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Immigration & Asylum Law

Catherine Cosgrave & Liam Thornton

About the Authors

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8.1. Introduction

People, including children, migrate for different reasons. Some are forced to migrate because they are fleeing persecution or other serious harm in their country of origin, whereas others may choose to migrate, for example, for economic reasons or study purposes. The 20th century and the start of the 21st century have been characterised by the need for many millions of people to seek refuge in countries which are not their own.¹ In 2015, almost 55 million people are in refugee or refugee like situations, stateless, internally displaced within their own countries or seeking asylum.² We live in an increasingly globalised world. The Irish legal system must ensure that the rights of the migrant child are respected. These rights are protected by the Irish Constitution, national legislation, the European Convention on Human Rights, the European Union Charter of Fundamental Rights, the European Social Charter and under UN Human Rights Treaties that Ireland has signed and ratified. At times, discourse on the rights of migrant children has sought to portray the State as some kind of victim against marauding child migrant hoards or their wicked parents seeking to utilise a child as a migrant anchor.³ Politicians, policy makers, the legal professions, media and the judiciary should be cautious against adopting such simplistic responses to issues of child migration.⁴

Migrant children are particularly vulnerable and have been recognised to face particular difficulties vindicating their rights.⁵ The issue of the rights of the children in

¹ In 2014, there were 1.796 million persons seeking asylum, whose cases were awaiting determination. Global Report 2014 (New York/London: UNHCR, 20 June 2014) available at http://www.unhcr.org/5575a7840.html (last accessed, 08 July 2015).
² Ibid.
immigration and asylum law is wide-ranging and this chapter considers three core areas:

- The legal obligations on Ireland to provide a child centred protection status determination process;
- Immigration law and family reunification;
- Deportation of non-EU citizen children.

8.2. Asylum Law & Children: Status Determination

As a matter of international law, States are under no general obligation to admit non-citizens into a country, be they adults or children. However, this general principle is limited when it comes to those seeking asylum, due to states obligations under the 1951 Refugee Convention and 1967 Protocol to the Refugee Convention. To this extent, Ireland has freely accepted obligations under national, international and European law to consider asylum and subsidiary protection claims from those who arrive in this state claiming to be in need of protection from the State of their birth or former habitual residence.

8.2.1. International Legal Obligations & Standards

The UN Convention on the Rights of the Child is relevant in a number of respects to children in the asylum system. Equality in the enjoyment of rights (Article 2(1) CRC),

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11 A third country national is entitled to subsidiary protection from EU Member States where he/she faces a real risk of suffering serious harm if returned to the country of origin or country of former habitual residence (Article 15 of the Qualification Directive). ‘Serious harm’ consists of (i) death penalty or execution, or, (ii) torture or inhuman or degrading treatment or punishment of the applicant in the country of origin; or (iii) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict. Ireland has transposed the Qualification Directive through S.I. No. 518 of 2006 European Communities (Eligibility for Protection) Regulations 2006 and S.I. No. 426 of 2013 European Union (Eligibility for Protection) Regulations 2013. The Recast Qualification Directive will not apply to Ireland.
best interests of the child as a primary consideration (Article 3(1) CRC), ascertaining the views of the migrant child (Article 12 CRC) and Ireland’s obligations to provide protection and assistance to child refugees, whether accompanied or unaccompanied (Article 22(1) CRC) are all recognised.

States international legal obligations, regarding the rights of the asylum-seeking child and protection status determination procedures, can be summarised as follows:

- The State has responsibility for ensuring the best interests of the child, in particular where the asylum seeker is a separated child;13
- There is a need for child sensitive status determination procedures;14
- In general, applications for refugee status (and other forms of protection) by children should be handled on a priority basis, unless there are good reasons not to do so;15
- The views of children to be taken into account, and the voice of the child to be heard during status determination procedures.16 As a corollary to this, decisions need to be communicated to children in a language they understand, and in an age appropriate manner.17
- For separated child asylum seekers, an independent guardian should be appointed to represent the interests of the child;18
- Decision makers must have training and competence to deal with asylum applications for children.19 These decision makers must recognise that children communicate differently to adults and cannot be expected to provide adult like accounts of their experiences.20

