

Human Trafficking:
Psychologically Shattered and Caught in a Legal Quagmire

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‘The Legal Quagmire’

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1. Introduction

The Immigrant Council of Ireland (ICI) is an **independent, non-governmental organisation which promotes the rights of migrants and their families** by providing **information and support, advocacy and strategic litigation**. We also conduct **policy and campaign work** and provide a **training service**.

The ICI prioritises support for **migrants who have experienced human rights abuses in this country**. Among these most vulnerable migrants, we have established special support for people in the following categories:

- **women who have been trafficked to Ireland for the purposes of sexual exploitation**
- **women subjected to sexual exploitation within the sex industry**
- **victims of domestic violence**
- **unaccompanied minors**

The ICI's unique position as an **Independent Law Centre** allows us to use our expertise in the area of Irish immigration law to offer high quality legal advice and representation to migrants who have experienced human rights abuses. We can provide support and advice to migrants in relation to their **immigration status** in Ireland, their **immigration related dependency on abusive family members** and a **range of issues facing victims of trafficking**, including liaison with An Garda Síochána.

The ICI has **long-established, collaborative relationships with organisations providing services to vulnerable migrants**, including the Women's Health Project (HSE), Women's Aid, AkiDwA, Ruhama, the Migrant Rights Centre Ireland and Act to Prevent Trafficking (APT). We are also partners in the **Dignity Project, an interagency initiative of the Dublin Employment Pact and the ICI working to deliver quality services for victims of sex-trafficking in Ireland** together with a number of Irish partners, including the Women's Health Project (HSE), the AHTU, the Sonas Housing Association, and the Garda National Immigration Bureau (GNIB).

The ICI welcomes the efforts of the Government set out in its **National Action Plan to Prevent and Combat Trafficking in Human Beings in Ireland (2009 – 2012)** to develop a fully effective system of supports for victims of trafficking. However, we do have some ongoing concerns regarding the **long-term situation of victims of trafficking within the State**, the risk that they **might not be adequately protected against being prosecuted** for offences committed by them in the context of their own trafficking, and we are concerned that the provisions in relation to the

compensation of victims of trafficking may not be adequate and in line with the requirements of the relevant provisions in international law.

2. Residency

When looking at the issue of residency for victims of trafficking in Ireland, it is necessary to distinguish between permits that may be ultimately granted for the purpose of the victim assisting the Gardaí or other relevant authorities in relation to an investigation or prosecution arising in relation to the trafficking and permits that may be granted to a victim of trafficking on the basis of their protection or humanitarian needs.

2.1. Recovery and reflection permits

In accordance with **Administrative Immigration Arrangements for the Protection of Victims of Human Trafficking** first introduced in June 2008, a recovery and reflection permit shall be granted to a person who has been identified by An Garda Síochána not below the rank of Superintendent in the Garda National Immigration Bureau (GNIB) as a suspected victim of human trafficking.

In practice, these permits are granted after many lengthy ‘informal interviews’ with members of An Garda Síochána and on occasion, victims of trafficking had already progressed to giving full and detailed witness statements by the time they were granted a recovery and reflection permit.

While the ICI acknowledges that they may be a pressing need to gather evidence in certain cases, it is of serious concern to us that in practice, victims of trafficking often do not seem to get the ‘breathing space’ allowing them to recover, escape the influence of the alleged perpetrators of trafficking and to make an informed decision as to whether to assist the Gardaí or other relevant authorities.

During the recovery and reflection period, victims of trafficking will merely be granted a **Stamp 3 residence permit**, which will be **valid for 60 days** and **can be terminated**, and they are not entitled to access the labour market or social welfare payments outside the system provided through the Reception and Integration Agency (RIA). In light of the limited rights granted to victims of trafficking during this period, we would encourage the GNIB and the Department of Justice, Equality and Law Reform to take a more liberal approach to the granting of such permits.

We have raised our concerns at the High Level Working Groups which the ICI is attending along with other stakeholders, including the Anti-Human Trafficking Unit (AHTU) and the GNIB and hope that the good relationships developed through the cooperation of Government and NGOs in this area, will lead to the improvement of the situation in line with international best practice.

