

UNHCR Submission Review of Prison Rules 2007 (SI 252/2007) – Public Consultation

I. Introduction

1. These observations are submitted by the United Nations High Commissioner for Refugees (“UNHCR”) in Ireland in relation to the Prison Rules 2007 (SI 252/2007).
2. UNHCR has a direct interest in law proposals in the field of asylum, as the agency entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, seek permanent solutions to the problems of refugees.¹ Paragraph 8 of UNHCR’s Statute confers responsibility on UNHCR for supervising international conventions for the protection of refugees,² whereas the 1951 Convention relating to the Status of Refugees³ and its 1967 Protocol relating to the Status of Refugees (hereafter collectively referred to as “1951 Convention”) oblige States to cooperate with UNHCR in the exercise of its mandate, in particular facilitating UNHCR’s duty of supervising the application of the provisions of the 1951 Convention and 1967 Protocol (Article 35 of the 1951 Convention and Article II of the 1967 Protocol).⁴
3. UNHCR’s supervisory responsibility is exercised in part by the issuance of interpretative guidelines on the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 Convention. Such guidelines are included in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and subsequent Guidelines on International Protection (“UNHCR Handbook”).⁵ UNHCR also fulfils its supervisory responsibility by providing comments on legislative and policy proposals impacting on the protection and durable solutions of its persons of concern. UNHCR has had a continuous presence in Ireland since 1998 and its supervisory role is also recognised in national legislation, namely the International Protection Act 2015.
4. UNHCR welcomes the opportunity to provide a submission in relation to the Review of Prison Rules 2007 (SI 252/2007) by the Irish Prison Service. UNHCR acknowledges that its mandate in relation to asylum-applicants is recognised in the Prison Rules 2007. At the same time, UNHCR wishes to address several points for consideration by the Irish Prison Service to ensure that persons falling under UNHCR’s mandate have access to asylum procedures and to the organisation while detained.

¹ UN General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V), available at: <https://www.refworld.org/docid/3ae6b3628.html> (“the Statute”).

² Ibid, para. 8(a). According to para. 8(a) of the Statute, UNHCR is competent to supervise international conventions for the protection of refugees. The wording is open and flexible and does not restrict the scope of applicability of the UNHCR’s supervisory function to one or other specific international refugee convention. UNHCR is therefore competent qua its Statute to supervise all conventions relevant to refugee protection, UNHCR’s supervisory responsibility, October 2002, available at: <http://www.refworld.org/docid/4fe405ef2.html>, pp. 7–8.

³ UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations Treaty Series, No. 2545, vol. 189, available at: <http://www.unhcr.org/refworld/docid/3be01b964.html>. According to Article 35 (1) of the 1951 Convention, UNHCR has the “duty of supervising the application of the provisions of the Convention”.

⁴ UNHCR’s supervisory responsibility has also been reflected in EU law, including by way of general reference to the 1951 Convention in Article 78 (1) of the Treaty on the Functioning of the EU.

⁵ UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, April 2019, HCR/1P/4/ENG/REV. 4, available at: <https://www.refworld.org/docid/5cb474b27.html>.

II. General remarks

5. Since the publication of the Prison Rules 2007, the Refugee Act 1996 (as amended), which was in force at the time, has been repealed and replaced by the International Protection Act 2015 (hereafter 2015 Act).⁶ Therefore, references to the Refugee Act 1996 require removal and updating to reflect the current primary and secondary legislation in relation to international protection in Ireland.

