State within such period as may be specified in the order and to remain thereafter out of the State.*

Section 5 of the Refugee Act, 1996 sets out the prohibition of *refoulement* under that Act:

> *5.- (1) A person shall not be expelled from the State or returned in any manner whatsoever to the frontiers of territories where, in the opinion of the Minister, the life or freedom of that person would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion.*
>
> *(2) Without prejudice to the generality of subsection (1), a person's freedom shall be regarded as being threatened if, inter alia, in the opinion of the Minister, the person is likely to be subject to a serious assault (including a serious assault of a sexual nature).*

The second qualification on the power conferred on the Minister to make a deportation order arises from the provisions of section 3(3) and (6) of the Immigration Act, 1999 which require the Minister to have regard to representations made by the proposed deportee, and certain specified matters, before deciding whether to proceed with the making of a deportation order. Section 3(6) of the Act, 1999 is as follows:

3.-(6) In determining whether to make a deportation order in relation to a person, the Minister shall have regard to

(a) the age of the person;

(b) the duration of residence in the State of the person;

(c) the family and domestic circumstances of the person;

(d) the nature of the person's connection with the State, if any;

(e) the employment (including self-employment) record of the person;

(f) the employment (including self-employment) prospects of the person;

(g) the character and conduct of the person both within and (where relevant and ascertainable) outside the State (including any criminal convictions);

(h) humanitarian considerations;

(i) any representations duly made by or on behalf of the person;

(j) the common good; and

(k) considerations of national security and public policy, so far as they appear or are known to the Minister.

These criteria are those that effectively constitute the criteria in what is informally referred to as an application for leave to remain, but what is properly understood as a case against the making of a deportation order.

Available statistics regarding decisions to grant temporary leave to remain do not distinguish between grants relating to those with protection issues and those without protection issues.[31] In the course of interviews for this study, representatives of the Department of Justice, Equality and Law Reform stated that the decision not to issue a deportation order and to grant leave to remain under section 3 of the Immigration Act, 1999 (as amended) is at the discretion of the Minister and does not distinguish between those who would otherwise obtain other forms of protection.

[31] Correspondence with staff members of the Department of Justice, Equality and Law Reform (November 2009).

In his judgment in *Meadows v The Minister for Justice, Equality and Law Reform,*[32] Murray CJ clarified the Minister's obligations in relation to his power to deport a person who has advanced a claim for international protection:

> *…In cases where there is no claim or factual material put forward to suggest that a deportation order would expose the deportee to any of the risks referred to in s. 5 then no issue as regards refoulement arises and the decision of the Minister with regard to s. 5 considerations is a mere formality and the rationale of the decision will be self evident.*
>
> *On the other hand if such material has been presented to him by or on behalf of the proposed deportee, as the case here, the Minister must specifically address that issue and form an opinion. Views or conclusions on such issues may have already been arrived at by officers who considered a proposed deportee's application for asylum at the initial or appeal stages, and their conclusions or views may be before the Minister but it remains at this stage for the Minister and the Minister alone in the light of all the material before him to form an opinion in accordance with s. 5 as to the nature of the risk, if any, to which a proposed deportee might be exposed. This position is underscored by the fact that s. 3 envisages that a proposed deportee be given an opportunity to make submissions directly to the Minister on his proposal to make a deportation order at that stage. The fact that certain decisions have been made by officers at an earlier stage in the course of the application for refugee status does not absolve him from making that decision himself.*

Murray CJ, again in his judgment in *Meadows,* and with specific reference to a decision in respect of the principle of *non-refoulement* under section 5 of the Refugee Act, 1996, stated that administrative decisions affecting the rights and obligations of persons should at least disclose the essential rationale on foot of which the decision is taken, and that the rationale should be patent from the terms of the decision or capable of being inferred from its terms and its context.[33]

[32] Unreported, Supreme Court, 21 January 2010. Ms. Meadows sought to quash, by way of judicial review, the Minister's decision to deport her. The Minister had considered the applicant's case in the context of section 3 of the Immigration Act, 1999, and had found that *refoulement* was not an issue in the case.

[33] The Irish High Court had previously held that there was no obligation on the Minister to enter into correspondence with applicants for leave to

In his judgment in the same case, Fennelly J stated that where 'decisions encroach upon fundamental rights guaranteed by the Constitution, it is the duty of the decision maker to take account of and to give due consideration to those rights.' Fennelly J stated further that the principle of proportionality can provide a sufficient and consistent standard of review in this regard. In her judgment in *Meadows*, Denham J expressed the manner in which the principle of proportionality should be applied as follows:

> *When a decision maker makes a decision which affects rights then, on reviewing the reasonableness of the decision (a) the means must be rationally connected to the objective of the legislation and not arbitrary, unfair or based on irrational considerations; (b) the rights of the person must be impaired as little as possible; and (c) the effect on rights should be proportional to the objective.*

There is no right of appeal against the issuance of a deportation order. An applicant can, however, seek to revoke or amend a deportation order under section 3(11) of the 1999 Act. The High Court plays a supervisory role in the context of judicial review. Further discussion regarding procedural matters is provided in chapter 3.

remain, or give them detailed reasons for deportation orders (See *Izevbekhai v The Minister for Justice, Equality and Law Reform*, Unreported, High Court, Feeney J, 13 March 2008).

2.3.3 PERMISSION TO LAND OR BE IN THE STATE PURSUANT TO SECTION 4 OF THE IMMIGRATION ACT, 2004

Section 4 of the Immigration Act, 2004 provides the Minister for Justice, Equality & Law Reform, or an immigration officer on his or her behalf, with discretion to provide a non-Irish national with permission to land or be in the State and to impose conditions on such permission in relation to engagement in employment or duration of stay as he deems fit. Officials of the Department of Justice, Equality and Law Reform have indicated that they consider this discretion necessary to allow the Minister to deal with individual cases,[34] but are of the view that the Minister is not obliged to consider applications for residency made pursuant to section 4(1) of the 2004 Act where a person is in the country without permission, or has made an unsuccessful application for refugee status.[35] Section 5(1) of the 2004 Act states:

> *'No non-national may be in the State other than in accordance with the terms of any permission given to him or her before the passing of this Act, or a permission given under this Act after such passing, by or on behalf of the Minister.'*

Departmental officials have also indicated that an individual who is already in the state without permission cannot subsequently apply for permission under section 4(1), but that a person who has been granted permission under section 4(1) on entry may apply under section 4(7) for that permission to be renewed or varied by the Minister for Justice, Equality and Law Reform, or by an immigration officer on his or her behalf.[36] The Departmental officials stated that they are of the view that that section 4(1) of the 2004 Act only applies to permission to land, and that section 4(7) only applies to renewing or varying permission already granted.[37]

[34] Interview with staff members of the Department of Justice, Equality and Law Reform (August 2009).

[35] *Ibid.*

[36] *Ibid.*

[37] Correspondence with staff members of the Department of Justice, Equality and Law Reform (November 2009).

Representatives of the Department of Justice, Equality and Law Reform confirmed that there have been instances where the Minister has granted migrants leave to remain under section 4 of the Immigration Act, 2004, but that this mechanism has not been used at any time to grant permission to remain to anyone with international protection needs, or who is at risk of *refoulement*. Officials of the Department of Justice, Equality and Law Reform stated during interviews for this study that they believe persons with protection needs are eligible for consideration only under (i) the Refugee Act, 1996, (ii) the European Communities (Eligibility for Protection) Regulations, 2006 and (iii) section 3 of the Immigration Act, 1999. It is noted, however, that section 4(1) of the 2004 Act nonetheless explicitly refers to authorisation to land or be in the State and that, by contrast, section 3 of the Immigration Act, 1999 does not in fact provide an explicit power to grant leave to remain.

Leave to remain in the State may be revoked for, *inter alia*, the following reasons:

- If the recipient does not comply with the conditions set out in the letter
- If the recipient is found to have provided false or misleading information in the course of the application for leave to remain in the State.

These conditions can vary depending on the circumstances of case or the prevailing economic situation in the State.

2.3.4 PERMISSION TO REMAIN PURSUANT TO SECTION 17(6) OF THE REFUGEE ACT, 1996

Section 17(6) of the Refugee Act, 1996 (as amended) provides as follows:

> *The Minister may, at his or her discretion, grant permission in writing to a person who has withdrawn his or her application or to whom the Minister has refused to give a declaration to remain in the State for such period and subject to such conditions as the Minister may specify in writing.*

Legislation provides no further guidance on the operation of this mechanism for granting permission to remain. Officials of the Department of Justice, Equality and Law Reform interviewed during the course of this study have stated that they are of the view that this section is no longer relevant, and that the section

has been, effectively, replaced by section 3 of the Immigration Act, 1999.[38] In addition, they have indicated that if the Minister decides not to issue a deportation order and grants leave to remain, it is done under the provisions of section 3 of the Immigration Act, 1999.[39] It is noted, though, that section 17(6) of the 1996 Act provides the Minister with an explicit discretion to grant permission to remain, while section 3 of the 1999 Act contains no such provision.

2.3.5 PERMISSION TO REMAIN FOR VICTIMS OF HUMAN TRAFFICKING

There is no protection status in Irish law specifically designed for the protection of victims of human trafficking. The Criminal Law (Human Trafficking) Act, 2008, which seeks to implement the Framework Decision on Combating Trafficking in Human Beings (for the purpose of labour and sexual exploitation)[40] and the Framework Decision on Combating the Sexual Exploitation of Children and Child Pornography,[41] creates offences criminalising, *inter alia*, trafficking in persons for the purposes of sexual or labour exploitation, and the trafficking of children into, through or out of the State,[42] and trafficking in adults.[43] The regulatory impact analysis states that this legislation was solely concerned with the criminal law response to trafficking, and that the protection of victims of trafficking would be dealt with administratively.[44]

Head 124 of the published Immigration, Residence and Protection Bill, 2008 proposes new provisions for protection of suspected victims of trafficking. Under the terms of the proposed legislation, a foreign national whom a member of the Garda Síochána, with reasonable grounds, believes to be a victim of

[38] *Ibid.*

[39] *Ibid.*

[40] Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings, OJ L 203 of 1 August 2002.

[41] Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography, OJ L 13 of 20 January 2004.

[42] Section 3 of the Criminal Law (Human Trafficking) Act, 2008.

[43] Section 5 of the Criminal Law (Human Trafficking) Act, 2008.

[44] *Screening Regulatory Impact Analysis, Criminal Justice (Human Trafficking) Bill, 2007.* Available at http://www.justice.ie/en/JELR/Pages/WP09000025.

trafficking, or who has provided a statement in writing to the Minister of Justice, Equality and Law Reform to the effect that he or she is a victim of trafficking, would be permitted to be present in the State for a forty-five day 'recovery and reflection period' to enable the suspected victim to recover from and escape the influence of the alleged perpetrators of the trafficking so that he or she can take an informed decision as to whether to assist the Garda Síochána or other relevant authorities in relation to any investigation or prosecution arising in relation to the alleged trafficking.

Under the Bill's proposed provisions, the recovery and reflection period could be terminated, *inter alia*, where the Minister is satisfied that the foreign national has actively, voluntarily and on his or her own initiative renewed his or her relevant connections with the alleged perpetrators.[45] The granting of permission to be present in the State for the recovery and reflection period would not entitle the suspected victim to any right to remain in the State upon the expiry of this period. A suspected victim's permission to be present in the State could be extended where the Minister is satisfied both that the suspected victim has severed all his or her relevant connections with the alleged perpetrators of the trafficking, and where it is necessary for the purposes of allowing the alleged victim to continue to assist the Gardaí in any arising investigation or prosecution.

The National Action Plan to Combat Trafficking of Human Beings in Ireland 2009 – 2012[46] states that the recovery and reflection period is to be increased to sixty days during the Bill's Report Stage.[47] The National Action Plan also states that suspected victims may be granted a residence permit to allow them assist the Garda Síochána or other relevant authorities in an investigation or prosecution. An administrative framework, broadly reflecting the provisions in the Bill, was introduced on 7 June 2008 to provide for the period of recovery, reflection and residency in the State

[45] An administrative framework, broadly reflecting the provisions in the Bill, was introduced on 7 June 2008 to provide for the period of recovery, reflection and residency in the State until the full enactment of the provisions of the Immigration, Residence and Protection Bill. The framework was recently amended to provide for the sixty-day recovery and reflection period. See www.blueblindfold.gov.ie.

[46] Published in June 2009. Further information available at www.justice.ie.

[47] The draft legislation was recently amended to provide for the sixty-day recovery and reflection period. See www.justice.ie.

until the full enactment of the provisions of the Immigration, Residence and Protection Bill. The National Action Plan states that a six-month period of temporary residence may also be granted thereafter if the suspected victim has severed all ties with the alleged traffickers and is willing to assist in an investigation or prosecution arising in relation to trafficking.

The National Action Plan outlines a number of other protection measures for suspected victims of human trafficking, including: existing support services for victims of crime, legislative provisions protecting the identity of suspected victims during criminal proceedings, legislative provisions that create offences aimed at protecting victims of crime, witnesses and their families, and the Voluntary Assisted Return and Reintegration Programme.

