

IRELAND OF THE EXCLUSIONARY WELCOMES - UNCOVERING IMMIGRATION-RELATED DETENTION

Tony O’Riordan, SJ

In January 2007, the Minister for Justice said that his Department was considering introducing a scheme whereby “high-risk” asylum seekers would be held in detention centres while their claims are fast-tracked¹. While the precise details of this scheme and its rationale remain to be revealed, many commentators reacted with alarm and questioned the necessity or desirability of such measures. In this context it is worth noting that the Government already presides over an extensive practice of detaining people under immigration laws. It is a practice that has developed in Ireland in recent years and, before any further measures to detain asylum seekers are considered, the current practice should be thoroughly examined. From 2003 to 2005, over 3,500 people, including asylum seekers, have been detained in prisons in this country on the basis of their immigration status. Almost 10% of all those sent to prison in 2005 were sent there under powers provided for under immigration laws². The vast majority of males detained under

immigration legislation are held in Cloverhill Prison, Dublin. The vast majority of females are detained in the Dochas Centre in Mountjoy Prison, to which there were 191 immigration related committals in 2005³.

In Prison but Not guilty

Although these detainees are in prison, they did not commit a crime and are not in prison as punishment. They are imprisoned as an administrative procedure – part of the routine practices of the immigration system. Anyone who takes the international commitments towards refugee protection and human rights seriously cannot justify the routine detention of immigrants just for the sake of simplifying administrative procedures. Yet it is not all that clear why there is a need to detain so many migrants in Irish prisons each year on that basis. It is a matter that receives little attention in the media and the practice is allowed continue without much public scrutiny or public concern.

This lack of scrutiny and concern is, perhaps, part of the culture of silence and indifference to the plight of vulnerable migrants, especially asylum seekers and refugees, which has developed in the light of increasing focus on migration from EU accession states. Issues arising from increased labour migration have overshadowed debate on our international obligations to the millions of refugees worldwide, a small proportion of whom make it to our shores. Detaining people because of their immigration status has not evoked public outrage, nor have a range of other state imposed exclusionary practices. These include the effective quarantining of in excess of 4,400 asylum seekers in accommodation centres, where they are provided with shelter, food and clothing and a cash allowance of €19.30 a week. Not allowed to cook, study or work causes them immense suffering and deterioration in their mental well-being. They have little means or opportunity to meet and integrate with people who live near these centres.

Another serious exclusionary practice concerns the large number of people who are refused permission to enter the country at ports and airports. This number now exceeds the total numbers admitted to the asylum process. A lot of energy is spent in measures to exclude people who might claim asylum. Predicated on the belief that many will not meet the strict criteria of refugee, we have a range of repressive measures that make it increasingly difficult to enter the country to claim asylum and, once in the country, official policy makes life difficult for many asylum seekers, including the use of detention.

Current Detention Practices Under Scrutiny

Some human rights organisations and NGO’s have sought to draw attention to the practice of detaining people under immigration laws. Details of the practice received some attention when, in September 2005, following an approach from the Jesuit Refugee Service Ireland, a number of Irish MEPs visited Cloverhill Prison to assess the situation of migrants detained there ⁴.

On that occasion they noted that approximately 70% of the 110 foreign nationals detained in Cloverhill were there under the provisions of immigration legislation. MEPs found that the facilities were humane and the conditions of detention generally satisfactory, although the question of

possible overcrowding had been raised during the visit. They noted that detainees benefit from the same services as prisoners on remand, including health care, psychological assistance and access to sport activities. MEPs praised the staff in Cloverhill whom they considered to be committed to ensuring that the conditions of detention were as good as possible in the circumstances. However, they all expressed serious concern that asylum seekers and irregular migrants are being detained in a prison when they have not committed a crime. They expressed concern about the possible serious negative consequences for the mental and physical well-being of the detainees, noting that detention can often add to existing trauma and mental health problems. After the visit, the MEPs recommended that:

- detention should be used as a measure of last resort;
- those detained under immigration and refugee legislation should be separated from sentenced prisoners and those remanded on criminal charges;
- overcrowding must be avoided in all circumstances;
- the period of detention should be kept to the minimum and a reasonable maximum clearly laid down in legislation;
- the right to family life, as provided by the European Convention on Human Rights, 19 should be guaranteed to those in detention;
- Ireland should sign up to the EU Directive laying down minimum standards for the reception of asylum seekers.

