Submission to the 4th Programme of Law Reform
under the Law Reform Commission Act 1975

Immigration, Residence and Citizenship – an Area for Law Reform

Introduction
The Immigrant Council of Ireland (ICI) wishes to make the following submission to the 4th Programme of Law Reform and we hope that the issues raised by us will inform the work of the Law Reform Commission with a view to achieving urgent reform and modernisation of this important area of law in the coming years:

After a long history of emigration, Ireland experienced significant changes in the make-up of communities in more recent times, as a result of immigration. During the 1990s and early 2000s in particular, immigration reached unprecedented levels. Against this backdrop, the Immigrant Council of Ireland (ICI) was established in 2001 by Sr. Stanislaus Kennedy, to develop innovative responses to Ireland’s changing society. Over the past decade, the ICI has become embedded as a key expert and one of the lead organisations in the areas of immigration and integration. It is an independent immigrant human rights organisation, which works with and for immigrants. It advocates for the rights of immigrants and their families, and acts as a catalyst for public debate and policy change. The ICI is also an Independent Law Centre. Two important principles underpin our work: that immigration is a permanent and positive reality in Ireland, and that individuals’ human rights must be respected, protected and upheld. Because of these beliefs, we will continue to lobby for integrated, transparent, rights-based immigration and integration legislation and policies which reflect this reality.

We note the Government’s recognition of the importance of migration and of the need to address it in a comprehensive statutory framework as well as its commitment to “progress the Immigration, Residence and Protection Bill 2010 and, following development of key Government amendments, to return to the Oireachtas with this comprehensive legislative centrepiece of a wider programme of reform, in line with the Programme for Government”. However, we are concerned that the Bill, even if progressed, will fail to address important matters affecting the lives of migrants and their family members in Ireland and that decisions, for example on the granting of residence permits and citizenship, will continue to be left to the discretion of the Minister for Justice, Equality and Defence. Given the current lack of clarity and published guidelines on the criteria or issues to be considered by immigration officers determining matters
on behalf of the Minister in relation to migrants’ rights and entitlements in the State, the ICI believes it is essential that matters such as family reunification, which affect the human and constitutional rights of migrants and their family members, should be the subject of primary legislation.

**Law reform in the area of immigration and residence:**
In the view of the ICI, a number of matters must be addressed through the introduction of statutory provisions:

1. **Clear immigration rules in primary legislation**
   Over many years, the ICI has highlighted the need for immigration rules to be set out in primary legislation, including the basis for migrants to enter and remain in the State, the conditions on which such permission will be granted and what entitlements migrants may or may not have while in the State. We believe that it is essential for matters such as family reunification, which affect the human and constitutional rights of migrants and their family members, to be the subject of primary legislation.

   While we do recognise the need to retain a certain amount of discretion on the part of the Minister in order to facilitate flexibility in the decision making process, also in the interest of applicants, we do believe that such discretion must be clearly limited by statutory provisions, setting a frame within which discretion can be exercised. For example, where certain criteria set out in primary legislation are fulfilled, a right to family reunification should follow – however, the Minister should also retain discretion not to grant family reunification in the interest of national security, public policy and public health while at the same time being able to waive certain requirements, for example income requirements, in certain circumstances.

2. **Provision of a right to family reunification**
   The ICI believes migrants’ rights to family life should be spelt out clearly in primary law. Family reunification is a major source of immigration internationally and a major issue of concern to migrants and Irish citizens in Ireland due to the absence of a formal application process for the majority of migrants and their family members. There is a lack of clarity regarding which family members may be admitted to the State, the conditions under which family reunification may be granted, the rights and obligations of family members once admitted to the State and the length of time it takes to process applications. The wide discretion of the Minister with regard to granting of family reunification to Irish nationals and legally resident migrants has led to inconsistencies and a lack of transparency of the decision making process.

