

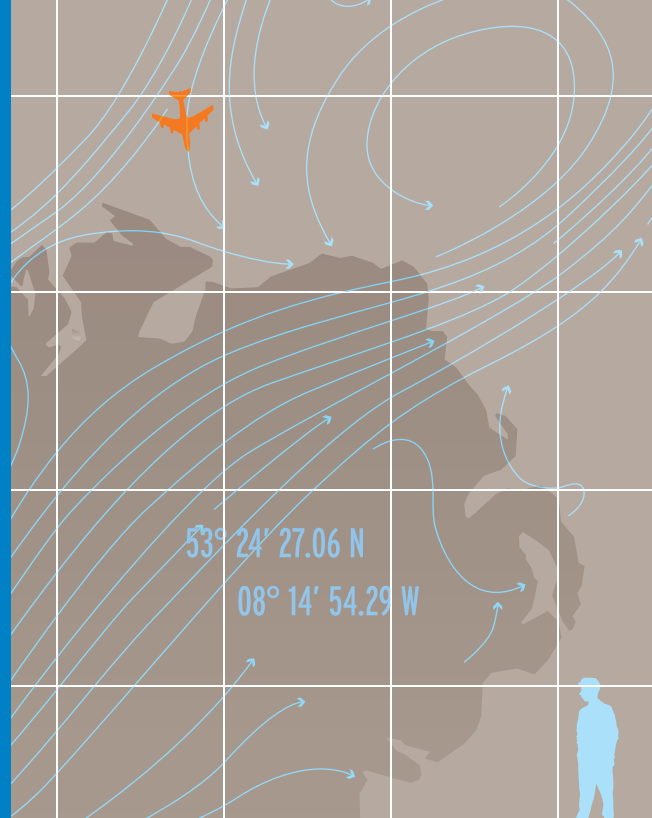
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Embedding equality in immigration policy

Item Type	Report
Authors	The Equality Authority
Publisher	The Equality Authority
Download date	2026-06-08 02:15:27
Link to Item	https://hdl.handle.net/10147/297604

Embedding Equality in Immigration Policy



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THE EQUALITY AUTHORITY
AN tÚDARÁS COMHIONANNAIS

First published August 2006

by

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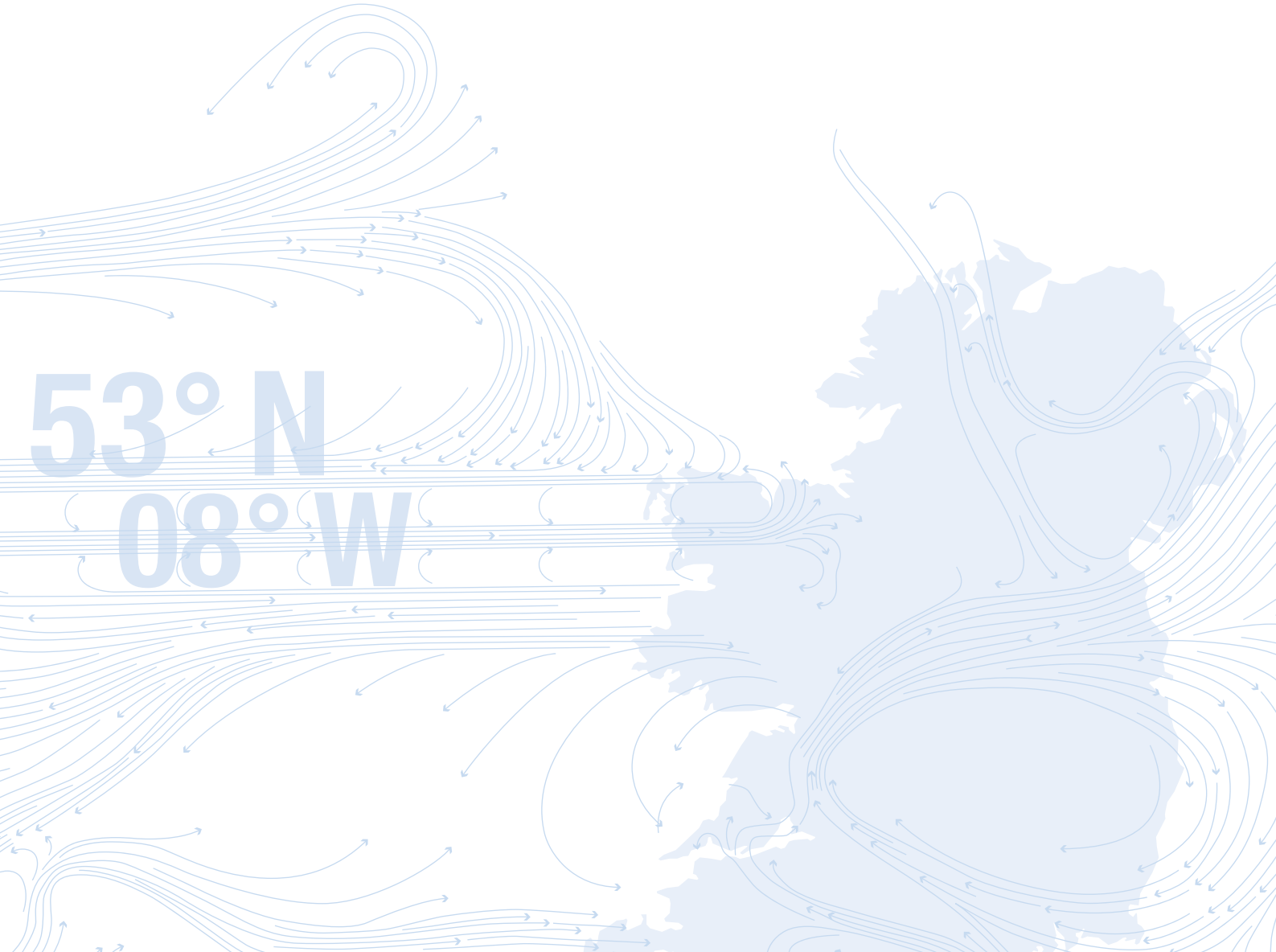
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ISBN-10 1-905628-19-6

ISBN-13 978-1-905628-19-3

Embedding Equality in Immigration Policy

Submission on the discussion document of the Department of Justice,
Equality & Law Reform on the Immigration and Residence Bill



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Foreword

“Embedding Equality in Immigration Policy” is the submission made by the Equality Authority to the Minister for Justice, Equality and Law Reform in response to the discussion document on the Immigration and Residence Bill. This submission is based on a core concern of the Equality Authority that any new immigration legislation (including provisions that deal with immigration control) would adhere to the substantive principle of equality.

This submission makes the argument that where the state has established a formal process to which the migrant must submit her/himself, then the state must bind itself to ensuring that this process adheres to the substantive principle of equality. The discussion document does make a commitment that the immigration system should operate in accordance with equality principles set by the government. However, this submission highlights that the protection afforded by these policies is limited and that this commitment to equality needs to be applied and elaborated across all areas covered by the discussion document.

The Equality Authority in this submission sets out a range of recommendations to be addressed in new immigration and residence legislation that would effectively embed a commitment to equality in the design and delivery of immigration policy. It is hoped that there will be a positive response to these recommendations such that policy and practice in this area can be characterised by non discrimination, the accommodation of diversity and the promotion of full equality in practice.

The Equality Authority is grateful to Eilís Barry BL, Legal Advisor to the Equality Authority, for her work in researching, preparing and drafting this submission. Her expertise and insight have ensured that this submission opens up a new and original perspective on immigration policy.



Niall Crowley

Chief Executive Officer
Equality Authority

1. Introduction



Migration Policy

Migration is high on the public, political and media agenda. In many societies citizens express concerns, both legitimate and unfounded, about the arrival of people from other countries and cultures. Migration has proved to be a politically difficult issue in a significant number of countries. The discourse on migration can become highly polarised at local, national, regional and global levels, with limited common ground between the different constituencies.

Migration policy is an emotive issue because it raises complex questions about the identity and value of individuals, households and communities as well as societies as a whole. It is controversial because it highlights important questions about national identity, global equity, social justice and the universality of human and equality rights. Migration policy is difficult to formulate and implement because it involves the movement of human beings.

The Programme for Government of June 2002 includes a commitment to prepare an Immigration and Residence Bill to consolidate legislation in the area and provide for future developments. The Department of Justice, Equality and Law Reform has published a discussion document outlining the range of issues to be addressed in legislation and current thinking on these issues and has invited comments.

The Immigration and Residence Bill will:

- “seek to review, amend, consolidate and enhance the current body of legislation which dates from the Aliens Act 1935”,
- “to put in place a 'modern legislative framework that will enable policies to be made and modified as needs require and that will provide a fair and transparent set of procedures for the day to day implementation of those policies’”.

A migration policy provides an opportunity for a state to provide a detailed account of the theoretical assumptions which underlie its treatment of migrants in the jurisdiction and those who have been or are excluded. It allows the identification of the moral, legal and political obligations owed to those who are seeking entry and those who have gained entry to the state.

