By post and e-mail
To All Members of the
UN Human Rights Committee
Office of the High Commissioner for Human Rights
Palais des Nations
CH-1211 GENEVA 10
Switzerland

30th May 2008

RE: 3rd Periodic Report of Ireland – list of issues

Dear Committee Members,

We refer to the above and would like to raise a number of issues affecting migrants and their family members in Ireland arising from the list of issues published on the website of the Office of the High Commissioner for Human Rights, CCPR/C/IRE/Q/3 2 May 2008.

We hope that the following comments will further assist the Committee with its examination:

12. While the legislation on human trafficking mainly addresses this issue from a criminal law angle, please provide further information on other measures and programmes carried out by the State party to assist the victims of human trafficking. Please specify the legal provisions regarding the protection of victims of trafficking.

The provisions now contained in Section 124 of the Immigration, Residence and Protection Bill, 2008 fall short of Ireland’s obligations under the Council of Europe Convention on Actions to Combat Human Trafficking which entered into force on 1 February 2008.

Most importantly, the Convention applies to all forms of trafficking in human beings, whether national or transnational, and would certainly apply to all victims of trafficking, regardless of their nationality. By comparison, Section 124 of the Bill only applies to ‘foreign nationals’ who are defined in Section 2(f) as a person who is neither - (a) an Irish citizen, nor (b) a person who has established a right to enter and be present in the State under the EC Regulations. In other words, EU/EEA nationals are generally excluded from its application. Thus a large proportion of those
trafficked into Ireland for the purpose of sexual or other types of exploitation will not be able to avail of the protection guaranteed by the Convention.

The ICI is concerned that the recovery period of 45 days provided in Section 124(1) in conjunction with Section 124(3), during which a victim of trafficking can make an informed decision as to whether to assist the Garda Síochána or other relevant authorities, is unnecessarily short, particularly in circumstances where Section 124 does not allow for an extension of this period. Victims of trafficking will often be highly traumatised and may not recover sufficiently within 45 days to make an informed decision about whether to participate in an investigation or prosecution.

The ICI is deeply concerned that, under Section 124(7), a temporary residence permit may only be issued in circumstances where the Minister is “satisfied that it is necessary for the purposes of allowing the suspected victim to continue to assist the Garda Síochána or other relevant authorities in relation to any investigation or prosecution arising in relation to the trafficking”. This will not allow the victim to remain in Ireland in order to pursue a civil action against traffickers and it fails to provide an avenue to residence on humanitarian grounds for victims who are too traumatised to return to their country of origin.

Overall, the Bill leaves victims of trafficking in a situation of passivity by not allowing them, or people acting on their behalf, to make applications for recovery and/or protection residence permits. Instead, the impetus for granting these permits must come from either the Garda Síochána or the Minister. The ICI does not believe that this process will assist the victims in their long-term recovery and re-integration and that it might instead perpetuate their victimisation.

Additionally, the Convention requires the adoption of legislative and other measures ensuring minimum assistance including at least:

- standards of living capable of ensuring their subsistence, through such measures as: appropriate and secure accommodation, psychological and material assistance;
- access to emergency medical treatment;
- translation and interpretation services, when appropriate;
- counselling and information, in particular as regards their legal rights and the services available to them, in a language that they can understand;
- assistance to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders; and
- access to education for children.

While these rights may be provided through ‘other measures’, it is the ICI’s belief that the rights of victims of trafficking should be enshrined in primary legislation in order to guarantee adequate and ongoing protection which is subject to full parliamentary scrutiny and meets the standards set by the Convention.

The ICI is particularly concerned that child victims of trafficking may not be adequately protected through the provisions contained in the Bill: Section 24(1)(b) – Arrival of persons under age of 18 years – should be amended to allow immigration
officers to require verification that adults accompanying children are in fact authorised to take responsibility for the child concerned.

15. **Please explain the compatibility of the Immigration, Residence and Protection Bill of 2007 with the Covenant, in particular the power of the State party to arrest, detain and remove any person who is unlawfully on the State territory without advance notice and without the possibility to make representations within 14 days (Sections 5, 51 and 52 of the bill).**

The **Immigration, Residence and Protection Bill, 2008** – as currently drafted – allows for the deportation without notice of any person who is ‘unlawfully present’ in the State.

The ICI is concerned that the abolition of the ‘Section 3 process’ and the introduction of summary deportations will prevent migrants in an irregular migration situation from being able to access voluntary return programmes carried out by organisations such as the International Organisation for Migration (IOM). Without adequate time to consider voluntary return and for the IOM to make the relevant arrangements, the State will find itself in a situation where more and more deportations will be carried out unnecessarily, at a high cost to the exchequer.