These provisions are in line with Articles 6 and 8 of Council Directive 2004/81/EC.[48] Accordingly, these provisions relate to EU harmonised statuses, but not to the EU harmonised protection statuses required by Council Directives 2004/83/EC and 2001/55/EC, which form the basis for EU harmonised protection statuses for the purposes of this study. The aim of the statuses for victims of human trafficking relates to the facilitation of the investigation of crime, rather than the protection of victims. Victims of trafficking to whom these provisions apply obtain the benefit of temporary permission to remain or residency in the State. While the Immigration, Residence and Protection Bill provides the legislative bases for both the reflection and recovery period, and the six-month residency period, both statuses exist under the current administrative scheme. It should be noted that the Department of Justice and Law Reform considers these statuses to be protection statuses.[49]

[48] Directive 2004/81/EC on the residence permit issued to third country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.

[49] Correspondence with staff members of the Department of Justice, and Law Reform (September 2010).

2.3.6 INHERENT POWER OF THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM TO GRANT LEAVE TO REMAIN

The Minister for Justice, Equality and Law Reform has, on occasion, set up at his discretion, administrative schemes in order to grant temporary leave to remain to certain categories of people. One such example is the 'IBC/05' scheme where 16,693 individuals were granted leave to remain as parents of Irish citizen children.[50] There are also schemes such as the Marriage to an Irish National scheme and the Business Permission scheme where the Minister has granted permission to 1,366 people and 273 people respectively since 2006.[51] Officials of the Department of Justice, Equality and Law Reform interviewed during the course of this study have indicated that they are of the view that leave to remain for protection applicants is only dealt with under the Refugee Act, 1996, section 3 of the Immigration Act, 1999, and the European Communities (Eligibility for Protection) Regulations, 2006, and that the prospect of adding a further layer to the process for international protection would serve no purpose.[52]

[50] The 'IBC/05' Scheme ('Revised arrangements for the consideration of applications for permission to remain made by the non-Irish national parents of Irish born children born before 1 January, 2005') was an administrative scheme by which the Minister for Justice, Equality and Law Reform invited applications for permission to remain in the State from non-Irish national parents of Irish children born in the State by 31 December 2004. Almost 18,000 applications were submitted under the initial 2005 Scheme, with 16,693 applications approved. The applications were not broken down by reference to whether they were asylum seekers or not, but out of an overall total of successful applicants, 10,032 (i.e. just over 60 per cent) were asylum seekers (Department of Foreign Affairs, *Value for Money Review of the Passport Service,* June 2008). Calls for renewal for those successful under the scheme were announced in 2007 and 2009.

[51] Figures provided by the Department of Justice, Equality and Law Reform and relate to grants up to 31 July 2009. Staff members of the Immigrant Council of Ireland stated that immigration-related applications are often made without reference to any specific scheme or legislative provisions (Correspondence, September 2009)

[52] Interview with staff members of the Department of Justice, Equality and Law Reform (August 2009).

3. PROCEDURES FOLLOWED AND RIGHTS PROVIDED

3.1 Introduction

This section outlines the procedures followed at national level, and the rights provided in respect of each legal status discussed in Chapter 2. Before dealing with the specific procedures related to the various legal statuses at issue, the role judicial review plays in relation to the asylum and immigration processes in Ireland should be noted. Section 5 of the Illegal Immigrants (Trafficking) Act, 2000 provides that the validity of certain decisions made in the Irish asylum and immigration processes cannot be questioned other than by way of judicial review. The affected decisions are:

- Notifications of a proposal to deport under sections 3(3)(a) and 3(3)(b)(ii) of the Immigration Act, 1999 (as amended)
- Deportation orders made under section 3(1) of the Immigration Act, 1999 (as amended)
- Refusal of permission to land made under the Aliens Order 1946 or section 4(3) of the Immigration Act, 2004
- Exclusion orders under section 4 of the Immigration Act, 1999 (as amended)
- Refusal of refugee status by or on behalf of the Minister/Recommendation of the Appeal Authority
- Recommendation (requiring) the Commissioner/ Tribunal to accord priority to certain classes of applications under section 12 of the Refugee Act, 1996 (as amended)

- Recommendation of the Commissioner whether an applicant should be declared a refugee under section 13 of the Refugee Act, 1996 (as amended)
- Decision of the Tribunal whether to affirm or set aside a recommendation of the Commissioner under section 16 of the Refugee Act, 1996 (as amended)
- Determination of the Commissioner/Tribunal re Dublin Regulations under section 22 of the Refugee Act, 1996 (as amended)
- Refusals by the Minister under section 17 of the Refugee Act, 1996 (as amended)
- Orders re Dublin Convention/Regulation 343/2003 under section 22 of the Refugee Act, 1996 (as amended)
- Decisions of the Tribunal re appeal of an ancillary Dublin Convention/Regulation 343/2003 order under section 22(4)(b) of the Refugee Act, 1996 (as amended)
- Decisions to revoke a declaration of refugee status by the Minister under section 21 of the Refugee Act, 1996 (as amended).

Section 5 of the 2000 Act also sets out special rules for judicial review of such decisions. These rules are more stringent that the normal rules for judicial review, and include a short time limit of fourteen days in which to bring the application for review, a higher threshold for leave to apply for judicial review,[53] and the

[53] Section 5(2) of the 2000 Act provides that applications for leave to apply for judicial review in respect of certain decisions in the asylum and immigration processes shall,

(a) be made within the period of 14 days commencing on the date on which the person was notified of the decision, determination, recommendation, refusal or making of the Order concerned unless the High Court considers that there is good and sufficient reason for extending the period within which the application shall be made, and

(b) be made by motion on notice (…) to the Minister and any other person specified for that purpose by order of the High Court, and such leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision, determination, recommendation, refusal or order is invalid or ought to be quashed.

removal of the right of appeal to the Supreme Court.[54] The validity of decisions of the Refugee Applications Commissioner, the Refugee Appeals Tribunal, and the Minister for Justice, Equality and Law Reform in relation to proposals to deport and decisions to issue a deportation order can all only be challenged by way of the special rules for judicial review under the 2000 Act. The Irish Supreme Court has held the restrictions imposed by section 5 of the 2000 Act are not repugnant to the Irish Constitution.[55] Decisions not listed under section 5 of the 2000 Act are subject to the normal rules of judicial review. For example, an application for judicial review of the validity of the Minister's decisions in respect of subsidiary protection is subject to the normal rules of judicial review rather than those set out under the 2000 Act. The legislation proposed in the Immigration, Residence and Protection Bill, 2008 would extend special rules similar to those in the 2000 Act to all decisions made in the asylum and immigration processes set out under the new legislation.

3.2 EU Harmonised Protection Statuses In Ireland

3.2.1 REFUGEE STATUS

Procedures Followed

Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (the 'Procedures Directive') required compliance with its provisions by 1 December 2007. Staff members from the Department of Justice, Equality and Law Reform have stated that they are of the view that Irish law and practice is already substantially in compliance with the terms of the Directive.[56] The published

[54] Section 5(3)(a) of the 2000 Act provides that:

> *The determination of the High Court of an application for leave to apply for judicial review as aforesaid or of an application for such judicial review shall be final and no appeal shall lie from the decision of the High Court to the Supreme Court in either case except with the leave of the High Court which leave shall only be granted where the High Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court.*

[55] Re Illegal Immigrants (Trafficking) Bill 1999 [2000] 2 IR 360.

[56] See Department of Justice, Equality and Law Reform (January 2008). 'Launch of New Immigration Bill'. Press Release. Available at www.inis.gov.ie/en/INIS/Pages/Launch_of_new_Immigration_Bill

Immigration, Residence and Protection Bill, 2008 contains provisions that propose to comply with the Directive.

The Refugee Act, 1996 (as amended) provides for applications for asylum,[57] and provides that applicants for asylum shall be given leave to enter and remain in the State while their applications are being considered.[58] The Act provides that there will be a person, independent in the exercise of his or her functions under that Act, known as the Refugee Applications Commissioner (ORAC),[59] and stipulates that his or her function is to investigate applications for asylum at first instance. The Act, as amended, also establishes the independent Refugee Appeals Tribunal, and sets out its functions as an appellate body in the asylum process.[60] The Act provides that applicants for asylum are entitled to remain in the State until transfer under the Dublin Regulation, withdrawal of the asylum application, or the date on which notice is sent that the Minister for Justice, Equality and Law Reform has refused to give a declaration of refugee status.[61]

The European Communities (Eligibility for Protection) Regulations, 2006 (S.I. No. 518 of 2006), which are intended to give effect to Council Directive 2004/83/EC,[62] contain provisions regarding, *inter alia*, protection needs arising sur-place, internal protection, what constitutes serious harm, and the criteria relevant to the consideration of facts and circumstances in an application for protection. The ORAC and the Refugee Appeals Tribunal are required to apply these Regulations to determinations within the asylum process.[63]

[57] Section 8 of the Refugee Act, 1996 (as amended).

[58] Section 9 of the Refugee Act, 1996 (as amended).

[59] Section 6 of the Refugee and Immigration Act, 1996 (as amended) provides that there shall be a person, independent in the exercise of his functions under that act, known as the Refugee Applications Commissioner. The Commissioner is a person, not an office, but ORAC, has become the accepted acronym, and is used in this study for the sake of consistency.

[60] Section 16 of the Refugee Act, 1996 (as amended).

[61] Section 9(2) of the Refugee Act, 1996 (as amended).

[62] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (i.e. the 'Qualification Directive').

[63] Regulation 3 of the European Communities (Eligibility for Protection) Regulations, 2006 (S.I. No. 518 of 2006).

Under amendments to the Refugee Act, 1996, contained in the Immigration Act, 2003, the Minister for Justice, Equality and Law Reform is empowered to issue directions to the ORAC and the Tribunal prioritising certain categories of applicant.[64] The Minister for Justice, Equality and Law Reform has directed that priority should be accorded to applications made by persons from 'safe countries of origin'[65] and Nigeria.[66] Applicants for asylum from countries designated as safe must rebut the presumption that they are not in need of refugee protection. Countries of origin designated as safe under Irish domestic law are currently Croatia, South Africa and the twelve Member States that most recently acceded to the EU.[67] Statutory amendments have also introduced an accelerated procedure at appeal stage for certain categories of applicants, including where an the application shows either no basis or a minimal basis for the contention that the applicant is a refugee, and where an applicant, without reasonable cause, failed to make an application as soon as reasonably practicable after arrival in the State.[68]

Ireland does not currently have a single procedure for applications for protection. Such a procedure is proposed in the published Immigration, Residence and Protection Bill, 2008. Asylum applicants who gain access to the territory can apply for international protection pursuant to section 8(1)(a) of the Refugee

[64] Section 12 of the Refugee Act, 1996 (as amended).

[65] Ministerial Direction dated 15 September, 2003 under section 12(1)(m) of the Refugee Act, 1996, as inserted by section 7 of the Immigration Act, 2003 regarding the prioritisation of applications from designated safe countries of origin.

[66] Direction of the Minister for Justice, Equality and Law Reform dated 15 December 2003 given pursuant to Section 12(1) of the Refugee Act, 1996 (as amended) directed to the Refugee Applications Commissioner and the Refugee Appeals Tribunal to give priority to applications for asylum from persons who are nationals of Nigeria.

[67] Refugee Act, 1996 (Safe Countries of Origin) Order 2004 (S.I. No. 714 of 2004). This legislative instrument remains in force notwithstanding Ireland's application of the EU Treaty Protocol on asylum for nationals of Member States of the European Union. Note also that Nigeria is not designated as a safe country of origin, notwithstanding that it is the subject of a priorisation order. See the leave judgment in *Dokie & Anor v Refugee Applications Commissioner & Ors*, High Court, Cooke J, 19 January 2010.

[68] For example, section 13 of the Refugee Act, 1996 as amended by section 7 of the Immigration Act, 2003. See Section 13(6) of the 1996 Act for the complete list of affected categories of applicant.

Act, 1996. The Act provides that persons seeking asylum arriving at the frontiers of the state are initially dealt with by an Immigration Officer. Applicants for protection are given permission to enter and remain in the State pursuant to section 9 of the 1996 Act. The Immigration Officer conducts a preliminary interview with the applicant pursuant to section 8(1)(a)(i) of the 1996 Act. The purpose of this interview is to establish, *inter alia*, whether the person wishes to make an application for a declaration of refugee status and, if so, the general grounds upon which the application is based, the identity of the person and their nationality, transport and route taken to reach Ireland as well as the legal basis for entry into or presence in the State. The Act also specifies that the interview shall be conducted in the presence of an interpreter where necessary and possible.

Any person entering the state who declares that he or she intends to seek asylum in Ireland is required to apply in writing to the Commissioner. Persons who do not present themselves at the frontiers of the State may apply directly at the offices of the Refugee Applications Commissioner in Dublin. In practice, most applications are made at the ORAC in Dublin. On arrival at the ORAC all applicants are photographed and all applicants over 14 years are fingerprinted. At this point a EURODAC check is carried out, and the Dublin Regulation may be applied.

Following the preliminary interview, a standard form (called an ASY1 form) is completed and signed by the applicant. This contains the individual's biographical data and a brief outline of their claim. The applicant is then given a detailed questionnaire, which requires him or her to provide biographical and other personal details, travel particulars and reasons for seeking asylum. The applicant is required to return the completed questionnaire to the ORAC. Applicants, subject to a means assessment, may seek legal advice from the Refugee Legal Service (RLS), the legal aid service for asylum seekers, in relation to the completion of the questionnaire and their preparation for interview. They may also seek legal advice from private solicitors. Applicants are issued with a Temporary Residence Certificate/Card which, though not a legal identity document, is evidence that they have applied for asylum. All applicants are provided with an information leaflet, which is available in many languages, that sets out the procedures for processing applications.