A comprehensive migration policy will identify the powers and obligations of the state in controlling the arrival, residence and departure of the migrant. It should identify the factors justifying the exclusion of people. It should specify the rights and obligations of migrants themselves. It should identify the factors which govern the different categories and classifications it makes. It should also identify areas of migration policy where states have agreed to cooperate with each other.

Migrants constitute a very diverse group of people. They can include permanent residents, temporary migrants, student migrants, family members on temporary visits, family reunion migrants, skilled or unskilled migrants, investors, entrepreneurs, transit migrants, asylum seekers, refugees, tourists and migrants with irregular status.

An individual migrant may belong to one or more of these categories at the same time. She or he may move successfully from one category to another in the course of a migratory movement, or may seek to be reclassified from one category to another.

Equality Authority

The issue of immigration intersects with all areas of the Equality Authority's powers and functions. The Equality Authority has the core function of promoting equality of opportunity and seeking to eliminate discrimination in employment and matters covered by the Equal Status Acts 2000 to 2004. These functions include promoting equality of

opportunity and eliminating discrimination for migrant workers and/or immigrants.¹

[See Appendix for the intersection of powers, functions and work of the Equality Authority and the equality infrastructure with immigration].

1 The Equality Authority is a specialised body for the promotion of equal treatment as required by the EU Race Directive and the Amended Gender Equal Treatment Directive.



2. The Intersection of Equality Legislation with Immigration



Limited Protection

The discussion document states that:

“The immigration system should provide for the fair treatment of migrants and should operate in accordance with the equality policies set by Government...”

and that:

“An issue to be considered is whether any specific provisions in relation to equality, or direct references to it, are required in the Immigration and Residence Bill given the existing extensive equality legislation framework in Ireland.”

In order to fully understand the commitments made in the discussion document in relation to the principle of equality in immigration policy, it is necessary to identify what are the actual equality policies set by government and to identify the equality legislation provisions that are currently applicable in areas that are relevant to immigration policy for example, the controlling functions of the state, and service provision to migrants (particularly in respect of non-EU nationals).

Current equality legislation affords limited protection in the field of immigration. The Employment Equality Act 1998 and the Equal Status Act 2000 introduced significant albeit limited protection to migrants via the prohibition against discrimination on the ground of race in the areas of employment, the provision of goods and services, accommodation and

educational establishments. However the extent of the protection is limited by a number of factors including the following.

- a) The scope of the legislation is defined in a way that important areas that have particular relevance to migrants are excluded (for example immigration control and police powers do not explicitly come under the ambit of the Equal Status Acts 2000 to 2004).
- b) The State and public sector is under no positive duty to promote equality and/or good relations among migrants and for migrants.
- c) The extent and content of the exemptions. A number of exemptions in the Employment Equality Acts allow discrimination in effect against migrants. The State allows itself significant exemptions in the areas of services, accommodation and educational establishments by virtue of the statutory exemptions in Section 14 of the Equal Status Acts.
- d) Problems in relation to enforcement – the current ceilings on compensation, procedural obstacles and delays in hearings in the Equality Tribunal do not provide effective, proportionate and dissuasive remedies in relation to the areas that are covered.

The Equality Act 2004 increased in certain respects the extent of the protection afforded² to migrants, however it also diluted the protection afforded to migrants by the introduction of two exemptions:

- an exemption under the Employment Equality Act 1998 on the nationality ground in relation to any action taken in accordance with the Employment Permits Act 2003;
- the addition of a new exemption in the Equal Status Act 2000 which purports to allow a broad range of public authorities to treat certain non-nationals differently.

Equality Legislation

The main legislative provisions in relation to equality are:

2 For example, by explicitly stating the burden of proof, amending the definition of indirect discrimination.

- The Employment Equality Acts 1998 and 2004 and
- The Equal Status Acts 2000 to 2004³.

These have to be read and interpreted in the light of a number of EU Directives⁴. The Race Directive is the Directive with most relevance to the issue of migrant workers. Its provisions take precedence over Irish law. (The amended Gender Equal Treatment Directive requires Member States to promote gender employment equality. This would extend to gender employment equality among migrant workers.)

Both Acts:

- promote equality;
- prohibit discrimination across nine discriminatory grounds;
- prohibit sexual harassment and harassment;
- prohibit victimisation;
- require reasonable accommodation of people with disabilities

(while the obligation to provide reasonable accommodation only applies explicitly in relation to people with disabilities, it is a concept that could usefully be applied in relation to migrant workers and other discriminatory grounds. The Labour Court in *Campbell Catering Limited v Rasaq* (see Appendix), in effect required employers in relation to disciplinary matters to provide reasonable accommodation in respect of language and cultural difficulties) and

3 The Intoxicating Liquor Act 2003 amended the Equal Status Act 2000 and transferred the jurisdiction for discrimination claims relating to licensed premises from the Equality Tribunal to the District Court.

4 (Council Directive 2002/73/EC of 23 September 2002 amending Council Directive 76/207/EC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions [2002] OJ L 269/15; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 202/10 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22); Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in access to and supply of goods and services.

- allow broad positive action measures
(these would include positive action measures which seek to achieve full equality in practice for migrant workers and measures to target the most vulnerable or disadvantaged migrants in the provision of goods and services, accommodation and education).

The legislation is integrated in that it prohibits discrimination on nine discriminatory grounds. The nine grounds recognise the multiple identities held by individuals for example migrant women or migrants with disabilities. The grounds that are most relevant to migrants are the ground of race and the religion ground. The ground of race is broadly defined to include “*race, colour, nationality or ethnic or national origins.*” The religion ground includes different religious belief, background, outlook or none.

Discrimination is broadly defined to include direct discrimination, indirect discrimination (i.e. discrimination by impact or effect), discrimination by association or by imputation.

The scope of the legislation is broad. The Employment Equality Acts 1998 and 2004 apply to all aspects of the employment relationship from access to employment to post employment⁵. It also applies to a broad range of employees and other bodies⁶. The Acts also extend to the self-employed, partnerships and people employed in another person's home.

The scope of the Equal Status Acts 2000 to 2004 is broad, applying to the provision of goods and services, accommodation and educational establishments. There are separate provisions in relation to discriminatory clubs.

Exemptions

Both Acts are subject to a number of general and specific exemptions. Under the Employment Equality Acts 1998 and 2004 some of the exemptions apply to particular types of employment, some apply to all kinds of employment, some apply to particular grounds, and some apply to provisions in other legislation.

5 Aspects of employment that are covered include: advertising, equal pay, access to employment, vocational training, work experience, terms and conditions of employment, promotion or re-grading, classification of posts, dismissal and collective agreements.

6 Full-time, part-time and temporary employees, public and private sector employment, vocational training bodies, employment agencies, trade unions, professional and trade bodies.

The exemptions under the Employment Equality Acts 1998 and 2004 that are most relevant to migrants include:

- requirements in relation to the holding of specified educational, technical or professional qualifications which are generally accepted qualifications in the State;
- requirements in relation to the production and evaluation of information about qualifications (these often prove problematic particularly for refugees);
- residence, citizenship and/or proficiency in the Irish language requirements in relation to officers or servants of the State (including the Garda Síochána and the Defence Forces) and officers or servants of a local authority, a harbour authority, a health board or a VEC;
- proficiency in the Irish language requirement in relation to teachers in primary and post primary schools (this has given rise to complaints from teachers qualified in Northern Ireland);
- an exemption in relation to access to employment in another person's home (this does not extend to other areas such as conditions of employment etc.);
- an exemption on the nationality ground in relation to any action taken in accordance with the Employment Permits Act 2003 (this exemption gives rise to a lot of confusion).

There are significant exemptions/restrictions in the Equal Status Acts which seek to allow discrimination against migrants particularly on behalf of the State in relation to non-EU nationals.

The Equal Status Act 2000 prohibits discrimination in the area of the provision of goods and services. Services that are provided by the State are covered but are subject to some exemptions. One exemption is that anything that is required by another statute (or EU law) is exempted. The protection against discrimination in relation to services provided by the State therefore does not extend to the taking of any action that is required by another statute for example the habitual residence requirements in the social welfare code or any provision that will be required by the proposed immigration legislation.

The Equality Act 2004 introduced a new exemption on the ground of nationality. It purports to allow a broad range of public authorities to treat certain non-nationals differently on the basis of their nationality, who are outside the State or for the purposes

of the Immigration Act 2004, unlawfully present in it, or in accordance with any provision or condition made by or under any enactment and arising from his or her entry to or residence in the State.

Functions

The provisions of the Equal Status Acts 2000 to 2004 do not extend to the functions of the State that do not come within the definition of services. Therefore matters like immigration control and police prosecutions do not come explicitly within the scope of the legislation.

Positive Duty

Both the Employment Equality Acts 1998 and 2004 and the Equal Status Acts 2000 to 2004 are limited to the extent that while there is a negative prohibition on discrimination in the areas covered, there is no positive obligation on the public or private sector to promote equality and/or good relations. This is one of the most significant weaknesses in the legislation in that the failure to have a positive duty to promote equality means that there is too much reliance on ex post facto individual remedy in the context of retrospective fault finding in an adversarial setting rather than encouraging proactive identification and elimination of discriminatory practices in a consensual manner. The failure to have a positive duty to promote equality also means that the legislation has very limited capacity in tackling institutional or structural discrimination as defined in the Stephen Lawrence Inquiry.

