Editorial

'The past is a foreign country: they do things differently there', L.P. Hartley famously wrote. Right now in Ireland, however, it is the present that feels like a foreign country. This is a place where we must adjust our assumptions and expectations and learn, or relearn, the skills to enable us deal with an economic situation that is the reverse of the favourable one to which we had become so acclimatised.

The need to think seriously about the values that will guide us through these difficult times was the core theme of a Statement, 'Justice in Recession?', which was issued by the Jesuit Centre for Faith and Justice on 12 October 2008, and is reproduced as the opening article in this issue of *Working Notes*.

The Statement says that a continued adherence to some of the values that gained ascendancy during the economic boom will result in a very inequitable distribution of the pain that is inevitable as we try to turn around the decline in our economy. It argues that social solidarity, a concern for the common good and care for the people who are financially or otherwise vulnerable ought to underpin the policies and measures adopted in response to the current crisis.

This is a time, the Statement says, when we should be prepared to reassess the economic and political model which has guided our development for more than a decade. This model entailed a strong reliance on the free market as the means not just of generating economic growth but of providing an increasing share of social services and supports. Current economic and financial circumstances provide the impetus and opportunity to engage in debate about the possibility of devising a model that would provide fairer, more equal, and more sustainable outcomes.

Budget 2009

One of the points made in 'Justice in Recession?' was that an early test of this society's commitment to solidarity and fairness in these challenging times would be Budget 2009, on 14 October 2008. However, elements of both the revenue-generating and expenditure sides of the Budget suggest that the many reassurances concerning the protection of vulnerable sections of our society were little more than rhetoric.

Taxation measures that do not differentiate on the basis of ability to pay (such as increases in indirect taxation), and the failure to seriously address the large number of tax avoidance schemes that allow the most well-off to (legitimately) reduce their tax liability, do not signal a strong sense of commitment to raising needed revenue in the fairest manner possible.

Restrictions on eligibility for and duration of Jobseekers Benefit will punish a group most seriously affected by the recession – those who lose their jobs. The halving (and later abolition) of Child Benefit for young people over eighteen will hit most severely those families on low incomes already struggling to maintain their children in education. Reductions in the education budget itself will erode many of the advances made in recent years in tackling disadvantage, reducing class size and meeting special needs. Direct and indirect increases in charges for health services represent the entrenching of a policy approach that sees health costs as something that must be borne by those already burdened by illness, rather than a shared responsibility.

At one level, Budget 2009 is drastically different from the budgets of the past decade. At a fundamental level, however, is it all that different? Many of those give-away budgets were exercises in the State generously supporting those who were already gaining hugely from the economic boom. However, the degree of redistribution to those on lower incomes, and those who needed support services, was limited. In an important sense, therefore, Budget 2009 represents continuity rather than a much-needed departure from the dominant approach of the past ten or so years.

In several places in his Budget speech, the Minister for Finance, Brian Lenihan TD, made reference to the on-going work of the Commission on Taxation, which he said will 'inform our

strategic thinking about the nature, incidence and burden of taxation for the next ten to twenty years'. In light of OECD data published in October 2008, which shows that Ireland remains among the most unequal of the thirty OECD countries in terms of income distribution, it is critically important that the recommendations of that Commission are shaped by principles that will promote equity.

It is to be hoped that the work of the Commission will foster a wider acceptance among both people and politicians that the imposition *and* collection of taxation should be based on the principles of fairness and concern for the common good. It is to be hoped also that its work will lead to a commitment to ensuring that the role of taxation in facilitating enterprise and initiative will be interpreted in a much broader way than it has been heretofore. This dimension of taxation ought to be concerned with releasing the initiative and enterprise of *al*l people, not just a select few who are in the position to stake their claim most strongly. This has all too often been the case, and has resulted in a situation where the redistribution that is the very essence of a taxation system becomes redistribution to the better-off.

Legislative and Policy Reform

The framing of legislation and the devising of policy are tasks of government that must go on in good times and bad: these tasks are the core theme of the remaining four articles in this issue of *Working Notes*.

In an analysis of the Immigration, Residence and Protection Bill 2008, Eugene Quinn, Director of the Jesuit Refugee Service (JRS) Ireland, sets the Bill's provisions on asylum and protection in the wider context of international migration from the poorer to the richer parts of the world and in the context also of trends in asylum policy within the EU. He highlights features of the proposed legislation (for example, in relation to detention and humanitarian leave to remain) which JRS Ireland believes should be amended as the Bill makes its way through the Oireachtas.

Over the past decade, more than 5,000 unaccompanied children from outside the country have come to the attention of the authorities in Ireland. Maria Corbett examines the response of the State's asylum and child care systems to the needs of these children. She highlights the fact that despite recent improvements, the quality of residential care provided for those separated children who are not reunited with their families falls far below that available to other children in the care of the State. There exists, in effect, a two-tier system of care. In this and other respects, she says, Ireland is failing to meet its obligations to separated children arising under international legislation and in particular the UN Convention on the Rights of the Child.

The consequences of Ireland's failure to ensure adequate legislative protection for temporary agency workers – a group which grew rapidly during the economic boom – is the subject of an article by Brendan MacPartlin SJ. He draws attention to the vulnerability to exploitation of this group and the danger that the use of agency workers can result in a race to the bottom in terms of pay and conditions for workers in some sectors of the economy. The fact that the EU has now reached political agreement on a long-delayed Directive on Agency Work means that Ireland will soon be faced with the task of framing legislation to implement the Directive. This provides an opportunity to finally address the serious deficiencies in this area of Irish employment legislation – but, asks Brendan MacPartlin, will there be attempts to water down the impact of the Directive in the process of transposing it into Irish law?

In the final article, Daragh McGreal and Tony O'Riordan SJ argue that current plans to double the number of prison places for women are not supported by statistics on the crimes for which women are convicted. In an analysis of the data on convictions against women, the authors show that only a minority of the offences for which women are convicted are at the serious end of the scale. And in analysis of statistics on the imprisonment of women, they show that detention on remand, detention under immigration legislation, and short prison sentences for relatively minor crimes, are the main purposes for which the two prisons for women in Ireland are currently used. There are strong grounds, the authors conclude, for questioning the extent to which imprisonment – an expensive and potentially damaging option – is used to detain and punish women and certainly for questioning any plans to increase the number of prison places for women.

Is Expansion of Prison Places for Women Needed? An Analysis of Statistics, 2003–2006

Daragh McGreal and Tony O'Riordan SJ

Introduction

Current government prison policy envisages the closure of the Dóchas Centre in Mountjoy and the opening of new women's prisons at Thornton Hall, in north Dublin and at Kilworth, Co. Cork, resulting in a doubling of the number of places for women prisoners. This radical expansion of prison capacity for female offenders is being justified by the authorities on the grounds that the existing facilities at Dóchas and in Limerick Prison are routinely overcrowded and that the prison building programme being undertaken at present needs to be 'future proofed' to cater for an on-going increase in the female prison population.

It will be argued in this article that the current policy direction ought to be reconsidered. This argument is rooted in the fact that there is no evidence of any trend in convictions against women suggesting that a radically increased number of prison places is needed. Furthermore, it is apparent that a significant proportion of women committed to prison are on remand or are detained under immigration legislation and that the majority of those committed under sentence have been convicted of crimes that are at the lower end of the scale of seriousness. For all these groups, non-custodial options could be far more widely used if policy and resources were so directed.

This article is intended to be an overview of the situation which obtained during the period 2003 to 2006; it is not claimed to be a comprehensive analysis of the relationship between women, crime and imprisonment in that period. However, even this limited exercise highlights the breadth of research that could and should be carried out in this area before substantial public resources are spent on building and operating a greatly increased number of prison places for female offenders.

Convictions against Women

Data Source

The analysis of convictions against women presented in this article is based on data contained in the Central Statistics Office (CSO) report, *Garda Recorded Crime Statistics: 2003–2006*.[1]

The CSO issued this report in April 2008, having taken over the compiling of crime data from An Garda Síochána in 2006. The report acknowledges the cooperation between the CSO, the Courts Service and the Gardaí which made possible the creation of such a comprehensive database.

An important feature of the report is that it employs the new Irish Crime Classification System (ICCS), which has changed the way in which crimes are recorded. The CSO acknowledges that the report contains 'little by way of trend analysis', but says that the publication 'is very much seen as introducing the ICCS and setting the baseline for future work', and that henceforth there will be 'an annual cycle of reports' which will include trend information.[2]

The report also draws attention to the fact that the statistics presented relate only to crime incidents brought to the attention of, and recorded by, An Garda Síochána: such incidents, it points out, represent 'only one part of criminal behaviour in Ireland'.[3]

The CSO report includes statistics in relation to all crime incidents recorded over the period 2003–2006, as well as statistics in relation to detections, proceedings and outcomes of proceedings in respect of these incidents.

A core feature of the way the statistics in the CSO report are presented is that data on detections, proceedings and outcomes of proceedings *are attributed to the year in which the incident to which they relate was recorded*. Thus, the handing down of a conviction for an offence by the courts might occur in 2006 but if the offence had taken place in 2004, then the latter is the year under which the conviction would be recorded. This process means that the conviction figures given in the CSO report for any of the four years, 2003–2006, may yet increase, as further detections, proceedings and convictions take place. This is obviously most likely to happen in respect of the figures for 2006.

In regard specifically to convictions, the CSO report provides a detailed breakdown by crime

category, and by sex and age-group. It is the material in this section of the report which made possible the analysis that is presented in this article.[4]

In the context of the issues discussed here, one notable gap in the CSO report is the lack of a breakdown by sex of the statistics on court proceedings taken. Thus, while the statistics published make it possible to chart the trend in convictions against women over the four years, 2003 to 2006, the absence of a breakdown by sex of the figures for proceedings means it is not possible to show the trend in convictions as a percentage of all proceedings taken against women.

Convictions: Key Findings

Trends in Convictions

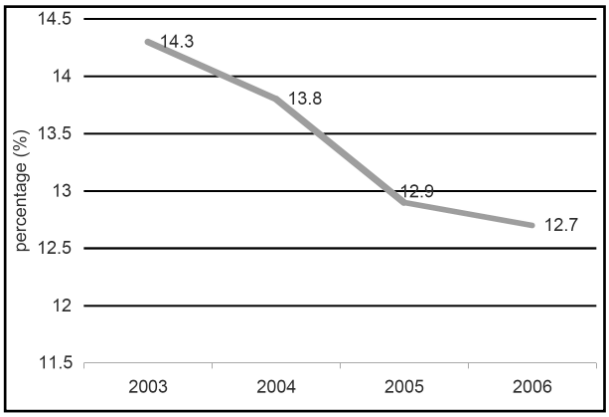
Over the period examined (2003 to 2006), the annual average number of women convicted of an offence was 9,168. It should be borne in mind that the figure for the *number of women convicted* of an offence in a given year does not equate with the *number of convictions against women* in that year: the latter figure is likely to be higher, since some women will have been convicted of more than one offence.

The trend over the four-year period was U-shaped: the number of women convicted for an offence recorded in 2003 was 9,463; the number fell to 8,771 in 2004, before increasing slightly in 2005 and almost returning to the 2003 level in 2006, when 9,329 women were convicted.

An important contextual feature of the trend in convictions is the fact that during this four-year period the overall population of the country grew rapidly, which means that the rate of convictions per 1,000 of the female population actually declined. Between the census years, 2002 and 2006, the female population rose by nearly 150,000 (an increase of 7.5 per cent). Based on the 2002 population figure, the 2003 rate of convictions for women (per 1,000 of the female population) was 4.8; the rate for 2006 was 4.4.

Over the four-year period, women represented a declining proportion of all persons against whom a conviction was given – this reduction reflects the increase of more than 7,000 in the number of men against whom there was a conviction (see Figure 1).

Figure 1: Trend in Female Convictions as a Proportion of all Convictions



Ages of those Convicted

Of females convicted for an offence recorded in 2003, girls under 18 represented 3.8 per cent of the total. Over the ensuing three years, however, this figure fell and by 2006 stood at 2.3 per cent.

The statistics for women convicted for an offence recorded in 2006 show that there were as many as 629 (6.7 per cent of the total) for whom an age was 'unavailable'. The majority of these women were convicted for 'Road Traffic Offences'. The 2006 figure for 'age unavailable' is substantially greater than that for the previous three years when the average number was 21 (0.2 per cent of the total). No information is provided in the CSO report to indicate the reasons for the anomalous 2006 figure.

Table 1 below gives the breakdown by age group of both males and females convicted of a crime recorded in the period 2003 to 2006: in light of the size of the 'age unavailable' group in 2006, it was decided to base the calculation of numbers in each age group on the population for whom an age was recorded.

Compared to men, a lower proportion of women

Table 1: Convictions by Age Group and Gender 2003–2006 (of those whose age is known)

Age	Male %	Female %
Under 18	4.9	3
18–24	39.9	33.7
25–44	44.4	51
45+	10.8	12.3

convicted of an offence recorded over the period were under 25 years of age (36.7 per cent as against 44.8 per cent). More than 70 per cent of women convicted were over 25, with 51 per cent in the age group 25–44 and 12.3 per cent over 45.

Categories of Offence

In the CSO report, offences are recorded under sixteen different headings. Four of these categories account for the vast majority of offences recorded between 2003 and 2006 for which women were subsequently convicted:

- Group 14: Road Traffic Offences
- Group 8: Theft and Related Offences
- Group 13: Public Order Offences
- Group 4: Dangerous or Negligent Acts

'Road Traffic Offences': These constituted the largest category of offence for which women were convicted. The number of women convicted for such offences, added to the number convicted for 'Dangerous or Negligent Acts', represented around 50 per cent of the total number convicted for an offence recorded in each of the four years examined.

The majority of convictions in relation to 'Dangerous or Negligent Acts' were in respect of road traffic incidents, but these were for more serious offences than those categorised as 'Road Traffic Offences'. As Figure 2 below reveals, convictions for both categories of offence showed a clear upward trend. It is very likely that, at least to some extent, this rise in convictions was the outcome of a marked increase in Garda operations on the nation's road.