Applicants are then referred to the Reception and Integration Agency (RIA) (which holds an office in the ORAC building in Dublin) which holds responsibility for the planning, co-ordination and provision of accommodation and reception services to asylum seekers. RIA has a number of reception

centres in Dublin where asylum seekers are accommodated initially. Applicants may subsequently be dispersed to other accommodation centres elsewhere in the State. This direct provision accommodation is provided on a full-board basis, and asylum seekers are allocated €19.10 per week for any other expenses.

Under section 11 of the Refugee Act, 1996, it is the function of the ORAC to investigate applications to ascertain whether applicants are persons in respect of whom declarations of refugee status should be given. To carry out this function, the Commissioner invites each applicant to an interview. This substantive interview is carried out by an ORAC caseworker, with the assistance of an interpreter where this is necessary and possible. An applicant is also entitled to have a legal representative present during the interview. In practice, it is unusual for such representatives to be present. The Refugee Legal Service (RLS) attends all interviews for unaccompanied minors, and may also attend the interviews of other vulnerable applicants. On the basis of the findings of the preliminary interview, the completed questionnaire, the substantive interview and any other relevant documentation, including country of origin information, the caseworker prepares a reasoned report on the application. This report incorporates a recommendation as to whether or not refugee status should be granted. Pursuant to section 17(1)(a) of the Refugee Act, 1996 (as amended), where the ORAC at first instance recommends to the Minister for Justice, Equality and Law Reform that the applicant should be declared a refugee, or on appeal where the Tribunal sets aside the recommendation of the ORAC, the Minister is obliged to give to the applicant a statement in writing declaring that he or she is a refugee. The Minister is obliged to notify the office of the UN High Commissioner for Refugees of his decision.

Unsuccessful applicants may appeal to the Refugee Appeals Tribunal, an independent appellate body also established by the Refugee Act, 1996 (as amended), with jurisdiction either to set aside or affirm the ORAC's recommendation. The general procedure is that an appeal must be made within 15 working days of the sending of the negative decision. An applicant is typically entitled to request an oral hearing for the appeal. In certain circumstances, set out in the Refugee Act, 1996, the period within which an appeal must be made is shorter (ten Working days) and the appeal will be dealt with by the Refugee Appeals Tribunal without an oral hearing. In cases where applicants withdraw or fail to participate in the process (e.g. through non-attendance at

interview) a negative recommendation is issued, against which there is no appeal.

Where the Commissioner recommends that an applicant not be declared a refugee, and this decision is not set aside on appeal, the Minister for Justice, Equality and Law Reform may refuse to give the applicant a declaration. The Minister for Justice, Equality and Law Reform is obliged to notify the office of the UN High Commissioner for Refugees of his decision.

Rights Provided

The rights accruing to a declared refugee are mainly set forth in sections 3 and 18 of the Refugee Act, 1996 (as amended). Section 3 provides that a refugee shall generally have the same rights and privileges as citizens, and enumerates particular rights in respect of the right to reside in the State, to employment, medical care, social welfare, travel, access to the courts, freedom of religion and religious education of children, and access to trade unions. Section 18 of the 1996 Act sets out the right of refugees to apply for family reunification.

Section 3(2)(a)(iii) of the 1996 Act provides that a declared refugee is entitled to reside in the State and to have the same rights of travel in or to or from the State as those to which Irish citizens are entitled. As a matter of practice, residence permits issued to declared refugees are issued for a period of one year and are renewable thereafter.[69]

Section 3(2)(a)(ii) of the 1996 Act provides that a declared refugee shall be entitled to receive the same medical care and services and the same social welfare benefits as those to which Irish citizens are entitled. Social welfare benefits are defined as including any payment or services provided for in or under the Social Welfare Acts, the Health Acts, 1947 to 1994, and the Housing Acts, 1966 to 1992.

Persons with refugee status are taken to have a right to reside in the State for the purpose of the relevant legislation, but are not to be regarded as being habitually resident in the State for the

[69] Note that Ireland has not opted into Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (the 'Long Term Residents Directive'), and as a result its provisions do not apply in Ireland.

time spent in the State before the date on which the relevant declaration or permission was given.[70]

Pursuant to sections 3(1) and 3(2)(a)(i) of the 1996 Act, a refugee in respect of whom a declaration is in force is entitled to seek and enter employment, to carry on any business, trade or profession, and to have access to education and training in the State in the like manner and to the like extent in all respects as an Irish citizen. Section 3(2)(a)(vi) further provides that a declared refugee shall have the right to form and be a member of associations and trade unions in the like manner and to the like extent in all respects as an Irish citizen.

Section 4(1) of the 1996 Act provides that pursuant to an application in writing, and on payment of such fee as may be prescribed, the Minister for Justice, Equality and Law Reform shall issue to a refugee in relation to whom a declaration is in force a travel document identifying the holder thereof as a person to whom a declaration has been given. In the normal course, the Minister issues a Travel Document (referred to as a Convention Travel Document[71]) to the declared refugee. This is subject to section 4(2) of the 1996 Act, which provides that the Minister may refuse to issue such a document in the interest of public security or public policy. An application form is available on the Irish Naturalisation and Immigration Service website.[72] The declared refugee may apply for travel documents to the Travel Documents Unit of the Irish Naturalisation and Immigration Service. Minors must apply for their own documents. Travel documents are valid for two years and may be renewed thereafter.

Section 18 of the Refugee Act, 1996 (as amended) provides that a refugee may apply to the Minister for Justice, Equality and Law Reform for permission to be granted to a member of his or her family to enter and reside in the State. The Minister for Justice, Equality and Law Reform is obliged to grant permission

[70] Section 246(4)(5) of the Social Welfare Consolidation Act, 2005 as inserted by section 15 of the Social Welfare and Pensions (No. 2) Act, 2009.

[71] As provided for by Article 28 of the 1951 Geneva Convention relating to the Status of Refugees.

[72] See www.inis.gov.ie. The INIS website also contains information on who may apply for such documents and the relevant procedure, see www.inis.gov.ie/en/INIS/Pages/Application_for_a_Travel_Document.

to a member of the family of the refugee (i.e. spouse, parent (if the applicant is under 18 years old), or unmarried child (if under 18 years)). The Minister for Justice, Equality and Law Reform has discretion to grant permission to enter and reside in the State to a dependent member of the family of a refugee (who may be a child, parent, brother, sister grandparent, grandchild, ward or guardian of the refugee), provided the member of the family is dependent on the refugee or suffering from a mental or physical disability to such an extent that they cannot maintain him/herself fully. The Minister gives notification to the United Nations High Commissioner for Refugees of any such application, and refers the application to the ORAC for investigation under the Refugee Act, 1996.

On completion of its investigation, the ORAC submits a report to the Minister of Justice, Equality and Law Reform for a decision. The report from ORAC sets out the relationship between the refugee and the person or persons the subject of the application, and their domestic circumstances. Where the Minister for Justice, Equality and Law Reform grants permission to enter and reside to a member of the family or dependent member of the family of a refugee, the individual is entitled to such rights and privileges as are specified in section 3 of the Refugee Act, 1996 for such a period as the refugee is entitled to remain in the State. There is no statutory appeal in respect of a negative decision regarding family reunification.

The Irish Nationality and Citizenship Act, 1956 (as amended) governs the right to apply for Irish citizenship. The Minister for Justice, Equality and Law Reform may grant an application for naturalisation, if he or she is satisfied that an applicant satisfies certain 'conditions for naturalisation.'[73] The Minister has discretion to grant naturalisation to certain categories of applicant, including refugees, where the conditions for naturalisation are not satisfied.[74] Declared refugees and their family members residing lawfully in Ireland are entitled to apply for citizenship pursuant to section 15 of the 1956 Act (as amended). Under the Act, a non-Irish national is entitled to apply for citizenship after five years of lawful residence in Ireland (one of those being in the year immediately prior to the application, and four out of the

[73] Section 15(1) of the Irish Nationality and Citizenship Act 1956 (as amended).

[74] Section 16 of the Irish Nationality and Citizenship Act, 1956 (as amended).

preceding eight years). The applicant must also establish that they are in good standing, intend in good faith to continue to reside in the State after naturalization, and undertake an oath of fidelity to the nation and loyalty to the State. The five-year residency requirement can be waived at the Minister's discretion in the case of refugees (and stateless persons). As a matter of policy the Minister currently waives 2 years in respect of refugees, and so requires refugees to have resided in the State for 3 years.[75] The fees in relation to naturalisation are waived for refugees. There is no appeal against a decision refusing naturalisation. In a recent report, the UNHCR concluded that Ireland currently has a favorable naturalisation scheme for refugees in comparison with other European countries.[76]

3.2.2 SUBSIDIARY PROTECTION

Procedures Followed

Ireland does not currently have a single procedure for international protection, though such a process is proposed in the published Immigration, Residence and Protection Bill, 2008. Under the current statutory regime, in order to apply for subsidiary protection in Ireland, an applicant must first have applied for, and have been denied, refugee status. When an asylum applicant has been refused a declaration by the Minister for Justice, Equality and Law Reform pursuant to section 17 of the Refugee Act, 1996, the Ministerial Decisions Unit of the Department of Justice, Equality and Law Reform issues the applicant with a notice that the Minister proposes to make a deportation order for him or her under section 3 of the Immigration Act, 1999 (as amended).

[75] Interview with staff members of the Department of Justice, Equality and Law Reform during the course of this study. Note that time spent in the asylum process by someone ultimately refused a declaration of refugee status does not count towards the five year residency requirement. See *Robert & Anor v Minister for Justice, Equality and Law Reform,* Unreported, High Court, 2 November 2004.

[76] UN High Commissioner for Refugees (2009) *Mapping Integration: UNHCR's Age, Gender and Diversity Mainstreaming Project on Refugee Integration in Ireland - 2008/2009. Targeted or Mainstream Support to Refugee Integration? Legislation, Policy and Support in Ireland and Selected European Countries.* Available at http://www.unhcr.org/refworld/docid/ 4a55e4712.html

The Minister for Justice, Equality and Law Reform considers applications for subsidiary protection pursuant to Regulation 4(3) of the European Communities (Eligibility for Protection) Regulations, 2006. Under the regulations, the Minister may either grant or refuse the application. In the event that the Minister refuses the application, the Minister will then proceed to consider whether or not to make the deportation order, and will consider matters pursuant to section 3 of the Immigration Act, 1999 (as amended). Consideration of subsidiary protection precedes consideration of whether to grant leave to remain. Representatives of the Department of Justice, Equality and Law Reform state that a subsidiary protection application is always dealt with to finality before an application made pursuant to section 3 of the Immigration Act, 1999 is considered.[77]

While notice of the Minister for Justice, Equality and Law Reform's decisions regarding subsidiary protection and whether to deport are not necessarily issued to an applicant at the same time, and while the determinations in respect of subsidiary protection are always dealt with before determinations in respect of decisions to deport, notification of a decision to issue a deportation order tends to follow soon after notification of a negative subsidiary protection determination. As a result, unsuccessful applicants for subsidiary protection will generally possess a short space of time to reconsider the possibility of voluntary return to their country of origin, between receipt of the negative subsidiary protection decision and receipt of the notification of their deportation order.[78] There is no appeal from a negative subsidiary protection decision, and there is no legal provision for suspensive effect pending determination of an application. In practice no steps would be taken to remove a person from the State while they had a subsidiary protection

[77] Interview with staff members of the Department of Justice, Equality and Law Reform (August 2009).

[78] Departmental officials of the Department of Justice, Equality and Law Reform explained that, in relation to persons exercising the option of voluntary return, it would be in the interests of such persons to apply for voluntary return before their cases are considered for subsidiary protection or under section 3 of the Immigration Act, 1999 (as amended) as it will take a number of months from the time a subsidiary protection application or section 3 representations are submitted until decisions on these matters are made. (Correspondence, December 2009). Officials also noted that this being the case, the window of opportunity for seeking to avail of the voluntary return option is already quite generous.

application pending.[79] To date, guidelines clarifying or outlining the implementation of subsidiary protection have not been published by the Department of Justice, Equality and Law Reform.

As discussed earlier in the text, before 10 October 2006,[80] applicants who had failed in their asylum claim and who yet sought international protection could generally only seek protection by way of making representations against the making of a deportation order. The Minister for Justice, Equality and Law Reform did not initially accept applications for subsidiary protection in respect of people who had been issued with deportation orders prior to 10 October 2006. In the joined cases of *H & D v Minister for Justice, Equality and Law Reform*,[81] applicants who had been refused declarations of refugee status, and who were the subjects of deportation orders, applied for subsidiary protection under the new legislative scheme, contending that they had an automatic right to apply for subsidiary protection pursuant to Council Directive 2004/83/EC.[82] The Minister stated that their applications were invalid and had to be refused as their deportation orders pre-dated the coming into operation and the transposition of the Directive, and asserted that he had no discretion to consider the applications. The applicants asked the Court to quash the Minister's decisions. The Court found that the intention of the Directive was to identify minimum standards, and that the Directive imposed higher standards than those previously in operation under section 3 of the Immigration Act, 1999.[83] The Court held that while people who did not have a

[79] Interview with staff members of the Department of Justice, Equality and Law Reform (August 2009).

[80] 10 October 2006 being the day on which Irish law was required to comply with Directive 2004/83/EC, and the date on which the Irish transposing legal instrument came into force.

[81] Unreported, High Court, Feeney J, 27 July 2007.

[82] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (i.e. the 'Qualification Directive').