The Macpherson Report in this inquiry defined institutional race discrimination as the “*collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture and ethnic origin...it can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtless and racist stereotyping which disadvantage minority ethnic people.*”⁷

7 W. Macpherson et al., *The Stephen Lawrence Inquiry* (Stationery Office, 1999), available at www.official-documents.co.uk/document/cm42/4262/4262.htm, (hereafter “The Macpherson Report”).

Remedies

The maximum financial compensation that can be awarded under the Equal Status Acts 2000 to 2004 and the Intoxicating Liquor Act, 2003 is €6,350. The maximum financial compensation that can be awarded for the effects of discrimination in an employment discrimination claim under the Employment Equality Acts 1998 and 2004 is two years salary irrespective of the severity of the discrimination, or the impact on the claimant (except for gender discrimination). However in a claim concerning access to employment where the claimant was not an employee the maximum compensation that may be awarded is €12,700 irrespective of the severity of the discrimination or the impact on the claimant. It has been the Equality Authority's experience that some of the worst incidences of discrimination may occur where migrants are applying for work. It has also been the Equality Authority's experience that some employers are aware that they can 'buy off' a discrimination claim involving access to employment for relatively small amounts of money.

Problems in relation to remedies are exacerbated in that there is no provision to apply for any type of interlocutory relief pending the hearing of the claim. The Equality Tribunal is the quasi judicial body established to investigate, hear and decide claims of discrimination. It is a very welcome and significant part of the equality infrastructure. However the backlog of cases in the Equality Tribunal means that parties will experience considerable delay in having their claim heard. The 2004 Annual Report of the Equality Authority noted that delays of over a year in the appointment of an equality officer are common. The situation has continued in 2005 with delays of up to three years in the assignment of an equality officer.

The Race Directive

The provisions of the Employment Equality Acts 1998 and 2004 and the Equal Status Acts 2000 to 2004 have to be read and interpreted in the light of the provisions of the Race Directive. The Race Directive prohibits discrimination on grounds of racial or ethnic origin. The scope of the Race Directive is very broad⁸. It contains and allows very few exemptions.

⁸ In addition to employment, self-employment and to occupation, the Race Directive also explicitly applies to social protection, including social security and healthcare, social advantages, education, access to and supply of goods and services which are available to the public, including housing.

There is no exemption in the Race Directive that allows the statutory exemption in Section 14 of the Equal Status Acts. The major exemption in the Race Directive is contained in Article 3(2) which provides:

“This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.”

One striking element of both the Race Directive and the Gender Equal Treatment Directive is the emphasis on enforcement. Both Directives require sanctions to be effective, proportionate and dissuasive.

Gender Equal Treatment Directive

The promotion of gender equality is now a task of the EC.

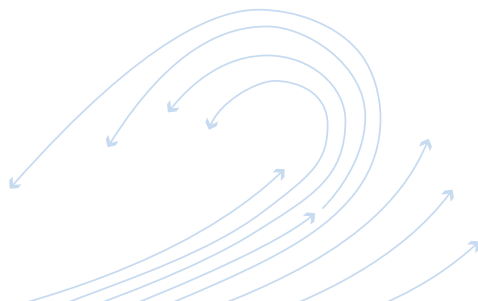
Article 2 EC provides:

“The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Article 3... to promote throughout the Community... equality between men and women”.

Council Directive 2002/73/EC of 23 September 2002 amending the 1976 Gender Equal Treatment Directive imposes on Member States a positive duty to promote gender employment equality.

“Member States shall actively take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities...”

Thus Ireland has to actively take into account the objective of equality between men and women in its formulation of employment related immigration policies.



3. Equality and Immigration

There appears to be a perception that principles of equality/non-discrimination are somehow less forceful in the sphere of immigration because the view is that sovereign interests must hold sway.

Immigration policy is about making commitments for the community, not just commitments about the community. It involves asking what sort of community should be constructed and thus, necessarily embraces the moral point of view. How the community treats those who are not members of the community is a crucial aspect of its moral identity, it manifests the community's commitment to equality and human rights. The executive function in relation to immigration policy is essentially a public activity in which multi-dimensional values are at play.

Equality is a universal value and the right to equality is a right which people have by virtue of being people. “[The] purpose of the equality guarantee is the promotion of human dignity”⁹. This is not qualified by reference to the extent of connection with a particular country (see membership theory below) or to other criteria which would exclude or otherwise limit the class of beneficiaries.

The concept of human dignity can be expressed in three ideas:

- that human wellbeing is of central importance;
- that some aspects of being human are of such importance to the individual that his/her dignity can be said to hinge on their presence; and
- that the use of certain factors as the ground for disadvantage is a way to attack the dignity of the person.

Moreover to exclude migrants on grounds which discriminate according to criteria such as disability, race, age or sex, which could be inappropriate in application to citizens is equally unjustifiable. A commitment to equality principles and values rules out this option.

It is expected that an immigration policy document would seek to elucidate answers to the following questions.

- How much protection is owed to migrants at the border?
- What are the reasons for not having an open door policy?
- If there are valid reasons for not having an open door policy, what is required at the border in relation to the reasons justifying exclusions at the border?
- How much protection is owed to migrants within the country (including those with irregular status)?
- Is more owed to those who have contributed to the economy and social interaction than is owed to newer arrivals?
- What are the reasons justifying differences in treatment between citizens, long-term resident migrants, short-term resident migrants including those with irregular status?
- Can these reasons justify discrimination against long-term resident migrants/short-term resident migrants on the basis of grounds that would be illegitimate if applied to non-migrants, such as race, religion, disability, age or sexual orientation?

A number of perspectives can be identified which illustrate different views as to the extent of application of equality principles in immigration matters. Some of these views are reflected in the discussion documents to greater and lesser extents. These are:

- a) the argument of executive sovereignty which requires absolute or near absolute deference in immigration matters;

- b) the “levels of membership” argument which holds that the application of equality principles varies according to a person's participation in the community;
- c) the argument of universal application, according to which principles of equality apply to every person regardless of their citizenship, place of residence or physical location on the globe; and
- d) the authority argument, according to which a person is protected by principles of equality when subject to the authority of the state.

The perspective in relation to sovereign immunity (a) is particularly evident in the discussion document. The levels of membership argument is reflected implicitly in the discussion document (yet the discussion document does not identify sufficiently that under the present system migrants who have been resident and integrated for a number of years are not accorded equality of treatment to citizens).

a) Sovereignty

Immigration policy has traditionally been seen as demonstrating or exemplifying the sovereignty of the state. The idea of sovereignty may come closest to being reified when a government deploys its laws and powers against one who is seen as an outsider and quite literally an alien. While all persons have a right to leave and re-enter their home state, the traditional view is that there is no concomitant duty on any state to admit them¹⁰.

Power over immigration is presented as a necessary characteristic of a sovereign and independent nation, engaged in interacting with foreign nations. The discussion document at page 12 states that the control of entry of migrants/foreign nationals to any state is viewed as an inherent element of national sovereignty. The discussion document also states that the development of policies in the immigration area is not a matter for legislation but falls to be exercised by the government of the day in the exercise of its executive powers and that the new legislation will acknowledge the primacy of the executive in the formulation of immigration policy.

The discussion document states that it is a well established principle that any sovereign state is entitled to control or manage the entry into, duration of stay and departure of non-

¹⁰ Once within a state many guarantees may be applicable which prevent deportation, either based on the Refugee Convention's norm of non-refoulement or the wider general human rights guarantees of non-return as evidenced in the jurisprudence of ECHR, CAT and ICCRR.

nationals from its territory. *“Our courts have recognised that control of entry of non-nationals into the State is a matter of executive discretion which is vested in the Minister for Justice, Equality and Law Reform. They recognise that the government is not only entitled but is obliged in order to protect the fundamental rights and integrity of the State and its citizens, to exercise these powers.”* The discussion document (on page 22) states that a fundamental function of the immigration system is to protect the safety and security of all who live in Ireland and to protect the common good. The control of non-nationals is an aspect of the common good related to the definition, recognition and the protection of the boundaries of the State. The discussion document states that the Irish Courts have recognised that the State must have very wide powers in the interest of the common good to control the entry to, and departure from the State of non-nationals and their activities within the State. This reflects an inherent element of state sovereignty over national territory long recognised in both domestic and international law. For this reason, the discussion document asserts, in the area of immigration, non-nationals may be subject to legislative and administrative measures which would not, or in some aspect, could not be applied to Irish citizens.

Ireland is a sovereign, independent democratic state. The sovereign authority within the Constitution is the people, from whom is derived the sovereignty of the State. External sovereignty cannot be fettered by the State.

“The State would not be completely sovereign if it did not have in common with other members of the family of nations the right and power in the field of international relations equal to the right and power of other states. These powers of the state include the power to declare war or to participate in a war, to conduct...to make treaties and to maintain diplomatic relations with other states.”¹¹

The view of sovereignty in the discussion document inevitably leads to the conclusion in the document that equality principles are not applicable in the area of immigration control.