2.2. **Temporary residence permits**

In line with the **Administrative Immigration Arrangements**, a **6-month temporary residence permit on Stamp 4 conditions**, allowing access to

the labour market, vocational training, education as well as to the social welfare system, will be granted only where the Minister is satisfied that the person has severed all relations with the alleged perpetrators of the trafficking and it is necessary for the purpose of allowing the suspected victim to continue to assist An Garda Síochána or other relevant authorities in relation to an investigation or prosecution arising in relation to the trafficking.

The ICI has previously expressed its concerns that the **current system fails to provide an avenue to residence on humanitarian grounds** unless a victim has been issued with a notification of the Minister's intention to deport her.

We would like to take this opportunity to repeat our call for an amendment of the **Immigration, Residence and Protection Bill 2008** to allow the Minister to **grant a renewable residence permit in circumstances where it is unreasonable to compel a victim of trafficking to leave Ireland.** Matters that should be considered include the victim's safety, state of health, family situation and other factors relating to the victim's humanitarian or medical needs. Furthermore, the Bill should be amended further to allow the Minister to **grant a renewable residence permit to child victims of trafficking in order to protect the child's best interest** and to allow for the renewal of same.

2.3. Longer term residence permits

The process under which a victim of trafficking can currently apply for permission to remain in the State on ‘humanitarian grounds’, i.e. **Section 3 of the Immigration Act 1999** as amended. However, this provision is set to be abolished with the coming into force of the *Immigration, Residence and Protection Act* which is foreseen for 2010.

If the new legislation is enacted as now drafted, the only avenue that will remain open would be a ‘protection application’. However, as the Refugee Convention is forward looking and the **Immigration, Residence and Protection Bill 2008** specifies that “*the Minister shall not be obliged to take into account factors in the case that do not relate to reasons for the applicant’s departure from his or her country of origin or that have arisen since that departure*”, when considering whether compelling reasons exist to grant permission to remain in the State, the ‘protection route’ will not provide adequate protection for many victims of trafficking.

We do hope of course that the Government will follow the **Concluding Observations of the UN Human Rights Committee** resulting from its examination of Ireland’s compliance with the **International Convention on Civil and Political Rights (ICCPR)** in July last year:

“While the Committee takes note of the positive measures adopted concerning trafficking in human beings, such as the establishment of an Anti-Human Trafficking Unit and the provision of training to border guards,

immigration officers, and trainees in these fields, the Committee is concerned about the lack of recognition of the rights and interests of trafficking victims. It is particularly concerned about lesser protection for victims not willing to cooperate with authorities under the criminal law (human trafficking) bill 2007. (arts. 3, 8, 24, 26). The State party should continue to reinforce its measures to combat trafficking of human beings, in particular by reducing the demand for trafficking. It should also ensure the protection and rehabilitation of victims of trafficking. Moreover, the State party should ensure that permission to remain in the State party is not dependent on the cooperation of victims in the prosecution of alleged traffickers. The State party is also invited to consider ratifying the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime”.

2.4. Applications for international protection

Applications for refugee status under the **Refugee Act 1996** (as amended) or for subsidiary protection pursuant to the **European Communities (Eligibility for Protection) Regulations 2006** are a viable option to obtain long-term safety for victims of trafficking. However, the criteria that are to be met in order to qualify for ‘international protection’ are very strict and are applied in a forward-looking way.

In relation to an application for refugee status, the questions to be asked are whether the victim of trafficking concerned has a ‘**well-founded fear**’ of **future persecution** based on a **convention ground**, in this case her

membership of a particular social group, and whether the State of her country of origin or former habitual residence is unable or unwilling to protect her.

The biggest challenge that victims of trafficking are faced with when trying to meet the refugee definition is the question of **availability of State protection**. Unfortunately, many victims are being refused on the basis that:

"State protection – albeit imperfect – would be available to the applicant if she were to be returned to Nigeria. The opinions cited in the relevant report as to the availability of protection for victims of trafficking are relatively cohesive.