8.2.2. Irish Law, Policy & Practice

14 UNHCR Executive Committee Conclusion No. 47 (XXXVIII) of 1987, para (b)(v) UNGA Doc. No. 12A (A/42/12/Add.1); UNHCR Executive Committee Conclusion No. 101 (LVIII) of 2007, para (c)(i), UNGA Doc. No. A/AC.96/1048.
15 UNHCR, Guidelines on International Protection: Child Asylum Claims under Article 1(A)2 and Article 1 (F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, UN Doc. HCR/GIP/09/08 (22 December 2009), para. 66.
16 Article 12 CRC and for separated children, see: Committee on the Rights of the Child, General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, UN Doc. CRC/GC/2005/6 (1 September 2005) and UNHCR Executive Committee Conclusion No. 102 (LVI) of 2005, paras. (n)-(w), UN Doc. A/AC.96/1021; UNHCR Executive Committee Conclusion No. 101 (LVIII) of 2007, para (g), UNGA Doc. No. A/AC.96/1048. For special measures for asylum seeking girls, see UNHCR Executive Committee Conclusion No. 105 (LVIII) of 2006, paras. (m)-(p), in particular (n) (iv), UNGA Doc. No. A/AC.96/1035.
17 UNHCR, Guidelines on International Protection: Child Asylum Claims under Article 1(A)2 and Article 1 (F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, UN Doc. HCR/GIP/09/08 (22 December 2009), para. 77.
18 UNHCR, Guidelines on International Protection: Child Asylum Claims under Article 1(A)2 and Article 1 (F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, UN Doc. HCR/GIP/09/08 (22 December 2009), para. 69
19 See above, fn. 16.
20 UNHCR, Guidelines on International Protection: Child Asylum Claims under Article 1(A)2 and Article 1 (F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, UN Doc. HCR/GIP/09/08 (22 December 2009), para. 72.
Irish law as regards status determination of asylum claims is set down in the Refugee Act 1996 (as amended). At first instance, an asylum claim is determined by the Office of the Refugee Applications Commissioner (ORAC), while an asylum seeker may appeal a negative determination to the Refugee Appeals Tribunal (RAT). Ireland is also bound by the EU’s Procedure’s Directive. This directive sets down minimum standards for assessing and deciding upon the granting of refugee status only. This includes minimum standards as regards: access to status determination procedures; guarantees as regards assessment of asylum applications; rights of interview and the principles relevant to assessing an asylum application. The rights of the child to proper asylum determination procedures are poorly considered in this directive. In Ireland, where an asylum seeker is found not to be in need of refugee status, only then may she claim to be in need of subsidiary protection. While there has rightly been a significant focus on the needs of separated children; the rights of children who are accompanied must also be considered during the status determination process.

As can be seen from the table below; the total number of children making initial refugee applications is relatively low.

<table>
<thead>
<tr>
<th>Year</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
<th>2014</th>
</tr>
</thead>
<tbody>
<tr>
<td>Separated Children</td>
<td>94</td>
<td>98</td>
<td>56</td>
<td>37</td>
<td>26</td>
<td>23</td>
<td>20</td>
<td>30</td>
</tr>
<tr>
<td>Total Refugee Applications by those under 18</td>
<td>1025</td>
<td>1016</td>
<td>764</td>
<td>573</td>
<td>387</td>
<td>277</td>
<td>261</td>
<td>264</td>
</tr>
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22 See, section 15 and section 16 of the 1996 Act (as amended).


Under Section 8(5)(b) of the Refugee Act 1996 (as amended), and the Irish 2011 Asylum Procedures Regulations, the Child and Family Agency have duties to inter alia ensure a representative appointed by the Child and Family Agency explains to an unaccompanied minor the nature of the status determination and interview processes. While ORAC and RAT do provide some facilities relating to child friendly nature of rooms and the Child and Family Agency can make an application for asylum on behalf of an unaccompanied minor; explicit recognition of the rights of all children in the asylum process are somewhat absent from the Irish status determination legislation. ORAC has engaged in training of staff on issues relating to separated children. The HSE may make an application for refugee status or subsidiary protection on behalf of a separated child.

Since November 2013, ORAC has been responsible for determining whether an asylum seeker meets the definition of subsidiary protection. The EU Procedures Directive states that for unaccompanied minors only, the best interest of the child is to be the primary consideration. Ireland is not bound by the EU Recast Asylum Procedures Directive, which will bind other Member States post July 2015. In the EU Recast Asylum Procedures Directive, there is a reference to protection of the ‘best interests of the child’ in applying the Directive. However, substantive exposition of this principle is absent, bar from State obligations relating to unaccompanied minors.

When dealing with an unaccompanied minor’s application for subsidiary protection, ORAC must take the best interests of the child as a primary consideration must ensure that the person appointed to represent the interests of the child, explains to the child how the refugee or subsidiary protection process operates and the potential outcomes, and how best the child may prepare him/herself for an interview; the representative is allowed to ask questions and make comments, “within the framework set” by the