[83] In particular, the Court found that the definition of torture that the Minister had to consider prior to the transposition of the Directive was narrower than that contained in Article 15 of the Directive in that previously the definition of torture was limited to acts or omissions done or made or at the instigation of, or with the consent or acquiescence of a public official (section 186 of the Criminal Justice Act, 2006 (as amended)),

deportation order made against them as of 10 October 2006 had an automatic right to apply for subsidiary protection, Regulation 4(2) of the 2006 Regulations gave the Minister for Justice, Equality and Law Reform a discretion to consider applications for subsidiary protection from applicants already issued with a deportation where such applicants identify relevant altered circumstances.[84]

The *H & D* judgment is silent in relation to situations where someone has been granted leave to remain for reasons connected to international protection, but nonetheless wishes to assert his or her right to subsidiary protection. Recital 9 of Council Directive 2004/83/EC states that '[t]hose third country nationals or stateless persons, who are allowed to remain in the territories of the Member States for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian grounds, fall outside the scope of this Directive'. Officials of the Department of Justice, Equality and Law Reform interviewed during the course of this study indicated that they are of the view that Recital 9 of the Directive specifically excludes those who have been granted leave to remain from applying for subsidiary protection. It is noted, however, that the Recital explicitly states that it is persons who are allowed to remain not due to a need for protection, but on a discretionary basis who fall outside the scope of the Directive. It is not clear whether, in any particular case, leave to remain is granted on a purely discretionary basis, or whether an absolute prohibition or the principle of *non-refoulement* applies.[85]

and that the limitation present in the protection from *refoulement* of provision of section 5(1) of the Refugee Act 1996, that the threat be on account of an applicant's race, religion, nationality, membership of a particular social group or political opinion, was not present in Article 15 of the Directive, and that with regard to the definition of serious harm in Article 15, it did not appear that consideration of section 5 of the Refugee Act 1996 would result in the Minister having considered, in every case, matters that he was now obliged to consider under Article 15's definition of serious harm.

[84] The Court stated that relevant altered circumstances could include a claim that an applicant's personal position was affected by the Directive's definition of serious harm, and might arise as a result of the passage of a prolonged period of time resulting in altered personal circumstances or alterations in an applicant's country of origin.

[85] McAdam (2007) notes that Recital 9 of the Directive 'is problematic if considered to apply to persons who cannot be removed under any circumstances, since it characterizes such persons as 'compassionate or humanitarian cases' subject to States' discretion, rather than as protected absolutely by international law (such as article 3 ECHR).'

Rights Provided

Pursuant to Regulation 17(1) of the European Communities (Eligibility for Protection) Regulations, 2006 (S.I. No. 518 of 2006), a person who has been approved for subsidiary protection shall be granted permission to remain in the State for three years. That permission shall be renewable unless compelling reasons of national security or public order otherwise require. Pursuant to section 14(1) the Minister for Justice, Equality and Law Reform shall revoke or refuse to renew a permission granted to a person where:

> *(a) subject to paragraph (2), the circumstances which led to the granting of the permission have ceased to exist or have changed to such a degree that protection is no longer required;*
>
> *(b) the person should have been or is excluded from being a person eligible for subsidiary protection under Regulation 13(1) or (2); or*
>
> *(c) misrepresentation or omission of facts, whether or not including the use of false documents, by the person were decisive for the granting of subsidiary protection status.*

In determining whether a change of circumstances pursuant to 14(1)(a) applies, the Minister for Justice, Equality and Law Reform shall have regard to whether the change of circumstances referred to in that provision is of such a significant and non-temporary nature that the person granted subsidiary protection no longer faces a real risk of serious harm (Regulation 14(2)). Pursuant to Regulation 14(3) the Minister for Justice, Equality and Law Reform may revoke or refuse to renew a permission granted where the person concerned should have been excluded from being eligible for subsidiary protection in accordance with Regulation 13(3). An opportunity will be given in such cases for the person in question to make representations to the Minister pursuant to section 3 of the Immigration Act, 1999. The permission to remain granted to people in need of subsidiary protection 'shall be renewable, unless compelling reasons of national security or public order *(ordre public)*, otherwise require.'[86]

Further to Regulation 19(1)(c), people granted subsidiary protection shall be entitled to receive the same medical care and services and the same social benefits as those to which citizens are entitled. Persons who are granted subsidiary protection are

[86] Regulation 17(2) of the European Communities (Eligibility for Protection) Regulations, 2006 (S.I. 518 of 2006).

also entitled to seek and enter employment, to carry on any business, trade or profession in the State in the like manner and to the like extent in all respects as an Irish citizen.[87] They are also entitled to have access to education and training in the State in the like manner and to the like extent in all respects as an Irish citizen.[88]

Persons granted subsidiary protection 'shall be entitled to the same rights of travel in or to or from the State, other than to his country of origin, as those to which Irish citizens are entitled.'[89] On application in writing, and subject to payment of any necessary fee, the Minister for Justice, Equality and Law Reform shall issue a travel document in the form set out in schedule 2 of the Regulations.[90] The Minister for Justice, Equality and Law Reform may, for reasons of national security or public order (*ordre public*), refuse to issue a travel document.[91]

Regarding family reunification, a person who has been found eligible for subsidiary protection and has received a determination to that effect may apply to the Minister for Justice, Equality and Law Reform for permission to be granted to a member of his or her family to enter and to reside in the State.[92] The Regulations' provisions in this regard are similar to those in section 18 of the Refugee Act, 1996 (as amended) *vis-à-vis* Convention refugees. Under the Regulations, the Minister is obliged to investigate, or cause to be investigated, such an application to determine the relationship between the applicant and the person who is the subject of the application and that person's domestic circumstances. If the Minister is satisfied that the person who is the subject of the application is a member of the family of the applicant, the Minister is obliged to grant permission in writing to the person to enter and reside in the State. A 'member of the family' may be either (i) where the applicant is married, his or her spouse (provided that the marriage is subsisting on the date of the application), (ii) where the applicant is, on the date of the application, under the age of 18 years and is not married, his or her parents, or (iii) a child of the applicant who, on the date of the application, is under the age of 18 years and is not married. The

[87] Regulation 19(1)(b).
[88] *Ibid.*
[89] Regulation 19(1)(a).
[90] Regulation 18(1).
[91] Regulation 18(2).
[92] Regulation 16(1).

Regulations also provide that the Minister may grant permission to a dependent member of the family of an applicant to enter and reside in the State. A 'dependent member of the family', in relation to an applicant, means any grandparent, parent, brother, sister, child, grandchild, ward or guardian of the applicant who is wholly or mainly dependent on the applicant or is suffering from a mental or physical incapacity to such extent that it is not reasonable to expect him or her to maintain himself or herself fully. The Minister may refuse to grant permission to enter and reside to a person in the interest of national security or public policy[93] or where the person the subject of the application is or would be excluded from refugee or subsidiary protection status.[94]

Unlike the special provision in respect of refugees, there is no legislative provision giving the Minister for Justice, Equality and Law Reform discretion to waive the five-year residency condition in respect of people who are granted subsidiary protection.[95] Therefore it appears that a person who has been granted subsidiary protection may apply for citizenship only after fulfilling the naturalisation condition of being resident for five years or more in the State. Representatives of the Department of Justice, Equality and Law Reform have stated that this issue is being looked at in the context of amendments to the published Immigration, Residence & Protection Bill, 2008, where it is proposed that successful protection applications will be afforded similar rights to refugees. It is believed that an overall review of citizenship laws is due to take place in 2010 and that the Department's position in relation to this issue may be thus subject to change.

3.2.3 TEMPORARY PROTECTION

The Immigration, Residence, and Protection Bill, 2008 contains provisions to comply with the objectives of Directive 2001/55/EC.[96] Head 48 of the Bill contains provisions setting out what rights would accrue to persons who qualify for

[93] Regulation 18(5).

[94] In accordance with sections 12 or 13 of the Regulations.

[95] Note also that there is no appeal against a refusal of naturalisation.

[96] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (i.e. the 'Temporary Protection Directive').

temporary protection if the Bill is enacted. Officials of the Department of Justice, Equality and Law Reform consulted during this study indicate they are of the view that current national provisions and procedures are substantially in compliance with the Directive.

3.3 National Statuses Not Covered by EU Legislation

3.3.1 PROGRAMME REFUGEES

Procedures Followed

A programme refugee is defined in section 24(1) of the Refugee Act, 1996 (as amended) as a person to whom leave to enter and remain in the State for temporary protection or resettlement as part of a group of persons has been given by the Government and whose name is entered in a register established and maintained by the Minister for Foreign Affairs, whether or not such person is a refugee within the meaning of the definition of 'refugee' in section 2 of the Act. The Minister for Justice, Equality and Law Reform may, after consultation with the Minister for Foreign Affairs, enter into agreements with the High Commissioner for the reception and resettlement in the State of refugees. The Office of the Minister for Integration has responsibility for the reception and resettlement of programme refugees.[97]

Arrangements and procedures for the admission of persons under Government programmes differ depending on the nature of the programme and whether it is for temporary or permanent resettlement.[98] Where large groups are being evacuated in an emergency situation for temporary protection, new arrivals are usually placed in reception centres where their immediate accommodation, medical, and social needs are met. Persons admitted under this type of programme are admitted for a short period with a view to their returning to their country of origin when the crisis is over.

Persons admitted under the UNHCR Resettlement Programme are admitted for permanent resettlement rather than

[97] See the website of the Office of the Minister for Integration for further information. Available at www.integration.ie.

[98] This information, and information contained in following paragraphs on the resettlement programmes, is taken from the Reception and Integration Agency website (www.ria.gov.ie) and that of the Office of the Minister for Integration (www.integration.ie).

for temporary protection. They may be accommodated on arrival either in private rented accommodation in a local community or in the National Orientation and Training Centre for a period of eight weeks. In the Centre, they undergo training to prepare them for independent living in the community. Regardless of the type of reception accommodation, those resettled under this programme are supported in the early stages to ensure that they are aware of, and in receipt of, their statutory entitlements which are set down in section 3 of the Refugee Act, 1996 (as amended).

Rights Provided

Pursuant to section 24(2) a programme refugee shall be entitled to the same rights and privileges as other declared refugees in the State during the time he or she is permitted to remain. On application in writing, a programme refugee may be issued with a travel document identifying the holder as a programme refugee. The Minister for Justice, Equality and Law Reform may, in the interest of national security or public policy, refuse to issue a travel document.[99] Programme refugees are not expressly entitled to apply for family reunification pursuant to section 18 of the Refugee Act, 1996 (as amended),[100] but the Minister for Justice, Equality and Law Reform has accepted and processed such applications. Programme refugees who entered the State prior to 2005 included the nuclear families of such persons at the time of arrival.[101] Applications for subsequent family members of these programme refugees were treated in the same manner as those of persons declared as refugees pursuant to section 17 of the Refugee Act, 1996.[102] Acquiescing to any such request is at the discretion of the Minister for Justice, Equality and Law Reform in consultation with UNHCR and the Minister for Foreign Affairs.[103] There is no appeal against a refusal of family reunification.

The length of authorisation given to a programme refugee to reside in the State is at the discretion of the Minister for Justice,

[99] Section 24(4) of the Refugee Act, 1996 (as amended).

[100] The Immigration Residence and Protection Bill, 2008 does not explicitly permit an application for family reunification from a programme refugee.

[101] Interview with staff members of the Department of Justice, Equality and Law Reform (August 2009).

[102] *Ibid.*

[103] *Ibid.*

Equality and Law Reform. Such residence permits may be renewed at the discretion and at such intervals as may be requested by the Minister. Programme refugees are extended the same medical assistance, social benefits, access to education and training, and access to the labour market as Convention refugees under section 3 of the Act. Programme refugees may apply for citizenship after three years in the State.[104]

3.3.2 LEAVE TO REMAIN AND SECTION 3 OF THE IMMIGRATION ACT, 1999

Procedures Followed

Any person who is formally refused a declaration of refugee status by the Minister for Justice, Equality and Law Reform, or any person who otherwise becomes illegally resident in the State, and comes to the attention of the Minister, will receive from the Ministerial Decisions Unit of the Department of Justice, Equality and Law Reform a notice that the Minister proposes to make a deportation order in respect of him or her under section 3 of the Immigration Act, 1999 (as amended). As well as informing the applicant of his or her right to apply for subsidiary protection at this time, the Minister will inform the person who has been refused a declaration of refugee status: (i) that the Minister is proposing to deport the applicant, and will consider representations pursuant to section 3 of the Immigration Act, 1999 (as amended) as to why a deportation order should not be made; (ii) that the applicant may leave the jurisdiction voluntarily; and (iii) that the applicant can consent to a deportation order. Applicants are requested to furnish any representations within 15 working days of the date of the notice. Nonetheless, it appears that representations may be made at any point up until the making of a deportation order.[105]

An applicant who makes representations pursuant to section 3 of the Immigration Act, 1999 (as amended) and who is unsuccessful does not have the opportunity to return to her or his country of origin voluntarily, in the sense that the option of

[104] There is no appeal against a refusal of naturalisation.

[105] Once a deportation order is issued, but prior to deportation itself, further representations are made in the context of section 3(11) of the Immigration Act, 1999 (as amended).

voluntary return is not available once a deportation order has been issued. Applicants who have made representations under section 3 of the Immigration Act, 1999 (as amended) may, however, submit an application for (assisted) voluntary return at any stage prior to the issuance of the deportation order.

