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**AN BILLE INIMIRCE 2004  
IMMIGRATION BILL 2004**

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**EXPLANATORY AND FINANCIAL MEMORANDUM**

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*Introduction*

1. The purpose of the Immigration Bill 2004 is to express in primary statute the principal elements of the law governing the State's operation of controls on the entry into and presence in the State of non-nationals.

2. The responsibilities of the State, as executive functions vested in the Government, to operate such controls in the interest of the common good have been set out in a passage from the judgment of Gannon J. in *Osheku v. Ireland* ([1986] IR 733 at 746) as follows:

The control of aliens which is the purpose of the Aliens Act 1935 is an aspect of the common good related to the definition, recognition, and the protection of the boundaries of the State. That it is in the interests of the common good of a State that it should have control of the entry of aliens, their departure, and their activities and duration of stay within the State is and has been recognised universally and from earliest times. There are fundamental rights of the State as well as fundamental rights of the individual citizens, and the protection of the former may involve restrictions in circumstances of necessity on the latter. The integrity of the State constituted as it is of the collective body of its citizens within the national territory must be defended and vindicated by the organs of the State and by the citizens so that there may be true social order within the territory and concord maintained with other nations in accordance with the objectives declared in the preamble to the Constitution.

3. This passage has been quoted with approval by the Supreme Court in a line of cases, including *Article 26 Referral of the Illegal Immigrants (Trafficking) Bill 1999* ([2000] 2 IR 360), *FP v. Minister for Justice* ([2002] 1 IR 164) and *L and O v. Minister for Justice, Equality and Law Reform* (Supreme Court (unrep.), 23 January 2003).

4. The Aliens Act 1935 has been the primary legislation giving a statutory framework for the operation of these executive functions. Orders made under section 5 of that Act (principally the Aliens Order 1946 (S. R. & O. 1946 No. 395), as amended by an extensive series of later Orders) set out a detailed scheme for controlling the entry of non-nationals into the State, granting permission to be in the State, the requirement to register periodically with the Garda Síochána acting as registration officers, and the deportation of non-nationals from the State.

5. In 1999, in the case of *Laurentiu v. Minister for Justice, Equality and Law Reform* ([2000] 2 IR 360), the Supreme Court found that

the manner in which the legislature had, in the 1935 Act, conferred on the Minister the power to make secondary legislation (Aliens Orders) in relation to deportation was inconsistent with the 1937 Constitution. The Oireachtas, in consequence, enacted the Immigration Act 1999 which, as well as putting the deportation process in the form of a primary statute, provided as follows at section 2(1):

Every order made before the passing of this Act under section 5 of the Aliens Act 1935 . . . shall have statutory effect as if it were an Act of the Oireachtas.

(Exceptions included the deportation elements impugned by the judgment.) The purpose of that section was to protect the remaining Aliens Orders from impugnement on similar grounds to those in *Laurentiu*.

6. On 22 January 2004, the High Court, in the case of *Leontjava and Chang*, found as follows:

- The provisions of the Aliens Orders allowing a condition as to duration of stay to be attached to a permission to stay in the State were *ultra vires* section 5 of the 1935 Act,
- The provision in that section providing for the making of orders requiring a non-national to produce identification and registration documents was inconsistent with the Constitution on the same basis as in *Laurentiu*, and
- Section 2 of the 1999 Act was an unconstitutional legislative method of giving the effect of primary statute to secondary legislation and thus did not operate to save the provisions concerned in the Orders.

7. The High Court has signalled its intention to grant declarations in those terms to the applicants in those cases on 30 January 2004.

8. In the absence of legislative provisions which do not stand impugned, the practical consequences of the judgment are that no aspect of the Aliens Orders can be regarded as safe from challenge, and that accordingly from that date there will be no reliable legislative basis for the operation of immigration controls on the entry to or presence on the State of non-nationals. This Bill seeks to fill that legislative lacuna. The approach of the Bill is to express in primary statute, with the minimum of changes and additional provisions necessary to create stand-alone provisions consistent with modern legislative practice, the content of the provisions of the Aliens orders as they stood up to 22 January last.

#### *Provisions of the Bill*

##### *Interpretation*

9. *Section 1* is a standard interpretation section. The definitions largely follow those in the Aliens Order 1946 as amended (referred to in this Memorandum as “the 1946 Order”) with minor modifications.

