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DETENTION AND ALTERNATIVES TO DETENTION IN INTERNATIONAL PROTECTION AND RETURN PROCEDURES IN IRELAND

EMILY CUNNIFFE



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ABOUT THIS REPORT

This European Migration Network study examines the use of detention and alternatives to detention in international protection and return procedures in Ireland. It presents an overview of the main legislation and the use of detention and alternatives to detention in practice. It consists of information gathered by way of a common template for an EU-level report published by the EMN, *Detention and alternatives to detention in the EU*, available at: www.emn.ie.

26 May 2022: Minor post-publication amendments were made to this study on pages 16 and 17. The amendments were made to ensure this report reflected the final version of the EMN report, '*Detention and alternatives to detention in international protection and return procedures*', published on 25 May 2022.

This report has been accepted for publication by the Institute, which does not itself take institutional policy positions. The report has been peer reviewed prior to publication. The author is solely responsible for the content and the views expressed do not represent the position of the Economic and Social Research Institute, the Department of Justice, or the European Commission, Directorate-General Migration and Home Affairs.

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ABBREVIATIONS AND IRISH TERMS

AIDA	Asylum Information Database
BMU	Border Management Unit
CEAS	Common European Asylum System
CFREU	Charter of Fundamental Rights of the European Union
CPSRA	Critical Part of the Security Restricted Area
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EMN	European Migration Network
ESRI	Economic and Social Research Institute
EU	European Union
Garda Síochána	National police force (Ireland)
GNIB	Garda National Immigration Bureau
GSOC	Garda Síochána Ombudsman Commission
ICCPR	International Covenant on Civil and Political Rights
IDC	International Detention Coalition
IHREC	Irish Human Rights and Equality Commission
IPAS	International Protection Accommodation Service
IPO	International Protection Office
IPRT	Irish Penal Reform Trust
IPS	Irish Prison Service
ISD	Immigration Service Delivery
NGO	Non-governmental organisation
OIP	Office of the Inspector of Prisons
OPCAT	Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
Spirasi	Spiritan Asylum Services Initiative
TFEU	Treaty of the Functioning of the European Union
UK	United Kingdom
UN	United Nations
UNCAT	United Nations Committee Against Torture
UNHCR	United Nations High Commissioner for Refugees

GLOSSARY

Alternatives to detention	Non-custodial measures used to monitor and/or limit the movement of third-country nationals in advance of forced return or deciding on the individual's right to remain in the Member State, such as regular reporting, the surrender of a financial guarantee or travel documents, electronic monitoring.
Detention	Non-punitive administrative measure ordered by an administrative or judicial authority(ies) in order to restrict the liberty of a person through confinement so that another procedure may be implemented.
Deportation order	An order issued to a person who does not hold permission to reside in the State. A deportation order requires the person to leave the State within a set period and remain thereafter outside of the State.
Dublin transfer decision	A decision issued to an applicant for international protection where another Member State is found to be responsible for their application for international protection, pursuant to the <i>Dublin III Regulation 604/2013</i> , and the applicant is to be transferred to that Member State.
Leave to land	Permission to enter the State.
Inadmissible application	An international protection application is inadmissible to the Irish international protection procedure where another Member State has granted refugee status or subsidiary protection status to the person, a country other than a Member State is a first country of asylum for the person, or the person arrived in the State from a safe third country.
Return order	An order issued where there is a finding of inadmissibility in an international protection application. The reasons for inadmissibility can include that the person arrived in Ireland to seek protection from a safe third country, such as the UK.
Return procedures	For the purposes of this study, return procedures in Ireland include those applied to persons subject to a deportation order and persons refused leave to land.
Third-country national	Any person who is not a citizen of the EU within the meaning of Art. 20(1) of TFEU and who is not a person enjoying the EU right to free movement, as defined in Art. 2(5) of the <i>Regulation (EU) 2016/399 (Schengen Borders Code)</i> . ¹

¹ See also Section 1.3 for sources.

EXECUTIVE SUMMARY

Detention and alternatives to detention can be used for immigration-related purposes in Ireland. Detention takes place in Garda Síochána stations and prisons. Throughout 2019, 477 people were detained in Irish prisons for immigration-related reasons, reducing to 245 people in 2020 during the COVID-19 pandemic. Alternatives to detention, such as regularly reporting to a Garda station, however, tend to be used more routinely and in the first instance.

This study presents a comprehensive review of legislation and practice on detention and alternatives to detention in international protection and return procedures in Ireland. It is based on the Irish contribution to a European Migration Network (EMN) report comparing the situation in EU Member States. Immigration detention in the EU and the UK has been the subject of considerable academic research; however, there has been comparatively less research on the situation in Ireland, particularly regarding alternatives to detention.

USE OF DETENTION

The number of persons detained for immigration-related reasons in Irish prisons gradually increased between 2015 and 2019 and decreased in 2020 during the COVID-19 pandemic. Between 2015 and 2020, there were 1,148 committals to prison for failure to have a valid passport. This was the most common immigration-related reason for detention in Irish prisons for these years. The second most common reason was failure to hold a valid visa, with 1,061 committals for this reason between 2015 and 2020. Ireland is the only EU country with no purpose-built immigration detention facility. The main prison used for immigration-related purposes is Cloverhill Prison, which is primarily a remand prison and only for male prisoners. The main prison for immigration detention for women is the Dóchas Centre. Female international protection applicants, however, can only be detained in Garda Síochána stations. Overall, a higher number of men than women are detained in prison for immigration-related purposes.

Figures on detention in prisons for immigration-related reasons are only a partial representation of the use of immigration detention. While data are available on persons detained in prisons, figures are not available on detention in Garda Síochána stations and ports. This gap in data means it is difficult to present a comprehensive picture of the overall use of immigration detention in Ireland.

USE OF ALTERNATIVES TO DETENTION

Alternatives to detention are non-custodial measures such as a requirement to report to a Garda Síochána station or a requirement to reside in a specified place. These are applied most commonly for persons with deportation orders or subject

to a Dublin transfer decision, where they are to be transferred to another EU Member State. Stakeholders interviewed for this study described several advantages to using alternatives to detention in immigration-related cases, as well as key challenges. Reported advantages include the fact that alternatives are less invasive, and that they allow for greater personal liberty and the possibility of integration in the community. Authorities also reported that alternatives to detention entail lower costs and staffing requirements as compared to detention. Key reported challenges include high levels of absconding, difficulties in establishing identity in the context of refusals of leave to land, as well as challenges faced by the third-country nationals themselves, particularly in terms of travel for reporting obligations and the temporal uncertainty surrounding the enforcement of a deportation order.

FOUR CATEGORIES OF THIRD-COUNTRY NATIONALS

This study examines the situation of four categories of third-country nationals: international protection applicants, persons subject to a Dublin transfer decision, persons refused leave to land, and persons subject to a deportation order.

Since the enactment of the *International Protection Act 2015* on 31 December 2016, one international protection applicant has been detained under the detention provisions of the Act. The *International Protection Act 2015* provides that applicants can be arrested without warrant and detained for a renewable period of up to 21 days. Applicants can be detained on grounds that include, *inter alia*, that they pose a threat to public security or public order in the State, that they have committed a serious non-political crime outside the State, or that they have not made reasonable efforts to establish their identity. The detention must be sanctioned by a District Court judge. Alternatives to detention can also be applied by a District Court judge.

For persons subject to a Dublin transfer decision, detention can be used if a person is deemed to present a significant risk of absconding. Factors such as whether the person has made efforts to establish their identity are examined in assessing this risk. The maximum period of detention is seven days. Most persons subject to a Dublin transfer decision are subject to an alternative to detention, such as a requirement to reside at a specific address and reporting requirements.

The third category concerns persons who are refused leave to land; in other words, refused permission to enter the State. The number of refusals of leave to land has increased in recent years: from 2,475 refusals in 2014 to 7,455 in 2019. It decreased in 2020 to 2,790 refusals with the reduction of international travel during the COVID-19 pandemic. In 2020, at Dublin Airport, the most common ground for refusing leave to land was that there was reason to believe that the non-national intended to enter the State for purposes other than those expressed.

The Border Management Unit (BMU) and the Garda National Immigration Unit (GNIB) reported that when a person is refused leave to land, there is an intention to return them on the next flight. If a flight is not immediately available, a decision is made to either detain the person pending removal or to issue a section 14(1) notice, as an alternative to detention. The person can be detained for up to 12 hours at a port and for a maximum of eight weeks in a prison. There are no established criteria followed for making this decision, but considerations such as risk of absconding are taken into account. No formal vulnerability assessment is carried out in the refusal of leave to land process. It was indicated by BMU and GNIB that vulnerable persons are generally not detained. The section 14(1) notice permits entry to the State for a temporary period, with requirements to surrender a passport and return to the airport on a designated day and time. These notices are issued in a minority of cases.

The last category is that of persons who are the subject of a deportation order. The first requirement is that the person leaves the State. If they do not leave, they can be required to comply with conditions. These include requirements to report to a Garda Síochána station, to reside at an address provided to authorities, and to cooperate in facilitating their removal from the State. Persons subject to a deportation order can be detained for an aggregate and renewable period of eight weeks. The grounds for detention include, *inter alia*, that the person intends to avoid removal or has failed to comply with one of the above-mentioned requirements. Case law has established that detention shall only occur when there is a settled intention to deport and the removal from the State is possible within the eight-week period.

SAFEGUARDS AND FUNDAMENTAL RIGHTS

Legal remedies and access to legal representation are among the key rights examined. Only the detention of international protection applicants must be sanctioned by a District Court judge. For the other three categories of persons examined — persons subject to a deportation order, refused leave to land or subject to a Dublin transfer decision — their initial period of detention does not have to be sanctioned by a judicial authority. The main venue to legally challenge a refusal of leave to land or a deportation order is via judicial review in the High Court. Any detained person can also apply to the High Court under Article 40.4 of the Irish Constitution to challenge the lawfulness of the detention.

Related to legal remedies is the issue of access to legal representation. At ports of entry, GNIB and BMU stated that if a person is refused leave to land, they will be given access to an interpreter and, if requested, can contact a legal representative by phone. Where a person is subsequently detained in a Garda station or in a prison, they are informed of their right to contact a legal representative and, if requested, contact will be facilitated. However, non-governmental organisations (NGOs) and legal practitioners reported that legal remedies and legal

representation are difficult to access, and legal aid is not available in practice. For international protection applicants, a right to legal representation is provided in the *International Protection Act 2015*, and applicants can access legal aid. Persons subject to deportation orders do not have an explicit right to legal representation in immigration legislation but may access pro bono legal representation, privately pay for representation or, in some cases, receive support from the Legal Aid Board.

This study also examines access to healthcare, the right to be informed and the right to communicate with a third party. It shows that the provisions for international protection applicants tend to be stronger than those for other third-country nationals. Nonetheless, legislation governing places of detention provide these rights for detained persons, in principle. However, as reported by NGOs, access to some of these rights can be difficult in practice.

For vulnerable third-country nationals, there are no specific provisions in the context of detention and alternatives to detention. Nonetheless, children are not detained for immigration-related purposes by law and there are typically special provisions for families. Where the parent(s) or guardian(s) of a child are detained, the child may be placed in the care of Tusla, the Child and Family Agency. Stakeholders reported an intention to keep families together and, in some cases, one adult may be detained, with the rest of the family subject to an alternative.

OVERSIGHT AND RECENT DEVELOPMENTS

Oversight of places of detention in Ireland is carried out periodically by the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and the UN Committee Against Torture (UNCAT). Monitoring visits occur approximately once every four years. On a national level, the two main bodies tasked with inspecting prisons are the Office of the Inspector of Prisons (OIP) and Visiting Committees. However, the reports that are publicly available from these national bodies do not specifically review the situation of persons detained for immigration-related purposes. Thus, there are limitations in the oversight of detention for immigration-related purposes.

The use of detention in immigration policy in Ireland is currently under review and a Department of Justice working group has been established to this end. In the government response to the CPT report on Ireland in 2020, it indicated that a longer-term sustainable solution is being explored. The F Block of Cloverhill Prison has been identified as a location to accommodate persons detained for immigration-related purposes. However, while it is not currently in use due to COVID-19 cocooning/isolation requirements for prisoners, there is an intention to use it as an interim solution.

CHAPTER 1

Introduction

1.1 STUDY OBJECTIVES AND BACKGROUND

This study examines the use of detention and alternatives to detention in international protection and return procedures in Ireland. It is based on material from the Irish contribution to the European Migration Network (EMN) report, *Detention and alternatives to detention in international protection and return procedures* (EMN, forthcoming), research for which was carried out by EMN National Contact Points during the first half of 2021.

The EMN report presents similarities and differences across 24 European Union (EU) Member States in their use of immigration detention, as well as their provision of alternatives to detention, such as reporting obligations or designated accommodation facilities. The EMN report sought to examine the practical applicability of alternative measures for detention, their effectiveness and the challenges in implementation.² The main EU legislation governing detention and alternatives includes the recast Reception Conditions Directive 2013/33/EU and the Return Directive 2008/115/EC.³ The EMN report shows differences in the use of detention and, to a greater extent, of alternatives to detention between Member States (*ibid.*).

Detention in immigration-related procedures in the EU and in the UK has been extensively examined in academic literature (see, for example, Majcher et al., 2020; Bosworth and Turnbull, 2015). By contrast, there have been comparatively few research studies on immigration detention in Ireland (Nasc, the Migrant and Refugee Rights Centre, 2018; Kelly, 2005), and none thus far on alternatives to detention, framed as such. The most recent study on detention in Ireland, *Immigration detention and border control in Ireland* (Nasc, the Migrant and Refugee Rights Centre, 2018), raised concerns about access to rights and safeguards, such as legal remedies, legal representation and transparency, particularly in the context of refusals of leave to land at ports of entry. The report

² In the EMN report, effectiveness is measured using three key indicators, namely the extent to which measures: (1) ensure compliance with migration procedures (including prompt and fair case resolution, facilitating voluntary and forced returns, reducing absconding); (2) uphold fundamental rights; and (3) improve the cost effectiveness of migration management. In the Irish context, as data are not available on compliance and levels of absconding, it is not possible to assess the effectiveness of alternatives to detention and detention.

³ *Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)* and *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals*. Ireland does not participate in the Return Directive 2008/115/EC pursuant to Protocol 21 to the Lisbon Treaty. Under Protocol 21, Ireland does not participate in the adoption of measures under Title V of Part Three of the Treaty on the Functioning of the European Union (TFEU), unless it notifies its intention to participate.

found little change in the policies followed in Ireland since the last report on immigration detention in 2005 (Kelly, 2005).

In contributing to this literature, the objective of this national study is to present an up-to-date overview of the legislation and practice with regard to detention in Ireland. It also examines the extent to which alternatives to detention are used and the key advantages and challenges of using alternatives to detention, as described by stakeholders interviewed for this report.

This study shows that in Ireland, the use of detention and alternatives to detention differs depending on the immigration procedure concerned. Alternatives to detention, in the form of non-custodial measures, are used widely and provisions exist across all immigration legislation. However, to date, Ireland does not have an operational immigration detention facility,⁴ and it is the only EU Member State that does not have dedicated immigration detention facilities (EMN, 2014). This means that persons detained for immigration-related purposes are detained in Garda Síochána stations or in prisons, as designated by the relevant statutory instruments.⁵ In recent years, there has been a series of policy and legislative developments in this area. These developments include the adoption of the *International Protection Act 2015*, which came into force on 31 December 2016.⁶ Section 20 of the *International Protection Act 2015* establishes the procedures, rights and grounds for the detention of international protection applicants. In 2018, Ireland transposed the recast Reception Conditions Directive 2013/33/EU.⁷ Among other things, this Directive lays down standards for detention conditions for international protection applicants.⁸

In November 2020, the the Council of Europe’s Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) published its report on Ireland and noted how immigration detainees continued to be held in prisons with remand and convicted prisoners and, ‘in some cases, subjected to abuse and bullying’ (CPT, 2020a, p. 4). The report described how the F Block of Cloverhill Prison had been converted for use for immigration detention. The F Block has been temporarily in use by the prison for isolating/cocooning during the COVID-19 pandemic, but it is foreseen as an interim solution for immigration

⁴ Committee of Public Accounts (2020). *Vote 24 – Justice and equality*, 9 December, www.oireachtas.ie/en/debates/debate/committee_of_public_accounts/2020-12-09/3/.

⁵ *International Protection Act 2015 (Section 51B) (Places of Detention) Regulations 2020*, S.I. No. 727/2020; *Immigration Act 2003 (Removal Places of Detention) Regulations 2005*, S.I. No. 56/2005; *International Protection Act 2015 (Places of Detention) Regulations 2016*, S.I. No. 666 of 2016, as amended by *European Communities (Reception Conditions) Regulations 2018*, S.I. 230/2018 Schedule 4, *European Union (Dublin System) Regulations 2018*, S.I. 62/2018, as amended by *European Communities (Reception Conditions) Regulations 2018*, S.I. 230/2018; Second Schedule, *Immigration Act 1999 (Deportation) Regulations 2005*, S.I. No. 55/2015.

⁶ Repealing the *Refugee Act 1996* and amending the *Illegal Immigrants (Trafficking) Act 2000* and the *Immigration Acts of 1999, 2003 and 2004*.

⁷ *European Communities (Reception Conditions) Regulations 2018*, S.I. No 230/2018.

⁸ *Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, OJ L 180, 29.6.2013, pp. 96-116.

detention.⁹ As Cloverhill Prison is only for male detainees, women are detained for immigration-related purposes in the Dóchas Centre, which is the women's prison within the Mountjoy Prison campus.¹⁰ At Dublin Airport, four one-person cells in the Garda Síochána station there are undergoing works and, at the time of writing, the works were expected to be completed by mid-November 2021.¹¹ While expected to be used for immigration-related purposes, the cells are not a dedicated immigration detention facility.¹²

The CPT's 2020 report called on Irish authorities to establish a specifically designed immigration detention facility. In response to the CPT report, the Irish Government indicated that 'work is also proceeding on the consideration of a longer term sustainable and compliant solution' (CPT, 2020b, p. 19). The use of detention in immigration policy in Ireland is currently under review and a working group has been established in the Department of Justice to this end.¹³

1.2 SCOPE AND METHODOLOGY

For the purposes of this study, four categories of persons are identified within international protection and return procedures in Ireland. The first category includes persons in international protection proceedings who fall under the *International Protection Act 2015*, as amended, and the *European Communities (Reception Conditions) Regulations 2018*.¹⁴ The second category of persons, who also to some extent fall under the provisions of the first category, comprises those subject to Dublin transfer decisions or return orders. Dublin transfer decisions are issued where another Member State is found to be responsible for the international protection application, pursuant to the *Dublin III Regulation 604/2013* and the *European Union (Dublin System) Regulations 2018*.¹⁵ The person is issued with a decision to transfer them to that Member State. Although similar to a Dublin transfer decision, persons are subject to a return order when their international protection application is considered inadmissible to the Irish international protection procedure, pursuant to section 51A of the *International Protection Act 2015*, as amended by the *Withdrawal of the United Kingdom from*

⁹ Correspondence with the Department of Justice, October 2021.

¹⁰ Correspondence with GNIB, October 2021. Pursuant to the *International Protection Act 2015*, international protection applicants can only be detained in Cloverhill Prison and Garda Síochána stations. For women protection applicants, they can only therefore be detained in Garda Síochána stations.

¹¹ Correspondence with GNIB, October 2021.

¹² Correspondence with GNIB, October 2021.

¹³ Interview with BMU, ISD, February 2021.

¹⁴ *International Protection Act 2015*, as amended; *European Communities (Reception Conditions) Regulations 2018*, S.I. No. 230/2018.

¹⁵ *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person; European Union (Dublin System) Regulations 2018*, S.I. No. 62/2018.

the European Union (Consequential Provisions) Act 2020.¹⁶ However, it is important to note that return orders for transfers to the UK have not been utilised to date.¹⁷

The third category of persons addressed in this study comprises those who are refused leave to land at the frontiers of the State, pursuant to the *Immigration Act 2004*, as amended.¹⁸ In other words, this concerns persons who are refused permission to enter the State. This category includes persons in the State irregularly for less than three months.

The final category includes persons subject to a deportation order under the *Immigration Act 1999*, as amended. It is to be noted that Ireland does not participate in the EU's Return Directive 2008/115/EC, which lays down common standards and procedures for the removal of third-country nationals from participating Member States.¹⁹ Ireland therefore follows different procedures as regards returns as compared to other EU Member States. Additionally, it is important to recognise from the outset that by law in Ireland, children are not detained for international protection or return procedures.²⁰

With regard to temporal scope, the study collates information and data on the use of detention and alternatives to detention in international protection and return procedures between 2015 and 2020, with some references to 2021 where relevant.

The structure of the study is based on information gathered according to EMN specifications for a wider study, agreed by EMN National Contact Points (NCPs). NCPs gather information according to these commonly agreed specifications (a common template). The main findings are brought together and compared in an EU-level EMN report (EMN, forthcoming).

For the Irish national study, desk research was undertaken at the outset, including a review of policy documents, legislation, academic literature and reports by non-governmental and international organisations. A total of nine semi-structured interviews were conducted with state and non-state stakeholders. The interview questions were based on the above-mentioned EMN common template and were sent to stakeholders in advance. The stakeholders interviewed included a representative of the Border Management Unit (BMU), two representatives of the

¹⁶ Section 51A, 51B and 51C, *International Protection Act 2015*, as amended by the *Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020*.

¹⁷ Correspondence with the Repatriation Unit, ISD, October 2021.

¹⁸ *Immigration Act 2003*, as amended; *Immigration Act 2004*, as amended.

¹⁹ *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals*, OJ L 348, 24.12.2008, pp. 98-107.

²⁰ Section 5(6)(a), *Immigration Act 1999*, as amended; Section 5(2)(b), *Immigration Act 2003*, as amended; Regulation 10(7)(a), *European Union (Dublin System) Regulations 2018*, S.I. No. 62/2018; section 20(6), *International Protection Act 2015*, as amended.

Garda National Immigration Bureau (GNIB), a representative of the Irish Prison Service (IPS), a representative of the Repatriation Unit, a representative of Tusla, the Child and Family Agency, a representative of UNHCR Ireland, a representative of the Immigrant Council of Ireland, a representative of the Irish Refugee Council and a practitioner from KOD Lyons law firm. A single interview was conducted with each stakeholder. These interviews were conducted between January and March 2021 and followed up with correspondence where further clarification was required. All stakeholders were invited to review the report prior to publication. The International Protection Office and the Civil Justice Policy/Migration Unit in the Department of Justice were also consulted.

The data used in this study were sourced from Eurostat, the Irish Prison Service annual reports, media articles, parliamentary questions, as well as directly from stakeholders. It is important to note that the available data on detention are limited. Figures are available for prisons but not for Garda Síochána stations, and data on the use of alternatives to detention are not currently available. It is therefore difficult to present a comprehensive picture of the extent of the use of detention and alternatives to detention in practice.

1.3 TERMINOLOGY

For the purposes of this report, detention in international protection and return procedures is defined as a ‘non-punitive administrative measure ordered by an administrative or judicial authority(ies) in order to restrict the liberty of a person through confinement so that another procedure may be implemented’.²¹

Alternatives to detention, while not defined under EU law, are herein defined as ‘non-custodial measures used to monitor and/or limit the movement of third-country nationals in advance of forced return or deciding on the individual’s right to remain in the Member State, such as regular reporting, the surrender of a financial guarantee or travel documents, electronic monitoring’.²² In the Irish context, alternatives to detention are implemented in a different manner to most EU Member States. Indeed, other than in situations where a person is refused permission to enter the State, alternatives to detention are often implemented prior to detention being considered, as discussed in greater detail in the chapters that follow.

Other key terms for this study include the following.

²¹ European Migration Network. Glossary 6.0, www.ec.europa.eu/home-affairs/networks/european-migration-network-emn/emn-glossary_en.

²² European Migration Network. Glossary 6.0, www.ec.europa.eu/home-affairs/networks/european-migration-network-emn/emn-glossary_en.

Deportation order: An order issued to a person whose application for international protection has been refused,²³ or a person who does not hold a permission to reside in the State. A deportation order is issued under section 3 of the *Immigration Act 1999*, as amended, which requires the person specified in the order to leave the State within a set period and remain thereafter outside of the State.²⁴

Dublin transfer decision: A decision issued to an applicant for international protection where another Member State is found to be responsible for their application for international protection, pursuant to the *Dublin III Regulation 604/2013* and the individual is to be transferred to that Member State.²⁵

Leave to land: Permission to enter the State pursuant to section 4 of the *Immigration Act 2004*, as amended.

Habeas corpus: Article 40.4 of the Constitution of Ireland protects against the deprivation of liberty of persons save where it is in accordance with law.²⁶ A *habeas corpus* application can be submitted to the High Court to request a review of the legality of the detention. Where the detention is found to be unlawful, an order is issued to require the release of the person from detention.

Inadmissible application: An international protection application is inadmissible to the Irish international protection procedure under section 21 of the *International Protection Act 2015* where another Member State has granted refugee status or subsidiary protection status to the person, a country other than a Member State is a first country of asylum for the person or the person arrived in the State from a safe third country.²⁷

Return order: Persons are subject to a ‘return order’ issued pursuant to section 51A of the *International Protection Act 2015*, as amended, where there is a finding of inadmissibility in their international protection application.²⁸

²³ Section 51(3), *International Protection Act 2015*, as amended.

²⁴ Section 3, *Immigration Act 1999*, as amended.

²⁵ *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.*

²⁶ Article 40.4, *Constitution of Ireland*, 1937.

²⁷ The *Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020* transposes the concept of a ‘safe third country’ into Irish law and adds coming from a safe third country to the grounds for deeming an application to be inadmissible. The United Kingdom was designated as a safe third country via the *International Protection Act 2015 (Safe Third Country) Order 2020 from 31 December 2020*, S.I. No. 725 of 2020. The UK was designated as a safe third country via the *International Protection Act 2015 (Safe Third Country) Order 2020 from 31 December 2020*, Act No. 23 of 2020.

²⁸ Section 51A, *International Protection Act 2015*, as amended. The *Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020* transposes the concept of a ‘safe third country’ into Irish law and adds coming from a safe third country to the grounds for deeming an application to be inadmissible. The UK was designated as a safe third country via the *International Protection Act 2015 (Safe Third Country) Order 2020 from 31 December 2020*, S.I. No. 725/2020.

Return procedures: For the purposes of this study, these procedures refer to persons subject to a deportation order and persons refused leave to land.²⁹

Third-country national: This term refers to any person who is not a citizen of the European Union within the meaning of Article 20(1) of the Treaty on the Functioning of the European Union (TFEU) and who is not a person enjoying the EU right to free movement, as defined in Article 2(5) of *Regulation (EU) 2016/399 (Schengen Borders Code)*.³⁰

1.4 STUDY STRUCTURE

The second chapter of this study examines the use of detention and alternatives to detention in the EU. This chapter examines academic literature and case law on detention and alternatives. It also presents key findings from the EMN report on EU Member States. The third chapter outlines the provisions for detention and alternatives to detention across all relevant Irish immigration legislation. It additionally presents relevant aspects of the legislation that governs places of detention.

