



Migrant Rights Centre Ireland

Submission to the Irish Government's Consultation Process on Progress on the Implementation of the International Convention on Economic, Social and Cultural Rights

11th November 2011

1. Introduction

The Migrant Rights Centre Ireland (MRCI) is a national, non-governmental organisation working to protect the rights of migrant workers and their families, with a specific focus on those at risk of poverty, social exclusion and discrimination. Since our foundation in 2001, MRCI has sought to promote the right and to highlight the experiences of migrant workers who are undocumented, or at risk of becoming undocumented and those vulnerable to exploitation, including extreme forms such as forced labour and trafficking for forced labour.

This submission will address issues relating to migrants who are at risk or living in poverty and experiencing social exclusion and discrimination focused on specific rights such as, equality, access to and fair treatment in the labour market, the right to education, and the right to health.

2. Comment on the General Legal Framework under which Human rights are protected

Ireland has shown its commitment to international human rights by ratifying a number of human rights treaties, including: the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of Discrimination Against Women, the Convention on the Rights of the Child and the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment. Ireland has still to ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families and it is the recommendation of the MRCI that they do so as to ensure compliance with the international human rights standards.

The Irish Human Rights Commission (IHRC) is charged with monitoring human rights access across the country and the development of policies for the furtherance of human rights in Ireland. In 2008, the Human Rights Council commented on the cut to the budget of IHRC. This budget of the IHRC has been subjected to further cuts, jeopardising the IHRC ability to conform the Paris Principles governing human rights commissions.

Ireland does not have a body charged with monitoring racism and the MRCI strongly recommends that such a body be established in line with that proposed by Article 7 of the International Convention on the Elimination of Racial Discrimination. Cutting of the racism monitoring mechanism remains problematic, as do the amalgamation of equality and human rights bodies and the elimination of a Minister with specific responsibility for Integration.

3. Comment on progress under specific Articles

Article 2. Non Discrimination and Equality

MRCI has been working with undocumented migrants and their families since 2001. In the two year period from July 2009 to July 2011, MRCI provided information and support to 1,250 undocumented migrants from 75 different nationalities. 75% were over 30 years of age and 87% had been living in Ireland for 4 or more years.

MRCI submits that rights for undocumented workers are relevant to this article. While the situation of undocumented workers is relevant to and cuts across a number of rights set out in the Convention, we set out the key issues here.

There are approximately 30,000 undocumented people in Ireland today, facing a greater risk of exploitation, poverty, social exclusion and they often live in situations of forced destitution. Due to their irregular immigration status undocumented migrants are much more vulnerable to mistreatment. Often faced and with few options and alternatives, they are forced to stay in exploitative situations. The majority of this group are engaged in some form of employment in the state, typically in more informal job sectors such as restaurants and cleaning, often living on meagre incomes. Many have been with the same employer for several years.

Undocumented migrants often live in the shadows under tremendous stress and fear of deportation. They face significant problems in accessing basic and essential services, such as health and education. They remain effectively cut off from visiting their extended families just like the Irish undocumented in the US. They fear the authorities, in particular the Gardaí, and are reluctant to report crimes such as domestic violence, theft and racist incidents.

It is critical that Ireland address the situation of the undocumented by providing a fair and responsible solution that recognises and balances the issues and concerns of undocumented migrants and the Irish state. The MRCI believes this can be best achieved by introducing an Earned Regularisation Scheme. Such a scheme would give undocumented people and their families living in Ireland a window of opportunity to come forward and earn their way to permanent residency status. Upon registering for the scheme and paying a fine, eligible applicants would be granted a temporary residency status. Then individuals would work their way to earning permanent residency status by meeting specific criteria such as working, paying taxes and contributing to the community, over a limited time period.

Earned regularisation is not an amnesty. It is earned over time as opposed to being rewarded automatically. It is a pragmatic solution which considers both the rights and responsibilities of undocumented migrants, and the Irish state. International migration experts consider earned regularisation as the most effective model to respond to the undocumented situation. They also point out that any potential pull factor in terms of irregular migration is likely to be minor relative to other factors, such as the labour market and family reunion¹.

