

**IRISH IMMIGRATION LAW:
AN INTRODUCTION FOR
NON-GOVERNMENTAL ORGANISATIONS**

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1. SOURCES OF IRISH IMMIGRATION LAW

1.1 Irish Sources

The main domestic sources of Irish immigration law are:

- The Constitution of Ireland
- Primary Legislation
- Statutory Instruments
- Case Law
- Policy

Primary legislation containing provisions on or impacting immigration law until relatively recently was essentially the Aliens Act 1935 and the Irish Nationality and Citizenship Act 1956. Now there is a great deal of highly relevant legislation. The most important acts include:

- **Aliens Act 1935**
Before 1999 this was the primary legislation governing the entry and residence of non-Irish nationals. The 1946 and 1975 Aliens Orders, made by the Minister pursuant to this Act, dealt with leave to land, deportation, and detention. After the constitutionality of parts of the 1935 Act, and those orders, was challenged in litigation in the superior courts,¹ new legislation, beginning with the Immigration Act, 1999, came into force.
- **Irish Nationality and Citizenship Acts 1956**
This legislation sets out who is, and who can become, an Irish citizen. It also sets out provisions on revocation and the loss of citizenship.
- **The Refugee Act 1996**
Gives statutory effect to the State's obligations under the 1951 Geneva Convention Relating to the Status of Refugees and the 1967 New York Protocol.
- **Child Trafficking and Pornography Act 1998**
Provides measures to protect children under 17 from sexual exploitation through child trafficking and child pornography.
- **Immigration Act 1999**
Sets out the law for deportation.
- **Criminal Justice (United Nations Convention Against Torture) Act 2000**
Gives effect to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
- **Illegal Immigrants (Trafficking) Act 2000**

¹ *Leontjawa and Chang v Minister for Justice, Equality and Law Reform* [2005] 1 ILRM, and *Laurentiu v Minister for Justice, Equality and Law Reform* [2000] 1 ILRM 1, Supreme Court, 20/05/1999.

Makes it an offence to organise or knowingly facilitate the entry into the State of an illegal immigrant or a person who intends to seek asylum. Section 5 of the Act provides strict rules for judicial review of immigration related decisions.

- Immigration Act 2003
Introduced carrier liability, making it a punishable offence for a carrier to bring an immigrant without permission to land to the State.
- European Convention on Human Rights Act 2003
Gives domestic effect to the Convention.
- Social Welfare (Miscellaneous Provisions) Act 2003
Makes asylum seekers no longer entitled to receive a rent supplement, and obliged to enter the State's direct provision accommodation system in order to qualify for benefits.
- Employment Permits Act 2003
Facilitates free access to the Irish labour market to nationals of the new EU Accession States after 1 May 2004.
- The Twenty-Seventh Amendment of the Constitution Act 2000
Increased the power of the legislature with regard to the acquisition of citizenship.
- Social Welfare (Miscellaneous Provisions) Act 2004
Added a Habitual Residence Condition for applicants for welfare benefits.
- Immigration Act 2004
Regulates the entry and residence of non-Irish nationals in the State.
- The Irish Nationality and Citizenship Act 2004
Sets out the conditions under which Irish citizenship may be granted to a child born in Ireland to non-Irish national parents.
- Criminal Justice Act 2006
Section 186 amended the definition of "torture" in the Criminal Justice (United Nations Convention Against Torture) Act 2000 by the insertion after "omission" of "done or made, or at the instigation of, or with the consent or acquiescence of a public official".
- Employment Permits Act 2006
Provides for the application, grant, renewal, refusal, and revocation of employment permits.
- European Communities (Amendment) Act 2006
Amends the European Communities Act 1972, to provide that certain provisions of the Treaty concerning the accession of the Republic of

Bulgaria and Romania to the European Union are part of Irish domestic law.

There are hundreds of statutory instruments that are relevant to immigration law. Three of the more important ones are:

- S.I. No. 518 of 2006 European Communities (Eligibility for Protection) Regulations 2006, which transposes Directive 2004/83/EC (the Qualification Directive) into Irish law.
- S.I. No. 656 of 2006 European Communities (Free Movement of Persons) (No. 2) Regulations 2006, which transposes Council Directive 2004/38/EC (the citizenship Directive) into Irish law.
- The Immigration Act 2004 (Visas) Order 2011 (SI No. 146 of 2011), which schedules the categories of person that do and do not require a visa to enter the State.

1.2 EU Sources

Where Irish domestic law conflicts with EU law, domestic law must be ignored so that the EU law can apply (the principle of supremacy or primacy of EU law). The main sources of EU law impacting Irish immigration law are:

- The Treaties
- The Charter of Fundamental Rights of the EU
- EU Secondary Legislation (e.g., Regulations, Directives, and Decisions)
- Case Law of the Court of Justice of the EU
- Policy

Relevant Articles in the Treaty on the Functioning of the EU (TFEU) include:

- Arts. 18-25: Non Discrimination & Citizenship
- Arts 45-48: Free Movement of Workers
- Arts 49-55: Establishment
- Arts 67- 76: Area of Freedom, Security & Justice generally
- Art 77: Border Checks
- Art 78: Asylum
- Art 79: Immigration

As with domestic immigration legislation, EU legislation impacting immigration law has grown exponentially in recent years, and particularly after the commitments made in the Treaty of Amsterdam in 1997, and at the European Council's meeting at Tampere in 1999.

EU secondary legislation comes in various forms, including Regulations, Directives, and Decisions. Regulations have direct effect, allowing individuals in Member States to rely on them domestically against the State and in litigation with others. Directives also have direct effect to the extent that individuals can rely on them domestically against the State. EU law allows Member States

leeway, however, in how they comply with the provisions of a directive, whether by legislative or administrative means. The most important legislation includes:

- Council Directive 2000/43 (the Race Directive)
Lays down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment.
- Council Directive 2000/78 (the Equal Treatment in Employment Framework Directive)
Lays down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.
- Regulation (EC) No 2725/2000 (the Eurodac Regulation)
Establishes a system, called Eurodac, for the collation and comparison of fingerprints of asylum applicants and illegal aliens. It establishes a centralised database of fingerprint data. It assists in determining which Member State is to be responsible for an asylum seeker under the Dublin Regulation
- Directive 2001/55 (the Temporary Protection Directive)
Establishes minimum standards for granting temporary protection, and seeks to promote a balance of efforts between Member States in receiving and bearing the consequences of displaced people.
- Council Directive 2001/40 (the Expulsion Decisions Directive)
Seeks to make possible the recognition of an expulsion decision issued by a competent authority in one Member State against a third country national present within the territory of another Member State. Ireland did not opt in.
- Regulation (EC) No 1030/2002 (the Residents Permits Directive)
Sets out the general characteristics of the uniform format for residence permits. Ireland did not opt in.
- Framework Decision 2002/629/JHA (the Human Trafficking Framework Decision)
Requires Member States to take measures to ensure that “the recruitment, transportation, transfer, harbouring, subsequent reception of a person, including exchange or transfer of control over that person” will be punishable where (a) use is made of coercion, force, threat or abduction, (b) use is made of fraud or deceit, (c) there is abuse of authority of position of vulnerability, or (d) payments or benefits are given or received to achieve consent for the purpose of exploitation of a person’s labour including forced labour or services, or for the purpose of exploitation of prostitution or sexual exploitation, including in pornography.

- Directive 2003/86/EC (the Family Reunification Directive)
Determines the conditions under which family members can enter into and reside in a Member State in order to preserve the family unit. Ireland did not opt in.
- Directive 2003/109 (the Long Term Residents Directive)
Obliges Member States to grant long-term resident status to third country nationals who have resided legally and continuously within the territory of a Member State for five years. Ireland did not opt in.
- Directive 2003/9 (the Reception Directive)
Sets out minimum standards of reception conditions for applicants for asylum in Member States. Ireland did not opt in.
- Regulation (EC) No 343/2003 (the Dublin Regulation)
Creates a system designed to determine, and lays down criteria and mechanisms for determining, the Member State responsible for determining an applicant's refugee status.
- Directive 2004/83 (the Asylum Qualification Directive)
Establishes minimum standards for the qualification of third country nationals and stateless persons as refugees or beneficiaries of subsidiary protection within the Member States.
- Directive 2004/38 (the Citizenship Directive)
Lays down the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members, the right of permanent residence in the territory of the Member States for Union citizens and their family members, and the limits that can be placed on these rights.
- Directive 2004/114 (the Third Country National Students Directive)
Determines the conditions and rules for admission of third-country nationals to the territory of the Member States for more than three months for the purposes of studies, pupil exchange, vocational training, or voluntary service. Ireland did not opt in.
- Framework Decision 2004/68/JHA (the Framework Decision for Combatting Child Exploitation)
Requires Member States to take measures to ensure that the following intentional conduct is punishable: (a) coercing a child into prostitution or into participating in pornographic performances, or profiting or exploiting a child for such purpose, (b) recruiting a child into prostitution or into participating in pornography, (c) engaging in sexual activities with a child where there is coercion, remuneration, or abuse of trust.
- Directive 2004/81 (the Human Trafficking Directive)
Defines the conditions for granting residence permits of limited duration,

linked to the relevant national proceedings, to third country nationals who cooperate in the fight against trafficking in human beings or against action to facilitate illegal immigration. Ireland did not opt in.