III. Specific observations

Asylum seekers crossing irregularly shall not be penalised for that sole reason

6. Travelling without fulfilling relevant travel and immigration requirements, including for example, visa requirements or registration procedures for legally exiting one country and entering another, is often an unavoidable reality for refugees who seek to invoke the international protection afforded to them under the 1951 Convention.⁷
7. Article 31 of the 1951 Convention relating to the Status of Refugees⁸ prohibits states from imposing penalties on refugees on account of their illegal entry or presence in the State provided they come directly from a territory where their life or freedom was threatened, present themselves without delay to the authorities and show good cause for their illegal entry or presence. Laws and policies penalising irregular entry and presence risk denying refugees access to fair asylum procedures and protection.⁹
8. Refugees apprehended at land, air or sea borders, and in country, without proper documentation may potentially be subject to punitive measures¹⁰ in Ireland. It sometimes occurs that persons seeking international protection, as defined by section 13(1) of the International Protection Act 2015, are arrested and charged with immigration offences prior to making such an application. UNHCR is aware of cases where such persons were charged with a criminal offence, for instance pursuant to [s.12 of the Immigration Act 2004](#), but were unable to lodge a claim for international protection without assistance.¹¹
9. UNHCR recommends that the Prison Rules 2007 be amended to ensure that all persons of concern to UNHCR, who are on remand or imprisoned for immigration offences, be provided with effective access to the international protection procedure, relevant

⁶ Irish Statute Book, International Protection Act, 2015, available at: <http://www.irishstatutebook.ie/eli/2015/act/66/enacted/en/pdf>

⁷ UN Ad Hoc Committee on Refugees and Stateless Persons, *Ad Hoc Committee on Statelessness and Related Problems, Status of Refugees and Stateless Persons - Memorandum by the Secretary-General*, 3 January 1950, E/AC.32/2, comment to paragraph 2 of then-draft Article 24, <http://www.refworld.org/docid/3ae68c280.html>, stating: “[a] refugee whose departure from his country of origin is usually a flight, is rarely in a position to comply with the requirements for legal entry (possession of national passport and visa) into the country of refuge. It would be in keeping with the notion of asylum to exempt from penalties a refugee, escaping from persecution, who after crossing the frontier clandestinely, presents himself as soon as possible to the authorities of the country of asylum.” UNHCR, *Beyond Proof, Credibility Assessment in EU Asylum Systems: Full Report*, May 2013, p. 213, <https://www.refworld.org/docid/519b1fb54.html>.

⁸ Convention relating to the Status of Refugees, 28 July 1951 (entered into force 22 April 1954), 189 UNTS 137 (1951 Convention).

⁹ UNHCR, Note on international protection, 16 June 2017, EC/68/SC/CRP.12, para. 24, <http://www.refworld.org/docid/595e1f684.html>

¹⁰ UNHCR, *Summary Conclusions on Non-Penalization for Illegal Entry or Presence: Interpreting and Applying Article 31 of the 1951 Refugee Convention*, 15 March 2017, Roundtable, available at: <https://www.refworld.org/docid/5b18f6740.html>

¹¹ *Afghan man assaulted in Cloverhill riot applies for asylum*, Irish Times, 13 July 2015, available at: <https://www.irishtimes.com/news/crime-and-law/afghan-man-assaulted-in-cloverhill-riot-applies-for-asylum-1.2303641>

information on that procedure and the right to contact and/or be contacted and/or visited by UNHCR.

Ensure access to UNHCR for all persons falling under its mandate

10. UNHCR notes that rule 16 of the Prison Rules 2007 ensures that an asylum applicant is provided with the means to contact UNHCR. In addition, rule 39 makes provision for a stateless person to receive a visit from the consul of a state of their choosing, and for “asylum applicants” to receive a visit from international or national authorities or organisations serving the interests of refugees and stateless persons, as designated by the Minister. UNHCR recommends the retention of such rights for asylum-applicants and stateless persons and that UNHCR is designated as such an organisation.
11. UNHCR strongly recommends that any revision to the Prison Rules allows for all persons falling under UNHCR’s mandate to have access to relevant information and to the organisation if matters relating to their protection needs or statelessness arise while they are detained. All persons in detention, on remand or imprisoned for immigration offences who are seeking to make an application for international protection, or are refugees or subsidiary protection beneficiaries, or are stateless, should be able to contact and be contacted and/or visited by UNHCR.
12. UNHCR also wishes to highlight that the special circumstances and needs of asylum-seekers and refugees should be taken into account for the purpose of the Prison Rules review. Asylum-seekers may have experienced traumatic events before seeking asylum and they may require specialised support to manage the psychological consequences of their past experiences.¹² In this context, detention is likely to have a negative impact on their physical and mental health. This underscores the importance of ensuring that all asylum applicants and persons seeking to make an application for asylum have quick and effective access to the international protection procedure, to related information on that procedure, and to be able to contact and/or be contacted and/or visited by UNHCR while detained.