Following the consideration of any such application, including consideration of any representations, any issues relating to the person's country of origin, a specific consideration of the position of the applicant *vis-à-vis* section 5 of the Refugee Act, 1996 (as amended) on the prohibition of *refoulement*, section 4 of the Criminal Justice (UN Convention against Torture) Act, 2000, and taking into account rights under the European Convention on Human Rights and the Irish Constitution, where appropriate, the Minister for Justice, Equality and Law Reform decides whether the applicant should become the subject of a deportation order or if, instead, he should grant him or her temporary leave to remain in the State. The granting of temporary leave to remain in Ireland is at the Minister's discretion. A favourable section 3 decision will have resulted from the Minister for Justice, Equality and Law Reform's conclusion that it would not be appropriate to make a deportation order in that particular case.

Where a decision is made to grant leave to remain in the State, this decision is conveyed in writing to the successful applicant and to his/her legal representative, if they are known. This communication advises the successful applicant of the conditions attaching to his or her permission to remain in the State, the circumstances under which this permission can be revoked, the means by which they can become registered in the State, and the process involved in applying for the renewal of the permission to remain. This communication does not advise the successful applicant of the specific reasons for the grant of leave to remain which could be based on any combination of the factors listed in section 2.3.2 of this study. Accordingly, a recipient of leave to remain will not know whether the reason for the grant of leave to remain relates to a *non-refoulement* and international protection claim, where applicable, or purely to other matters.

There are no published guidelines regarding the application of the provisions in section 3 of the Immigration Act, 1999. Representatives of the Department of Justice, Equality and Law Reform have stated that the relevant issues to be considered are those specified in section 3 and as outlined above. Representatives of the Department of Justice, Equality and Law Reform stated that the Case Processing personnel of the Repatriation Unit within the Department receive ongoing training

(both formal and informal), in how to process the different types of cases that arise under section 3 of the 1999 Act. Representatives of the Department consulted during this study also stated that while there are no published guidelines, all relevant personnel are clear as to case circumstances likely to give rise to the making of a deportation order and circumstances meriting leave to remain.[106]

Where an applicant has raised a gender-specific protection issue in their claim, or if there are gender-specific protection issues in an applicant's country of origin, relevant gender-specific country of origin information will be considered in line with the requirements in section 3 of the 1999 Act. If representations relate to minors (unaccompanied or accompanied), relevant country of origin information specific to minors will be considered as part of the section 3 consideration, and the best interests of the child will be considered.[107]

Where there are a number of applicants from one family, such applications, where possible, are dealt with together. However, this may not always occur for practical reasons (e.g. where additional children are born in, or arriving into, the State after other family members have already been considered, or where an applicant does not make the Minister for Justice, Equality and Law Reform aware of the existence of family members). If a person the subject of representations under section 3 of the 1999 Act has indicated at either the asylum or subsidiary protection stage that he or she wished to have dependants included in their application, then any representations made relating to those dependants will also be considered, together with those of the parent or parents, as deemed appropriate by the Minister. Officials of the Department of Justice, Equality and Law Reform have stated that the length of time taken to process applications under section 3 of the Act varies as cases are disparate, and as such, complex cases can take substantially longer to process than more straightforward cases. Delays can be caused by a range of

[106] Correspondence with staff members of the Department of Justice, Equality and Law Reform (November 2009). Officials of the Department further clarified that all decisions to grant leave to remain have to be approved at the level of Assistant Principal Officer or higher, and that this ensures that there is consistency in the decision making process. Departmental officials also indicated that that this applies regardless of whether leave to remain is being granted for protection-related or other reasons.

[107] Ibid.

factors including the large number of representations received, changing personal circumstances of applicants, and the submission of information from applicants in piecemeal fashion.

There is no appeal against the issuance of a deportation order (i.e. there is no appeal against a 'refusal' of leave to remain). It is possible, however, for a person to apply at any time for a deportation order to be revoked or amended under section 3(11) of the Immigration Act, 1999 (as amended).

Applications for renewal of leave to remain will be considered on their individual merits in order to ascertain whether the applicant complied with the conditions of his or her original grant.[108] This necessitates checks with outside agencies. The average waiting time for the processing of such applications is one to three months.[109] Staff members of the Department of Justice, Equality and Law Reform state that the Minister considers such a time frame reasonable given that outside checks are necessary.[110]

Recipients of leave to remain are informed upon their grant of leave to remain that their temporary permission to remain in the State is granted subject to the result of enquiries regarding whether they have obeyed the laws of the State or have been convicted of any offence and have not been involved in criminal activity. If information indicates that an applicant has not complied with these requirements, their file may be returned to the appropriate unit in INIS for reconsideration and possible revocation. The following conditions typically apply to a grant of leave to remain in the State:

- That the recipient will obey the laws of the State;
- That the recipient will not become involved in criminal activity;

[108] Interview with staff members of the Department of Justice, Equality and Law Reform (August 2009).

[109] The waiting time can be considerably longer in some cases, causing particular difficulties where the person's residence stamp expires (Correspondence with representatives of the Immigrant Council of Ireland).

[110] Interview with staff members of the Department of Justice, Equality and Law Reform (August 2009).

- That the recipient will make every effort to become economically viable in the State by engaging in employment, business or a profession;
- That the recipient will take all steps (such as participation in training or language courses) to enable him or her to engage in employment, business or a profession;
- That the recipient will reside continuously in the State;[111]
- That the recipient will accept that the granting of permission to remain does not confer any entitlement or legitimate expectation on any other person, whether or not related to the recipient, to enter or remain in the State.

Leave to remain in the State becomes operative when a recipient has registered at a local Registration Office. In order to register, a recipient is required under section 9(2)(a) of the Immigration Act, 2004 to produce a passport or other form of photographic identification issued by an authority recognised by the Irish government, establishing the recipient's identity and nationality, unless there is a satisfactory explanation regarding why circumstances prevent this. Provided that the Garda National Immigration Bureau (GNIB) is satisfied that a recipient meets the necessary requirements for registration, and upon payment of a fee of €150, the recipient is issued with a Certificate of Registration. This contains the person's photo, registration number, relevant immigration stamp, and an expiry date. A certificate of registration card contains one of a number of different immigration stamps. Those granted a Stamp 4 type temporary leave to remain are entitled to work in the State without the need of a Work Permit, and to set up a business without seeking permission of the Minister.

Applications for renewal of leave to remain in the State are founded on the provisions of section 3 of the Immigration Act,

[111] 'Continuous residency' is said to mean living in the State for the period covered by the permission to remain, allowing for reasonable periods of absence from the State for holidays, exceptional family circumstances or commitments outside the State arising from business or employment carried on within the State.

1999 (as amended). Those who have been residing in the State under section 3 of the Immigration Act, 1999 (as amended) are required to apply to the Minister for renewal of such permission before their current period of permission expires. People who are granted temporary leave to remain are informed that they will be required to apply one month before the end of the expiry period if they wish to renew their leave to remain. The renewal application must include a statement to the effect that the applicant has complied with the conditions of his or her permission to remain.

As discussed in chapter 2, leave to remain in the State may be revoked for, *inter alia*, the following reasons:

- If the recipient does not comply with the conditions set out in the letter
- If the recipient is found to have provided false or misleading information in the course of the application for leave to remain in the State.

These conditions can vary depending on the circumstances of case or the prevailing economic situation in the State.

Rights Provided

The rights that accrue to persons in possession of leave to remain in Ireland are not the same as those accorded to refugees or those with subsidiary protection status. Rights for holders of leave to remain are not defined in legislation. Persons granted leave to remain who have *refoulement* issues will not necessarily be afforded different rights than those granted leave to remain for *non-refoulement* reasons (as previously indicated, their grant of leave to remain will not state whether *non-refoulement* is an issue in their particular case).[112] The rights

[112] Persons with a need for international protection granted leave to remain prior to the coming into force of the European Communities (Eligibility for Protection) Regulations, 2006 (S.I. No. 518 of 2006) will have, on the whole, lesser rights under leave to remain than they would have received as persons eligible for subsidiary protection. As persons with a need for international protection may yet be regularised in connection with section 3 of the Immigration Act, 1999 (as amended), the significant increase in grants of leave to remain from 2007 through to 2009 (see section 4.4 of this report) stands in contrast with the small number of grants of subsidiary protection in the same period (see section 4.2 of this report).

granted to a person with leave to remain vary dependent on their personal circumstances and the prevailing circumstances in the State, including economic factors. Some applicants will get Stamp 4 permission which entitles them to seek work without a work permit and to apply for social welfare benefits, some applicants will get a Stamp 3.[113]

The duration of leave to remain in the State and the application for renewal of persons granted leave to remain are discretionary. Persons granted leave to remain have no statutory entitlement to be granted family reunification. Those granted leave to remain under section 3 of the Immigration Act, 1999 (as amended) are entitled to access to third level education in the same manner as citizens.[114] Persons granted leave to remain must be legally resident in the State for five years before they are eligible to apply for citizenship pursuant to the Irish Nationality and Citizenship Act, 1956 (as amended), unless the conditions for applying are waived under section 16 Irish Nationality and Citizenship Act, 1956 (as amended). Departmental officials of the Department of Justice, Equality and Law Reform indicate that whether or not a person has established a degree of self-sufficiency (i.e. is not dependant on State support payments) would be relevant in the context of an application for renewal of leave to remain or an application for citizenship.

3.3.3 PERMISSION TO LAND OR BE IN THE STATE PURSUANT TO SECTION 4 OF THE IMMIGRATION ACT, 2004

A person who has been granted permission under section 4(1) of the 2004 Act may apply under section 4(7) of that Act for that permission to be renewed or varied by the Minister for Justice, Equality and Law Reform or by an immigration officer on his or her behalf.[115] There is no appeal against a decision refusing to grant, vary or extend permission to remain under this section. Applicants for a change of status or extension

[113] This stamp entitles a person to reside in the State without giving them permission to work or to receive social welfare benefits.

[114] Persons granted leave to remain under the IBC/05 Scheme are not entitled to free third level fees or maintenance grants.

[115] Interview with staff members of the Department of Justice, Equality and Law Reform (August 2009).

pursuant to section 4(7) now do, however, receive lengthy considerations.

3.3.4 PERMISSION TO REMAIN PURSUANT TO SECTION 17(6) OF THE REFUGEE ACT, 1996

Section 17(6) provides that the Minister for Justice, Equality and Law Reform may, at his or her discretion, grant permission in writing to a person who has withdrawn his or her application or to whom the Minister has refused to give a declaration to remain in the State for such period and subject to such conditions as the Minister may specify in writing. Departmental officials of the Department of Justice, Equality and Law Reform have stated that this section is no longer relevant, and that the section has been, effectively, replaced by section 3 of the Immigration Act, 1999 (as amended), and that if the Minister for Justice, Equality and Law Reform decides not to issue a deportation order and grants leave to remain, it is done under the provisions of section 3 of the Immigration Act, 1999.[116]

3.3.5 PERMISSION TO REMAIN FOR VICTIMS OF HUMAN TRAFFICKING

Pending the enactment of the Immigration Residence and Protection Bill, 2008, the Minister for Justice, Equality and Law Reform has introduced interim arrangements with effect from the passing into law of the Criminal Justice (Human Trafficking) Act, 2008. A person who has been identified by a member of the Garda Síochána not below the rank of Superintendent in GNIB as a suspected victim of human trafficking shall be granted a permission to remain lawfully in the State for a period of 60 days.[117] This permission is called a 'recovery and reflection period', the purpose of which is to

[116] Interview with staff members of the Department of Justice, Equality and Law Reform (August 2009). The Departmental officials have indicated that since the provisions of the Immigration Act, 1999 came into force, any leave to remain decision would have been founded on the provisions of section 3 of that Act. It is noted, however, that section 3 of the 1999 Act does not contain a provision explicitly giving the Minister power to grant leave to remain in the State.

[117] Department of Justice, Equality and Law Reform (November 2008) *Administrative Immigration Arrangements for the Protection of Victims of Human Trafficking*. Available at www.justice.ie.

allow the person time to recover, to escape the influence of the alleged perpetrators of the trafficking, and to take an informed decision as to whether to assist Gardaí or other relevant authorities in relation to any investigation or prosecution arising in relation to the alleged trafficking.[118] The Minister will issue such a person with a notice confirming the fact that the person has been granted permission to be in the State for 60 days.[119] During the period of recovery and reflection, the victim of trafficking will not be the subject of removal proceedings.[120] A recovery and reflection period may be terminated in circumstances where the Minister for Justice, Equality and Law Reform is satisfied that the person has 'actively, voluntarily and on his or her own initiative renewed contact with the alleged perpetrators of the trafficking' or that 'victim status is being claimed improperly'.[121] The Minister may also terminate the period in the interests of national security or public policy. The granting of a recovery and reflection period does not create any entitlement to assert a right to reside following the expiry of the period.[122]

In circumstances where the Minister for Justice, Equality and Law Reform is satisfied that 'the person has severed all relations with the alleged perpetrators of the trafficking' and 'it is necessary for the purpose of allowing the suspected victim to continue to assist the Garda Síochána or other relevant authorities in relation to an investigation or prosecution arising in relation to the trafficking', the Minister will grant to the person concerned a temporary residence permission valid for a period of 6 months. Temporary residence permission may be granted during the recovery and reflection period or following the expiry of that period, as the Minister considers appropriate.[123]

A temporary residence permission will be renewed in circumstances where the Minister for Justice, Equality and Law Reform is satisfied that the person has not renewed contact with the alleged perpetrators of the trafficking, and it is necessary for the purpose of allowing the suspected victim to continue to assist

[118] *Ibid.*
[119] *Ibid.*
[120] *Ibid.*
[121] *Ibid.*
[122] *Ibid.*
[123] *Ibid.*

the Garda Síochána or other relevant authorities in relation to an investigation or prosecution arising in relation to the trafficking.