- Directive 2005/85 (the Asylum Procedures Directive)
Establishes minimum standards for procedures within EU Member States for granting and withdrawing refugee status.
- Regulation 2007/2004 (the Frontex Regulation)
Establishes Frontex, a European agency for the management of operational cooperation at the external borders of the EU.
- Directive 2008/115 (the Returns Directive)
Establishes common standards for regularization, detention, removal and exclusion of illegally staying third country nationals. Ireland did not opt in.
- Directive 2009/50 (the Highly Skilled Third Country Workers Directive)
Provides rights to highly skilled third country national workers.
- Directive 2009/52 (the Employment of Unlawful Third Country Workers Directive)
Provides sanctions against employers of illegally resident third country nationals

1.3 International Sources

As Ireland is a dualist State, international legal instruments to which Ireland has signed up and which are in force, are binding against Ireland on the international plane, but unless they are incorporated into domestic law they cannot be relied upon in domestic litigation as binding legal instruments. International legislation is nonetheless a vital source of immigration law. Important legal instruments include:

- International Covenant on Civil and Political Rights (ICCPR)
- International Covenant on Economic, Social and Cultural Rights (ICESC)
- International Convention on the Rights of the Child (CRC)
- International Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT)
- Convention on the Reduction of Statelessness (CRS)
- Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (MWC)
- European Convention on Human Rights (1950)
- European Social Charter and Revised Social Charter

2 A TIMELINE OF IRISH IMMIGRATION LAW

1935 Introduction of primary legislation governing the entry and residence of non-Irish nationals – the Aliens Act 1935.

1946 The Aliens Order 1946

1956 Introduction of primary legislation to set out who is, and who can become, an Irish citizen – the Irish Nationality and Citizenship Act 1956

1972 European Communities Act 1972

The Aliens Order 1972

1991 Treaty of Maastricht agrees principles of Treaty on European Union (TEU)

1996 The Refugee Act 1996 gives effect to Ireland's obligations under the Refugee Convention.

1997 The Treaty of Amsterdam 1997 commits the EU to establishing a common area of freedom, security and justice. Inserts a new Title IV re Immigration, asylum and visas into the EC Treaty. Double aim: for Member States to open their borders to each other, while controlling their external borders. Pursuant to Article 1 of Protocol (No 21) on The Position of The United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice, and subject to an option to take part in the adoption of any proposed measures, Ireland does not take part in the adoption of measures pursuant to Title V.

1999 The Treaty of Amsterdam enters into force.

The Tampere European Council establishes an EU approach in the field of immigration and asylum, dealing with the creation of a common asylum system, an immigration policy (Four principles: partnership with countries of origin; common EU asylum system; fair treatment of third country nationals; efficient migration flow management). 1999 – 2004 Programme begins.

Two cases questioned the legality of the domestic legislative regime: (a) *Laurentiu v Minister for Justice, Equality and Law Reform & Ors* [2000] 1 ILRM; (b) *Leontjava and Chang v Director of Public Prosecutions* [2005] 1 ILRM.

The Immigration Act 1999.

In the 1990s Ireland goes from being a country of emigration, to one of immigration.

The number of asylum applications rise.

2000 The Refugee Act 1996 becomes fully operative.

2003 Immigration Act 2003

Treaty of Nice enters into force

2004 Hague Programme 2004 (2005-2009). Emphasises security, returning irregular migrants.

Ten new Member States

Immigration Act 2004

Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States

Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted

Case C-200/02 *Chen* – ECJ decision confirming that enjoyment by a young EU citizen child of a right of residence necessarily implies that the child is entitled to be accompanied by the person who is his or her primary carer and that the carer must be in a position to reside with the child in the host Member State.

Constitutional referendum re citizenship of children born in the State to non Irish citizen parents

2005 IBC 05 Scheme, by which the Minister for Justice allowed permission to remain in the State from non-Irish national parents of Irish children born before January 1 2005.

2006 S.I. No. 518 of 2006 European Communities (Eligibility for Protection) Regulations 2006, transposing Directive 2004/83/EC into Irish law.

S.I. No. 656 of 2006 European Communities (Free Movement of Persons) (No. 2) Regulations 2006 transposing Council Directive 2004/38/EC into Irish law.

2007 Bulgaria & Romania join the EU

Immigration, Residence & Protection Bill 2007

The Frontex Regulation

Supreme Court *Bode* decision upholding the Minister's policy not to include consideration of the rights of Irish children in the IBC 05 scheme.

- 2008** Supreme Court *Oguekwe* decision requiring the Minister to consider the rights of an Irish citizen child in the context of consideration of proposal to deport the child's non Irish citizen parent.

Case C-127/08 *Metock* – ECJ Decision confirming the right of third country nationals to join their EU family members in Member States.

Immigration, Residence & Protection Bill 2008

EU Pact on Immigration & Asylum. More emphasis on security/immigration control, including bilateral agreements.

- 2009** Stockholm Programme agreed (2010-2014).

Treaty of Lisbon comes into effect.

The Charter of Fundamental Rights of the EU comes into effect.

- 2010** Immigration, Residence & Protection Bill 2010

Alli High Court case upholds the Minister's power to remove non-Irish citizen parents of Irish citizen children.

- 2011** CJEU finds Ireland liable for failure to transpose EU asylum procedures law

Case C-34/09 *Zambrano* - CJEU decision confirming the obligation of Member States to grant residency to parents of dependent EU citizen children in order to ensure that the children's citizenship rights are guaranteed.

Case C-434/09 *McCarthy* – CJEU decision upholding the UK's decision to refuse residency to the third country national spouse of a UK citizen.

CJEU *NS* Opinion on transfers under the Dublin Regulation

Immigration, Residence & Protection Bill (2011)

- 2012** Transitional arrangements for citizens of Bulgaria and Romania to come to an end on 1st January 2012, unless Ireland requests an extension.

3 KEY AGENCIES IN THE IRISH IMMIGRATION SYSTEM

- **Garda National Immigration Bureau (GNIB)**
Office in An Garda Siochana whose immigration officers grant permission to land or be in the State, carry out residency registrations (GNIB cards), deportations, border control and investigations relating to illegal immigration and human trafficking.
- **Minister for Justice and Equality**
Government minister responsible for immigration policy. Sections within the Department responsible for administration and policy in relation to immigration matters include:
 - Asylum Policy
 - Citizenship Section
 - EU Treaty Rights Unit
 - Long Term Residence Unit
 - Repatriation Unit
 - Visa Appeals Unit
- **Irish Nationality and Immigration Service**
Section in the Department of Justice responsible for administering the Department's functions in relation to asylum, immigration, visa, and citizenship matters.
- **Refugee Integration Agency**
Body under the aegis of the Department of Justice that coordinates services to asylum seekers and refugees, including direct provision, and implements integration policy generally.
- **Refugee Applications Commissioner (RAC)**
Independent person responsible for determining refugee status at first instance. The Commissioner's authorized officers are responsible for interviewing applicants, and for presenting the Commissioner before the Refugee Appeals Tribunal.
- **Refugee Appeals Tribunal (RAT)**
Independent body responsible for dealing with asylum appeals.
- **Refugee Legal Service (RLS)**
Specialised office established by the Legal Aid Board to provide confidential and independent legal services to persons applying for asylum in Ireland and, in appropriate cases, on immigration and deportation matters. (RLS website)
- **United Nations High Commission for Refugees**
The agency mandated to lead and co-ordinate international action to protect refugees and resolve refugee problems worldwide. Its primary purpose is to safeguard the rights and wellbeing of refugees.

4 HUMAN RIGHTS & IMMIGRATION LAW

4.1 Human Rights inextricably bound up with Immigration Law.

Examples of human rights that are particular to immigration related matters include:

- The right to seek asylum
 - The 1951 Refugee Convention
 - Directive 2004/83/EC - the Qualification Directive
 - Article 18 of the Charter of Fundamental Rights of the EU
- The right not to be refouled
 - Article 33 of the 1951 Refugee Convention
 - Directive 2004/83/EC – the Qualification Directive
 - Article 19 of the Charter of Fundamental Rights of the EU
- The right not to be trafficked
 - UN Protocol to Prevent, Suppress and Punish Trafficking in Persons (the Palermo Protocol)
 - Council of Europe Convention on Action against Trafficking in Human Beings
 - Council Directive 2004/81
 - Article 5(3) of the Charter of Fundamental Rights of the EU
 - Article 4 ECHR
- The right to a nationality/not to be stateless
 - Article 15 of the Universal Declaration of Human Rights
 - 1954 Convention relating to the Status of Stateless Persons
 - 1961 Convention on the Reduction of Statelessness

4.2 International Human Rights Law Generally

Treaties containing human rights relevant to immigration matters include:

- The European Convention on Human Rights (ECHR)
- The International Covenant on Civil and Political Rights (ICCPR)
- The Convention Against Torture (CAT)
- The Convention on the Rights of the Child (CRC)
- The Convention on Ending Racial Discrimination (CERD)
- The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

4.3 The European Convention of Human Rights

The European Convention of Human Rights has been given effect in Irish domestic law in the European Convention of Human Rights Act 2003 and is a particularly fruitful and effective source of human rights law of relevance to immigration matters.

Obligations of Courts

The 2003 Act has the effect of requiring the Irish courts to interpret domestic legislation in a manner consistent with the Convention - rights under the Convention are now enforceable in Irish courts. Irish Courts are obliged to

interpret domestic legislation in a manner consistent with the Convention (section 2).