**Section 4(5) provides** a significant new power that will be vested in the State and effectively abolishes the ‘Section 3 process’ established in the Immigration Act, 1999 as amended. Currently, a person who has entered and is residing in Ireland without permission can be removed from the State on foot of a deportation order. The deportation order requires notice and the person concerned is given 15 working days to make submissions as to why he or she should not be removed from the State. Those reasons can include matters such as family circumstances, duration of residence in Ireland and humanitarian considerations.

In fact, the Supreme Court in **Bode & ors v. Minister for Justice, Equality & Law Reform** held as recently as December 2007 that “in making a deportation order the Minister must comply with Section 3 of the Immigration Act, 1999 as amended. The Minister is required to have regard to a wide range of matters in Section 3(6) of the Immigration Act, 1999 (...). Thus, bearing in mind the case law of this Court, the Minister is required to consider in this context Constitutional and Convention rights of the applicants. The Section 3 process is sufficiently wide ranging for the Minister to exercise his duty to consider Constitutional or Convention rights of the applicants”.

The repeal of Section 3 of the Immigration Act, 1999 without an equivalent replacement in the Immigration, Residence and Protection Bill, 2008 is of grave concern to the ICI as it may lead to the summary deportation of vulnerable migrants who may have become unlawfully resident in the State through no fault of their own.

We believe there must be an avenue to deal with and provide for persons in exceptional circumstances. Currently, the Bill provides the Minister, and officers acting on his behalf, no flexibility to deal with persons whose residence permits are non-renewable, or who were not able to apply for a modification of their existing residence permit on grounds set out in Section 33, or who did not manage to apply for
the renewal of their permit within the time period specified in Section 32(4) and (5) of the Bill. Once classified as ‘unlawfully present’ a foreign national no longer has any possibility of regularising his or her status in the State.

The ICI believes that the Bill needs to make clear that discretion can be exercised to take into account exceptional cases. For example, if a woman, resident here on the basis of a marriage to an Irish national, suffers domestic violence and no longer lives in the same household with her husband, she would need to apply for the modification of her residence permit in order to remain in the State. Where she has not done so within three months from the expiry of her current permit, the legislation as drafted does not allow for the renewal of her permit even if the reason for her failure to apply are threats made by her husband to have her deported if she went near the Gardaí.

Section 4(5), 54(1) and 55(1) of the Bill seem to be in direct conflict with the recent Supreme Court judgments in the cases of Oguekwe v. Minister for Justice, Equality & Law Reform¹ and Dimbo v. Minister for Justice, Equality & Law Reform² in that no consideration of constitutional and Convention rights is required prior to the arrest, detention and removal of a person who ‘appears’ to be ‘unlawfully present in the State’.

16. Please provide information regarding the Nationality and Citizenship Act 2004 and the Supreme Court ruling, which reportedly makes it possible that the non-Irish parents of an Irish child may not be entitled to reside in Ireland or may even be deported.

There has been a series of Supreme Court rulings regarding the status of parents of Irish citizen children in the State. In the 1990 case of Fajujonu v. Minister for Justice and another³, the Court clarified that "(...)parents who are not citizens and who are aliens cannot, by reason of their having as members of their family children born in Ireland who are citizens, claim any constitutional right of a particular kind to remain in Ireland, they are entitled to assert a choice of residence on behalf of their infant children, in the interests of those infant children."

However, in that particular case, the Court held that the reason which would justify the removal of the family "three of whom are citizens of Ireland" from the State would have to be "a grave and substantial reason associated with the common good." There were specific circumstances in the Fajujonu case to which the Minister had to have regard, together with the constitutional rights of the family and any other matters relevant to their continued stay in the State which might come to the Minister's attention, i.e.

1. the "appreciable time" (approximately eight years at the date of the hearing in the Court) for which they had resided as a family in Ireland;  
2. the fact that the family had made its "home and residence" in Ireland; and

¹ [2008] IESC 25, 1st May 2008,  
http://www.courts.ie/judgments/2008/05/31/46682159/05369626710347d5f3f8f1376d053685/1f5bae481d8b80f2578d5d03aef0900?OpenDocument  
² [2008] IESC 26, 1st May 2008,  
http://www.courts.ie/judgments/26/1f5ef56e73f3674663e0f705f8f25743d0f03b4a090f00900?OpenDocument  
³ [1990] 2 IR 151
3. the fact that the first plaintiff had been offered employment, that the relevant authority was prepared to issue him a work permit and that the only ground on which a permit would not be issued was that the Minister in that case had refused to grant him permission to stay in Ireland.