Conditions in prisons used for detention in Ireland again became the focus of attention in November 2005, with the publication of a research report, *Immigration-Related Detention in Ireland*, which had been commissioned by the Irish Refugee Council, the Irish Penal Reform Trust and the Immigrant Council of Ireland. On the basis of interviews with detainees, and of an independent examination of living conditions, the report concluded that: 'neither Cloverhill Prison nor the Dochas Centre provides an appropriate environment in which to hold immigration detainees'⁵.

Who is Held?

There are 3 main categories of persons held under immigration laws:

- persons refused permission to land
- applicants for asylum
- persons awaiting deportation

.....

Only aggregate statistics are provided on immigration-related detention, so there is no accessible breakdown to show what proportion is made up of different groups, for example, pre-admission asylum seekers; pre-removal detainees; those who have been refused permission to land or other groups of irregular immigrants. There is no published information available to tell us where these people came from, or under what specific provisions of law they are detained. The lack of such transparency is a serious gap in our immigration system and makes a thorough assessment of the practice of detaining immigrants very difficult.

Pre- admission detention

On the face of it there appear to be three broad forms of administrative detention. The first form of administrative detention concerns asylum-seekers, and is termed “pre-admission detention”. Pre-admission detention happens immediately after arrival. It concerns the detention of people who have not yet made nor have had the opportunity to make an asylum application. The 2005 Annual Report of the Office of the Refugee Applications Commissioner (ORAC) notes that during 2005, 239 asylum applications were received from persons detained in prison⁶. Some of these applicants were subsequently released from prison to pursue their applications, while ORAC notes that 121 applicants were interviewed in prison. Significantly, no information is available on how many asylum applications made in prison are positively determined.

Such information might allay the concern that detention may prejudice an asylum seeker’s claim or may result in their claim being automatically put into the ‘fast-track’ on the basis that it is ‘manifestly unfounded’. The consequence of pre-admission detention in these cases may be to undermine a person’s right to seek asylum. Transparency is one of the vital safeguards to allay this concern. It is important that ORAC publish a more detailed account of asylum applications made from prison and the outcome of such applications. Such an account should include information concerning applications processed while applicants remain in prison and those applicants whose cases are determined after release.

Pre-removal detention

Pre-Admission Detention can be distinguished from the detention of irregular immigrants with the intention of deportation, often described as

“pre-removal detention”. In 2006 some 1,566 deportation orders were signed and 302 of these were effected. Anecdotal evidence suggests that it is a common occurrence to detain migrants before deportation, as part of the administrative process of organising the return of migrants. No official figures, however, are available to show how many of the 302 people deported were detained just prior to their deportation.

Refused permission to land detention

A third category of person likely to be detained for administrative reasons concerns those who are refused permission to enter the country. If a person is refused leave to land at an airport or port, an immigration officer may arrest that person and detain him/her in a prescribed place (Section 5 of the Immigration act, 2003). Under the Immigration Act 2003 (Removal Places of Detention) Regulations 2005, Garda stations and prisons are prescribed places of detention for the purposes of the Act. It is the case, therefore, that from time to time, individuals who have been refused permission to be in the State are detained in prison. However the assessment of this practice in both its extent and desirability on an evidence led basis is again difficult because of the paucity of detail available.

The Figures

From what official figures are available it would appear as if there has been decline in the numbers being detained in each of the years 2003-2005⁷. In 2003 a total of 1,852 people were detained in Irish prisons under provisions of our immigration laws. Significantly fewer people were detained on these grounds in 2004 (946) and perhaps even more significantly there was also a large reduction in the numbers held for long periods. In that year 70 people were held for periods longer than fifty days compared with 367 in 2003.

2003	1852
2004	946
2005	860

The number of immigration related detentions in Irish prisons 2003 to 2005

The downward trend appears to have continued into 2005. The most recent annual report of the Irish Prison Service notes that 860 of the 8,686 persons who entered the prison system in 2005 were immigration detainees. This represents a 9% decrease in the number of immigration detainees as compared with the previous year. So not only have the numbers detained fallen since 2003, there is also a reduction in the number of people spending long periods in detention. 19 people were in detention for 50 days or more in 2005 compared with 367 in 2003. Over half those detained in 2005 were in prison for 3 days or less. Close to a quarter were detained for at least a week and some for over two months or more. Curiously, the Irish Prison Service Report for 2005 states that ‘the indications are that the reduced level is likely to be maintained or possibly fall further in future years.’ While such a trend is to be welcomed, the report does not elaborate on the ‘indications’ that lead to such a conclusion. Whatever these indications might be, on the face of it appears that the Prison Service is of the view that the need for detention is declining.