The fourth, fifth and sixth chapters draw on stakeholder interviews and data provided by stakeholders. The fourth chapter examines the use of detention in practice for each of the four categories examined in this study: international protection applicants, persons subject to a Dublin transfer decision or a return order, persons refused leave to land, and persons subject to a deportation order. In turn, the fifth chapter examines the use of alternatives to detention in practice for the same four categories. The sixth chapter looks at key fundamental rights and safeguards at issue. The seventh chapter concludes the study.

²⁹ *Immigration Act 1999*, as amended, and *Immigration Act 2004*, as amended.

³⁰ European Migration Network. Glossary 6.0, www.ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network.

CHAPTER 2

European law and policy context

The detention of persons in international protection or return procedures in Europe is governed by an intersection of international, regional and national law. In contrast, the provisions for alternatives to detention are largely undefined and remain an area of predominantly national competence.

This chapter describes the legislative framework within Europe, along with case law from the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU). It goes on to examine the use of detention and alternatives to detention in EU Member States, as described in the forthcoming European Migration Network (EMN) report and relevant academic literature.

2.1 INTERNATIONAL AND EUROPEAN LEGAL FRAMEWORKS ON DETENTION

The right to liberty is protected across international, regional and EU law, all of which set limits on a state's ability to deprive persons of their liberty.

In international human rights law, Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR) protects a person's right to liberty and security and prohibits arbitrary arrest and detention.³¹ Similarly, Article 5 of the European Convention on Human Rights (ECHR) protects the right to liberty and security.³² Article 5(1) ECHR sets out six grounds on which a person can be deprived of their liberty. One of these grounds, set out in Article 5(1)(f), permits deprivation of liberty for 'the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition'.³³ Under Article 5(2) ECHR, there is a right for the detained person to be informed promptly of the reasons for their deprivation of liberty, and Articles 5(3) and 5(4) lay down rules on judicial remedies.³⁴

³¹ Article 9(1), International Covenant on Civil and Political Rights (ICCPR). See also: UN Working Group on Arbitrary Detention, (16 February 2009). 'Detention of Immigrants in an Irregular Situation', Human Rights Council, A/HCR/IO/21; UN Working Group on Arbitrary Detention, (18 January 2010). 'Detention of Immigrants in an Irregular Situation', Human Rights Council A/HCR/13/30; UN Working Group on Arbitrary Detention (24 December 2012). 'The prohibition of arbitrary deprivation of liberty in international law', Human Rights Council, A/HCR/22/44.

³² Article 5, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended).

³³ Article 5(1)(f), Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended).

³⁴ Article 5(2) and (4), Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended).

Immigration detention has been the subject of numerous cases brought to the ECtHR since the 1990s.³⁵ The ECtHR has repeatedly upheld that detention must be lawful, proportional to the objective pursued and necessary. In this sense, detention cannot be arbitrary.³⁶ In *Saadi v. the UK*, the ECtHR found the detention of an asylum applicant for seven days was permitted under Article 5(1)(f) to prevent unauthorised entry and was therefore non-arbitrary.³⁷ This approach was clarified and nuanced in later rulings from the ECtHR.³⁸ Nonetheless, in *Amuur v. France*, where four Somali siblings were detained in the transit zone of Paris–Orly airport, the ECtHR held that the applicants fell under the territorial jurisdiction of France, and that their lack of access to legal, humanitarian and social assistance during their detention in the transit zone, and the lack of established procedures and time limits to this detention, was a violation of Article 5(1) ECHR.³⁹

The ECtHR also requires that procedural safeguards be implemented where a decision is taken to deprive a person of their liberty, including access to a legal remedy and for the person to be informed of the detention.⁴⁰ Detention conditions must be adequate and not amount to a violation of Article 3 ECHR, which prohibits torture and inhuman and degrading treatment or punishment.⁴¹

Scholars on immigration detention case law from the ECtHR highlight the central tension between state sovereignty and the right to liberty, and limitations in the protections against deprivation of liberty for third-country nationals in particular (Moreno-Lax, 2011; Basilien-Gainche, 2015). A similar tension and limitation of protections is seen more broadly in international human rights law for third-country nationals (Costello, 2012).

Under EU law, immigration detention is provided for in three key instruments: the Return Directive 2008/115/EC, the recast Reception Conditions Directive 2013/33/EU and the *Dublin III Regulation 604/2013/EU*.⁴² While Ireland

³⁵ ECtHR (1996). *Amuur v. France*, 25 June, App. No. 19776/92.

³⁶ *Saadi v. United Kingdom* [GC], App. No. 13229/03 (ECHR, 2008); *Feilazoo v. Malta*, App. No. 6865/19 (ECHR, 11 March 2021).

³⁷ *Saadi v. United Kingdom* [GC], App. No. 13229/03 (ECHR, 2008).

³⁸ *Susa Musa v Malta*, App. No. 42337/12 (ECHR, 23 July 2013); *Khlaifia and others v. Italy*, App. No. 16483/12 (ECHR 15 December 2016); *Kanagaratnam v. Belgium*, App. No. 15297/09 (ECHR, 13 December 2011).

³⁹ *Amuur v. France*, App. No. 19776/92 (ECHR, 25 June 1996).

⁴⁰ *Khlaifia and others v. Italy*, App. No. 16483/12 (ECHR 15 December 2016).

⁴¹ *Riad and Idiab v. Belgium*, App. No. 29787/03 and 29810/03 (ECHR, 24 April 2008). This case concerned two Palestinian nationals detained in the transit zone of Brussels Airport following their unlawful entry into Belgian territory. The applicants' detention in the transit zone of the airport, which is by nature only to be used for short periods of time, amounted to a violation of Article 3.

⁴² *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals*, OJ L 348, 24.12.2008, pp. 98-107; *Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, OJ L 180, 29.6.2013, pp. 96-116; *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person*, OJ L 180, 29.6.2013, pp. 31-59.

participates in the latter two, it does not participate in the Return Directive 2008/115/EC.⁴³

Under the Return Directive, which governs the removal of third-country nationals who are deemed to be illegally staying on the territory, detention for the purpose of removal 'should be limited and subject to the principle of proportionality with regard to the means used and objectives pursued'.⁴⁴ Article 15(1) provides that 'unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process'.⁴⁵ Article 15 refers to two particular situations where this could be considered: that there is a risk of the person absconding; and that the person avoids or hampers the preparation of return or the removal process.⁴⁶ The use of detention must be for as short a period as possible and 'only maintained as long as removal arrangements are in progress and executed with due diligence'.⁴⁷ As established in Article 15, the maximum period for detention that can be applied by Member States is 18 months.⁴⁸ The Return Directive also lays down specific requirements as regards detention conditions, including that detention shall 'take place in specialised detention facilities'.⁴⁹ It specifies that if a Member State must use prison facilities, 'third-country nationals in detention shall be kept separated from ordinary prisoners'.⁵⁰ The Return Directive also contains specific provisions for the detention of children and families.⁵¹

Pre-removal detention is the most common form of immigration detention in EU Member States (Majcher et al., 2020), and it has been the subject of numerous

⁴³ Pursuant to Protocol 21 to the Lisbon Treaty. Under Protocol 21, Ireland does not participate in the adoption of measures under Title V of Part Three of the Treaty on the Functioning of the European Union (TFEU) unless it notifies its intention to participate.

⁴⁴ Recital 16, *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals*, OJ L 348, 24.12.2008, pp. 98-107.

⁴⁵ Article 15(1), *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals*, OJ L 348, 24.12.2008, pp. 98-107.

⁴⁶ Article 15(1)(a) and (b), *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals*, OJ L 348, 24.12.2008, pp. 98-107.

⁴⁷ Article 15(1), *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals*, OJ L 348, 24.12.2008, pp. 98-107.

⁴⁸ Article 15(5) and (6), *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals*, OJ L 348, 24.12.2008, pp. 98-107.

⁴⁹ Article 16(1), *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals*, OJ L 348, 24.12.2008, pp. 98-107.

⁵⁰ Article 16(1), *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals*, OJ L 348, 24.12.2008, pp. 98-107.

⁵¹ Article 17, *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals*, OJ L 348, 24.12.2008, pp. 98-107.

rulings from the CJEU. In these rulings, the court has clarified the grounds on which people can be detained prior to their return. In *Kadzoev* (C-357/09), the CJEU interpreted the Return Directive's provision that detention is permitted only when there is a 'reasonable prospect of removal' to mean 'a real prospect that removal can be carried out successfully', with reasonable prospect not existing where it is unlikely that the country to which the person is to be deported will admit that person.⁵² The CJEU clarified that when the maximum period of detention has expired the person must be released, and grounds such as failure to hold valid documents, aggressive conduct or a lack of means to support themselves are not grounds for further detention.⁵³ Later, in *El Dridi* (C-61/11), the CJEU explained that irregular migrants cannot be detained on the sole ground that they have been issued with a return order,⁵⁴ and in the case of *Mahdi* (C-146/14), the Court held that a 'lack of cooperation' as a ground for detention can only relate to the individual's personal actions.⁵⁵ The CJEU has also clarified the rules around procedural safeguards and judicial review, stating that the use of detention must be assessed on a case-by-case basis (*Arslan*, C-543/11),⁵⁶ and that all the factual and legal circumstances of a case, including the observations of the detained migrant and other relevant facts beyond those submitted by authorities, must be considered (*Mahdi*, C-146/11).⁵⁷ In other cases, however, the Court has limited the right to be heard for the purposes of administrative efficiency (*Mukarubega*, C-166/13).⁵⁸

Overall, while some scholars have noted how the CJEU's case law on the Return Directive has established higher standards than those set by the ECtHR (Costello, 2012), others, such as Majcher, have nonetheless been critical of the margin of appreciation left to national courts, concluding that the CJEU has failed 'to preclude domestic practices amounting to arbitrary detention' (Majcher, 2013, p. 24).

Legislation for detention and alternatives to detention, although in line with the same core principles, differs in some respects for international protection applicants. The recast Asylum Procedures Directive 2013/32/EU makes explicit that applicants must not be held in detention for the sole reason of applying for international protection.⁵⁹ Indeed, 'freedom of movement for asylum-seekers is the conceptual starting point of EU asylum law' (Tsourdi, 2016, p. 11). The Refugee Convention of 1951 establishes that refugees must not be penalised for illegal

⁵² Para 67, Case C-357/09, *PPU Kadzoev*, [2009], ECLI:EU:C:2009:741.

⁵³ Case C-357/09, *PPU Kadzoev*, [2009], ECLI:EU:C:2009:741.

⁵⁴ Case C-61/11, *PPU El Dridi*, [2011], ECLI:EU:C:2011:268.

⁵⁵ Case C-146/11, *Mahdi*, [2014], ECLI:EU:C:2014:1320.

⁵⁶ Case C-543/11, *Arslan*, [2013], ECLI:EU:C:2013:343.

⁵⁷ Case C-146/11, *Mahdi*, [2014], ECLI:EU:C:2014:1320.

⁵⁸ Case C-166/13, *Mukarubega*, [2014], ECLI:EU:C:2014:2336.

⁵⁹ Article 26, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection*, OJ L 180, 29.6.2013, pp. 60-95.

entry.⁶⁰ It also establishes a necessity requirement for detention to be used in the case of refugees who enter a country illegally.⁶¹ In the United Nations High Commissioner for Refugee's (UNHCR) *Guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention*, the agency reiterates that asylum seekers should only be detained as a measure of last resort and detention must be proportional to and necessary for the objective pursued (UNHCR, 2012).

Under the Common European Asylum System (CEAS), the recast Reception Conditions Directive 2013/33/EU and the *Dublin III Regulation 604/2013* are the main sources of rules on detention. Where applicants are detained, the recast Reception Conditions Directive 2013/33/EU establishes the grounds upon which this detention is permitted, including, *inter alia*, to establish the person's nationality or identity,⁶² to determine elements of the application that would not be possible to determine without the use of detention (e.g. for reasons of absconding),⁶³ to decide the applicant's right to enter the territory,⁶⁴ and where it is required for the protection of national security or public order.⁶⁵ The recast Reception Conditions Directive also lays down specific guarantees for detained applicants, including detention conditions and access to legal remedies.⁶⁶

Under the *Dublin III Regulation 604/2013*, applicants can be detained for the purposes of facilitating a transfer to the responsible Member State.⁶⁷ In *Al Chodor* (C-528/15), a case where an asylum applicant was detained on the ground that he posed a 'risk of absconding' pending a Dublin transfer, the CJEU held that national legislation must define objective criteria for assessing the 'risk of absconding'.⁶⁸ This ruling meant that EU Member States, including Ireland, had to define in national law the criteria followed to assess risk of absconding in their national legislation (Vavoula, 2019).

The CEAS provisions on detention are, on the whole, 'more generous' than those provided in the Return Directive 2008/115 (Majcher et al., 2020, p. 7). Nonetheless,

⁶⁰ Article 26, Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

⁶¹ Article 31, Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

⁶² Article 8(3)(a), *Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, OJ L 180, 29.6.2013, pp. 96-116.

⁶³ Article 8(3)(b), *Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, OJ L 180, 29.6.2013, pp. 96-116.

⁶⁴ Article 8(3)(c), *Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, OJ L 180, 29.6.2013, pp. 96-116.

⁶⁵ Article 8(3)(e), *Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, OJ L 180, 29.6.2013, pp. 96-116.

⁶⁶ Article 9, *Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, OJ L 180, 29.6.2013, pp. 96-116.

⁶⁷ Article 28, *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person*.

⁶⁸ C-528/15, *Al Chodor*, [2017], ECLI:EU:C:2017:213.

Costello and Mouzourakis have described how the CEAS legislation, through increasing the deportability and transferability of international protection applicants, may in turn increase the ‘detainability’ of applicants (Costello and Mouzourakis, 2016). Similarly, Tsourdi highlights a broader tension ‘between protection provision and administrative imperatives, such as migration management’ (Tsourdi, 2016, p. 7).

2.2 ALTERNATIVES TO DETENTION

There is no common legal definition for ‘alternatives to detention’ and it has been implemented differently across EU Member States. Nonetheless, the use of alternatives to detention has become increasingly prominent in discussions on migration management (Bloomfield, 2016).

The definitions of alternatives to detention vary in scope. Key to defining the term is the difference between the deprivation of liberty of a person and restrictions on freedom of movement, which, according to De Bruycker et al., is ‘one of degree or intensity, not of kind’ (De Bruycker et al., 2015, p. 28). Indeed, alternatives must be alternatives *to* detention and not alternatives *of* detention (De Bruycker et al., 2015). This distinction is also emphasised in the 2012 UNHCR guidelines, which further clarify that an alternative to detention must not be seen as an alternative to release (UNHCR, 2012). In a report for UNHCR, Costello and Kaytaz propose two types of definitions for an alternative to detention. The first is a narrow definition and is defined as ‘a practice used where detention has a legitimate basis, in particular where a justified ground for detention is identified in the individual case, yet a less restrictive means of control is at the State’s disposal’ (Costello and Kaytaz, 2013, p. 10). The second definition is broader, where alternatives to detention can be ‘any of a range of policies and practice that States use to manage the migration process, which fall short of detention, but typically involve some restrictions’ (ibid.). However, as highlighted by De Bruycker et al., the latter, broad approach is difficult to apply in the EU legal context in that all reception conditions would fall within the scope of an alternative to detention (De Bruycker et al., 2015). Indeed, alternative forms of detention should be authorised only in the same circumstances as detention and following the same guarantees (Tsourdi, 2016). As indicated in Chapter 1, for the purposes of this report, the EMN Glossary definition is used, which defines alternatives to detention as: ‘non-custodial measures used to monitor and/or limit the movement of third-country nationals in advance of forced return or deciding on the individual’s right to remain in the Member State, such as regular reporting, the surrender of a financial guarantee or travel documents, electronic monitoring’.⁶⁹

⁶⁹ European Migration Network. Glossary 6.0, www.ec.europa.eu/home-affairs/networks/european-migration-network-emn/emn-glossary_en.

Under EU law, the Return Directive 2008/115/EC does not set out alternatives to detention to be used by Member States; however, it provides that detention shall only be used where less coercive measures would not be sufficient.⁷⁰ It also provides, in the context of voluntary return, measures to avoid the risk of the person absconding, 'such as regular reporting to authorities'.⁷¹ For international protection applicants, the recast Reception Conditions Directive 2013/33/EU, under Article 8(4), provides that 'Member States shall ensure that the rules concerning alternatives to detention, such as regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place, are laid down in national law.'⁷² The ECtHR has also upheld the requirement of Member States to consider alternatives to detention.⁷³ Thus, the parameters of alternatives to detention have been largely left within the competence of Member States. Scholars, nonetheless, have emphasised that the use of alternatives to detention must comply with the same requirements of proportionality and necessity, as well as access to procedural safeguards as those established for detention (Costello and Mouzourakis, 2016; Tsourdi, 2016).

The promotion of alternatives to detention presents various opportunities and risks (Bloomfield, 2016). As Bloomfield describes, the use of alternatives is almost always less harmful than detention, and other opportunities, beyond the protection of the right to liberty, include improved integration prospects and better physical and mental health (Bloomfield, 2016). The International Detention Coalition (IDC) also describe the potential for improved trust between the persons concerned and authorities (IDC, 2015). Nonetheless, some of the risks highlighted include that alternatives to detention may be used more often in general, and UNHCR has emphasised that they should not become a substitute for normal reception systems (UNHCR, 2012).

Moreover, according to Bloomfield, the use of alternatives to detention may create the potential for the 'further criminalisation of migrants', with many of the alternatives currently in use borrowed from the criminal framework (Bloomfield, 2016, p. 12). This relates to a broader body of scholarship on the criminalisation of migration, which has examined the use of substantive criminal law in the migration context as well as the use of 'criminal law tools, such as surveillance' (Mitsilegas, 2014, p. 2; see also Franko, 2019).

⁷⁰ Recital 16 and Article 15, *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals*, OJ L 348, 24.12.2008, pp. 98-107.

⁷¹ Article 7(3), *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals*, OJ L 348, 24.12.2008, pp. 98-107.

⁷² Article 8(4), *Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, OJ L 180, 29.6.2013, pp. 96-116.

⁷³ ECtHR (2011). *Yoh-Ekale Mwanje v. Belgium*, App. No. 10486/10.

2.3 LEGISLATION AND PRACTICE ACROSS EUROPE

Since 2015, the use of detention for immigration-related purposes has increased in most countries in the EU (Majcher et al., 2020). In all EU Member States, detention is permitted in the context of return procedures and in Dublin transfer procedures. Detention in international protection procedures is permitted in all EU Member States, except Spain and France (EMN, forthcoming).

In the context of return procedures, most Member States have adopted the maximum time limit of 18 months permitted by the Return Directive 115/2008. However, France, Belgium, Spain and Portugal have shorter maximum periods (Majcher et al., 2020). Ireland, due in part to its non-participation in the Return Directive, differs from other EU Member States in its provisions for detention. For example, detention in the context of refusals of leave to land is permitted for a maximum eight-week period in aggregate.⁷⁴ For persons who are the subject of a deportation order, this eight-week aggregate period is renewable.⁷⁵

The 2021 EMN study on detention and alternatives to detention sought to update a previous study by EMN in 2014. The 2014 study found that the most common ground for detention among reporting states was a ‘risk of absconding’, mainly applied in the context of return (EMN, 2014). This remains the most common ground in the 2021 report (EMN, forthcoming).

With regard to detention facilities, in 2014, Ireland was the only reporting Member State to not use immigration detention facilities. As detailed in this study, Garda Síochána stations and prisons are used. The report identified 128 immigration-detention facilities across the EU (EMN, 2014).

The 2021 EMN study finds that, since 2015, most Member States have introduced legislative changes regarding detention. The changes included to implement EU legislation, such as in Austria, Germany and Luxembourg, as well as in Ireland.⁷⁶ It also finds that some Member States, including Ireland, have further defined the scope and criteria of detention,⁷⁷ as well as the length of time for which detention can be used (EMN, forthcoming).⁷⁸

The 2021 report highlights that while most EU Member States reported providing similar types of alternatives in law, fewer Member States made use of these alternatives in practice. Reporting obligations was the most common alternative available, with 25 Member States providing for the alternative in law.

⁷⁴ Section 5(3)(a), *Immigration Act 2003*, as amended.

⁷⁵ Section 5(8) and (9)(b), *Immigration Act 1999*, as amended.

⁷⁶ In the transposition of the recast Reception Conditions Directive 2013/33/EU and the *European Union (Dublin System) Regulations 2018*.

⁷⁷ Austria, Belgium, Bulgaria, Germany, Estonia, France, Finland, Luxembourg, the Netherlands and Slovakia.

⁷⁸ Such as in Austria, Germany and Luxembourg.

Among those Member States, 24 reported using reporting obligations in practice, 17 reported applying this alternative on a regular basis,⁷⁹ while eight said they seldom apply it, if ever.⁸⁰ The second most common alternative is a requirement to reside in a designated place. Of the 20 Member States that provide for the alternative in law, 17 reported using it in practice, including Ireland.⁸¹ The third most common alternative to detention is a requirement to surrender a passport, travel document or identity document(s). It is provided in law in 17 Member States,⁸² and used by 14, including Ireland.⁸³ The report also describes how Member States such as Cyprus, the Czech Republic, Estonia and Luxembourg have introduced policy and legal changes to expand the types of alternatives to detention that are available, and/or introduced changes to prioritise alternative measures over detention (such as, Greece, Finland, France, Latvia and Luxembourg) (ibid).

Ireland is among the EU Member States that use alternatives to detention routinely in practice and provides for similar types of alternatives to detention as other EU Member States (ibid).

The 2021 EMN report also found that little information is available on the effectiveness of detention and alternatives to detention in return and international protection procedures. In the few Member States that reported on compliance, it found reduced levels of absconding for persons who are detained. Three Member States (Bulgaria, Latvia and Slovenia) reported that return procedures were less efficient when using alternatives to detention. The report further found that most Member States guarantee the right to legal aid, the right to be heard and the right to healthcare more commonly when a person is in detention as compared to an alternative. Nonetheless, the conditions to access these rights and the content of these rights vary.

With regard to cost effectiveness, in Belgium, national authorities have examined financial costs of detention and alternatives, as well as their use in human resources. It found alternatives to detention to be more cost effective, but not as effective in ensuring return as detention. There were similar findings in an independent report on the Netherlands. In Slovenia, research found that the costs of detention and alternatives to detention were similar, but alternatives to detention led to higher absconding rates. Nonetheless, Slovenia stated that other alternatives had not been sufficiently explored and that a more systematic cost-effectiveness assessment was needed (ibid).

⁷⁹ Austria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France (in the framework of house arrest procedure), Germany, Greece, Ireland, Italy, Lithuania, the Netherlands, Portugal, Spain, Slovenia and Sweden.

⁸⁰ Belgium, Bulgaria, Hungary, Luxembourg, Latvia, Malta, Poland and Slovakia.

⁸¹ Austria, Belgium, Croatia, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Lithuania, Luxembourg, the Netherlands, Portugal, Slovenia.

⁸² Bulgaria, Croatia, Cyprus, Estonia, Finland, France, Greece, Hungary, Ireland, Italy, Latvia, Luxembourg, Malta, the Netherlands, Poland, and Sweden.

⁸³ Bulgaria, Croatia, Cyprus, Estonia, Finland, France (house arrest), Ireland, Italy, Latvia, the Netherlands, Spain and Sweden.

2.4 CONCLUSION

Detention in international protection and return procedures in the EU context is bound by a wide body of international, regional and national law. By contrast, there are fewer provisions that establish rules on the administering of alternatives to detention.

Across the EU, the most common form of immigration detention is pre-removal detention. Ireland is the only EU Member State that does not have immigration detention facilities, but it also routinely uses alternatives to detention.

CHAPTER 3

National legislative framework

In Ireland, the applicable legislative framework for detention and alternatives to detention depends on the immigration or international protection procedure concerned. This chapter examines the applicable legislation for each of the four categories of persons covered by this study: international protection applicants; persons subject to a Dublin transfer decision or a return order; persons refused leave to land; and persons subject to a deportation order.

The final section of this chapter presents the legislation that governs places of detention, namely the *European Communities (Reception Conditions) Regulations 2018*, which transposes the recast Reception Conditions Directive 2013/33/EU, as well as the *Prison Rules 2007* and the *Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987*.

3.1 INTERNATIONAL PROTECTION APPLICANTS

The *International Protection Act 2015* came into force on 31 December 2016. It repeals the Refugee Act 1996 and amends the *Illegal Immigrants (Trafficking) Act 2000* and the *Immigration Acts 1999, 2003 and 2004*.

3.1.1 Grounds for detention

Section 20 of the *International Protection Act 2015* sets out the grounds and procedural safeguards for the detention of an international protection applicant. Section 20(1) of the Act provides that an immigration officer or a member of An Garda Síochána ‘may arrest an applicant without warrant where that officer or member suspects, with reasonable cause, suspects’ that one of the six stipulated grounds applies. The grounds are that an applicant:

- ‘a) poses a threat to public security or public order in the State,
 - b) has committed a serious non-political crime outside the State,
 - c) has not made reasonable efforts to establish his or her identity,
 - d) intends to leave the State and without lawful authority enter another state,
 - e) has acted or intends to act in a manner that would undermine — (i) the system for granting persons international protection in the State, or (ii) any arrangement relating to the Common Travel Area,
- or

f) without reasonable excuse — (i) has destroyed his or her identity or travel document, or (ii) is or has been in possession of a forged, altered or substituted identity document.’⁸⁴

The applicant arrested on one of the above grounds may be brought to, and detained in, a place of detention.⁸⁵ The only prison that can be used for international protection applicants is Cloverhill Prison, which is for male-only detainees. Any Garda Síochána station can also be used for the purposes of detention.⁸⁶ In their annual report for the Asylum Information Database (AIDA), the Irish Refugee Council noted that the grounds for detention set out under the *International Protection Act 2015* are not in line with the six exhaustive grounds under Article 8(3) of the recast Reception Conditions Directive 2013/33/EU (AIDA, 2021).⁸⁷

While the provisions for detention under the 2015 Act remain similar to those of the *Refugee Act 1996*, three key amendments were brought in with the new Act. Firstly, section 20(1) of the 2015 Act introduces additional grounds for detention, namely if the person has acted or intends to act in a manner that would ‘undermine (i) the system for granting persons international protection in the State, or (ii) any arrangement relating to the Common Travel Area’.⁸⁸ Secondly, the ground for detention under the *Refugee Act 1996* of ‘an applicant without reasonable cause has destroyed his or her identity or travel documents or is in possession of forged identity documents’,⁸⁹ has been added to in the 2015 Act to state ‘an applicant without reasonable excuse — (i) has destroyed his or her identity or travel document, or (ii) is or has been in possession of a forged, altered or substituted identity document’.⁹⁰ The addition of ‘altered or substituted’ to the latter provision expands this ground for detention. Thirdly, unlike the *Refugee Act 1996*, the 2015 Act allows for the arrest of an applicant without warrant.⁹¹

The *International Protection Act 2015* provides a role for a District Court to sanction the detention. When an applicant is detained, they must be brought before a District Court judge assigned to the district in which the person is being detained

⁸⁴ Section 20(1), *International Protection Act 2015*, as amended.

⁸⁵ Section 20(1), *International Protection Act 2015*, as amended.

⁸⁶ *International Protection Act 2015 (Section 51b) (Places of Detention) Regulations 2020*, S.I. No. 720/2020.