Obligations of Organs of the State

The Act obliges “every organ of the State” to “perform its functions in a manner compatible with the State’s obligations under the Convention provisions” (section 3).

ECtHR Decisions are Persuasive

The Act requires that “judicial notice” be taken of the Convention provisions and any decisions of the Convention institutions (section 4). A court shall “take due account” of the principles established by these decisions when dealing with Convention-related proceedings. Accordingly, judgments of the European Court of Human Rights are persuasive authorities in Irish courts when dealing with Convention rights.

Declaration of Incompatibility

The Act empowers the superior courts to make a “declaration of incompatibility” where a “statutory provision or rule of law is incompatible with the State’s obligations under the Convention provisions” (section 5). The Taoiseach would have to bring the order containing any such declaration before both houses of the Oireachtas within twenty-one days of the making of the order (section 5(3)). A party to any such proceedings can make an application to the Attorney General for compensation arising from the incompatibility (and the Government can make an *ex gratia* payment to that party. Note, however, that a statutory provision or rule of law that is declared incompatible with the Convention is still law (section 5(2)).

Relevant Rights under the ECHR

Certain rights and freedoms protected by the Convention are of special relevance to asylum and immigration law and the identification of persecution, serious harm, or possible *refoulement* issues. These include:

- The right to life (Article 2);
- The prohibition against torture (Article 3);
- The right to liberty and security (Article 5);
- The right to a fair trial (Article 6);
- The prohibition on retroactive criminal punishment (Article 7);
- The right to respect for family and private life (Article 8);
- The prohibition against discrimination (Article 14);
- The prohibition against restrictions on political activity of aliens (Article 16);
- The right to an effective remedy (13);
- The protection of freedom of movement (Article 2 of Protocol 4);
- Safeguards relating to the expulsion of aliens (Article 1 of Protocol 7); and
- The prohibition of the death penalty (Articles 1 and 2 of Protocol 6, and Article 1 of Protocol 13).

Article 3 ECHR

Case law of the ECtHR has clarified the following important points:

- Where a state expels a person to face treatment in breach of a Convention article, the expelling State could be held to be in breach as the expulsion itself is a breach (*Soering v UK*²)
- Expulsion in a deportation case may be a violation of the Convention as the expulsion would be a breach because of what is likely to happen elsewhere (*Cruz Varas v Sweden*³)
- Adverse treatment on race grounds may breach Article 3 (e.g., East African Asian cases⁴)
- Poor treatment of asylum seekers may amount to a breach of Article 3 (*Q & M*⁵)
- The right is said to be absolute, even if the applicant is a national security risk (*Chahal v UK*)
- The right can be qualified in practical terms, and cases can appear inconsistent:
 - *D v UK*⁶ - To return the applicant, in the final stages of AIDS, to St Kitts would result in the end of his life being marked by great suffering in breach of Art 3
 - *N v SSHD*⁷ - To return the applicant, a Ugandan woman with AIDS, whose life expectancy would thereby be reduced to one or two years, was not in breach of Art 3. While D indicated a negative obligation (not to deport D), N unsuccessfully raised a positive obligation (to provide N with medical care). The ECtHR confirmed that in medical cases Art 3 applied only in very exceptional circumstances.

Article 4 ECHR

In *Rantsev v Cyprus & Russia*⁸ the ECtHR accepted human trafficking was prohibited under Article 4, and found Cyprus in violation in circumstances where the police had failed to investigate whether a deceased woman had been trafficked, and instead delivered her back to the hands of possible traffickers.

Article 8 ECHR

Article 8 states:

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime,*

² *Soering v UK* (1989) 11 EHRR 439.

³ *Cruz Varas v Sweden* [1991] 14 EHRR 1.

⁴ [1981] 3 EHRR 76.

⁵ *Q & M* [2003] EWCA Civ 364.

⁶ *D v UK* (1997) 24 EHRR 423.

⁷ *N v SSHD* [2005] UKHL 31; *N v UK* (2008) 47 EHRR.

⁸ *Rantsev v Cyprus & Russia*, ECtHR, 7 January 2010.

for the protection of health or morals, or for the protection of the rights and freedoms of others.

- A real risk of any Convention right on return may make an expulsion a breach of domestic obligations (*R v Special Adjudicator ex parte Ulla & Do v SSHD*⁹)
- The feared breach would need to be flagrant (if re an absolute right), or a fundamental denial of a right (if re a qualified right) to engage the state's responsibility (ibid.)
- Convention rights do interfere with state sovereignty (ibid.)
- That the putative breach would happen elsewhere does not relieve a state of its obligations (ibid.)
- In a domestic case the state must always act in a way that is compatible with the Convention rights. There is no threshold test related to the seriousness of the violation or the importance of the right involved. Foreign cases, on the other hand, represent an exception to the general rule that a state is only responsible for what goes on within its own territory or control... there is clearly some additional threshold test indicating the enormity of the violation to which the person is likely to be exposed if returned (*SSHD ex parte Razgar*¹⁰)
- Where the claim is in respect of a qualified right abroad, the treatment feared needs to constitute a flagrant breach amounting to a nullification of the essence of the right (*EM (Lebanon) v SSHD*¹¹).
- Article 8 expulsion cases can be 'domestic' (as per the *Razgar* ratio) or 'foreign' (as per *EM*), depending on the facts.
- The right to respect for the family life of one necessarily encompasses the right to respect the family life of others, normally a spouse or minor children, with whom that family life is enjoyed (*Beoku-Betts v SSHD*¹²)
- Families should be considered as a whole (*ZB (Pakistan) v SSHD*¹³)

The questions to ask in an Article 8 case:

1. *Does Private life exist?*
 - E.g.: 'The totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of 'private life' (*Maslov v Austria*¹⁴).

⁹ *R v Special Adjudicator ex parte Ulla & Do v SSHD* [2004] UKHL 26.

¹⁰ *SSHD ex parte Razgar* [2004] UKHL 27, Per Baroness Hale at para 42.

¹¹ *EM (Lebanon) v SSHD* [2008] UKHL 64.

¹² *Beoku-Betts v SSHD* [2008] UKHL 39, per Baroness Hale.

¹³ *ZB (Pakistan) v SSHD* [2009] EWCA Civ 834, Court of Appeal.

¹⁴ *Maslov v Austria* [2008] ECHR 546.

- E.g.: To remove an AIDS sufferer ‘from free care and treatment in one of the best health services in the world’ was an invasion of her private life (*DM (Zambia)*¹⁵)
2. *Does Family life exist?*
 - The existence or non-existence of family life is question of fact depending on the real existence in practice of close personal ties (*Lebbink v Netherlands*)
 3. *Has there been an interference with the right to respect?*
 - Is the interference justified?
 - Is it in accordance with law?
 - Is it in pursuit of a legitimate aim?
 - Is it necessary in a democratic society?
 - Is it (i.e., the interference, not the aim) proportionate to the aim pursued

The ECtHR will consider the duration of an exclusion/non entry order in ascertaining under Article 8(2) whether a measure’s interference with Article 8(1) rights is necessary or proportionate (e.g., *Omoregie v Norway*, Application¹⁶; *Uner v Netherlands*¹⁷; *Maslov v Austria*¹⁸).

A Note on Article 13

Article 13 provides for the right for an effective remedy before national authorities for violations of rights under the Convention. This right imposes an obligation on member states parties to provide a preemptive remedy for any of the rights provided for in the Convention (*Soering*). An applicant need only show that he or she has an arguable claim regarding a breach of a substantive Convention right in order to raise a claim about a breach of Article 13.

4.4 EU Law

EU law does not purport to have general human rights competence. Rather, it has upheld human rights when they are breached within EU law. Key points:

- The removal of third country nationals has to be in accordance with Article 8 ECHR (the ECJ *Carpenter* decision).
- Deprivation of nationality and EU citizenship may be a matter of EU law (e.g., Case C-135/08 *Rottmann*)
- Citizenship rights may now be displacing economic matters as the starting point for citizens’ rights (e.g., CJEU *Zambrano* decision).
- With the entry into law of the Lisbon Treaty in 2009, the Charter of Fundamental Rights of the EU now has the same legal status as the EU Treaties. Provisions of particular relevance to immigration matters include:
 - Article 5(3) (protection from human trafficking);

¹⁵ *DM (Zambia)* EWCA Civ 474, Court of Appeal.

¹⁶ *Omoregie v Norway*, Application No. 265/07, ECHR 31 October 2008.

¹⁷ *Uner v Netherlands*, Application No. 46410/99, ECHR 18 October 2006.

¹⁸ *Maslov v Austria*, Application No. 1638/03, ECHR 23 June 2008.

- Article 7 (respect for private and family life);
- Article 9 (right to marry and found a family);
- Article 19 (protection in the event of removal);
- Article 20 (equality before the law);
- Article 21 (non discrimination);
- Article 34 (social security and social assistance);
- Articles 39 to 46 (citizens' rights).