Following the Fajujonu judgment, parents of Irish citizen children were routinely granted permission to remain in State. However, as numbers of immigrants into the State were growing and more and more people lodged applications for permission to remain in the State on the basis of their parentage to an Irish citizen child, the Minister for Justice, Equality & Law Reform began to refuse residence permit applications.

On 23rd January 2003, the Supreme Court delivered its judgment in the cases of Lobe & Osayande v. The Minister for Justice, Equality & Law Reform. The Court confirmed that “the Minister must consider each case involving deportation on its individual merits, he is undoubtedly entitled to take into account the policy considerations which would arise from allowing a particular applicant to remain where that would inevitably lead to similar decisions in other cases, again undermining the orderly administration of the immigration and asylum system.” However, distinguishing the present cases from the Fajujonu case, the Court went on to say that “those considerations did not arise to anything like the same extent (if indeed they arose at all) at the time the Fajujonu case was decided and, so far as the report of the case goes, were not relied on in any way by the Minister”.

Following the Lobe & Osayande cases, the Irish Government suspended its previous practice of granting residency to parents of Irish citizen children, leaving a total of 10,497 people in limbo. In July of 2003, the Minister for Justice, Equality & Law Reform began issuing notifications of intention to deport parents who had no legal basis for remaining in the State other than their Irish citizen child(ren). By late 2003, up to 700 such notifications had been issued and by late 2004, 37 parents of Irish citizen children had been deported.

Following the enactment of the new citizenship legislation, which lead to children born in Ireland no longer being automatically entitled to Irish citizenship, the Government introduced an administrative scheme to deal with the enormous backlog of applications as well as with the situation of parents of children born before 1st January 2005. As a result of 17,917 applications made under the so-called IBC/05 Scheme, 16,993 parents were granted residence permits while the remainder, 1119, were refused. Reasons for refusal included: i) continuous residence not proven, ii) identity not proven, iii) criminality, iv) no role in the upbringing of the Irish born child.

According to the Supreme Court in its judgment of Bode (A Minor) v. Minister for Justice, Equality and Law Reform & ors., “the IBC 05 Scheme was a scheme established by the Minister, exercising executive power, to deal administratively with a unique group of foreign nationals in a generous manner, on general principles.”

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4 From 1996 until early January 2003, a total of 10,584 people were granted residency, with few problems, on the basis of their Irish citizen children.
The Court agreed with the Minister in holding that “at no stage was it intended that within the ambit of the scheme the Minister would consider, or did the Minister consider, Constitutional or Convention rights of the applicants”. And in accordance with the findings of the Court, “applicants who were not successful in their application under the IBC 05 Scheme remain in the same position as they had been before their application”. Within the IBC/05 Scheme “neither Constitutional nor Convention rights were in issue, at issue was whether or not the Minister acted within the same stated parameters of the executive scheme”.

However, according to the Court – even in the Bode judgment – the constitutional and Convention rights of Irish citizen children and their families are “appropriately considered” in the context of representations pursuant to Section 3 of the Immigration Act, 1999 – after receipt of a notice of the Minister’s intention to issue a deportation order”.

This view was further affirmed in the most recent judgment of the Court regarding this matter. The Supreme Court confirmed in the cases of Dimbo v. Minister for Justice, Equality & Law Reform and Oguekwe v. Minister for Justice, Equality & Law Reform that the Minister was permitted to refuse the parents’ applications on the basis that they did not qualify under the IBC/05 Scheme, without considering the constitutional and Convention rights of the Irish citizen children and their families.

However, Court then went on to consider whether the Minister for Justice, Equality & Law Reform had exercised his power to issue deportation orders in these cases “in a manner which is consistent with and not in breach of the constitutionally protected rights of persons affected by the order”. The Court also recognised that “the power of the Minister is further constrained by the provisions of (...)the European Convention on Human Rights Act 2003”.

Denham J. – delivering the unanimous judgment of the Supreme Court – held that “the decision making process should identify a substantial reason which requires the deportation of a foreign national parent of an Irish born citizen. The test is whether a substantial reason has been identified requiring a deportation order”. The judge further held that “the Minister is required to make a reasonable and proportionate decision”.

Most importantly, the Court specified that “the Minister should deal expressly with the rights of the child in any decision. Specific reference to the position of an Irish born child of a foreign national parent is required in decisions and documents relating to any decision to deport such foreign national parent”.