⁸⁷ Irish Refugee Council (April 2021). *Country report: Ireland*, Asylum Information Database (AIDA), European Council for Refugees and Exiles (ECRE), www.asylumineurope.org. These grounds differ from those of the recast Reception Conditions Directive (2013/33/EU), which only provides six grounds for detention. The grounds of ‘committed a serious non-political crime outside the State’, ‘intention to leave the State and unlawfully enter another’, ‘acting in a manner undermining the asylum system’, or ‘destroyed identity or travel documents’ are not included grounds under EU law.

⁸⁸ Section 20(1)(e), *International Protection Act 2015*, as amended. Compare to section 9(8), *Refugee Act 1996*.

⁸⁹ Section 9(8)(f), *Refugee Act 1996*, as amended.

⁹⁰ Section 20(1)(f), *International Protection Act 2015*, as amended.

⁹¹ Compare section 9(8), *Refugee Act 1996* to section 20(1), *International Protection Act 2015*, as amended. This was criticised by the Irish Refugee Council in their submissions to the Department of Justice, where they called this an ‘unnecessary expansion of the State’s power to detain’. Irish Refugee Council (November 2015). ‘Recommendations on the International Protection Bill 2015’, www.irishrefugeecouncil.ie.

as soon as is practicable.⁹² The District Court judge may commit the person to a place of detention for a period not exceeding 21 days,⁹³ or release the applicant and make such release subject to conditions.⁹⁴ When a person has been committed to a place of detention, they can be recommitted for periods each not exceeding 21 days by a District Court judge.⁹⁵ There is no stipulated maximum number of periods for which a person can be recommitted, and an applicant can continue to be detained pending a decision on their application for international protection.⁹⁶ Under section 20(18), the application for international protection can be prioritised.⁹⁷ If, during the period of detention, an immigration officer or a member of An Garda Síochána is of the opinion that the grounds for detention under section 20(1) no longer apply, the applicant shall be brought before a District Court judge as soon as is practicable.⁹⁸

In situations where an applicant is released following a decision by a District Court judge and is required to comply with conditions, such as a reporting obligation (as described in the next section), where the applicant fails to comply with the condition, a member of An Garda Síochána can arrest the applicant without warrant again and detain the applicant in a place of detention.⁹⁹ In such cases, the applicant must be brought before a District Court judge, and if the judge considers the applicant complied with the condition, they can be released.¹⁰⁰ Where it is found that the applicant failed to comply, they can be committed for a period of detention, as described above.¹⁰¹

If at any point during the detention period, the applicant expresses a desire to leave the State, the applicant shall be brought before a District Court judge, who, if satisfied that the applicant wishes to withdraw their application for international protection and has received professional legal advice in making this decision, can order the Minister to arrange for the removal of the person from the State.¹⁰²

In June 2021, rules for the District Court concerning the detention of international protection applicants came into operation in *District Court (Order 38) Rules 2021* (S.I. No.262/2021). Rules 11 to 15 refer to forms set out in Schedule B of the instrument. These forms are to be used by District Court judges to order the committal of an international protection applicant to a place of detention,¹⁰³ to

⁹² Section 21(2), *International Protection Act 2015*, as amended.

⁹³ Section 20(3)(a), *International Protection Act 2015*, as amended.

⁹⁴ Section 20(3)(b), *International Protection Act 2015*, as amended.

⁹⁵ Section 20(12), *International Protection Act 2015*, as amended.

⁹⁶ Section 20(12), *International Protection Act*, as amended.

⁹⁷ Section 20(18), *International Protection Act 2015*, as amended.

⁹⁸ Section 20(4), *International Protection Act 2015*, as amended.

⁹⁹ Section 20(9), *International Protection Act 2015*, as amended.

¹⁰⁰ Section 20(11), *International Protection Act 2015*, as amended.

¹⁰¹ Section 20(10), *International Protection Act 2015*, as amended.

¹⁰² Section 20(13), *International Protection Act 2015*, as amended.

¹⁰³ Schedule B, Or.38, r.11, No 38.16, *District Court (Order 38) Rules 2021*, S.I. No.262/2021.

order the detained applicant to be committed for further periods of detention,¹⁰⁴ to order the release of an applicant subject to conditions,¹⁰⁵ and to order the committal of an applicant where they have failed to comply with conditions imposed by the court upon their release.¹⁰⁶ There are also forms that can be used to vary, revoke or add a conditions of release,¹⁰⁷ to order the variance, revocation or addition of conditions of release,¹⁰⁸ to order the release of the applicant,¹⁰⁹ and for when the person withdraws their application for international protection and wishes to leave the State.¹¹⁰

Children in international protection procedures in Ireland cannot be detained.¹¹¹ Unaccompanied children can be placed in the care of Tusla, the Child and Family Agency.¹¹² However, under section 20(7) of the 2015 Act, where not fewer than two members of An Garda Síochána or two immigration officers, or one of each, on reasonable grounds, believe that the person is aged 18 years or over, then that person can be detained.¹¹³ They can also be detained where only one member of An Garda Síochána or an immigration officer believes they are aged 18 or older, where this is proven by an age assessment test or where the individual refuses to undergo an age assessment.¹¹⁴

Section 20 of the *International Protection Act 2015* makes a number of explicit provisions for: access to legal representation and assistance;¹¹⁵ the right to be informed, including the right to make a complaint under Article 40.4.2 of the Constitution;¹¹⁶ the right to a copy of the warrant;¹¹⁷ the right to notification of the detention sent to the United Nations High Commissioner for Refugees (UNHCR) or another reasonably nominated person;¹¹⁸ and the right to access to an interpreter.¹¹⁹ Moreover, an applicant must be informed, in a language they can be reasonably supposed to understand, that they are being detained.¹²⁰

In addition to the above provisions, the *International Protection Act 2015* also provides for prison terms for offences committed by an applicant. Under section 16(3), a number of conditions can be attached to an international applicant's

¹⁰⁴ Schedule B, Or.38, r.11, No.38.16B, *District Court (Order 38) Rules 2021*, S.I. No.262/2021.

¹⁰⁵ Schedule B, Or.38, r.12, No. 38.17, *District Court (Order 38) Rules 2021*, S.I. No.262/2021.

¹⁰⁶ Schedule B, Or.38, r.11, No. 38.16A, *District Court (Order 38) Rules 2021*, S.I. No.262/2021.

¹⁰⁷ Schedule B, Or.38, r.13, No. 38.18, *District Court (Order 38) Rules 2021*, S.I. No.262/2021.

¹⁰⁸ Schedule B, Or.38, r.13, No. 38.19, *District Court (Order 38) Rules 2021*, S.I. No.262/2021.

¹⁰⁹ Schedule B, Or.38, r.14, No. 38.20, *District Court (Order 38) Rules 2021*, S.I. No.262/2021.

¹¹⁰ Schedule B, Or.38, r.15, No. 38.21, *District Court (Order 38) Rules 2021*, S.I. No.262/2021.

¹¹¹ Section 20(6), *International Protection Act 2015*, as amended.

¹¹² Section 20(8), *International Protection Act 2015*, as amended.

¹¹³ Section 20(7), *International Protection Act, 2015*, as amended.

¹¹⁴ Section 20(7)(b), *International Protection Act 2015*, as amended.

¹¹⁵ Section 20(14)(a) and (aa), *International Protection Act 2015*, as amended.

¹¹⁶ Section 20(14)(ab), *International Protection Act 2015*, as amended.

¹¹⁷ Section 20(14)(ac), *International Protection Act 2015*, as amended.

¹¹⁸ Section 20(14)(b), *International Protection Act 2015*, as amended.

¹¹⁹ Section 20(14)(c), *International Protection Act 2015*, as amended.

¹²⁰ Section 20(15)(a), *International Protection Act 2015*, as amended.

permission to enter and remain in the State. These conditions include, *inter alia*, to not leave the State without the consent of the Minister and to inform the Minister of their address and any change of address as soon as possible.¹²¹ Where those conditions are contravened, the applicant shall be liable on summary conviction to a class D fine or a prison term not exceeding one month, or both.¹²²

The *International Protection Act 2015* also provides, under section 17, that a person who ‘forges, fraudulently alters, assists in forging or fraudulently altering or procures the forging or fraudulent alteration’ of a temporary residence certificate shall be guilty of an offence, and liable to a class C fine or a prison term not exceeding 12 months or both.¹²³

3.1.2 Alternatives to detention

In the *International Protection Act 2015*, two sections provide for non-custodial measures.

Firstly, under section 16(3)(d) of the 2015 Act, when an applicant is issued with a permission to reside in the State for the purpose of the international protection application, this permission can be subject to the following requirements:

- (i) that he or she reside or remain in a specified district or place in the State;
- (ii) that he or she report at specified intervals to—
 - (I) an immigration officer, or
 - (II) a specified Garda Síochána station.¹²⁴

Given that the above conditions are not considered alongside a decision to detain an applicant, these provisions may not be seen as alternatives to detention as such, but still provide for non-custodial measures that can be applied as a means of control.

Where an applicant fails to comply with the reporting obligations attached to their permission to enter and reside in the State under section 16(3)(d), they are informed by the Minister of their failure to cooperate under section 38 of the 2015 Act.¹²⁵ Additionally, as described in the previous section, failure to comply with with section 16(3) is an offence.¹²⁶

¹²¹ Section 16(3)(a), *International Protection Act 2015*, as amended.

¹²² Section 16(5), *International Protection Act 2015*, as amended.

¹²³ Section 17(6), *International Protection Act 2015*, as amended.

¹²⁴ Section 16(3)(d), *International Protection Act 2015*, as amended.

¹²⁵ Section 38(2)(b), *International Protection Act 2015*, as amended.

¹²⁶ Section 16(5), *International Protection Act 2015*, as amended.

The above-listed conditions can also be applied to an individual who has appealed a Dublin transfer decision and is awaiting the outcome of that appeal, pursuant to Regulation 8 of the *European Union (Dublin System) Regulations 2018*.¹²⁷

The second set of alternatives to detention can be applied where an applicant is released following their detention under section 20 of the *International Protection Act 2015*. As mentioned above, the applicant must be brought before a District Court judge as soon as is practicable.¹²⁸ The judge can commit the applicant to a period of detention, or can release the applicant, and/or impose one of the following conditions under section 20(3)(b):

- (i) reside or remain in a specified district or place in the State,
- (ii) report at specified intervals to a specified Garda Síochána station, or
- (iii) surrender any passport or other travel document that they hold'.¹²⁹

If an applicant, in the opinion of a member of An Garda Síochána, has failed to comply with one of these conditions, the Garda member may arrest them without warrant and detain them.¹³⁰

In practice, and as detailed in Chapter 4, the measures for the detention of international protection applicants as well as those for alternatives are currently seldom used.

3.2 PERSONS SUBJECT TO A DUBLIN TRANSFER DECISION OR A RETURN ORDER

Persons are issued with a Dublin transfer decision where, pursuant to the *Dublin III Regulation 604/2013*,¹³¹ responsibility for their international protection application lies with another Member State.

A 'return order' can be issued to a person following a finding of inadmissibility of their application for international protection through a preliminary interview. This is conducted pursuant to section 13(2) of the *International Protection Act 2015*.¹³² An application is inadmissible where another Member State has granted refugee status or subsidiary protection status to the person, a country other than a Member State is a first country of asylum for the person, or the person arrived in

¹²⁷ *European Union (Dublin System) Regulations 2018*, S.I. No. 62/2018.

¹²⁸ Section 20(2), *International Protection Act 2015*, as amended.

¹²⁹ Section 20(3), *International Protection Act 2015*, as amended.

¹³⁰ Section 20(9), *International Protection Act 2015*, as amended.

¹³¹ *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person*, OJ L 180, 29.6.2013, pp. 31-59.

¹³² Section 13(2), *International Protection Act 2015*, as amended.

the State from a safe third country.¹³³ The *Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020* introduced the concept of ‘return orders’ in its amendments to the *International Protection Act 2015*.^{134,135} With the withdrawal of the UK from the EU, the *Dublin III Regulation 604/2013* no longer applies to the UK, and the UK has been designated by Ireland as a ‘safe third country’.¹³⁶ However, it should be noted that, while the applicable legislation is set out below for return orders, at time of writing it had not yet been utilised.¹³⁷

3.2.1 Grounds for detention

The rules for detention of persons subject to a Dublin transfer decision and persons subject to a return order are similar. Where it is considered that there is a significant risk of the person absconding, they can be arrested without warrant and detained in order to facilitate their transfer to another Member State or to enforce the return order.¹³⁸ They can be detained for a period of seven days in a prescribed place of detention,¹³⁹ or, where detained in a vehicle or port, for periods not exceeding 12 hours.¹⁴⁰ There is no requirement to bring the person before a court to sanction the detention.

For both categories, the same factors must be considered when assessing whether the person presents a significant risk of absconding. These factors were introduced in the *European Union (Dublin System) Regulations 2018*,¹⁴¹ and in light of the CJEU ruling in *Al Chodor* (C-528/15).¹⁴² These factors are:

- (a) whether the person, in their efforts to establish their identity, has misrepresented or omitted facts, whether or not by the use of false documents;
- (b) whether the person has failed to comply with a requirement attached to their return order, such as a reporting requirement;
- (c) whether the person has failed to co-operate with those arrangements for their return;

¹³³ The *Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020* transposes the concept of a ‘safe third country’ into Irish law and adds coming from a safe third country to the grounds for deeming an application to be inadmissible. The UK was designated as a safe third country via the *International Protection Act 2015 (Safe Third Country) Order 2020* from 31 December 2020, S.I. No. 725 of 2020.

¹³⁴ *Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020*, S.I. No. 693/2020.

¹³⁵ Section 51A, *International Protection Act 2015*, as amended.

¹³⁶ *Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020*, S.I. No. 693/2020.

¹³⁷ Correspondence with the Repatriation Unit, ISD, October 2021.

¹³⁸ Regulation 10(4), *European Union (Dublin System) Regulations 2018*, S.I. No. 62/2018; section 51B(4), *International Protection Act 2015*, as amended.

¹³⁹ Regulation 10(4)(b), *European Union (Dublin System) Regulations 2018*, S.I. No. 62/2018; section 51B(4), *International Protection Act 2015*, as amended.

¹⁴⁰ Regulation 10(10)(b) *European Union (Dublin System) Regulations 2018*, S.I. No. 62/2018; section 51B(11), *International Protection Act 2015*, as amended.

¹⁴¹ *European Union (Dublin System) Regulations 2018*, S.I. No. 62/2018.

¹⁴² C-528/15, *Al Chodor*, [2017], ECLI:EU:C:2017:213.

(d) whether the person has explicitly expressed an intention not to comply with arrangements for his or her return; and

(e) whether the person has previously failed to comply with the law of the State, or of another state, relating to the entry or presence of foreign nationals in the State or, as the case may be, that state.¹⁴³

For the purposes of an arrest, an immigration officer or member of An Garda Síochána may enter and search any premises — if necessary, by use of reasonable force — either where the person is or where they are suspected to be, with reasonable cause.¹⁴⁴ Where the premises is a dwelling, the immigration officer or member of An Garda Síochána shall not enter the dwelling unless acting with the consent of the person, or unless the person ordinarily resides at the location, or it is believed on reasonable grounds that they reside there.¹⁴⁵

As for international protection applicants, the places of detention for persons subject to a Dublin transfer decision or a return order include every Garda Síochána station and Cloverhill Prison, which is only for male detainees.¹⁴⁶ Women can therefore only be detained in Garda Síochána stations.

Lastly, for persons subject to a Dublin transfer decision, the *Dublin III Regulation 604/2013* has direct effect. In other words, the provisions of that EU Regulation apply directly in Ireland and can be relied on by the person in a court.¹⁴⁷ Article 28 of the *Dublin III Regulation 604/2013* provides that persons shall not be detained for the sole purpose of being subject to the procedure of the Regulation.¹⁴⁸ Detention must be based on an individual assessment, and used only insofar as it is proportional and other less coercive measures cannot be applied effectively.¹⁴⁹ Article 28(3) provides that detention ‘shall be for as short a period as possible’ and ‘for no longer than the time reasonably necessary to fulfil the required

¹⁴³ Section 51B(6), *International Protection Act 2015*, as amended; Regulation 10(6), *European Union (Dublin System) Regulations 2018*, S.I. No. 62/2018.

¹⁴⁴ Regulation 10(5), *European Union (Dublin System) Regulations 2018*, S.I. No. 62/2018; section 51B(5), *International Protection Act 2015*, as amended.

¹⁴⁵ Regulation 10(5)(a) and (b), *European Union (Dublin System) Regulations 2018*, S.I. No. 62/2018; Section 51(B)(5)(a) and (b), *International Protection Act 2015*, as amended.

¹⁴⁶ Schedule 4, *European Union (Dublin System) Regulations 2018*, S.I. 62/2018, as amended by *European Communities (Reception Conditions) Regulations 2018*, S.I. No. 230/2018; *International Protection Act 2015 (section 51B) (Places of Detention) Regulations 2020*, S.I. No. 727/2020.

¹⁴⁷ Article 288, Consolidated version of the Treaty on the Functioning of the European Union OJ C 326, 26.10.2012, pp. 47-390.

¹⁴⁸ Article 28(1), *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person*, OJ L 180, 29.6.2013, pp. 31-59.

¹⁴⁹ Article 28(3), *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person*, OJ L 180, 29.6.2013, pp. 31-59.

administrative procedures with due diligence until the transfer under this Regulation is carried out'.¹⁵⁰

The provisions of the recast Reception Conditions Directive 2013/33/EU and the transposed regulations also apply to persons in Dublin proceedings.¹⁵¹

3.2.2 Alternatives to detention

Persons subject to a Dublin transfer decision or a return order may be required by an immigration officer or a member of An Garda Síochána, by notice in writing, to comply with one or more of the conditions listed below:

- (a) that they present themselves to such immigration officer or member of An Garda Síochána at a date, time and place specified in the notice;
- (b) where, and only for so long as, it is reasonably necessary to facilitate their transfer or return, that they surrender their passport and any other travel document that they hold;
- (c) that they co-operate in any way necessary to enable an immigration officer or a member of An Garda Síochána to obtain a passport or other travel document, travel ticket or other document required for the purpose of their transfer or their return; and
- (d) that they reside or remain in a particular place in the State pending their transfer.¹⁵²

Where a person fails to comply with one of the above conditions, it can be considered in the assessment of whether a person presents a significant risk of absconding.¹⁵³

As mentioned above, a person who has appealed a Dublin transfer decision can be subject to non-custodial measures set out under section 16(3)(d) of the *International Protection Act 2015*, as amended, pending the outcome of their appeal.¹⁵⁴

¹⁵⁰ Article 28(3), *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person*, OJ L 180, 29.6.2013, pp. 31-59.

¹⁵¹ *European Communities (Reception Conditions) (Amendment) (No. 2) Regulations 2021*, S.I. No. 178/2021.

¹⁵² Regulation 10(2), *European Union (Dublin System) Regulations 2018*, S.I. No. 62/2018; section 51B(1), *International Protection Act 2015*, as amended.

¹⁵³ Regulation 10(6)(b), *European Union (Dublin System) Regulations 2018*, S.I. No. 62/2018; section 51B(6)(b), *International Protection Act 2015*, as amended.

¹⁵⁴ Regulation 8, *European Union (Dublin System) Regulations 2018*, S.I. No. 62/2018.

3.3 PERSONS REFUSED LEAVE TO LAND OR IN THE STATE IRREGULARLY FOR LESS THAN THREE MONTHS

Upon arrival at the frontiers of the State, a non-national is required to present themselves to an immigration officer to request permission to enter the State.¹⁵⁵ Section 11(2) of the *Immigration Act 2004*, as amended, provides that every person landing in or embarking from the State shall present to an immigration officer, when requested to do so, their passport or equivalent document, and information ‘in such manner as the immigration officer may reasonably require for the purposes of the performance of his or her functions’.¹⁵⁶ Where a non-national does not comply, they are guilty of an offence.¹⁵⁷

An immigration officer may refuse the person permission to enter the State. Section 4(3) of the 2004 Act lists the grounds on which a person can be refused permission. These grounds include:

- ‘(a) that the non-national is not in a position to support themselves and any accompanying dependants;
- (b) that the non-national intends to take up employment in the State, but is not in possession of a valid employment permit (within the meaning of the *Employment Permits Act 2003*);
- (c) that the non-national suffers from a condition set out in the First Schedule;
- (d) that the non-national has been convicted (whether in the State or elsewhere) of an offence that may be punished under the law of the place of conviction by imprisonment for a period of one year or by a more severe penalty;
- (e) that the non-national, not being exempt, by virtue of an order under section 17, from the requirement to have an Irish visa, is not the holder of a valid Irish visa;
- (f) that the non-national is the subject of—
 - (i) a deportation order (within the meaning of the 1999 Act),
 - (ii) an exclusion order (within the meaning of that Act), or
 - (iii) a determination by the Minister that it is conducive to the public good that they remain outside the State;
- (g) that the non-national is not in possession of a valid passport or other equivalent document, issued by or on behalf of an authority recognised by the Government, which establishes his or her identity and nationality;

¹⁵⁵ Section 4(2), *Immigration Act 2004*, as amended.

¹⁵⁶ Section 11(2), *Immigration Act 2004*, as amended.

¹⁵⁷ Section 11(3), *Immigration Act 2004*, as amended.

- (h) that the non-national-
 - (i) intends to travel (whether immediately or not) to Great Britain or Northern Ireland, and
 - (ii) would not qualify for admission to Great Britain or Northern Ireland if they arrived there from a place other than the State;
- (i) that the non-national, having arrived in the State in the course of employment as a seaman, has remained in the State without the leave of an immigration officer after the departure of the ship in which they so arrived;
- (j) that the non-national's entry into, or presence in, the State could pose a threat to national security or be contrary to public policy;
- (k) that there is reason to believe that the non-national intends to enter the State for purposes other than those expressed by the non-national;
- (l) that the non-national —
 - (i) is a person to whom leave to enter or leave to remain in a territory (other than the State) of the Common Travel Area (within the meaning of the *International Protection Act 2015*) applied at any time during the period of 12 months immediately preceding his or her application, in accordance with subsection (2), for a permission,
 - (ii) travelled to the State from any such territory, and entered the State for the purpose of extending his or her stay in the said Common Travel Area regardless of whether or not the person intends to make an application for international protection'.¹⁵⁸

In deciding whether to grant or refuse leave to land, the immigration officer can request to search the non-national and their luggage and request all relevant documentation.¹⁵⁹

The power of immigration officers to search mobile phones under section 7(3) of the *Immigration Act 2004* was challenged in *Akram v. the Minister for Justice and Equality*.¹⁶⁰ The appellant, a national of Pakistan and holder of a valid travel visa for Ireland, arrived at Dublin Airport in October 2017; the purpose of his trip was to visit his brother. During an interview with an airport immigration officer and a search of the applicant's text messages on his phone, the immigration officer concluded that the applicant had come to Ireland to enter into a marriage of convenience. The applicant was refused leave to land pursuant to section 4(3)(k) of the *Immigration Act 2004*, as amended: 'that there is reason to believe that the non-national intends to enter the State for purposes other than those expressed

¹⁵⁸ Section 4(3), *Immigration Act 2004*, as amended.

¹⁵⁹ Section 7(3), *Immigration Act 2004*, as amended.

¹⁶⁰ *Akram v. Minister for Justice and Equality* [2018] IEHC 643.

by the non-national'.¹⁶¹ The High Court held it was within the powers vested to immigration officers to search the applicant's phone in coming to a decision to grant entry to the State.¹⁶² The case is being appealed.¹⁶³

Following a decision to refuse leave to land, a decision is then taken by the immigration officer as to whether the individual shall be detained or subject to an alternative to detention in the form of a non-custodial measure.

In addition to persons refused leave to land, the provisions for detention and alternatives to detention also apply to persons found to be found in the State without permission to enter within three months of arrival.¹⁶⁴

3.3.1 Grounds for detention

Where a decision is made to detain the person following a refusal of leave to land, section 5 of the *Immigration Act 2003*, as amended, applies.¹⁶⁵ Section 5(2) provides for the arrest without warrant and detention under warrant of such persons in a prescribed place for the purpose of their removal.¹⁶⁶ A person may be detained only until such time – being as soon as is practicable – as they are removed from the State, but they may not be detained for a period exceeding eight weeks in aggregate.¹⁶⁷ However, any time spent in the following are not included in this aggregate eight-week period: in custody pending a criminal trial or serving a sentence of imprisonment; on board a ship, train, road vehicle or aircraft; or in court proceedings challenging the validity of their removal from the State.¹⁶⁸

In addition, section 80 of the *International Protection Act 2015* amends the *Immigration Act 2003* to authorise detention for a period or periods, each not exceeding 12 hours, in a vehicle for the purposes of transporting the person to a port or within the port itself.¹⁶⁹ This followed the ruling in *Ni v. the Garda Commissioner*, where the High Court held that detention in Dublin Airport, which was not a prescribed place of detention at the time, was unlawful.¹⁷⁰

There are three key conditions with which a person detained following refusal of permission to enter the State must comply. These conditions are that they:

¹⁶¹ Section 4(3)(k), *Immigration Act 2004*, as amended.

¹⁶² *Akram v. Minister for Justice and Equality* [2018] IEHC 643.

¹⁶³ *Akram v. Minister for Justice and Equality* [2019] IEHC 33.

¹⁶⁴ Section 5(1), *Immigration Act 2003*, as amended.

¹⁶⁵ Section 5(1), *Immigration Act 2003*, as amended.

¹⁶⁶ Section 5(2), *Immigration Act 2003*, as amended.

¹⁶⁷ Section 5(3), *Immigration Act 2003*, as amended.

¹⁶⁸ Section 5(3)(b), *Immigration Act 2003*, as amended.

¹⁶⁹ Section 80, *International Protection Act 2015*, as amended.

¹⁷⁰ *Ni v. Garda Commissioner* [2013] IEHC 134.

(a) shall not, by act or omission, obstruct or hinder an immigration officer or a member of An Garda Síochána engaged in the removal of a person from the State,

(b) cooperate in assisting An Garda Síochána or immigration officer obtain a travel document, ticket or other document required for the purpose of such removal and, in particular, shall comply with any request from the immigration officer or, as the case may be, the member of An Garda Síochána to sign a document in that connection or to affix his or her fingerprints to such a document, or

(c) shall not behave in a manner likely to endanger the safety of himself or herself or the safety of others in the course of his or her removal from the State.¹⁷¹

If the applicant fails to comply with one of the above conditions, they are, pursuant to section 5(9) of the *Immigration Act 2003*, guilty of an offence and shall be liable on summary conviction to a fine not exceeding €3,000 or imprisonment for a term not exceeding 12 months or both.¹⁷²

There are a number of other offences under the *Immigration Act 2004*. These include, *inter alia*, failure to present to an immigration officer,¹⁷³ failing to declare carrying or conveying any documents and, when required, failing to produce them to the immigration officer or member of An Garda Síochána,¹⁷⁴ arriving at an unapproved port¹⁷⁵ or facilitating such arrival,¹⁷⁶ failing to comply with registration obligations,¹⁷⁷ failing to produce on demand documentation such as a passport, or registration certificate,¹⁷⁸ and failing to comply with conditions set out under section 14(1) of the *Immigration Act 2004*, as amended, and as described below.¹⁷⁹ These offences are punishable, upon conviction, of a fine or a term of imprisonment.¹⁸⁰

Pursuant to the *Immigration Act 2003 (Removal Places of Detention) Regulations 2005*, every Garda Síochána station, as well as Castlerea Prison, Cloverhill Prison, Cork Prison, Limerick Prison, Midlands Prison, Mountjoy Prison, Saint Patrick's

¹⁷¹ Section 5(8), *Immigration Act 2003*, as amended.