The Minister may revoke temporary residence permission in cases where:

(a) the person concerned has actively, voluntarily and on his or her own initiative renewed contact with the alleged perpetrators of the trafficking,

(b) the person concerned no longer wishes to assist the Garda Síochána or other relevant authorities in the investigation or prosecution of the trafficking,

(c) the allegation of trafficking is fraudulent or unfounded, or

(d) any investigation or prosecution arising in relation to the trafficking has been finalized or terminated, or

(e) the Minister is satisfied that it is in the interest of national security or public policy to do so.[124]

Where the person is under the age of 18 years, the Administrative Arrangements state that regard will be had to the best interests of the child in the granting and revocation of a temporary residence permission.[125] The granting of temporary residence permission does not of itself create any right to long-term or permanent residence.[126]

As noted above, The Minister for Justice, Equality and Law Reform published *The National Action Plan to Combat Trafficking of Human Beings in Ireland 2009 – 2012*.[127] The Action Plan's protective measures include the provision of a recovery and reflection period of 60 days and temporary residency permits for six months (renewable) where suspected victims are co-operating with an investigation or prosecution. Access to the labour market for persons not in the asylum system who are granted six months temporary residence permits is also outlined.

[124] *Ibid.*

[125] *Ibid.*

[126] *Ibid*. One major difference to note between the Administrative Arrangements and the provisions in the Immigration, Residence and Protection, Bill, 2008 as it currently stands, is that the Administrative Arrangements allow for the granting of permits to EU/EEA nationals, whereas the Bill's provisions do not.

[127] Published in June 2009. Available at www.justice.ie.

3.3.6 INHERENT POWER OF THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM TO GRANT LEAVE TO REMAIN

The Minister for Justice, Equality and Law Reform is said to have an inherent power to create administrative schemes in order to grant leave to remain in the State. An example of such a scheme is the 'IBC/05' Scheme.[128] Rights and entitlements arising from a grant of leave to remain are discretionary and are based on the conditions attaching to the applicant's permission to remain in the State being fulfilled. The renewal of permission to remain would have regard to any conditions attaching to the original permission to remain having been fulfilled. The Minister for Justice, Equality and Law Reform ensures that in every instance the applicant is advised of the circumstances under which this permission may be revoked, the means by which they can become 'registered' in the State and the process involved in applying for the renewal of such permission.[129] Interviewed officials of the Department of Justice, Equality and Law Reform for this purpose of this study have indicated that there is no ad hoc system for applying for and/or granting leave to remain, and are of the view that section 3 of the Immigration Act, 1999 provides the statutory considerations that the Minister for Justice, Equality

[128] At present, there is no legislation in Ireland that sets out entitlements to family reunification for non-EEA migrants or Irish citizens with non-EU relatives. As part of the application under IBC/05 individuals signed a declaration to the effect that they were aware that if granted permission to remain, their status does not confer 'any entitlement or legitimate expectation' of family reunification. The Coalition Against Deportation of Irish Citizen Children (CADIC) argued that under the current system the Minister has a duty to examine each case individually and that a blanket ban on family reunification is not compatible with the State's obligations under the Irish Constitution or the European Convention of Human Rights (CADIC, 2006). Staff members of the Department of Justice, Equality and Law Reform state that references to any blanket ban on family reunification is not correct. A person who is not legally in the State and who is the parent of an Irish citizen child will have their position in the State decided under section 3 of the Immigration Act, 1999 (as amended), at which point all factors relating to that person's connection with the State will be examined (Correspondence with staff members of the Department of Justice Equality and Law Reform, November 2009).

[129] Correspondence with staff members of the Department of Justice, Equality and Law Reform (November 2009).

and Law Reform is bound to consider in respect of applications to remain in the State.[130]

3.3.7 NOTE ON THE HABITUAL RESIDENCE CONDITION IN RESPECT OF SOCIAL WELFARE BENEFITS

In Ireland, to qualify for social welfare benefits, a person must satisfy a 'Habitual Residence Condition'. This was introduced in order to ensure that only persons who had been living in Ireland for a certain period of time could qualify for welfare benefits. Five factors are to be taken into consideration to determine whether a person qualifies, with no single factor being determinative. The five factors are set out in Section 246(3)(4) of the Social Welfare Consolidation Act, 2005 as inserted by Section 30 of the Social Welfare and Pensions Act, 2007, and are as follows:

(a)the length and continuity of residence in the State or in any other particular country;

(b)the length and purpose of any absence from the State;

(c)the nature and pattern of the person's employment;

(d)the person's main centre of interest;

(e)the future intentions of the person concerned as they appear from all the circumstances.

Section 246(4)(5) of the Social Welfare Consolidation Act, 2005 as inserted by section 15 of the Social Welfare and Pensions (No. 2) Act, 2009 introduced the additional qualification that a person who does not have a right to reside in the State shall not be regarded as being habitually resident in the State. Persons with refugee status, programme refugee status, subsidiary protection, and leave to remain in accordance with section 4 or 5 of the Immigration Act, 2004, among others, are taken to have a right to reside in the State for the purpose of the Act. The Act sets out categories of persons who are not regarded as being resident in the State for the purposes of the Act. The Act is silent in respect

[130] *Ibid.*

of persons with leave to remain other than such leave in accordance with Section 4 or 5 of the Immigration Act, 2004.

Section 246 of the 2005 Act, as amended by the 2009 Act, provides that those with, *inter alia*, refugee status, programme refugee status, subsidiary protection, or leave to remain under the Immigration Act 2004 shall not be regarded as being habitually resident in the State for any period before the date on which the relevant declaration or permission was given.

4. STATISTICS ON PROTECTION

4.1 Statistics Regarding Refugee Status

Data on asylum seekers are compiled principally by ORAC and the Refugee Appeals Tribunal.

Table No. 1 shows the number of applications for asylum that were lodged in Ireland over the period from 1994 to October 2009. The total number of applications over the entire period was more than 82,000. The number increased from negligible proportions in the early 1990s to over 11,600 in 2002. However, between 2002 and 2005 the number of applicants fell sharply by over 7,000, or about 60 per cent. There were a total of 3,866 applications for asylum in 2008, the lowest since 1997. According to provisional figures released by the Office of the Refugee Applications Commissioner (ORAC) in January 2010, in 2009 the State received 2,689 asylum applications, down from 3,866 in 2008. Of these, some 2,660 were new applications for a declaration as a refugee. By 31 December 2009, some 470 applications were on hand at the ORAC.

Table 1: Applications for Asylum 1994-2009[131]

Year	Applications
1994	362
1995	424
1996	1,179
1997	3,883
1998	4,626
1999	7,724
2000	10,938
2001	10,325
2002	11,634
2003	7,900
2004	4,766
2005	4,323
2006	4,314
2007	3,985
2008	3,866
2009	2,689*
Total 1994-2009	**82,938***

Source: Office of the Refugee Applications Commissioner
* Provisional

Table No. 2 shows that Nigeria remains the stated country of nationality of the largest number of applicants for asylum (21 per cent) during 2009. In 2004, nearly 40 per cent of all applicants stated that they were of Nigerian nationality; by 2008 about a quarter of asylum applicants (1,009) stated they were of Nigerian nationality. Overall, applications from stated nationals of Nigeria, China and Pakistan were present in the top five ranking countries of nationality for 2007, 2008 and 2009. Historically, applications from those listing Romanian nationality ranked second in 2001 and 2004, but declined following its accession to the EU in 2007 and Ireland's decision to apply the EU Treaty Protocol on asylum for nationals of Member States of the European Union.

[131] Provisional data as released in December 2009 monthly statistics by the Office of the Refugee Applications Commissioner.

Table 2: Top 5 Applicant Countries for Asylum 2009[132]

Country of Stated Nationality	Applications	%
Nigeria	569	21.2
Pakistan	257	9.6
China	194	7.2
DR Congo	102	3.8
Zimbabwe	91	3.4
Others	1,476	54.9
Total	**2,689***	**100**

Source: Office of the Refugee Applications Commissioner
* Provisional

Calculation of refugee recognition rates that take adequate account of first instance and appeal stages are inherently problematic because they involve the comparison of annual numbers of applications and determinations, and the latter can relate to applications over a number of years. Ideally the measure should view the first instance and appeal stages as one integrated process and avoid double counting of individual applicants. Table 3 provides estimated refugee recognition rates for the period 2004 to 2008 based on published statistics from the Refugee Applications Commissioner and the Refugee Appeals Tribunal. These rates are calculated on the basis of the total number of determinations that refugee status should be granted at first instance and appeal in any given year as a percentage of the total number of determinations made at first instance or appeal in that year.[133] The problem of double counting cases persists.

[132] Provisional data as released in December 2009 monthly statistics by the Office of the Refugee Applications Commissioner.

[133] Cases finalised refer to those that are processed to the stage where the Minister for Justice, Equality and Law Reform is in a position to grant, or not to grant, a declaration of refugee status. Applications processed under Regulation (EC) No 343/2003 of 18 February 2003 ('The Dublin Regulation') are excluded from these calculations. Applications that are withdrawn, deemed withdrawn or abandoned are included in the calculations and are counted as negative recommendations/decisions; inadequate data are published to construct a rate excluding such cases.

Table 3: Refugee Recognition Rates 2004-2008*

	2004	2005	2006	2007	2008
Total ORAC Recommendations	6,878	5,243	4,244	3,808	3,926
Total RAT Completed appeals	6,305	4,029	1,950	1,878	2,568
Positive ORAC Recommendations	430	455	397	376	295
'Positive' RAT Decisions**	717	514	251	203	293
Total Decisions/ Recommendations	13,183	9,272	6,194	5,686	6,494
Total Positive Decisions/ Recommendations	1,147	969	648	579	588
Recognition Rate ORAC %	6.3	8.7	9.4	9.9	7.5
Recognition Rate RAT %	11.4	12.8	12.9	10.8	11.4
Overall Recognition Rate %	8.7	10.5	10.5	10.2	9.0

Source: Derived from Office of the Refugee Applications Commissioner statistics available at www.orac.ie; Refugee Appeals Tribunal 2008, 2007, 2006, 2005. Data related to EU Dublin Regulation cases are excluded.
* These data include withdrawn/deemed withdrawn/abandoned cases as 'negative' recommendations/decisions because comprehensive data excluding such cases are not published.
** Recommendations issued by the Refugee Appeals Tribunal to the Minister for Justice, Equality and Law Reform to overturn the decision of the Refugee Applications Commissioner are counted as 'positive decisions'.

4.2 Statistics Regarding Subsidiary Protection

Statistics on subsidiary protection only exist from October 2006, when the European Communities (Eligibility for Protection) Regulations, 2006 (S.I. No. 518 of 2006) came into force. In the latter months of 2006, 185 applications were received. This number rose significantly in 2007 to some 1,341, and the numbers of applicants have continued to rise (1,498 in 2008, and 2,089 during 2009), while the numbers granted subsidiary protection have been small and represent a small fraction of either the applications received or determined. This trend contrasts with that evident in the numbers granted leave to remain since 2006 (see section 4.4 below).

Table 4: Applications for Subsidiary Protection 2006 – 2009

Year	Applications Received	Applications Granted	Applications Refused
2006*	185	0	0
2007	1,341	2	97
2008	1,498	7	472
2009	2,089	24	653

Source: Department of Justice, Equality and Law Reform.
* Subsidiary Protection Regulations came into force on 10 October 2006.

4.3 Statistics Regarding Programme Refugees

Table 5 presents an overview of persons admitted under Government resettlement programmes. It does not reflect the number of programme refugees currently in the State.

Table 5: Resettlement of Programme Refugees 2000 - 2009

Country of Origin	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	Total
Afghanistan	19	8	-	2	-	-	-	-	-	1	30
Cameroon	-	1	-	-	-	-	-	-	-	-	1
Chad	-	3	-	-	-	-	-	-	-	-	3
Chechnya	-	-	-	15	29	41	-	-	2	-	87
China	-	-	-	-	-	-	-	-	1	-	1
Congo	-	10	11	15	-	7	1	-	-	-	44
Cuba	-	-	-	-	-	-	-	-	12	3	15
D.R. Congo	-	-	-	-	-	-	-	7	-	84	91
Eritrea	-	-	-	-	-	-	-	2	-	-	2
Ethiopia	-	-	-	-	11	-	-	-	3	-	14
Iran	-	1	-	-	-	-	-	-	6	-	7
Iranian Kurd	6	15	12	10	-	46	180	-	-	8	277
Iraq	-	3	3	6	-	-	-	-	5	7	24
Ivory Coast	-	-	-	-	-	-	-	3	-	-	3
Liberia	3	-	-	-	-	-	-	-	-	-	3
Myanmar/ Burma	-	-	-	-	-	-	-	97	-	82	179
Palestine	-	-	-	-	-	-	3	-	-	4	7
Russia	-	-	1	-	-	-	-	-	-	-	1
Rwanda	6	-	-	-	-	9	-	-	-	-	15
Serbia	-	-	-	2	-	-	-	-	-	-	2
Somalia	-	4	1	-	10	10	-	-	-	-	25
Sri Lanka	-	-	-	-	-	-	-	5	-	-	5
Sudan	1	1	-	-	5	-	-	-	71	-	78
Syria	-	-	-	-	-	-	-	-	1	3	4
Togo	-	-	-	-	3	2	-	-	-	-	5
Tunisia	-	6	-	-	-	-	-	-	-	-	6
Total	35	52	28	50	58	115	184	114	101	192	929

Source: Office of the Minister for Integration. Available at www.integration.ie.
Note: Ireland has an annual quota of 200. Refugees are selected for resettlement during the quota year but in many cases may not arrive in Ireland until the following year. The above table reflects the year of arrival.