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28 See also, Head 33 of the General Scheme of the International Protection Bill.
29 This is the phrasing utilised in Irish law, as opposed to the preferred phrase of separated children, see below fn. 34.
30 For an examination of the rights of separated children in Ireland, see Irish Refugee Council, Closing a Protection Gap (Dublin: IRC, 2011) and Ní Raghallaigh, M., Foster Care and Supported Lodgings for Separated Asylum Seeking Young People in Ireland: The views of young people, carers and stakeholders (Dublin: HSE/Barnardos, 2013).
33 See above.
34 In this regard, the EU refuses to use the phrase ‘separated children’. As the Irish Ombudsman for Children notes: “The term “separated” is preferable to “unaccompanied” because it better defines the essential problem that such children face. Namely, that they are without the care and protection of their parents or legal guardian and as a consequence suffer socially and psychologically from this separation…”, see Ombudsman for Children, Separated Children Living in Ireland (Dublin: OCO, 2009), p. 13.
35 See Recital 14 and Article 17 of the Procedures Directive.
37 Recital 33, EU Recast Procedures Directive.
38 Article 25, EU Recast Procedures Directive.
ORAC interviewer; the particular interviewer must have “the necessary knowledge of the special needs of minors” and the report regarding refugee or subsidiary protection. The decision must be prepared “by a person or persons with the necessary knowledge of the special needs of minors”. That the best interests of the child is the primary consideration as regards the Minister granting permission to reside, a travel document or permission for a family member (if that family member does not qualify for subsidiary protection) to reside in the State is also welcome.

In January 2015, the Chairperson of the Refugee Appeals Tribunal, Barry Magee issued Guidance Note 2015/1, Appeals from Child Applicants. This Guidance Note represents an important development in the hearing of child refugee/subsidiary protection claim on appeal. It applies to all children (whether separated or accompanied) and is informed by key international legal obligations upon the State as regards procedural rights for children in the status determination process. The best interests of the child as a primary consideration, awareness of child-centric forms of persecution and “treatment as children first and foremost and asylum applicants second”, are the key guiding principles within this Guidance Note.

The Guidance Note imposes on Tribunal Members key obligations pre-hearing, at the hearing and when the substantive consideration of the child’s protection claim

39 Reg. 4 of the 2011 Regulations.
40 Reg. 3 of the 2011 Regulations deals with the recommendation of ORAC on whether to grant or refuse the application for refugee status. Reg. 6 of the 2013 Regulations deals with the recommendation from ORAC (be it to grant or refuse the application for subsidiary protection). See also, Head 33 of the General Scheme of the International Protection Bill 2015.
41 Reg. 4(b) of the 2011 Regulations and Reg. 19 of the 2013 Regulations. See also, Head 33 of the General Scheme of the International Protection Bill 2015.
42 Reg. 23 of the 2013 Regulations.
43 Reg. 24 of the 2013 Regulations.
44 Reg. 25 of the 2013 Regulations. Children, be they accompanied or separated, are also entitled to have their best interests taken into account when the Minister decides
45 Reg. 22(3)(b) of the 2013 Regulations. This approach to the best interests of the child, post the recognition of protection status, will continue under Heads 47 to 52 of the General Scheme of the International Protection Bill 2015.
47 The Guidance Note was issued pursuant to paragraph 17 of the Second Schedule of the Refugee Act 1996 (as amended).
48 Guidance Note 2015/1, Appeals from Child Applicants (January 2015), para. 1.2.
49 Guidance Note 2015/1, Appeals from Child Applicants (January 2015), para. 1.3.
50 Guidance Note 2015/1, Appeals from Child Applicants (January 2015), para. 3.1.
51 Guidance Note 2015/1, Appeals from Child Applicants (January 2015), para. 3.3.
52 Guidance Note 2015/1, Appeals from Child Applicants (January 2015), para. 3.4. In line with international law, the Guidance Note (para. 3.2) recognises that children will still have to satisfy “all elements of the refugee and person in need of subsidiary protection definitions…”
53 Guidance Note 2015/1, Appeals from Child Applicants (January 2015), paras 4-11. This includes RAT and individual Tribunal Members being responsible for prioritising child applicants, undergoing child specific training, communicating information about the hearing in a child appropriate manner, and scheduling hearings to be child friendly.
54 Guidance Note 2015/1, Appeals from Child Applicants (January 2015), paras 12-20. This includes an obligation on the Tribunal Member to ensure that the child’s right to be heard is respected, protected and facilitated, and the shared burden obligation within refugee/subsidiary protection status determination may be greater on the RAT, than may be the case for adult applicants.
occurs.  

The Guidance Note also provides information on questioning style to be utilised when interviewing child applicants.

The near invisibility of accompanied children within Irish asylum law, has been recognised by the Irish Human Rights Commission (2008), the Ombudsman for Children (2008) and the Irish Refugee Council (2010) who have highlighted some key problems from a child’s rights perspective with earlier emanations of the Immigration, Residence and Protection Bill/ General Scheme of the International Protection Bill 2015. ORAC and RATs internal guidance to decision makers does go some way to ensuring a more child friendly status determination process.

However, at the legislative-policy level, children who make asylum/subsidiary protection claims should not simply be treated as having made adjunct claims subordinate to those made by their parents/guardians, as is envisaged by Head 12(3) of the General Scheme of the International Protection Bill 2015.