'Theft and Related Offences': This was the second largest category of offence for which women were convicted. It showed a downward trend, with

Figure 2: Trends in Road Traffic Related Offences 2003–2006

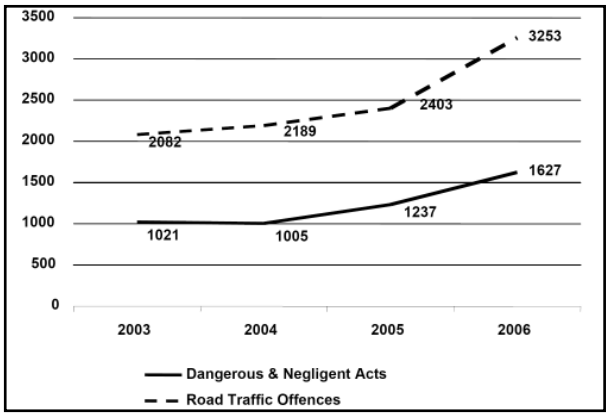
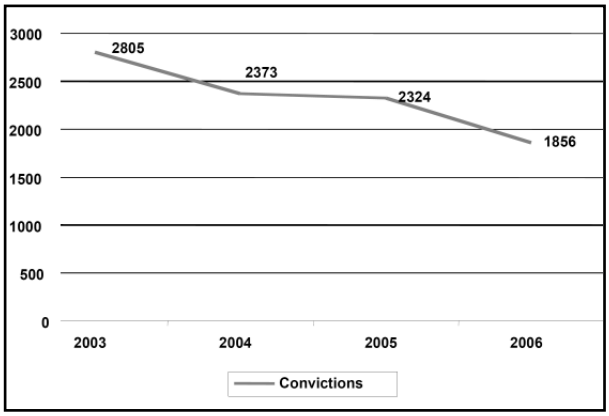


Figure 3: Convictions for Theft and Related Offences 2003–2006



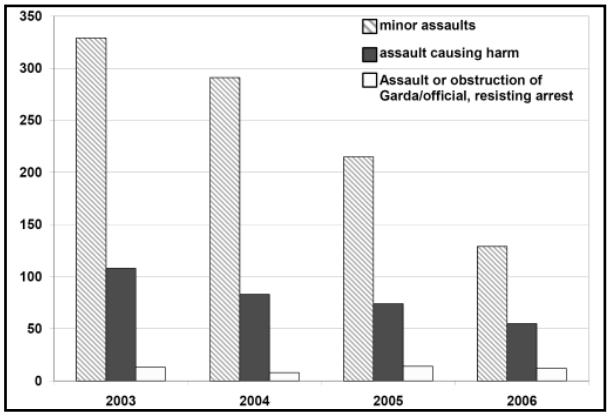
nearly 1,000 (33 per cent) fewer convictions in 2006 than in 2003 (see Figure 3).

A drop of this scale is obviously noteworthy and may be due to a number of factors, including a real reduction in theft by women, a reduction in reporting to the Gardaí of incidents of theft, or a reduction in the prosecution of alleged offences. However, it may also be the case that further convictions for theft and related offences may yet arise (particularly in regard to the final year examined, 2006) as proceedings in respect of incidents recorded are concluded.

Assaults: As Figure 4 shows, there was a marked reduction between 2003 and 2006 in the number of women convicted of assault, with this dropping from 450 to 207. Again, however, it may be that these figures will increase as proceedings in relation to incidents recorded (especially those for 2006) reach a conclusion.

Overall, it is noteworthy that the number of women convicted of assault over the period represented a relatively small percentage of the total number convicted of an offence – 1,331 out of 36,671 (3.6 per cent).

Figure 4: Trend in Convictions for Assaults 2003–2006



The great majority of women – 72.5 per cent – convicted of assault during the four-year period were found guilty of a 'minor assault'; 24 per cent were convicted for the offence, 'assault causing harm', and 3.5 per cent for 'assault or obstruction of Garda/official, resisting arrest'.

Imprisonment of Women

Data Source

The statistics on the imprisonment of women over the period 2003 to 2006 come from the Annual Reports of the Irish Prison Service.[5] These statistics offer two means of obtaining a picture of women in prison – one, by providing information about the women who come into the prison system during a given year and, two, by providing information about the female prisoner population on a specific day in December of that year.

There are, however, gaps in the data presented in the prison reports from one year to the next: these inconsistencies present significant obstacles in analysing trends over time.

It should be noted that the statistics on committals under sentence do not include information as to the year in which the offence giving rise to the conviction was recorded. On the basis of the information currently available, therefore, it is not possible to express *committals under sentence* in a particular year (i.e., the data provided in the Prison Service reports) as a percentage of *convictions* for that year (i.e., the data provided in the CSO *Crime Statistics* report).

Number of Committals

One of the most striking facts revealed by the Prison Service statistics is the number of women committed to prison in any one year.

Whereas the daily average number of female prisoners in each of the four years 2003 to 2006 was around 100 (the highest daily average being 106, in 2006, and the lowest 97, in 2003) a total of over 1,100 women were committed to prison in 2003, and in each of the subsequent three years over 900 women were sent to prison (Table 2). The wide gap between the numbers committed and the daily average is, of course, due to the very short periods many women spend in prison.

It should be noted that the number of women committed to prison in any one year does not equate with the total number of committals in that year – the latter is likely to be higher since some women may be committed more than once during the same year either for different crimes, or because they are first committed on remand and then under sentence. Only the 2006 Annual Prison Report provides sufficient data to indicate how significant this difference might be: it shows that while a total of 960 women were sent to prison in that year, there were, in all, 1,160 committals.

Non-Sentence Committals

Leaving aside imprisonment under sentence, women may enter prison having been committed under immigration legislation or on remand while awaiting trial or sentencing by the court. Unfortunately, the Prison Service Annual Reports provide little detailed information on either immigration related committals or remand committals.

Immigration: Only in the 2006 report is an overall figure given for the number of female committals under immigration legislation. In that year, there

Table 2: Committals of Women to Prison 2003–2006

Committals	2003	2004	2005	2006
Number of women committed to prison	1,145	906	906	960
Number of committals under sentence	417**	405	402	409
Number of committals under remand	Not available	503*	485*	459
Number of committals under immigration legislation	Not available	197*	191*	292
Total committals to prison	Not available	Not available	Not available	1,160

** Figures for the Dóchas Centre; figures for the women's section of Limerick Prison were not given in the 2004 and 2005 reports.*

*** This is a revised figure included in the 2004 Report; the figure originally given (in the 2003 Report) was 413.*

were 292 such committals, representing as much as 25 per cent of all female committals (Table 2). In the reports for 2004 and 2005, a figure for committals under immigration legislation is provided for the Dóchas Centre, but not for the women's prison in Limerick. In the 2003 report, no breakdown by sex of the committals under immigration legislation is provided (Table 2).

While the annual reports give overall statistics on the length of time spent in prison by those detained under immigration legislation, no breakdown by sex is provided. The statistics for immigration detainees as a whole show that the great majority remain in prison for less than seven days. A significant minority, however, spend thirty days or more in prison – in 2006, for example, the figure was 10 per cent of those detained under immigration legislation.

Remand: Again, as Table 2 shows, the 2006 report alone gives a figure for the total number of committals on remand; figures for 2004 and 2005 are provided only for the Dóchas Centre, and in the 2003 report no figure at all for remand committals is provided. It is evident from the information available in the 2004 to 2006 reports that the number of committals under remand exceeds those under sentence.

In the Prison Service Annual Reports for all but one of the four years examined, the profile of prisoners on a specific day in December of that year omits any information in relation to women on remand. The exception is 2003, the report for which reveals that 24 per cent of all female prisoners on 2 December 2003 were on remand. By contrast, on the same day, just 15 per cent of male prisoners were on remand.

Committals under Sentence

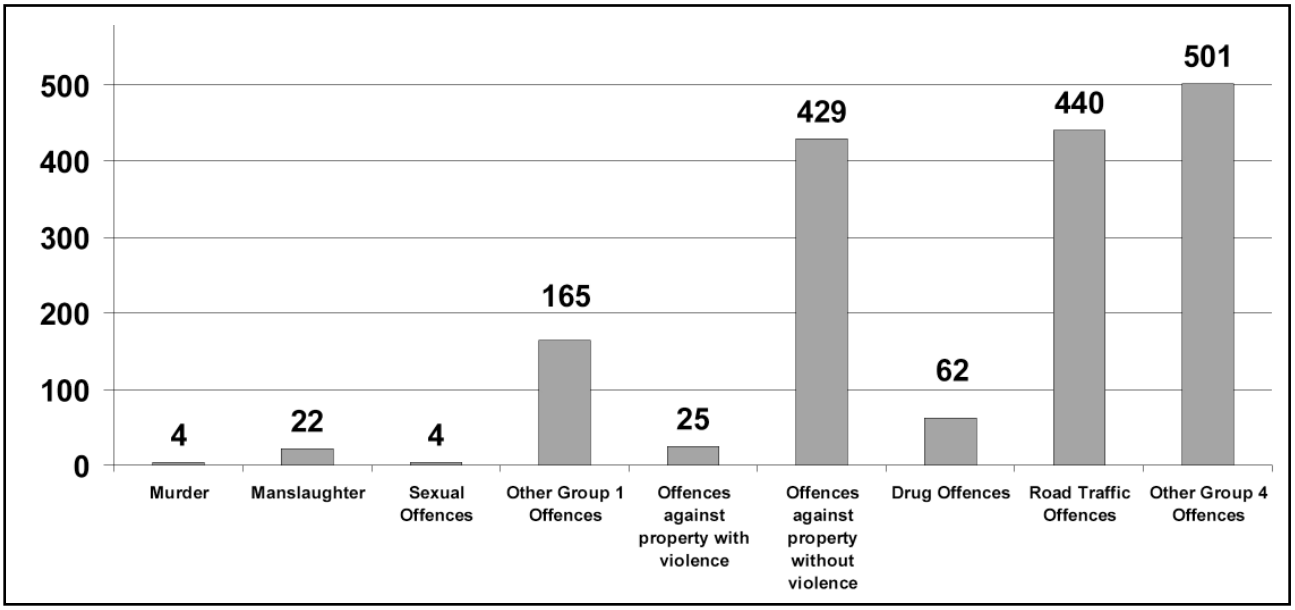
As Table 2 shows, the total number of committals under sentence remained more or less static over the four years. Furthermore, there were no significant changes in the types of offences for which women were committed over the period.

Figure 5 (below) gives the total committals under sentence 2003–2006, broken down into the offence categories used in the Prison Service Annual Reports. It reveals that only a minority of the prison sentences imposed were for the most serious crimes. The statistics used to create Figure 5 show that there was a fall in committals for violent offences over the period.

The single largest category was, 'Other Group 4 Offences', which can include offences varying in seriousness from 'Debtor Offences' to 'Possession of Knives and Other Articles'. However, it was 'public order offences' which constituted the largest sub-group of offences in this category.

The second largest category was 'Road Traffic Offences' (440 over four years), and the third largest was 'Offences against Property without Violence' (429).

Figure 5: All Female Committals under Sentence 2003–2006



Note: *'Other Group 1 Offences' include Assault; Assault Causing Harm; Assault on a Garda; Assault Occasioning Actual Bodily Harm, and 'Other Offences'. The category, 'Other Group 4 Offences' includes miscellaneous offences, the largest number of which relate to public disorder.*

Profile of Prison Population

The statistics on female committals in each year need to be read alongside the statistics which provide a 'profile' of the female prison population on a given day in December each year. Included in these statistics are the offences for which the women in prison on that day had been committed. Figure 6 below shows the percentage of sentences falling into the different offence categories, giving the average for the four years.

Analysis of the data used to compile Figure 6 reveals that of the women in prison in December 2006, just 2 per cent were there because of a conviction for 'Offences against Property with Violence' as compared to 10 per cent in December 2003. However, in real terms, this drop was only from 7 to 2 prisoners. The percentage of women who had been sentenced to imprisonment for 'Offences against Property without Violence' was higher in 2006 than in 2003 (41 per cent as against 33 per cent) and in this case the change may be of somewhat greater significance, as the numbers rose in absolute terms from 23 to 34.

On average over the four years, 18 per cent of the women in prison had been convicted of 'Other Offences against the Person' (mainly assaults). However, this average figure hides a story of decline over the four years: in December 2003, 21 women in prison under sentence (or 31 per cent) were being held for an offence in this category, whereas by December 2006, just 7 women (9 per cent of the total) were in prison for such offences.

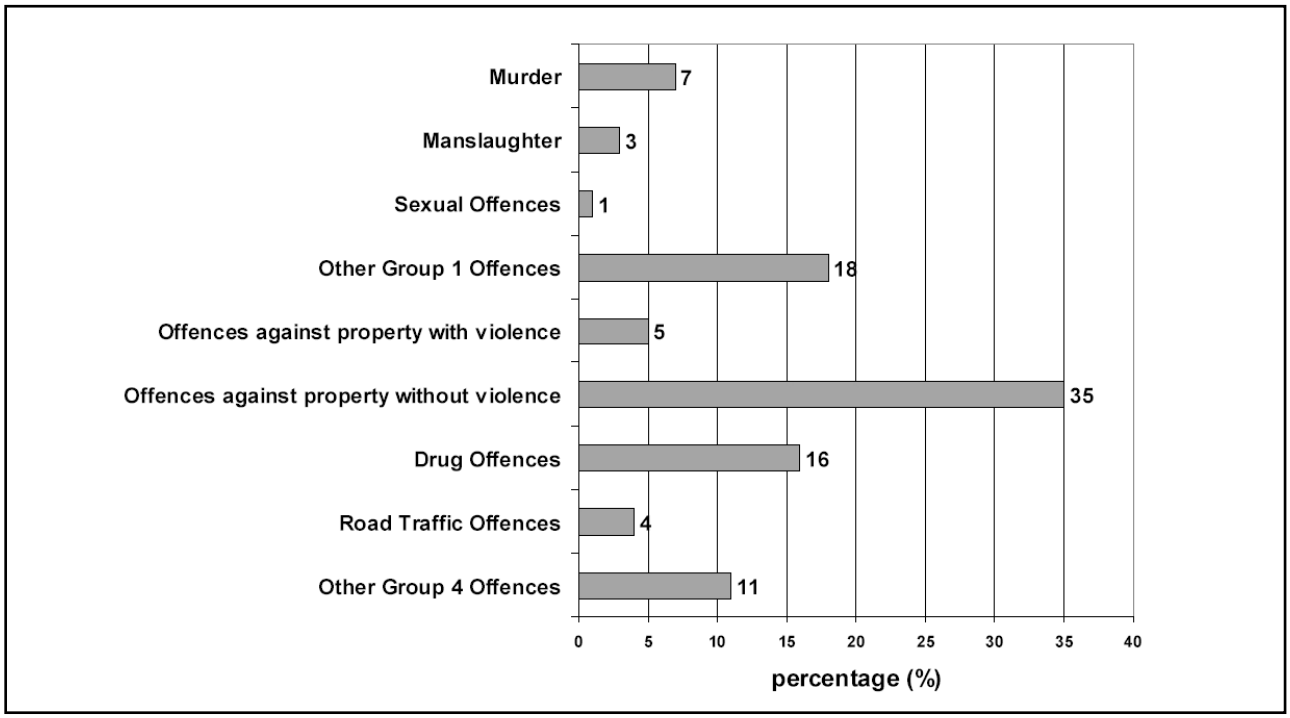
Overcrowding in Female Prisons

A key argument being used to justify the expansion in places for women prisoners is overcrowding in the prisons where women are detained. Table 3 (overleaf) presents data from the Annual Reports on the capacity and occupancy of the two prisons for women – the Dóchas Centre and the unit for female prisoners in Limerick Prison – over the period examined.