(i) Asylum seekers pursuant to section 13(1) of the International Protection Act 2015

13. The International Protection Act 2015 differentiates between persons expressing an intention to seek asylum, and those who have effectively managed to lodge an asylum application. Section 13(1) of the International Protection Act 2015 refers to persons who are in the State, or at the frontiers of the State, and who indicate that they wish to apply for international protection, or request not to be returned to their country of origin for fear of persecution or other serious harm.¹³ Section 2(1) of the International Protection 2015 Act

¹² UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, Guideline no.9, makes specific reference to the special circumstances and specific needs of particular asylum-seekers, including victims of trauma or torture, women, victims or potential victims of trafficking, asylum-seekers with disabilities, older asylum-seekers and LGBTI asylum-seekers. Available at: <https://www.refworld.org/docid/503489533b8.html>

¹³ International Protection Act 2015, above note 6, Section 13(1) states: “A person who is at the frontiers of the State, or who is in the State, and who indicates that he or she— (a) wishes to make an application for international protection, (b) is requesting

defines an “applicant” as someone who has lodged an application for international protection with the Minister for Justice in accordance with section 15 of that Act.¹⁴

14. UNHCR is concerned that if the only term included in the Prison Rules is “asylum applicant” or “applicant for international protection”, this will limit its scope to section 2 of the 2015 Act, which may result in a denial of the right to seek asylum and/or access to UNHCR for persons who have not formally registered as an international protection applicant.
15. Under international law, asylum seekers in detention¹⁵ are entitled to contact and be contacted by UNHCR, the means to make such contact and the right to communicate in private.¹⁶ This applies equally to asylum-applicants whose claims are being considered within status determination procedures, as well as admissibility, pre-screening or other similar procedures.¹⁷
16. Therefore, in revising the Prison Rules 2007, UNHCR recommends that both international protection applicants as defined by section 2(1) of the International Protection Act 2015, and asylum seekers as defined by section 13(1) of the 2015 Act, be included within their scope to ensure that all such persons in detention for immigration-related reasons can access UNHCR.

ii) Guarantee the right of stateless persons to contact and be visited by UNHCR

17. The international legal definition of a stateless person is ‘*a person who is not considered as a national by any State under the operation of its law.*’¹⁸ Statelessness can occur for several reasons, including discrimination against ethnic or religious groups or based on gender, the emergence of new States and transfers of territory between existing States, and gaps in nationality laws. Ireland is a State party to the 1954 Convention relating to the Status of Stateless Persons¹⁹ and the 1961 Convention on the Reduction of Statelessness,²⁰ but the lack of a formal procedure to determine and recognise the status of stateless persons

not to be expelled or returned to a territory where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment, or (c) fears or faces persecution or serious harm if returned to his or her country of origin, shall be interviewed by an officer of the Minister or an immigration officer at such time as may be specified by the officer concerned and the person shall make himself or herself available for such interview at the time or times so specified.”

¹⁴ International Protection Act 2015, above note 6, Section 2(1) states: ““applicant” means a person who— (a) has made an application for international protection in accordance with section 15, or on whose behalf such an application has been made or is deemed to have been made, and (b) has not ceased, under subsection (2), to be an applicant.”

¹⁵ UN High Commissioner for Refugees (UNHCR), *Procedural Standards for Refugee Status Determination Under UNHCR’s Mandate*, 26 August 2020, at page 176. <https://www.refworld.org/docid/5e870b254.html>

¹⁶ UNHCR Detention Guidelines, above note 12, para. 47(vi) states: “...persons in detention must be given access to asylum procedures, and detention should not constitute an obstacle to an asylum-seeker’s possibilities to pursue their asylum application. ... It is also important that asylum-seekers in detention are provided with accurate legal information about the asylum process and their rights. (vii) to contact and be contacted by UNHCR. Access to other bodies, such as an available national refugee body or other agencies, including ombudsman offices, human rights commissions or NGOs, should be available as appropriate. The right to communicate with these representatives in private, and the means to make such contact, should be made available.”