8.2.3 Recommendations: Hearing the Voice of the Child in the Status Determination Process

In terms of concrete recommendations, the reformed status determination system that will be introduced in the forthcoming International Protection Bill, should ensure full respect for the rights of the child, and comply with Ireland’s obligations under international law. This must include:

The Government should accept and implement all recommendations made by the Working Group on the Protection Process and Direct Provision System as regards the rights of the child in the protection status determination process.

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55 Guidance Note 2015/1, Appeals from Child Applicants (January 2015), paras 21-23. This includes an obligation on Tribunal Members to give the benefit of the doubt to the child applicant, where the child’s account is broadly credible, recognising child specific forms of persecution and the heightened duty of confidentiality in the status determination process.

56 Guidance Note 2015/1, Appeals from Child Applicants (January 2015), Annex 1.

57 IHRC, Observations on the Immigration, Residence and Protection Bill 2008 (Dublin: IHRC, March 2008), p. 15, where the IHRC called for the insertion of a general provision regarding the best interests of the child.

58 OCO, Advice of the Ombudsman for Children on the Immigration, Residence and Protection Bill 2008 (Dublin: OCO, March 2008), pp. 11-13. The OCO has specifically noted how children are automatically deemed to be part of their parents application under Section 73(12) of the 2008 Bill (for the 2010 Bill, see Section 81(12)).


60 The Immigration, Residence and Protection Bill has been around in one form or another since 2006. The Heads of the Immigration, Residence and Protection Bill were initially published in 2006. Two substantive Bills then followed: the Immigration, Residence and Protection Bill 2008 and the Immigration Residence and Protection Bill 2010. In March 2015, the General Scheme of the International Protection Bill 2015 was published by Government.

A general duty to ensure that in exercising their functions, status determination bodies in the International Protection Bill should safeguard, promote and protect the best interests of the child.\textsuperscript{62}

The International Protection Bill should include an explicit provision that at all stages of the protection process, the best interests of the child must be the primary consideration. This will augment the policy developments already occurring at ORAC and RAT.

All children, whether separated or accompanied, who are in the asylum process, must have their voice heard throughout the entirety of status determination procedures. This should be a specified legislative right of the child.\textsuperscript{63}

An application for protection is only made, for separated children, where it is in the best interests of the child to do so. Such a determination will need to be made by the Child and Family Agency, the child’s guardian ad litem and an independent legal representative, in conjunction with the separated child who is able to express her or his views on the matter. It is essential that unaccompanied children not be left in legal limbo, and face the prospect of having to make an asylum claim many years after arriving in the country.

For accompanied children, it is recognised that their parents or guardians will often be able to protect and vindicate the best interests of the child. However, in order to protect the rights of the child, as an individual, it is important that at all stages of the protection status determination procedures, the rights of the child are respected and protected. The forthcoming International Protection Bill should contain provisions that strengthen the rights of children to make protection claims independent of their parents or guardians.

Explicit legislative provisions should be inserted to the International Protection Bill, recognising the duty on all decision makers to ensure the right of the child to be heard, where it is appropriate to do so, in line with the capacity of the child to express her or his views.

8.3. Family Reunification

In general, the term ‘family reunification’ is used to describe the attempts of family members separated by forced, or voluntary, migration to re-unite in a particular country. It can involve families whose members are third country nationals only or families that are a mix of third country nationals and EU/EEA citizens or Irish citizens. It covers situations where a sponsor seeks to be joined by third country family members where this relationship pre-existed before the sponsor moved to Ireland (family reunification), as well as situations in which a family unit is established between a sponsor who has acquired legal residence in Ireland or is already an Irish citizen with a third country national who lives abroad (family formation). Furthermore, the term may also be used when considering whether a family unit established in Ireland

\textsuperscript{62} This could be potentially modelled on such an existing legal provision applicable in the United Kingdom: Section 55, Borders, Citizenship and Immigration Act 2009. See also, McMahon Report, paras. 3.192 and 3.199 (general duty as regards best interests of the child).

\textsuperscript{63} See also, McMahon Report, para. 3.203.
is protected against the expulsion or deportation of one or more family members (family retention).  