¹⁷² Section 5(9), *Immigration Act 2003*, as amended.

¹⁷³ Section 4(9), *Immigration Act 2004*, as amended.

¹⁷⁴ Section 7(4), *Immigration Act 2004*, as amended.

¹⁷⁵ Section 6(4), *Immigration Act 2004*, as amended.

¹⁷⁶ Section 4(12), *Immigration Act 2004*, as amended.

¹⁷⁷ Section 9(8), *Immigration Act 2004*, as amended.

¹⁷⁸ Section 12(2), *Immigration Act 2004*, as amended.

¹⁷⁹ Section 14(2), *Immigration Act 2004*, as amended. Section 15(4) is another provision regarding offences.

¹⁸⁰ Section 13, *Immigration Act 2004*, as amended.

Institution [closed since 2017], the Training Unit – Glengariff Parade¹⁸¹ and Wheatfield Prison are suitable places of detention.¹⁸²

3.3.2 Alternatives to detention

There are two situations in which a person refused leave to land or found in the State without permission within three months of arrival may be required to comply with an alternative to detention.

Firstly, when a person is refused leave to land at a port of entry, the immigration officer can issue the applicant with a ‘section 14(1) notice’.¹⁸³ Section 14(1) of the 2004 Act provides that the Minister, a member of An Garda Síochána, or an immigration officer may require that they:

- ‘(a) reside or remain in a particular district or place in the State;
- (b) report at specified intervals to —
 - (i) an officer of the Minister, an immigration officer or a member of An Garda Síochána specified in the notice, or
 - (ii) the registration officer of the registration district in which they are resident;
- (c) where, and only for so long as, it is reasonably necessary to facilitate his or her removal from the State in accordance with any enactment or other law, surrender their passport and any other travel document that they hold’.¹⁸⁴

Failure to comply with a condition under section 14(1) of the 2004 Act means the individual shall be guilty of an offence and can be arrested.¹⁸⁵

The second context in which a person refused leave to land, or found in the State without a permission within three months of arrival, may be required to comply with an alternative to detention is where they are in detention and they instigate court proceedings to challenge their removal. Under section 5(4) of the *Immigration Act 2003*, the court hearing those proceedings may determine whether the person shall continue to be detained or shall be released, and may make any such release subject to conditions, including any one or more of the following:

¹⁸¹ Currently undergoing refurbishment.

¹⁸² *Immigration Act 2003 (Removal Places of Detention) Regulations 2005*, S.I. No. 56/2005.

¹⁸³ Interview with BMU, ISD, February 2021.

¹⁸⁴ Section 14(1), *Immigration Act 2004*, as amended.

¹⁸⁵ Section 14(2), *Immigration Act 1999*, as amended.

- (a) that the person reside or remain in a particular district or place in the State;
- (b) that they report to a specified Garda Síochána station or immigration officer at specified intervals;
- (c) that they surrender any passport or travel document in his or her possession'.¹⁸⁶

3.4 PERSONS SUBJECT TO A DEPORTATION ORDER

Where there are grounds for removal of a third-country national from the State, a person can be issued with a proposal to make a deportation order under section 3 of the *Immigration Act 1999*, as amended.¹⁸⁷ Pursuant to this notification, the person is informed they may leave the State before the matter is decided, consent to the deportation order or make representations to the Minister within 15 days as to why a deportation order should not be made.¹⁸⁸

For persons whose international protection application was unsuccessful, they are given five days to voluntarily leave the State after the final negative decision.¹⁸⁹ Subject to the prohibition on *refoulement* under section 50 of the *International Protection Act 2015*, section 51 provides that the Minister shall make a deportation order against an applicant who has been unsuccessful in applications for refugee status, subsidiary protection and permission to remain.¹⁹⁰ A deportation order issued under section 51 of the *International Protection Act 2015* shall be deemed to be a deportation order made under section 3(1) of the *Immigration Act 1999*.¹⁹¹

Under Irish law, a person who is the subject of a deportation order is not automatically detained. There must be a final or concluded intention to deport prior to detention,¹⁹² and only where their removal from the State is feasible within the detention period.¹⁹³ The case *BFO v. The Governor of Dóchas Centre* concerned a Nigerian woman who sought leave to judicially review the decision to refuse her permission to remain in the State based on her parentage of an Irish-born child. The appellant moved address and had failed to report this change of address to An Garda Síochána. When she subsequently presented to Waterford Garda Station to notify them of a change of address, she was arrested and detained on the ground that she was the subject of a deportation order. The applicant, along with her child, were detained in the Dóchas Centre. The High Court found that, due to a pending Court decision on residency based on the Irish-born child, the appellant could not

¹⁸⁶ Section 5(4), *Immigration Act 2003*, as amended.

¹⁸⁷ Section 3, *Immigration Act 1999*, as amended.

¹⁸⁸ Section 3(4), *Immigration Act 1999*, as amended.

¹⁸⁹ Section 48(3), *International Protection Act 2015*, as amended.

¹⁹⁰ Section 51, *International Protection Act 2015*, as amended.

¹⁹¹ Section 51(4), *International Protection Act 2015*, as amended.

¹⁹² *BFO v. The Governor of Dóchas Centre* [2005] 2 I.R. 1.

¹⁹³ This has frequently been upheld in case law; see, for example, *Om v. Governor of Cloverhill Prison* [2011] IEHC 341.

have been deported from the State and, as there was no ‘final or concluded intention to deport’, the applicant could not be detained.¹⁹⁴

3.4.1 Grounds for detention

Section 5 of the 1999 Act establishes the grounds for the detention of persons with deportation orders.

Section 5(1) provides that an immigration officer or a member of An Garda Síochána may arrest a person without warrant if they ‘with reasonable cause, suspects that a person against whom a deportation order is in force:

- (a) has failed to leave the State within the time specified in the order,
- (b) has failed to comply with any other provision of the order or with a requirement in a notice under section 3(3)(b)(ii),
- (c) intends to leave the State and enter another state without lawful authority,
- (d) has destroyed his or her identity documents or is in possession of forged identity documents, or
- (e) intends to avoid removal from the State’.¹⁹⁵

A person so arrested ‘may be taken to a place referred to in subsection (3) and detained in the place in accordance with that subsection’.¹⁹⁶

The *International Protection Act 2015* amends section 5 of the *Immigration Act 1999* and allows for the previous maximum detention period of eight weeks to be extended by authorisation of a District Court judge.¹⁹⁷ There is no statutory maximum detention period. However, as described above, case law has established that there must be a settled intention to deport,¹⁹⁸ and the person’s removal must be possible within the eight-week period, or any subsequent period permitted under the 2015 Act.¹⁹⁹ As clarified in *Kristo*, the removal of the detained person must be carried out as soon as is practicable within the eight-week period.²⁰⁰

¹⁹⁴ *BFO v. The Governor of Dóchas Centre* [2005] 2 I.R. 1.

¹⁹⁵ Section 5(1), *Immigration Act 1999*, as amended.

¹⁹⁶ Section 5(1), *Immigration Act 1999*, as amended.

¹⁹⁷ Section 78, *International Protection Act 2015*, as amended.

¹⁹⁸ *FI v. the Governor of Cloverhill Prison* [2015] IEHC 639; *Kadri v. Governor of Cloverhill Prison* [2012] IESC 27; Re: *Illegal Immigrants Trafficking Bill 1999* [2000] IESC 19 [2000] 2 I.R. 360 and *B.F.O. v. Governor of Dóchas Centre* [2005] 2 I.R. 1.

¹⁹⁹ Re: *Illegal Immigrants Trafficking Bill 1999* [2000] IESC 19 [2000] 2 I.R. 360, para 150; *Trang and Vu v. The Governor of the Dóchas Centre* [2018] IEHC 211.

²⁰⁰ *Kristo v. Governor of Cloverhill Prison* [2013] IEHC 218.

Section 78 of the 2015 Act amends the *Immigration Act 1999* to provide that persons subject to deportation orders can be detained in a vehicle or port for a 12-hour period.²⁰¹ The amendment additionally permits an immigration officer or a member of An Garda Síochána to enter a residential premises for the purpose of arrest — where necessary, through use of reasonable force — to facilitate deportation from the State.²⁰² This change addresses the High Court ruling in *Omar v. the Governor of Cloverhill Prison* in 2013 where it was held that there was no legislative power of entry to private premises to enforce a deportation order.²⁰³ The case concerned a Tanzanian family subject to deportation orders. Members of An Garda Síochána travelled to the family's house in Limerick in order to effect their arrest. The High Court held that there was no legislative power of entry for members of An Garda Síochána to enter private premises to enforce a deportation order. As a result, the family's *de facto* detention and arrest was unlawful.²⁰⁴

Where a person contravenes a provision of a deportation order or a requirement issued to them in the deportation notice (for example, a requirement to reside at the address that the person provides or a reporting obligation), they can be arrested. In *Seeruttun v. The Governor of Cloverhill Prison*, it was found that the applicant had not been truthful about the address at which he was residing and thus his detention was justified.²⁰⁵ Moreover, where a person obstructs their deportation from the State, fails to cooperate with facilitating their deportation from the State, including any request to sign a document in that connection or to affix their fingerprints to such a document, or if they act in a manner likely to endanger the safety of themselves or the safety of others in the course of their deportation from the State, they are guilty of an offence under section 8 of the *Immigration Act 1999*. Under section 9, a person guilty of an offence can be imprisoned for up to 12 months or made to pay a fine.²⁰⁶

The prescribed places of detention are set out in the second schedule of the *Immigration Act 1999 (Deportation) Regulations 2005* and are: Castlerea Prison, Cloverhill Prison, Cork Prison, Limerick Prison, Midlands Prison, Mountjoy Prison, Saint Patrick's Institution [closed since 2017], The Training Unit – Glengarriff Parade²⁰⁷ and Wheatfield Prison, as well as all Garda Síochána stations.²⁰⁸

²⁰¹ Section 78(3), *International Protection Act 2015*.

²⁰² Section 78(11), *International Protection Act 2015*.

²⁰³ *Omar v. Governor of Cloverhill Prison* [2013] IEHC 579.

²⁰⁴ *Omar v. Governor of Cloverhill Prison* [2013] IEHC 579.

²⁰⁵ *Seeruttun v. Governor of Clover Hill Prison* [2013] IEHC 217.

²⁰⁶ Section 9, *Immigration Act 1999*, as amended.

²⁰⁷ Currently undergoing refurbishment.

²⁰⁸ *Immigration Act 1999 (Deportation) Regulations 2005*, S.I. No. 55/2015.

Children cannot be detained under the *Immigration Act 1999*.²⁰⁹ Where an adult is detained on foot of a deportation order, the child may be placed in the care of Tusla, the Child and Family Agency.

3.4.2 Alternatives to detention

Non-custodial measures for persons issued with a deportation order are typically issued in the form of an ‘arrangements letter’, pursuant to which the person will be required to comply with specified conditions. Under section 3(9)(a)(i) of the *Immigration Act 1999* where the Minister has issued a deportation order, they may require the person to comply with any one or more of the following:

- (I) present themselves to such member of An Garda Síochána or immigration officer at such date, time and place as may be specified in the notice;
- (II) produce any travel document, passport, travel ticket or other document in their possession required for the purpose of such deportation to such member of An Garda Síochána or immigration officer at such date, time and place as may be specified in the notice;
- (III) co-operate in any way necessary to enable a member of An Garda Síochána or immigration officer to obtain a travel document, passport, travel ticket or other document required for the purpose of such deportation;
- (IV) reside or remain in a particular district or place in the State pending removal from the State;
- (V) report to a specified Garda Síochána station or immigration officer at specified intervals pending removal from the State;
- (VI) notify such member of An Garda Síochána or immigration officer as may be specified in the notice as soon as possible of any change of address.

While the above-listed conditions are the main non-custodial measures used, section 5(7) of the *Immigration Act 1999* provides that where an individual pursues court proceedings to challenge the validity of the deportation order, the court may determine whether a detained individual shall continue to be detained or may make any such release subject to conditions, including:

- ‘(a) that the person reside or remain in a particular district or place in the State;
- (b) that he or she report to a specified Garda Síochána station or immigration officer at specified intervals;

²⁰⁹ Section 5(4)(a), *Immigration Act 1999*, as amended.

(c) that he or she surrender any passport or travel document in his or her possession'.²¹⁰

3.5 PLACES OF DETENTION

The previous sections in this chapter have set out the legislation that applies to each of the four categories of persons examined in this report. This section presents the legislation that governs detention conditions and applies to one or more of the categories.

The *European Communities (Reception Conditions) Regulations 2018*, addressed first below, transpose the recast Reception Conditions Directive 2013/33/EU and apply to detained international protection applicants and persons subject to a Dublin transfer decision. The second relevant legal instrument is the *Prison Rules 2007*, under which a broad set of rights are established for prisoners. The third relevant instrument is the *Criminal Justice Act 1984 (Treatment of Persons in Custody) Regulations 1987*, which are applicable to all persons detained in a Garda Síochána station.²¹¹

3.5.1 *European Communities (Reception Conditions) Regulations 2018*

In 2017, following the Supreme Court ruling in *NHV v. the Minister for Justice and Equality*,²¹² Ireland opted in to the recast Reception Conditions Directive 2013/33/EU. This Directive is transposed into national law in the *European Communities (Reception Conditions) Regulations 2018*.²¹³ These Regulations apply to applicants for international protection.²¹⁴

Regulation 19 of the *European Communities (Reception Conditions) Regulations 2018* sets out the rules on detention conditions for international protection applicants. Under Regulation 19(1), a detained applicant shall be detained separately from any other prisoner detained in the place of detention. Where this separation is not possible, the detention conditions set out under Regulation 19 must be applied to all persons who are detained. The Regulations provide that applicants shall have access to open air spaces and that they are entitled to communicate and receive visits from UNHCR, family members, legal

²¹⁰ Section 5(5), *Immigration Act 1999*, as amended.

²¹¹ In *J.A.(Cameroon) v. The Governor of Cloverhill Prison and anor.* [2017] IEHC 610, Humphreys J states (para 36): 'There is no obligation to articulate in minute detail in primary legislation issues such as what the conditions and safeguards are to be. It would be contrary to public policy and in particular, the requirement that systems must be workable and flexible not to allow reasonable latitude for statutory instruments to be made spelling out these details or indeed for much of the details to be provided administratively, particularly given the reality that the legislative process is a lengthy and formal one and not without its inflexibilities'.

²¹² *N.H.V. v. the Minister for Justice and Equality* [2017] IESC 35.

²¹³ *European Communities (Reception Conditions) Regulations 2018*, S.I. No. 230/2018.

²¹⁴ Regulations 2(1) and (2), *European Communities (Reception Conditions) Regulations 2018*, S.I. No. 230/2018. A recent ruling from the CJEU in Joined Cases C-322/19 and C-385/19 held that the exclusion of persons in Dublin procedures from the category of applicant and the rights that are attached to this category is not in line with the personal scope of Directive 2013/33/EU.

representatives and representatives of relevant non-governmental organisations (NGOs).²¹⁵ The applicant must be informed of the rules and their rights and obligations in a language they can be reasonably supposed to understand.²¹⁶ Where a detained applicant is vulnerable,²¹⁷ Regulation 19(9) provides that the Minister for Justice shall ensure regular monitoring and that the applicant is provided with adequate support (subject to the specific circumstances of the individual). Regulation 31 amends the *International Protection Act 2015* and reduces the number of prescribed places of detention to Garda Síochána stations and Cloverhill Prison, which is only for male detainees.

In the only case on detention conditions provided under the Reception Conditions Regulations, *Singh v. Governor of Cloverhill Prison*, Mr. Singh contested his detention conditions on the grounds that they were not compliant with Regulation 19.²¹⁸ The judge dismissed the argument because it was a *habeas corpus* application and, as Mr. Singh had been issued with a deportation order, he could not be considered an ‘applicant’ pursuant to the Regulations.²¹⁹ The provisions on detention conditions apply only to international protection applicants.²²⁰

3.5.2 Prison Rules 2007

The *Prison Rules 2007* apply to all prisons in the State and prisoners in the prison system.²²¹ The *Prison Rules 2007* are currently undergoing a review following the publication of an update to the *European Prison Rules* in 2020.²²²

The *Prison Rules 2007* cover foreign nationals and asylum applicants in prisons. The latter group, asylum applicants, are defined in the *Prison Rules 2007* as persons ‘referred to in section 8(1)(a) of the *Refugee Act, 1996* (No. 17 of 1996)’.²²³ Section 8(1)(a) of the *Refugee Act 1996* refers specifically to persons who arrive at the frontiers of the State ‘seeking asylum in the State or seeking the protection of the State against persecution or requesting not to be returned or removed to a particular country or otherwise indicating an unwillingness to leave the State for fear of persecution’.²²⁴ UNHCR Ireland, in a submission to the public consultation

²¹⁵ Regulation 19(4), *European Communities (Reception Conditions) Regulations 2018*, S.I. 230/2018.

²¹⁶ Regulation 20(6), *European Communities (Reception Conditions) Regulations 2018*, S.I. 230/2018.

²¹⁷ Regulation 2(5), *European Communities (Reception Conditions) Regulations 2018*, S.I. 230/2018.

²¹⁸ *Singh v. Governor of Cloverhill Prison* [2019] IEHC 317.

²¹⁹ *Singh v. Governor of Cloverhill Prison* [2019] IEHC 317.

²²⁰ In an earlier case, *J.A.(Cameroon) v. The Governor of Cloverhill Prison and anor.* [2017] IEHC 610, concerning detention conditions for persons subject to a deportation order, Humphreys J states (para 36): ‘There is no obligation to articulate in minute detail in primary legislation issues such as what the conditions and safeguards are to be. It would be contrary to public policy and in particular, the requirement that systems must be workable and flexible not to allow reasonable latitude for statutory instruments to be made spelling out these details or indeed for much of the details to be provided administratively, particularly given the reality that the legislative process is a lengthy and formal one and not without its inflexibilities’.

²²¹ *Prison Rules 2007*, S.I. No. 252/2007.

²²² Department of Justice (July 2021). *Public consultation on the review of prison rules*, www.justice.ie/en/JELR/Pages/Review_of_Prison_Rules.

²²³ Rule 2(2), *Prison Rules 2007*, S.I. No. 252/2007.

²²⁴ Section 8(1)(a), *Refugee Act 1996*, as amended.

on the review of the *Prison Rules 2007* recommended that the definition of asylum applicant in the Prison Rules be updated to refer to the *International Protection Act 2015* and to specifically refer to sections 2(1) and sections 13(1) of the *International Protection Act 2015* (UNCHR, 2021).²²⁵

Part 2 of the *Prison Rules 2007* concerns registration and reception in prison. It establishes the rules around registration during a committal to prison (rule 4), the right for a prisoner to have their family or a nominated person informed of their imprisonment (rule 5), regulations on searches and prisoner property (rules 6–9), that a medical examination be conducted upon arrival (rule 11), access to a hot shower/bath (rule 12), the provision of information about the prison rules (rule 13) and a meeting with the prison governor (rule 14).

Within part 2, rule 16 provides that imprisoned foreign nationals ‘shall be provided with the means to contact a consul and, in addition, an asylum applicant shall be provided with the means to contact the United Nations High Commissioner for Refugees or the Representative in Ireland of the High Commissioner’ (UNHCR), or ‘national or international authorities and organisations whose principal object is to serve the interests of refugees or stateless persons or to protect the civil and human rights of such persons’.²²⁶ The foreign national shall also be informed of their right to be visited by a legal adviser or visits relating to a court appearance.²²⁷

Part 3 of the *Prison Rules 2007* establishes the rules on the treatment of prisoners, including, *inter alia*, visits (rules 35–41) and telephone calls (rule 46). With reference to visits, rule 38 permits visits from a legal advisor or visits relating to court appearances, and rule 39 concerns visits to foreign nationals. The latter rule provides that a foreign national shall be entitled to a visit from their consul, or where the person is an asylum applicant, they can receive a visit from ‘national or international authorities or organisations, as may be designated by the Minister, whose principal object is to serve the interests of refugees or stateless persons, and a consul of a state of his or her choosing’.²²⁸ Pursuant to rule 46(5), regarding access to telephone calls, persons shall be entitled to contact the persons or organisations from who they are entitled to receive a visit under rules 38 and 39.²²⁹

²²⁵ While asylum applicant is defined under section 2(1) of the *International Protection Act 2015*, UNHCR also stated that it is necessary to refer to section 13(1) to include persons both at the frontiers of the State and in the State – who at that stage will not have formally lodged an application – who indicate that they wish to make an application for international protection, are requesting not to be expelled or returned to a territory where there is a serious risk that they would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment, or who fears or faces persecution or serious harm if returned to their country of origin. Section 13(1), *International Protection Act 2015*, as amended.

²²⁶ Rule 16, *Prison Rules 2007*, S.I. No. 252/2007.

²²⁷ Rule 16, *Prison Rules 2007*, S.I. No. 252/2007.

²²⁸ Rule 39, *Prison Rules 2007*, S.I. No. 252/2007.

²²⁹ Rule 46(5), *Prison Rules 2007*, S.I. No. 252/2007.

Lastly, rule 63 contains special provisions for the protection of vulnerable prisoners, including that a vulnerable prisoner can request to be kept separate from other prisoners ‘who are reasonably likely to cause harm to him or her’. The Governor of the Prison is obliged under rule 63(3) to record instances where this Rule has been applied to a prisoner.²³⁰

UNHCR recommended that any revisions to the Prison Rules ‘make full provision for (i) persons seeking to make an application for international protection, (ii) applicants who have lodged an international protection application, (iii) stateless persons, and (iv) refugees, including programme refugees and subsidiary protection beneficiaries, to have the right to contact and/or be contacted by and/or visited by UNHCR while in detention’ (UNHCR, 2021).

3.5.3 *Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987*

The *Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987* apply to all persons held in custody in a Garda Síochána station.²³¹ While these Regulations do not apply to the custody of persons in ports of entry, in interviews conducted for this study, a representative of GNIB reported that they are applied in principle, in ports of entry, except for the facilitation of visits.²³²

The Regulations lay down rules on the information to be provided to an arrested person,²³³ and permission for the arrested person to contact a solicitor.²³⁴ Under Regulation 14, the ‘member in charge shall without delay inform or cause to be informed any arrested person who is a foreign national that he may communicate with his consul and that, if he so wishes, the consul will be notified of his arrest.’²³⁵ Where the arrested person is believed to be a ‘political refugee or is seeking political asylum, a consular officer shall not be notified of his arrest or given access to or information about him except at the express request of the foreign national’.²³⁶

²³⁰ Rule 63(3), *Prison Rules 2007*, S.I. No. 252/2007.

²³¹ *Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987*, S.I. No. 119/1987.

²³² Correspondence with GNIB, March 2021.

²³³ Regulation 8, *Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987*, S.I. No. 119/1987.

²³⁴ Regulation 9(2), *Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987*, S.I. No. 119/1987.

²³⁵ Regulation 14, *Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987*, S.I. No. 119/1987.

²³⁶ Regulation 14(4), *Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987*, S.I. No. 119/1987.

The Regulations also contain generally applicable provisions, including that a doctor shall be summoned for a person in custody who requires medical attention, or an ambulance where immediate removal is required.²³⁷

3.6 CONCLUSION

This chapter has presented the main legislation on detention for the four categories of persons who are in international protection or return procedures in Ireland. This chapter has also outlined the various provisions for alternatives to detention that can be applied for each category, as well as the three key legislative acts that govern detention conditions and rights in detention.

This legal framework sets the scene for the following chapters on the use of detention and alternatives in practice, as well as the rights and safeguards for the four categories covered.

²³⁷ Regulation 21, *Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987*, S.I. No. 119/1987.

CHAPTER 4

The use of detention in practice

Just as legislation governing detention varies depending on the immigration procedure, so too does the use of detention in practice. Whereas only one international protection applicant has been detained under the detention provisions of the *International Protection Act 2015*, a higher number of third-country nationals are detained following a refusal of leave to land.

This chapter presents the places used for detention in Ireland and the available figures on the immigration detention population within the Irish prison system. This is followed by an overview of the use of detention in practice for each category of persons examined. The last two sections examine the situation for vulnerable persons and oversight of places of detention.

4.1 PLACES OF DETENTION

The main places for detention are prisons and Garda Síochána stations.²³⁸ The Irish Prison Service reported that Cloverhill Prison is the main facility used for immigration-related purposes.²³⁹ It is a prison that is only for men and is dedicated primarily to remand prisoners, in other words, prisoners who have not been sentenced (pre-trial) (Irish Prison Service, 2020a). For women, the main place of detention is the Dóchas Centre in the Mountjoy Prison campus, the main women's prison in Ireland. However, as detailed below, legislation for international protection applicants only stipulates Cloverhill Prison to be used for applicants. Thus, for women who are international protection applicants, Garda Síochána stations comprise the only place of detention.

The number of persons detained for immigration-related reasons in Irish prisons gradually increased between 2014 and 2019. There was a decrease in 2020 during the COVID-19 pandemic. This was due to a reduction in international travel, along with a halt in the enforcement of deportation orders, except where the person presented a threat to national security or whose presence in Ireland would be contrary to public interest (see Table 4.1 and Figure 4.1).²⁴⁰

²³⁸ *International Protection Act 2015 (Section 51b) (Places Of Detention) Regulations 2020*, S.I. No. 720/2020; *Immigration Act 2003 (Removal Places of Detention) Regulations 2005*, S.I. No. 56/2005; Schedule 4, *European Union (Dublin System) Regulations 2018*, S.I. No. 62/2018, as amended by *European Communities (Reception Conditions) Regulations 2018*, S.I. No. 230/2018; Second Schedule, *Immigration Act 1999 (Deportation) Regulations 2005*, S.I. No. 55/2015.

²³⁹ Interview with Irish Prison Service, March 2021.

²⁴⁰ Department of Justice (2021), 'Response to Parliamentary Question [14875/21]', 24 March, www.oireachtas.ie.