It is immediately obvious that in each of the four years covered the Dóchas Centre was overstretched. The figures for Limerick show occupancy to be less than capacity. However, it should be borne in mind that the unit for female prisoners in Limerick operates on the basis of two per cell – with cells providing very limited space, and bunk beds used to accommodate the two people.

There is indeed, therefore, a problem of overcrowding in Irish prisons for women. But is this a problem to which the only, or the most appropriate, response is an increase in the number of places?

Figure 6: Offence Profile on a Given Day in December of each Year 2003–2006 (Average Figures)



Note: *'Other Group 1 Offences' include Assault; Assault Causing Harm; Assault on a Garda; Assault Occasioning Actual Bodily Harm, and 'Other Offences'. 'Other Group 4 Offences' includes miscellaneous offences, the largest number of which relate to public disorder.*

Table 3: Capacity and Occupancy of Women's Prisons 2003–2006

Year	Institution	Bed Capacity	Daily Average	% Occupancy	Highest Daily
2003	Dóchas Centre	76	81	107%	100 (132%)
	Limerick	18	16	89%	Not Given
2004	Dóchas Centre	81	84	104%	96 (119%)
	Limerick	20	13	65%	Not Given
2005	Dóchas Centre	85	87	102%	104 (122%)
	Limerick	20	15	75%	Not Given
2006	Dóchas Centre	85	89	105%	Not Given
	Limerick	20	17	85%	Not Given

The data on the offences for which women are imprisoned (presented in Figures 5 and 6), which highlights how few are under sentence for the most serious crimes, would suggest there is considerable scope for using non-custodial sentences in response to the crimes committed by women. As already noted, 'Offences against Property without Violence' constituted one of the largest categories of offence for which women were committed to prison under sentence. Offences in this category, it could be argued, do not warrant a custodial sentence. Indeed, the same could be said in regard to many of the 501 committals under the largest category, 'Other Group 4 Offences', the greatest number of which, as already noted, are public order offences.

The data in Figure 7 reinforces this argument. This gives a breakdown of the average length of sentences in the case of female committals under sentence. Unfortunately, it was not possible to present information for the full four years between 2003 and 2006, since the Annual Report for 2006 does not give a breakdown that would show the length of the sentences imposed on women committed on conviction in that year.

Figure 7: Average Sentence Length, Committals of Females to Prison, 2003–2005

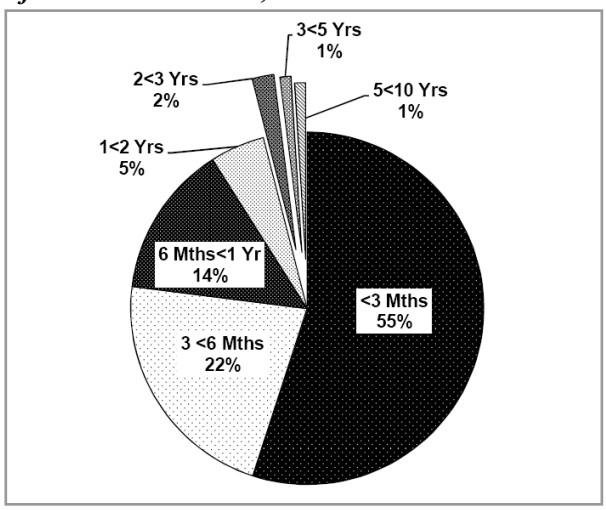


Figure 7 reveals the striking fact that on average over the three years, 2003 to 2005, 77 per cent of all committals of women under sentence were for a period of less than six months and only 4 per cent were for more than two years.

Conclusion

The data sources used in this article provide two distinct ways of looking at the issue of women and crime. Although it is not possible to directly link information from the two sources, the picture emerging from each set of statistics is broadly similar.

The analysis shows that over the four years, 2003 to 2006, and in a context where the population of the country was rising, there was no evidence of any marked upward trend in convictions by the courts against women. Neither was there an increase in convictions for serious crimes.

Regarding the imprisonment of women, one of the most striking facts emerging from the analysis is the scale of committals under immigration legislation and under remand. Although there is a lack of detail in relation to such committals it is clear that, taken together, these greatly outnumber committals under sentence.

Many groups, including the Jesuit Refugee Service Ireland, have advocated that detention should not be used in relation to asylum and migration issues. They have argued that non-custodial alternatives should be used instead, and

that if detention is unavoidable then centres other than prisons should be used.

Likewise, given the non-violent nature of the vast majority of crimes committed by women, the extent to which imprisonment is used for women on remand deserves serious scrutiny. One alternative that could form part of a process of lessening the use of imprisonment for remand purposes would be the development of a network of bail hostels for women.

Data in relation to the crimes for which women are given a sentence of imprisonment, and the duration of these sentences (Figure 6 and Figure 7), strongly suggests that imprisonment is being used in the case of crimes that are far from being at the serious end of the scale.

However, it has to be acknowledged that basic data on convictions and imprisonment cannot reveal the extent to which factors other than the actual crime for which a woman appears in court may serve to influence the decision to impose a sentence of imprisonment. Are women being imprisoned because they have had several convictions and judges run out of patience or decide that the possibilities offered by non-custodial sentences have been exhausted? Might it be that judges see a custodial sentence as the only way that some women will have access to services they desperately need but which are unavailable in the community? If this is the case, it must be said that imprisonment is a very inappropriate – and expensive – way of providing needed social supports. Clearly, these are the type of questions that need to be explored in future research into the Irish criminal justice system.

While we await the undertaking of such research, however, we need to keep in mind the findings of the research that has been already carried out into the background of women in prison in Ireland. These findings highlight the poverty, family breakdown, housing insecurity, educational disadvantage and mental ill health that characterise the lives of many women who come into prison.[6] They show, in other words, the personal and social circumstances which lie behind the offences committed by the women who end up being imprisoned – circumstances which prison in itself can do little to address.

A particularly interesting question concerning the use of imprisonment is whether the existence of a set number of prison places gives rise to a systemic tendency to fill those places. If there is an imperative within the criminal justice system to somehow ensure that available prison places are filled, what are the implications of an increase in places on the scale currently being planned by the Irish prison authorities? Not least of all, what are the financial implications, given that the average cost of detaining a person in prison in Ireland now comes to around €100,000 per annum – and given also the problems now facing the public finances?

The analysis presented in this article suggests there is a strong case for questioning the use of imprisonment for the offences for which most women are sent to jail; for questioning the imposing of short prison sentences, during which little by way of rehabilitative work can be undertaken, rather than alternative penalties; and for questioning why we as a society cannot devise more effective and appropriate responses to the situation of the many vulnerable women who come into the criminal justice system. There is certainly a very strong case for querying any proposal to double the number of places provided for the imprisonment of women in Ireland.

Notes

1. Central Statistics Office, *Garda Recorded Crime Statistics: 2003–2006*, Dublin: Stationery Office, 2008.
2. *Ibid*., p. 15.
3. *Ibid*., p. 15.
4. *Ibid*., Table 2.1a–Table 2.1d.
5. Irish Prison Service, *Annual Report 2003; Annual Report 2004; Annual Report 2005*, Dublin: Irish Prison Service; *Annual Report 2006*, Longford: Irish Prison Service.
6. Christina Quinlan, 'The Women We Imprison', *Irish Criminal Law Journal*, Vol. 13, No. 1, 2003; Celesta McCann James, 'Recycled Women: Oppression and the Social World of Women Prisoners in the Irish Republic', Ph.D. Thesis, National University of Ireland, Galway, September 2001; Barbara Mason, 'Imprisoned Freedom: A Sociological Study of a 21st Century Prison for Women in Ireland', Ph.D. London School of Economics and Political Science, 2004; C.M. Comiskey, K. O'Sullivan and J. Cronly, *Hazardous Journeys to Better Places: Positive Outcomes and Negative Risks Associated with the Care Pathway Before, During and After Admittance to the Dochás Centre, Mountjoy Prison*, Dublin, Ireland, Dublin, 2006 (report for the Health Service Executive).

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Temporary Agency Work: Labour Leasing or Temping?

Brendan MacPartlin SJ

Introduction

The word 'temping' conjures up an era when young secretarial workers moved from assignment to assignment, almost like a rite of passage, until it was time to take up a desirable employment opportunity and settle down. Nowadays, people in skilled occupations such as nursing and information technology often avail of the services of temping agencies as a way 'to see the world'.

'Temping' has benign associations of opportunity for the 'subject of work' – the worker.[1] 'Labour leasing' refers to the same practice but looks at it from the point of view of the labour market. Now known as 'temporary agency working', it is the practice whereby an employment agency engages workers and leases them to a user company. It is a practice that is growing in frequency and in acceptability but at the same time carries a serious risk of giving rise to employment conditions that fall far short of the standards prevailing for non-agency workers.

In the debate surrounding temporary agency working, it is argued, on the one hand, that this practice is a freedom of business that should not be interfered with because it serves to increase efficiency in the labour market and, on the other hand, that it is potentially exploitative of workers and should be regulated.

The issue then comes down to the extent and type of regulation. It is increasingly evident that the complexities of concrete situations pose problems for regulation but as the debate continues the issues that are in contention are becoming clearer. In this article, I will try to bring together some strands of the issue that have emerged in recent years, including specific examples and the legal and political responses to them.

Rationale for Agency Working

Agency working on a large scale is a relatively new phenomenon. It arises out of capital's ongoing search for flexibility and competitiveness based on its 'transaction cost' approach to human resource recruitment. In other words, capitalism wants cheap labour.

In the search for cheaper labour, the increase in the number of atypical contracts of employment is such that now more than 10 per cent of the Irish labour force come under the heading 'non-permanent employees' – temporary, fixed-term contract, and casual workers. A further step in this trend is the use of agency workers who are in abundant supply because of a lack of employment opportunities in failed economies.

Employers believe that agency working contributes to flexibility in the labour market. The practice works for individual employers in some circumstances but many find that the fees charged by employment agencies can be prohibitive if there is not sufficient competition or economies of scale among the agencies. It works quite differently for people employed in construction, agriculture, hotels and restaurants than it does for people qualified in IT, finance or nursing. When agency working is combined with the organisational model of 'core' and 'peripheral' workforces, numerical and financial flexibilities can be achieved.

In many European countries, temporary agency working began as a policy tool for integrating marginalised groups into the labour market. Groups that typically have difficulty in getting back to work – for example, the long-term unemployed, disadvantaged people, older workers, ethnic minorities – were placed, usually by non-profit organisations, in temporary jobs with the ultimate aim of achieving full-time permanent employment. This practice was seen to be compatible with social goals and lent a positive image to temporary agency working.

In a context where the EU, in 2000, set itself the target of becoming the most competitive and dynamic economy in the world by 2010,[2] successful models of temporary agency working were seen by many as providing a means of achieving a balance between flexibility and protection at work.

Dedicated Legislation

Most EU countries counteract the obvious risk of

exploitation in agency working by enacting and enforcing dedicated legislation in this area. They regulate the agency business with commercial legislation and the assignment of workers to user companies with employment legislation.

Those countries with the most comprehensive legislation regulate the relationship between the agency, the user company and the worker and define a specific status for temporary agency workers. Recognising the potential of agency working for displacing direct employment, they have legislated for a limited duration of temporary employment, after which the worker becomes permanent.[3]

Irish business is in danger of espousing an exploitative approach to agency working

Only Ireland, the UK and Denmark do not have a clear definition and regulation of temporary agency working as a separate type of employment relationship. Lacking the European social and legislative constraints, and open to the neo-liberal free market ideologies of the Anglo-Saxon model of political economy, Irish business is in danger of espousing an exploitative approach to agency working.

Employment Agency Act, 1971

The only piece of Irish legislation which deals specifically with agency working is the Employment Agency Act, 1971. This is concerned with the regulation of agencies and provides for the *commercial* aspects of labour leasing, but it is not concerned with the responsibilities of agencies to workers.

The Act was passed at a time when permanent full-time employment was the norm. Although its definition of the business of employment agencies covers temping, the growth of agency working requires further legislation. This was proposed in the White Paper, *Review of the Employment Agency Act 1971*, published in June 2005.[4]

The White Paper puts forward a series of recommendations for amendments to extend and update the regulations, most notably the drawing up of a Code of Practice for the employment agency sector which would be put on a statutory basis.[5] It was proposed that this Code would include a section on the rights of workers recruited by employment agencies or businesses.[6] One wonders how this proposed reform will be affected by the Directive on agency work being prepared by the EU, which will be discussed below.

GAMA Construction in Clondalkin

The danger that, in the absence of dedicated legislation, agency employment can lead to exploitation was highlighted in two cases involving agency workers employed by the GAMA Group which came into the public domain in recent years.