4.4 Statistics Regarding Leave to Remain

Data on applicants for leave to remain are compiled by the Department of Justice, Equality and Law Reform. The published data on leave to remain are considerably less than that on asylum. As discussed early in greater detail, each case is considered individually and regardless of whether or not written representations are submitted by, or on behalf of, the applicant. Following a detailed examination of each individual case, including a consideration having regard to section 5 of the Refugee Act, 1996 (as amended) on the prohibition of *refoulement*, a recommendation is made as to whether a deportation order should be issued or temporary leave to remain in the State granted. The Department does not, however, distinguish between leave to remain granted in relation to international protection, in relation to humanitarian reasons, or in relation to other matters. Accordingly, there are no statistics on these matters currently available.

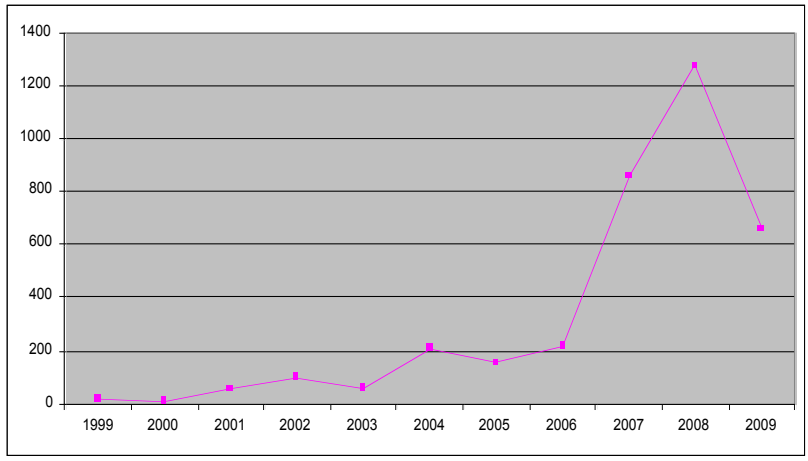
Where an application for Subsidiary Protection in the State has been submitted in addition to representations submitted for consideration under section 3 of the Immigration Act, 1999 (as amended) – i.e. the so-called application for leave to remain - the subsidiary protection application is considered prior to considering the section 3 Representations.

The Minister for Justice, Equality and Law Reform has stated that there are indications that many of those whose cases are still awaiting decision may already have left the State without notifying the Department of their having done so, and that other applicants will have submitted other applications for residency, including applications for permission to remain in the State on the basis of their marriage to an Irish or EU National.[134] This latter kind of application must be finalised before the cases of the same persons can be considered under section 3 of the Immigration Act, 1999 (as amended).

[134] Dáil Éireann (1 July 2008) Written Answers - Residency Permits. Volume 658.

Chart 1 illustrates the changing trends in the granting of leave to remain from 1999 to 2009. The year 2007 saw a significant increase in grants of leave to remain which continued during 2008 and, to a lesser extent, during 2009. This is mainly attributable to additional resources deployed to the processing of cases under section 3 since 2007.[135] Table 6 provides the numbers of grants of leave to remain per year since 1999 and Table 7 shows the number of deportation orders effected during this same time.

Chart 1: Applications for Leave to Remain Granted under Section 3 of the Immigration Act, 1999 (as amended) 1999 – 2009



Source: Department of Justice, Equality and Law Reform.

[135] Correspondence with staff members of the Department of Justice, Equality and Law Reform (February 2010).

Table 6: Applications for Leave to Remain Granted under Section 3, Immigration Act, 1999

Year	Number of Applications
1999	22
2000	11
2001	53
2002	98
2003	59
2004	209
2005	154
2006	217
2007	859
2008	1,278
2009	659
Total	3,619

Source: Department of Justice, Equality and Law Reform.

As of end of December 2009, some 12,076 cases were awaiting a decision under Section 3 of the Immigration Act 1999 (as amended). At the same time, some 2,996 applicants were awaiting a decision on their application for Subsidiary Protection.

Table 7: Deportation Orders Effected 1999 - 2009

Year	Deportation Order Effected
1999	6
2000	188
2001	365
2002	521
2003	591
2004	599
2005	396
2006	302
2007	142
2008	161
2009	291

Source: Department of Justice, Equality and Law Reform.

Table 8 provides a breakdown of the then extant (as of 30 June 2009) 14,131 cases pending under section 3 of the Immigration Act, 1999 by nationality.

Table 8: Cases, by Nationality, awaiting consideration under section 3 of the Immigration Act, 1999 (as amended) at 30 June 2009

Nationality	No. of Cases on Hand
Nigeria	3,963
China	1,130
Moldova	533
Pakistan	529
DR Congo	451
Georgia	403
Somalia	370
Sudan	354
South Africa	340
Ghana	320
Algeria	298
Brazil	292
Iran	278
Iraq	262
Russia	239
Zimbabwe	234
Afghanistan	233
Ukraine	214
Albania	200
Cameroon	197
Liberia	159
India	151
Philippines	136
Belarus	135
Kosovo	134
Sierra Leone	128
Angola	125
Kenya	123

Egypt	98
Palestine	81
Croatia	79
Burundi	75
Bangladesh	74
Ivory Coast	73
Mauritius	73
Libya	70
USA	69
Eritrea	67
Syria	67
Malaysia	64
Mongolia	63
Israel	62
Morocco	60
Congo	56
Uganda	54
Togo	53
Kuwait	52
Turkey	50
Guinea	48
Malawi	38
Rwanda	35
Vietnam	32
Yugoslavia	31
Ethiopia	30
Lebanon	27
Kazakhstan	26
Stateless	26
Armenia	25
Hong Kong	24
Bhutan	22
Nepal	22
Australia	21
Jamaica	21

Gambia	20
Canada	19
Thailand	18
Zaire	18
Jordan	16
New Zealand	16
Azerbaijan	14
Benin	14
Serbia	14
Chile	12
Niger	12
Tunisia	12
Uzbekistan	12
Sri Lanka	11
Argentina	10
Bosnia	10
Mauritania	10
Others	194
Total	14,131

Source: Department of Justice, Equality and Law Reform (Written answer to Parliamentary Question No. 532, 8 July 2009).

Statistical data is not available for the renewal of leave to remain in the State, primarily as it is recorded electronically as a further grant of leave to remain and therefore cannot currently be recorded as a stand-alone procedure.[136] Statistical records of the number of section 3(11) applications on hand on a monthly basis are not available in the public domain.

[136] Parliamentary Question No. 283, 8 July 2009.

4.5 Statistics Regarding Victims of Human Trafficking

As of December 2009, the Anti-Human Trafficking Unit reported that a total of 10 persons have received the 60 day recovery and reflection period to enable them remain in the State. Four of these ten persons have been granted the six months temporary residency and, of these four, two are in their second period of temporary residency. One further person (an EU national) has been granted a temporary residence permit.[137]

[137] Correspondence with staff members of the Anti Human Trafficking Unit (December 2009).

5. National Opinions on the Granting of Protection

5.1 Transposition of Council Directives 2004/83/EC[138] & 2005/85/EC[139]

At the time of signing into law the European Communities (Eligibility for Protection) Regulations, 2006 which provided for a statutory basis for subsidiary protection in Ireland, the Tánaiste and Minister for Justice, Equality and Law Reform at that time, Michael McDowell, stated that the Regulations gave full effect in Irish law to the provisions of Council Directive 2004/83/EC.[140] The Minister for Justice, Equality and Law Reform further clarified that the Regulations represented an interim measure to give effect to the Directive, pending finalisation of the Immigration, Residence and Protection Bill.[141] He confirmed that under the Regulations applications for subsidiary protection would be considered consecutively, after an application for refugee status is determined, and that they would be examined by the Department of Justice,

[138] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (i.e. the 'Qualification Directive').

[139] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (i.e. the 'Procedures Directive').

[140] Department of Justice, Equality and Law Reform (2006) Eligibility for Protection Regulations Signed In to Law. Available at http://www.justice.ie/en/ JELR/Pages/PR07000309.

[141] *Ibid.*

Equality and Law Reform.[142] The Minister stated that, in general terms, he believed subsidiary protection can be available to a person who does not qualify as a refugee, but who, if returned to his country of origin, would face a real risk of suffering serious harm as defined by the Directive. The Minister for Justice, Equality and Law Reform further indicated at this time his belief that '[s]uch matters are already determined by the Department under domestic and international legal obligations as part of the current leave to remain process.'[143]

The Minister for Justice, Equality and Law Reform has stated that it is proposed that the Immigration Residence and Protection Bill, 2008 overhaul Irish law in relation to international protection, and that the Bill comprises a significant step in modernising the way in which the State deals with inward migration.[144] Introducing the Bill, the Minister accepted that while Ireland's asylum determination system has been the subject of favourable comment by UNHCR Representatives to Ireland,[145] our present processes are not 'optimally organized'.[146] The Minister also stated his belief that the present processes have been open to abuses over the years.[147]

The Minister for Justice, Equality and Law Reform noted the dual system currently in operation, whereby it is only when a

[142] *Ibid.*

[143] *Ibid.*

[144] Address of the Minister for Justice Equality and Law Reform Introducing the Immigration, Residence and Protection Bill, (29 January 2008). Available at www.oireachtas.ie.

[145] E.g. Manuel Jordão, UNHCR Representative to Ireland, letter to Irish Times, 6 July 2006: '…The UNHCR has commended Ireland for the procedural safeguards it makes available at the first and second instance of the refugee status determination procedure, including: access to a first full interview on the merits of the application; interpretation in a language the applicant understands; the right for female applicants to be interviewed by a female interviewers and interpreters; the right to legal representation provided by the Refugee Legal Service; the assignment of a social worker to separated children; information to applicants on the reasoning of decisions as well as the right to appeal; and the suspensive effect of appeal applications.'

[146] Address of the Minister for Justice Equality and Law Reform Introducing the Immigration, Residence and Protection Bill, (29 January 2008). Available at www.oireachtas.ie.

[147] *Ibid.*

negative response has been received in the refugee process, and deportation proposed, that a person makes representations in support of their case to remain in the State. The Minister accepted that this method of examining in sequence different aspects of the same case could give rise to delays for some applicants, and that these delays lead to uncertainty for applicants and resource implications for the State.[148] The Minister noted that the single procedure introduced by the Bill will put in place a system that will allow all aspects of an applicant's wish to remain in Ireland to be looked at in a unified way, allowing the applicant to get a complete determination of his or her case at the end of the first instance process. The Minister indicated his view that this single procedure would provide the necessary speed and clarity for applicants, while ensuring respect for their fundamental human rights.[149]

Although there has been significant criticism of aspects of the proposed Bill, the decision to overhaul existing fragmented legislation has generally been welcomed, as has the decision to introduce a single procedure. Analysis and comments on the Immigration, Residence and Protection Bill, 2008 focused predominantly on access to the State for those seeking protection; provisions for detention of those seeking protection in the State while pending an entry permit; detention of irregular migrants; lack of provision for an independent immigration appeals mechanism; publication of refugee status decisions; summary removal from the State; the nature of a proposed reflection and recovery period for victims of trafficking; and temporary residency for victims of trafficking.

The UN Human Rights Committee Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant Concluding Observations of the Human Rights Committee – Ireland made a number of observations on the published Bill, noting that:

> *'The State party should amend the Immigration, Residence and Protection Bill, 2008 to outlaw summary removal which is incompatible with the Covenant and ensure that asylum-seekers have full access to early and free legal representation so that their rights under the Covenant receive full protection. It should also introduce an independent appeals procedure to review all immigration-related decisions. Engaging such a procedure, as well*

[148] *Ibid.*
[149] *Ibid.*

> *as resorting to judicial review of adverse decisions, should have suspensive effect in respect of such decisions. Furthermore, the State party should ensure that the Minister for Justice, Equality and Law Reform is not charged with the appointment of members of the new Protection Review Tribunal.'*[150]

The Irish Refugee Council (IRC) made three separate submissions on the published Bill. Their primary concerns included the protection of separated children; the publication of asylum decisions, particularly by the proposed Protection Review Tribunal; a potential for imprisonment of asylum seekers and those who have not committed a crime; detention upon arrival and time limit of such detention; carriers' liability provisions; and minors being deemed to be part of their parent's protection application[151].

The United Nations High Commission for Human Rights (UNHCR) produced a substantial number of recommendations for amendment regarding the Bill, particularly regarding the principle of *non-refoulement* within the proposed legislation. The UNHCR also submitted comments regarding access of those in need of protection to the State and the use of detention. The Law Society of Ireland made a substantial submission on the Bill, focusing on the potential for summary deportation, reduction in time for submission of a judicial review application and the potential for costs being awarded against applicants' legal representation in certain judicial review cases. UNHCR Representative in Ireland Manuel Jordão said the new Immigration, Residence and Protection Bill offered 'a unique opportunity to strengthen Ireland's existing asylum system by introducing a single asylum procedure.'[152]

The Irish Human Rights Commission (IHRC) produced 59 recommendations on the draft 2008 Bill in which the main areas of focus concerned removal from the State; protection of victims

[150] UN Human Rights Committee (July 2008) Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant Concluding observations of the Human Rights Committee – Ireland.