5 ENTRY TO THE STATE

5.1 Visas

Visas provide pre entry clearance to land & reside. A definition of 'Visa' in Irish immigration legislation is as follows:

'an endorsement made on a passport or travel document other than an Irish passport or Irish travel document for the purposes of indicating that the holder thereof is authorized to land in the State subject to any other conditions of landing being fulfilled' (s. 1 Immigration Act 2003)

The power to designate classes of foreign nationals as requiring, or not requiring, a visa is set out in section 17 of the Immigration Act 2004

17.—(1) The Minister may, for the purposes of ensuring the integrity of the immigration system, the maintenance of national security, public order or public health or the orderly regulation of the labour market or for the purposes of reciprocal immigration arrangements with other states or the promotion of tourism, by order declare—

- (a) that members of specified classes of non-nationals are not required to be in possession of a valid Irish visa within the meaning of the Immigration Act 2003 when landing in the State, or*
- (b) that members of specified classes of non-nationals are required to be in possession of a valid Irish transit visa within the meaning of that Act.*

The Immigration Act 2004 (Visas) Order 2011 (SI No. 146 of 2011) schedules the categories of person that do and do not require a visa:

- Schedule 1 lists those countries whose nationals do not need a visa to enter.
- Schedule 2 lists those countries whose nationals require a transit visa.
- Section 3 lists other categories of people who do not need a visa:
 - Non-nationals with a Convention travel document (i.e., refugees) from certain states.
 - Non-nationals with a valid permanent residence card or a residence card.
 - Non nationals with a residence card of a family member of a Union Citizen

Visa applications can be made on line or at an Irish embassy or consulate. There are two types (in line with EU law):

- C Visa - Short stay
- D Visa - Long stay

The documentation typically required for a visa application is as follows:

- Completed visa application signed by the applicant.
- Consent of both parents for children travelling alone.
- Consent of one parent of sole custody where the child is travelling with the other parent.
- Valid passport.
- Evidence of financial self-sufficiency for duration of stay.
- Details of other family members in Ireland, or other member states.

- Details of any previous Irish visa applications.
- Details of any visa refusals for any other country.

There can be category specific documentation required, depending on the particular reason an applicant seeks a visa.

In *RMR & Anor v Minister for Justice, Equality and Law Reform* [2009] IEHC 279 Clark J stated at para. 25:

It is clear that the Minister is under no legal obligation to grant a visa – the grant or refusal of visas is entirely within his discretion and it is for the visa applicant to convince the Minister that he or she should be granted a visa. Government policy determines which foreign nationals require visas to visit or transit the State and whether they can work in the State. The inherent executive power and responsibility of the Government to formulate immigration policy is supplemented by statutory provisions including the Aliens Act 1935 and the Immigration Acts 1999, 2003 and 2004. There is at present no statutory framework for issuing visas.

A refusal to grant a visa can be appealed to a Visa Appeals Officer at INIS, or the relevant embassy or consulate. Two months is usually allowed.

Key Case: Visa Policy Must be Implemented in a Flexible Manner

In *Ezenwaka & Anor v The Minister For Justice, Equality And Law Reform*, Unreported, High Court, Hogan J, 21st July, 2011; [2011] IEHC 328, the first named applicant was granted residency in the State by virtue of having an Irish born son, under the administrative scheme known as the IBC 05 scheme. The first named Applicant and the child's mother, an Irish national, never married and the relationship had long since ended. Indeed, the Irish national had since re-married. The second applicant, the wife of the first applicant, is also Nigerian and lives in Nigeria with their two Nigerian citizen children.

In August, 2006 Mr Ezenwaka applied to the Irish Embassy in Abuja for a family re-unification visa, but this was refused. He reapplied in April, 2008 Mr. Ezenwaka re-applied for a visa. A type "D" visa permitting for family re-unification was granted by the Embassy in June, 2008. Acting on the strength of this visa, the Ezenwakas sought a new life in Ireland and aimed to move here permanently from Nigeria: Ms. Ezenwaka gave up her job, sold her car and moved out of her family accommodation in anticipation of a permanent move to Ireland, and the Ezenwakas purchased tickets for a flight from Lagos to Dublin via Istanbul.

When Ms. Ezenwaka and her two children arrived in Dublin Airport on 28th July, 2008, they presented their Irish visas to the immigration officials. Having examined the documents, the relevant immigration officials formed the view that the visas had been issued in error and that Mr. Ezenwaka was not entitled to seek family unification based on the existence of an Irish citizen child whom he had fathered by another lady who was not his wife. Contact was made with the appropriate officials in the Department of Justice who explained that IBC 05 policy did not cover that situation.

In the event, therefore, Ms. Ezenwaka and her children were not permitted to land. They were accordingly obliged to return to Nigeria. The immigration notice was issued pursuant to s. 4(3)(j) of the Immigration Act 2004 (“the 2004 Act”) on the ground that their admission into the State would be contrary to public policy. In response to correspondence on behalf of the Ezenwakas, the Minister for Justice (Mr. Dermot Ahern TD) wrote a letter setting out the Department’s position:

...In a nutshell, the new approach to allowing overseas-based parents and siblings join an IBC is for single, immediate family units only and does not extend to second and subsequent families and the visa office was not sufficiently aware of this ‘immediate family only’ aspect.

As the Ezenwakas were Nigerian nationals coming from a state that was not visa exempt, they were required to have an Irish visa before they could lawfully land (s. 4(3)(e) of the Immigration Act 2004). As the holders of Irish visas, they had a legitimate expectation that they would be permitted to land, subject to “other conditions of landing being fulfilled”. Permission was refused by reference to s. 4(3)(j) of the 2004 Act, which provides:

an immigration officer may, on behalf of the Minister, refuse to give a permission to a [non-national presenting for entry into the State] if the officer is satisfied— ... (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....

The Court stated that the reference to public policy must here be understood in the statutory context in which it occurs, and that the fact that the reference to “public policy” is juxtaposed beside the words “national security” means that the former words take on their traditional and somewhat more restricted meaning in the sphere of immigration law. In that context, the words “public policy” do not simply mean contrary to existing Government policy, but rather connote a situation where that the *personal conduct* of the immigrant poses a real and immediate threat to fundamental policy interests of the State. In that sense, the concept of public policy at issue here is but another variant of the concept national security, albeit wider and somewhat more flexible in its scope and reach than national security properly so called.

The Court stated that any decision to refuse admission to the State on s. 4(3)(j) grounds must be based on the personal conduct of the non-national concerned. The Court held that while it is true that the Government was fully entitled as a matter of policy to restrict the operation of the IBC Scheme and to take the view that the admission of the Ezenwakas did not come within the scope of that policy, the concept of public policy in the context in which that phrase appears in s. 4(3)(j) is a very different one, and neither Ms. Ezenwaka nor her children pose a threat to Irish public policy in that particular sense of the term.

The Court held that the decision to refuse permission to land based on s. 4(3)(j) was unlawful. While the immigration officer believed that it was sufficient that their admission would be contrary to Government policy, this in and of itself did

not necessarily mean that the public policy provisions of s. 4(3)(j) were thereby engaged. The Court stated that this was a classic example of where a legitimate policy has been operated in an unduly rigid or inflexible manner, and found that a legitimate policy - that an IBC family reunification visa would be issued only where the other spouse was also the other parent of the Irish born child - was rigidly applied and the Ezenwakas were given no real opportunity to argue that an exception should have been made for them given that this mistake was not of their making. The Court held that the decision to refuse entry was therefore unlawful on this ground.

The Court stated, there were competing interests at stake, i.e., (a) the Minister's policy interests in controlling immigration which should not be defeated by reason of a simple misunderstanding; and (b) the question of fairness to the Ezenwakas, ensuring that they are not the innocent victims of an error that was not of their making. The Court remitted the matter to the Minister for fresh re-consideration in which he could balance the competing interests in the matter outlined by the Court.

5.2 Work Permits

Work permits effectively provide a pre entry clearance to work in the State.

Exempt categories:

- Work visa issued before 31 December 2006
- Temporary contract for workers from another Member State
- Refugees & family members of refugees
- People granted subsidiary protection
- Holders of relevant visas (see above)

Special Cases: Bulgaria & Romania

- Require work permit (for first 12 months only)
- Exemptions (e.g., if Irish third level graduate)
- Allowed to work in a self employed capacity (provided they do not become an unreasonable burden on the State), with ancillary right of family members to work in the State.
- Likely to cease 31 December 2011.

Employment Permits

- Job offer
- Statutory labour market test
- Salary threshold
- Job category test

Green Cards

- High level strategic jobs only
- Allows for immediate family reunification
- No labour market test
- High (two tier) Salary threshold test

Association Agreements

- EU law based (e.g., Decision No 1/80 re Turkey)
- May give foreign nationals right to work where lawfully resident

Intra Company Transfers

- Senior management
- High salary threshold
- Applications 12 months in advance

Working Holidays

- Extended holiday with limited work permission
- Applies to restricted list of countries

Business Permission

- 300,000 available for investment (exemptions in certain fields)
- Employment for two EEA nationals
- Add to the State's commercial activity and competitiveness
- Viable trading concern & economically sufficient
- Good character

5.3 Study & Research Permits

These provide a pre entry clearance to study, often with ancillary work permission.

International Students

- Allowed to work 20 hours per week during term; 40 hours per week during holidays

Graduate Scheme

- Allows 6 months residence permit after completion of studies.
- Facilitates obtaining a work permit/green card.
- Allows work up to 40 hours per week.
- Self employed not permitted

Researchers

- Gives effect to Directive 2005/71.
- Five year maximum.
- Facilitates admission of foreign nationals conducting scientific research.
- Must have sufficient monthly resources.