The recognition and protection of national sovereignty does not require or demand the non-application of equality principles. Ireland does not become less independent in the international community by allowing the application of equality principles in immigration control issues. Ireland has limited its sovereignty or its sovereignty is limited by virtue of

11 Walsh S *Crotty v An Taoiseach* [1987] I L R M 400

international agreements such as international human rights instruments, the Belfast Agreement and the Race Directive. It is difficult to imagine how a decision to apply equality principles in the area of immigration control could prejudice foreign relations.

It ignores the reality to hold that every provision concerned with immigration control as applied to every factual situation it might encompass, is so intimately rooted in foreign policy considerations that the application of equality principles would hamper the effective conduct of foreign relations. In seeking the application of equality principles, it is not sought to second guess the executive on matters of defence – that would be inappropriate.

The conception of sovereignty in the discussion document is somewhat outdated and reflects an expansive notion of sovereignty and a denial that individuals could be “subjects” or rights holders in international law. One can readily agree that the sovereignty and independence of Ireland would be impaired if other nations could unilaterally force it to accept or retain their citizens without its consent. But the consent expressed through international law and treaties in the communities of nations is also a form of consent. International law, equality and human rights norms may impose limits on a nation's discretion to expel or exclude aliens. Sovereignty is a more relativised concept today and absolute control over the movement of persons in its territory is no longer regarded as a necessary ingredient of sovereignty.

An absolute right to exclude each/any alien for good reasons, bad reasons or no reasons is not inherent in sovereignty. The concept of absolute sovereignty evident in the discussion document treats the migration of a person from one nation to another as if it were a transaction between the two governments. It treats the foreign national as if he/she was an agent of his/her government regardless of the actual relations between them.

Does the preservation of the relative autonomy of domestic politics and national identity require an absolutist power devoid of equality principles in relation to the exclusion and expulsion of aliens? A degree of power to control access to membership would appear necessary if a democratic community wishes to maintain its independence and continuity. A degree of power to control the long-term settlement of migrants would also appear necessary. However, these considerations do not justify an equality free absolutist power over exclusion and expulsion.

b) The Levels of Membership Argument

This argument presents a model of the community in terms of levels of membership with citizenship being equated with full, paradigmatic membership and with other statuses, such as permanent resident, visitor and even illegal alien, being understood to embrace lesser degrees of belonging to the body politic. The model is one of concentric circles with the citizen standing at the centre, and others standing further out as their bonds with the community, and hence claims of membership become more attenuated. The further a person is located from the paradigm example of full membership, the fewer benefits need to be accorded to him or her.

The membership approach does carry some intuitive weight. It is understandable to feel that we owe more to those who have contributed to social interaction. There are however problems with this approach. The comparison between citizen and migrant will never be apt when application for membership is at stake. The migrant cannot claim that he or she should be treated more like a citizen since a citizen never has to apply for membership and is not subject to deportation.

The membership theory is exclusive in that it attempts to define who is not a member of the community and then excludes the person from the framework of values which define the nation. This ignores a central thread in principles of equality, that all people matter.

Principles of equality define the humane way to treat individuals when decisions affecting their interests are being made. They do not state an ideal about how to achieve the decision, rather they state the minimum which determination of the particular interests demands and thereby ensures respect for the person who is subject to the process whoever that may be. Principles of equality are not variable according to the vagaries of the economy. They stipulate the minimum which must be respected.

c) Universalism

The rejection of the 'levels of membership' model might be thought to lead to a universalist approach with no limitations as to the persons or places covered. This has normally been described as an open door approach. An open door approach would however place an overwhelming burden on the state.

The very act of controlling borders entails in the normal course of events, the exclusion of non nationals of the state and could be argued as a way of treating such non nationals

as inferior beings. The failure to have an open door policy does not in itself reveal insufficient concern for these non nationals. The exclusion of a non national is not based on considerations of inferiority nor does it express an attitude of disdain. Nor are there sufficient grounds to claim that non nationals are as a group disadvantaged, such that to exclude them amounts to a continuation of disadvantage which would amount to de facto discrimination.

d) The Authority Argument

The authority argument holds the middle ground between the levels of membership argument which relies on a diluted conception of community and a universalist/open door argument which relies on a utopian conception of the global responsibility of each state government.

The authority argument can be described as follows: where a state imposes the framework of a government process on a migrant, the migrant should be entitled to the advantages of the principle of equality. One can experience the authority of a state where the state makes available benefits but stipulates an application process. This is exactly what happens when an individual is faced by the visa application process. In this process the individual submits to an inquiry and interview and the application of standards to his or her case. While the applicant is not obliged to apply, or having applied to pursue the application to completion nevertheless the applicant is subject to legal decision making by a state official, it is this submission to official treatment by a legal process which grounds the recognition of equality/non-discrimination principles.

A migrant cannot seek protection from his or her own country for administrative abuse which does not amount to a wrongdoing. A migrant's experience in the immigration process should be protected. When protection is unavailable from his or her own country, it is the responsibility of the state to provide it.

The authority argument looks for a nexus between the migrant and the relevant government and finds it in the fact that the government makes a process available to the migrant. Having established a formal process, the government binds itself to ensuring that the process adheres to the substantive principle of equality.

The authority argument recognises that the responsibility of a government is unbounded by international borders and driven by concern for people, not just 'the people'. The authority argument not only takes seriously the benefit that is at stake, it also takes account of the seriousness of that benefit for the individual and the effect of government action on that individual.

Conclusion

There appears to be a perception that principles of equality/non-discrimination are somehow less forceful in the sphere of immigration because the view is that sovereign interests must hold sway. However this is an understanding of sovereignty that is somewhat outdated and does not take into account that individuals could be rights holders in international law.

Another dominant viewpoint suggests that there are different levels of membership within a society and that those who are defined as outside of full membership are excluded from the framework of values which define the nation. However this ignores a central thread in the equality principle that all people matter.

The alternative to these viewpoints is often suggested as requiring an open door policy. This would be untenable. However there is an important middle ground between these extremes which should be reflected in new immigration legislation and that allows the application of equality principles to the immigration process.

In immigration the state is making a process available to the migrant. The migrant submits to this process and the application of standards to his or her case. The state in such a context needs to bind itself to ensuring the process adheres to the substantive principle of equality.



4. Comparators, Best Practice and International Standards

International experience suggests that sovereignty requirements do not necessarily require the exclusion of equality principles from immigration control.

Northern Ireland

In two major respects Northern Ireland has a significantly greater degree of protection in relation to immigrants than Ireland. The Equal Status Acts 2000 to 2004 do not explicitly apply to the performance of public functions (unless the functions come within the definition of service). In contrast, in Northern Ireland the Race Relations Order (Amendment) Regulations (Northern Ireland) explicitly prohibits discrimination in the performance of public functions. This includes public authorities exercising particular powers that are specific and reserved to State bodies including immigration control and policing – with exceptions being made for certain judicial, prosecutorial and legislative acts.

The greatest area of lack of equivalence between the two parts of this island¹² is in the area of a duty to promote equality. Section 75 of the Northern Ireland Act, 1998 imposes a duty on specified public authorities to have “*due regard to the need to promote equality of opportunity*” across all the equality grounds including religion, political opinion, race, age, marital status, sexual orientation, gender, disability and family status in carrying out their public functions.

¹² “Equivalence in Promoting Equality” by Colm O’Cinnéide, published by the Equality Authority, 2006

In formulating immigration policy, it is important to have due regard to the provisions of the Belfast Agreement which contains significant commitments on the part of both the UK and Irish governments to implement measures to ensure the protection of human rights and in particular to promote equality of opportunity. The Agreement also commits Ireland to ensuring “*at least an equivalent level of protection of human rights as will pertain in Northern Ireland.*”

Britain

The UK Race Relations (Amendment) Act, 2000 imposes a general positive duty on an extensive list of specific public authorities which combines a negative obligation to eliminate racial discrimination with complementary positive obligations to promote equality of opportunity and good relations between people of different ethnic groups. The aim of this duty is to make the promotion of racial equality and the elimination of existing discriminatory practices integral to the conduct of public bodies.

The Law Lords in *R v Immigration Officer and Prague Airport, ex parte European Roma Rights Centre*¹³ considered some of the provisions of the Race Relations (Amendment) Act 2000. The UK government and the Czech Republic made an agreement which would permit British immigration officers to give or refuse leave to enter the UK to passengers at Prague Airport before they boarded.

“The appellants' case is, first, that the Prague operation carried with it a very high risk of racial discrimination. Its avowed object was to prevent people travelling from the Czech Republic to this country in order to seek asylum or otherwise overstay the limits of their leave to be here. The vast majority of those who have done this in the past are Roma. Many Roma have good reason to want to leave. For some, this may amount to persecution within the meaning of the Refugee Convention. The operation was targeting all potential asylum seekers, with or without a good claim. The object was not only to prevent the would-be travellers at the airport. It was also to deter others from even getting that far. Given the high degree of congruence between the object of the exercise and a particular ethnic group, which was recognised in public statements by the Czech Prime Minister and his deputy, the risk that the operation would be carried out in a racially discriminatory manner was very high.”

It was alleged that would-be travellers of Roma origin were treated less favourably than non-Roma were.