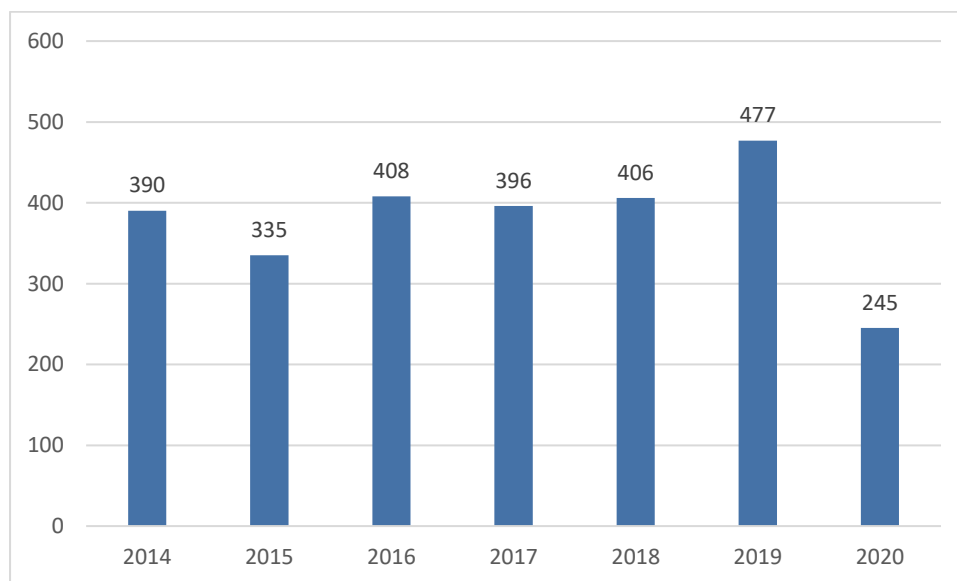
TABLE 4.1 NUMBER OF COMMITTALS AND PERSONS COMMITTED TO PRISON FOR IMMIGRATION ISSUES (2014–2020)

Category	2014	2015	2016	2017	2018	2019	2020
Number of committals in respect of immigration issues	407	342	421	418	414	490	247
Number of persons committed (detained) for immigration issues	390	335	408	396	406	477	245

Source: Irish Prison Service (2014–2020), *Annual reports*, www.irishprisons.ie/information-centre/publications/annual-reports/.

Note: If a person is committed (detained) for two or more offences, each is counted separately as a committal. Additionally, if a person is committed to prison (detained) more than once in one period (for example, twice in one year), each is counted as a separate committal.

These figures are sourced from the Irish Prison Service’s annual reports. It is important to note that these annual reports refer to ‘immigration issues’ for all immigration-related matters, including persons subject to European arrest warrants. Statistics on detention in Garda stations are not available and therefore the figures are not fully representative of the population of people detained for immigration-related purposes.

FIGURE 4.1 NUMBER OF PERSONS COMMITTED TO PRISON FOR IMMIGRATION ISSUES (2014–2020)

Source: Irish Prison Service (2014–2020), *Annual reports*, www.irishprisons.ie/information-centre/publications/annual-reports/.

In 2020, the two main immigration-related reasons for imprisonment were failure to have a valid passport, with 1,148 committals for this reason between 2015 and 2020, and failure to hold a valid visa, with 1,061 committals for this reason between 2015 and 2020. The third most common immigration-related reason was remaining in the State after expiry date of permission, although significantly fewer committals were based on this ground, with 25 committals between 2015 and

2020.²⁴¹ It is important to note that these figures refer to committals to prison and not to the number of persons detained for immigration-related purposes. If a person is committed for two or more offences, each is counted separately. Additionally, if a person is committed to prison more than once in one period (for example, twice in one year), each is counted as a separate committal. Nonetheless, as shown in Table 4.1, the difference between the number of persons committed and the number of committals is relatively small.

In 2019, according to figures obtained by The Irish Times from the Irish Prison Service, the top five nationalities of persons detained for immigration-related reasons were Albanian, Brazilian, Pakistani, Nigerian and Georgian.²⁴²

²⁴¹ Correspondence with the Irish Prison Service, September 2021.

²⁴² Butterly, L. (20 August 2020). 'Number refused entry to State by immigration authorities increases', *The Irish Times*, www.irishtimes.com/news/ireland/irish-news/number-refused-entry-to-state-by-immigration-authorities-increases-1.4334342.

TABLE 4.2 TOP 12 IMMIGRATION-RELATED REASONS FOR COMMITTALS (2015–2020)

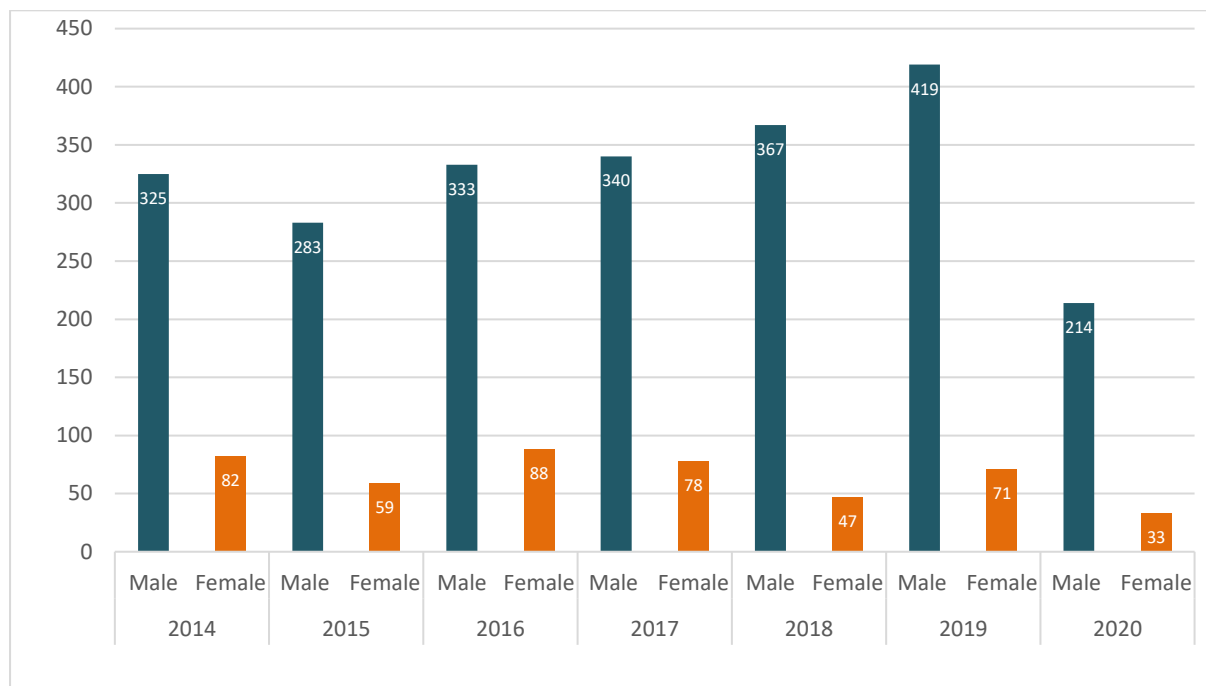
Immigration-related reason for imprisonment	2015	2016	2017	2018	2019	2020	Total per reason
Failing to have valid passport	221	314	298	131	108	76	1,148
Failing to have valid visa	97	93	104	257	356	154	1,061
Remaining in the State after expiry date of permission	-	-	3	6	11	5	25
Failing to produce registration certificate etc.	11	4	2	2	5	-	24
Failing to comply with provisions of a notice under section 14(1) of the Immigration Act 2004	4	3	3	9	-	-	19
<i>European arrest warrant offences*</i>	2	1	-	5	3	-	11
Failing to leave a place/ re-enter within 7 days	-	1	1	1	4	-	7
Embarking from the State and failing to furnish to an immigration officer (information they may reasonably require for the purpose of their performance of their function)	1	-	1	1	-	3	6
Landing in the State without possession of a valid passport (other than from Great Britain or N.I.)	-	1	2	-	-	3	6
Failing to co-operate with deportation (failure to co-operate to obtain travel document)	2	-	-	-	-	1	3
Failing to co-operate with deportation (obstruct or hinder)	1	-	-	-	2	-	3
Failing to ensure persons seeking to land/pass through State disembark in compliance with directions of immigration officer	1	1	1	-	-	-	3

Source: Correspondence with the Irish Prison Service, October 2021.

Note: These figures refer to committals to prison and not to the number of persons detained for immigration-related purposes. If a person is committed for two or more offences, each is counted separately. Additionally, if a person is committed to prison more than once in one period (for example, twice in one year), each is counted as a separate committal. However, as shown in Table 4.1, the figures are quite similar.

*European arrest warrant offences are included above. However, these are not within the scope of this research. A full table is available in Appendix 2.

The gender profile of persons in prisons for immigration-related purposes reveals a significantly higher number of men detained than women (Figure 4.2). This reflects a broader gender disparity in persons detained in prisons in Ireland, with significantly more men detained than women (see, for example, Irish Prison Service, 2019, 2020a). However, no information is available on why more men are detained in prison for immigration-related purposes than women, and further research is necessary in this area.

FIGURE 4.2 NUMBER OF PERSONS DETAINED IN IRISH PRISONS FOR IMMIGRATION ISSUES BY GENDER

Source: Irish Prison Service (2014–2020), *Annual reports*, www.irishprisons.ie/information-centre/publications/annual-reports/.

Regarding nationality, Irish Prison Service statistics on nationality report on region of origin among the prison population, but not on the correlated reasons for imprisonment (for example, whether they are immigration-related). In 2019, of the prison population, 3.17 per cent had an African nationality, 3.22 per cent had an Asian nationality and 0.82 per cent had a Middle Eastern nationality (Irish Prison Service, 2020b). As nationality is not correlated with reason for imprisonment it is important to treat these figures with caution.

For vulnerable persons in prisons, during the committal interview the prison governor will assess if the individual requires different treatment on account of their vulnerabilities and Rule 63 of the *Prison Rules 2007* can be applied. This can also be applied upon request of the individual and is reviewed weekly.²⁴³ The Border Management Unit (BMU) and the Repatriation Unit stated that, in practice,

²⁴³ Interview with the Irish Prison Service, March 2021.

vulnerable persons are generally not detained.²⁴⁴ GNIB reported that vulnerable persons would only be detained in exceptional circumstances.²⁴⁵

4.1.1 Detention conditions

The use of prisons for detention for immigration-related purposes and the conditions in detention have been the subject of media reports, oversight reports from international bodies and criticism from civil society.

In 2015, the media reported on the case of a 21-year-old Afghan man who was found without identification on the side of a motorway in Naas.²⁴⁶ It was thought that he arrived in Ireland as a stowaway in a truck. Newspapers reported how he was detained for failing to produce documentation to evidence his identity. He was briefly released on bail but was re-detained on the same ground immediately following his release. During his time in Cloverhill Prison, it was reported that he was assaulted and held hostage during a prison riot. The man was later released on bail and entered the international protection procedure.²⁴⁷ In 2017, The Irish Times reported the story of a 24-year-old Brazilian woman who was refused leave to land at Dublin Airport on the ground that she intended to seek work in Ireland without an employment permission.²⁴⁸ The woman was travelling to Ireland to visit a family in Galway for whom she had previously worked. Following the refusal of leave to land, she was detained overnight in the Dóchas Centre.²⁴⁹ The family for whom she had worked reported difficulties in contacting her and in pursuing legal action against the refusal and detention decisions (Nasc, the Migrant and Refugee Rights Centre, 2018). In July 2020, the media reported the story of a 33-year-old Chilean woman who was refused leave to land and detained for 12 days in the

²⁴⁴ Interview with the BMU, ISD, February 2021. Interview with the Repatriation Unit, February 2021. In interviews, stakeholders were asked specifically with regard to: disabled persons, elderly persons, families with children and single parents, persons with serious illnesses including mental disorders, victims of trafficking, pregnant women and other vulnerable persons. It is important to note that vulnerability is difficult to define and there is no legal definition for vulnerability. According to the EMN Glossary, and in line with the recast *Reception Conditions Directive 2013/33/EU*, vulnerable persons are defined as ‘minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of trafficking in human beings, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation’, www.ec.europa.eu/home-affairs/pages/glossary/vulnerable-person_en.

²⁴⁵ Correspondence with GNIB, October 2021.

²⁴⁶ Hennessy, M. (2015). ‘Asylum seeker horribly beaten in Cloverhill is the Afghan man found at side of motorway’, *The Journal*, 30 July, www.thejournal.ie/prisoners-cloverhill-riot-2243491-Jul2015/ [last accessed 18 October 2021].

Moctar, H. (2015). ‘Criminalising asylum-seeking in Ireland: the case of Walli Ullah Safi’, *Open Democracy*, 21 August, www.opendemocracy.net/en/criminalising-asylum-seeking-in-ireland-case-of-walli-ullah-safi/ [last accessed 18 October 2021]

²⁴⁷ RTE News (2021). ‘Afghan man found on road in Naas granted bail’, 7 August, www.rte.ie/news/2015/0806/719553-walli-ullah-safi/ [last accessed 18 October 2021]

²⁴⁸ Pollack, S. (2017). ‘Brazilian woman left with “black mark on immigration record’’, 1 August, *The Irish Times*, www.irishtimes.com/news/social-affairs/brazilian-woman-left-with-black-mark-on-immigration-record-1.3173882 [Last accessed 18 October 2021].

²⁴⁹ Pollack, S. (2017). ‘Brazilian woman left with “black mark on immigration record’’, 1 August, *The Irish Times*, www.irishtimes.com/news/social-affairs/brazilian-woman-left-with-black-mark-on-immigration-record-1.3173882 [Last accessed 18 October 2021].

Dóchas Centre, where she was held in solitary confinement due to COVID-19 restrictions.²⁵⁰

The detention of persons for immigration-related purposes in prisons has been addressed in several reports by national and international bodies. Visiting Committees, appointed by the Minister for Justice, produce annual inspection reports on Irish prisons. Although the situation of persons detained for immigration-related purposes is not covered in-depth in these reports, on Cloverhill Prison, the Committee stated in 2019 that ‘sleep deprivation, overcrowding in cells and disruption during the night when committals (usually immigrant committals) arrive in an already crowded cell are among the issues that feature regularly’ (Cloverhill Visiting Committee, 2019, p. 5). The 2018 report describes persons detained for immigration-related purposes sleeping on the floor in cells (Cloverhill Visiting Committee, 2018). The 2018 and 2019 reports link overcrowding with tension among prisoners, and the 2019 report stressed that the F Block be considered as a place to house immigration-related committals (Cloverhill Visiting Committee, 2018, 2019). In a recent thematic inspection report from the Office of the Inspector of Prisons (OIP) on COVID-19 in Cloverhill Prison, it noted that there were some persons who were held for immigration-related reasons for less than 24 hours, despite the protocol of bringing people who are remanded for 72 hours or more (Office of the Inspector of Prisons, 2021, p. 34).

Conditions in detention have also been the subject of criticism from national civil society organisations. Nasc’s report from 2018 details how detainees experienced bullying and, in some cases, physical abuse in prison (Nasc, the Migrant and Refugee Rights Centre, 2018). In a submission to the UN Committee Against Torture (UNCAT), the national non-governmental organisation (NGO) Spirasi (Spiritan Asylum Services Initiative) described the damaging effects of detention on survivors of torture (Spirasi, 2017). The submission states that ‘detention puts torture survivors in circumstances of relative isolation, often exacerbated by their lack of English, thereby increasing the likelihood of their reliving and fixating upon past traumatic experiences, with few, if any, means of relief, and leading to increased anxiety and distress and the possibility of self-harm and suicide’ (Spirasi, 2017). On an international level, the 2020 report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on Ireland described how ‘a middle-aged diminutive foreign national was placed in a cell with two young remand prisoners who allegedly attempted to rape him as well as physically aggressed and verbally intimidated him’ (CPT, 2020a).

The F Block of Cloverhill Prison has recently been converted to comply with the *European Communities (Reception Conditions) Regulations 2018*, which transposes

²⁵⁰ O’Faolain, A. (2020). ‘Chilean student kept in solitary confinement in Mountjoy Prison is freed’, 14 July, *The Irish Times*, www.irishtimes.com/news/crime-and-law/courts/high-court/chilean-student-kept-in-solitary-confinement-in-mountjoy-prison-is-freed-1.4304421 [last accessed 18 October 2021].

the recast Reception Conditions Directive 2013/33/EU.²⁵¹ This Block has temporarily been in use by the prison for isolating/cocooning during the COVID-19 pandemic, but it is foreseen that it will be used as an interim solution for immigration detention.²⁵² As reported by the CPT, the F Block consists of six double cells and six single cells. Each cell is equipped with a partially screened toilet. There are three showers, an outdoor exercise area and a recreation room. However, the CPT also noted that there were ‘no telephone facilities and escorts would have to be provided for access to the visits area and health care’ (CPT, 2020a, p. 18). The CPT advised that further steps need to be taken to ensure it is an ‘appropriate open regime’ that ‘is properly staffed by persons having the necessary language and inter-cultural skills’ (ibid.).

4.2 CATEGORIES OF PERSONS

4.2.1 International protection applicants

GNIB reported that since the coming into force of the *International Protection Act 2015* on 31 December 2016, one person has been detained under section 20 of the *International Protection Act 2015*.²⁵³

Pursuant to section 20 of the *International Protection Act 2015*, applicants can be arrested without warrant and detained on grounds that include, *inter alia*, that they pose a threat to public security or public order or that they have not made reasonable efforts to established their identity.²⁵⁴ They must be brought before a District Court judge as soon as is practicable, and a decision is made as to whether the applicant can be detained for up to 21 days or released subject to conditions (such as reporting obligations).²⁵⁵ The period of detention can be renewed for further periods of 21 days, subject to a decision by a District Court judge.

There is no maximum number of renewals of the detention period for international protection applicants. This has been raised as a concern by Nasc, the Migrant and Refugee Rights Centre and the Irish Refugee Council. The Irish Refugee Council, in its comments on the *International Protection Bill* in 2015, recommended a maximum detention period of ten days, subject to ‘a statutorily determined definite time period limiting the number of detentions’ (Irish Refugee Council, 2017, p. 29). Nasc in 2018 recommended that a limit to the number of renewals of

²⁵¹ *European Communities (Reception Conditions) Regulations 2018*, S.I. No. 230/2018.

²⁵² *European Communities (Reception Conditions) Regulations 2018*, S.I. No. 230/2018.

²⁵³ This case concerned a person who was convicted of a serious offence in another jurisdiction and there was evidence that they intended to commit a similar offence in Ireland. The person applied for international protection from prison, where they were detained following a refusal of leave to land. They were then detained under section 20 of the *International Protection Act 2015* and subsequently withdrew their international protection application and left the country. Correspondence with GNIB, October 2021.

²⁵⁴ Section 20(1)(a) and (c), *International Protection Act 2015*, as amended.

²⁵⁵ Section 20(2) and (3), *International Protection Act 2015*, as amended.

detention be brought into the *International Protection Act 2015* (Nasc, the Migrant and Refugee Rights Centre, 2018).

Persons detained in prison can apply for international protection and, according to the Irish Prison Service, the procedure has been streamlined in recent years.²⁵⁶ Contact can also be made with the United Nations High Commissioner for Refugees (UNHCR) in this regard,²⁵⁷ as well as ‘national or international authorities and organisations whose principal object is to serve the interests of refugees or stateless persons or to protect the civil and human rights of such persons’.²⁵⁸ However, as described above in section 3.5.2, the term ‘asylum applicant’ as defined in the *Prison Rules 2007* specifically refers to persons who wish to make an asylum application at the frontiers of the State. As highlighted by UNHCR, this may consequently *de jure* exclude persons who are already in the State and wish to apply for asylum, as well as other qualified persons under the *International Protection Act 2015*: refugees and subsidiary protection beneficiaries.²⁵⁹ UNHCR noted that, to their knowledge, there does not appear to be issues with contacting UNHCR in practice.²⁶⁰ Where an international protection applicant is in prison, their international protection application can be prioritised.²⁶¹

If a detained applicant is considered to be vulnerable, the Minister for Justice is required to ensure the person is monitored regularly and provided with adequate support, taking into account the person’s particular situation.²⁶² A vulnerable applicant includes ‘a person who is a minor, an unaccompanied minor, a person with a disability, an elderly person, a pregnant woman, a single parent of a minor, a victim of human trafficking, a person with a serious illness, a person with a mental disorder, and a person who has been subjected to torture, rape or other form of serious psychological, physical or sexual violence’.²⁶³

4.2.2 Persons subject to Dublin transfer decisions or return orders

Where a person is issued with a Dublin transfer decision, pursuant to Regulation 10(2) of the *Dublin Regulations 2018*, an immigration officer or a member of An Garda Síochána may, for the purpose of facilitating the transfer, by notice in writing, require the person to comply with one or more of four listed conditions, including, *inter alia*, reporting obligations and the surrender of a passport.²⁶⁴

²⁵⁶ Interview with Irish Prison Service, March 2021.

²⁵⁷ Rule 16(a)(i), *Prison Rules 2007*, S.I. No. 252/2007. Interview with UNHCR, March 2021.

²⁵⁸ Rule 16(a)(ii), *Prison Rules 2007*, S.I. No. 252/2007.

²⁵⁹ UN High Commissioner for Refugees (UNHCR) (2021). *UNHCR submission review of Prison Rules 2007 (S.I. 252/2007) – Public consultation*, www.refworld.org/docid/615716d74.html [accessed 6 October 2021].

²⁶⁰ Correspondence with UNHCR, September 2021.

²⁶¹ Section 20(18), *International Protection Act 2015*, as amended.

²⁶² Regulation 19(9), *European Communities (Reception Conditions) Regulations 2018*, S.I. No. 230/2018. As only one applicant has been detained under section 20 of the *International Protection Act 2015*, it is not possible to reflect on practice as regards vulnerability.

²⁶³ Regulation 2(5), *European Communities (Reception Conditions) Regulations 2018*, S.I. No. 230/2018.

²⁶⁴ Regulation 10(2), *European Union (Dublin System) Regulations 2018*, S.I. No. 62/2018.

Where it is considered that the person presents a ‘significant risk’ of absconding, they can be detained.²⁶⁵ However, they can only be detained for a maximum of seven days.²⁶⁶

There are no figures available for persons detained for Dublin transfer decisions or return orders. In 2019, 817 Dublin transfer decisions were issued. In that same year, 30 transfers were carried out, with two persons transferred to another EU Member State, and 28 persons transferred to the UK. In 2020, 310 Dublin transfer decisions were issued, with one person transferred to another EU Member State and eight persons transferred to the UK (Table 4.3).²⁶⁷

TABLE 4.3 DUBLIN TRANSFER DECISIONS ISSUED AND EFFECTED (2015–2020)

Year	Transfer decisions issued by the International Protection Office	Applicants subject to a transfer decision and transferred to the UK	Applicants subject to a transfer decision and transferred to another EU Member State
2015	302	17	2
2016	594	42	0
2017	3	55	1
2018	251	17	5
2019	817	28	2
2020	310	8	1
Total	2,277	167	11

Source: Department of Justice (31 March 2021). Response to Parliamentary Question [17098/21], 31 March, www.justice.ie.

GNIB stated that while every effort is made to not detain persons subject to Dublin transfer decisions, the seven-day detention period may, in some circumstances, be inadequate. Receiving Member States can require five working days to facilitate a transfer, so the person subject to a Dublin transfer decision may have to be released before the receiving Member State has processed the application.²⁶⁸

Under Regulation 10(6), the factors to be considered when deciding whether a person presents a significant risk of absconding, and may therefore be detained, include whether they have: ‘misrepresented or omitted facts’ when required to establish their identity, whether or not by using false documents;²⁶⁹ failed to comply with one of the four above-listed requirements;²⁷⁰ failed to cooperate with the arrangements for their transfer;²⁷¹ expressed an intention not to comply with arrangements for their transfer;²⁷² and/or previously failed to comply with the law

²⁶⁵ Regulation 10(4), *European Union (Dublin System) Regulations 2018*, S.I. No. 62/2018.

²⁶⁶ Regulation 10(10)(a), *European Union (Dublin System) Regulations 2018*, S.I. No. 62/2018.

²⁶⁷ Department of Justice (2021). ‘Response to Parliamentary Question [17098/21]’, 31 March, www.justice.ie.

²⁶⁸ Correspondence with GNIB, April 2021.

²⁶⁹ Regulation 10(6)(a), *European Union (Dublin System) Regulations 2018*, S.I. No. 62/2018.

²⁷⁰ Regulation 10(6)(b), *European Union (Dublin System) Regulations 2018*, S.I. No. 62/2018.

²⁷¹ Regulation 10(6)(c), *European Union (Dublin System) Regulations 2018*, S.I. No. 62/2018.

²⁷² Regulation 10(6)(d), *European Union (Dublin System) Regulations 2018*, S.I. No. 62/2018.

relating to the entry or presence of foreign nationals in Ireland or in another state.²⁷³

4.2.3 Persons refused leave to land

When a third-country national arrives at a port of entry in Ireland, they are required to present themselves to an immigration officer and to request permission to land (permission to enter the State).²⁷⁴ At Dublin Airport, border control is conducted by the BMU, under the remit of the Department of Justice. At all other ports of entry, immigration control is the responsibility of the local superintendent of An Garda Síochána, and is operationally supported by GNIB, a unit of An Garda Síochána.²⁷⁵ At Dublin Airport, GNIB also support the BMU through, *inter alia*, conducting the arrest, detention and removal of persons refused leave to land, preliminary interviews for international protection applicants, arrival and exit checks at targeted flights and investigations into facilitation of an offence.²⁷⁶

As described in Chapter 3, a person can be refused leave to land on one of the 12 listed grounds under section 4(3), *Immigration Act 2004*, as amended. These include, *inter alia*: that they are not in a position to support themselves or any accompanying dependants;²⁷⁷ that they intend to take up employment in the State but are not in a position to do so;²⁷⁸ that they are not in possession of a valid visa, where one is required;²⁷⁹ and that there is reason to believe that the non-national intends to enter the State for purposes other than those expressed by the non-national.²⁸⁰

The total number of persons refused leave to land at all ports of entry annually between 2014 and 2020 is set out in Table 4.4. The number of persons refused leave to land increased significantly between 2014 and 2019 and dropped in 2020 due to the restrictions implemented during the COVID-19 pandemic. Regarding the notable increase in refusals of leave to land in the prior period, GNIB reported that this was due to a number of factors, including Brexit, the global migration crisis, and political instability and uncertainty in the Middle East.²⁸¹

²⁷³ Regulation 10(6)(e), *European Union (Dublin System) Regulations 2018*, S.I. No. 62/2018.

²⁷⁴ Section 4(1), *Immigration Act 2004*, as amended.

²⁷⁵ Interview with GNIB, March 2021. Correspondence with GNIB, October 2021.

²⁷⁶ Interview with GNIB, March 2021.

²⁷⁷ Section 4(3)(a), *Immigration Act 2004*, as amended.

²⁷⁸ Section 4(3)(b), *Immigration Act 2004*, as amended.

²⁷⁹ Section 4(3)(e), *Immigration Act 2004*, as amended.

²⁸⁰ Section 4(3)(k), *Immigration Act 2004*, as amended.

²⁸¹ Correspondence with GNIB, October 2021.