6 RESIDENCY

6.1 Initial permission

Visas are only pre entry clearance documents. In matters of domestic immigration law, Immigration Officers have power to grant or deny entry, decide on the duration of the stay, and any conditions:

4.—(1) Subject to the provisions of this Act, an immigration officer may, on behalf of the Minister, give to a non-national a document, or place on his or her passport or other equivalent document an inscription, authorising the non-national to land or be in the State (referred to in this Act as “a permission”). (Section 4 Immigration Act 2004)

Clarke J. noted in *VI v. Minister for Justice, Equality and Law Reform* [2007] 4 I.R. 42, the holder of an Irish visa does not have an automatic right to enter the State, since a visa is simply:

a permission to land and amounts to a form of pre-clearance to that end. A permission to remain in the State is given by an immigration officer under the Immigration Acts and, subject to its terms, allows the recipient to remain in the State for whatever period and, subject to whatever conditions, as may be properly attached to that permission.

See also section 5(1) & (2) of the Immigration Act 2004¹⁹

5.—(1) No non-national may be in the State other than in accordance with the terms of any permission given to him or her before the passing of this Act, or a permission given under this Act after such passing, by or on behalf of the Minister.

(2) A non-national who is in the State in contravention of subsection (1) is for all purposes unlawfully present in the State.

In *Saleem v The Minister for Justice, Equality and Law Reform*, 2 June 2011, Cooke J commented on the function of sections 4 and 5 of the 2004 Act:

If one leaves aside the special arrangements applicable to migrant workers who are nationals of a Member State of the European Union or of a state in the European Economic Area, the arrangements governing an entitlement to enter or land in the State and to remain within the jurisdiction thereafter, derive in effect from ss. 4 and 5 of the Immigration Act 2004. Section 5 of that Act provides that no non-national may be in the State other than in accordance with the terms of a permission given under the Act by or on behalf of the Minister, or given before the passing of that Act. Section 4 provides that an Immigration Officer may on behalf of the Minister give a non-national, either by means of a document or by placing a stamp on his passport, “an authorization to land or be in the State”.

Statutory bases for permission to be in the State apart from sections 4 and 5 of the 2004 Act are:

- Section 9(1) of the Refugee Act 1996 (for asylum applicants - note that there is no similar provision in Irish law in respect of applicants for

subsidiary protection.)

- Sections 17(6) and 21(7) of the Refugee Act, 1996 contain status regularising provisions in respect of people who either do not get declarations of refugee status, or whose refugee status is revoked.

An Immigration Officer can refuse to give permission to land or be in the State if satisfied that any of the situations set out in section 4(3)(a) to (k) apply:

(3) Subject to section 2(2), an immigration officer may, on behalf of the Minister, refuse to give a permission to a person referred to in subsection (2) if the officer is satisfied—

(a) that the non-national is not in a position to support himself or herself 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 Act of 1999),

(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 he or she 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;

(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 he or she 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 he or she 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.

There is no statutory appeal against a refusal of permission to land in the State.

Key case re Residency & 'Visa Not Required' country of origin

In *Desiree O'leary & Ors v The Minister for Justice, Equality and Law Reform*, Unreported, High Court, Hogan J, 30th June, 2011, [2011] IEHC 256, the applicants sought to quash a decision of the Minister for Justice pursuant to s. 4(7) of the Immigration Act 2004 whereby he refused to give permission to reside in the State to an elderly south African couple ("the Lemieres"), whose daughter and Irish citizen son live in the State.

The Lemieres, old, infirm, and residing in a violent and generally unsafe area in South Africa, applied for permission to reside in the State in August 2009. They provided detail of dependency, as well as setting out the details of their financial affairs, the issues arising from their advanced years, and health problems, and the impacts on their family in Ireland. They were granted permission to reside in the State until 31st July, 2010, subject to the condition that they could not have recourse to public funds, State services or benefits. The applicants sought to have the decision revoked insofar as it required them to leave the State by 31st July, 2010. The Department of Justice refused to extend the permission to stay beyond the end of July, 2010.

The Court stated that the underlying theme of the Article 41 case law is that the autonomy of family decision making in relation to such matters should be free from unnecessary State interference, save where this is objectively justified. Recalling that Article 41.1.1 describes the family as a "moral institution" possessing inalienable and imprescriptible rights, the Court stated that providing support for parents in advancing years is one dimension of the moral nature of the family as an institution, and that a decision by an adult child to provide emotional and financial support for parents in advancing years by inviting them to live with her and her husband clearly in principle engages Article 41 rights. The Court stated, this principle would suggest that the emotional and financial dependency must be a real one between the adult child and his or her parents, and not, for example, simply a contrivance to circumvent immigration legislation.

The Court stated that an interference by the State with a family decision of this kind otherwise protected by Article 41 could be upheld if the Minister could point to a substantial reason associated with the common good, and that given that the Lemieres are obviously persons of good character, two other broad public policy reasons can immediately be advanced:

- That the Lemieres would not be charges on any public funds.
- The integrity of the immigration system.

The Court stated that while the balance of competing interests is in the first instance a matter for the Minister, the assessment of the underlying facts must be conducted in a fair and reasonable fashion. The Court then considered the reasons for the refusal. The Court noted that the refusal decision referred to the credit card payments, but concluded that this was not "adequate proof of providing financial support", notwithstanding that the financial support

provided went a great deal further than necessary. The Court said that the relevant question was whether the financial transfers were appreciable and significant in the context of the recipients, and the Court found that they were (and, indeed, that they were essential).

The Court noted, with criticism, that the Department's refusal, though it expressed concern and sympathy re the applicants' age, health concerns and fear of violence, suggested that this was a standard concern of elderly persons living alone in many communities. The Court noted that the Department's decision stated that the applicants' claim that the Minister's decision would impact on a number of Irish citizens was "overstating the fact" In response to this, the Court said that Mr and Mrs O'Leary "are so manifestly affected by this decision to refuse permission that the suggestion to the contrary contained in the memorandum for the Minister is, with respect, quite divorced from reality."

The Court noted that the applicants were subjected to what it called "acerbic criticism" in the decision's findings that suggested that they had "attempted to circumvent and manipulate the immigration system to their own ends." The Court said it saw no possible justification for such comments, and noted that while it is true that the Lemieres did not declare in advance of their arrival in Ireland in February 2009 that they intended to reside here on a long term basis, equally there was no procedure whereby such an application could have been made in advance in respect of a couple coming from a visa-exempt country such as South Africa.

The Court granted leave to apply for judicial review on the ground that the Minister's decision represented a disproportionate interference with Ms. O'Leary's Article 41 rights, and that the reasoning for the refusal was not based on a fair and reasonable assessment of the underlying facts and considerations. The Court also granted leave to challenge the decision by reference to Article 8 ECHR and Article 14 ECHR, should it transpire that the domestic constitutional law arguments does not avail the applicants. The Court stated that the obvious devotion of Ms. O'Leary to her parents was manifest, her steadfastness in this regard was thoroughly commendable, and that Mr. O'Leary's dedication to the welfare of his parents-in-law was exemplary. The Court concluded:

"Their deportment vis-à-vis their respective parents and parents in law should be a matter for praise and encouragement, rather than suspicion and criticism. While virtuous conduct cannot always be rewarded by the law, I should have thought that, measured by the values to which this society has committed itself in Article 41 of the Constitution - the protection of which is the solemn duty of this Court - the O'Learys should not be placed at a disadvantage simply because they believe more than most of us do in the precepts of the Fourth Commandment."

6.2 Residence Stamps

Endorsement of the permission to land or be is by way of an immigration stamp called a Certificate of Registration.

The certificate is issued by the Garda National Immigration Bureau (GNIB) to

lawfully resident non-Irish nationals who expect to stay in the State for more than three months. The Certificate of Registration contains the person's photo, registration number, relevant stamp, and an expiry date. Currently, the possible registration stamps are as follows:

- Stamp 1: Non EEA nationals with an employment permit or business permission (employment permit holders; Green Card holders; business permission; working holiday authorizations; non EEA doctors)
- Stamp 1A: Non EEA nationals authorized for full time training with a named body until a specified date (trainee accountants).
- Stamp 2: Non EEA national students who are permitted to work up to 20 hours per week during term, and up to 40 hours per week during holidays.
- Stamp 2A: Non EEA national students who are not permitted to work.
- Stamp 3: Non EEA nationals who are not permitted to work (visitors; spouses and dependents of people with residency/citizenship).
- Stamp 4: People who are permitted to work without needing an employment permit or business permission (Non EU EEA nationals; Spouses and dependants of Irish and EEA nationals; People who have permission to remain on the basis of parentage of an Irish child; Convention and Programme refugees; People granted leave to remain; Non- EEA nationals on intra-company transfer; Temporary registered doctors; Non-EEA nationals who have working visas or work authorizations).
- Stamp 4 (EU FAM): Non EEA national family members of EU citizens who have exercised their right to move to and live in Ireland under the European Communities (Free Movement of Persons) Regulations 2006. People holding this stamp are permitted to work without needing an employment permit or business permission, and they can apply for a residence card under the 2006 Regulations.
- Stamp 5: Foreign nationals who have lived in Ireland for at least eight years and have been permitted by the Minister for Justice to remain in Ireland without condition as to time. They do not need an employment permit or business permission to work.
- Stamp 6: Placed on the foreign passport of an Irish citizen who has dual citizenship, and who wants their entitlement to remain in Ireland to be endorsed on their foreign passport.

The Immigration Officer has the power under the 2004 Act to attach conditions as he sees fit as to duration of stay and engagement in employment. A permission to be in the State can be renewed under section 4(7) of the Immigration Act 2004.