The multinational GAMA Group was invited to Ireland by a government delegation in 1998. It was claimed that GAMA could deliver major construction projects in a shorter time and at a better price than other companies. GAMA Construction Ireland Limited was contracted for a number of projects being undertaken by local authorities. GAMA Endustri, an employment agency in the GAMA Group, supplied up to 1,000 employees, mainly Turkish nationals, to GAMA Construction.

The first issue with GAMA that came to public notice was the sacking of three workers at a County Council construction site in Clondalkin in 2004. At the time they were employed, the workers were informed that they would work on a PAYE basis. Since they were to work on a local authority site, they assumed that their conditions of employment would be secure. Soon after commencing employment, however, they were informed by GAMA Construction that they were working on a sub-contract basis. They rejected this and were sacked.

During an application by the company for an injunction, the High Court ruled that the workers were not employees of GAMA Construction. The Labour Court dealt with some of the employment issues that had arisen and recommended that GAMA Construction pay the workers for the work they had already done; however, it was not able to recommend that they be re-employed by the company, because of the High Court ruling.[7] The case illustrates, among many other things, the fact that in practice there is often confusion as to whether it is the employment agency or the company using the agency which carries the responsibility of being the employer.

Who is the Employer?

The question as to who is the responsible employer can be answered in terms of employment legislation which says in different ways, in different statutes, that the one who pays the wages is the employer. Where the agency pays the worker, the agency is the employer. Where the user company pays the wages, the user company is the employer. The legislation on unfair dismissals is the only exception in that under its provisions the user company carries the responsibility of the employer.

Case law in the UK and Labour Court rulings in Ireland show, however, that the question is more complex. This was illustrated in a case determined by the Labour Court in January 2004 concerning a registered general nurse who was recruited via an employment agency to work part-time with Diageo Global Supply in Dublin. The nurse provided cover for other nurses during sick leave, absences and holidays, and was called into work as she was required. Her union claimed that Diageo was in breach of the Protection of Employees (Part-Time Work) Act, 2001 by treating the claimant in an unfair manner when she was selected for a reduction to her hours of work and a change in her pattern of attendance, because of her part-time status.[8]

Diageo maintained that the claimant was not an employee of the company, but of the agency, because the agency paid the nurse's wages and the definition of 'employer' in Section 3 of the Act includes reference to the employer being the person 'liable to pay the wages'. It asserted that the only contract that existed was that between the company and the agency. The claim of unfair treatment should rest, therefore, with the agency. The nurse contended that she had never entered into any contractual arrangements with the agency and that it had merely acted as the paying agent for Diageo. She further contended that she worked under the direction and control of Diageo and was, therefore, its employee. The Court concluded its investigation by concurring with the nurse.

Confusion as to who is the employer does not arise in the two-way employment relationship that exists in the case of a directly employed worker. Temporary agency working, on the other hand, involves three parties: worker, agency and user company. This relationship is based on two contracts – a business contract between the agency and the user company, and a contract of employment with the worker. The three-way relationship is a significant departure from the two-way relationship: the contracts involved clearly need more regulation if only to avoid confusion.

Vulnerability to Exploitation

According to the Oxford Dictionary, to 'exploit' is 'to utilise for one's own ends'. The traditional employer–employee relationship has an inherent vulnerability to exploitation, which experience has shown can be overcome only by negotiation and mutual accommodation. The triangular relationship that arises in the case of agency working is even more vulnerable to conflict and therefore demands considered regulation. This was highlighted in a second case involving GAMA Construction, which came into the public domain in 2005.

GAMA workers protesting outside Leinster House
© D.Speirs

GAMA Construction in Ennis

The second GAMA case concerned Turkish building workers supplied by GAMA Endustri to the Ennis site of GAMA Construction. There they worked in excess of 80 hours per week for a basic rate of €2 to €3.30 per hour. These conditions were in contravention of minimum wage and maximum hours legislation. Moreover, for periods of up to three years, the Turkish workers worked overtime for which they were not paid. In addition, while the Irish workers on the site had a clock-in system and received normal payslips, the Turkish workers were not provided with any proper time-recording or payslip system.

The workers were isolated and cut off from others and did not know how to go about changing their conditions. They were members of the trade

union, SIPTU,[9] but because of language difficulties and a lack of understanding of collective organisation they were unable to voice their grievances and so SIPTU officials were unaware of their situation. When Mick Murphy, a Socialist Party Councillor, approached them they withdrew and told him nothing. He decided to find out what was going on and had prepared a leaflet in Turkish explaining their entitlement to legal rates of pay. He got around the efforts of the company's security employees to prevent access to the workers by throwing the leaflets over the fence.

Thus, with the help of Murphy and of Joe Higgins, who was then a member of the Dáil, there began the process of the workers finding their voice, resulting in meetings, protests and a long strike. What emerged into public view was scandalous exploitation involving not just low pay and no payslips but workers being housed in sub-standard accommodation, intimidation, and the misplacing of wages by paying them into bank accounts in Holland, which were in the workers' names but of which the workers knew nothing.

'Legitimate' Discrimination

Individual examples, then, clearly highlight the fact that the present situation allows for exploitation, manipulation and illegal practice. Perhaps even more disturbing is the realisation that, according to the rules of the system, agency workers can be subject to pay and conditions quite different from those of non-agency colleagues doing the same work. This 'legitimate' discrimination facilitates the emergence of illegal exploitation.

Union officials report on the difficulties encountered in trying to respond in cases where employers use labour leasing as a means to exploit. Workers are contracted through complex supply chains of agencies. Employees in the same workplace may have different employers – that is, have been supplied by different agencies – and may well have different pay and conditions. The agencies can bypass industry-agreed pay rates by using cheap and temporary labour from poorer countries.

More and more migrant workers in the hospitality, food processing, and agriculture sectors are hired on these short-term contracts. A hotel, for example, may use several different agencies to supply its catering staff, waiting staff, and cleaning staff. Employees and their representative who want to pursue a grievance can find it difficult to identify someone who will take responsibility for dealing with the issue. In this way, employment agencies and the employers using them can circumvent employment rights that are available to directly employed workers.

All Workers are Equal before Protective Legislation?

Mainly thanks to our participation in the European Union, the Irish labour market is not unrelievedly in the Anglo-Saxon model but does enjoy extensive protective legislation. Employers and government insist that all workers are protected equally under employment law. However, as many of the protective measures do not kick in for six to twelve months of employment they do not apply to short-term temporary workers. For instance, the question of whether a dismissal is unfair does not arise in the first twelve months of employment.

A crucial issue concerns the principle of non-discrimination. All categories of workers are protected by the Employment Equality Act,1998, which provides that there should be no discrimination in pay and conditions between workers doing like work. But government and employers gloss over the small print of Section 7 (2) of the Act. This says that for an agency worker 'the comparator' can only ever be another agency worker and never a non-agency worker:

In relation to the work which an agency worker is employed to do, no person except another agency worker may be regarded ... as employed to do like work (and, accordingly, in relation to the work which a non-agency worker is employed to do, an agency worker may not be regarded as employed to do like work).

This is the loophole which allows the difference in pay and conditions between directly employed and agency workers. As a result, two colleagues may work side by side in the same company doing the same work for different wages and with different conditions of employment. Furthermore, since Ireland, unlike several EU countries, does not have legislation placing a limit on the duration of agency working, this situation may continue indefinitely. Effectively, two tiers of employee are being created. To the extent that directly employed workers tend to be Irish, and the agency workers foreign, this practice is at odds with national policies on integration.

EU Directive on Agency Work

It was this gap in the defence against exploitation that the EU wanted to close through the formulation of a Directive on Temporary Agency Work.[10] This proposed Directive was, however, held up for years by Ireland, the UK and Germany.[11]

The UK Government overtly disagreed with the requirement for equal pay and conditions for agency workers and was strongly supported by employer bodies. Ireland couched its objections in terms of the advantage that would accrue to other countries which would be permitted to deviate from equality requirements by means of national, legally binding, collective agreements. The weakness of this argument was that it overlooked the fact that Ireland had the facility to make collective agreements binding, as in the case of the Labour Court's Registered Employment Agreements and Employment Regulation Orders.

Eventually, however, in light of the reality that the other EU countries might reach agreement imposing even more demanding conditions, the UK and Ireland gave way. On 9 June 2008, the European Council finally achieved 'political agreement' on a common position regarding the proposed Directive.[12] It was agreed that 'the principle of equal treatment from day one will be the general rule' – with the qualification that:

... Article 5(3) will allow Member States to give the social partners the option of upholding or concluding collective agreements which, while respecting the overall protection of temporary agency workers, establish working and employment conditions which may differ from the principle of equal treatment.

This means that Ireland may deviate from equality by means of a social partnership agreement. This surely is the only way of balancing efficiency with fairness – that is, as long as trade unions have bargaining power.

The Directive on temporary agency work will have to be transposed into Irish law. This should provide an opportunity for Ireland to look comprehensively at the whole question of agency working and to develop dedicated legislation to address the problems it can generate. Given our previous experience of formulating legislation on foot of EU Directives, one can expect lobbying that will result in a whittling down of the provisions of the Directive as it is transformed into Irish law.

Already ISME (Irish Small and Medium Enterprises Association) has said the Directive would do 'extreme damage' to small business flexibility and 'would not be acting in the interests of agency workers themselves'. It has claimed that the requirements imposed by the Directive could 'lead to the demise of the agency worker concept'.[13]

Protesting in support of Irish Ferry workers *© D.Speirs*

Displacement of Directly Employed Workers by Agency Workers

As well as the issue of providing protection for the agency worker, there is also the question of protecting the directly employed worker from losing his or her job to a cheaper agency worker. The process by which cheaper agency workers can replace permanent workers is illustrated by the Irish Ferries dispute.

In 2004, Irish Ferries made a collective agreement with its employees on pay and conditions for the following three years. By mid-2005, the company had come to believe that it needed to make savings of €15 million if it was to survive on its Irish Sea and continental routes. Outsourcing had become an established practice in competitor companies, giving them lower pay costs. Irish Ferries took the position that outsourcing was its only option and therefore it would have to get out of the collective agreement.

The Labour Court required the company to observe the agreement until its expiry date. In the meantime, however, the company was able to offer redundancy deals to its own workers and

replace them with cheaper agency workers. During the course of the dispute, a protest march by 100,000 people underlined public repugnance towards replacing good jobs with ones paying lower wages.

In the context of international competition, which includes the widespread use of cheap labour, and from the perspective of the individual company, the rationale behind the action of Irish Ferries is obvious. However, international competition in the absence of international regulation, especially in countries where labour standards are low, tends to generate a 'race to the bottom'. It *is* possible to run a sustainable economy without the necessity of maintaining a tier of workers who are poorly paid and badly treated, but international regulation and governance are required to enable this.

The Services Directive

Issues that are distinct from but related to the question of agency working arise as a consequence of the EU Directive on 'Services in the Internal Market'.[14] The Services Directive reflects the EU's concern to facilitate competition and allow service providers to act beyond national boundaries. The question that arises is whether the Polish plumbing contractor undertaking work in France should pay his employees at the 'country of origin' rate or the 'host country' rate. The principle of competition would suggest that the 'country of origin' rate should prevail, subject to the statutory requirements of the host country – for example, its minimum wage legislation. The right to collective bargaining should allow employees to act collectively to improve their wages.

The celebrated case of the Latvian construction company, Laval, which was engaged to refurbish a school in the Swedish town of Vaxholm, is relevant. Laval refused to sign a collective agreement, and proposed to pay the Latvian labourers well below Sweden's minimum wage. Swedish trade unions initiated industrial action at the workplace.

The case ended up at the European Court of Justice which ruled, in December 2007, that the right to strike is a fundamental right, but not as fundamental as the right of businesses to supply services across borders and that the Swedish workers were within their rights to take industrial action, but such action should be in pursuit of an overall social good and not just to safeguard their own privileged positions.

The Court's findings would suggest that the local agreements of countries can be superseded by EU provisions for free movement: this opens the way for social dumping.

The more recent Rueffert case, decided in April 2008, focused on whether public authorities, when awarding contracts for work, have the right to demand that tendering companies commit themselves to pay wages that are in line with the collective agreement in the place where the work is done, or whether this amounts to a restriction on the freedom to provide services which is enshrined in EU treaties.

The European Court of Justice found that the freedom to provide services prohibits the imposition of a requirement to pay collective agreement rates, given that most likely these will be higher than the applicable minimum wage. A public procurement obligation of this kind would prevent foreign service providers from competing on the basis of lower wages. Such a restriction on the freedom to provide services is not justified by the objective of ensuring the protection of workers.

Without a balance between union freedoms and the freedom of capital, the dynamic of 'a race to the bottom' is envitable

It would appear, then, that case law is interpreting the EU treaties as according secondary importance to the rights of workers, including the right to strike, when these rights clash with the freedom of the market.

This dilemma echoes the centuries-long struggle about the right to strike in the UK, which was resolved by the concept of immunity in the pursuit of a trades dispute. Without a balance between union freedoms and the freedom of capital, the dynamic of 'a race to the bottom' is inevitable.

Employment agencies are, of course, service providers. They provide ready-made human resources for user companies. However, in

response to trade union protests, the EU decided in 2006 to exempt employment agencies from the provisions of the Services Directive – much to the chagrin of employer bodies, and of the International Confederation of Private Employment Agencies which declared that this was a betrayal of the ideals of the EU.

Conclusion

In the area of labour market regulation, the Irish Government and Irish employers appear to take a stance similar to that of the UK Government and UK employers – that is, a preference for low levels of regulation in a free market.

The EU, with its traditions of social integration and partnership, is the source of most of the protective employment legislation operative in the UK and Ireland. Irish social partnership has been a good mediator between the Anglo-Saxon and the European industrial relations styles. On the issue of agency working, it seems as if the EU Directive will come just in time to rescue us from Victorian-style exploitation – having been delayed long enough to allow us extract as much as possible from the receding Celtic Tiger. The transposing of the Directive into Irish law provides an opportunity to deal specifically with the relatively new phenomenon of a triangular employment relationship and to try to reconcile the tension between efficiency and fairness in the labour market in a way that brings its functioning to a new level of integration.