##### *Legal presence in the State*

10. *Sections 2* and *5* provide the general framework of the Bill’s applicability. Where the 1946 Order used “alien”, the Bill uses the term “non-national”. The effect of this definition is to exempt from immigration control citizens of any country so designated by order of the Government—currently British citizens. *Subsections (1)* and

(2) of *section 2* exclude certain other persons from immigration control: diplomatic representatives (and certain of their family members), and persons in respect of which certain exceptions arise as of right arising from the State's membership of the European Union or its international obligations under the Geneva Convention as reflected in the Refugee Act 1996. *Section 5* sets out the general principles whereby non-nationals not exempt from the Bill's provisions are or are not lawfully present in the State. Simply put, a non-national's presence in the State must cohere with the terms of a permission granted by or on behalf of the Minister before or after the passing of the Bill. *Section 5(3)* makes provision, by way of exception, for those whose entitlement to reside derives from the Refugee Act 1996. Presence in the State on any other basis is unlawful (*section 5(2)*).

#### *Border controls*

11. *Sections 3, 4, 6, 7, 8, 11 and 17* set out the mechanisms to provide effective border controls and are in large part restatements of the law as set out in the 1946 Order. *Section 3* provides for the appointment of immigration officers by the Minister to exercise the immigration control functions. *Section 17* empowers the Minister, in accordance with the principles and policies set forth in *subsection (1)*, to make orders specifying the classes of non-nationals for whom visas are not a requirement on arrival at the frontiers of the State and the classes of non-nationals who must have transit visas. *Section 6* requires a non-national coming by sea or air from outside the State to land at an approved port (such ports may be prescribed by the Minister). *Section 7* empowers the master of a ship or the pilot of an aircraft to detain on board any non-national coming from a place outside the State until he or she is landed for examination and *section 8* imposes obligations on carriers in relation to the provisions of the Act in ease of both passengers and the immigration authorities. *Section 11* imposes an obligation on every person (other than a person under the age of 16 years) landing in the State from a place other than Great Britain or Northern Ireland to be in possession of a valid passport or identity document. The exemption in relation to Great Britain and Northern Ireland does not apply to a non-national.

12. *Section 4* is the primary provision dealing with the operation of immigration controls at points of entry to the State. *Section 4(2)* imposes an obligation on any non-national coming by sea or air from outside the State to present to an immigration officer for a permission. The section also provides for the giving of permission (*subsection (1)*), for the attachment of conditions to a permission (*subsection (6)*) and the refusal (and grounds) to give a permission (*subsection (3)*). *Section 4(5)* provides for the special position of non-nationals arriving in the State via the land border with Northern Ireland. Such persons shall not remain in the State for longer than one month without the permission of the Minister given on his or her behalf by an immigration officer (*section 4(5)(d)*).

#### *Controls within the State*

13. *Sections 9, 10, 12 and 14* are similar to analogous provisions of the 1946 Order providing for the control of non-nationals within the State. *Section 9* obliges a non-national (subject to exceptions provided for in *subsection (6)*) who has permission to remain in the State to register with the registration officer (the Superintendent of each Garda district or, in Dublin, the offices of the Garda National Immigration Bureau) and to furnish the personal details set out in the Schedule to the Bill. The exemption from the requirement to register of the female spouse or the widow of an Irish national, a feature of

the 1946 Order, is not reproduced in the Bill. Upon his or her registration the non-national is issued a registration certificate (*section 9(2)(f)(i)*). *Section 12* substantially mirrors the provision of the 1946 Order setting out the power of an immigration officer or a member of the Garda Síochána to demand certain documents from a non-national. *Section 10* re-enacts the obligation on the keeper of every premises in which lodging or sleeping accommodation is provided for reward to keep on such premises a register of all non-nationals staying on the premises. *Section 14* empowers the Minister by notice in writing to require a non-national who does not have permission to be in the State to comply with certain residency and reporting requirements: this power has hitherto existed in relation to all non-nationals, including those legally present in the State.

#### *Offences, search etc*

14. Failure to comply with provisions in *sections 4 to 12 and 14* above is a summary criminal offence punishable (*section 13*) by a fine of up to €3,000 or to imprisonment up to 12 months or both. *Section 13(2)* provides that a member of the Garda Síochána may arrest without warrant a person whom he or she reasonably suspects to have committed an offence, mirroring largely the existing power under section 17 of the 1946 Order. A difference is however that persons who are “reasonably suspected of being about to so act” are no longer liable to arrest. *Section 15* provides powers of entry, search and seizure similar to those contained in section 7 of the Aliens Act 1935 (as inserted by the Immigration Act 2003).

#### *General*

15. *Section 16* makes consequential amendments to existing legislation. *Section 19* is a new provision which empowers the Minister to prescribe fees for immigration-related services. *Sections 18, 20, 21 and 22* are standard provisions dealing with the service of notices, the making of regulations and orders for the purpose of giving full effect to the Act, expenses and short title.

#### *Financial Aspects*

16. The operation of the provisions of this Bill will have no greater implications for public finances than those of the provisions of the Aliens Act and Orders which they replace. The making of regulations under *section 19* of the Bill allows the potential for the immigration service to become self-financing over time.

*An Roinn Dlí agus Cirt, Comhionannais agus Athchóirithe Dlí,  
Eanáir 2004*