Section 9(6) of the Immigration Act 2004 sets out those people who are exempt from needing a permission to be in the State:

- (a) a non-national who is under the age of 16 years;*
- (b) a non-national who was born in Ireland;*
- (c) a non-national not resident in the State who has been in the State for a period of not more than 3 months since the date of his or her last arrival in the State;*
- (d) a non-national seaman not resident in the State whose ship remains at a port in the State and who does not land in the State for discharge.*

Section 5(3) sets out those people whose are not unlawfully in the State:

- Asylum applicants
- Refugees
- Members of the family of a refugee
- Programme refugees

6.3 Habitual Residence

Application of the Condition

The Habitual Residence conditions may apply where residents in the State seek to get any of the following benefits:

- Blind Pension
- Carer's Allowance
- Child Benefit
- Disability Allowance
- Domiciliary Care Allowance
- Guardian's Payment (Non Contributory)
- Jobseeker's Allowance
- One Parent Family Payment
- State Pension (Non Contributory)
- Supplementary Welfare Allowance (other than once off exceptional and urgent needs payments)
- Widow(er)'s Non Contributory Pension

The main legislation is Section 246 of the Social Welfare Consolidation Act 2005.

Irrelevance of the 'two year rule' presumption

Section 246(1) provides that for the purpose of the sections dealing with the relevant benefits²⁰ it shall be presumed, until the contrary is shown, that a person is not habitually resident in the State at the date of the making of the application concerned unless the person has been present in the State or any other part of the Common Travel Area for a continuous period of two years ending on that date.

Notwithstanding the reference to two years in s. 246(1), EU case law clarifies that, in relation to EU matters, a State cannot stipulate a specific period of time to determine habitual residence. The State is also a signatory to the European Code

²⁰ Sections 141(9), 154(c), 163(3), 168(5), 173(6), 180, 192, 210(9) and 220(3).

of Social Security. There is no set time limit on when a person may become habitually resident.

Relevant Factors/Considerations

Section 246(4)²¹ provides that a deciding officer, when determining whether a person is habitually resident in the State, shall take into consideration all the circumstances of the case including, in particular, the following:

- The length and continuity of residence in the State or in any other particular country;
- The length and purpose of any absence from the State;
- The nature and pattern of the person's employment;
- The person's main centre of interest, and
- The future intentions of the person concerned as they appear from all the circumstances.

Note that satisfying this provision is a question of fact. It is for the decision maker to weigh up all the relevant facts and make a reasonable decision in line with fair procedures. It is important to note that no single factor of the five is more important than the others. Also, note that these criteria are not exhaustive. 'All the circumstances' of a case must be considered.

Length and Continuity of Residence & Length and Purpose of Absence

Relevant considerations include length of time abroad; length of time in Ireland; length of intended time abroad; property in the State; family connections; reasons for leaving and returning.

Nature and Pattern of Employment

Relevant considerations include work history; whether work is full-time or part-time; whether it is short-term or seasonal; and the terms of any contract. If the applicant is self employed, the viability of the work will be important, as will be whether the person is joined in the State by any family.

Main Centre of Interest

The Department of Social Protection's guidance note states that a person's main centre of interest would normally be in the country in which he or she has lived most of his or her life, where his or her family and home are located.

Future Intentions

Relevant considerations include why the claimant came to the State; travel arrangements; accommodation and living arrangements; previous or other employment before arrival; and immigration status.

The Right to Reside Rule

Section 246(5) provides that

Notwithstanding subsections (1) to (4) and subject to subsection (9), a person who does not have a right to reside in the State shall not, for the purposes of this Act, be regarded as being habitually resident in the State.

²¹ *Robin Swaddling v Adjudication Officer*, C-90/97.

Note that this is a question of law. Either the applicant is or is not lawfully resident in the State.

Section 246(6) stipulates those who are to be taken to have a right to reside in the State:

- An Irish citizen
- A person who has a right to enter and reside in the State under EU law
- A refugee
- A member or dependent member of the family of a refugee
- A programme refugee
- A person with subsidiary protection
- A member or dependent member of the family of a person with subsidiary protection
- A person with permission to remain under section 4 or 5 of the Immigration Act 2004.

Section 246(9) provides that notwithstanding that a person has, or is taken to have in accordance with subsection (6), a right to reside in the State the determination as to whether that person is habitually resident in the State shall be made in accordance with subsections (1) and (4).

Excluded People

Section 246(7) sets out those who shall not be regarded as being habitually resident in the State for the purpose of this Act:

- An applicant for asylum
- An applicant for subsidiary protection
- A person the subject of a proposal to deport
- An unsuccessful asylum seeker
- A unsuccessful applicant for subsidiary protection
- A person against whom a deportation order has been made

People whose duration of habitual residence is limited

Section 246(8) sets out those whose habitual residence applies only from the date of their declaration/permission to remain:

- A refugee
- A member or a dependent member of the family of a refugee
- A person with subsidiary protection
- A member or a dependent member of the family of a person with subsidiary protection
- A person granted permission to remain in the State ('under and in accordance with the Immigration Act 1999 or the Immigration Act 2004')

A claimant is entitled to appeal a negative decision to the Social Welfare Appeals Office/ Appeals Health Service Executive Officer with a further right of appeal to the Social Welfare Appeals Office, as the case may be.

6.4 Long-term residence

There are three categories of Long-term residence under domestic law:

- Long-term residence
 - Applicable to people legally resident for five years
 - Valid for five years

- Residence without condition as to time
 - Applicant must have lived legally in the State for eight years
 - Not available to international students; temporary registered doctors; trainee accountants; intra company transfers.
 - Exempts holder from needing a work permit
 - Valid until expiry of the passport
 - No longer accepted from foreign nationals with a Stamp 4 who already have long term residency

- Residence without condition
 - Through a parent born in the State
 - Through a grandparent born in the State
 - Naturalisation/Post Nuptial Citizenship
 - Applicant who had a previous Without Condition endorsement
 - Applicant has a parent who was granted citizenship by naturalisation/PNC/parentage/etc before the applicant in question was born.
 - Irish citizens with dual nationality may get this stamp on their foreign passport.

7. DEPORTATION & EXCLUSION

7.1 Removal

Section 5 of the Immigration Act 2003 provides for the removal of people refused leave to land, but can be used only in respect of people who have been unlawfully in the State for a continuous period of less than three months.

7.2 Deportation

The Minister's Power to Make a Deportation Order

The deportation process is provided by s. 3 of the Immigration Act 1999. S. 3(1) contains the provision giving the Minister power to order a foreign national to leave, and thereafter remain out of, the State, subject to the prohibition of *refoulement* in s. 5 of the Refugee Act, 1996 (as amended):

3.- (1) Subject to the provisions of section 5 (prohibition of refoulement) of the Refugee Act, 1996, and the subsequent provisions of this section, the Minister may by order (in this Act referred to as "a deportation order") require any non-national specified in the order to leave the State within such period as may be specified in the order and to remain thereafter out of the State.

Pursuant to s. 3(2) of the 1999 Act, a deportation order can only be made in respect of:

- (a) a person who has served or is serving a term of imprisonment imposed on him or her by a court in the State,
- (b) a person whose deportation has been recommended by a court in the State before which such person was indicted for or charged with any crime or offence,
- (c) a person who has been required to leave the State under Regulation 14 of the European Communities (Aliens) Regulations, 1977 (S.I. No. 393 of 1977),
- (d) a person to whom Regulation 19 of the European Communities (Right of Residence for Non-Economically Active Persons) Regulations, 1997 (S.I. No. 57 of 1997) applies,
- (e) a person whose application for asylum has been transferred to a convention country for examination pursuant to section 22 of the Refugee Act, 1996,
- (f) a person whose application for asylum has been refused by the Minister,
- (g) a person to whom leave to land in the State has been refused,
- (h) a person who, in the opinion of the Minister, has contravened a restriction or condition imposed on him or her in respect of landing in or entering into or leave to stay in the State,
- (i) a person whose deportation would, in the opinion of the Minister, be conducive to the common good.

While s. 5 of the 2004 Act renders unlawful any non national without a permission to be in the State, deportation orders can be made only in respect of the categories of person set out at s. 3(2)(a)-(i) of the 1999 Act. Accordingly, the Minister has no power to make deportation orders in respect of persons

unlawfully in the State under s. 5 of the 2004 Act, but who do not come within the categories set out in s. 3(2)(a) to (i).

The Proposal to Deport

Where the Minister proposes to make a deportation order, he is required by s. 3(3) and (4) of the 1999 Act to inform the person whom he proposes to deport:

- (i) that he is proposing to deport the applicant, and will, consider representations pursuant to section 3 of the Immigration Act, 1999 as to why a deportation order should not be made, within fifteen working days;
- (ii) that the applicant may leave the jurisdiction voluntarily; and
- (iii) that the applicant can consent to a deportation order.

Applicants are requested to furnish any representations within fifteen working days, though representations have been accepted until the making of a deportation order.

Representations Against Deportation

There are two statutory qualifications to the Minister's power to make a deportation order. The first, as set out in s. 3(1) of the 1999 Act, is s. 5 of the Refugee Act, 1996, which prohibits the expulsion from the State in any manner whatsoever where, in the Minister's opinion, the life or freedom of a person would be threatened on account of the matters set out in that section. S. 5 of the Refugee Act, 1996 sets out the prohibition of *refoulement* under that Act:

5.- (1) A person shall not be expelled from the State or returned in any manner whatsoever to the frontiers of territories where, in the opinion of the Minister, the life or freedom of that person would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion.