The Habitual Residency Condition on which much access to social protection depends prevents undocumented migrants accessing such protection. Access to social protection is central to a person's ability to seek redress. If migrant workers feel they have been discriminated against while accessing social welfare services, they cannot make a complaint to the Equality bodies because these services are exempt from the equality legislation. Migrant workers who have paid social insurance contributions should be able to access benefits regardless of their legal status.

¹ Demetrios. G. Papademetriou & Will Somerville (2008) *Earned Amnesty: bringing illegal workers out of the shadows*. (PUB: Centre Forum)

Article 3. Equality Between men and Women/Measure M: Steps to Overcome Human Trafficking

MRCI recognizes the progress that has been made on the issue of Trafficking in Human Being and in particular, the work of the Anti-Human Trafficking Unit. However, since the enactment of the Criminal Justice (Human Trafficking) Act 2008, no prosecutions have been taken by An Garda Siochana for forced labour. Despite trafficking legislation few victims are identified and protected and few perpetrators are actually prosecuted and convicted. To date, in Ireland there have been no convictions for trafficking for forced labour. The low rate of prosecutions for trafficking, contributes to the confusion about the incidence of trafficking, and leads to an underestimation of the severity of the problem.

The appointment of a National Rapporteur, working with government but independent of them, who would monitor the effects of the implementation of legislation and policy developments, would be a significant development in this area.

Article 6. The right to work/ B Accessibility to the Labour Market

Legislation for low paid work

Many migrant workers in Ireland are in low paid employment and will be particularly badly affected by proposed legislation in relation to Employment Regulation Orders (ERO's), Registered Employment Agreements (REA's) and Joint Labour Committees (JLC). While the number of migrant workers coming to Ireland has decreased, many migrant workers and their families have made Ireland their home. They are keen to be part of Ireland's recovery and to contribute to a more just and equal society. MRCI believes that cutting EROs and REAs and the wage setting mechanisms in any way will work against Ireland being a more equal place for migrant workers and their families. Also, the erosion of the terms and conditions set by EROs and REAs will undoubtedly lead to greater poverty and social exclusion of those who are covered by them. In MRCI's experience many workers have already had their hours cut which has put them and their families under great pressure and hardship.

MRCI recommend that there are no cuts or reduction to worker's wages and conditions set by ERO's and that the JLC mechanism of social dialogue between workers and employers for determining wages and conditions of EROs is maintained.

Employment Permits

There are approximately 15,000 migrant workers currently in the employment permit system in Ireland. The immigration status of individuals in this system is directly tied their employment permit. There are two primary types of permits, the work permit and the green card. Approximately 75% of the total are work permit holders. Work permit holders must complete at least five years in the permit system before they are entitled to apply for residency status in their own right which then entitles them to work without a permit.

Permit holders are tied to their employer, that is, they are only allowed to work for the employer stated on their permit and cannot freely change employer. They may apply to change employer within their employment sector or within another eligible sector of employment but there are significant obstacles. They must first complete a minimum of 12 months with an employer and then submit a new application for a permit which entails returning their current permit, paying another permit fee (€1,000) and waiting a minimum of two months for the permit to be processed, during which time they are not entitled to work. It is MRCI's experience that workers risk losing their immigration status if they attempt a change of employer in this way. It is also extremely difficult to find prospective employers who are willing to deal with the delays, cost and bureaucracy of the permit system. These factors greatly hinder permit holders from attempting to change employer and create the conditions that trap workers in situations of exploitation.

Workers claim that not being able to freely change employer puts them in a powerless situation, wholly dependent on the employer for their permit and continued legal immigration status. Migrant workers commonly speak of how employers threaten them with revoking or not renewing their permit if they complain. One of MRCI's most serious cases involved an Indian national working in virtual slave-like conditions in a private home for five years, who received a Labour Court award of over €240,000 in unpaid wages.

Recent reports by the United Nations, the Organisation for Security and Co-operation in Europe (OSCE), The International Labour Organisation (ILO) and Amnesty International, all indicate that the practice of linking a worker to a single employer and limiting the options to change employer contributes to exposing migrant workers to greater risk of labour exploitation.