¹⁷ *Ibid.*, para. 9.

¹⁸ Article 1(1), UN General Assembly, *Convention Relating to the Status of Stateless Persons*, 28 September 1954, United Nations, Treaty Series, vol. 360, p. 117, available at: <https://www.refworld.org/docid/3ae6b3840.html>

¹⁹ *Ibid.*

²⁰ UN General Assembly, *Convention on the Reduction of Statelessness*, 30 August 1961, United Nations, Treaty Series, vol. 989, p. 175, available at: <https://www.refworld.org/docid/3ae6b39620.html>

in Ireland may result in obstacles for stateless persons in accessing their rights under the 1954 Convention.

18. While some stateless persons may apply, or wish to apply, for international protection, others may not and, consequently, they will not fall within the scope of the 2015 Act. Therefore, due to the unique position of stateless persons, the various obstacles they may face in accessing their rights, and UNHCR's mandate to find solutions for stateless persons, UNHCR recommends that the Prison Rules be amended to ensure that stateless persons have the right to contact or be contacted and/or visited by UNHCR when in detention, on remand or in prison for immigration offences.²¹

iii) Guarantee the rights of refugees and subsidiary protection beneficiaries to contact and be visited by UNHCR

19. The Prison Rules 2007 do not make specific reference to the rights of international protection beneficiaries, namely refugees or subsidiary protection beneficiaries, when referring to the right of accessing and/or contacting UNHCR.
20. The 2015 Act defines beneficiaries of international protection as “qualified persons”.²² While qualified persons in Ireland have the protection of the Irish State and have access to many rights on an equal footing to Irish citizens, UNHCR notes that refugees and subsidiary protection beneficiaries may experience specific difficulties and obstacles linked to their status and background, and therefore are entitled to access UNHCR.²³
21. UNHCR recommends that any revision of the Prison Rules includes the right of refugees and subsidiary protection beneficiaries in Ireland to contact and/or be contacted and/or visited by UNHCR when in immigration detention, on remand or in prison for immigration offences. To ensure equal access to UNHCR for international protection beneficiaries, UNHCR recommends that “programme refugees” be included in such rights.²⁴ The importance of access to UNHCR for refugees and asylum-seekers in detention has been recognised by the Executive Committee of the High Commissioner's Programme (Excom), who has recommended that:

*refugees and asylum-seekers who are detained be provided with the opportunity to contact the Office of the United Nations High Commissioner for Refugees or, in the absence of such office, available national refugee assistance agencies.*²⁵

²¹ UNHCR, *Stateless Persons in Detention, A tool for identification and enhanced protection*, June 2017,

<https://www.refworld.org/pdfid/598adacd4.pdf>

²² International Protection Act 2015, above note 6, section 2(1).

²³ For example, section 52 of the International Protection Act 2015 provides for the circumstances under which a refugee or subsidiary protection declaration may be revoked by the Minister for Justice. As per section 52(5), the Minister shall inform UNHCR of proposals to revoke the status of a qualified person.

²⁴ International Protection Act 2015, above note 6, section 59 states: “In this section, and subject to subsection (4), a “programme refugee” means a person to whom permission to enter and remain in the State for resettlement, or for temporary protection other than temporary protection provided for in section 60, has been given by the Government or the Minister and whose name is entered in a register established and maintained by the Minister, whether or not such person is a refugee within the meaning of the definition of “refugee” in section 2.”

²⁵ Executive Committee of the High Commissioner's Programme, *Detention of Refugees and Asylum-Seekers No. 44 (XXXVII)* - 1986, 13 October 1986, No. 44 (XXXVII), at paragraph (g), available at: <https://www.refworld.org/docid/3ae68c43c0.html>

22. In summary, UNHCR recommends that the Prison Rules 2007 be amended to ensure that all persons of concern to UNHCR be provided with the right to contact and/or be contacted and/or visited by UNHCR. This includes applicants for international protection according to section 2(1) of the 2015 Act, persons seeking international protection as per section 13(1) of that Act, stateless persons, qualified persons pursuant to section 2 of the 2015 Act, and programme refugees pursuant to section 59 of the 2015 Act.

iv) Other means of communication

23. Rule 44 in the Prison Rules 2007 sets out a list of persons and bodies to whom a prisoner may send, or from whom a prisoner may receive, a letter. Such letters shall be sent or shared with the prisoner without delay and will not be opened before being sent from, or received by, the prisoner. UNHCR recommends that it be added to the list of bodies in any revision of rule 44 so that persons falling under UNHCR's mandate may avail of it in communications with the organisation.