*"It does not seem to me that there is a conflict of any significance as to the availability of protection; rather, **different opinions are expressed as to the quality and duration of the protection that is available to victims of trafficking.***

In my judgment, therefore, it was open for the Tribunal Member to reach the conclusion that he did based on the information that was before him, and he did so with due regard to natural and constitutional justice."¹

In some cases, appeals against recommendations of the Office of the Refugee Applications Commissioner (ORAC) to the Refugee Appeals Tribunal (RAT) have been successful and determination by the ORAC were set aside. Generally, these cases have involved very young and vulnerable

¹ See the judgment of Hedigan J in *A. v. MJELR* [2008] IEHC 336

persons, for example in a case where the Tribunal Member held that internal relocation in Nigeria was not a viable alternative:

*“The internal relocation theory is one that must be reasonable in all the circumstances and I do not accept that it would be reasonable in the applicant’s case. The applicant is a **single mother, alone, with no family ties and no visible means of support.** Her family have never been any support to her in her life.*

*“(…) it would be **unduly harsh to expect [the Appellant] to relocate given the importance of family ties and social networks in Nigeria.** I further find that it would be **unduly harsh given the past experiences of the applicant**”.*

In another case, involving a minor appellant from Nigeria, the Tribunal held that

*“While the State does offer protection to victims of trafficking, the applicant’s position is **distinguished by the fact that it was family members who trafficked her,** and considering the fact that the applicant’s father appears to have an extensive network of connections within Nigeria, the Tribunal therefore cannot be sure that the State could protect the Applicant were she to return.”*

The above cases certainly give some scope in relation to applications for international protection from victims of human trafficking and I would argue that despite the less hopeful judgments coming from the High Court so far, victims of trafficking still have a chance of succeeding with their

applications for protection, particularly where they belong to particularly vulnerable categories of persons.

And it is certainly positive that human trafficking has, in principle, been accepted as a **ground for granting refugee status**. However, it is important to bear in mind that many victims of trafficking will not qualify for refugee status and that **other avenues, allowing victims of trafficking to obtain long-term security in relation to their immigration status**, for example by way of introducing a residence permit granted to victims of trafficking on the basis of their safety needs, state of health, family situation and other factors relating to their humanitarian or medical needs, **must be established**.

3. Risk of prosecution

The Immigrant Council of Ireland is concerned that currently, **victims of trafficking in Ireland are not adequately protected against being prosecuted for offences which they committed as a direct consequence of their situation as trafficked persons**, or where they were **compelled to commit such unlawful acts**.

The majority of immigration related offences are contained in the *Immigration Act 2003* and the *Immigration Act 2004* and the failure to comply with a duty prescribed by either act generally triggers the commission of a criminal offence under the relevant act. A person guilty of an offence is liable on summary conviction to a fine not exceeding €3,000 or

to imprisonment for a term not exceeding 12 months or both.² However, victims of trafficking for the purpose of sexual exploitation could also find themselves being charged with breaches of the **Employment Permit Acts 2003 and 2006** as well as with **prostitution related offences**.

Article 26 of the Council of Europe Convention on Action against Trafficking in Human Beings obliges Member States to “*provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so*”.³

So far, the Government has failed to transpose this provision into the *Criminal Law (Human Trafficking) Act 2008* by way of a **non-prosecution clause**. And while we recognise the **commitment in the National Action Plan to Prevent and Combat Trafficking of Human Beings 2009 – 2012** to ensure that “*a person who is a suspected victim of an offence under the Criminal Law (Human Trafficking) Act 2008 shall not be prosecuted for entry into, or presence in the State for carrying out labour or sexual acts where those acts were a consequence of the trafficking of that person*”, we would suggest that as a minimum, the **DPP should issue publicly accessible guidelines on non-prosecution of victims of trafficking** similar to those issued by the Crown Prosecution Service (CPS) in the UK.

Where investigating officers in the UK have reason to believe that the person has been trafficked, “*prosecutors must consider whether the public*

² Section 13(1), Immigration Act 2004.

³ Article 26, Council of Europe Convention on Action against Trafficking in Human Beings, Warsaw, 16th May 2005.

interest is best served in continuing the prosecution in respect of the immigration offence”.