The lack of freedom to change employer is also a major factor in workers becoming undocumented in Ireland. The MRCI has assisted hundreds workers who have become undocumented after falling out of the employment permit system. This occurred when workers left exploitative employment or when false promises were made by their employer that a permit would be renewed. This phenomenon has been acknowledged by the government's Undocumented Workers Scheme of 2009. However, the primary cause of workers becoming undocumented has still not been addressed.

The MRCI believes that a better and fairer employment permit system would be one in which employment permits are granted to workers within a designated job category with the right to freely change employer. This basic change would provide significant benefits and it does not require a complete overhaul of the employment permit system.

Redress for breaches of employment rights

Through no fault of their own, a worker can thus lose any legal right to live in Ireland, resulting in much associated difficulty. The workers who find themselves in such a situation will be under great stress and anxiety as they feel they have no formal right to remain in the country and have in the process been criminalised despite being the one who has experienced ill treatment.

In a growing number of cases where an employee has become undocumented and is therefore not legally resident in the country, employers have sought to rely on the defence of illegality of contract. This stems from the traditional position that where the employee is not legally entitled to work, their contract of work is illegal and therefore unenforceable. This presents obvious difficulties for an employee who has become undocumented through the negligence of their employer.

There has been case law which seeks to put some onus on the employer in such situations and allow a complainant to seek statutory protection, namely enforcing their employment rights. It is important that undocumented worker's employment rights are protected and that the inspectorate and the legal redress mechanisms follow through on it. To date, however, the inspectorate and redress bodies have indicated that they cannot or will not seek monies owed to undocumented workers. A bar to recovery of lost wages by an undocumented worker would lessen an unscrupulous employer's potential liability to undocumented workers and make it more financially attractive to hire them.

MRCI recommends that a legal provision is introduced in to an existing law that enables all workers, regardless of their legal status, to have the right to exercise their employment rights, and ensure there are no barriers to legal redress.

Article 7. Just and Favourable Conditions of Work

Forced Labour

Since MRCI opened in 2001 it has identified over 150 cases of forced labour. MRCI assists workers in the domestic, agricultural, restaurant, seafaring and construction sectors who have experienced forced labour. Forced labour begins with deception about working and living conditions, followed by low or no pay. Deception, coercion and abuse are also used to control workers. The process can also be gradual: working conditions may be initially decent but deteriorate over time.

Despite the requirements of Article 25 of the 1930 ILO Convention and Article 4 of the European Convention on Human Rights concerning Forced or Compulsory Labour² that forced labour shall be punishable as a penal offence, Ireland has failed to introduce penalties and effective remedies to victims of forced labour.

The Criminal Law (Human Trafficking) Act 2008 states that trafficking for labour or sexual exploitation is a crime with a maximum sentence of life imprisonment. In MRCI's experience, the current interpretation of this Act by the authorities is that trafficking into or within Ireland is a required ingredient for there to be an offence. The 2008 Act can, however, be read as criminalising forced labour without the ingredient of cross-border or internal trafficking.

MRCI submitted this interpretation to the authorities in June 2010, but unfortunately a response is still outstanding. Without a crime of forced labour, victims who have not been trafficked or where trafficking is difficult to prove, are not protected under Irish law.

MRCI recommend that, in order to ensure compliance with ILO Conventions and other human rights obligations, the interpretation of the Criminal Law (Human Trafficking) Act 2008 should be immediately accepted by the authorities, or if not, that a new law of forced labour is immediately drafted and passed.

Article 11. Adequate Standard of Living

Undocumented workers

Significant numbers of the undocumented population are families and children. An MRCI survey of undocumented migrants in 2011 revealed that 62% live with their spouse and 58% have children under the age of 18 years. 50% of all children were born in Ireland. Due to their irregular immigration status however undocumented migrants are much more vulnerable to mistreatment and often live on meagre incomes. Undocumented migrants often live in the shadows under tremendous stress and fear of deportation. They encounter significant problems in accessing basic and essential services. In this context children are more at risk of living in poverty and often do not have an adequate standing of living in the State.