8.3.1 International Obligations

The primacy of the family as the most basic unit of society and its importance to children is reflected in many of the human rights instruments relevant to the rights of the child.  The UN Committee on the Rights of the Child has noted that separation of a child from a parent has adverse consequences, particularly for very young children, arising from their physical dependence on and emotional attachment to their parents/primary caregivers. Article 9 and Article 10 CRC place obligations on States parties to deal with applications for family reunification by a child and his or her parents to enter or leave a State Party for the purpose of family reunification in a positive, humane and expeditious manner. It is important to note that there is no right to family reunification per se. The obligation on States under the CRC consists of:

- A fair and transparent process and procedure to consider family reunification applications from those with refugee status and any other migration status;
- The best interests of the child and preservation of the family unit have to be considered throughout the process;

8.3.2 Irish Law, Practice and Practice

The importance of the family unit to society and rights to private and family life are protected under the Irish Constitution and international and European human rights law. There is no automatic or absolute right under Irish or EU law for family members to have the care and/or companionship of other migrant family members in Ireland. There are complex and separate legislative and administrative policies/procedures governing applications for family reunification depending on an individual’s residence status. Some of the current statutory rights to family reunification concern non-

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65 See, Preamble, CRC and Article 5 and Article 9 CRC.
66 Committee on the Rights of the Child General Comment No 7 Implementing Child Rights in Early Childhood (2005) CRC/C/GC/7/Rev.1, para 18. See also, Children’s Commissioner for England: Dr. Maggie Atkinson correspondence to Minister of State for Immigration re. Migration Family Rules, August 2013.
67 General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), UN Doc. CRC/C/GC/14 (29 May 2013), para. 3, 29 and 66. See also,
69 See, Article 41.1.1° and Article 41.1.2° of the Irish Constitution.
70 See, for example, Article 17 ICCPR and Preamble para. 6 and Article 5 CRC.
71 This includes Article 8 of the European Convention on Human Rights and Article 7 of the European Union Charter of Fundamental Rights.
EEA/EU family members of EU/EEA nationals, scientific researchers, refugees and persons granted subsidiary protection. There is a lack of any legislative process as regards the admission of family members of Irish citizens (adults and children). Individuals granted leave to remain, long-term residents, migrant workers, and international students, are generally subject to discretionary Ministerial decision-making on an individual case-by-case basis. The details of this current legal and policy framework governing family reunification applications in Ireland has been set out comprehensively in a number of publications elsewhere and will not be discussed in this chapter. A significant underlying issue that impacts on knowledge of family reunification, law, policy and the rights of the child is the lack of available data and statistics in this area.

In 2006, the Committee on the Rights of the Child recommended that Ireland must ensure systematic collection of data on a range of child rights issues. To date, this has not occurred. Ireland does not keep statistics on issues relating to family reunification. Although there is some limited information available from Eurostat on first permits issued, the lack of data on visas and residence permits issued for the purpose of joining or remaining with family members in Ireland has been highlighted as an issue. A number of key issues arise as regards the approach of Ireland to issues of family reunification from a child’s rights perspective, including the level of discretion as regards family reunification in Irish law and policy; the rights of Irish citizen children to care and companionship of family members and refugee rights to family reunification.

a) Procedure, Discretion and Delay
The level of discretion within Ireland’s family reunification laws and policies could potentially have serious consequences for children. The UN Committee on the Rights of the Child has noted that

“young children are especially vulnerable to adverse consequences of separations because of the physical dependence on and emotional attachment to their parents/primary caregivers. They are also less able to comprehend the circumstances of any separation.”

The separation of a child from a parent has particularly serious consequences for very young children when they are forming basic, life-long attachments. The negative psychological, emotional and social impacts on young children following the forced removal of a parent and the additional burdens placed on the remaining de facto single parents have also been highlighted. In POT v Minister for Justice, Equality and Law Reform, Mr. Justice Hedigan voiced concerns about the period of time it took ORAC/the Minister to consider the application for family reunification in light of Irish constitutional protection of the family, Article 16 of the Universal Declaration of Human Rights and Article 8 of the European Convention on Human Rights. Mr Justice Hedigan stated that even a two year delay in arranging the reunification of the family of a person granted refugee status would be an acceptable delay in the light of Article 8 of the European Convention on Human Rights and the protection of the family within the Irish Constitution. In the context of refugee applications, average processing times are currently two years. In respect of non-refugee applications, the Minister has recently identified processing targets of between 6-12 months depending on the category of applicant. The Irish High Court has already indicated that a processing time of 12 months for applications for residence permits made by spouses of Irish nationals is the maximum time which can be considered reasonable.

b) Irish Citizen Children

The issues of discretion, lack of clear policy and inconsistent outcomes are issues that have particularly affected, and are well-illustrated by the experiences of Irish citizen children seeking family reunification with their non-Irish family members, including their parents and siblings. The Irish Naturalisation and Immigration Service (INIS) policy document on Non-EEA Family Reunification recognises the rights of the citizen child
to special protection\textsuperscript{91} and to consider the child’s rights to the financial and emotional support of her non-EU national parent(s).\textsuperscript{92} However, the policy goes on to set out that an Irish child may be one member of a larger family comprised of non-Irish citizens and that applications

“seeking to bring to Ireland both parents and all siblings, on the basis of the citizenship of a single minor would seem to go beyond what is reasonable, particularly if the State would be required to provide financial support for the family.”\textsuperscript{93}