While the Court held “that there can be no exclusive list of factors for the Minister to consider” and that “each case should be determined on its own circumstances in accordance with law”, it went on to state that the “matters relevant for consideration by the Minister when making a decision as to deportation under Section 3 of the Immigration Act, 1999 of a parent of an Irish born child” include the following:

1. The Minister should consider the circumstances of each case by due enquiry in a fair and proper manner as to the facts and factors affecting the family.
2. Save for exceptional cases, the Minister is not required to inquire into matters other than those which have been sent to him by and on behalf of applicants and which are on the file of the department. The Minister is not required to inquire outside the documents furnished by and on behalf of the applicant, except in exceptional circumstances.

3. (...) the relevant factual matrix includes the facts relating to the personal rights of the Irish born citizen child, and of the family unit.

4. The facts to be considered include those expressly referred to in the relevant statutory scheme, which in this case is the Act of 1999, being:-
   (a) the age of the person/s;
   (b) the duration of residence in the State of the person/s;
   (c) the family and domestic circumstances of the person/s;
   (d) the nature of the person/s/persons’ connection with the State if any;
   (e) the employment (including self-employment) record of the person/s;
   (f) the employment (including self-employment) prospects of the person/s;
   (g) the character and conduct of the person/persons both within and (where relevant and ascertainable) outside the State (including any criminal convictions);
   (h) humanitarian considerations;
   (i) any representations duly made by or on behalf of the person/persons;
   (j) the common good; and
   (k) considerations of national security and public policy; so far as they appear or are known to the Minister.

5. The Minister should consider the potential interference with rights of the applicants. This will include consideration of the nature and history of the family unit.

6. The Minister should consider expressly the Constitutional rights, including the personal rights, of the Irish born child. These rights include the right of the Irish born child to:-
   - reside in the State,
   - be reared and educated with due regard to his welfare,
   - the society, care and company of his parents, and
   - protection of the family, pursuant to Article 41.

   The Minister should deal expressly with the rights of the child in any decision. Specific reference to the position of an Irish born child of a foreign national parent is required in decisions and documents relating to any decision to deport such foreign national parent.

7. The Minister should also consider the Convention rights of the applicants, including those of the Irish born child. (...).

8. Neither Constitutional nor Convention rights of the applicants are absolute. They require to be considered in the context of the factual matrix of the case.

9. The Minister is not obliged to respect the choice of residence of a married couple.

10. The State's rights require also to be considered. The State has the right to control the entry, presence, and exit of foreign nationals, subject to the Constitution and international agreements. Thus the State may consider issues of national security, public policy, the integrity of the Immigration Scheme, its consistency and fairness to persons and to the State. Fundamentally, also, the Minister should consider the common good, embracing both statutory and Constitutional principles, and the principles of the Convention in the European context.

11. The Minister should weigh the factors and principles in a fair and just manner to achieve a reasonable and proportionate decision. While the Irish born child has the right to reside in the State, there may be a substantial reason, associated with the common good, for the Minister to make an order to deport a foreign national who is a parent of an Irish born child, even though the necessary consequence is that in order to remain a family unit the Irish born child must leave the State. However, the decision should not be disproportionate to the ends sought to be achieved.
12. The Minister should consider whether in all the circumstances of the case there is a substantial reason associated with the common good which requires the deportation of the foreign national parent. In such circumstances the Minister should take into consideration the personal circumstances of the Irish born child and the foreign national parents (…).

13. The Minister should be satisfied that there is a substantial reason for deporting a foreign national parent, that the deportation is not disproportionate to the ends sought to be achieved, and that the order of deportation is a necessary measure for the purpose of achieving the common good.

14. The Minister should also take into account the common good and policy considerations which would lead to similar decisions in other cases.

15. There should be a substantial reason given for making an order of deportation of a parent of an Irish born child.

As outlined above, Section 4(5), 54(1) and 55(1) of the Immigration, Residence and Protection Bill, 2008 seem to be in direct conflict with the recent Supreme Court judgments in the cases of Oguekwe v. Minister for Justice, Equality & Law Reform and Dimbo v. Minister for Justice, Equality & Law Reform in that no consideration of Constitutional and Convention rights is required prior to the arrest, detention and removal of a person who ‘appears’ to be ‘unlawfully present in the State’.

We would welcome the opportunity to make submissions to the UN Human Rights Committee in the context of its forthcoming examination of Ireland on 14th/15th July 2008. We are planning to travel to Geneva on Sunday, 13th July and will stay until the evening of 15th July – should any of the Committee Members wish to speak with us about the particular situation of immigrants and their family members in Ireland, we would be delighted to facilitate any requests from the Members then and in advance of Ireland’s examination.

Yours sincerely,

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