The EU itself is also being driven towards market liberalism by the forces of globalisation and its own competition strategy. The European Court of Justice is increasingly leaning in favour of the rights of business, although its approach is counterbalanced by the European Commission in its role as the proposer of legislation.

The protests during the Irish Ferries dispute show that people's embedded values do not favour the excesses of neo-liberal business practices that try to replace decent jobs with cheaper ways of using human resources. It is up to the Government and to the EU to reconcile the contradictions between efficiency and social protection by rising above fundamentalist economics to a viewpoint based on political economy in the service of the public good.

Notes

1. In his 1981 encyclical letter on work, Pope John Paul speaks of the human person being the 'subject of work' and strongly asserts that 'the primary basis of the value of work' is the human person, 'who is its subject'. This, he says, 'leads immediately to a very important conclusion of an ethical nature' – work is, in the first place, 'for' the human person, rather than the person being 'for work'. See *Laborem Exercens* (on Human Work), Encyclical Letter of Pope John Paul II, issued 14 September 1981, n. 6. (www.vatican.va)
2. The 'Lisbon Strategy', adopted by the Heads of State or Government during the European Council meeting in March 2000, set as the 'strategic goal' for the EU that it would become 'the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion'. (Presidency Conclusions, Lisbon European Council, 23–24 March 2000)
3. European Foundation for the Improvement of Living and Working Conditions, *Temporary Agency Work in an Enlarged European Union*, Luxembourg: Office for Official Publications of the European Communities, 2006.
4. Department of Enterprise, Trade and Employment, *Review of the Employment Agency Act 1971: White Paper*, Dublin: Department of Enterprise, Trade and Employment, 2005 (www.entemp.ie/publications). The White Paper proposed that in updated legislation the definition of 'employment agency' would be revised in line with the ILO definition (ILO Convention No. 181). Under this definition, an employment agency is 'any natural or legal person' which provides one or more of the following types of service: (a) introduces suitable candidates to an employer for direct employment, (b) employs workers and supplies them to a user company which assigns and supervises their work, and (c) assists individuals looking for either permanent or temporary work – in other words, provides 'work-finding services'. (pp. 4–5)
5. *Ibid*., p. 8.
6. *Ibid*., pp. 15–16.
7. Labour Court Recommendations, Determination No. LCR18070. (www.labourcourt.ie)
8. Labour Court Recommendations, Determination No. PTD042. (www.labourcourt.ie)
9. The SIPTU website includes a podcast: 'The Agency Experience from the Worker's Perspective'. (www.siptu.ie/agency)
10. Commission of the European Communities, *Proposal for a Directive of The European Parliament and The Council on Working Conditions for Temporary Workers*, Brussels, 20.3.2002, COM(2002) 149 final, 2002/0072(COD). In November 2002, the Commission published an *Amended Proposal* (Brussels, 28.11.2002, COM(2002) 701 final, 2002/0072 (COD).
11. The European Parliament delivered its first-reading opinion on the draft Directive six years ago, on 21 November 2002.
12. Council of the European Union, Press Release, 2876th Council meeting, Employment, Social Policy, Health and Consumer Affairs, Luxembourg, 9–10 June 2008, pp. 11–12.
13. 'ISME Concerned by Temporary Workers Directive', Press Release, 10 June 2008. (www.isme.ie/press)
14. 'Directive 2006/123/EC of The European Parliament and of The Council of 12 December 2006 on Services in the Internal Market', *Official Journal of the European Union*, 27.12.2006.

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Hidden Children: the Story of State Care for Separated Children

Maria Corbett

Introduction

During the past ten years, over 5,300 children have come to the attention of the authorities in Ireland, having arrived here without the company of either of their parents. Many of these children, referred to as 'separated children' or 'unaccompanied minors', have experienced war and violence; some have been trafficked or smuggled into Ireland. They come from a wide range of countries, including Nigeria, Somalia, Ghana, Angola, Rwanda, China and parts of the Middle East and Eastern Europe.

It is impossible to give an example to illustrate the experiences of a 'typical' separated child: each has his or her own unique story. For some, fear will prevent them telling their full story so we can only guess at the circumstances that led to their leaving home, family and friends to seek safety or a better life in Ireland. Did they choose to leave – or were they taken? Was the person assisting them in their journey thinking of their well-being – or part of a sinister system of human trafficking? Were they being smuggled over borders to be reunited with family – or sent from family as a protection against political violence? And, crucially, how will they fare in Ireland?

This article will examine how the Irish State has responded to the presence within its territory of this group of vulnerable children.

The State's Responsibility

The Irish State has a duty under national legislation, including the Child Care Act, 1991, to respond to the needs of any child (that is, any person, whether or not an Irish citizen, under the age of eighteen) within its borders who is in need of care or protection. Furthermore, it has obligations arising under international law – notably, the 1951 Refugee Convention, the 1967 Protocol Relating to the Status of Refugees, and the 1989 UN Convention on the Rights of the Child.

Under the Convention on the Rights of the Child, which Ireland ratified in 1992, the State is required to ensure that all children, including separated children, within its territory have access to all of the rights set down in the Convention. Specifically, Article 22 requires that asylum seeking and refugee children should 'receive appropriate protection and humanitarian assistance'. Under Article 20, the State has an obligation to provide special protection and assistance for children deprived of their family environment and to ensure that appropriate alternative family care or institutional placement is made available to them, taking into account the child's cultural background.

Article 3 of the Convention has fundamental implications for the State's response to the situation of separated children. This Article requires that: 'In all actions concerning children … the best interests of the child shall be a primary consideration.' The 'best interests' principle applies to the framing of relevant legislation, to actions by the courts and administrative authorities, and to the provision of educational, health and social services, whether supplied by public or private agencies.

The Office of the United Nations High Commissioner for Refugees (UNHCR) has highlighted the need to have 'best interests assessments' as an integral part of asylum and protection processes in relation to children.[1] It says such assessments have 'particular relevance for unaccompanied and separated children', and should start 'from the moment of their identification … and throughout the displacement cycle until a durable or long-term solution is implemented'.[2]

Put simply, the State is duty bound – by national and international law – to protect and provide for separated children in the same way it would for children normally resident in Ireland who are without parental care.

Absence of Specific Legislation

Despite this obligation, no specific legislation has been enacted in response to the arrival in Ireland of large numbers of separated children. There is no definition of a separated child in Irish law nor

is there any clarity as to how services provided by the State should respond to their needs. (Internationally, separated children are defined as those under eighteen years of age who are outside their country of origin and separated from both parents or their previous legal or customary primary caregiver.[3])

Many groups working in the area of asylum and protection expected that the framing of the legislation that became the Criminal Law (Human Trafficking) Act 2008 would have provided an opportunity to ensure comprehensive protection for separated children who are victims of trafficking. Likewise, the Immigration, Residence and Protection Bill 2008, now before the Dáil, was seen as an opportunity to ensure greater legislative protection for separated children generally. However, neither the Act nor the Bill contains any measures designed specifically to improve the State's care and protection systems for separated children.

Care Provision

So where do these children go when they arrive on Irish shores? Who takes care of them? The majority of separated children are reunited with family members already in Ireland; the remainder are placed in the care of the State. Currently, there are in all around 180 separated children in the care of the Health Service Executive (HSE), the body which, under the Child Care Act, 1991, has statutory responsibility for any child who does not have adequate care.[4]

Figures for the number of separated children currently coming to the attention of the authorities are provided by the HSE social work team for separated children, located in Dublin. In 2007, 336 separated children came to the attention of this social work team; in the first nine months of 2008 the total number was 237.

In both 2007 and 2008, more than 50 per cent of separated children referred to the authorities were reunited with family members in Ireland. Of those who remained in State care, most of the remainder were placed in hostel accommodation, and a small number were placed in foster care or other form of care.

There is no standard approach to the provision of care for separated children. In some instances, these children are signed into voluntary care under Section 4 of the Child Care Act; in others, they are taken into care under a full care order (Section 18 of the Child Care Act). In some HSE areas, Section 5 of the Act, which provides for the accommodation of homeless children, is utilised. Occasionally, sections of the Act which allow the statutory authorities to apply for an emergency care order are used.

There is obviously a need for a standard national approach, under-pinned by legislation, which would clarify the responsibility of the HSE for the care needs of the separated child and how these are to be met.

The quality of care for separated children is not of a standard equal to that provided for other children in care

When a separated child arrives in Ireland, one of the first things the authorities want to confirm is his or her age. In some instances, State officials may have doubts about the claim of a young person that he or she is under the age of eighteen. While this is a legitimate concern for the authorities, it is essential that the question be handled with due regard for the rights of the young person concerned.

The Irish Refugee Council has suggested that age should be assessed 'by an independent panel of experts including a social worker, a general practitioner and a psychologist, who have expertise in child and adolescent behaviour and who have been trained in child-friendly interview techniques'.[5] The Council argues that the current practice, where immigration officers or members of An Garda Síochána are solely responsible for assessing the age of an applicant, is inappropriate.

Accommodation

Once the child's age status is confirmed, he or she must be accommodated. The *National Children's Strategy* – a ten-year policy plan for safeguarding children's rights and improving their lives, published in 2000 – gave a commitment that separated children would be treated in accordance with international best practice.[6] The reality is, however, that the quality of care and accommodation for separated children is not of a

standard equal to that provided for other children in care under the Child Care Act, 1991. In effect, a two-tier system of care exists.

The majority of separated children in the care of the HSE are accommodated in private, unregistered, profit-making hostels funded by the State. Such hostels are not covered by the *National Standards for Children's Residential Centres* (2001), which govern residential provision for other children in the care of the HSE. These regulations set down standards concerning a wide range of issues, including staffing, children's rights, care plans, contact with family, child protection, and access to internal and external complaints systems.[7] No inspection report relating to the hostels used to accommodate separated children has ever been made public.

Despite welcome improvements over the past number of years, concern remains that the level of care for separated children – in terms of adult supervision, security and support – is inadequate and significantly below that provided for other children in residential care. There is concern that this inadequate level of care is directly linked to specific instances of vulnerable separated children going missing and being trafficked for exploitation.[8]

Equality of Care

At present, Ireland's treatment of separated children breaches its obligations under the UN Convention on the Rights of the Child. The Convention requires the State to assure to *all* children within its territory, without discrimination of any kind, all of the Convention's rights.

A key requirement towards meeting the obligations arising under the Convention is that the HSE should, as a matter of urgency, adopt a policy of 'equality of care' for all children in its care, including separated children, and bring to an end the practice of accommodating separated children in a second-tier hostel system.

An 'equality of care' policy would mean that all care placements for separated children, whether in residential care or foster care, would be covered by national guidelines,[9] with care provided by trained and vetted carers on a twenty-four hour basis. It would also mean that there would be a designated social worker for each child and that those in residential care would be assigned a 'key worker'.

There have been some steps in this direction. The HSE is in the process of opening three new residential units for separated children, on an equality of care basis. This is a welcome development, but the progress it represents needs to be put in context. There are, as noted, approximately 180 separated children in the care of the HSE. The new centres will provide a total of eighteen places (six of which will be for initial placement and assessment) which means that 90 per cent of separated children will continue to be accommodated in privately-run hostels.

Clearly, much remains to be done if the care provided for the majority of separated children is to be brought up to best practice standards.

Decentralisation of Care Provision

As a means of addressing the current situation where the majority of separated children are in accommodation that is inappropriate – and in light of the concentration of placements in the Dublin area – the HSE has mooted the possibility of spreading the care of these children more evenly around the country.

Ireland's treatment of separated children breaches its obligations under the UN Convention on the Rights of the Child

A policy of dispersal may make sense from a logistical perspective. However, an impact assessment would need to be undertaken to ensure that relocation would not in itself become a negative factor in the care provided for separated children. An infrastructure of care and support now exists in Dublin – for example, specialised services and expertise (in relation to trauma, for instance) tend to be concentrated in Dublin; informal contacts and voluntary initiatives provide access to invaluable peer support, and a number of Dublin schools have experience of responding to the needs of separated children.

If a policy of dispersal is pursued, then appropriate groundwork would need to be laid down in advance, including the up-skilling of local staff in relation to relevant issues – for example, dealing with the impact of trafficking

and trauma specific to separated children, recognising the risk that there may be grooming of children in care for exploitation, and understanding how the asylum and protection systems operate.

Appropriate accommodation options and supports would also need to be put in place, including access to specialist psychological and mental health services. Work would need to be undertaken to ensure that non-governmental service providers, and specifically youth work and immigration organisations, are included in the creation of appropriate non-HSE supports in each dispersal location.

Seen in a wider context, it is clear that supporting separated children is not just the responsibility of the HSE, but requires a truly joined-up approach from a variety of local services and agencies.

Family Reunification

Family reunification is generally considered to be the best outcome for a separated child,[10] and a significant proportion of separated children who arrive in Ireland are reunited with family members in this country.

However, there are concerns that in a minority of cases, the reunification of a separated child with his or her parent(s) or extended family results in the sexual exploitation of the child and/or in their being drawn into forms of domestic servitude and slavery. There are concerns, too, that in some instances the 'family reunification' has been fraudulent – in other words, the adults who came forward to claim the child were not, in fact, family members – and this has led to the child being exploited.

In order to ensure the safety and well-being of children reunited with family there is need for adequate assessment to verify the identity of the people who present as family members, and to ensure that children are not placed in an abusive situation. There is need also for periodic follow-up visits so that supports can be provided in cases where a child or family is having difficulty adapting following reunification. This obviously requires social work resources, which are already over-stretched. The reality is that at present in most areas of the country there is no follow-up care once a separated child is reunited with his or her family.

Application for Asylum and Protection

Whether the separated child is reunited with family or is in the care of the HSE, one possible option for ensuring the long-term stability of their situation may be to seek refugee or other form of protection status. Within the asylum and protection system, separated children face a series of distinct challenges as the system is not designed to be child friendly.