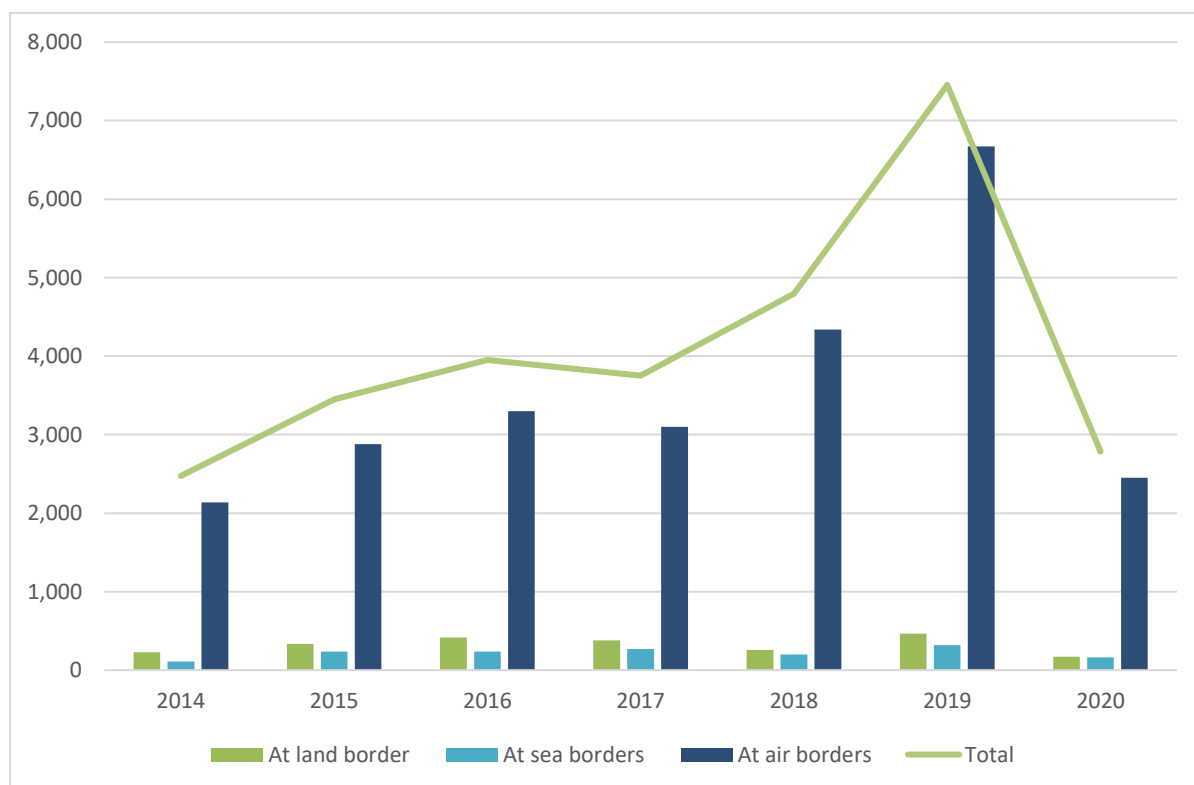
TABLE 4.4 NUMBER OF REFUSALS OF LEAVE TO LAND AT ALL PORTS OF ENTRY (2014–2020)

	2014	2015	2016	2017	2018	2019	2020
Number of persons refused entry at Irish external borders	2,475	3,450	3,950	3,745	4,795	7,455	2,790

Source: Eurostat, 'Third-country nationals refused entry at the external borders – Annual data (rounded)'. Accessed 21 June 2021.

Most refusals of leave to land occur at airports, with 6,670 refusals at airports in 2019. There were also refusals at sea ports, with 320 refusals in 2019, and at the border with Northern Ireland, with 465 refusals in 2019 (Figure 4.2).

Immigration controls can be used along the border with Northern Ireland to detect persons entering the State without permission. There are no physical border controls but, at times, mobile immigration controls can be put in place (Sheridan, 2020).

FIGURE 4.3 NUMBER OF REFUSALS OF LEAVE TO LAND AND LOCATION (2014–2020)

Source: Eurostat, 'Third country nationals refused entry at the external borders – Annual data (rounded)'. Accessed 21 June 2021.

In 2020, the top ten countries of nationality refused leave to land at ports of entry were: Brazil, Eritrea, South Africa, Syria, the United States, Albania, Somalia, Afghanistan, Iraq and Pakistan (Table 4.5).²⁸² Media reports have highlighted that

²⁸² Eurostat, 'Third country nationals refused entry at the external borders – Annual data (rounded)'. Accessed 21 June 2021.

while the overall number of refusals of leave to land decreased in 2020, there was a notable increase in refusals of leave to land for persons from Eritrea (25 were refused in 2019, increasing to 180 in 2020), Syria (70 people were refused in 2019, increasing to 150 in 2020) and Yemen.²⁸³ The Irish Refugee Council stated that '[p]eople from countries which are demonstrably unsafe and in conflict were refused leave to land. Refusals have actually increased for countries such as Syria, Yemen, Afghanistan and Eritrea'.²⁸⁴

In 2019, 2,613 persons who were refused leave to land at Dublin Airport sought international protection (An Garda Síochána, 2020). This reduced in 2020, with 807 persons who were refused leave to land at Dublin Airport seeking international protection (An Garda Síochána, 2021). GNIB reported that most people who claim international protection at a port of entry are initially refused leave to land. GNIB also stated that while a minority of cases present and immediately claim international protection to border control authorities, the majority do not claim international protection until after they have been detected or refused entry.²⁸⁵ BMU reported that the increase in refusals of nationals from typically asylum-seeking countries in 2020 is a result of people with refugee status in other EU Member States travelling to Ireland, destroying their documentation before arrival, and claiming asylum on arrival. BMU stated that after indicating that they wish to seek protection in the State, they are released, and the majority do not present at the International Protection Office (IPO) to further their claim. Many are subsequently found to have made their way to the UK.²⁸⁶ GNIB similarly reported that persons may apply for international protection at the airport and conduct a preliminary interview pursuant to section 13(2) of the *International Protection Act 2015*, but they do not subsequently present to the IPO to continue their international protection application.²⁸⁷ Nonetheless, approximately half of the persons who present at the IPO to pursue an international protection application are referred from airports and other ports of entry (Cunniffe and Sheridan, 2021).

GNIB stated that persons who claim international protection at a port of entry are not detained. Where a person is refused leave to land and then detained pending removal from the State, they may apply for international protection from detention. If the person is detained in a Garda Síochána station, they are released. If the person is detained in a prison they will also be released; however, this is

²⁸³ Butterly, L. (2021). "Concerning" increase in people from conflict zones refused entry to Ireland', *The Detail*, www.thedetail.tv/articles/rise-in-refugees-from-war-torn-countries-being-refused-entry-to-ireland-during-covid-19-pandemic.

²⁸⁴ Butterly, L. (2021). "Concerning" increase in people from conflict zones refused entry to Ireland', *The Detail*, www.thedetail.tv/articles/rise-in-refugees-from-war-torn-countries-being-refused-entry-to-ireland-during-covid-19-pandemic.

²⁸⁵ Correspondence with GNIB, October 2021.

²⁸⁶ Correspondence with BMU, October 2021.

²⁸⁷ Correspondence with GNIB, October 2021.

typically after two to three days pending the lodging of their international protection application.²⁸⁸

TABLE 4.5 NATIONALITY OF PERSONS REFUSED LEAVE TO LAND IN 2020

Nationality	Total number refused leave to land
Brazil	335
Eritrea	180
South Africa	180
Syria	150
United States	140
Albania	105
Somalia	75
Afghanistan	75
Iraq	75
Pakistan	70

Source: Eurostat, 'Third country nationals refused entry at the external borders – Annual data (rounded)'. Accessed 21 June 2021.

In 2019, The Irish Times reported that immigration checks were being conducted at the points of exit of airplanes due to persons destroying their documents before arriving at immigration control.²⁸⁹ In response to a clarification request from the Irish Refugee Council regarding effective access to the asylum procedure and *non-refoulement* obligations, the Department of Justice stated that the checks on arrival had 'always been a part of immigration control and as a standard procedure it complies with all legal obligations not impeding persons from claiming asylum' (Asylum Information Database, 2021; Sheridan, 2020).

Persons found in the State within three months of arrival and without a permission to be in the State are considered to be unlawfully present in contravention of section 5(1) of the 2004 Act.²⁹⁰ Under section 5(1) of the 2003 Act, subject to section 3A of the *Immigration Act 1999 (non-refoulement)* and section 4 of the *Criminal Justice (UN Convention Against Torture) Act 2000*, the individual can be removed from the State.²⁹¹ They are then issued with a section 14(1) notice pursuant to the 2004 Act. GNIB reported that while there is a power of arrest and

²⁸⁸ Interview with GNIB, March 2021. Correspondence with GNIB, October 2021.

²⁸⁹ Lally, C. and F. Kelly (2019). 'Immigrant airport checks revised over destruction of fake papers', *The Irish Times*, 31 December, www.irishtimes.com.

²⁹⁰ Section 5(1), *Immigration Act 2004*, as amended.

²⁹¹ Section 5(1), *Immigration Act 2003*, as amended.

power to detain, this is normally not required if the identity and place of residence of the subject can be secured.²⁹²

4.2.3.1 Procedure at Dublin Airport

The following section details the procedure followed at Dublin Airport when a person is refused leave to land, as described by representatives of BMU and GNIB in interviews for this study. Firstly, GNIB and BMU reported that when a person is refused leave to land at an airport, there is an intention to return the person on the next available return flight to the last point of embarkation.²⁹³ Where there is no immediate return flight with the same air carrier, GNIB stated that they will on occasion serve a notice to the air carrier instructing them to make a booking with another air carrier for the immediate removal of the person, pursuant to section 5(10) of the *Immigration Act 2003*, as amended.²⁹⁴ GNIB reported that while the principal carrier can often be reluctant to comply with the instruction to book a flight with another air carrier for the person refused leave to land, GNIB can, on occasion, issue a notice to oblige the primary carrier to provide the secondary carrier with a letter of indemnity and purchase the ticket for the person refused leave to land. According to GNIB, this approach has proved successful.²⁹⁵ Moreover, with a view to reducing a detention period, where there is no return flight to the airport of embarkation, GNIB reported that they will insist on a carrier removing the person refused leave to land to a different airport in the same country if there is an earlier flight to that State.²⁹⁶

Where a decision is made by a BMU immigration officer to refuse leave to land to a person, the BMU will decide whether to issue a section 14(1) notice to the person or to detain them pending their removal from the State. A section 14(1) notice is an alternative to detention and permits the person to enter the State for a temporary period with a requirement that they surrender their passport and return to the airport for their return flight on a designated day and time.²⁹⁷ This is examined in greater detail in Chapter 5.

With regard to the criteria followed to determine whether a person will be detained when there is a decision to refuse leave to land, BMU stated that no set criteria is followed and assessment is on a case-by-case basis.²⁹⁸ However, BMU

²⁹² Correspondence with GNIB, April 2021.

²⁹³ Interview with BMU, ISD, February 2021. Interview with GNIB, March 2021. Section 5(5), *Immigration Act 2003* provides that a person shall be removed to the state from which they last embarked for the State, or if the person is transiting through Ireland and the carrier or the authorities of the other state refuse for the person to be brought back to the last place of embarkation, they shall be brought to the original country of embarkation, or the person can be sent back to the country of their passport, the country of which they are a national or a country to which the person is guaranteed entry.

²⁹⁴ Correspondence with GNIB, April 2021.

²⁹⁵ Correspondence with GNIB, April 2021.

²⁹⁶ Correspondence with GNIB, April 2021.

²⁹⁷ Section 14(1), *Immigration Act 2004*, as amended. Interview with BMU, ISD, February 2021.

²⁹⁸ Interview with BMU, ISD, February 2021.

reported that the main consideration is the level of risk of absconding.²⁹⁹ Other considerations include whether the person poses a threat to public security, has committed a serious crime, or if the person has not made reasonable efforts to establish their identity. BMU reported that there is an intention to avoid detaining persons where possible.³⁰⁰

With regard to vulnerable persons, BMU reported that their staff have been trained on issues of vulnerability, including with regard to detecting if a person may be a victim of trafficking. However, there is no formal vulnerability assessment in place.³⁰¹ BMU.³⁰² If the person is under 18 years old, Tusla, the Child and Family Agency, is contacted. For families where there are two parents or guardians who are adults, one adult may be detained while the rest of the family is provided with alternative accommodation.³⁰³

Where a decision is made by BMU to not issue a section 14(1) notice, the supervisor on shift will check with their manager in making this decision and GNIB at Dublin Airport is contacted.³⁰⁴ Notwithstanding the earlier decision by BMU not to issue a section 14(1) notice, GNIB will then independently assess the case and may issue a section 14(1) notice or detain the person pending their removal.³⁰⁵ However, GNIB will consult BMU before issuing a final decision.³⁰⁶

A majority of the persons refused leave to land who are not issued with a section 14(1) notice are initially detained for a short period at the airport, but, according to GNIB, in most cases, overnight detention is required, based on the availability of return flights and seasonal airline schedules. In circumstances where an escort is required to return the person, the detention period may be two to three nights.³⁰⁷

If there is a return flight within 12 hours, the person will be detained at the GNIB facility airside and boarded on the return flight. In such cases, the use of a section 14(1) notice is not considered. If the first return flight is within 24 hours, GNIB reported that the person will be detained at a Garda Síochána station. If the return flight exceeds a 24-hour period from the time of arrival, the person is detained in a prison.³⁰⁸

²⁹⁹ Interview with BMU, ISD, February 2021.

³⁰⁰ Interview with BMU, ISD, February 2021.

³⁰¹ Interview with BMU, ISD, February 2021.

³⁰² Interview with BMU, ISD, February 2021.

³⁰³ Interview with GNIB, March 2021.

³⁰⁴ Interview with BMU, ISD, February 2021.

³⁰⁵ Interview with GNIB, March 2021.

³⁰⁶ Interview with GNIB, March 2021.

³⁰⁷ Interview with GNIB, March 2021. Correspondence with GNIB, April 2021.

³⁰⁸ Correspondence with GNIB, April 2021.

4.2.3.2 Reasons for refusals of leave to land at Dublin Airport

In 2020, 2,221 persons were refused leave to land at Dublin Airport, a decrease from 6,109 in 2019, which is likely due to the reduction in international flights during the COVID-19 pandemic.³⁰⁹ Persons can be refused leave to land pursuant to one of the grounds under section 4(3) of the *Immigration Act 2004* and some persons are refused on multiple grounds. The most common ground for a refusal of leave to land, including when combined with other grounds, was section 4(3)(k): ‘that there is reason to believe that the non-national intended to enter the State for the purposes other than those expressed by the non-national’ (see Table 4.6).³¹⁰ The second most common ground used was section 4(3)(g): ‘that the non-national is not in possession of a valid passport or equivalent document issued by or on behalf of an authority recognised by the Government, which establishes his or her identity and nationality’.³¹¹

³⁰⁹ Correspondence with BMU, ISD, October 2021.

³¹⁰ Correspondence with BMU, ISD, October 2021.

³¹¹ Correspondence with BMU, ISD, October 2021.

TABLE 4.6 REFUSALS OF LEAVE TO LAND AT DUBLIN AIRPORT IN 2020

Ground for refusal (section 4(3), Immigration Act 2004, as amended)	Number of times ground relied on at Dublin Airport
S. 4.3(a): That the non-national is not in a position to support himself or herself and any accompanying dependents.	33
S. 4.3(b): That the non-national intends to take up employment in the State but is not in possession of a valid employment permit.	74
S. 4.3(c): That the non-national suffers from a condition set out in Schedule 1 of the <i>Immigration Act 2004</i> .	0
S. 4.3(d): That the non-national has been convicted (whether in the State or elsewhere) of an offence that may be punished under the law of the place of conviction by imprisonment for a period of one year or by a more severe penalty.	2
S. 4.3(e): That the non-national, not being exempt, by virtue of an order under Section 17, from the requirement to have an Irish visa, is not the holder of a valid Irish visa.	324
S. 4.3(f): That the non-national is the subject of: <ul style="list-style-type: none"> (i) a deportation order; (ii) an exclusion order; or (iii) a determination by the Minister that it is conducive to the public good that he or she remain outside of the State. 	18
S. 4.3(g): That the non-national is not in possession of a valid passport or equivalent document issued by or on behalf of an authority recognised by the Government, which establishes his or her identity and nationality.	919
S. 4.3(h): That the non-national: <ul style="list-style-type: none"> (i) intends to travel (whether immediately or not) to Great Britain or Northern Ireland; and (ii) would not qualify for admission to Great Britain or Northern Ireland if he or she arrived there from a place other than the State. 	209
S. 4.3(i): That the non-national, having arrived in the State in the course of employment as a seaman has remained in the State without the leave of an immigration officer after the departure of the ship in which he or she arrived.	0
S. 4.3(j): That the non-national's entry into or presence in the State could pose a threat to national security or be contrary to public policy.	122
S. 4.3(k): That there is reason to believe that the non-national intends to enter the State for purposes other than those expressed by the non-national.	1,440
S. 4.3(l): That the non-national: <ul style="list-style-type: none"> (i) is a person to whom leave to enter or leave to remain in a territory (other than the State) of the Common Travel Area (within the meaning of the <i>International Protection Act 2015</i>) applied at any time during the period of 12 months immediately preceding his or her application, in accordance with subsection (2), for a permission; (ii) travelled to the State from any such territory; and (iii) entered the State for the purpose of extending his or her stay in the said Common Travel Area regardless of whether or not the person intends to make an application for international protection. 	3

Source: Correspondence with BMU, October 2021.

Note: Persons can sometimes be refused on more than one ground. The figures in the table are not indicative of the total number refused leave to land, but rather the number of times each ground for refusal was used. For a full table of reasons for refusals of leave to land at Dublin Airport in 2020, see Appendix 3.

4.2.4 Persons detained on foot of a deportation order

A person can be issued with a deportation order under section 3 of the *Immigration Act 1999*.³¹² In such cases, a person is issued with what is known as an ‘arrangements letter’, which states that the person is required to leave the State by a specified date, and pending their departure, to comply with a number of requirements, such as a reporting obligation.³¹³

An immigration officer or member of An Garda Síochána can arrest without warrant and detain a person against whom a deportation order is in force under section 3(1A) of the *Immigration Act 1999*,³¹⁴ or on one or more of the five listed grounds under section 5(1) of the 1999 Act, including, *inter alia*, failure to comply with the provisions of the deportation order.³¹⁵ In practice, where a person fails to comply with the conditions of their deportation order, they are classified as an evader.³¹⁶ A person who is classified as such could be more likely to be detained.³¹⁷ As described above, case law has established that an individual subject to a deportation order can only be detained when there is a concluded intention to deport,³¹⁸ and removal from the State is possible within the eight-week period.³¹⁹

The majority of persons subject to a deportation order are subject to an alternative to detention in the form of reporting obligations combined with a requirement to reside at a specified address and cooperate in facilitating their removal from the State.³²⁰ According to the Repatriation Unit, there is a high rate of absconding for persons issued with deportation orders with reporting obligations.³²¹ Where a person is absconding, they are more likely to be arrested and detained as opposed to a person who is presenting.³²² The Repatriation Unit observed that it is difficult to collect figures on absconding as an individual may have left the State and not informed authorities.³²³

With regard to vulnerable persons subject to deportation orders, there is no statutory vulnerability assessment. The Repatriation Unit and GNIB try to keep families together and, for the night prior to flight of departure, a family may be accommodated in Baleskin Reception Centre in Dublin.³²⁴

³¹² Section 3, *Immigration Act 1999*, as amended.

³¹³ Interview with the Repatriation Unit, ISD, February 2021.

³¹⁴ Section 3(1A), *Immigration Act 1999*, as amended.

³¹⁵ Section 5(1), *Immigration Act 1999*, as amended.

³¹⁶ Interview with the Repatriation Unit, ISD, February 2021.

³¹⁷ Interview with the Repatriation Unit, ISD, February 2021.

³¹⁸ *BFO v. The Governor of Dóchas Centre* [2005] 2 I.R. 1.

³¹⁹ Re: Article 26 and the *Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360; *Parvaiz v. The Commissioner of An Garda Síochána And The Garda National Immigration Bureau* [2016] IEHC 772.

³²⁰ Interview with the Repatriation Unit, ISD, February 2021.

³²¹ Interview with the Repatriation Unit, ISD, February 2021.

³²² Interview with the Repatriation Unit, ISD, February 2021.

³²³ Interview with the Repatriation Unit, ISD, February 2021.

³²⁴ Interview with the Repatriation Unit, ISD, February 2021.

4.3 OVERSIGHT OF PLACES OF DETENTION

The oversight of places of detention is conducted periodically by international bodies and more frequently by national authorities and organisations.

The CPT is an independent monitoring committee in the Council of Europe. It conducts monitoring visits to the 47 member states of the Council to review places of detention approximately every four years. The CPT, in their standards on immigration detention, state that ‘immigration detention must not be punitive in character: it is not a sanction or a punishment. Therefore, immigration detainees should be afforded both a regime and material conditions appropriate to their legal situation’ (CPT, 2017, p. 1).

In the two CPT monitoring reports on Ireland, the CPT has reiterated that prisons are ‘by definition not a suitable place in which to detain someone who is neither suspected nor convicted of a criminal offence’ (CPT, 2020, p. 17; CPT, 2017, p. 3). In 2020, the CPT called on Irish authorities to open a specifically designed centre for the purpose of immigration detention (CPT, 2020a). Similar concerns were raised in the concluding observations of the UN Committee Against Torture (UNCAT) in the second periodic report of Ireland in 2017 (UNCAT, 2017). UNCAT recommended Ireland ‘enshrine in its legislation the principle that detention of asylum-seekers should be used as a measure of last resort, for as short a period as possible and in facilities appropriate for their status’ (UNCAT, 2017, para 12(a)). UNCAT also recommended the independent monitoring of places of deprivation of liberty and highlighted how Ireland has yet to ratify the Optional Protocol to the Convention (OPCAT), despite signing it in 2007. Ratifying OPCAT would require Ireland to ‘set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment’ as a national preventive mechanism (NPM).³²⁵ Ireland, Belgium and Slovakia are the only EU Member States who have not ratified OPCAT.³²⁶

In a research study on the OPCAT in Ireland, commissioned by the Irish Human Rights and Equality Commission (IHREC), Murray and Steinerte (2017) identify a number of gaps in current oversight of places of detention and deprivation of liberty. This includes the lack of independent inspections of Garda stations; other areas of uncertainty included ‘transport and transit between prisons and court; court cells; military detention; detention of individuals awaiting deportation; detention facilities at airports and ports and on flights; as well as de facto detention and in voluntary settings’ (Murray and Steinerte, 2017, p. 8). The authors detail ways in which Ireland can implement the NPM when it ratifies OPCAT, particularly

³²⁵ Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, A/RES/57/199, adopted on 18 December 2003; this came into force on 26 June 2006.

³²⁶ See: OHCHR, ‘Map on ratifications of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’, www.ohchr.org/en/hrbodies/opcat/pages/opcatindex.aspx.

in terms of the bodies in Ireland that could be involved, and their powers, to allow for greater independent oversight and inspection of places where people are deprived of liberty (ibid).

On a national level, there are various separate bodies that have oversight for prisons and Garda Síochána stations. However, there are limitations in this oversight, particularly, but not only, in terms of the extent to which persons detained for immigration-related purposes are included in monitoring and inspection reports.

For oversight of prisons, there are Visiting Committees and the OIP (van der Valk, 2020). However, thus far, as highlighted by the Irish Penal Reform Trust (IPRT) (2021), there are a limited number of OIP reports publicly available.³²⁷ Moreover, immigration detainees and the specific concerns of this group have not featured significantly in the inspection and annual reports of the OIP or of the Visiting Committees (Cloverhill Visiting Committee, 2018, 2019; OIP, 2019, 2020, 2021a, 2021b).

For Garda Síochána stations, the Garda Síochána Ombudsman Commission (GSOC), the Policing Authority and the Garda Inspectorate have oversight of stations and GNIB facilities at Dublin Airport.³²⁸ The *Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987* apply to detention in Garda stations and GNIB reported that such regulations are also observed at ports, save for visiting rights.³²⁹ Nonetheless, the CPT report on Ireland states that ‘at the time of the visit, there was still no independent system of monitoring of Garda stations’ (CPT, 2020a).

In the Programme for Government from October 2020, the Government states that it intends to ‘ratify and implement the Optional Protocol to the Convention against Torture within 18 months of the formation of the Government’.³³⁰ The *Inspection of Places of Detention Bill* was described as being the vehicle through which Ireland would ratify OPCAT.³³¹ As highlighted by the IPRT, it has been in the drafting phase on the Legislation Programme for a number of years (IPRT, 2018).³³² In April 2021,

³²⁷ Four thematic inspection reports were published on COVID-19 in Cloverhill Prison, Wheatfield Prison, Mountjoy Prison and Limerick Prison in August 2021, <https://www.oip.ie/thematic-inspection-reports-for-mountjoy-cloverhill-wheatfield-and-limerick-prisons/> [last accessed 14 October 2021]. Prior to this, the next most recent publicly available inspection reports was to the Training Unit in Mountjoy Campus in 2017 and to Loughan House Open Centre in 2014, www.oip.ie/inspection-of-prisons-reports/.

³²⁸ Interview with GNIB, March 2021.

³²⁹ Interview with GNIB, March 2021. Correspondence with GNIB, April 2021.

³³⁰ Government of Ireland (2020). *Programme for Government: Our shared future*, www.gov.ie/en/publication/7e05d-programme-for-government-our-shared-future/.

³³¹ Department of Justice (2021). ‘Response to Parliamentary Question [32878/19]’, 23 July, www.justice.ie. Department of Justice (2018). ‘Response to Parliamentary Question [29659/18]’, 5 July, www.justice.ie.

³³² See: Office of the Government Chief Whip (2016). ‘Legislation programme autumn session’, 27 September, www.merrionstreet.ie; Office of the Government Chief Whip (2018). ‘Legislation programme autumn session 2021’, 28 September, www.gov.ie.

the drafting of the *Policing, Security and Community Safety Bill* was approved by Cabinet.³³³ This Bill contains provisions to merge the Policing Authority and the Garda Inspectorate into the Policing and Community Safety Authority. It is proposed that this Authority will be vested with the power to conduct unannounced visits. GSOC is proposed to be replaced by the Office of the Garda Síochána Ombudsman.³³⁴

4.4 CONCLUSION

Whereas one person has been detained under the *International Protection Act 2015*, detention for immigration-related purposes is more common in the context of refusals of leave to land. The number of persons in prisons for immigration-related purposes gradually increased between 2014 and 2019, with a decrease in 2020 during the COVID-19 pandemic. Between 2014 and 2019, there was also a significant increase for persons refused leave to land, and this decreased in 2020 during the COVID-19 pandemic. The most common ground for a refusal of leave to land was that there was reason to believe that the non-national intends to enter the State for purposes other than those expressed by the non-national.

There are currently limitations in the oversight of places of detention, particularly as regards immigration detention. The new proposed reforms to the oversight of places of detention, including the proposed ratification of OPCAT, could bring additional and independent supervision mechanisms for places of detention.

³³³ Department of Justice (2021). 'Minister McEntee publishes General Scheme of landmark Policing, Security and Community Safety Bill', 27 April, www.justice.ie.

³³⁴ Department of Justice (27 April 2021). 'General Scheme of the Policing, Security and Community Safety Bill', www.justice.ie.

CHAPTER 5

The use of alternatives to detention in practice

In most international protection and return procedures in Ireland, non-custodial measures are not necessarily used as an alternative, as such, to detention. Other than situations where a person is refused leave to land, alternatives to detention are used in the first instance with detention considered subsequently. As described in Chapter 2, Ireland is among the EU Member States that use alternatives to detention routinely in practice and provides for similar types of alternatives to detention as other EU Member States (EMN, forthcoming).

This chapter describes the use of alternatives to detention for each category of persons covered by this study: international protection applicants; persons subject to a Dublin transfer decision or a return order; persons refused leave to land; and persons subject to a deportation order. This is followed by an overview of the practical advantages and disadvantages reported by stakeholders of using alternatives to detention. The final section of this chapter looks specifically at provisions for children.