According to the CPS guidelines, the following factors are relevant when deciding where the public interest lies:

- **is the person a ‘credible’ trafficked victim;**
- **the role that the suspect has in the immigration offence;**
- **was the immigration offence a direct consequence of their trafficked situation;**
- **were violence, threats or coercion used on the trafficked victim to procure the commission of the offence;**
- **was the victim vulnerable or put in considerable fear.**

And, where information has come to light from other sources that a suspect might be the victim of trafficking, for example from a Non-Government Organisation (NGO), the prosecutor should:

- **contact the police officer or immigration officer investigating the immigration offences;**
- **ask the investigating officer to make enquiries and obtain information in connection with the claim that the suspect has been trafficked (this should be done by contacting the UK Human Trafficking Centre (UKHTC)⁴**
- **re-review the immigration case in light of any fresh information or evidence;**

⁴ See: www.ukhtc.org

- **if new evidence obtained supports the claim that the suspect has been trafficked and committed the immigration offences whilst they were coerced, give consideration to discontinuing the prosecution. Where there is clear evidence that the defendant has a credible defence of duress, the case should be discontinued on evidential grounds.**

It is of grave concern to the Immigrant Council of Ireland that victims of trafficking may be reprimanded by members of An Garda Síochána for offences committed in the context of their trafficking in situation, particularly where they have not yet been identified as victims of trafficking. One concrete example of one of our clients' contact with the Gardaí involved a situation where she, having previously escaped her traffickers, was apprehended in a shopping centre by one of them. A fracas ensued and the Gardaí were called on request by our client, herself and the trafficker were taken to the Garda Station where they were questioned and then released. However, some weeks later, our client received a request to attend at the relevant Garda Station to be cautioned on in relation to Public Order Offences.

Furthermore, we are worried that **victims of trafficking may feel compelled to give exhaustive information about their experience of trafficking and potentially about any offences committed by them in that context, in advance of having had the benefit of legal advice,** particularly in a situation where the services of the **Legal Aid Board's dedicated service for victims of trafficking** will only be offered upon referral from the Garda

National Immigration Bureau following their assessment of the person's status as a 'potential victim'.

The only way in which non-prosecution can be guaranteed at present, is through a **letter from the Director of Public Prosecutions (DPP) giving immunity in relation to specific offences**. This was done in the recent case of two women allegedly trafficked into Ireland who were granted immunity from prosecution, having agreed to give full statements about how they came to Ireland and the work in which they were engaged in a criminal trial against a Carlow man and his daughter who are living in Wales.⁵ However, in order to obtain such letter, it is necessary to list every single offence that the person concerned is afraid of being prosecuted for, including all immigration, employment and public order related offences. In our view this is far too uncertain to guarantee adequate protection of victims of this most heinous crime.

It is important to note from the recent judgment of the Court of Appeal of England and Wales in the case of *Regina v. O*, decided on 2nd September 2008, that:

- **prosecutors must be aware of the protocols which, although not in the text books are enshrined in their Code,⁶**
- **defence lawyers must respond by making enquiries, if there is before them credible material showing that they have a client who**

⁵ See: <http://www.carlowpeople.ie/news/two-give-statements-in-trafficking-investigation-1868448.html>

⁶ The Crown Prosecution Service, Legal Guidance – Human Trafficking and Smuggling, 26 March 2009

might have been the victim of trafficking, especially a young client, and

- **where there is doubt about the age of a defendant who is a possible victim of trafficking, proper inquiries must be made.**

The judgment confirms the duty of prosecutors to make full and proper enquiries in criminal prosecutions involving individuals who may be victims of trafficking and to be proactive in establishing if a suspect is a potential victim of trafficking.

4. Lack of compensation

Article 15 of the Council of Europe Convention on Action against Trafficking in Human Beings requires national legal provisions for *“the right of victims to compensation from the perpetrators”*.

In accordance with Article 15(4), *“each Party shall adopt such legislative or other measures as may be necessary to guarantee compensation for victims in accordance with the conditions under its internal law, for instance through the establishment of a fund for victim compensation or measures or programmes aimed at social assistance and social integration of victims”*, which could be funded by the assets resulting from the application of measures against the perpetrators such as monetary sanctions and the confiscation of assets.