The Court of Appeal accepted that the trial judge was entitled to find that the immigration officers tried to give both Roma and non-Roma a fair and equal opportunity to satisfy them that they were coming to the UK for a permitted purpose and not to claim asylum once here. But the Court of Appeal considered it “*wholly inevitable*” that being aware that Roma have a much greater incentive to claim asylum and that the vast majority, if not all, of those seeking asylum from the Czech Republic are Roma, immigration officers will treat their answers with greater scepticism, will be less easily persuaded that they are coming for a permitted purpose and that “*generally, therefore, Roma are questioned for longer and more intensely than non-Roma and are more likely to be refused leave to enter than non-Roma*”.

In the House of Lords Baroness Hale concluded that discrimination was inherent in the operation of the scheme itself:

“The whole point of the law is to require suppliers to treat each person as an individual, not as a member of a group. The individual should not be assumed to hold the characteristics which the supplier associates with the group, whether or not most members of the group do indeed have such characteristics, a process sometimes referred to as stereotyping”.

She referred to the following extract from Laws LJ in *Equal Opportunities Commission v Director of Education*¹⁴:

“The mistake that might arise in relation to stereotyping would be a supposition that the stereotype is only vicious if it is untrue. But that cannot be right. If it were, it would imply that direct discrimination can be justified”.

She pointed out:

“It is worth remembering that good equal opportunities practice may not come naturally. Many will think it contrary to common sense to approach all applicants with an equally open mind, irrespective of the very good reasons there may be to suspect some of them more than others. But that is what is required by a law which tries to ensure that individuals are not disadvantaged by the general characteristics of the group to which they belong.”

14 [2001] 2HKLRD 690 para. 180

Canada

Canadian legislation provides an important example of the inclusion of the equality principle in immigration legislation.

Section 15 of the Canadian Charter of Rights and Freedoms provides:

“15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

Paragraph 3(3)(d) of the *Canadian Immigration and Refugee Protection Act* states:

“3.(3) this Act is to be construed and applied in a manner that,

[...]

(d) ensure that decisions taken under this Act are consistent with the Canadian Charter of Rights and Freedoms, including its principles of equality and freedom from discrimination and of the equality of English and French as the official languages of Canada;”

International Standards

Irish immigration policy should reflect and comply with fundamental principles of international human rights law. Ireland has ratified a number of regional and international conventions that have direct relevance to immigration policy. It is commonplace in international human rights instruments to declare that everyone is entitled to the rights and freedoms they set forth without distinction of any kind such as race, colour, sex – for example, the Universal Declaration of Human Rights 1948, Article 2; the International Covenant on Civil and Political Rights (ICCPR) 1966, Article 2; the European Convention on Human Rights, Article 14; and the Refugee Convention itself in Article 3 provides:

"The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin."

The ICCPR goes further, in Article 26:

"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

The International Convention on the Elimination of all Forms of Racial Discrimination 1966 provides in Article 2:

"(1) States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

(a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation."

Racial discrimination is defined in Article 1 in terms of distinctions which have the "purpose or effect of nullifying or impairing the recognition, or enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." While Article 1(2) states that the Convention does not apply to distinctions, exclusions, restrictions or preference made between citizens and non-citizens, this certainly does not mean that States Parties can discriminate between non-citizens on racial grounds.

It was the existence of these and other instruments, some only in draft at the time, together with the principle of equality enshrined in the Charter of the United Nations and emphasised in numerous resolutions of the General Assembly, which led Judge Tanaka of the International Court of Justice in the *South West Africa Cases (Ethiopia v South Africa) (Liberia v South Africa) (second phase)* [1966] ICJ Rep 6, 293 to conclude that:

"we consider that the norm of non-discrimination or non-separation on the basis of race has become a rule of customary international law . . ."

The General Assembly has "urged all States to review and where necessary revise their immigration laws, policies and practices so that they are free of racial discrimination and compatible

with their obligations under international human rights instruments” (UNGA Resolution 57/195, para 1.6, adopted 18 December 2002; see also UNGA Resolution 58/160 adopted on 22 December 2003).

Ireland is also a party to the Convention on the Rights of the Child (CRC) which states that in all actions concerning children, whether undertaken by courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary considerations.

The Convention on the Rights of the Child also provides that states should deal with applications by a child or his or her parents to enter or leave a state for the purpose of family reunification in a positive, humane and expedite manner. The Convention further guarantees to every child the right to the highest attainable standard of health, the right to benefit from social security, the right to an adequate standard of living and the right to education.

1990 UN Convention of Rights of Migrant Workers and their Families

The 1990 International Convention for the Protection of the Rights of All Migrant Workers and Members of their Families provides a comprehensive legal framework for protection of migrants against all forms of racist and xenophobic hostility. The Convention applies both to documented (legal) and undocumented (unauthorised or irregular) migrant workers. It stipulates that migrant workers must not be held in slavery or servitude and that forced labour must not be demanded of them. State Parties must provide sanctions against persons or groups who use violence against migrant workers, employ them in irregular circumstances, threaten or intimidate them.

The importance and relevance of the provisions in this Convention can be summarised as follows:

Migrant workers are viewed as more than labourers or economic entities. They are social entities with families and accordingly have rights, including that of family reunification. The Convention recognises that migrant workers and members of their families, being non-nationals residing in states of employment or in transit, are unprotected. Their rights are often not addressed by the national legislation of receiving states or by their own states of origin. It provides, for the first time, an international definition of migrant worker, categories of migrant workers, and members of their families. It also establishes

international standards of treatment through the elaboration of the particular human rights of migrant workers and members of their families. Fundamental human rights are extended to all migrant workers, both documented and undocumented, with additional rights being recognised for documented migrant workers and their families, notably equality of treatment with nationals of states of employment in a number of legal, political, economic, social and cultural areas.

The International Convention seeks to play a role in preventing and eliminating the exploitation of all migrants, including an end to their illegal or clandestine movements and to irregular or undocumented situations. It attempts to establish minimum standards of protection for migrant workers and members of their families that are universally acknowledged. It serves as a tool to encourage those states lacking national standards to bring their legislation in closer harmony with recognised international standards. While the Convention specifically addresses migrant workers and members of their families, implementation of its provisions would provide a significant measure of protection for the basic rights of all other migrants in vulnerable situations, notably those who are in irregular situations.



5. Intersection of Policy Document with Equality Issues – Particular Areas of Concern

The Equality Authority welcomes the opportunity to comment on the Department of Justice, Equality and Law Reform's discussion document on the Immigration and Residence Bill. A number of aspects of the discussion document are particularly welcome, in particular the commitment that the immigration system should operate in accordance with the equality policies set by government. The commitment that equality considerations would apply in respect of the immigration service is also welcome. However it can be seen in Part 2 of this submission that the protection afforded by these policies is limited.

The Equality Authority is concerned that the commitment to equality evidenced in the discussion document is not given sufficient consideration, application and elaboration in a number of places in the document. It submits that a commitment to equality is wholly relevant to the content of the discussion document and requires some further elaboration in policy and practical aspects.

The core concern of the Equality Authority is that any new immigration legislation (including provisions that deal with immigration control) would adhere to the substantive principles of equality. This would follow from the authority argument set out in Part 3 of this submission where the nexus between the migrant and the state lies in the processes that the state makes available to the migrant and where having established a formal process, the state must bind itself to ensuring that the process adheres to the substantive principles of equality. This will require further development of equality legislation, planned

and systematic approaches to equality by institutions with responsibilities in relation to migrants and equality proofing of policies and programmes in this area.

Further Development of Equality Legislation

New immigration legislation should introduce a number of key amendments to the equality legislation. These amendments should in particular ensure that equality legislation covers the function of the State in relation to immigration, that there is a positive duty on the State to have due regard to equality in immigration policy, procedures and practices and that exemptions in equality legislation that permit discrimination in this area are reviewed and amended.

Planned and Systematic Approaches to Equality

Institutions with responsibilities in relation to migrants and to immigration should be required to be planned and systematic in their approach to equality. This planned and systematic approach should govern both employment and service provision.

A planned and systematic approach to equality should involve these organisations in:

- putting in place an equality infrastructure including equality policies, equality and diversity training for all staff, according responsibility for equality issues to a senior member of staff and developing and implementing an equality action plan on foot of a review of organisational policies, procedures and practices for their impact on equality; and
- securing a focus on equality within governance including gathering equality related data to support evidence based decision making, engaging with relevant equality organisations in a manner that allows decision making to be participatory and conducting equality impact assessments to assess the impact of new policies and programmes on equality and on the nine grounds covered by the equality legislation.

Equality Proofing

Equality proofing should be a key practice within organisations which provide services or exercise functions in relation to migrants. This equality proofing will be accomplished through the equality impact assessment procedure identified above.

However, it is also important that equality impact assessment be a key practice within the legislative process and within policy development in this area of immigration. New immigration legislation and new policy should be assessed for its impact on equality and for its impact on each of the nine grounds covered by the equality legislation. Adjustments should be required to ensure a positive impact where a negative or neutral impact is predicted.