(2) Without prejudice to the generality of subsection (1), a person's freedom shall be regarded as being threatened if, inter alia, in the opinion of the Minister, the person is likely to be subject to a serious assault (including a serious assault of a sexual nature).

Accordingly, the Minister cannot make a deportation order in respect of someone whom the Minister considers is likely to be subjected to a serious assault in his or her country of origin.

Murray CJ in his judgment in *Meadows v the Minister for Justice, Equality and Law Reform*, unreported, Supreme Court, 21st January 2010 explained the Minister's arising obligations in the context of s. 3 of the Immigration Act 1999:

Accordingly, before making a deportation order the Minister is required to consider in the circumstances of each particular case whether there are grounds under s.5 which prevent him making a deportation order.

...if such material has been presented to him by or on behalf of the proposed deportee ... the Minister must specifically address that issue and form an opinion. Views or conclusions on such issues may have already been arrived at by officers who considered a proposed deportee's application for asylum,

at the initial or appeal stages, and their conclusions or views may be before the Minister but it remains at this stage for the Minister and the Minister alone in the light of all the material before him to form an opinion in accordance with s. 5 as to the nature or extent of the risk, if any, to which a proposed deportee might be exposed. This position is underscored by the fact that s. 3 envisages that a proposed deportee be given an opportunity to make submissions directly to the Minister on his proposal to make a deportation order at that stage. The fact that certain decisions have been made by officers at an earlier stage in the course of the application for refugee status does not absolve him from making that decision himself.

The second qualification on the power conferred on the Minister to make a deportation order arises from the provisions of s. 3(3) and (6) of the Immigration Act, 1999 which require the Minister to have regard to representations made by the proposed deportee, and certain specified matters, before deciding whether to proceed with the making of a deportation order. S. 3(6) of the Act, 1999 is as follows:

3.-(6) In determining whether to make a deportation order in relation to a person, the Minister shall have regard to

- (a) the age of the person;*
- (b) the duration of residence in the State of the person;*
- (c) the family and domestic circumstances of the person;*
- (d) the nature of the person's connection with the State, if any;*
- (e) the employment (including self-employment) record of the person;*
- (f) the employment (including self-employment) prospects of the person;*
- (g) the character and conduct of the person both within and (where relevant and ascertainable) outside the State (including any criminal convictions);*
- (h) humanitarian considerations;*
- (i) any representations duly made by or on behalf of the person;*
- (j) the common good; and*
- (k) considerations of national security and public policy, so far as they appear or are known to the Minister.*

These criteria, and any matters arising relevant to *non refoulement*, essentially constitute the criteria in what is informally referred to as an application for 'leave to remain', but which is better understood as a claim against the making of a deportation order. This is also the context in which the Minister can consider Article 3 and Article 8 ECHR matters.

The Minister, in making a deportation order, is obliged (a) to provide clear rationale on foot of which he decided that the *non refoulement* principle of s. 5 of the Act has been complied with, and (b) to ensure it is evident from the terms of the decision that he took all relevant considerations into account to ensure, *inter alia*, that there is no lack of proportionality in the decision (*Meadows, Per Murray CJ*)

Deportation & Effective Remedy

While there is no right of appeal against the issuance of a deportation order, an applicant can, however, seek to revoke or amend a deportation order under s. 3(11) of the 1999 Act. This remedy does not suspend the deportation order. An applicant can, alternatively, as already noted above, seek judicial review of a deportation order. This remedy does not suspend the deportation order. Should an applicant seek either to revoke or review a deportation order, he will be dependent on the Minister giving an undertaking not to effect deportation pending determination of the request or application, or will otherwise need to seek an injunction from the High Court restraining removal pending the determination of the matter. The High Court recently confirmed that the section 3(11) and judicial review process, together, ensured an effective remedy in deportation cases (*Efe v Minister for Justice*, Hogan J, 6 July 2011)

7.3 Exclusion

As already noted, s. 3 of the Immigration Act 1999 provides that a deportation order requires a non national “to leave the State within such period as may be specified in the order and to remain thereafter out of the State.” The order thus contains two distinct measures: (a) a measure requiring the non national to leave the State within such period as may be specified in the order, and (b) a measure requiring the non national to remain thereafter out of the State.

The exclusion measure inherent in deportation was raised in *B.I.S. and Ors v Minister for Justice, Equality and Law Reform*, High Court, 30th November 2007, but the judgment of Dunne J in that matter did not necessitate determining the issue. More recently, in *J.B. (a minor) and Ors v Minister for Justice, Equality and Law Reform*, unreported, High Court, 14th July 2010, Cooke J, finding that the deportation order made against the mother of an Irish citizen child could mean that she could never be entitled to visit her child in the State as she grows up, granted leave on the ground that in making a deportation order against the applicant child’s mother, the Minister did not consider and weigh in the balance any less restrictive measure available to him to control the mother’s presence in the country.

8 DETENTION OF FOREIGN NATIONALS

8.1 Detention of Asylum Seekers

Article 18(1) of Council Directive 2005/85 states that Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum.

Section 9(8) of the Refugee Act, 1996 (as amended) provides:

(8) Where an immigration officer or a member of the Garda Síochána, with reasonable cause, suspects that an applicant—

- (a) poses a threat to national 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 true identity,*
- (d) intends to avoid removal from the State in the event of his or her application for asylum being transferred to a convention country pursuant to section 22 or a safe third country (within the meaning of that section),*
- (e) intends to leave the State and enter another state without lawful authority, or*
- (f) without reasonable cause has destroyed his or her identity or travel documents or is in possession of forged identity documents,*

he or she may detain the person in a prescribed place (referred to subsequently in this Act as “a place of detention”).

Section 9(8) does not apply to persons under the age of 18. Pursuant to sections 10(1)(c) and (f) of the 1996 Act a detained person shall be informed by the immigration officer without delay, where possible in a language he or she understands, that he or she is entitled to consult a solicitor and is entitled to the assistance of an interpreter for the purposes of such a consultation.

Section 9(8) is not a criminal provision and is considered a civil matter. A person detained pursuant to s 9(8) must be brought before a judge of the District Court as soon as practicable. Where the Court is satisfied that a reasonable cause exists pursuant to the relevant section, the Court may commit the person to a place of detention for a period not exceeding 21 days from the time of her detention. In *SN v Governor of Cloverhill Prison* [2005] IEHC 471, 14 April 2005, High Court (unreported) the Court held that a District Court Judge must set out clearly the evidential basis for detention pursuant to s 9(8) of the Refugee Act, 1996.

The Judge may also grant conditional release. (this applies equally to the provisions cited below). The conditions of release may be varied on application by either party). A person who fails to comply with a condition imposed may be detained and again brought again before a Judge. There is no statutory limit on the number of times an application pursuant to s 9(8) may be made in relation to an applicant, and there is no appeal to the Circuit Court from a District Court Judge’s decision to detain an applicant pursuant to this Section.

In the event that at any time during the period of detention an immigration officer or Garda forms the opinion that none of the paragraphs of s 9(8) apply,

the applicant shall be brought before a Judge of the District Court and, if satisfied, the Judge shall release the person from detention.

8.2 Detention pending transfer under the Dublin Regulation

Section 22(1)(b) of the Refugee Act, 1996 (as amended) allows the Minister to make such orders as appear to him or her to be necessary or expedient for the purpose of giving effect to Council Regulation (EC) 343/2003.

Section 22(1) provides, inter alia, that without prejudice to the generality of subsection (1), an order under this section may—

- *specify the measures to be taken for the purpose of the removal of a person whose application has been transferred to a convention country or a safe third country from the State to that convention country or safe third country including, where necessary, the temporary detention or restraint of the person, and*
- *provide for the temporary detention (for a period not exceeding 48 hours) of a person who, having arrived in the State directly from a convention country or a safe third country, makes an application for asylum until a decision on the matters at paragraph (a) has been made.'*

As noted above, the Refugee Act, 1996 (Section 22) Order, 2003 (SI No. 423 of 2003) is the principle statutory instrument giving effect to the Council Regulation, and Article 7(5) of the Order provides that a person to whom a notice of the making of a transfer has been issued may without further notice be arrested and detained for the purpose of ensuring his or her departure from the State in accordance with the transfer order. The transfer order must already have been made and the notification issued in order to activate this provision.

8.3 Detection of People Refused Permission to Land

Foreign nationals to whom section 5 of the 2003 Act applies (i.e., people who are in the State less than three months and who are to be removed from the State) can be detained under s. 5(2) of that act, for a maximum aggregate of eight weeks.

8.4 Detention of Foreign Nationals Without ID

Section 11 and 12 of the Immigration Act 2004 (as amended by Section 34 of the Civil Law (Miscellaneous Provisions) Act 2011) provide:

11.—(1) Every person (other than a person under the age of 16 years) landing in the State shall be 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.

(2) Every person landing in or embarking from the State shall furnish to an immigration officer, when requested to do so by that officer—

(a) the passport or other equivalent document referred to in subsection (1), and

(b) such information in such manner as the immigration officer may reasonably require for the purposes of the performance of his or her functions.

(3) (a) A person who contravenes this section shall be guilty of an offence.

(b) In proceedings brought against a person for an offence under this section, it shall be a defence for the person to prove that, at the time of the alleged offence, he or she had reasonable cause for not complying with the requirements of this section to which the offence relates.

...