Concerns about the Legal Provisions for Detaining Asylum Seekers

The observable decline in the practice of detention is to be welcomed. It may indicate some effectiveness of those human rights groups and NGOs that have sought to draw attention to the practice. The fact remains that significant numbers continue to be detained. It is important to look at the legal provisions that underpin this practice. The amended 1996 Refugee Act outlines six grounds under which an immigration officer or a member of An Garda Síochána may detain an asylum-seeker. These are when, ‘with reasonable cause’, he or she suspects that an asylum-seeker:

1. poses a threat to national security or public order in the State;
2. has committed a serious non-political crime outside the State;
3. has not made reasonable efforts to establish her/his true identity;
4. intends to avoid removal from the State in the event of his or her application for asylum being transferred to a convention country or a ‘safe third country’ (under the Dublin Convention asylum seekers must apply for asylum in the first ‘safe’ country that they enter);
5. intends to leave the State and enter another state without lawful authority; or
6. without reasonable cause has destroyed his or her identity or travel documents or is in possession of forged identity documents.

.....

Under these provisions Immigration Officers have considerable discretion under which they can, 'with reasonable cause', detain people entering the country to seek asylum. One may question the need to detain people on many of these grounds since the asylum process exist precisely to examine and deal with these matters. For example, a person may be detained on the grounds that they cannot adequately prove their identity or that they are travelling with either none or false travel documents. However having valid documentation is not a requirement to assert the right to claim asylum and, in fact, people fleeing persecution are often likely to travel with incomplete documentation. Issues arising from such circumstances should be a matter for the authorities charged with making a determination on the asylum claim. In such situations detention does little to aid the process of establishing the identity of such asylum seekers. The strongest grounds for detaining people are when circumstances in individual cases raise concerns about threats to national security or alleged criminal activity. However these concerns should be dealt with under criminal law proceedings and any decision to detain should comply with due process guarantees.

For other situations envisaged in the legislation, less coercive measures are available which may be far preferable and effective. The amended 1996 Refugee Act allows a judge to impose conditions for release of asylum seekers who have been detained, including '(I) that the person resides or remains in a particular district or place in the State, (II) that he or she reports to a specified Garda Síochána station or immigration officer at specified intervals, (III) that he or she surrenders any passport or travel document in his or her possession' (Section 9 (10)(ii)). These alternatives to detention are obviously preferable, both from a human rights and a cost perspective. Research in the UK, for instance, has shown that only 2 per cent of people released on bail in such situations have absconded⁸. The likelihood of a person absconding is clearly lower in the case of someone who is at the start of the process of trying to make a claim for asylum than it is in the case where a person has made the application, been turned down and, having exhausted all legal channels, is now faced with deportation.

The considerable discretion given to immigration officers and Gardai to detain asylum seekers at the point of entry also raises the question: who vindicates the rights of asylum seekers at the point of

.....
detention? Imagine the situation of an individual asylum seeker who arrives at a port of entry to Ireland and is detained because they cannot adequately prove their identity or are carrying false travel documents: what safeguards are in place to ensure that their rights are respected? It is important to remember that if an Irish national is arrested for an alleged crime they have certain statutory and constitutional rights. A Garda will inform them of these rights and allow them call their solicitor who can advise them on how to proceed. The rights of foreign nationals being detained under immigration legislation should likewise be protected; they are entitled to an explanation of the reasons for their detention in a language they understand and to have access to legal assistance. However authorities have resisted a proposal to have independent observers on site to monitor the practices of detaining people and refusing people permission to land.

Some such mechanism is required to ensure transparency particularly in light of the increasing numbers of people refused permission to enter the country. Under the Immigration Act 2004, third country nationals arriving in Ireland by air and sea are obliged to present themselves to an immigration officer for ‘permission to land’. There are eleven grounds outlined in the Act under which an immigration officer may refuse permission to land. One of the grounds is that the person 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. The Garda National Immigration Bureau (GNIB) reported that 4,827 people were refused permission to enter Ireland in 2003; in 2004 the number increased marginally, to 4,844. Significantly, according to GNIB, up to 10% of those refused permission to land were regarded as asylum seekers. We do not know how many of these people were detained in prison or how many were sent back to their country of origin.