Discrimination on Grounds of Nationality

The policy document states that immigration laws of necessity makes distinctions between persons on grounds of nationality since they must distinguish between nationals of the legislating state and non nationals and between different categories of the latter (p25). This is not a wholly accurate account. The requirements of the EU Treaties mean that the state is not allowed of necessity to make distinctions between nationals of the legislating state and EU nationals. In terms of non EU nationals, distinctions that are made do not have to be made on the basis of the nationality of the applicant migrant.

The policy document proposes that the Minister should have powers to specify in secondary legislation among other things the nationalities of the persons requiring a visa. It also states earlier *“the inclusion of nationalities on lists of persons who require visas is usually the result of experience regarding the nationalities concerned within the immigration system such as the history of compliance with immigration law”* (page 36).

Discrimination on the basis of nationality is difficult in many instances to justify objectively with reference to relevant and sufficient reasons. This is particularly the case with the reasons (or more accurately the lack of them) for determining which nationalities should be placed on lists requiring visas, or denied welfare or other benefits. Moreover the effect of such proposals is that they have the potential to discriminate indirectly against third-country nationals by reference to their racial, ethnic or national origins as well as their religion. Such discrimination is clearly prohibited by the pertinent international human rights standards.

A law which applies only to those seeking admission can discriminate against those who already belong where discrimination on the basis of nationality is allowed for.

Gerald M. Rosberg explains this indirect victimisation as follows:

“When Congress declares that aliens of Irish or Polish origin are excludable on the grounds of ancestry alone, it fixes a badge of opprobrium on citizens of the same

ancestry... Congress cannot implement a policy that has the effect of labelling some group of citizens as inferior to others because of their race or national origin.”

Difference in treatment in the immigration field that have a disparate impact on a particular group of persons defined by reference to nationality should only be permitted if they can be objectively justified. Legitimate, relevant and sufficient reasons for the differences in treatment must be provided and made publicly available, particularly where such reasons are based, for example on statistics relating to irregular migration. The actions taken to achieve the legitimate objective sought must be proportionate and the justifications relied upon must not be related to the grounds of discrimination. The profiling of third countries on the basis of criteria relating to the risks of irregular migration and crime is problematic from the standpoint of non-discrimination and the only criterion that should be applied in determining whether the nationals of a particular country should be subject to a visa requirement or otherwise is that of international relations.

If such profiling is to be pursued, Ireland can only avoid allegations of discrimination if it adopts, on the basis of reliable and responsible statistical evidence, strict and objective criteria, which are drawn up using a common approach and placed in the public domain, and by which the risks relating in particular to irregular migration can be objectively assessed in respect of specific countries. Such a system would also have to include a transparent mechanism to ensure that relevant developments in a third country can be taken into account.

Migrants with Irregular Status

Migrants may acquire irregular status for a number of very different reasons. They may have been the victims of human trafficking, their status may have become irregular on account of the failure of their employer to take certain steps to regularise the migrants' position. This failure on the part of the employer may be due to inadvertence but also may be used by some employers as a means of exploiting the migrant worker and their illegal status. There may be migrants whose irregular status may be due to an unsuccessful asylum application.

People who enter or remain in a country without authorisation can be at risk of exploitation by employers and landlords. (See Appendix for details of Equality Authority casework in this area). Because of their irregularity migrants are often unable to make full use of their skills and experience once they have arrived in a country of destination.

Migrants with irregular status are often unwilling to seek redress from authorities because they fear arrest and deportation. As a result they do not always make use of public services to which they are entitled.

The conditions that promote irregular migration can be addressed by providing additional opportunities for regular migration and by taking action against employers who engage migrants with irregular status. A comprehensive migration policy needs to recognise that it is inappropriate to treat all migrants with irregular status in the same way.

Special efforts must be made to identify victims of human trafficking. Many countries offer such people a 'reflection period', which ensures that they are not immediately repatriated and are granted access to legal services and rehabilitation assistance.

A number of countries have established regularisation programmes. Such programmes offer legal status to migrants with irregular status, who have been present in a country for significant periods of time. A transparent decision-making process for regularisation programmes is essential, with clearly defined criteria for migrants to qualify for regular status.

The discussion document states that in general terms consideration should be given as to what extent there should be a prohibition on providing public services to non nationals who are not legally resident in the State and the extent of such a prohibition (for example such migrants might be allowed to access emergency medical treatment but not social housing or publicly funded third level education courses). It also states (at page 67) that there is a need for cooperation and coordination to ensure that access to public services by persons illegally in the State is limited to emergency services so as not to encourage illegal immigration. No data is provided in relation to this.

The discussion document does not distinguish in this regard between the different types of migrants with illegal status. What are the reasons for denying someone who has illegally been trafficked here access to public housing or someone whose passport has been confiscated by their employer and no steps taken to regulate their position? The document does not deal with the impact of such policy on the children of migrants with illegal status.

Ireland is not a signatory of the United Nations Convention on the Protection of the Rights of all Migrant Workers and Members of their Families. The discussion document provides a number of reasons as to why Ireland is not a signatory. One of these is stated (at page 64):

“it should also be noted that the rights of migrant workers are already comprehensively protected under existing national legislation.”

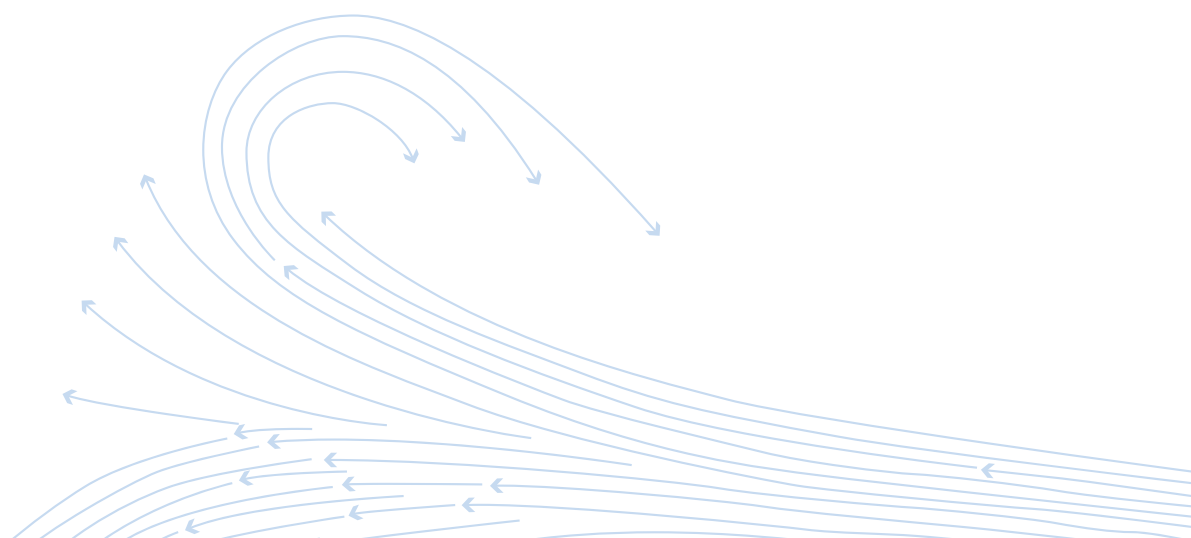
Part 2 of this submission points out how existing protections are not comprehensive and the particular vulnerability of those with irregular status.

It is recommended that there needs to be a charter of minimum rights which would also apply to those with irregular status. The UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families should be applied in this area.

Other Equality Issues

It will be important that the immigration legislation addresses a range of other equality issues that are evident in this area. These include:

- The need to address the particular circumstance of same sex couples and to comply with the European Convention on Human Rights in this regard. Treatment of same sex couples should be on par with heterosexual couples.
- The need to address the issue of family reunification and to ensure adequate policies, procedures and practices in this regard. Adoption of and compliance with the UN Convention on the Protection of the Rights of Migrant Workers and their Families would assist in this regard.
- The need to ensure immigration policies and procedures do not discriminate on any of the grounds covered by equality legislation. The discussion document raises particular issues in relation to the age and disability grounds in referring to the use of age and health status in selection procedures.



6. Recommendations

1. The core recommendation is that any new immigration legislation, policies and procedures (including provisions, policies and procedures that deal with immigration control) would adhere to substantive principles of equality.

New immigration legislation, policy and procedures developed on foot of the discussion document should be subjected to an equality impact assessment. Any negative or neutral impact predicted should be addressed before finalising any such legislation, policy or procedures.

2. Recommendations in relation to immigration legislation:
 - a) A positive duty should be imposed on public bodies and institutions with responsibilities in relation to immigration which combines a negative obligation to eliminate discrimination with a complementary obligation to promote equality of opportunity and good relations in relation to migrants.
 - b) Institutions with responsibility in relation to migrants and to immigration should be required to be planned and systematic in their approach to equality. This planned and systematic approach should govern both employment and service provision.