   Ireland continues to be the only EU Member State that does not have national rules regarding family reunification enshrined in legislation. The previous government decided not to opt-in to Council Directive 2003/86/EC on the right to family reunification; however, the ICI believes that Irish rules regarding family reunification should be inspired by international best practice and that given the fundamental importance of family life to all of society, any forthcoming legislation should provide a clear entitlement for Irish citizens and legally resident migrants to be joined by immediate family members, including spouses or partners and minor children. Discretionary provisions should allow for the admission of other family members such as parents and dependent adult children on certain conditions.
3. Introduction of permanent immigration status

Ireland has not opted-in to Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents and there are no specific legislative provisions regarding the granting of ‘long-term residence’ in Ireland. General immigration legislation provisions, such as section 4 of the Immigration Act 2004 do apply and long-term residence status, which is a five-year renewable permit granted and renewed at the discretion of the Minister for Justice and Equality, is only available to foreign nationals who were first admitted under employment permits schemes or as scientific researchers on the basis of a hosting agreement.

The ICI continues to advocate for the introduction of a statutory entitlement to a right to truly permanent residence – other than through an application for naturalisation as an Irish citizen – after five years of legal residence in the State, provided certain conditions are met. This is a commonly accepted practice in other EU Member States which recognises that the integration of third-country nationals who are long-term residents in the Member States is a key element in promoting economic and social cohesion, a fundamental objective of the European Community.

4. Reform of the naturalisation process

In 2009, the Irish Government signalled that a review of current citizenship and naturalisation provisions would be undertaken by the Office of the Minister for Integration (now the Office for Promotion of Migrant Integration). Last year, the Programme for Government signalled an undertaking to provide for the efficient processing and determination of citizenship applications within a reasonable period of time. Whilst no comprehensive formal proposals for reform of the existing legislative framework have yet been published, last year a number of statutory and administrative changes were introduced in respect of application fees, forms and the processing of applications. Changes announced by the current Minister for Justice and Equality in relation to the granting of citizenship in Ireland, in particular the introduction of citizenship ceremonies in June 2011, have largely been welcomed. Additionally, the volume of applications has now risen from 1,400 in 2005 to 10,700 in 2011 and 12,300 in the period from January to July 2012 alone.

Organisations working with prospective new citizens in Ireland, including the ICI, have argued that there are several ways in which social cohesion could be improved in the context of the naturalisation process and recommendations previously made by the ICI include:

- a right to naturalisation on fulfilment of statutory eligibility criteria;
- discretionary granting of naturalisation to persons who do not fulfil the eligibility criteria on humanitarian or particular vulnerability grounds;
- definition of the ‘good character’ requirement in legislation;
- provision of reasons for the refusal of applications for naturalisation;
- reduction of fees for naturalisation so as not to constitute an obstacle for applicants;
- processing of all applications within a reasonable period of time and provision of information to applicants, including reasons for any delay in the processing of their applications; and
- annual publication of comprehensive disaggregated data of citizenship applications and decisions.
5. **Avenues for the regularisation of undocumented migrants**

The ICI believes that the provisions contained in Section 3 of the *Immigration Act 1999*, which provide the Minister with discretion not to deport an undocumented migrant despite the presence in the State without permission to reside in certain circumstances must be retained in future legislation. We believe there must be an avenue to deal with and provide for persons in exceptional circumstances, 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 should have an avenue to apply for the reinstatement of her residence permit even where she has been undocumented for a lengthy period of time due to threats made by her husband to have her deported if she went near the Gardaí.