5.1 CATEGORIES OF PERSONS

5.1.1 International protection applicants

There are two sources of non-custodial measures in the *International Protection Act 2015*, namely section 16(3)(d) and section 20(3).

Pursuant to section 16(3)(d) of the 2015 Act, conditions can be attached to a permission to reside in the State during the protection procedure, such as reporting obligations either to an immigration officer or a member of An Garda Síochána and/or a requirement to reside or remain in a specified district or place in the State.³³⁵ The applicant must be notified in writing of any of these conditions.³³⁶

In practice, the International Protection Office (IPO) stated that it does not currently impose any restrictions under this section of the Act.³³⁷ The Garda National Immigration Bureau (GNIB) confirmed that section 16(3) is not normally utilised but that the use of these conditions was considered in the past when several international protection applicants of the same nationality were believed to be involved in criminal acts, and travelling between various accommodation

³³⁵ Section 16(3)(d), *International Protection Act 2015*, as amended.

³³⁶ Section 16(3)(d), *International Protection Act 2015*, as amended.

³³⁷ Correspondence with the International Protection Office, April 2021.

centres in doing so.³³⁸ GNIB stated that section 16 would have a similar effect as a section 14(1) notice issued to persons refused leave to land,³³⁹ and similar to imposing bail conditions on a person charged and before the courts.³⁴⁰

Under section 20 of the *International Protection Act 2015*, an applicant can be arrested without warrant and detained. They must be brought before a District Court judge as soon as is practicable, where the judge decides whether the applicant can be detained or released subject to conditions. These conditions include reporting obligations, a requirement to reside at a specified address, and/or surrender of any passport or travel document.³⁴¹ These conditions can also be applied when the applicant is brought before a District Court judge after a period in detention.

To date, only one person has been detained under section 20 of the *International Protection Act 2015*, as amended.³⁴² It is therefore not possible to highlight findings about the use of alternatives to detention in practice in this regard.

5.1.2 Persons subject to a Dublin transfer decision or a return order

For persons subject to Dublin transfer decisions and persons subject to return orders (although not currently in use), the provisions for alternatives to detention include reporting obligations, a requirement to reside at a designated address, a requirement to cooperate in facilitating their removal from the State and a requirement to surrender a passport or any travel documents as so required.³⁴³

In practice, alternatives to detention are used in the main for persons subject to a Dublin transfer decision and the requirement is often a combination of the above-listed conditions. The Repatriation Unit stated that while there is absconding in practice, compliance is generally higher than for persons with deportation orders.³⁴⁴ A failure to comply with conditions, including reporting obligations, is a considered factor when a member of An Garda Síochána is assessing whether an individual presents a significant risk of absconding and must be detained.³⁴⁵

5.1.3 Persons refused leave to land

When a person is refused leave to land or found to have been irregularly in the State for less than three months, GNIB reported that the main alternative to

³³⁸ Correspondence with GNIB, April 2021.

³³⁹ Section 14(1), *Immigration Act 2004*, as amended.

³⁴⁰ Correspondence with GNIB, April 2021.

³⁴¹ Section 20(3)(b), *International Protection Act 2015*, as amended.

³⁴² Correspondence with GNIB, April 2021.

³⁴³ Regulation 10(2), *European Union (Dublin System) Regulations 2018*, S.I. No. 62/2018; section 51B(1), *International Protection Act 2015*, as amended.

³⁴⁴ Interview with the Repatriation Unit, ISD, February 2021.

³⁴⁵ Regulation 10(6)(b) *European Union (Dublin System) Regulations*, 2018, S.I. No. 62/2018.

detention in such cases is that there is an intention to return the person on the next return flight as soon as possible and every effort is made to do so.³⁴⁶

Where there is no available return flight, the main alternative used is a section 14(1) notice, pursuant to which the individual surrenders their passport or travel document, is required to reside at a stipulated address – either chosen by the individual or assigned by the immigration officer – and is required to re-present at the airport on a specified date for the purposes of a ‘supervised departure’.³⁴⁷ Generally, such notices are issued for a number of days, and there are no reporting obligations during that period.³⁴⁸

The number of section 14(1) notices issued by GNIB Dublin Airport was 242 in 2019 and 177 in 2020.

TABLE 5.2 NUMBER OF SECTION 14(1) NOTICES ISSUED BY GNIB AT DUBLIN AIRPORT, 2019 AND 2020

Year	Number of section 14(1) notices issued by GNIB at Dublin Airport
2019	242
2020	177

Source: Correspondence with GNIB, April 2021.

5.1.4 Persons subject to a deportation order

Where there are grounds for removal from the State,³⁴⁹ a person can be issued with a proposal to make a deportation order under section 3 of the *Immigration Act 1999*, as amended. Pursuant to this, the person is informed they may leave the State before the matter is decided, consent to the deportation order, or make representations to the Minister within 15 days.³⁵⁰ Where a person is irregularly in the State and found by authorities, prior to being issued with a section 3 proposal to make a deportation order letter, they can be issued with a section 14(1) notice, pursuant to the *Immigration Act 2004*, as amended.³⁵¹

The deportation order is typically issued with an ‘arrangements letter’, which sets out that the person in question is required to leave the State by a specified date; typically four to five weeks from the date of issue of the deportation order.³⁵² Once the date to leave the State has lapsed and the person has not left, they are required to present to a member of An Garda Síochána, pursuant to section 3(9)(a)(i) of the

³⁴⁶ Correspondence with GNIB, April 2021.

³⁴⁷ Interview with BMU, ISD, February 2021.

³⁴⁸ Interview with BMU, ISD, February 2021. Interview with GNIB, March 2021.

³⁴⁹ Section 3(2), *Immigration Act 1999*, as amended.

³⁵⁰ Section 3(4), *Immigration Act 1999*, as amended.

³⁵¹ Interview and Correspondence with GNIB, March and April 2021.

³⁵² Interview with the Repatriation Unit, ISD, February 2021.

Immigration Act 1999, as amended. This reporting requirement is linked with a number of other requirements, including to produce at that appointment any relevant documentation to facilitate their removal from the State, to cooperate with members of An Garda Síochána or immigration officer to obtain the necessary documentation to facilitate their removal, and to reside at the address reported to authorities.³⁵³

In addition to the above-mentioned alternatives to detention, where a person is detained on foot of a deportation order, they can be released subject to conditions, such as a reporting obligation.³⁵⁴ These conditions can only be applied by a High Court judge where the person has challenged their removal from the State.³⁵⁵ Additionally, bail can also be used in the context of *habeas corpus* cases, but it is not common.³⁵⁶ The use of bail is seen in case law from the High Court, including, for example, in *Parvaiz v. The Commissioner Of An Garda Síochána And The Garda National Immigration Bureau*.³⁵⁷

5.2 ADVANTAGES AND CHALLENGES OF ALTERNATIVES TO DETENTION

In interviews conducted for this study with authorities and civil society organisations, a number of advantages to and challenges with the use of alternatives of detention were highlighted.

With regard to the advantages, firstly, for the individual, using alternatives to detention is less intrusive and ensures their right to liberty. This was observed by the Repatriation Unit and the Border Management Unit (BMU), as well as the Immigrant Council of Ireland and the Irish Refugee Council.³⁵⁸ Further to this, as highlighted by the Immigrant Council of Ireland and the Irish Refugee Council, the person has greater freedom of movement and more opportunities to integrate within a community.³⁵⁹

A further advantage reported by BMU, GNIB and the Repatriation Unit was the reduced administrative costs involved in alternatives to detention. Alternatives to detention do not require the resource-intensive detention facilities of prisons and An Garda Síochána stations.³⁶⁰ Stakeholders also indicated an advantage in terms of the availability of staff to administer the alternative to detention. Indeed, Garda

³⁵³ Correspondence with the Repatriation Unit, ISD, March 2021.

³⁵⁴ Section 5(7), *Immigration Act 1999*, as amended.

³⁵⁵ Section 5(7), *Immigration Act 1999*, as amended.

³⁵⁶ Interview with the Repatriation Unit, ISD, February 2021.

³⁵⁷ *Parvaiz v. The Commissioner Of An Garda Síochána and the Garda National Immigration Bureau* [2016] IEHC 772. See also: *Sharma v. Member in Charge of Store Street Garda Station*; *Igahodaro v. Governor of Cloverhill Prison*; *Gjonaj v. the Governor of Cloverhill Prison* [2016] IECA 330.

³⁵⁸ Interviews with the Repatriation Unit and BMU, ISD, February 2021. Interviews with Immigrant Council of Ireland and Irish Refugee Council, March 2021.

³⁵⁹ Interviews with the Immigrant Council of Ireland and the Irish Refugee Council, March 2021.

³⁶⁰ Interviews with the Repatriation and BMU, ISD, February 2021. Interview with GNIB, March 2021.

Síochána stations across the country can be used for reporting obligations and the use of alternatives does not require constant supervision of the person.³⁶¹ In the context of persons refused leave to land who are issued with a section 14(1) notice, BMU reported that they can provide accommodation and travel to the airport, where necessary.³⁶² Lastly, stakeholders reported that using alternatives means that the authorities have sufficient time to ensure everything is in place for a deportation to occur, as required by law.³⁶³

Related to the advantages of using alternatives to detention, civil society organisations have described the negative impact detention can have on the health of persons detained (Spirasi, 2017; Nasc, the Migrant and Refugee Rights Centre, 2018).

Three overarching challenges were reported in interviews conducted for this study, the first of which is absconding. The Repatriation Unit reported that for persons issued with a deportation order or a Dublin transfer decision, it is not uncommon to see people absconding and, as a result, it can be subsequently difficult to track/locate these persons.³⁶⁴ There are higher numbers of absconders as compared to people who do not abscond.³⁶⁵

In relation to absconding, a challenge raised by GNIB concerned the alternative to detention provided to persons refused leave to land in the form of a section 14(1) notice.³⁶⁶ GNIB reported that it can be difficult to establish the identity of a person who may have entered the State with false documentation or without documentation. While the fingerprints of international protection applicants are collected as part of the international protection procedure, those of persons who are refused leave to land are not. GNIB reported that the issuance of a section 14(1) notice granting entry to the State can therefore pose a threat to national security, with the true identity of persons unknown.³⁶⁷ Another absconding-related challenge reported by the Repatriation Unit related to the fact that deportation orders can be issued in batches. Due to the high number of people who typically abscond, cases may not be reviewed prior to the first presentation appointment. As a result, the Repatriation Unit can face a number of queries arriving simultaneously relating to those who do present.³⁶⁸

The second group of challenges relates to the individual themselves and their access to supports. Financially, an individual subject to reporting obligations would

³⁶¹ Interview with the Repatriation Unit and BMU, ISD, February 2021.

³⁶² Interview with BMU, ISD, February 2021.

³⁶³ Interview with the Repatriation Unit, ISD, February 2021.

³⁶⁴ Interview with the Repatriation Unit, ISD, February 2021.

³⁶⁵ Interview with the Repatriation Unit, ISD, February 2021.

³⁶⁶ Correspondence with GNIB, April 2021.

³⁶⁷ Correspondence with GNIB, April 2021.

³⁶⁸ Correspondence with GNIB, April 2021.

have to self-fund the costs of travelling to the appointment.³⁶⁹ Non-governmental organisations (NGOs) observed that this may be difficult if a person is located in a remote area of Ireland.³⁷⁰ Additionally, it may be stressful for the individual due to the uncertainty of when reporting obligations may cease and a deportation order is enforced.³⁷¹ The Repatriation Unit reported that where an individual requests to report to a local Garda Síochána station, this request can be reviewed.³⁷²

UNHCR Ireland described how the application of an alternative to detention should be assessed on a case-by-case basis with regard to availability, effectiveness and appropriateness of the alternative.³⁷³ Furthermore, UNHCR Ireland described how it should not place a disproportionate burden on the individual, such as requiring a family to report to a specific authority that can be difficult to attend due to its location.³⁷⁴

A final key challenge highlighted by stakeholders, and particularly for persons with deportation orders, concerns the provisions around access to healthcare, social welfare and legal representation during the time a person is subject to an alternative to detention.³⁷⁵ Persons with deportation orders are generally ineligible for social welfare and housing (Polakowski and Quinn, forthcoming). For healthcare, the Immigrant Council of Ireland observed that persons with deportation orders are generally not turned away from healthcare facilities but may be invoiced for services afterwards.³⁷⁶ Persons with deportation orders resident in International Protection Accommodation Service (IPAS) accommodation are means tested for a medical card (Polakowski and Quinn, forthcoming). Under the *Immigration Act 1999*, *Immigration Act 2003* and *Immigration Act 2004*, there is no explicit right to legal representation. Legal advice and representation can be sought on a pro bono basis and/or through relevant Independent Law Centres or may be available on a private, fee-paying basis.³⁷⁷ Some persons may have legal representation upon arrival or as a result of being in the State for some time prior to being issued with a deportation order.³⁷⁸

³⁶⁹ Interviews with the Irish Refugee Council and the Immigrant Council of Ireland, March 2021.

³⁷⁰ Interview with Immigrant Council of Ireland, March 2021.

³⁷¹ Interviews with the Irish Refugee Council and the Immigrant Council of Ireland, March 2021.

³⁷² Interview with the Repatriation Unit, ISD, February 2021.

³⁷³ Interview with UNHCR, March 2021.

³⁷⁴ Interview with UNHCR, March 2021.

³⁷⁵ Interview with Immigrant Council of Ireland, March 2021.

³⁷⁶ Interview with Immigrant Council of Ireland, March 2021.

³⁷⁷ As compared to international protection applicants, whose right is set out in section 18 of the International Protection Act 2015, as amended.

³⁷⁸ Interviews with the Repatriation Unit, ISD, February 2021; Interview with GNIB, March 2021.

5.3 CHILDREN AND RELEASE TO A CARE WORKER

Across all immigration and international protection legislation in Ireland, the detention of children for immigration-related purposes is prohibited.³⁷⁹ This section presents information on detention and alternatives to detention relating to children and families. In the interests of completeness, supports provided by Tusla, the Child and Family Agency, to unaccompanied minors are also discussed, although this care arrangement is not an alternative to detention.

For accompanied children, where the adult(s) accompanying a child is/are detained, the immigration officer or member of Garda Síochána shall inform Tusla of the detention of the adult,³⁸⁰ and Tusla will assess the situation of the child and may decide to place the child into the care of Tusla.³⁸¹ In the case of *P.O. and G.E. v. The Governor of the Dóchas Centre*, the applicants were a mother and daughter who were detained by representatives of An Garda Síochána for the purposes of removal.³⁸² The applicants were brought to Dublin Airport and scheduled to depart on a flight to Nigeria via Frankfurt. However, just before boarding the flight, the applicant protested her return stating that her daughter did not want to go to a country to which she has never been. The Detective Garda decided it was no longer possible at the time to deport the applicants. The mother was brought to the Dóchas Centre, detained pending removal, and the minor daughter was placed into the care of Tusla. The High Court held that the arrest and detention of the applicant was lawful. The mother consented to the daughter being placed in care, and this was therefore found to be lawful.³⁸³

In situations where there are two parents, in practice one parent may be detained, with the other parent and the children accommodated in a reception centre in an effort to keep the family together.³⁸⁴ In the case of *Delsoz v. the Garda National Immigration Bureau*, a mother and her daughters were refused leave to land.³⁸⁵ One daughter who was over the age of 18 was detained in the Dóchas Centre in Mountjoy Prison campus, while the mother and her other daughter, who was below the age of 18, were brought to Baleskin Reception Centre to prevent the separation of mother from child, pending their removal from the State. In a prior challenge, the appellant contested what they alleged was detention in Baleskin

³⁷⁹ Section 20(6), *International Protection Act 2015*, as amended; Regulation 10(6), *European Union (Dublin System) Regulations 2018*, S.I. No. 62/2018; Section 51B(7), *International Protection Act 2015*, as amended; Section 5(7)(c), *Immigration Act 1999*, as amended; Section 5(2)(a), *Immigration Act 2003*, as amended.

³⁸⁰ Section 20(8), *International Protection Act 2015*; section 5(2)(d), *Immigration Act 2003*, as amended; Section 5(6)(c), *Immigration Act 1999*, as amended.

³⁸¹ Interview with Tusla, the Child and Family Agency, March 2021.

³⁸² *P.O. and G.E. v. The Governor of the Dóchas Centre and anor* [2016] IEHC 557.

³⁸³ *P.O. and G.E. v. The Governor of the Dóchas Centre and anor* [2016] IEHC 557.

³⁸⁴ Interview with the Repatriation Unit, ISD, February 2021.

³⁸⁵ *Delsoz v. the Garda National Immigration Bureau* [2018] IEHC 492.

Reception Centre; however, the case did not conclude whether this constituted detention.³⁸⁶

For unaccompanied migrant children, an immigration officer or member of An Garda Síochána shall contact Tusla, and upon the assessment of Tusla, the child can be placed into the care of Tusla throughout the whole immigration or international protection procedure.

Among the advantages reported by Tusla was the equity of care principle, which affords migrant children the same standard of care as any other child in care.³⁸⁷ Additionally, Tusla observed that there is a sufficient number of social workers, as well as sufficient funds, to meet the needs of the young people concerned.³⁸⁸ Children can be supported in developing their skills and in adjusting to life in Ireland with the help of social workers.³⁸⁹ Tusla also reported that unaccompanied minors and separated children have specific accommodation, and that there are efforts to recognise the cultural identity of each young person and to meet their religious and spiritual needs.³⁹⁰ Every child receives a care plan and prison visits can be facilitated with parents who are detained.³⁹¹

Among the challenges Tusla reported in placing children in care was the availability of accommodation. While there is a sufficient number of beds and accommodation needs are always met, challenges arise for care leavers (minors who have reached the age of the majority) who may have to go into private rented accommodation or direct provision.³⁹² Tusla has an aftercare programme, but there can be a lack of beds.³⁹³

5.4 CONCLUSION

Alternatives to detention are frequently used for persons subject to Dublin transfer decisions and deportation orders. Stakeholders interviewed for this report, including state authorities and civil society organisations, identified advantages in using alternatives to detention, including reduced administrative costs and staffing requirements, as well as greater liberty and integration prospects for the individuals concerned. Challenges highlighted by stakeholders include high levels of absconding and, for the individuals concerned, having to meet travel costs involved in reporting as well as a sense of ‘being in limbo’.

³⁸⁶ *Delsoz v. the Garda National Immigration Bureau* [2018] IEHC 492.

³⁸⁷ Interview with Tusla, Child and Family Agency, March 2021.

³⁸⁸ Interview with Tusla, Child and Family Agency, March 2021.

³⁸⁹ Interview with Tusla, Child and Family Agency, March 2021.

³⁹⁰ Interview with Tusla, Child and Family Agency, March 2021.

³⁹¹ Interview with Tusla, Child and Family Agency, March 2021.

³⁹² Interview with Tusla, Child and Family Agency, March 2021.

³⁹³ Interview with Tusla, Child and Family Agency, March 2021.

CHAPTER 6

Fundamental rights protections, legal remedies and safeguards

Fundamental rights protections for persons in international protection and return procedures flow from the Charter of Fundamental Rights of the European Union (CFREU), the European Convention on Human Rights (ECHR) and the Constitution of Ireland. However, the provisions vary within the relevant legislation for each category of person and whether the person is in detention or subject to an alternative.

This chapter examines four key sets of rights and safeguards. Firstly, the provisions for access to legal assistance and, relatedly, access to legal remedies are examined. This is followed by an overview of the provisions for access to healthcare and medical attention. Thirdly, the right to be informed is explored, including access to an interpreter. Lastly, this chapter looks at the right to communicate with a third party.

6.1 ACCESS TO LEGAL ASSISTANCE AND LEGAL REMEDIES

6.1.1 Access to legal representation

For international protection applicants, as well as persons subject to a Dublin transfer decision, they must be informed of their right to consult a legal representative.³⁹⁴ International protection applicants can apply for access to civil legal aid for their international protection application.³⁹⁵ Where an applicant is detained, they are entitled to consult a legal representative and seek legal assistance and legal representation.³⁹⁶ Moreover, the individual can have their detention details notified to the United Nations High Commissioner for Refugees (UNHCR) or another reasonably nominated person and the assistance of an interpreter for the purpose of consultation with a legal representative.³⁹⁷

For persons refused leave to land, there is no express right to legal representation under the *Immigration Acts of 2003 and 2004*. The Garda National Immigration Bureau (GNIB) and the Border Management Unit (BMU) stated that where an individual who has been refused leave to land requests legal representation, this can be facilitated.³⁹⁸ However, GNIB stated that persons who are refused leave to land are not provided with a panel of legal representatives.³⁹⁹ If the person requests a solicitor, but does not nominate a particular one, a solicitor can be

³⁹⁴ Section 18(1)(b), *International Protection Act 2015*.

³⁹⁵ Legal Aid Board, 'Civil legal aid and advice for international protection cases', www.legalaidboard.ie/en/our-services/legal-aid-services/services-for-international-protection-applicants/.

³⁹⁶ Section 20(14), *International Protection Act 2015*.

³⁹⁷ Section 20(14)(b), *International Protection Act 2015*, as amended.

³⁹⁸ Interview with BMU, ISD, February 2021; Interview with GNIB, March 2021.

³⁹⁹ Interview with GNIB, March 2021.

selected by GNIB from a panel of legal representatives. GNIB further stated that a request for access to a solicitor will always be accommodated by phone at the port. However, legal practitioners are not permitted to enter the detention processing/holding rooms that are airside due to security restrictions in the Critical Part of the Security Restricted Area (CPSRA).⁴⁰⁰ Some persons who have been refused leave to land may have the details of an Irish solicitor to hand, and in such cases the solicitor is contacted.⁴⁰¹

When held in a Garda Síochána station, persons have a right to notify a solicitor of their being in custody.⁴⁰² In prisons, the *Prison Rules 2007* apply, pursuant to which a detained person can contact a legal representative.⁴⁰³ Nonetheless, the person is not provided with a panel of legal representatives to choose from by the Irish Prison Service,⁴⁰⁴ and may therefore face difficulties in contacting a solicitor, particularly where they have only just arrived in the country or are in the country for the first time.⁴⁰⁵ The *Prisoner information booklet*, however, does state that the person's consulate may arrange for legal representation.⁴⁰⁶ GNIB stated that where a person is detained in a prison (usually for a period in excess of 24 hours before a return flight), they can also request and will be facilitated with a phone call to a solicitor and possibly a visit from a solicitor, depending on the time and date of the scheduled departure flight.⁴⁰⁷

Access to legal remedies following a refusal of leave to land is a *de facto* difficulty raised by non-governmental organisations (NGOs) and practitioners. This is in particular due to the lack of access to legal representation, including the inability to access civil legal aid in practice,⁴⁰⁸ an inability of legal representatives to access detention processing/holding rooms in Dublin Airport as they are airside, and the short period for which a person is in the State.⁴⁰⁹ These stakeholders further described how they are not often contacted by persons refused leave to land and that, when they are, it can be family members and friends contacting them on behalf of a person who they believe to have been detained following refusal of leave to land.⁴¹⁰ In a report published by Nasc, the Migrant and Refugee Rights Centre (2018), only one of the eight detainees that were interviewed for the report

⁴⁰⁰ Correspondence with GNIB, April 2021.

⁴⁰¹ Correspondence with GNIB, April 2021.

⁴⁰² Regulation 9(2), *Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987*, S.I. No. 119/1987.

⁴⁰³ Rule 16 and Rule 38(1) and (3), *Prison Rules 2007*, S.I. No. 252/2007. Interview with the Irish Prison Service, March 2021.

⁴⁰⁴ Correspondence with the Irish Prison Service, March 2021.

⁴⁰⁵ Interview with KOD Lyons, March 2021.

⁴⁰⁶ Prisoner Information Booklet, received via consultation with the Irish Prison Service, March 2021.

⁴⁰⁷ Correspondence with GNIB, April 2021.

⁴⁰⁸ *Civil Legal Aid Act 1995*, as amended. *Civil Legal Aid Regulations 1996–2017*. Interview with Immigrant Council of Ireland, February 2021.

⁴⁰⁹ Interview with Immigrant Council of Ireland, KOD Lyons Solicitors, February and March 2021.

⁴¹⁰ Interview with Immigrant Council of Ireland and the Irish Refugee Council, March 2021. Nasc, the Migrant and Refugee Rights Centre (2018). *Immigration detention and border control in Ireland: Revisiting Irish law, policy and practice*, Cork.

who were held in prison following a refusal of leave to land availed of legal representation.⁴¹¹

Persons issued with a deportation order have no express right to legal representation under the *Immigration Act 1999*. Nonetheless, in *DP v. Governor of Training Unit*, the High Court held that the *Immigration Act 1999* must be applied in a constitutional manner and thus persons detained under section 5 of the *Immigration Act 1999* should have access to legal advice (IHRC, 2014).⁴¹² Persons with deportation orders typically already have a legal representative by virtue of their previous stay in the State.⁴¹³ The Legal Aid Board can provide legal advice and, in some cases, legal representation (Legal Aid Board, n.d.).⁴¹⁴

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in its report on Ireland noted that, generally speaking, the right to access legal advice, among other rights, for an arrested person ‘operate[s] in a satisfactory manner’ and the report highlights the publication of the *Code of practice on access to a solicitor by persons in Garda stations* in April 2015 (CPT, 2020a). However, the CPT noted that the right of access to legal advice for all persons in custody was not on a statutory basis and that persons they met reported being denied access to legal representation (CPT 2020a). The Government’s response accepted the recommendation and highlighted that it intended to bring the right of access to a solicitor onto a statutory basis in a new Bill (CPT, 2020b). The General Scheme of Garda Síochána (Powers) Bill was published in June 2021 and includes the right to access legal advice.⁴¹⁵

6.1.2 Legal remedies and complaints mechanisms

All detained persons, irrespective of immigration status, have the right to be brought before court by way of a *habeas corpus* application to challenge the legality of the detention under Article 40.4 of the Irish Constitution. Access to an effective remedy is also enshrined in the Charter of Fundamental Rights of the EU under Article 47. Nonetheless, as with the case regarding access to legal representation, the mechanisms available for legal remedies within national immigration and international protection legislation can vary.

For international protection applicants, the *International Protection Act 2015* provides that when an applicant is detained, they shall be brought before a District

⁴¹¹ Nasc, the Migrant and Refugee Rights Centre (2018 *Immigration detention and border control in Ireland: Revisiting Irish law, policy and practice*, Cork, p. 44.

⁴¹² *DP v. Governor of Training Unit* [2000] IEHC 104.

⁴¹³ Interview with the Repatriation Unit, ISD, February 2021.

⁴¹⁴ See also: Legal Aid Board, *Best practice guidelines*, www.legalaidboard.ie/en/lawyers-and-experts/legal-professionals-in-civil-cases/international-protection/best-practice-guidelines/key-stage-6-deportation.html [last accessed 18 October 2021].

⁴¹⁵ Department of Justice (14 June 2021). ‘General Scheme of Garda Síochána (Powers) Bill’, www.justice.ie.