A planned and systematic approach to equality should involve these organisations in:

- putting in place an equality infrastructure including equality policies, equality and diversity training for all staff, according responsibility for equality issues to a senior member of staff and developing and implementing an equality action plan on foot of a review of organisational policies, procedures and practices for their impact on equality; and
 - securing a focus on equality within governance including gathering equality related data to support evidence based decision making, engaging with relevant equality organisations in a manner that allows decision making to be participatory and conducting equality impact assessments to assess the impact of new policies and programmes on equality and on the nine grounds covered by the equality legislation.
- c) Public bodies and institutions with responsibilities in relation to immigrants should be obliged to make reasonable accommodation of migrants in terms of cultural and linguistic difference and in terms of the diversity of migrants from across the nine grounds subject to this not imposing a disproportionate burden.
- d) New immigration policies and procedures should be required to be assessed for their impact on equality and for their impact on each of the nine grounds covered by the equality legislation.
- e) Differences in treatment in the immigration field on grounds of nationality should only be permitted if they can be objectively justified. Legitimate, relevant and sufficient reasons for the difference in treatment must be provided and made publicly available.
- f) The legislation should recognise that migrants may acquire irregular status for a number of very different reasons and that it is inappropriate to treat all such migrants in the same way. Special efforts must be made to identify victims of human trafficking. Ireland should offer such people a 'reflection period', which ensures that they are not immediately repatriated and that they are granted access to legal services and rehabilitation assistance.
- g) The legislation should establish a regularisation programme which offers legal status to migrants with irregular status, who have been present in a country for significant periods of time. A transparent decision-making process for regularisation programmes is essential, with clearly defined criteria for migrants to qualify for regular status.

- h)** The legislation should provide for a Charter of Rights for all migrants (including those with irregular status).
- i)** The provisions of the UN Convention on the Protection of the Rights of all Migrant Workers and Members of their Families should be applied to the immigration legislation and policies and procedures made thereunder. This should in particular ensure that issues of family reunification are adequately addressed.
- j)** The legislation should allow public bodies and institutions with responsibilities in relation to migrants to provide positive action measures to achieve full equality in practice.
- k)** The legislation should expand the definition of services under the Equal Status Acts to explicitly include the function of the State so to bring immigration control and police powers within the ambit of the Equal Status Acts. The legislation should delete the statutory exemption (including the recent exemption in relation to non nationals) in Section 14 of the Equal Status Acts so as to ensure compliance with the Race Directive (regarding the race and Traveller grounds) and to bring any mandatory provision of immigration legislation within the Equal Status Acts. The legislation should allow application for interlocutory relief in cases under the equality legislation, should remove the cap on the level of awards that can be made under equality legislation and should introduce changes found to be necessary on foot of a review of current exemptions on the equality legislation that impact on migrants.
- l)** The legislation should ensure a recognition for same sex couples on a par with heterosexual couples within the immigration process.



Appendix

The Intersection of the Powers, Functions and Work of the Equality Authority and Equality Infrastructure with Immigration

Equality Authority

The issue of immigration intersects with all areas of the Equality Authority's powers and functions. The Equality Authority has the core function of promoting equality of opportunity and seeking to eliminate discrimination in employment and matters covered by the Equal Status Acts 2000 to 2004. These functions include promoting equality of opportunity and eliminating discrimination for migrant workers or potential migrant workers and in relation to the provision of goods and services (including State services subject to exemptions) and accommodation to migrants and in relation to educational establishments. The Equality Authority also has an information function in relation to a number of Acts (the Employment Equality Acts 1998 and 2004, the Equal Status Acts 2000 to 2004, the Parental Leave Acts 1998 and 2006 the Maternity Protection Acts 1994 and 2004, the Adoptive Leave Acts 1995 and 2005 (entitlements under these last Acts are not predicated on non-migrancy status). It also has the additional function of keeping under review and making proposals for reform in relation to the Employment Equality Acts, the Equal Status Acts and a number of other Acts¹⁵.

15 It has not been given the explicit function of providing information to the public on the operation of the relevant parts of the Intoxicating Liquor Act 2003. Therefore it cannot provide information to migrants (or others) who consider that they have been discriminated against on or at the point of entry to licensed premises.

Codes of Practice

The Equality Authority may prepare codes of practice which, if approved by the Minister, are admissible in evidence and if relevant may be taken into account in proceedings. The Equality Authority has issued a Code of Practice on Sexual Harassment and Harassment at Work which would be applicable in relation to migrant workers¹⁶.

Research

The Equality Authority also has a broad power to undertake or sponsor such research as it considers necessary and as appears expedient for the performance of any of its functions. While a number of research projects would include migrants under the ground of race along with other discriminatory grounds, a number of research projects have particular relevance to migrants.

These include, for example:

- Migrant Workers and their Experiences,
- Rethinking Identity – The Challenge of Diversity,
- Minority Ethnic People with Disabilities in Ireland,
- Accommodating Diversity in Labour Market Programmes and
- Promoting Equality in Intercultural Workplaces.

Inquiries

The Equality Authority has a very broad power to conduct an inquiry for any purposes connected with its functions.

Equality Reviews and Action Plans

The Equality Authority may invite particular businesses to voluntarily carry out an equality review and prepare an action plan or may itself carry out an equality review and prepare

¹⁶ It has carried out preparatory work for a Code of Practice on Access to Licensed Premises. However, this work cannot be finalised on account of the diminution of the Equality Authority's powers and functions in this area brought about by the Intoxicating Liquor Act 2003.

action plans. This is an extremely useful initiative for public bodies that have responsibilities in relation to migrants to undertake.

Promoting Equality – Good Practice

The Equality Authority is concerned to identify, stimulate and support good practice in the employment of migrant workers and in managing culturally diverse workplaces.

This work on good practice has been organised around an annual Anti-Racist Workplace Week. This has involved a broad range of organisations working in partnership with the Equality Authority – IBEC, Congress, Small Firms Association, Construction Industry Federation, Chambers of Commerce of Ireland, Irish Farmers Association and the Department of Justice, Equality and Law Reform. This Anti-Racist Workplace Week has sought to:

- provide a national leadership for employers and employees in support of good practice in culturally diverse workplaces;
- build an awareness of the contribution of migrant workers and their importance to the Irish economy and
- provide practical guidance on promoting equality in intercultural workplaces and encourage implementation of this.

The partner organisations involved share a goal of stimulating and supporting workplaces to:

- be free from discrimination and harassment;
- be welcoming to Black and minority ethnic (including Traveller) employees and customers;
- accommodate and value cultural and linguistic diversity in the workplace, alongside a wider accommodation of diversity, including making reasonable accommodation for employees with disabilities;
- take practical steps to achieve full equality in practice for Black and minority ethnic employees (including Travellers) and
- communicate a message for greater equality within its wider community.

The guidance developed on promoting equality in intercultural workplaces emphasises the need to:

- support migrant workers to adapt to the Irish workplace and their local community through initiatives such as induction training;
- make allowances for the needs of particular cultures through, for example, introducing flexibilities in work organisations;
- create a workplace ethos and environment that is positive to diversity and equality by such as the provision of equality and diversity training for all employees;
- support compliance with equality legislation by such as putting in place and implementing anti-discrimination, sexual harassment and harassment policies and procedures;
- review all workplace policies and procedures to ensure they take into account cultural and linguistic diversity;
- develop an equality action plan to achieve full equality in practice for Black and minority ethnic employees, based on a review of workplace policies, procedures, practices and perceptions for their impact on equality within the workplace; and
- embed an equality focus into everyday management including management meetings, performance reviews, business plans and annual reports.

It is important to stimulate and support the implementation of this guidance in companies and organisations. This requires an adequately resourced support infrastructure to provide resources and technical expertise. This support infrastructure would encompass the Equality Authority, business networks, trade unions, management schools and training institutes, non governmental organisations and private sector consultants. This support infrastructure requires additional resources to build a capacity to engage effectively with all sectors of the economy.

Eliminating Discrimination – Casefiles

Any person who considers that they have been discriminated against can apply to the Equality Authority for assistance in bringing proceedings under the Employment Equality Acts 1998 and 2004 and/or the Equal Status Acts 2000 to 2004 and the Intoxicating Liquor Act 2003. The Equality Authority has a broad discretion to grant assistance if it is satisfied

that the case raises an important point of principle or it appears to the Equality Authority that it is not reasonable to expect the person to adequately present the case without assistance. A large proportion of requests for assistance under the Employment Equality Act 1998 come from migrant workers (see below). The Equality Authority has also granted assistance to migrants in respect of claims under the Equal Status Act 2000.

The Equality Authority can also institute proceedings in a number of instances without a claimant – for example where there is a general practice of discrimination or where an individual has not referred a complaint and where it is not reasonable to expect the person to refer a claim¹⁷. The Equality Authority can institute proceedings where there is discriminatory advertising.

Complaints in relation to matters relevant to immigration may be taken under the ground of race and the religion ground. The complaints have arisen across the whole spectrum of areas covered by the Employment Equality Acts 1998 and 2004 and the Equal Status Acts 2000 to 2004. The Equality Authority has had experience of migrants in various situations from short-term, long-term, migrants with legal status, family reunification migrants, migrants with irregular status (including those whose status has become illegal on account of the actions/inactions of their employers) and asylum seekers.

The 2003 Annual Report of the Equality Authority highlighted the particularly vulnerable position of migrant workers. In 2003, 2004 and 2005 the ground of race was the largest category among the casefiles of the Equality Authority under the Employment Equality Act 1998 (31.9% in 2004). In 2004, 49.1% of the casefiles on the ground of race related to working conditions. 19.5% of the casefiles related to dismissal and 16.1% related to access to employment.