The matters currently to be considered by the Minister before issuing a deportation order in respect of the person, including the age of the person, the duration of residence in the State of the person, family and domestic circumstances, employment record and prospects as well as humanitarian considerations. The ICI believes that it is essential that a Section 3 type procedure should be retained in any future legislation and acknowledges the statement by the current Minister for Justice, Equality and Defence in the debate on the Immigration, Residence and Protection Bill 2010 that “the Bill should contain provisions to assist people in exceptional circumstances who should not be subject to summary deportation” and that “(A)rguably, the summary deportation provisions as currently framed are in violation of the State’s obligations under the International Covenant of Civil and Political Rights”.5

6. **Protection of Victims of Human Trafficking**

The ICI is concerned that the *Administrative Immigration Arrangements for the Protection of Victims of Human Trafficking* fail to fulfil Ireland’s obligations under the Council of Europe Convention on Actions to Combat Human Trafficking which entered into force on 1 February 2008 and calls on the Government to use this opportunity to put protections for victims of human trafficking in Ireland on a statutory footing in line with the relevant international Conventions as well as with *Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims*.6 Most importantly, both the Convention and the Directive apply 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. We would therefore call on the Government to ensure that all of those trafficked into Ireland for the purpose of sexual or other types of exploitation, including EEA nationals, will be able to avail of the protection guaranteed by these instruments.

Furthermore, the current approach of the Irish Naturalisation and Immigration Service not to grant ‘Recovery and Reflection Periods’ or ‘Temporary Residence Permits’ to victims of trafficking who are in the asylum process and have been granted leave to enter the State pursuant to Section 9(1) of the *Refugee Act 1996 (as amended)* must, in the view of the ICI, be changed for the Government to comply with its obligations under Article 14(5) of the Convention and to end the prejudicial treatment of victims of trafficking who have applied for international protection in the State. We submit that currently, rights afforded to asylum seeking victims of trafficking versus other suspected victims of trafficking are not the same: asylum seeking victims of trafficking have less access to safe and appropriate accommodation, education, training, work and travel with that clearly suffer prejudicial treatment contrary to Article 14(5) and they are excluded from Section 21 of the 2011 Administrative Immigration Arrangements, which provide
for a change of status for a person who has assisted the Gardaí and has held a ‘Temporary Residents Permit’ for three years.

The ICI was deeply concerned that the previous Immigration, Residence and Protection Bills only provided for ‘Temporary Residence Permits’ to be issued in circumstances where the Minister was “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”. We call on the Government to now seize this historic opportunity and to ensure that victims of human trafficking will also be permitted to remain in the State where this is necessary because of their personal situation, in accordance with Article 14(1)(a) of the Convention, for example in response to the victims’ needs, by way of redress for the victims’ suffering or where a victim is seeking to pursue legal action against her trafficker(s).

7. Establishment of an independent appeals mechanism for the review of immigration decisions

Lengthy delays in decision-making and inconsistencies, leading to challenges of those decisions, are current phenomena that have lead to the so-called ‘Asylum List’ in the High Court having a backlog of some 1,000 cases. The ICI believes that it is therefore crucial that the Government honours its commitment in the Programme for Government 2011-2016 to “introduce comprehensive reforms of the immigration, residency and asylum systems, which will include a statutory appeals system”. The establishment of an independent appeals mechanism would provide transparency to the decision-making process and could also be more cost efficient than the current system. Furthermore, an independent appeals mechanism to deal with immigration decisions is the only way to ensure access to fair procedures and effective remedies for migrants and their family members seeking to challenge decisions affecting their human rights as protected under the European Convention on Human Rights and Fundamental Freedoms (ECHR), in particular Articles 3 (prohibition of torture) and Article 8 (right to family life), as required by Articles 6 (right to a fair trial) and 13 (right to an effective remedy) of the Convention.

Currently, people seeking to challenge decisions refusing them permission to remain in the State or permission to enter the State – for example for the purpose of family reunification or the preservation of the family unit – are effectively forced to seek judicial review of that decision by the High Court instead of accessing a more efficient ‘Immigration Appeals Tribunal’ which, unlike the High Court, would also have the power to alter or vary an administrative decision. The ICI believes the establishment of an independent Immigration Appeals Tribunal could save money and would, if designed in a way that would make challenges of the procedure through High Court proceedings unlikely, provide for a more efficient and cost-effective immigration system.