The HSE assesses the circumstances of each separated child in its care and decides whether or not an application for asylum or protection should be made on their behalf. However, the HSE may not be best placed to take this important decision. Rather, there is a strong case for saying that the decision should be made by an independent Guardian following consultation with the Refugee Legal Service. The Guardian – known as a Guardian *ad Litem* – would independently represent, aid and assist a separated child in the care of the State and advocate for and generally safeguard the child's best interests.[11]

In the *National Children's Strategy* (2000), the Government gave a commitment that each separated child would have a Guardian *ad Litem*, but only rarely does this happen.[12] One of the recommendations of the Council of Europe Commissioner for Human Rights, Thomas Hammarberg, following his official visit to Ireland in November 2007, was that a Guardian *ad Litem* be assigned to each separated child.[13]

... supporting separated children is not just the responsibility of the HSE, but requires a truly joined-up approach

Legal Limbo

Where an application for asylum or protection is not made on behalf of a separated child, he or she is left in a legal limbo. Although remaining in the country, he or she has no legal status, may not have any identity papers, and on reaching the age of eighteen, and no longer within the remit of the child care system, may be deported. With no national register of separated children, it is impossible to know how many young people are

caught in this untenable position. Since the Immigration, Residence and Protection Bill 2008 is still before the Oireachtas, there remains an opportunity to include a provision that would allow all separated children be granted 'temporary leave to remain' while their best interests are being determined. This opportunity should be seized.

Missing and Trafficked Children

For some years, a particularly worrying issue in relation to separated children has been the number who go missing from their care placement. HSE data show that in 2007, 41 children went missing from care. In all, between 2000 and 2007, 441 separated children were recorded as missing from their care placement and of these only 53 (12 per cent) were eventually accounted for. However, it appears that during 2008 there has been a marked decline in the numbers going missing: this is clearly a very welcome development.

We do not have a sufficient understanding of why, and how, separated children disappear and what happens to them afterwards. It appears that in the past at least, a high percentage of the separated children who went missing did so within one or two days of coming to the attention of the authorities. Some of these children would have been identified outside office hours, when they may have been placed in hostels for homeless children by the out-of-hours service.

Media reports and anecdotal evidence point to the possible reasons separated children go missing. Some children may be unofficially reunited with a family member in Ireland or another country. Some who are approaching their eighteenth birthday may fear that once they no longer come under the protection of child care legislation they will be deported and so they leave the official system. Others may leave because they want or need to work but cannot legally do so.

Clearly, any child who has left a care placement and is without family support is particularly vulnerable to exploitation. And some children *are* exploited. Media reports show evidence of children being trafficked to Ireland, within Ireland, or from Ireland, for exploitative purposes, including sexual exploitation, domestic servitude and forced marriage.[14]

It is extremely difficult to trace, and to maintain any contact with, separated children who go missing. The disappearance of separated children is, however, not an inevitable phenomenon; it can be addressed. International experience demonstrates that good practice can reverse trends in separated children going missing.

Measures that may help include the availability of social work services at points of entry to assist in the identification, assessment and referral of separated children, and the registration of each separated child upon their coming to the attention of the authorities. It should be noted, however, that the majority of separated children in Ireland are not identified at ports of entry (seaports and airports) and may have been in the country for some time before coming to the attention of the statutory agencies.

Young people involved in the P+L+U+S (Please Let Us Stay) campaign *© D.Speirs*

The provision of adequate care by trained staff, and the availability of 'safe house' accommodation where this is required, are fundamental elements of a policy to reduce the incidence of children going missing. Clearly, a better understanding of how separated children arrive in Ireland, and why they arrive here, is essential to addressing the problem of how and why they subsequently go missing.

Trafficking of Children

There have been some welcome steps towards addressing the problem of child trafficking. The Anti Human Trafficking Unit in the Department of Justice, Equality and Law Reform was established in November 2007. This Unit has responsibility for facilitating the implementation of a planned new national strategy to address trafficking; its remit includes working in coordination with An Garda Síochána and the Irish National Immigration Service, as well as engaging with NGOs involved in the issue.[15] Among the working groups already established by the Unit is one on

child trafficking; this brings together representatives of a range of agencies and organisations concerned about the issue.

Another welcome initiative is the development by the HSE and An Garda Síochána Missing Persons' Bureau of new national protocols regarding missing children.[16] It is to be hoped that these protocols will address not only the issue of reporting the fact that a child is missing but the question of follow-up mechanisms for all missing children.

Separated Young Adults

When a separated child reaches the age of eighteen, he or she leaves the protection of the State's child care system. Even if the young person has obtained refugee status or been given humanitarian leave to remain in the country, their situation can be precarious: he or she may be very much on their own, at an age when most young people in Ireland are still emotionally and probably economically reliant on their parents and family. For these young people, an aftercare system is crucial, including supervised transitional accommodation and other supports to assist the young person's adjustment to independent living.

'Aged-out Minors'

The term 'aged-out minors' is used to describe young adults who came to Ireland as separated children, and have now passed their eighteenth birthday, but who do not have refugee status or other form of protection. Once these young people leave the child care system, they are transferred, by the Reception and Integration Agency (RIA), to 'direct provision' accommodation where they remain while their application for refugee or protection status is being processed.

There are no exact figures for the number of separated young people over eighteen who are without protection status. However, it appears that during each of the past four years, between 50 and 60 separated children have been transferred to 'direct provision' accommodation, on reaching the age of eighteen.

In some cases, these young people have been waiting for several years (as many as five or more) for a decision on their application for asylum or humanitarian leave to remain. This group is at high risk of going missing. The unique situation of these young people requires a response that is humane and compassionate and fully respects their rights and best interests. They have attended school here, have developed friendships, and may already have children born here; all their support systems are in Ireland and many have become integrated into Irish society. They may either have no family members remaining in their country of origin or have lost contact with them: in effect, if these young people were to be returned to their country of origin, they would be strangers there.

Some provisions of the Immigration, Residence and Protection Bill 2008, if enacted, would have serious consequences for this group. Under existing legislation, an 'aged-out minor' who has been refused asylum or subsidiary protection may be granted leave to remain by the Minister for Justice, Equality and Law Reform. Among the grounds the Minister may consider when making a decision in these cases are 'humanitarian considerations'. The 2008 Bill does provide that the Minister can grant a temporary residence permit to a person who is refused refugee status or subsidiary protection, where there are 'compelling reasons' for so doing. However, two features of the Bill's provisions give rise to concern that the intention is to limit the extent to which account will be taken of humanitarian considerations.

Firstly, the Minister will be required to consider whether the presence of the applicant in the State would give him or her an unfair advantage compared to a person not present in the State but in otherwise similar circumstances.

Secondly, the Minister will not be obliged to take into consideration factors which do not relate to the reasons for the applicant's departure from his or her country of origin or that have arisen since their departure. Strictly interpreted, this could mean that conditions and developments in the country of origin since the applicant left, as well as the personal circumstances of the applicant since their arrival, would be excluded from consideration.

In the case of applications from 'aged-out minors', it would seem the Minister would not be obliged to take account of the degree to which a young person who had come to Ireland as a separated child had become integrated into Irish society; the fact that they had begun a family of their own in Ireland; the fact that the political situation in their country of origin may have deteriorated or that they no longer had contacts in that country.[17] In essence, this provision of the

Bill would mean that a decision affecting the young person's whole future would not take into account critical realities of their life. Many groups commenting on the Bill have called for the restoration of 'humanitarian considerations' as specific grounds for the granting of temporary residence.

Conclusion

Over the past ten years, as significant numbers of separated children arrived in Ireland, it became evident that in many instances the services available were unable to meet the needs being presented. The result was an inadequate level of care, social supports and accommodation.

Services *have* improved somewhat in recent times, and there are encouraging signs of further reform, but there is a considerable way to go before the level of care provided for these children will be in line with that available to other children in care in Ireland – or in line with internationally accepted standards for the care of separated children. It is regrettable that recent efforts to update and reform the law in relation to trafficking and protection have not given due regard to the need to make comprehensive legislative provision for separated children.

On ratifying the UN Convention on the Rights of the Child in 1992, Ireland made a formal declaration to the international community, and indeed to the people of Ireland, that it was committed to the full implementation of the Convention. However, deficiencies in the care and protection systems show that Ireland is failing to keep its commitment in respect of separated children. Reform is urgently needed. A separated child is a child first and a migrant second: Ireland has a duty to vindicate their right to a decent childhood.

Notes

1. United Nations High Commissioner for Refugees, *Guidelines for Formal Determination of the Best Interests of the Child*, Geneva: UNHCR, 2006.
2. *Ibid*., p. 9.
3. UNHCR and Save the Children, *Separated Children in Europe Programme, Statement of Good Practice*, third edition, Copenhagen and Geneva, 2004.
4. Council of Europe, *Report by the Commissioner for Human Rights, Mr. Thomas Hammarberg on his visit to Ireland, 23–30 November 2007*, Strasbourg, 30 April 2008, CommDH(2008)9, n. 48. (http://wcd.coe.int)
5. Irish Refugee Council, *Comments by the Irish Refugee Council on the Immigration, Residence and Protection Bill 2007, in relation to the Protection of Separated Children*, 26 July 2007, n. 3. (www.irishrefugeecouncil.ie)
6. *Our Children: their Lives: National Children's Strategy*, Dublin: Stationery Office, 2000, p. 71.
7. Department of Health and Children, *National Standards for Children's Residential Centres*, Dublin: Stationery Office, 2001.
8. Carl O'Brien, 'Migrant Group Aware of Child Victims', *The Irish Times*, 22 November 2005; Maeve Sheehan, 'Teen Missing from Care Working as a Prostitute', *Sunday Independant*, 12 April 2007.
9 *National Standards for Children's Residential Centres, op. cit*.; Department of Health and Children, *National Standards for Foster Care*, Dublin: Stationery Office, 2003.
10. The Irish Constitution and the UN Convention on the Rights of the Child strongly emphasise the right of the child to a family life.
11. The UN Committee on the Rights of the Child has provided authoritative guidance on the role of such guardians. See: Committee on the Rights of the Child, *Treatment of Unaccompanied and Separated Children outside their Country of Origin*, General Comment No. 6, Geneva: Committee on the Rights of the Child, Thirty-ninth Session, 17 May–3 June 2005. Under Article 12 of the UN Convention, a child has a right to have their views taken into account in any matter affecting him or her, in accordance with his or her age and maturity.
12. The National Children's Strategy states: 'Unaccompanied children seeking refugee status will be treated in accordance with best international practice, including the provision of a designated social worker and Guardian-Ad-Litem'. (p. 71)
13. *Report by the Commissioner for Human Rights, Mr. Thomas Hammarberg on his visit to Ireland, 23–30 November 2007*, Recommendation 11. Mr. Hammarberg's visit 'was part of a continuous process of regular country missions by the Commissioner to all Council of Europe member states to assess their effective respect for human rights'. (n. 1)
14. For example, Ali Bracken, 'Files sent to DPP after Garda Probe into Child Sex Trafficking', *The Sunday Tribune*, 10 February 2008; 'Traffickers may have Brought Minors Here', *The Irish Times*, 21 June 2008; Ruadhán Mac Cormaic, 'Gardaí Believe Teenage girl was Trafficked', *The Irish Times*, 9 July 2008; 'Trafficked Teen Released into Care of HSE, *The Irish Times*, 14 July 2008. See also: Pauline Conroy, *Trafficking in Unaccompanied Minors in Ireland*, Dublin: International Organization for Migration, 2004, and US Department of State, Office of the Under Secretary for Democracy and Global Affairs and Bureau of Public Affairs, *Trafficking in Persons Report*, Washington DC: US Department of State, Publication 11407, June 2008.
15. Department of Justice, Equality and Law Reform, 'Lenihan Announces New Anti Trafficking Unit', Press Release, 20 November 2007. (www.justice.ie)
16. Information contained in Recommendation 11, *Report by the Commissioner for Human Rights, Mr. Thomas Hammarberg on his visit to Ireland, 23–30 November 2007*.
17. Children's Rights Alliance, *Submission to the Select Committee on Justice, Equality, Defence and Women's Rights in Relation to the Immigration, Residence and Protection Bill 2008*, April 2008, n. 5, pp. 7–8. (www.childrensrights.ie)

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The Immigration, Residence and Protection Bill 2008: Well-Founded Fears?

Eugene Quinn

Context

The Immigration, Residence and Protection Bill 2008 has come before the Dáil at a time when there has been a significant reduction in the number of new asylum claims being made in Ireland. In line with European trends, applications have dropped from a peak of 11,634 in 2002 to fewer than 4,000 in 2007.

Announcing the publication of the Bill on 29 January 2008, the then Minister for Justice, Equality and Law Reform, Brian Lenihan TD, said:

The Bill replaces all of the present legislation on immigration, some of which dates back to 1935, and puts in place an integrated statutory framework for the development and implementation of Government immigration policies into the future.[1]

The range and complexity of the immigration and asylum issues covered in the Bill are evident in its sheer size – the text runs to 142 pages. So far, there have been 700 amendments put forward in relation to the Bill, which is currently at Committee Stage, being considered by the Select Committee on Justice, Equality, Defence and Women's Rights.[2]

Anybody reviewing the submissions that have been made on the proposed legislation or following the progress of the Bill through the Dáil, including the deliberations of the Select Committee, would be struck by the degree of polarisation, particularly on asylum and protection issues, among different stakeholders. In an opinion piece in Metro Éireann in February 2008, Conor Lenihan TD, Minister for Integration, commented:

S*ome of the reactions to date [to the Bill] have been somewhat knee-jerk ... and in a way typical of an immigration sector that has been mobilised around the rights-based approach that sits with the determination of asylum matters, rather than bigger-picture migration*.[3]

At the launch of the Bill, the Minister for Justice, Equality and Law Reform emphasised the Government's desire to tackle irregular immigration. He drew attention to the 66 per cent reduction in asylum applications since 2002 and said:

This reduction results from the implementation of strategies aimed at combating, across the spectrum, abuses of the asylum process where 90% of asylum applications are unfounded. This Bill will underpin that strategy by ensuring more efficient and streamlined processing and removals arrangements.[4]

The Minister said also that among the innovative features of the Bill were provisions 'to prevent the misuse of the judicial process by a foreign national solely for the purposes of frustrating their removal from the State'.[5]

Concern about the Bill's Protection Provisions

Many of the specific sections of the Bill which relate to protection,[6] and indeed the overall tenor of the Bill in this area, have given rise to serious concern among a wide range of groups. The United Nations High Commissioner for Refugees, the Irish Human Rights Commission, the Law Society of Ireland, and many non-governmental organisations, including the Jesuit Refugee Service Ireland, have expressed reservations about the proposed legislation.