The compensation victims of trafficking are entitled to is **pecuniary and covers both material injury, for example the cost of medical treatment, and non-material damage for the suffering experienced.**

Ordinarily, victims' right to compensation consists in a **claim against the perpetrators of the trafficking** - it is and it should be the traffickers who bear the burden of compensating the victims. And if, in proceedings against traffickers, the criminal courts are not empowered to determine civil liability towards the victims, it must be possible for the victims to submit their claims to civil courts with jurisdiction in the matter and powers to award damages with interest.

However, even though it is the trafficker who is liable to compensate the victim, by order of a civil court or - in some countries - a criminal court, or under a judicial or extra-judicial transaction between the victim and the trafficker, **in practice there is rarely full compensation whether because the trafficker has not been found, has disappeared or has declared himself bankrupt.**

Article 15 of the Council of Europe Convention therefore requires that Parties **take steps to guarantee compensation of victims.** The means of guaranteeing compensation are left to the Parties, which are responsible for establishing the **legal basis of compensation, the administrative framework** and the **operational arrangements for compensation schemes.** In this regard, Article 15(4) suggests setting up a **compensation fund** or **introducing measures or programmes for social assistance to**

and social integration of victims that could be funded by assets of criminal origin.

In deciding the compensation arrangements, Parties may use as a model the principles contained in the **European Convention on the Compensation of Victims of Violent Crimes**, which is concerned with European-level harmonisation of the guiding principles on compensating victims of violent crime and with giving them binding force. Moreover, EU Member States must also have regard to the **Council Directive of 29 April 2004 on compensation of crime victims**.

The ICI is most concerned that the only avenues for victims of trafficking being granted compensation in Ireland seems to be through the awarding of compensation by a **civil court** or a **court of criminal law**, pursuant to the provisions of the Criminal Justice Act 1993, or through the **Criminal Injuries Compensation Tribunal**. As the Tribunal only covers '*out of pocket expenses*' and does not compensate for pain and suffering, the provisions clearly fall short of the level of compensation required by the Council of Europe Convention, at least in situations where the perpetrator cannot be found or has been declared bankrupt.

It is of course important not to forget that victims of trafficking may potentially also be able to pursue a claim against a trafficker through **employment legislation**. However, this can only be done in so far as national law recognises the activity of the person as legal employment. Access to such compensation will therefore depend on a person's immigration status, the basis and nature of the employment contract, and

whether the work is ‘legal’ – something that is unlikely in the case of persons who have been trafficked for the purpose of sexual exploitation.

A report from the OSCE, published in May 2008,⁷ found that **for the trafficked person to actively participate in legal proceedings** including giving oral and documentary evidence in relation to the wrongdoing and the damages and losses they have suffered **can be “an intimidating experience, and that free legal assistance and representation is necessary to improve the individual’s chances of successfully navigating the procedures and receiving an award”**. According to the report, **“(H)aving to prove damage by evidence of past and ongoing victimisation, and the titles and definitions of some of the damages categories such as ‘loss of dignity’ can have a re-traumatising effect on the trafficked person”**.

Recommendations from the OSCE, which we would like to echo, therefore include:

- **establishment of quick, streamlined and accessible procedures with an independent appeal process**
- **provision of legal advice and representation in relation to compensation claims**
- **examination of the relative merits of establishing a scheme specifically for trafficked persons, ensuring that the criminal assets seized from traffickers contribute to fund it.**

⁷ OSCE/ODIHR, Compensation for Trafficked and Exploited Persons in the OSCE Region, 2008

5. Conclusion

There obviously is **still a lot to do to ensure that Ireland has legislative and administrative structures to address the heinous crime of human trafficking and to fully ensure the protection of the human rights of victims of trafficking.**

However, the very significant progress made in this area, particularly since the establishment of the Anti-Human Trafficking Unit and the High Level Working Groups, involving the GNIB, the Department of Justice, Equality and Law Reform, the HSE and a variety of NGOs, including Ruhama and the Migrants Rights Centre Ireland, as well as through the work of organisations like Act to Prevent Trafficking (APT) must be acknowledged and give me and my colleagues in the ICI great hope for the future.