The files reveal breaches of employment protection legislation including excessive working hours, non-payment for overtime, illegal deductions of pay, lack of holiday pay, harassment

¹⁷ The Equality Authority advised the Connacht Sentinel of these powers after it had published an ad which had been placed by a property letting agency, City Property Services which read “Knocknacarra – Ashleigh Grove: 4 bedroom house, no coloured, fully furnished”. The newspaper accepted that the ad should never have been published and apologised for any offence that may have been caused. The property company stated that the placement of the ad was regrettable in the extreme and that they had immediately apologised for same and re-advertised. They had paid €250 to a charity and have undertaken to provide equality training for all staff.

and dismissal. Some employers provided overcrowded substandard accommodation and others deducted excessive rent from salaries.

The Annual Reports highlight that the current work permit system can leave some migrant workers vulnerable to exploitation. In a number of cases employees were unwilling to take action because they feared that the employer would not reapply for a work permit. In one case the employer required the payment of a substantial sum of money by the employee before the employer obtained the work permit. A female employee who was sexually harassed felt she could not leave on protest because of her employer holding the work permit. Female migrant workers who become pregnant or seek maternity leave are also particularly vulnerable. The position of migrant workers who work in private households was highlighted in the Annual Report of 2002 and 2003. Some serious cases of discrimination encountered by the Equality Authority arose in relation to migrant workers employed as childminders and carers in people's homes. During 2003 the Equality Authority was unable to take any action in respect of this because of the exemption in the legislation in relation to domestic employment.

In one settlement reached in 2004 the complainant worked as a cleaner. Her employer forced her to work excessive hours, 6 days a week. He constantly threatened her with deportation if she did not do as requested. Her employer confiscated documents including her passports and gave them back to her only when she paid him a lump sum. The complainant eventually had no option but to leave. He refused to give her a P45 which she needed for another employer.

The Labour Court in 2004 in the case of *Campbell Catering v Rashaq* highlighted the particular vulnerabilities faced by migrant workers.

“It is clear that many non-national workers encounter special difficulties in employment arising from a lack of knowledge concerning statutory and contractual employment rights together with difficulties of language and culture. In the case of disciplinary proceedings, employers have a positive duty to ensure that all workers fully understand what is alleged by them, the gravity of the alleged misconduct and their right to mount a full defence including the right to representation...Special measures may be necessary in the case of non-national workers to ensure that this obligation is fulfilled and that the accused worker fully appreciates the gravity of the situation and is given appropriate facilities and guidance in making a defence.”

Allegations of discrimination in the casefiles of the Equality Authority under the Employment Equality Acts 1998 and 2004 have also related to:

- failure to recognise professional qualifications,
- Irish language requirements,
- work permit rules being used to justify unequal pay,
- refusal of employment because of wearing of hyjab and
- threats to withdraw visas.

The Equality Authority has also received information from the IMO concerning allegations of discrimination and harassment by migrant doctors in the health services. In one case in which the Equality Authority provided representation, a migrant consultant was paid a substantial sum of money in settlement of a claim concerning access to promotion.

Complaints under the Equal Status Act 2000 include the following:

Provision of goods and services

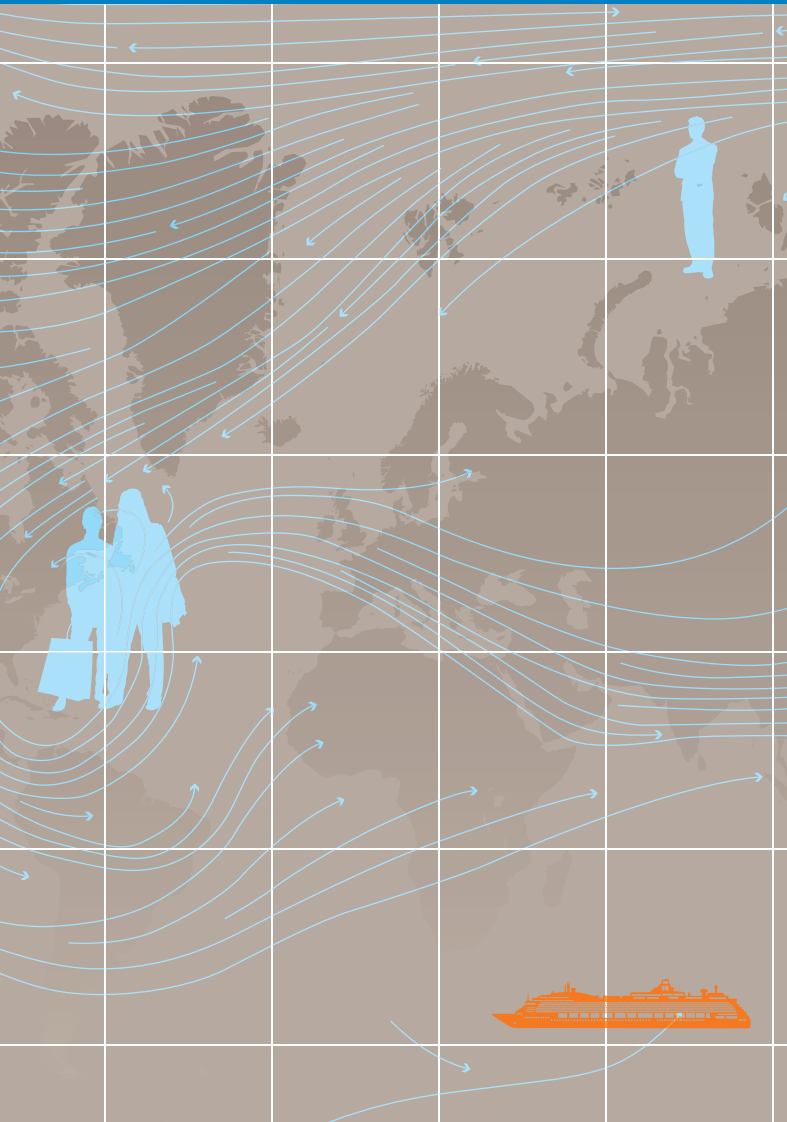
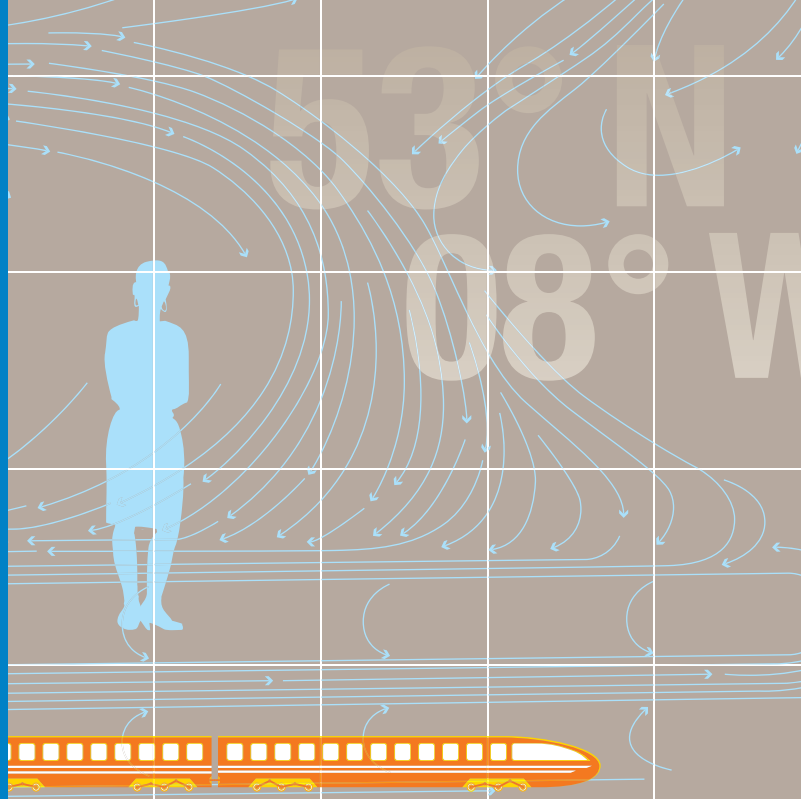
- Migrants who have experienced difficulties obtaining access to shops and pubs (and/or experienced harassment in them).
- Migrants who have been subject to Aids tests in order to obtain insurance.
- Migrants who have experienced difficulties transferring money home.
- Post Office issuing a guidance note regarding Black males.
- A migrant being refused a laser card by a financial institution.
- Migrants who alleged that they have been harassed by police.
- The system of direct provision – two asylum seekers being allowed to move out of direct provision.
- Subscription policy.
- Harassment of a transport user.

Accommodation

- Local authority tenants who have been harassed by neighbours.
- Discriminatory advertising in relation to accommodation.
- Homeless asylum seekers seeking assistance in getting accommodation.

Education

- Third level colleges charging very high fees to migrant students.
- Access of a Muslim child to a school.
- Reduction in fees.
- Refusal to let Russian Junior Certificate students use English – Russian dictionary.



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