In submissions to the Joint Committee on Justice, Equality, Defence and Women's Affairs, these organisations have indicated their concern about the Bill's provisions in relation to a range of issues, including detention, carrier sanctions, ministerial discretion, the operation of the Protection Review Tribunal and judicial review. (An analysis of the main concerns raised in the submissions is provided in the Appendix. The analysis has been structured around six different stages in the asylum process: access to the territory; border controls; initial interview; independent appeal; judicial review; return.)

While the reservations raised about the Bill's protection provisions have been the subject of

considerable public and political debate, so far it is not evident that the Government is prepared to respond by amending the Bill. Of the 700 amendments that have been proposed, 200 have been by the Government itself. However, as *The Irish Times* noted on 21 April 2008, the majority of these relate to provisions affecting legal migrant workers and 'there is less willingness to change provisions on asylum, which have been the focus of many of the Bill's critics'.[7]

One of the main reasons that a higher political priority is being accorded to labour migration than to protection concerns lies in the scale of immigration relative to asylum applications. In 2002, when total net inward migration stood at 40,000, there were not far off 12,000 new applicants for asylum. The proportion of persons seeking asylum relative to labour migrants has declined significantly since then, particularly since the accession of ten new EU Member States on 1 May 2004 and the passage of legislation following the Citizenship Referendum in June 2004. By 2007, when inward migration to Ireland reached almost 70,000, there were, as already noted, just below 4,000 applications for asylum.[8]

Underlying Dilemmas

Underlying the framing of legislation and policy in regard to protection are certain key dilemmas which arise from competing rights. Many of the contested provisions in the 2008 Bill reflect this tension between different sets of rights. The debate about these contentious provisions is also, of course, heavily influenced by political realities.

From an Irish legislator's perspective, a balance has to be struck between the right of the State to control its borders and the right of individuals to seek protection. In this process, account has to be taken of the fact that Ireland is subject to obligations under international law, as well as those arising from being an EU Member State.

A major factor complicating the development and implementation of asylum legislation is the phenomenon of 'mixed flows' – the reality that 'among those seeking asylum [are] significant numbers of persons seeking economic betterment rather than protection'.[9] It is now generally accepted that the demand for legal migration into industrialised countries far outstrips the number of opportunities provided. Where legal immigration channels become 'plugged', then economic migrants may seek access via the asylum channel. In its 2005 report, *Migration in an Interconnected World*, the Global Commission on International Migration acknowledged the challenge represented by economic migrants submitting a claim for asylum 'in the hope of gaining the privileges associated with refugee status'.[10]

In the case of Ireland, a legal immigration route does not *de facto* exist for the vast majority of people from outside the European Economic Area (EEA); consequently, some will seek to access the territory via the asylum process – and inevitably the State will seek to implement policies to prevent this.

A balance has to be struck between the right of the State to control its borders and the right of individuals to seek protection

A second factor is the increasing sophistication of traffickers and other criminal agents involved in the movement of people across borders. Their activities pose significant challenges to states and to asylum determination systems, and significant risks for the people who in desperation avail of their services. How do asylum determination systems deal with people who arrive in the country with the assistance of traffickers but who, on the instructions of the traffickers, have destroyed their travel documents en route and relate an invented story to immigration officials? For genuine protection applicants who unquestioningly follow such instructions the consequence may be the fatal undermining of the credibility of their protection claim.

A third factor motivating states to restrict access is the difficulty of enforcing negative decisions in asylum cases. While the public may, in theory, favour removal of those whose application has been denied, there is often ambivalence in individual cases (such as those which have received high-profile coverage in the Irish media over the past few years) where people do not perceive there is an issue of public safety. On 24 July 2008, during the Committee Stage debate on the Immigration, Residence and Protection Bill, Barry Andrews TD, Minister for Children, acknowledged that 'as few as 21% of all

deportation orders signed in the last four years were executed'.[11]

A fourth factor is the political reality that individual EU Member States (including Ireland) do not wish to appear to be more 'asylum friendly' – by having better standards of protection – than other Member States, for fear of receiving a disproportionate share of asylum claims within the EU.

That these various underlying motivations will have an impact on asylum policy is understandable but if the net result is that genuine asylum applicants are denied access to the territory, or to a fair hearing, then the human costs of such a policy approach are unacceptable.

Ultimately, at the heart of the issue of asylum policy is the question of credibility. From the perspective of the State, the credibility of the personal stories of individuals seeking asylum is paramount in a process which is intended to be non-adversarial. From the perspective of asylum seekers and advocates of those seeking asylum, the credibility of the asylum process is key to ensuring that each applicant receives a full and fair hearing. However, applicants often allege that, rather than the State examining the case put forward by individual applicants in an open-minded manner, there exists a 'culture of disbelief', so that the system is in effect biased against those seeking protection.[12]

JRS Ireland Protection Concerns

In this section, the main concerns of the Jesuit Refugee Service (JRS) Ireland in relation to the Immigration, Residence and Protection Bill 2008 are outlined.[13]

1. Immigration and Protection – Tension in Legislation

The process that led to the publication in January 2008 of the Immigration, Residence and Protection Bill 2008 could be said to have started in April 2005 when the Government published a discussion document, *Immigration and Residence in Ireland: Outline Policy Proposals for an Immigration and Residence Bill.*

The document was explicit that its focus was on proposals for the reform and consolidation of the law governing immigration, not asylum:

In general, the Bill will not deal with the area of asylum, an area where policy is well developed and where legislation has been substantially revised in recent times in the Refugee Act 1996 and subsequent amendments.[14]

However, with the publication in September 2006 of the document, *Scheme of the Immigration, Residency and* ***Protection*** *Bill 2006* (emphasis added), it became apparent that the proposed legislation would, after all, cover asylum issues. In its observations on the Scheme, the Irish Human Rights Commission (IHRC) highlighted the inherent tension that exists when asylum and other protection issues are included alongside general provisions on immigration in the one piece of legislation. IHRC believed that including protection legislation in an act that also dealt with general immigration carried 'the potential to create legal uncertainty for the status of protection applicants' and saw a danger that 'access to the protection determination process may be impeded in practice'.[15]

Ultimately, at the heart of the issue of asylum policy is the question of credibility

Despite the reservations that were voiced following the publication of the 2006 Scheme, provisions in relation to protection *were* included in the Bill published in January 2008. JRS Ireland shares the concern expressed by many other organisations in their submissions on the Bill that there are inherent difficulties in including immigration and protection in the one piece of legislation. The Law Society of Ireland, for example, referred to 'an uneasy tension in the Bill between the law on immigration and the law relating to protection' and said that it 'would like to see these two areas of law dealt with separately and comprehensively'.

The Law Society went on to say:

Immigration and Protection law present the State with different challenges. Immigration law will always be related to the power of the State to control the entry, residence and removal of foreign nationals. Protection, on the other hand, raises very serious human rights considerations, most particularly, the right to non-refoulement.[16]

A key danger of the legislative approach currently being proposed is that in certain circumstances persons seeking protection may find themselves, through no fault of their own, to be unlawfully in the State and therefore subject to arrest, detention and removal under general immigration provisions.

2. Leave to Remain

In its 1992 document, *Refugees: A Challenge to Solidarity*, the Pontifical Council for the Pastoral Care of Migrants and Itinerant People called for asylum systems to take account of the needs of people who fall outside the strict definition of 'refugee' under the Geneva Convention but whose circumstances are such that they are *de facto* refugees. The Pontifical Council mentioned specifically those who are victims of armed conflict, natural disasters, and 'economic conditions that threaten [people's] lives and physical safety'.[17]

JRS Ireland believes that protection systems must be able to respond to the humanitarian issues that arise as a result of these various forms of enforced migration.

The reality of *de facto* refugees is acknowledged in the EU document, *Policy Plan on Asylum: An Integrated Approach to Protection across the EU*, adopted by the EU Commission on 17 June 2008. The *Policy Plan* notes that 'an ever-growing percentage of applicants are granted subsidiary protection or other kinds of protection status based on national law, rather than refugee status according to the Geneva Convention. This is probably due to the fact that an increasing share of today's conflicts and persecutions are not covered by the Convention.'[18]

In Ireland at present a person who has been refused a declaration as a refugee may be granted 'subsidiary protection', if they are deemed to be at risk of suffering serious harm should they be returned to their country of origin. Even if a person qualifies for neither refugee status nor subsidiary protection, he or she may be given 'leave to remain' in the State under Section 3 of the Immigration Act, 1999.

Leave to remain is granted at the discretion of the Minister for Justice, Equality and Law Reform, usually on humanitarian grounds. Under the current legislation, a person has the right to apply for leave to remain after their application for asylum has been rejected, or to withdraw from the asylum process before its conclusion and seek leave to remain. In the period 2000–2005, a total of 617 people were granted leave to remain, the vast majority of whom had been asylum seekers.[19]

A person given leave to remain in Ireland does not have all of the rights granted to those who have been accorded refugee status. For example, he or she is not eligible for 'free fees' for university education, whereas a person with refugee status who has been resident in an EU country for at least three years does qualify.[20] Moreover, a person with leave to remain does not have the right to family reunification; however, anyone who is entitled to reside and remain in the State may apply to the Minister requesting that family members be permitted to join them.

Right to stay, right to work campaign *© D. Speirs*

The Immigration, Residence and Protection Bill 2008 proposes a 'single procedure' for dealing with applications from those seeking protection. The Bill specifies that the Minister should assess, in order, (1) whether someone is entitled to protection on the grounds that they are eligible for refugee status; (2) whether they are eligible for subsidiary protection; (3) whether the principle of *non-refoulement* under the Geneva Convention requires that they should not be returned to a country where their life may be in danger, and (4) whether there are other 'compelling reasons' they should be granted protection.

It remains to be clarified what will constitute 'compelling reasons', but it is significant and worrying that the Bill does not specifically provide that a person may apply to the Minister for permission to stay in the State on humanitarian grounds. Only in respect of procedures for revocation of residence permission or of a

protection declaration does the draft legislation specify that humanitarian considerations should be taken into account.[21]

It seems clear that there are persons who are deserving of the protection of the State who may not meet the criteria for protection under the single procedure proposed in the Bill. It is imperative, therefore, that the proposed legislation should be amended to include specific provision, similar to that which exists in Section 3 of the Immigration Act, 1999, to enable people facing removal to seek permission to remain on humanitarian grounds.

3. Treatment of Vulnerable Asylum Seekers

In the on-going process of establishing a Common European Asylum System (CEAS) within the EU, attention has been drawn to the importance of taking account of the special needs of vulnerable groups. Article 17.1 of the EU Reception Conditions Directive of 2003 is explicit about the obligations of EU Member States to frame reception policies that are cognisant of the needs of vulnerable persons:

Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, in the national legislation implementing the provisions of Chapter II relating to material reception conditions and health care.[22]

Regrettably, Ireland has opted out of the Reception Directive so these provisions are not applicable in this country.[23]

In its submission to the Select Committee on the Immigration, Residence and Protection Bill, JRS Ireland argued that the proposed new protection legislation should reflect the special needs of vulnerable groups where relevant, and should in particular include a provision to ensure that people in such groups would not be detained. The submission stated:

Section 58 (1) which excludes minors from detention, should be expanded to include other vulnerable categories of detainees such as pregnant and lactating women, traumatised persons, persons with special physical or mental health needs, persons older than 65 years and chronically or seriously ill persons and families with children.[24]

During the Committee Stage Debate on the Bill, Denis Naughten TD (Fine Gael), queried whether there were vulnerable groups other than unaccompanied minors whose specific needs should be recognised in the legislation. Barry Andrews TD, Minister for Children, acknowledged the concern but did not give any commitment that the matter would be addressed at the Report Stage of the Bill.

JRS Ireland urges that the needs of the different categories of vulnerable protection applicants identified above be specifically recognised through amendments to the current Bill, particularly in its provisions relating to detention and to procedures for assessing an asylum claim.

4. Immigration Related Detention

The Immigration, Residence and Protection Bill provides for four categories of immigration related detention. Three of these categories exist under current legislation: detention of persons refused permission to enter, detention of protection applicants, and detention pending removal. The additional category allows for the detention of a protection applicant while he or she is awaiting the issuing of a 'protection application entry permit' – a permit which allows a protection applicant enter or remain in the State for the purpose of having his or her claim investigated.

As Table 1 indicates, official figures show there was a decline in the numbers detained under immigration provisions in the years 2003–2005. However, in 2006, there was a reversal of this trend, with detentions rising by 39 per cent from the 2005 figure.

Table 1: Number of Immigration Related Detentions in Irish Prisons 2003 to 2006

Year	Detentions
2003	1,852
2004	946
2005	860
2006	1,196

Source: *Annual Reports of the Irish Prison Service, 2003–2006*

A further indication that there may be an upward trend in immigration related detention is contained in the 2007 Annual Report of the Office of the Refugee Applications Commissioner (ORAC). The Report notes an increase during that year in the number of asylum claims received from people detained in prison: 385 such applications were received, and these constituted almost 10 per cent of total asylum applications in 2007.[25] In 2006, applications received from people in detention represented just under 6 per cent of the total.

Among key changes to the detention provisions of the Immigration, Residence and Protection Bill 2008 which JRS Ireland recommends are:

- Immigration detainees should not be detained in prisons;
- Certain vulnerable categories of protection applicants should not be detained;
- Detention of protection applicants while they are waiting for a protection application entry permit to be issued is not justified as the issuing of a permit is purely a question of administrative capacity;
- The grounds for detaining asylum applicants at the start of the process should be narrowed;
- The maximum duration of detention of protection applicants, which as currently outlined in the Bill could be potentially indefinite, should be specified as eight weeks, in line with the operational maximum that exists in practice;
- The lawfulness of any detention for the purposes of removal from the State should be assessed by a judicial authority.

Overall, JRS Ireland believes there is considerable scope for exploring alternatives to detention. Such non-custodial alternatives would allow for significant savings in financial terms, and would avoid the substantial human costs which are imposed on those detained. A welcome feature of the Immigration, Residence and Protection Bill 2008 is that it allows for the release of protection applicants subject to their providing a bond or securing a surety or guarantee for the performance of the conditions of release.