[151] *Irish Refugee Council (2008) Submission* by the Irish Refugee Council on the Immigration Residence and Protection Bill. Available at www.irishrefugeecouncil.ie/media/Microsoft_Word_-_Submission_by_the_Irish_Refugee_Council_on_the_Immigration_Residence_and_Protection_Bill__2_.pdf

[152] See www.unhcr.org

of trafficking; potential for detention of those seeking subsidiary protection; conditions attached to the marriage of a third-country national while in Ireland; a perceived high level of Ministerial discretion; a recommendation for publishing of decisions of the proposed Protection Review Tribunal; and the need for greater protection against *refoulement*.

The Immigrant Council of Ireland (ICI) made several submissions and proposed over 100 amendments to the published Bill, highlighting, *inter alia*, the need for an Independent Appeals Tribunal for the adjudication of immigration-related decisions. The Migrant Rights Centre of Ireland (MRCI) noted the absence of protection of undocumented workers. Later in the year the Minister for Justice, Equality and Law Reform noted that workers who had become undocumented through no fault of their own would be 'accommodated' under a scheme.[153]

The treatment of separated children attracted the criticism of several organisations (including the Ombudsman for Children), particularly regarding the lack of definition of a separated child or unaccompanied minor, and the lack of special protection for such children. In addition, the lack of specification of the best interests of the child as being the primary consideration when dealing with this group was noted. Further recommendations for substantial amendments were made by Amnesty, the ICCL, UNICEF, the UN Children's fund, Barnardo's, the Children's Rights Alliance, the ISPCC, and religious organisations.

5.2 Family Reunification

In a report by the Refugee Information Service (RIS), *'The Challenges Facing Refugees, Beneficiaries of Subsidiary Protection and Leave to Remain as they Seek Reunification with their Families in Ireland'*[154] the RIS highlights that Ireland is alone among a study of twelve European countries in having no right to appeal a

[153] During 2009 the Department of Justice, Equality and Law Reform announced details of an administrative scheme for undocumented immigrant workers formerly holding Employment Permits who have become undocumented through no fault of their own. Further information is available at www.inis.gov.ie/en/INIS/Pages/Undocumented_Workers_Scheme_HP.

[154] RIS (2009*) Report on Family Reunification 2009*. Available at http://www.ris.ie/blog/index.php/?p=62

negative family reunification decision.[155] It notes that applicants are informed in writing of the reasons for a negative decision and invited to reapply. With delays of two years, however, the RIS emphasises the hardship that may be caused to applicants in these circumstances. The RIS notes that in response to requests made to the Family Reunification Division of INIS to review certain negative decisions (particularly if new information is to hand), officials stated that there was no legal basis for this process. The RIS recommends that applications be dealt with within six months of the date of the application. It noted that some headway was being made in processing the backlog, but that the delay was still unnecessarily long.[156] The RIS report states that programme refugees and individuals granted temporary leave to remain do not have a statutory right to family reunification in Irish law. The RIS recommends that the rights of programme refugees be amended to include an express right to family reunification where the refugee has not entered the State with his or her family. It also notes that while most programme refugees enter with their families, not all such refugees do so, and where this arises the lack of a statutory footing for family reunification for such refugees creates a climate of uncertainty.

With regard to the right to family reunification of those granted subsidiary protection, the RIS report refers to section 16 of the European Communities (Eligibility for Protection Ireland) Regulations, 2006, which provides that beneficiaries of subsidiary protection may apply for family reunification. It notes however that while the provisions relating to family reunification for those granted subsidiary protection are identical to those for refugees, to date only a very small number of applicants have been granted subsidiary protection and hence it is impossible to speculate on how section 16 is interpreted, and whether such persons encounter the same difficulties as refugees in realising family reunification. The author of the report notes that those granted leave to remain also have no right to family reunification even

[155] The other countries examined being the Czech Republic, Denmark, France, Germany, Hungary, Italy, Luxemburg, Malta, Portugal, Spain, and the UK. See '*The Challenges facing Refugees, Beneficiaries of Subsidiary Protection and Persons granted Leave to Remain as they seek reunification with their families in Ireland*', p. 38. Available at http://www.ris.ie/media/F_R_Report_Catherine_Kenny_(2)_2.pdf

[156] Since publication of the report the Refugee Applications Commissioner has reported continued progress in reducing the backlog.

though, for many such persons, it is not possible to return to their country of origin and enjoy family life there. In addition, the report highlights that as persons granted leave to remain are not informed of the reasons for the grant, it is not possible to say how many people have been permitted to stay for protection reasons. The Report notes that prior to the existence of subsidiary protection in Irish law in October 2006, individuals who did not qualify as refugees but who had other protection needs were granted leave to remain. Such persons do not gain any right to family reunification irrespective of their ability to support their family and regardless of their length of time in Ireland. In light of the fact that this leave to remain process will cease when the Immigration, Residence and Protection Bill 2008, comes into force, RIS recommends that consideration should be given to permitting this limited group the right to apply to be reunited with their families, in particular where there is no possibility of return to their country of origin in the short-term. Representatives of the Department of Justice, Equality and Law Reform have stated that applicants who are granted leave to remain and have it renewed to the extent that they establish an entitlement to Irish citizenship will then have an entitlement to family reunification through their status as Irish citizens.[157] The RIS report also calls for the rights of refugees and subsidiary protection beneficiaries, once they become citizens, to be expressly clarified in law.

In April 2009, The Irish Times reported on UNHCR's comments regarding delay in the processing of applications for family reunification in Ireland.[158] Comments attributed to the UNHCR were made at the launch of UNHCR's report on the integration of refugees, at which they noted that delays in processing applications for family reunification could be an obstacle to integration. In the UNHCR survey of refugees, some 91per cent felt that more information should be given to them about Irish society after they are granted their status, particularly in areas such as education, housing, employment and Irish culture. Half of those surveyed said they had not received any such information. However, some 82 per cent stated that they felt they had responsibility for their own integration, and the majority felt like they were 'at home' in Ireland. Some 98 per cent felt that

[157] Correspondence with staff members of the Department of Justice, Equality and Law Reform (August 2009).

[158] The Irish Times (April 24 2009) 'UN concern over delay in refugee family cases'. Available at www.irishtimes.com.

having a job was an important aspect of integration but that this could be inhibited. The most common reasons given for the difficulties in finding a job were discrimination, lack of relevant experience, recognition or qualifications and a lack of language schools.

5.3 Human Trafficking

The Immigrant Council of Ireland (ICI) has stated that while *the National Action Plan to Combat Trafficking of Human Beings in Ireland 2009 – 2012*[159] shows a commitment to dealing with horrific crimes carried out in Ireland, the Government must do more for the protection of victims.[160] The ICI commented that one of their main concerns regarding the Action Plan 'is that it continues to link trafficking to illegal migration, rather than seeing victims of sex trafficking as victims of transnational organised crime.' The ICI noted that the Government has stated that six-month residence permits will be provided to victims who are co-operating with an investigation or prosecution, but commented that these provisions do not consider the needs of victims of trafficking who are too traumatised to co-operate with an investigation, or those involved in cases where the authorities do not or cannot proceed with an investigation or prosecution. The ICI submitted that trafficked women need to be granted permission to remain in Ireland on humanitarian grounds.

The *US State Department Trafficking in Persons Report 2009* states that Ireland is both a destination and transit country in terms of trafficking for forced labour and sexual exploitation. The Report stated that the Irish government does not comply fully with the minimum standards for the elimination of trafficking but 'is making significant efforts to do so.' It acknowledged that the government had 'enacted legislation criminalizing human trafficking during the reporting period, increased trafficking awareness efforts, and investigated nearly 100 cases of potential trafficking' but noted that 'there was no evidence that trafficking offenders were prosecuted or convicted during the reporting

[159] Published in June 2009.

[160] Immigrant Council of Ireland (10 June 2009*) 'Anti Human Trafficking Plan contains significant positives but must do more for victims'*. Press Release. Available at www.immigrantcouncil.ie.

period, and concerns remained about victim identification and protection.' The report recommends that Ireland:

> *Vigorously prosecute trafficking offenses and convict and sentence trafficking offenders; continue to implement procedures to guide officials in proactive identification of possible sex and labour trafficking victims among vulnerable groups, such as unaccompanied foreign minors; continue to take steps that will ensure trafficking victims are not penalised for unlawful acts committed as a direct result of being trafficked; and continue prevention measures targeted at reducing the vulnerability of the unaccompanied foreign minor population to trafficking.*

The Immigrant Council of Ireland fully backed the recommendation,[161] stating that they had raised concerns regarding issues surrounding the identification of victims of sex trafficking for some time and that while they 'acknowledge that the Government is committed to combating trafficking, this remains a real concern'.

In an article in June 2009, *The Irish Times* reported that, according to new official figures, the Gardaí are investigating 65 cases of alleged trafficking into the State.[162] In the article, it noted that individuals were being considered as potential victims of trafficking under the provisions of the Criminal Law (Human Trafficking) Act, 2008, pursuant to which four had been granted permission to remain for recovery and reflection. Thirty-two of the cases involved asylum seekers and fourteen involved separated children seeking asylum.

[161] Immigrant Council of Ireland (16 June 2009) *'US State Department confirms Immigrant Council's concerns about treatment of victims of trafficking'*. Press Release. Available at http://www.immigrantcouncil.ie/press_detail.php?id=97.

[162] The Irish Times (29 June 2009). '65 Suspected Human Trafficking Cases Investigated'. Available at www.irishtimes.com.

6. CONCLUSIONS

Ireland has two legal statuses clearly governed by Council Directive 2004/83/EC:[163] refugee status and subsidiary protection. Refugee status is governed by a combination of primary legislation, the Refugee Act, 1996 (as amended), enacted prior to the Directive coming into operation, and domestic Regulations, the European Communities (Eligibility for Protection) Regulations, 2006, designed to ensure compliance with the Directive. The 2006 Regulations also give effect to the Directive's provisions in relation to subsidiary protection. Procedures in Ireland for dealing with refugee status and subsidiary protection are distinct, and, consequently, Ireland does not have a single procedure for dealing with international protection. In order to apply for subsidiary protection, one must first be refused a declaration of refugee status.

Ireland initially opted out of, but later opted into, Directive 2001/55/EC[164]. Legislation does not yet expressly give effect to the provisions of this Directive, but the Immigration, Residence and Protection Bill, 2008 contains provisions designed to comply with that Directive. It is expected that this legislation will be enacted in 2010. Representatives of the Department of Justice, Equality and Law Reform are of the view that Ireland is currently in compliance with the Directive's objectives.

[163] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (i.e. the 'Qualification Directive').

[164] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (i.e. the 'Temporary Protection Directive').

Ireland's domestic refugee legislation contains provisions relating to protection for programme refugees. This is the only non-EU harmonised status in Ireland fully dedicated to the provision of international protection. There are, however, other domestic legal mechanisms whereby someone with a need for international protection may be given permission to remain in the State.

Until it transposed the provisions of Council Directive 2004/83/EC in 2006[165] in respect of subsidiary protection, Ireland did not have a dedicated legislative scheme for subsidiary protection. Prior to the introduction of subsidiary protection in line with the Directive, the legal mechanism used to grant temporary residency to failed asylum seekers in need of international protection was the Minister for Justice, Equality and Law Reform's power to grant leave to remain to persons who make representations against the making of a deportation order. The Minister continues to have this power, and is still obliged to consider whether *refoulement* is an issue in any particular case before making a deportation order. Accordingly, this power may still be used for granting legal status to those in need of international protection who do not qualify for refugee status or for subsidiary protection. Whether this mechanism has been used to provide temporary residence to those with protection needs since the introduction of EU harmonised provisions for subsidiary protection is unknown as grants of leave to remain do not include reasons, and relevant statistics are not available.

The rights of refugees, those who qualify for subsidiary protection and programme refugees are set out in domestic legislation. Programme refugees do not have a statutory right to family unification, but their rights are otherwise similar to those of Convention refugees, and representatives of the Department of Justice, Equality and Law Reform confirm that programme refugees can avail of family unification. The rights of those with leave to remain are on the whole less than those with refugee, subsidiary protection or programme refugee status, are not legislated for, and may vary, at the discretion of the Minister for Justice, Equality and Law Reform, from case to case. Representatives of the Department state, however, that it is possible to discern the rights and obligations that would typically

[165] The European Communities (Eligibility for Protection) Regulations, 2006 (S.I. No. 518 of 2006).

apply in any such case. Representatives of the Department of Justice emphasise that any person granted leave to remain, whether for *non-refoulement* or other reasons, is granted a status enabling them to establish themselves in the State, and to secure employment, or to set up in business, and that it must be also be recognised that any person who arrived in the State and sought to be granted a protection status would have had their asylum and protection claims examined by the Refugee Applications Commissioner, separately, if necessary, by the Refugee Appeals Tribunal and subsequently, since the introduction of subsidiary protection, and if relevant, by a representative of the Minister in the context of any subsidiary protection claim.

When implemented, the Immigration, Residence and Protection Bill will radically change Irish protection law. While there has been significant criticism of aspects of the Bill, the decision to overhaul existing fragmented legislation has generally been welcomed, as has the decision to introduce a single procedure for applicants for international protection the first time into Irish legislation.

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