² A fundamental convention of the ILO according to the 1998 Fundamental Declaration

Article 12. The Right to Health

Access to health care is a basic need and right for all human beings. In the experience of MRCI most undocumented migrant workers will not access medical services due to the fear of becoming visible. Many undocumented migrants ignore minor illnesses and only attend hospital following accidents or emergencies. The coping mechanisms used by other migrant workers are not as available for this group, for example they cannot travel home to seek medical attention as without a valid permission to remain they are not able to move freely. This drives migrant workers to seek alternatives and in some cases use uncertified medical practitioners. Self-medication is also common place.

Immigration status also plays a key part in accessing pre and post natal care. Many women after they give birth report that they do not consistently return for medical checkups, impacting in the long term on their gynecological and reproductive health.

The proposed Immigration Residence and Protection Bill provides that undocumented workers should only be allowed to access the emergency services. This runs contrary to Article 12 .2 (D) of the International Covenant on Economic, Social and Cultural Rights in relation to all participants of society being supported to access basic level of medical services, as well as being contrary to a range of policy commitments by successive Irish governments.

MRCI submits that access to health services for migrant workers, particularly undocumented migrant workers is an area of concern in Ireland today. It is also respectfully submitted that undocumented migrants should not be limited to emergency services. Undocumented migrant workers and those working in an irregular situation should have the right to access basic health and social care services in Ireland.

Article 13. Right to Education

Child dependants of non-EU workers in Ireland are not issued with an immigration stamp until they turn 16. Long term residency status which is earned by parents cannot be transferred to their children, and children cannot earn long term residency status in their own right. International (non-EU) students are subject to a different fee regime for higher education, a difference which amounts to several thousand Euros. The decision on whether an applicant has to pay Non-EU fees is made by individual universities on a case-by-case basis after applying a residency test. It is almost impossible for a child dependent of non-EU migrant workers to get access to financial assistance for their studies as a nationality requirement has to be satisfied to be eligible for a grant.

The lack of a coordinated and transparent procedure in issuing stamps to child dependents, the ad-hoc approach of universities and the inability of children to earn long term residency in their own right often leads to children being subject to excessive university fees when they have been resident and schooled in Ireland for many years. Loss residency and the denial of the right to education are also significant problems

The Irish immigration system has yet to establish fair, consistent and clear procedures to deal with thousands of children of non-EU migrants born outside of Ireland but who have settled with their families here. The *ad hoc* nature of the current system presents significant barriers to these children even if they have lived in Ireland for many years and their parents have become Irish citizens or permanent Irish residents. Many children of non-EU migrants are denied reduced fees and financial assistance in attending third level education. Most are barred from entering the labour market without an employment permit. Many are being forced to leave Ireland when they reach 18 or face becoming undocumented. This situation is having a detrimental impact on the lives and well-being of migrant children and on families and communities. The inequality of the system undermines Ireland's commitment to integration and the rights of children and families. Urgent government action is required to remove these unnecessary barriers and to provide a system that is fair and just.

4. Recommendations

- Reintroduce a state sponsored racism monitoring mechanism; ensure that all State bodies are covered by equality legislation.
- Issue an authoritative statement confirming that forced labour is a crime.
- Appointment a National Rapporteur, working with government but independent of them, to monitor the effectiveness of the Anti-Human Trafficking Strategy.
- There should be no cuts or reduction to worker's wages and conditions set by ERO's and that the JLC mechanism of social dialogue between workers and employers for determining wages and conditions of EROs is maintained.
- Grant employment permits to workers within a designated job category with the right to freely change employer.
- Introduce a legal provision in to existing law so that all workers, regardless of their legal status, have the right to exercise their employment rights, and ensure there are no barriers to legal redress.
- Reform the legislation in relation to fees for third level and higher education financial assistance to remove the significant access barriers faced by migrant students who are long term residents.
- Introduce a regularisation scheme to enable undocumented migrants to re-enter the immigration system.
- Reform the Habitual Residence Condition to ensure that it does not discriminate against migrant workers.