Although not explicitly stated, it seems that a child’s rights are deemed to be met by facilitating their presence in Ireland by permitting a parent to reside in the State with them, even if this results in ongoing separation from another parent and/or siblings living in another country. The policy does not appear to address the situations of Irish children whose parents were previously deported or who left of their own volition, perhaps to avoid the risk of deportation and consequential life-long ban from re-entering Ireland.\textsuperscript{94}

In the event that the applicant family member is the subject of a deportation order previously issued, it is necessary for an application to revoke the deportation order to be submitted. These applications are also determined at the discretion of the Minister for Justice and Equality.\textsuperscript{95} There is no statutory right of appeal in the event that any category of family reunification application is refused, although individuals may seek an administrative review\textsuperscript{96} or, if there are grounds, judicial review. In terms of access to remedies, however, there is no access to legal aid in practice and the costs involved can be prohibitive.\textsuperscript{97} Arising from the high levels of Ministerial discretion and low levels of actual reunification,\textsuperscript{98} according to MIPEX,\textsuperscript{99} Ireland has the least favourable family reunification policies in the EU. The Irish Human Rights Commission (IHRC) has criticised the existing framework noting that the lack of statutory rules for all applicants, especially Irish citizens, is a major gap. It has also recommended that where applications involve children, the best interests of the child should be a primary consideration and factors such as the age of the child, their situation in their country of origin and their degree of dependence on their parents should be taken into account.\textsuperscript{100}

c) Refugees, subsidiary protection holders and qualifying family members

\textsuperscript{92} INIS, \textit{Policy Document on Non-EEA Family Reunification} (December, 2013), pp. 54-56.
\textsuperscript{94} See further, Becker, H., \textit{Immigrants and the Law in Ireland} paper delivered at the Burren Law School, 4\textsuperscript{th} June 2013 at p. 4.
\textsuperscript{95} Section 3, Immigration Act, 1999.
\textsuperscript{96} INIS, \textit{Policy Document on Non-EEA Family Reunification} (December, 2013).
\textsuperscript{97} Cosgrave, C. and Becker, H. at p.44.
\textsuperscript{99} Migrant Integration Policy Index (MIPEX) III, (British Council and MPG, 2011) at pp. 106-107. See also MIPEX Key Findings Ireland, 2014 available at \url{http://www.mipex.eu/ireland} (last accessed, 08 July 2015).
\textsuperscript{100} Irish Human Rights Commission, \textit{Position Paper on Family Reunification} (IHRC, 2005).
Even where statutory entitlements to reunification do exist, difficulties can nonetheless arise. Although refugees/subsidiary protection holders do enjoy rights to family reunification with particular family members, the definition of qualifying family members is very strictly applied, which can have profound impacts on family unity. Examples highlighted in available research\(^\text{101}\) include a minor refugee seeking reunification with a parent and siblings. The application for the parent was approved but the siblings were refused, as they were not considered to be dependent on the refugee applicant. Despite a recommendation by the European Council on Refugees and Exiles\(^\text{102}\) that a broader sense of dependence be taken into account both in psychological terms and cultural terms, this does not seem to be the practice during the Government’s decision-making process. A further example\(^\text{103}\) is the situation of refugees who arrive in Ireland while under the age of 18, but who have turned 18 by the time their application for asylum has been determined. In such circumstances, ‘aged-out’ minors have considerable difficulty in making successful applications for family reunification, as they are no longer considered to be children at the time of application.

### 8.3.3 Recommendations on the Rights of Children & Family Reunification

It is questionable whether domestic legislation, administrative policies and practice, as outlined above, currently fulfil Ireland’s obligations under the UNCRC. In accordance with international standards and best practice and having regard to the existing UNCRC Concluding Observations 2006,\(^\text{104}\) the following recommendations for reform are made:

**Procedural:**

- An independent legal adviser and/or guardian should be appointed at the outset of all migration-related procedures before any application is made by or on behalf of a child to ensure that children are independently advised and represented and have an opportunity to have their voice heard at all stages of the application process.
- Family reunification should take place with the least possible delay and within a period of six months from the time an application is made. Applications from or regarding separated children should be prioritised in view of the potential harm caused by long periods of separation from their parents.

**Legislative:**

- Review the current definition of qualifying family members in the Refugee Act, 1996 (as amended) and provide amendments in the International Protection Bill to better correspond to refugee situations.

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\(^{103}\) Cosgrave, C. *Family Matters: Experiences of Family Reunification in Ireland* (ICI, 2006) at p. 77.

Statutory provisions for family reunification for all other categories of family reunification be introduced in future Immigration and Residence legislation with the underlying principle of best interests of children explicitly recognised.

Family migration legislation and practice should ensure that children are supported to live with their parents in Ireland where their best interests require this.

8.4 Deportation

The power to exclude non-citizens from territory is viewed as an inherent right of states. Given the profound consequences for individuals, however, it is not surprising that this power to deport is not absolute. The focus of this part of the chapter is on the rights of non-Irish citizen and non-European Union citizen children. While there is a growing questioning of the system of deportation in and of itself, neither international nor European human rights law prohibits deportation.