Right to Manage Migration Flows v Right to Liberty

A state’s fundamental right to manage migration flows is largely undisputed. The state has a right to protect its people by preventing those who try to immigrate illegally, as well as those who might pose a threat to the health or security of the nation, from entering the country. In an ethical analysis of the detention of asylum seekers, Professor Markus Babo, University of Lucerne, writing in a Jesuit Refugee Service Europe report, *Detention in Europe*, argues: “This right must be enforceable, so that anyone refused

.....
entry, who does not leave the country voluntarily, may be forcibly removed. Without such sanction, legal immigration would be impossible to control and maintain and therefore the state would be forced into a passive role”⁹.

On the other hand, it cannot be denied that detention violates a person’s liberty. The right to liberty is a fundamental human right, which is protected by Article 6 of the Charter of Fundamental Rights of the European Union which states: ‘Everyone has the right to liberty and security of person’. As Professor Babo points out: “Should a state find it necessary to limit this right to liberty, it is obliged to give reasons, for the removal of liberty represents a grave moral evil to the affected individual. This can only be ethically justified, if an even greater evil (generally for the relevant state or society) is to be avoided by such means. Deprivation of the right to liberty of movement can therefore be allowed only in absolutely exceptional circumstances”¹⁰.

It is questionable if in Ireland the detention of people under immigration happens in ‘absolutely exceptional circumstances’. Any proposal to introduce an extension of coercive detention for certain asylum seekers does not seem to be justified.

The International Convention on Refugees, adopted by the United Nations, defines who a refugee is and gives a person a right to seek asylum in another state that is party to the convention. It places a duty on the state in question to accept and process each asylum application. It explicitly states that persons fleeing their country of origin on any of the grounds which it specifies shall not be liable to penalties on an account of irregular entry to another state. There are strong grounds to conclude that our current practice of immigration related detention undermines both the spirit and letter of this international law. The alternative to administrative detention of asylum seekers is not an open door policy on immigration; rather it is to ensure that the mechanisms of the asylum system operate so as to afford each applicant a full, fair, transparent and efficient hearing.

**Tony O’Riordan, S.J. is Director of the
Jesuit Centre for Faith and Justice, Dublin**

.....

I wish to acknowledge my gratitude for valuable insights and references taken from an article by Eugene Quinn and Renaud de Villaine, "To Detain or Not to Detain", published in *Working Notes*, Issues 51, December 2006.

Notes

- ¹ The Minister was speaking at a conference on the forthcoming Immigration and Residence Protection Bill, hosted by the Law Society on 29 January 2007.
- ² Irish Prison Service Annual Report 2005, p 9.
- ³ Ibid, p 39.
- ⁴ A full report of this visit can be found in *Working Notes*, the journal of the Jesuit Centre for Faith and Justice, Issue 51, December 2005, p 10. The delegation included Proinsias de Rossa (Labour), Bairbre de Brun (Sinn Féin), Mairead McGuinness (Fine Gael) and Gay Mitchell (Fine Gael)
- ⁵ Mark Kelly, *Immigration-Related Detention in Ireland*, Dublin, Irish Refugee Council, Irish Penal Reform Trust and Immigrant Council of Ireland, 2005, p8.
- ⁶ Annual Report of the Office of the Refugee Applications Commissioner, 2005, p 16.
- ⁷ The following figures were provided by Department of Justice Equality and Law Reform in its Update for the Follow-up Coordinator on the Recommendations in the Concluding Observations on the initial and second national report of Ireland under the United Nations Convention on the Elimination of All Forms of Racial Discrimination. It was made available in June 2006. More details available on: [www.diversityireland.ie/Publications/upload/File/Ireland Follow Up Report.doc](http://www.diversityireland.ie/Publications/upload/File/Ireland%20Follow%20Up%20Report.doc)
- ⁸ Irene Bruegel, and Eva Natamba, *Maintaining Contact; What Happens After Detained Asylum Seekers get Bail?*, London , 2002, p 16
- ⁹ Jesuit Refugee Service (JRS) Europe, *Detention in Europe*, Brussels, 2004, paragraphs 15.4.1
- ¹⁰ *ibid*, paragraph 15.4.2.