Furthermore, the ICI would advocate for the 14-day time limit within which judicial review proceedings have to be initiated in the majority of immigration decisions to be extended. The short time limit severely restricts migrants’ access to justice. In most other areas of the law, people have three months, exceptionally six months, to make an application to the High Court. The ICI would view the current time limit as unfair and unreasonable and feels supported by the views of the Law Reform Commission expressed in its 2004 ‘Report on Judicial Review Procedure’ where it recommended that the relevant section of the Illegal Immigrants
(Trafficking) Act 2000 be amended to increase the fixed time limit on applications to apply for judicial review of limited type of decisions to 28 days. In this regard, we would like to highlight the decision of the European Court of Human Rights in the case of *Stubbings v. UK*¹¹, where it held that an unduly short limitation period can, in certain circumstances, give rise to a violation of Article 6 of the ECHR, which provides that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The Court held that in order to be in accordance with Article 6(1) of the ECHR, the limitations applied must not “restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired”.

8. **Legal safeguards against refusal of entry**

The ICI believes that any future immigration legislation must seek to remedy the fact that currently, an appeal against the refusal of entry to the State is not provided for in existing legislation and procedure. In 2011 alone, 2,719 individuals from countries such as China, Brazil, Bolivia, South Africa, Albania and Nigeria¹² were refused leave to land at airports and other ports of entry to the State. We have advocated for a right to appeal refusal of entry in situations where such decision may affect Constitutional and human rights and we are concerned that while a refusal of entry may also arise in situations where a person has obtained a visa prior to travelling to Ireland, those who are visa required nationals have at least access to a non-statutory visa appeals mechanism within the Irish Naturalisation and Immigration Service. The refusal of entry does also affect otherwise privileged foreign nationals, for example nationals of the United States of America, South Africa or Brazil, who are not visa required and who are not in a position to obtain any type of pre-entry clearance.

By not providing an appeal mechanism against the refusal of entry, Ireland would continue to be out of line with developments in the majority of EU Member States who – through the *Community Code on the rules governing the movement of persons across borders*¹³ – are obliged to provide a right to appeal to persons refused entry.

The ICI believes that independent monitoring of forced returns, including the return of those refused leave to land, is essential to ensure the protection of human and Constitutional rights in the context of deportations and removals from the State. The establishment of an independent monitoring body in a statutory framework would not only ensure rights compliance but also transparency and sustainability of the process. In this context, the ICI notes the Minister’s decision in January of this year to introduce an ‘Immigration Control Pilot Project’¹⁴ at Dublin Airport, which was to see Departmental staff assigned to immigration control duties at the airport. It was planned that these staff members will work in association with Gardaí in the context of reducing Garda numbers, continued commitment to the civilianisation of appropriate tasks, and the need to look afresh at how public services are delivered. The ICI would welcome the opportunity to engage with the Minister on this pilot and would welcome the opportunity to participate in a consultation with stakeholders as part of the monitoring and review of the pilot prior to the drafting of recommendations.

**Conclusions**

The ICI welcomes the opportunity the 4th *Programme of Law Reform* presents and we hope that the issues raised by us will benefit and inform the work of the Law Reform Commission in the coming years. We are committed to making a contribution to the urgently needed reforms in
this area of law and would be available to provide briefings, background information or other supports which may be of assistance to the Law Reform Commission.

Contact: 

**Denise Charlton**  
Chief Executive Officer  
denise@immigrantcouncil.ie

**Hilkka Becker**  
Senior Solicitor  
hilkka@immigrantcouncil.ie
ENDNOTES

2 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0086:EN:NOT
8 http://www.irishtimes.com/newspaper/ireland/2012/1017/1224325338894.html
12 Nationals from Brazil, Bolivia and South Africa are not required to have a visa to travel to Ireland (see: http://www.inis.gov.ie/en/INIS/(List%20of%20Countries)%202012%20Schedule%201.pdf)
14 http://www.inis.gov.ie/en/INIS/Pages/Immigration%20in%20Ireland%202011%20%E2%80%93%20major%20changes%20and%20more%20to%20follow