5. Need for a Wider Entry Route for Legal Migrants

The Immigration, Residence and Protection Bill 2008 has been presented by the Government as if it will become the overarching piece of immigration legislation, filling gaps in legislative provision in this area. From the time it was first proposed in 2005 through to the present, new legislation in this area has been the subject of widespread public consultation and debate.

In reality, however, legislation and policy on immigration and protection have been already significantly shaped by the provisions of the Employment Permits Act 2006 – legislation that was prepared by the Department of Enterprise, Trade and Employment and enacted with much less fanfare than that accompanying the current Bill. A key concern of the Government in bringing forward that legislation was revealed in a comment of the then Minister for Enterprise, Trade and Employment, Micheál Martin TD, in introducing the Second Stage of the Employment Permits Bill 2005 to the Dáil. Mr Martin said: 'we must maximise the potential for European Economic Area nationals to fill most of our skills deficits'.[26]

The Employment Permits Act has had profound implications for the ability of people from outside the EEA to legally enter the country: in effect, non-EEA nationals can now only access certain jobs which have a salary of €30,000+ in specific sectors of the economy where there are skill shortages. In other words, a legal route for migration into Ireland has been effectively closed to the vast majority of people outside the EEA.

The Immigration, Residence and Protection Bill 2008 will not fundamentally alter this reality. The Bill grants to migrant workers legally present in the country some additional rights and it appears that these are to be further enhanced as a result of amendments being proposed by the Government.

The motivation for moving to provide these enhanced rights was clearly a concern that skilled migrants were leaving Ireland to go to other western countries. In April 2008, Conor Lenihan TD, Minister for Integration, suggested that Ireland would have to 'fight hard' to retain migrants at a time of global competition for skilled workers. He added: 'For this reason, the Immigration Bill currently going through the Dáil will need to be amended, and in a fashion that explicitly makes us more attractive to immigrants.'[27]

In the view of JRS Ireland, reform has to go further than this. At present, it is clear that overall asylum policy is being shaped to a significant degree by the drive to implement ever more

restrictive controls on access to the territory in response to the 'mixed flows' of migrant workers and protection applicants already referred to.[28] Such a restrictive approach is not only ultimately inefficient but is prone to creating injustices in individual cases. Offering a permanent legal route for migration into Ireland, perhaps through a quota or points system, could be part of a fairer and more durable solution.

Trends in EU Protection Policies

The Immigration, Residence and Protection Bill 2008 cannot be reviewed without considering the wider EU policy context. In general, Ireland has reflected EU trends in asylum applications and its policies have been influenced by developments at EU level.

1. Declining Asylum Claims

The statistical review, *Asylum Levels and Trends in Industrialized Countries 2007*, issued by the Office of the United Nations High Commissioner for Refugees (UNHCR), shows the first increase in five years in asylum applications received by developed countries, reversing a downward trend that had resulted in a twenty-year low being recorded in 2006. Despite the increase in 2007, the number of asylum claims received by EU Member States was still only half that in 2001.[29]

The overall decline in numbers in this decade is due in part to increasing stability in Europe, particularly in areas that accounted for large numbers of asylum seekers in the past – for example, the Balkans. It can be attributed also to the increasingly tough and restrictive practices of EU Member States which not only make it harder for asylum seekers to reach Europe, but make Europe as a region a less attractive asylum destination. More restrictive controls undoubtedly deny entry not only to those who are not entitled to enter, but also to many with a genuine right to protection. The closing of Europe's borders has led to accusations of a move towards a 'Fortress Europe'.

2. Asylum Lottery

There are wide variations in refugee recognition rates between EU countries, as shown in Table 2 below. It should be noted that variations between countries exist also in the proportion of applicants accepted on appeal or granted subsidiary protection. These variations between countries in the protections offered have given rise to what some critics call 'the lottery of asylum' in Europe.

The EU document, *Policy Plan on Asylum: An Integrated Approach to Protection across the EU*, acknowledges that the differences between Members States 'in decisions to recognise or reject asylum requests from applicants from the same countries of origin point to a critical flaw in the current CEAS [Common European Asylum System]'.[30]

On the other hand, the European Commission believes that 'secondary' movements – the phenomenon of asylum-seekers moving from one Member State to another – and multiple applications for asylum place an unfair strain on some national administrations and on asylum seekers themselves.[31]

3. Enhanced Cooperation

The EU *Policy Plan on Asylum*, in outlining the next stage of the process of creating a Common European Asylum System (CEAS), states:

As a whole, the first phase legislative instruments of the CEAS can be considered as an important achievement and form the basis on which the

Table 2: Refugee Recognition Rates at the First Instance in Selected EU Member States, 2000–2007

Country of Asylum	2000	2001	2002	2003	2004*	2005*	2006	2007
Austria	17.3%	23.1%	20.0%	29.6%	46%	43%	37.5%	38.6%
Cyprus	14.9%	11.0%	10.8%	11.1%	1%	1%	1.9%	1.4%
Denmark	17.1%	21.2%	12.7%	14.5%	5%	7%	13.8%	12.9%
Germany	15.0%	23.6%	7.2%	4.3%	4%	5%	5.2%	17.7%
Ireland	4.2%	9.0%	12.8%	5.9%	8%	10%	10.9%	12.5%
Sweden	2.1%	1.1%	1.1%	1.7%	1%	2%	4.4%	3.2%
UK	25.7%	11.6%	12.5%	8.0%	4%	8%	12.1%	19.6%
EU25**	17.0%	14.1%	9.3%	8.0%				

**Only rounded figures available in UNHCR statistics for 2004 and 2005*

***EU 25 subtotal not provided in annual statistics after 2003*

second phase must be built. However, shortcomings have been identified and it is clear that the agreed common minimum standards have not created the desired level playing field.[32]

In reality, it appears that the main focus of EU 'enhanced cooperation' on immigration and asylum policy has been to combat irregular migration. A host of *internal* policies (including carrier sanctions, visa restrictions, integrated border management initiatives), and *external* policies (including re-admission agreements and regional protection programmes), emphasise barriers to entry rather than protection of migrants.

In addition, more restrictive reception conditions in Member States have been introduced, making the stay of asylum seekers increasingly difficult. In Ireland's case, asylum seekers are denied the right to work and are provided with 'direct provision' accommodation, food and a token social welfare benefit (the direct provision benefit of €19.10 per adult per week has not increased since its inception in 2000).

In a report in March 2007, the Rapporteur for the Committee on Migration, Refugees and Population of the Parliamentary Assembly of the Council of Europe commented on asylum trends as follows:

While considering that the fight against terrorism and irregular migration are legitimate concerns for Council of Europe member states, your Rapporteur is concerned that these policies negatively impact on the effective possibility for persons in need of protection to claim and enjoy asylum in Europe.[33]

The Rapporteur's comments were, of course, directed towards the situation in the forty-seven Council of Europe states as a whole, but they are also an apt summation of the current situation within the EU.

Conclusion

The 'push' and 'pull' factors of international migration have become ever more intertwined. It is a significant challenge for protection systems to fairly and without undue delay adjudicate on whether an applicant's claim is based on the need for protection or is prompted by the desire for a better life. It is at times an unenviable task for those responsible for making and implementing policy to try to strike the right balance between border controls and individuals' right to protection.

Without doubt, the Immigration, Residence and Protection Bill 2008 contains provisions which if implemented would represent significant improvements in the immigration and asylum systems of this country. JRS Ireland particularly welcomes the introduction of a single procedure for determining refugee status and other forms of protection. Increased efficiency arising from the single procedure should be of considerable benefit to protection applicants.

However, JRS Ireland shares the concern of many other advocates that the Bill's emphasis on combating unfounded asylum claims will result in denying genuine protection applicants the right to seek protection and the right to a full and fair hearing.

This article has outlined reservations about the Bill's provisions as they relate to five key issues. Firstly, the 'inherent tension' between protection provisions and general immigration provisions makes the inclusion of both in the same piece of legislation highly questionable. Secondly, the current legislative proposals need to be amended to ensure that humanitarian leave to remain will continue to be an explicit component of the protection framework. Thirdly, the new legislation must give greater regard than is currently proposed to the special needs of vulnerable groups seeking protection. Fourthly, legislation and practice should provide for increased recourse to non-custodial alternatives to detention, which would allow for significant savings in terms of both human and financial costs. Finally, in dealing with the challenge of 'mixed flows' among protection applicants there is a role for positive immigration measures that offer people from outside the EEA a legal route to reside and work in Ireland.

Notes

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2. Select Committee on Justice, Equality, Defence and Women's Affairs, *Committee Stage Amendments – Immigration, Residence and Protection Bill 2008. (*www.oireachtas.ie)
3. 'Identity Politics will only Harm, not Help', *Metro Éireann*, 28 February 2008.
4. Department of Justice, Equality and Law Reform, Press Release, 29 January 2008

5. *Ibid.*
6. The terms 'protection' and 'asylum' are often used interchangeably. The Hague/UNESCO Process Handbook 2008 defines asylum as 'the grant, by a state, of protection on its territory to (a) person(s) from another state fleeing persecution or serious danger'. Protection is defined as 'all activities aimed at obtaining full respect for the rights of the individual in accordance with the letter and spirit of human rights, refugee and international humanitarian law'. In general, the scope of protection provisions could be interpreted as wider than asylum granted under the Geneva Convention, including humanitarian leave to remain and other complementary forms of state protection.
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17. Pontifical Council for the Pastoral Care of Migrants and Itinerant People, *Refugees: A Challenge to Solidarity*, 1992, n. 4. (www.vatican.va)
18. Commission of the European Communities, *Policy Plan on Asylum: An Integrated Approach to Protection across the EU*, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Brussels: Commission of the European Communities, 17 June 2008, n. 1.3, p. 3.
19. Department of Justice, Equality and Law Reform, *Annual Report 2007*, Dublin: Department of Justice, Equality and Law Reform, 2008, p. 28.
20. Refugee Information Service, 'What are my Rights?' (http://www.ris.ie/whataremyrights/refugee.asp)
21. Immigration, Residence and Protection Bill 2008, Section 45: 'Procedure for the revocation of renewable residence permission, qualified long-term residence permission or long-term residence permission'; Section 100: 'Procedure for revocation of protection declaration'.
22. Council of the European Union, 'Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers', *Official Journal of the European Union*, L 31/18, 6.2.2003.
23. Generally, when Ireland has opted out of EU immigration and asylum legislation it has been following a UK lead – this is because of the existence of the Common Travel Area between the two states. However, this is not the case with regard to the Reception Directive where Denmark is the only other country to have opted out.
24. Jesuit Refugee Service Ireland, *op. cit*., p. 11.
25. Office of the Refugee Applications Commissioner, *Annual Report 2007,* Dublin: ORAC.
26. Micheál Martin TD, Minister for Enterprise, Trade and Employment, Second Stage Speech on the Employment Permits Bill 2005, 12 October 2005, *Dáil Debate*, Vol. 607, No. 3. (http://debates.oireachtas.ie)
27. *Metro Éireann*, 17 April 2008.
28. The term 'asylum–migration nexus' is frequently used to describe this phenomenon. The term reflects the fact that migrants and refugees arrive in mixed flows and that increasingly the distinction between 'refugee' and 'migrant' is hard to establish at both a theoretical and practical level.
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31 Questions and Answers on the Policy Plan on Asylum, MEMO/08/403, Brussels, 17 June 2008. (www.europa.eu/rapid)
32. Commission of the European Communities, *Policy Plan on Asylum: An Integrated Approach to Protection across the EU, op. cit*., n. 3, p. 4.
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Appendix
Immigration, Residence and Protection Bill 2008: Analysis of Protection Concerns

Stage in Asylum Process	Legislative Provision	Intended Aim of Legislative Provision	Concerns about Legislative Provision
Access to the Territory	Carrier sanctions	Ensure carriers meet their immigration responsibilities in regard to persons they carry	May undermine the right to seek asylum; outsources immigration controls
	Detention of protection permit applicants	Provide an option if protection permit cannot be issued for administrative reasons	Not proportionate to detain people because of insufficient administrative capacity; no time limit on detention
Border Controls	Detention of asylum seekers at the start of the process	Provide the option of detention where immigration officials believe there is 'reasonable cause'	Grounds for detention are very wide; detention of vulnerable groups not excluded
Initial Interview and Independent Appeal	Single procedure for protection claims	Provide a single procedure which can effectively and speedily assess all protection claims	Failure to specify 'leave to remain on humanitarian grounds' means potentially omitting a key element of the wider protection framework
	Definition of 'refugee', and of 'persecution', 'actors of protection' and 'exclusion'	Ensure clarity in definitions and consistency with other EU Member States	Concern whether definitions are in line with 1951 Convention; risk infingement of the principle of *non-refoulment*
	Definition of 'withdrawn' and 'deemed withdrawn' claims	Provide clear ending to the process for people not genuinely pursuing their applications	Risk infringement of the principle of *non-refoulment*; procedural safeguards insufficient
	Assessment of credibility of claim	Ensure it is possible to ascertain if claim has been made in good faith and not in order to circumvent immigration controls	Does not allow for benefit of the doubt when applicant has made a genuine effort to substantiate claim
Independent Appeal	Independent appeals body – the Protection Review Tribunal	Provide an independent appeals mechanism that addresses the concerns raised by the Supreme Court about the existing agency, the Refugee Appeals Tribunal	Decisions of Protection Review Tribunal will not be published; concerns about the process for appointing the chairperson and members of the Tribunal
Judicial Review	Access to judicial review	Curb alleged excessive recourse by protection applicants to expensive and time-consuming judicial review	Provision will infringe an essential right; access already unequal compared to Irish citizens
	Non-suspensive effect	Restrict the taking of legal actions that have the sole aim of frustrating removal	Undermines access to justice; may amount to breach of the principle of *non-refoulment*
	Costs awarded against people bringing frivolous or vexatious claims	Restrict the taking of unfounded legal actions with the sole aim of frustrating removal	Undermines access to justice
Removal	Detention of persons prior to removal	Prevent people absconding to avoid removal	Lack of requirement that detention prior to removal should be authorised by a judicial authority
	Summary removal process	Allows for more efficient removal procedures	Lack of requirement that removal should be authorised by a judicial authority