Effective access to interpretation

24. The Prison Rules 2007 make provision for an interpreter to be provided to a prisoner in limited circumstances, as set out in rules 38, 40 and 67. UNHCR recommends that any revision of the Prison Rules allows for access to an interpreter to be facilitated, where necessary, to assist communication during any visits to a detainee/prisoner from UNHCR.

Detention conditions

25. UNHCR notes that the Prison Rules 2007 do not prescribe specific places of detention for prisoners, including asylum-applicants, refugees, subsidiary protection beneficiaries or stateless persons. While Rule 71 of the Prison Rules makes provision for non-convicted prisoners to be accommodated separately from convicted prisoners, it is conditional on practicability and “*subject to the maintenance of good order and safe and secure custody*”.

26. UNHCR reiterates the concerns expressed by the UN Committee against Torture in 2016 in relation to the detention of persons in need of international protection.²⁶ The Committee recommended that persons detained for immigration purposes are not held together with remand and convicted prisoners, are informed about their situation in a language they can understand and have effective access to legal advice and to the process of application for international protection.²⁷

27. UNHCR notes the State's intention to open a dedicated immigration detention facility at Dublin airport since 2016. However, UNHCR understands that, as of January 2021, no such

²⁶ Committee Against Torture, Concluding observations on the second periodic report of Ireland, CAT/C/IRL/CO/2, 31 August 2017, at para. 11, available at: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhstySI%2BO7WcYaiEOWzYSqa3PQ0QCZkEUtkhuvK2j5JR6zJ0sj%2Fv5Y7B2BlmFEF0D2ekQfhz0rGuBb%2BYho%2F%2B8Oaj7sfaMPbWsjdk5oS2YwSzcI>

²⁷ Ibid, para. 12(d).

facility was in operation.²⁸ While UNHCR welcomes the fact that asylum-applicants are detained on exceptional grounds only in Ireland, it is imperative that the detention of asylum-applicants and others detained on immigration grounds takes place in facilities where they are separated from convicted and remand prisoners.²⁹

Conclusion

28. UNHCR recommends that any revised 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. This would assist in ensuring that the special circumstances and needs of persons falling under UNHCR's mandate are considered and that they have full access to relevant information, advice and procedures as required. Such access to UNHCR can be further enhanced by making provision for access to interpretation for prisoners who require it when receiving visits from the organisation and its representatives. UNHCR further recommends that the organisation be included in the list of bodies currently set out under Rule 44 of the Prison Rules 2007. Finally, UNHCR reiterates that asylum-applicants and others detained on immigration grounds should only be detained in facilities where they are separated from convicted and remand prisoners.

²⁸ AIDA, Country report: Place of Detention, <https://asylumineurope.org/reports/country/republic-ireland/detention-asylum-seekers/detention-conditions/place-detention/>

²⁹ Article 10 of the European Union: *Council of the European Union, Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection* (recast), provides that: "Detention of applicants shall take place, as a rule, in specialised detention facilities. Where a Member State cannot provide accommodation in a specialised detention facility and is obliged to resort to prison accommodation, the detained applicant shall be kept separately from ordinary prisoners and the detention conditions provided for in this Directive shall apply." Available at: <https://www.refworld.org/docid/51d29db54.html> Additionally, UNHCR's Detention Guidelines, above note 12, Guideline no.8, paragraph 48(iii) provide that: "Detention of asylum-seekers for immigration-related reasons should not be punitive in nature. The use of prisons, jails, and facilities designed or operated as prisons or jails, should be avoided. If asylum-seekers are held in such facilities, they should be separated from the general prison population. Criminal standards (such as wearing prisoner uniforms or shackling) are not appropriate."