8.4.1 International Legal Obligations & Standards

The Convention on the Rights of the Child is silent as regards the direct issue of deportation. However, if the State does propose to deport a child and/or his or her parents, then a number of the child’s rights under the Convention on the Rights of the Child (CRC) may be relevant.

- Article 3 CRC: The best interests of the child;
- Article 5 CRC: Respect for the responsibilities of parents;
- Article 12 CRC: The right of a child to be heard;
- Article 37(b) CRC: Protection of children from unfair and arbitrary detention.

The core international obligations on States, include:

- An obligation to consider the impact of any proposed deportation on the best interests of the child;\(^{105}\)
- While the best interests of the child is the primary consideration, it is not the only consideration;\(^{106}\)
- The child has a right to be heard and involved in any decision relating to her proposed removal from a State;\(^{107}\)
- If it is decided that the child is to be deported, there is an absolute prohibition on placing the child in a detention facility (with or without her parents) pending deportation.\(^{108}\)


\(^{106}\) See above, paras 73 and 74.

\(^{107}\) See above, paras 83-85.

\(^{108}\) See, as examples, Application no. 13178/03, *Mayeka and Mitunga v Belgium*, decision of the European Court of Human Rights (12 October 2006); Application no. 41442/07, *Muskhadziyeva and Others v. Belgium*, decision of the European Court of Human Rights (13 December 2011); Applications
8.4.2. Irish Law, Policy & Practice

Subject to the prohibition against *refoulement*, the Minister for Justice and Equality is vested with a wide discretion to deport individuals from the State in certain situations. This power is most typically exercised against a person whose application for asylum has been refused, or who is deemed to be in the State without permission and, in the opinion of the Minister, their deportation would be in the common good. There is no statutory bar against the deportation of a child, including unaccompanied children. Before a deportation order may be issued against a person, the Minister is obliged to follow a statutory procedure. In addition, the Minister must exercise her power to deport in a manner compatible with Ireland’s obligations under the European Convention on Human Rights. Furthermore, it is clear there is legal obligation on the Minister to expressly consider the Constitutional and personal rights of the child. In addition, the welfare or best interests of the child are a relevant consideration, albeit not the primary consideration, in the making of any decision to issue a deportation order.

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The Rights of the Child & Inadequate Procedural Safeguards

As identified above, the best interests of the child are supposed to be examined by the Minister in the course of the determination whether to issue a deportation order. However, a legal challenge to the lack of consideration of the best interests of the child in deportation proceedings before the Irish High Court has failed. At the earlier leave for review stage of *Dos Santos*, the State argued during the course of these cases, that while the UNCRC has been ratified, it has not been incorporated into domestic law and that the "best interests" principle does not apply in the context of deportation proceedings. In *Dos Santos v Minister for Justice*, McDermott J. had to consider

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109 Section 5, Refugee Act, 1996 provides that a person shall not be expelled from the State or returned in any manner whatsoever to the frontiers of territories where, in the opinion of the Minister, the life or freedom of that person would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion.

110 Section 3(1), Immigration Act 1999.

111 Section 3(2)(f)(g) and (i), Immigration Act 1999

112 This includes: notifying the person concerned of the proposal to deport and the reasons for this decision. The person may then, within 15 working days, make representations to the Minister and, before the Minister decides the matter, he is obliged to take into consideration any representations made and then notify the person in writing of the decision and the reasons for it. Section 3(6) sets out that in determining whether or not to make a deportation order, the Minister is obliged to have regard to various matters including age, duration of residence in Ireland, family and domestic circumstances, nature of persons connection with the state, humanitarian considerations, the common good and national security.


114 *Dimbo v Minister for Justice and Law Reform* [2008] IESC 26


116 *Dos Santos & Ors v Minister for Justice* [2013] IHEC 237 at paras. 31 and 41.

117 *Dos Santos & Ors v Minister for Justice* [2014] IHEC 559.
whether the best interests of non-citizen children had to be considered by the Minister who proposed to deport the children, with their parents, to their country of nationality (Brazil). 118 McDermott J. held that while non-citizen children hold significant constitutional rights, 119 the Minister for Justice had considered these constitutional rights, along with the “welfare of each child” 120 when making the deportation order. McDermott J. noted that the constitutional rights of non-citizen children derive from a number of different Constitutional articles, including Article 41 on the family. 121 A child also enjoys a number of unenumerated rights under Article 40.3. 122 McDermott J. further held that the principle of the best interests of the child as the primary consideration in making a deportation order (Article 3 CRC) does not form part of domestic Irish law. 123 In light of previous Supreme Court decisions as regards domestically unincorporated international human rights treaties, McDermott J. determined that the UN CRC does not form part of Irish law. 124 However, McDermott J. noted that this contrasts with the domestic application of the “best interests” principle as regards immigration matters in the UK. 125 This decision is currently on appeal to the Supreme Court. While it is welcome that the Minister is under a legislative obligation under Section 3 of the Immigration Act 1999 to consider the welfare of the child, this is arguably a lower threshold that the “best interests” as primary consideration under the UN CRC. Forthcoming legislative reforms in the area of deportation need to explicitly recognise the best interests of the child as the primary consideration.