Court judge as soon as is practicable.⁴¹⁶ The District Court judge may then either commit the person to a place of detention for up to 21 days or release the person subject to conditions.⁴¹⁷ A District Court judge may, on the application of the person, an immigration officer, or a member of An Garda Síochána, if the judge considers it appropriate to do so, vary, revoke or add a condition to the release.⁴¹⁸ Under section 20(13)(a), if at any time during the detention period the person indicates a desire to leave the State, they shall, as soon as is practicable, be brought before a District Court judge and where the judge is satisfied that the person wishes to withdraw their international protection application and has received sufficient legal representation in making this decision, the judge can order their removal.⁴¹⁹

Persons held in detention can also apply for international protection.⁴²⁰ However, the definition of ‘asylum applicant’ under the *Prison Rules 2007* is limited to persons who apply for asylum at the frontiers of the State, thus *de jure* excluding persons who apply for asylum within the State, as well as refugees, subsidiary protection beneficiaries and stateless persons.⁴²¹ UNHCR has recommended an expansion and update to the scope of ‘asylum applicants’ in any revision to the *Prison Rules*.⁴²² Pursuant to rule 16 of the *Prison Rules 2007*, asylum applicants can contact UNHCR,⁴²³ as well as ‘national or international authorities and organisations whose principal object is to serve the interests of refugees or stateless persons or to protect the civil and human rights of such persons’.⁴²⁴ For persons subject to a Dublin transfer decision or a return order, a deportation order, or refused leave to land, there is no requirement for a court to sanction the initial period of detention.⁴²⁵ Persons who are the subject of a deportation order can only be detained beyond the aggregate eight-week period if authorities are given leave to do so by a District Court judge.⁴²⁶

For persons refused leave to land, the main venue to legally challenge a decision of a refusal of leave to land is via judicial review in the High Court.⁴²⁷ Section 5(4) of the *Immigration Act 2003*, as amended, provides that where a detained person institutes court proceedings challenging the validity of their proposed removal from the State, the court hearing those proceedings or any appeal therefrom may, on application to it, determine whether the person shall continue to be detained

⁴¹⁶ Section 20(2), *International Protection Act 2015*, as amended.

⁴¹⁷ Section 20(3), *International Protection Act 2015*, as amended.

⁴¹⁸ Section 20(5), *International Protection Act 2015*, as amended.

⁴¹⁹ Section 20(13)(b), *International Protection Act 2015*, as amended.

⁴²⁰ Interview with Irish Prison Service, March 2021.

⁴²¹ Rule 2(2), *Prison Rules 2007*, S.I. No. 252/2007.

⁴²² UN High Commissioner for Refugees (UNHCR) (2021). *UNHCR submission review of Prison Rules 2007 (S.I. 252/2007) – Public consultation*, www.refworld.org/docid/615716d74.html [last accessed 6 October 2021].

⁴²³ Rule 16(a)(i), *Prison Rules 2007*, S.I. No. 252/2007. Interview with UNHCR, March 2021.

⁴²⁴ Rule 16(a)(ii), *Prison Rules 2007*, S.I. No. 252/2007.

⁴²⁵ *European Union (Dublin System) Regulations 2018*, S.I. No. 62/2018.

⁴²⁶ Section 5(9)(a), *Immigration Act 1999*, as amended.

⁴²⁷ Pursuant to section 5, *Illegal Immigrants (Trafficking) Act 2000*, as amended.

or shall be released, and may make any such release subject to such conditions as it considers appropriate.⁴²⁸ Persons who are refused leave to land but subject to an alternative to detention, in other words, issued with a section 14(1) notice, can challenge that notice, as well as the decision to refuse leave to land.⁴²⁹

A legal practitioner in KOD Lyons described how judicial review cases can be difficult to bring as the vast majority of cases in this area require a procedural error in law.⁴³⁰ The Department of Justice stated that the Courts afford considerable latitude to practitioners applying *ex parte* for leave to proceed and it is not difficult to initiate such proceedings.⁴³¹ In the 2018 Nasc report, providing access to an effective legal remedy to appeal a refusal of leave to land at ports of entry is a key recommendation (Nasc, the Migrant and Refugee Rights Centre, 2018). Similarly, in an interview for this report, a representative of the Immigrant Council of Ireland described the need for an independent appeals process for refusals of leave to land.⁴³²

In Dublin Airport, a complaint can be filed against the BMU via a customer service feedback procedure, details of which were published by BMU in June 2020.⁴³³ The person receives an acknowledgement of their concern, and a response is issued within 15 working days. This response can be appealed, where the case is reviewed by a senior manager.⁴³⁴ However, this procedure ‘does not cover decisions regarding immigration service delivery at the border, such as; the type of permission granted or reasons for refusal of entry to the state’.⁴³⁵ Thus, the complaints mechanism is not a legal remedy for a refusal of leave to land.

Where GNIB issue the decision to refuse leave to land and the person refused entry wishes to make a complaint, GNIB have an obligation to process complaints in line with internal guidelines.⁴³⁶ A complaint may also be filed with the GSOC, but, according to GNIB, the person may not be aware of this mechanism.⁴³⁷ GNIB stated that in the airport, these complaints typically relate to individuals not being able to access their checked-in luggage when refused leave to land. Another type of complaint concerns the inability of persons who are detained in prison following a refusal of leave to land to retrieve money that may have been stored in a prison

⁴²⁸ Section 5(4), *Immigration Act 2003*, as amended.

⁴²⁹ Interview with BMU, ISD, February 2021. See also, for example, *Ting v. The Minister for Justice and Anor* [2021] IEHC 226.

⁴³⁰ Interview with a practitioner from KOD Lyons law firm, February 2021.

⁴³¹ Correspondence with the Department of Justice, October 2021.

⁴³² Interview with Immigrant Council of Ireland, February 2021.

⁴³³ Interview with BMU, ISD, February 2021.

⁴³⁴ BMU Dublin Airport (2020). *Customer service feedback procedure, immigration service delivery*, www.irishimmigration.ie/wp-content/uploads/2020/06/BMU-Customer-Feedback-Policy-June-2020.pdf.

⁴³⁵ Border Management Unit Dublin Airport (2020). *Customer service feedback procedure, immigration service delivery*, www.irishimmigration.ie/wp-content/uploads/2020/06/BMU-Customer-Feedback-Policy-June-2020.pdf.

⁴³⁶ Garda Síochána Ombudsman Commission, *Garda Síochána Act 2005 and Garda Síochána (Discipline) Regulations 2007*, as amended. Interview with GNIB, March 2021.

⁴³⁷ Interview with GNIB, March 2021.

safe when they are removed. This is due to their being removed from prison by GNIB outside working hours.⁴³⁸

Lastly, for persons subject to a deportation order, under section 5(7) of the *Immigration Act 1999*, persons detained for the purposes of removal can institute proceedings challenging the validity of the deportation order. The court hearing those proceedings, or any appeal therefrom, may, on application to it, determine whether the person shall continue to be detained or shall be released, and may make any such release subject to such conditions as it considers appropriate. After eight weeks, a judge of the District Court must assess whether the period of detention can be extended.⁴³⁹ Pursuant to section 5(1) of the *Illegal Immigrants (Trafficking) Act 2000*, persons issued with deportation orders shall not challenge the decision, save for in judicial review proceedings.⁴⁴⁰

6.2 ACCESS TO MEDICAL ASSISTANCE AND HEALTHCARE

International protection applicants and persons subject to Dublin transfer decisions, both when they are in detention and when subject to alternatives, have a right to health care under Regulation 18 of the *European Communities (Reception Conditions) Regulations 2018*.⁴⁴¹ This is primarily for necessary and emergency healthcare.⁴⁴² However, for persons refused leave to land and subject to a deportation order there are no specific provisions for access to health care in the *Immigration Acts of 1999, 2003, or 2004*.

Notwithstanding these differences, when in a place of detention, the same provisions for medical assistance and healthcare apply to all persons detained. These include the *Prison Rules 2007* and the *Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987*.⁴⁴³

At Dublin Airport, GNIB reported that where a person requests medical assistance, this can be provided by paramedics onsite as part of the general airport facilities.⁴⁴⁴ In prisons, as part of the initial committal assessment, a medical assessment is conducted by a nurse.⁴⁴⁵ Under rule 33 of the *Prison Rules 2007*, each prisoner is entitled to the provision of primary healthcare services (of a diagnostic, preventative, curative and rehabilitative nature).⁴⁴⁶ In Garda Síochána stations, the *Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána*

⁴³⁸ Interview with GNIB, March 2021.

⁴³⁹ Section 5(8), *Immigration Act 1999*, as amended.

⁴⁴⁰ Section 5(1)(a), (b) and (c), *Illegal Immigrants (Trafficking) Act 2000*.

⁴⁴¹ Regulation 18, *European Communities (Reception Conditions) Regulations 2018*, S.I. No. 230/2018.

⁴⁴² Regulation 18, *European Communities (Reception Conditions) Regulations 2018*, S.I. No. 230/2018.

⁴⁴³ *Prison Rules 2007*, S.I. No. 252/2007 and *Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987*, S.I. No. 119/1987.

⁴⁴⁴ Interview with GNIB, March 2021.

⁴⁴⁵ Interview with the Prison Service, March 2021. Rule 11, *Prison Rules 2007*, S.I. No. 252/2007.

⁴⁴⁶ Rule 33, *Prison Rules 2007*, S.I. No. 252/2007.

Stations) Regulations 1987 provides for medical attention where requested or where it is considered necessary for a serious condition.⁴⁴⁷

Civil society organisations have described the negative impact detention can have on the health of persons detained. Spirasi, in a submission to the UN Committee Against Torture in 2017, described detrimental effects of detention on survivors of torture, including re-traumatisation and how it can, in some cases, lead to increased anxiety and distress, as well as an increased risk of self-harm and suicide (Spirasi, 2017). Nasc's report from 2018 details how detainees experienced bullying in prison and threats of physical abuse (Nasc, the Migrant and Refugee Rights Centre, 2018).

When a person is subject to an alternative to detention, the provisions vary. For international protection applicants, a right to necessary and emergency healthcare is provided for under the *European Communities (Reception Conditions) Regulations*, as detailed above.⁴⁴⁸ For persons refused leave to land or persons who have been issued a deportation order, there are no express provisions for access to healthcare.⁴⁴⁹ Persons issued with deportation orders can gain access to healthcare in practice; however, NGOs reported that access to follow-up care tends to be *ad hoc*, and that those concerned may afterwards be invoiced for these services.⁴⁵⁰

6.3 ACCESS TO INFORMATION AND THE RIGHT TO BE INFORMED

Similar to the other rights described in this chapter, access to information and to the right to be informed are provided to differing extents across immigration and international protection legislation. The provisions for international protection applicants, particularly with the transposition of the recast Reception Conditions Directive, are more explicit in legislation.

The CPT report on Ireland from 2020, in reiterating concerns raised in previous reports, noted that 'immigration detainees are still not provided with information in a language they can understand about what is happening to them, heightening their anxieties' (CPT, 2020a). Similarly, in a report from August 2021 from the Office of the Inspector of Prisons on Cloverhill Prison, it states that the 'Inspection Team spoke with a number of Foreign National prisoners who reported that they relied on people who speak their language and English to give and receive information' (Office of the Inspector of Prisons, 2021b).

⁴⁴⁷ Regulation 21, *Criminal Justice Act 1984* (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987, S.I. No. 119/1987.

⁴⁴⁸ Regulation 18, *European Communities (Reception Conditions) 2018*, S.I. No 230/2018.

⁴⁴⁹ Interview with Immigrant Council of Ireland, March 2021.

⁴⁵⁰ Interview with Immigrant Council of Ireland, March 2021.

For international protection applicants, an immigration officer or member of An Garda Síochána must inform the person, in a language they may reasonably be presumed to understand, that they are being detained, that they will be brought before a court as soon as is practicable, of their entitlements and that they are entitled to leave the State at any time.⁴⁵¹ The *European Communities (Reception Conditions) Regulations 2018* amended the *International Protection Act 2015* to explicitly include that an applicant has a right to be informed of their entitlement to legal representation and assistance and to make a complaint under Article 40.4.2 of the Constitution and the relevant procedures, and to be given a copy of the warrant under which they are being detained.⁴⁵²

In addition to the above, pursuant to Regulation 19(6) of the *European Communities (Reception Conditions) Regulations 2018*, the person in charge of a place of detention shall provide the applicant with information '(a) that explains the rules applied in the place of detention in which the detained applicant is, or is to be, detained, and (b) setting out, in a language which he or she understands or may reasonably be supposed to understand, the detained applicant's rights and obligations while he or she is detained in the place of detention'.⁴⁵³ An international protection applicant whose residence permission is subject to conditions must be informed in writing of such conditions and any amendments to said conditions.⁴⁵⁴ Lastly, the applicant has a right to the assistance of an interpreter.⁴⁵⁵ Persons subject to a Dublin transfer decision fall under the provisions of the *European Communities (Reception Conditions) Regulations 2018*.

For persons issued with a Dublin transfer decision or a return order, they are informed in writing and where they are required to comply with a requirement, such as a reporting obligation, they must also be notified in writing.⁴⁵⁶ Where they are arrested, this can be carried out without a warrant, but the person is detained under warrant.⁴⁵⁷ There is no explicit provision in law to provide persons with a copy of the warrant.

Persons refused leave to land are informed of the grounds for their refusal under section 4(4) of the 2004 Act, both verbally and in writing.⁴⁵⁸ The BMU and GNIB stated that, in practice, they seek to ensure the individual concerned understands the decision being taken and interpretation is brought in to facilitate this.⁴⁵⁹

⁴⁵¹ Section 20(15), *International Protection Act 2015*, as amended.

⁴⁵² Section 20(14)(ab) and (ac), *International Protection Act 2015*, as amended.

⁴⁵³ Regulation 6, *European Communities (Reception Conditions) Regulations 2018*, S.I. No. 230/2018.

⁴⁵⁴ Section 16(4), *International Protection Act 2015*, as amended.

⁴⁵⁵ Section 20(14)(c), *International Protection Act 2015*, as amended.

⁴⁵⁶ Regulation 10(2), *European Union (Dublin System) Regulation 2018*, S.I. 62/2018; section 51B(1), *International Protection Act 2015*, as amended.

⁴⁵⁷ Regulation 10(4), *European Union (Dublin system) Regulations 2018*, S.I. No. 62/2018; Section 51B(4), *International Protection Act 2015*, as amended.

⁴⁵⁸ Section 4(4), *Immigration Act 2004*, as amended. Interviews with BMU, ISD and GNIB, February and March 2021.

⁴⁵⁹ Interviews with BMU, ISD, and GNIB, February and March 2021.

Similarly, a person subject to a deportation order must be informed in writing of the requirements with which they must comply under section 3 of the *Immigration Act 2003*, as amended.⁴⁶⁰ Under section 5 of that Act, they can be arrested without warrant and detained.⁴⁶¹

In places of detention there are also provisions for access to information. Under the *Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987*, persons held in Garda stations shall also be informed of the reasons for arrest.⁴⁶² They will be given a notice of their rights in their own language and they will be informed by a member of An Garda Síochána not connected with the deportation proceedings that they have a right of access to a solicitor by phone or through an unsupervised visit.⁴⁶³ A notice of rights is available on the Garda Portal in every language. GNIB reported that the member in charge will print it out, serve a copy on the individual and read it to them, through an interpreter if required.⁴⁶⁴

An information booklet is given to people upon entry to prison in Ireland.⁴⁶⁵ This has been translated into eight languages: Cantonese, Irish, French, Latvian, Lithuanian, Polish, Romanian and Spanish (CPT, 2020b). However, these languages are primarily European. Rule 14 of the *Prison Rules 2007* provides that the governor of the prison shall meet with the detained person and satisfy themselves that the prisoner has been informed of and understands their obligations, entitlements and privileges.⁴⁶⁶ In the committal process, the person is asked if they need interpretation services.⁴⁶⁷

With regard to the provision of information, UNHCR recommended that information on the asylum procedure should be made visible in places where third-country nationals are detained, in the form of posters, for example.⁴⁶⁸

6.4 THE RIGHT TO COMMUNICATE WITH A THIRD PARTY

The last right examined in this chapter is the right to communicate with a third party, such as an embassy, family members or another nominated person.

For international protection applicants, including persons subject to a Dublin transfer decision, a detained applicant is entitled to communicate with and receive visits from, in conditions that respect privacy, (a) representatives of UNHCR and (b)

⁴⁶⁰ Section 3(b)(ii), *Immigration Act 1999*, as amended.

⁴⁶¹ Section 5(1), *Immigration Act 1999*, as amended.

⁴⁶² Regulation 8, *Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987*, S.I. No. 119/1987.

⁴⁶³ Correspondence with GNIB, April 2021.

⁴⁶⁴ Correspondence with GNIB, October 2021.

⁴⁶⁵ Rule 13, *Prison Rules 2007*, S.I. No. 252/2007.

⁴⁶⁶ Rule 14, *Prison Rules 2007*, S.I. No. 252/2007.

⁴⁶⁸ Interview with UNHCR, March 2021.

family members, legal representatives and representatives of relevant non-governmental organisations (NGOs).⁴⁶⁹

For persons refused leave to land or who have been issued with a deportation order, there are no explicit provisions in immigration legislation that provide for the right to communicate with a third party. When subject to alternatives to detention, there are, nonetheless, no restrictions on communicating with third parties. According to BMU and GNIB, in practice, a person refused leave to land is facilitated in seeking help from their embassy, if requested, and are also given access to interpretation services, mainly by phone.⁴⁷⁰

When held in a Garda Síochána station, persons have a right to notify a reasonably named person of their being in custody.⁴⁷¹ Visits by other persons are screened for security reasons and for the safety of the detained person and the safety of the officer.⁴⁷² For security reasons, a detained person is not permitted access to their mobile phone, but they are provided with numbers from that phone if they so request and if they provide the relevant pin.⁴⁷³ Under *Prison Rules 2007*, a detained person has a right to contact a family member or friend and is permitted to make phone calls.⁴⁷⁴ They are also permitted to contact their consulate or embassy.⁴⁷⁵ The Irish Prison Service stated that, in practice, the person is asked if they require interpretation and if they would like to contact their consul upon committal.⁴⁷⁶

A main safeguard advocated by the CPT is the right of detained persons to inform a close relative or another third party of their choice of their situation (CPT, 2017, 2020a). The CPT noted in their recent report on Ireland that immigration detainees are ‘only offered screened visits and not permitted to access their mobile phones’ (CPT, 2020a). In the 2018 Nasc report, it is noted that the confiscation of phones can inhibit access to the right to contact a person of choice (Nasc, the Migrant and Refugee Rights Centre, 2018). Six of the ten detainees interviewed for the report complained of the confiscation of their phones and resultant ‘inability to contact anyone, despite repeated requests’ (Nasc, the Migrant and Refugee Rights Centre 2018, p. 43). It was only upon committal to prison that a number of those detained were able to contact an individual of their choice. Of the five additional interviewees, two of the three who were detained for long periods reported that they were provided with contact and visitation opportunities only once they had left Dublin Airport (ibid.).

⁴⁶⁹ Regulation 19(4), *European Communities (Reception Conditions) Regulation 2018*, S.I. No. 230/2018.

⁴⁷⁰ Interview with BMU, ISD, February 2021. Interview with GNIB, March 2021.

⁴⁷¹ Regulation 9(2), *Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987*, S.I. No. 119/1987.

⁴⁷² Correspondence with GNIB, April 2021.

⁴⁷³ Correspondence with GNIB, April 2021.

⁴⁷⁴ Rules 5 and 46, *Prison Rules 2007*, S.I. No. 252/2007.

⁴⁷⁵ Rule 16, *Prison Rules 2007*, S.I. No. 252/2007.

⁴⁷⁶ Correspondence with the Irish Prison Service, April 2021.

6.5 CONCLUSION

This chapter has presented an overview of four key sets of rights and safeguards: legal assistance and legal remedies; access to medical attention and healthcare; access to information and the right to be informed; and the right to communicate with a third party.

Overall, the rights and safeguards provided to international protection applicants, including persons subject to Dublin transfer decisions, are stronger and more explicitly set out in law than they are for persons refused leave to land or who are subject to a deportation order. While in practice, some persons may be able to access legal remedies and legal assistance, and healthcare, as well as have the right to be informed and to communicate with a third party, there are limited provisions in law for these rights and safeguards for those refused leave to land or who are subject to a deportation order.

CHAPTER 7

Conclusion

While detention in the EU is governed by a wide body of international, regional and national law, there are fewer provisions that set down rules on the administering of alternatives to detention. Thus, the ways in which alternatives to detention are legislated for and used in practice on a national level varies across the EU. Ireland, as compared to other EU Member States, tends to use alternatives to detention in the first instance. However, Ireland is also the only EU Member State to not have dedicated immigration detention facilities and therefore exclusively relies on Garda Síochána stations and prisons for immigration detention.

Gaps and limitations in the data available make it difficult to present a comprehensive picture of the use of detention and alternatives to detention in Ireland. Figures are not available for the number of persons detained in Garda stations, and neither are they available for the total number of persons subject to an alternative to detention. The provision of these data would allow for a more comprehensive picture of the extent to which detention and alternatives to detention are used in Ireland.

This study has examined the use of detention and alternatives to detention for four categories of persons: international protection applicants; persons subject to a Dublin transfer decision or a return order; persons refused leave to land; and persons subject to a deportation order. The provisions for each category vary, both with regard to detention and to alternatives, as well as their use in practice.

Stakeholders interviewed for this report highlighted advantages and challenges in using alternatives to detention. Advantages included alternatives to detention being less invasive than detention and not infringing upon the personal liberty of the person. They were also reported to be less costly for authorities, particularly when compared to use of places of detention, and to require fewer staff. The use of alternatives also allows for greater integration in the community for the individual. Challenges highlighted by authorities included high rates of absconding, as well as, from the perspective of the third-country nationals concerned, costs involved in meeting mandatory reporting conditions and the uncertainty, mainly in terms of time involved, surrounding a deportation order and its enforcement.

A key challenge raised by non-governmental organisations (NGOs) and legal practitioners is the limited availability of legal remedies and limited access to legal representation, such as civil legal aid, particularly for persons refused leave to land. The Garda National Immigration Bureau (GNIB) and the Border Management Unit (BMU) reported that when a person who has been refused leave to land requests legal representation, this can be facilitated.

The oversight of places of detention is currently conducted by the Office of the Inspector of Prisons (OIP); however, reports produced by this office do not tend to comment on the situation of persons detained for immigration-related purposes. The Garda Síochána Ombudsman Commission (GSOC), along with the Policing Authority and the Garda Inspectorate, is responsible for oversight of Garda Síochána stations; however, it does not carry out inspections. In the Programme for Government 2020, it is stated that Ireland intends to ratify the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). If ratified, this would entail the establishment of an NPM, which would comprise independent body(ies) to monitor places where people are deprived of their liberty. The European Committee for the Prevention of Torture Inhuman or Degrading Treatment or Punishment (CPT) and the United Nations Committee Against Torture (UNCAT) also provide oversight in their periodic visits, albeit infrequently. Some of the main concerns raised in reports by the CPT on the use of detention in international protection and return procedures include the inappropriateness of prisons as immigration detention facilities, the executive power to arrest without warrant and issues around access to legal remedies.

The use of detention in immigration policy in Ireland is currently under review and a Department of Justice working group has been established to this end.⁴⁷⁷ In the government response to the CPT report in 2020, it was indicated that a longer-term sustainable solution is currently being explored (CPT, 2020b).

⁴⁷⁷ Interview with BMU, ISD, February 2021.

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APPENDIX I

Refusals of leave to land by location (2014–2020)

TABLE A.1

Location	2014	2015	2016	2017	2018	2019	2020
At land border	230	335	415	380	255	465	170
At sea borders	110	235	235	270	200	320	165
At air borders	2,135	2,880	3,300	3,100	4,340	6,670	2,450
Total	2,475	3,450	3,950	3,750	4,795	7,455	2,785

Source: Eurostat, 'Third country nationals refused entry at the external borders – Annual data (rounded)', accessed 21 June 2021.

APPENDIX II

Detained for immigration-related reasons (2015–2020)

TABLE A.2

Immigration-related reason	2015	2016	2017	2018	2019	2020	Total per reason
Failing to have valid passport	221	314	298	131	108	76	1148
Failing to have valid visa	97	93	104	257	356	154	1061
Remaining in the State after expiry date of permission			3	6	11	5	25
Failing to produce registration certificate etc.	11	4	2	2	5		24
Failing to comply with provisions of a notice under section 14(1) of the Immigration Act 2004	4	3	3	9			19
European arrest warrant offences	2	1		5	3		11
Failing to leave a place/ re-enter within 7 days		1	1	1	4		7
Embarking from the State and failing to furnish to an immigration officer (information they may reasonably require for the purpose of their performance of their function)	1		1	1		3	6
Landing in the State without possession of a valid passport (other than from Great Britain or N.I.)		1	2			3	6
Failing to co-operate with deportation (failure to co-operate to obtain travel document)	2					1	3
Failing to co-operate with deportation (obstruct or hinder)	1				2		3
Failing to ensure persons seeking to land/pass through state disembark in compliance with directions of immigration officer	1	1	1				3
Failing to make a declaration embarking at any place in the State					1	2	3

TABLE A.2 (CONTD.)

Immigration-related reason	2015	2016	2017	2018	2019	2020	Total per reason
Carrier failing to furnish immigration officer with information requested		1		1			2
Failing to furnish information to a registration officer (having arrived by land from N.I. to take up employment in the State)			1			1	2
Failing to present to an immigration officer on arrival	1		1				2
Failing to comply with a requirement from an authorised officer				1		1	2
Organising etc. illegal immigrants/asylum seekers to enter the State		2					2
No entry visa (having arrived in the State by land from N.I.)						1	1
No transit visa (having entered the State)			1				1
Total	341	421	418	414	490	247	2,332

Source: Correspondence with the Irish Prison Service, October 2021.

APPENDIX III**Reasons for refusal of leave to land at Dublin Airport in 2020****TABLE A.3**

Refusal reasons under section 4(3) of the Immigration Act 2004, as amended	Total refusals
(a)(b)	1
(a)(b)(e)	1
(a)(e)	2
(a)(e)(g)(k)	1
(a)(g)(k)	1
(a)(h)	1
(a)(h)(k)	2
(a)(j)	2
(a)(k)	22
(b)	7
(b)(e)	1
(b)(e)(f)	1
(b)(e)(k)	1
(b)(h)	1
(b)(h)(k)	1
(b)(j)	1
(b)(j)(k)	1
(b)(k)	58
(d)(h)(k)	1
(d)(k)	1
(e)	117
(e)(f)	2
(e)(f)(h)(j)(k)	1
(e)(g)	5
(e)(g)(h)	1
(e)(g)(h)(k)	1
(e)(g)(k)	26
(e)(h)	5
(e)(h)(j)(k)	1
(e)(h)(k)	24
(e)(j)	2
(e)(j)(k)	3
(e)(k)	129
(f)	8
(f)(j)	1
(f)(k)	6

TABLE A.3 (CONTD.)

Refusal reasons under section 4(3) of the Immigration Act 2004, as amended (g)	Total refusals 515
(g)(h)	5
(g)(h)(k)	4
(g)(k)	360
(h)	57
(h)(j)(k)	1
(h)(k)	102
(h)(k)(l)	1
(j)	44
(j)(k)	65
(k)	626
(k)(l)	1
(l)	1
Total	2,221

Source: Correspondence with the BMU, October 2021.

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