**Manner in which removal/deportation affected**

In accordance with statutory obligations, an individual, in respect of whom a deportation order is issued, must be informed of the decision in writing and is thereafter under an obligation to remove themselves from the country. In practice, individuals are notified of the decision in writing and are required to present to the GNIB on a particular date, in order to make arrangements and to facilitate their departure from the State. However, in general an individual is not removed from the State on that occasion and thereafter they are required to present regularly, usually monthly, to the GNIB. Such practices have recently been considered by the Irish courts in examining an application for an inquiry under Article 40.4.2 of the Constitution into the legality of the detention of one of the family members in the course of seeking to effect his deportation from Ireland. 126 The case of *Omar v Governor of Cloverhill* 127 illustrates the need to ensure

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118 For the complete grounds of the applicants’ arguments, see *Dos Santos & Ors v Minister for Justice* [2014] IEHC 559, para 1. The High Court also rejected arguments on the basis of Article 8 ECHR (paras 61-81), using similar rationale to previous deportation decisions from the Irish courts and from the European Court of Human Rights. Many of the decisions relied upon by McDermott J are discussed in Mullally, S and Thornton, L. “The Rights of the Child, Immigration and Article 8 in the Irish Courts” in Kilkelly, U. *ECHR and Irish Law* (2nd ed., Bristol: Jordans, 2009).

119 *Dos Santos & Ors v Minister for Justice* [2014] IEHC 559.

120 *Dos Santos & Ors v Minister for Justice* [2014] IEHC 559 at para. 47.

121 *Dos Santos & Ors v Minister for Justice* [2014] IEHC 559 at paras 29-34.

122 *Dos Santos & Ors v Minister for Justice* [2014] IEHC 559 at paras 35-41.

123 *Dos Santos & Ors v Minister for Justice* [2014] IEHC 559 at para. 47 and para. 59.

124 *Dos Santos & Ors v Minister for Justice* [2014] IEHC 559 at para. 59, with discussion of previous Irish cases at paras 50-54.


126 See, for example, *Omar v Governor of Cloverhill* [2013] IEHC 579.

that the best interests of the child are the primary consideration when deportations are being effected in Ireland. In this case, the Omar family, which included a seven year old child, were subjected to a number of unlawful and intrusive actions by An Garda Síochána. The family, including a seven year old child, were placed under "de facto arrest"\textsuperscript{128} by the Gardaí.

Mr. Justice Hogan stated:

\begin{quote}
"It is simply distressing beyond words to think that a State committed to safeguarding the best interests of children would ever contemplate subjecting a young boy of seven years and six months to such an ordeal, even if he was not an Irish citizen and even if he had no right to be in the State".\textsuperscript{129}
\end{quote}

The best interests of children are not in any way served by when children experience trauma during the migration process arising from unnecessary and avoidable State practice in the context of forced removals from the State.\textsuperscript{130} Fundamentally, children should never be detained on the basis of their immigration status.\textsuperscript{131}

\subsection*{8.4.3 Recommendations}

- Head 45 of the General Scheme of the International Protection Bill 2015 should be amended to include express provision for the recognition of the best interests of the child as the primary consideration, where a decision is made on issues relating to deportation.
- A child, who has the capacity and capability of forming his or her own views, must have an explicit right to be heard in any deportation process related to the child and/or the parent(s)/guardian(s) of the child.
- The International Protection Bill must make it clear, that where the State proposes to deport a separated child, this can only be carried out where there is an identified responsible adult/caregiver to accompany and care for the child on return.
- Where the State proposes to continue with a deportation (after a consideration of the best interests’ principle and respect the right of a child to be heard); there must never be any resort to actual or de facto detention of the child and his/her family.
- Given the serious nature of the exercise of the States power to deport a child, the State should provide information on the rights of child deportees; the number of child deportees; and explicitly recognise the right of child deportees to contact the Ombudsman for Children and the Irish Human Rights and Equality Commission.

\textsuperscript{128} Omar v Governor of Cloverhill [2013] IEHC 579, para. 57.
\textsuperscript{129} Omar v Governor of Cloverhill [2013] IEHC 579, para. 29 (emphasis added).
\textsuperscript{130} See, Mulznieks, N., “Decisions concerning migrant children must always be based on their best interests”, Human Rights Comment, 1/09/2013.
\textsuperscript{131} See above, fn. 108.