12.—(1) Every non-national present in the State (other than a non-national under the age of 16 years) shall produce on demand—

(a) 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, and

(b) in case he or she is registered or deemed to be registered under this Act, his or her registration certificate.

(2) (a) A non-national who contravenes this section shall be guilty of an offence.

(b) In proceedings brought against a person for an offence under this section, it shall be a defence for the person to prove that, at the time of the alleged offence, he

or she had reasonable cause for not complying with the requirements of this section to which the offence relates.

(3) In this section ‘on demand’ means on demand made at any time by the Minister, any immigration officer or a member of the Garda Síochána, for the purposes of establishing that the presence in the State of the non-national concerned is not in contravention of section 5.

The amendment replaces the old section 12, which had been found to be unconstitutional. The original section 12 was as follows:

(1) Every non-national shall produce on demand, unless he or she gives a satisfactory explanation of the circumstances which prevent him or her from so doing-

(a) 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, and

(b) in case he or she is registered or deemed to be registered under this Act, his or her registration certificate.

(2) A non-national who contravenes this section shall be guilty of an offence.

(3) In this section ‘on demand’ means on demand made at any time by any immigration officer or a member of the Garda Síochána.

....”

Kearns J, *Dokie v Minister for Justice, Equality and Law Reform*, 25 March 2011, in striking the original section 12 down, said:

... I am of the view that, while s. 12 was designed as an immigration control mechanism, its vagueness is such as to fail basic requirements for the creation of a criminal offence. As drafted it gives rise to arbitrariness and legal uncertainty. It also offends the principle that a person be not obliged to incriminate himself. I find it unconstitutional for those reasons.

8.5 Detention of foreign nationals on ships arriving at a port

Section 7 of the Immigration Act 2004.

7.—(1) The master of any ship arriving at a port in the State may detain on board any non-national coming in the ship from a place outside the State until the non-national is examined or landed for examination under this section, and shall, on the request of an immigration officer, so detain any such non-national, whether seaman or passenger, whose application for a permission has been refused by an immigration officer, and any such non-national so detained shall be deemed to be in lawful custody.

8.6 Detention Pending Deportation

Section 5 of the Immigration Act 1999

5.—(1) Where an immigration officer or a member of the Garda Síochána, with reasonable cause, suspects that a person against whom a deportation order is in force has failed to comply with any provision of the order or with a requirement in a notice under section 3 (3)(b)(ii), he or she may arrest him or her without warrant and detain him or her in a prescribed place.

Detention under s. 5 must be for the purpose of effecting a deportation order.

Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999 [2000] 2 IR 360

The detention, if it is to remain lawful, must be confined to the statutory purposes in accordance with the principles enunciated by Flood J in Gutrani [...] Flood J observed as follows:

“The essence of the present application is that the Minister’s power of detention under the said provisions are for the purpose of fulfilling the deportation order and not otherwise...”

The detention of an applicant pursuant to s. 5 of the 1999 Act to ensure that she was available for deportation in the event that the Minister ultimately confirmed the pre-existing deportation order was unlawful in the absence of a “final or concluded” intention to deport. (*BFO v Governor of Dochas Centre* [2005] 2 IR 1)

It must be evident that the deportation can actually be effected within the eight-week period. (*Om v Governor of Cloverhill Prison*, Unreported, Hogan J, 1 August 2011)

9 EU FREE MOVEMENT & CITIZENSHIP

9.1 The Development of EU Free Movement Law

While Irish domestic immigration law regulates entry, residence and removal of foreign (i.e., non-EU citizen) nationals, EU citizenship and free movement law regulates the entry, residence and removal of EU citizens exercising EU law rights, and their family members, whether those family members are themselves EU citizens, or foreign nationals. The nature of EU free movement has developed markedly in recent years.

The rights to live and work anywhere in the Member States, introduced in the Treaty of Paris in 1951 developed into Union citizenship, inserted under Article 8 of the EC Treaty by the Maastricht Treaty in 1992. The relevant Treaty provisions are now in Articles 20 to 25 of the Treaty on the Functioning of the European Union (TFEU). The Court of Justice developed the idea of Union citizenship by interpreting these provisions in light of the right to equal treatment and the prohibition of discrimination, and clarified that a Union citizen's right to move and reside in another Member State was independent from the traditional economically grounded protection of free movement rights (e.g., *Martinez Sala*²²).

The Court went on to develop this interpretation, benefiting economically inactive Member State nationals, in light of the Treaty's citizenship provisions (e.g., *Grzelczyk*²³ on free movement rights, and *Spain v UK*²⁴ on electoral rights). These judicial and progressive interpretations of citizenship rights were reflected in the legislative consolidation of citizenship rights in Directive 2004/38.

The Court of Justice subsequently clarified that the exercise of free movement rights brought Union citizens within the material scope of the Treaty, and that any measure with a restrictive or deterrent effect, unless justified by an overriding objective in the general interest, and proportionate to the aim sought to be achieved, was prohibited (e.g., *Metock*²⁵).

Union citizenship again evolved with the Court of Justice's interpretation of Article 20 TFEU in *Zambrano*²⁶, which showed that Union citizens could invoke rights essential to the concept of citizenship without exercising free movement. Moreover, the ruling effectively clarified that the right to reside can be distinct from the right to move. Union citizens who have not exercised free movement rights can therefore invoke EU law against their own Member States, when there is a linking EU matter. This is a fundamental change in the relationship between Member States and their nationals. The consequences of the *Zambrano* decision have been the subject of a delimiting exercise in the Court of Justice decision in

²² Case C-85/96 *Martinez-Sala* [1998] ECR I-2691

²³ Case C-184/99 *Grzelczyk* [2001] ECR I-6193.

²⁴ Case C-145/04 *Spain v UK* [2006] ECR I-7917

²⁵ Case C-127/08 *Metock* [2008] ECR I-6241.

²⁶ Case C-34/09 *Zambrano* (unreported), 9th March 2011.

*McCarthy*²⁷ in which the Court held that the UK authorities' refusal to grant residency to a foreign national spouse of a UK and EU citizen was not in breach of her EU Treaty rights.

Key Legislation includes:

- Article 20(1) TFEU
 1. *Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.*

- Article 21(1) TFEU
 1. *Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.*

- Article 45 TFEU
 1. *Freedom of movement for workers shall be secured within the Union.*
 2. *Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.*
 3. *It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:*
 - (a) *to accept offers of employment actually made;*
 - (b) *to move freely within the territory of Member States for this purpose;*
 - (c) *to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;*
 - (d) *to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.*
 4. *The provisions of this Article shall not apply to employment in the public service.*

- Directive 2004/38 (recital 3)

Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens.

- European Communities (Free Movement of Persons) Regulations 2006 (S.I. 656 of 2006) as amended (transposes Directive 2004/38 into domestic Irish law)

²⁷ Case C-434/09 *McCarthy* (unreported), 5th May 2011.

9.2 Union Citizens' Rights

Entry to the State

Article 5(1) of Directive 2004/38 (the Citizenship Directive) provides:

1. Without prejudice to the provisions on travel documents applicable to national border controls, Member States shall grant Union citizens leave to enter their territory with a valid identity card or passport and shall grant family members who are not nationals of a Member State leave to enter their territory with a valid passport.

No entry visa or equivalent formality may be imposed on Union Citizens

Right of Residence up to Three Months

Article 6(1) of the Citizenship Directive provides:

1. Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.

Right of Residence for more than Three Months

Article 7 of the Citizenship Directive provides:

1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

- (a) are workers or self-employed persons in the host Member State; or*
- (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or*
- (c) — are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and*
— have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence;
- (d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).*

Permanent Residence

Article 16(1) of the Citizenship Directive provides:

- 1. Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.*
- 2. ...*
- 3. Continuity of residence shall not be affected by temporary absences not*

exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of 12 consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country.

4. Once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years.

Citizens of Bulgaria & Romania

A transition period applies under the Treaties of Accession. It is scheduled to end on 31st December 2011. Meanwhile, full rights do not apply to citizens of Bulgaria and Romania, and citizens of these Member States seeking to work in the State must get a work permit. The transitional arrangements may be extended for a maximum of two more years if Ireland persuades the Commission that there would otherwise be “serious disturbance to its labour market”. To date, Ireland has not made any such representations to the Commission.

EU Workers’ Rights

- 45(2): Treaty basis of the Right of access to employment
- Art 1612/68 develops this right:
 - *1. Any national of a Member State, shall, irrespective of his place of residence, have the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State in accordance with the provisions laid down by law, regulation or administrative action governing the employment of nationals of that State.*
- 45(3): Treaty basis of the Right to reside
- Work requirement
 - In work: whether effective and genuine, for remuneration, however few the hours and minimal the pay.
 - Seeking work: reasonable period must be allowed
 - Loses Work:
 - Article 7(3) of the Citizenship Directive:*
 - For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:*
 - (a) he/she is temporarily unable to work as the result of an illness or accident;*
 - (b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;*
 - (c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;*
 - (d) he/she embarks on vocational training. Unless he/she is*

involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.

○ *Social Welfare, Tax, Training, Equality Protections:*

Article 7 Regulation 1612/68:

1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment;

2. He shall enjoy the same social and tax advantages as national workers.

3. He shall also, by virtue of the same right and under the same conditions as national workers, have access to training in vocational schools and retraining centres.

Any clause of a collective or individual agreement or of any other collective regulation concerning eligibility for employment, employment, remuneration and other conditions of work or dismissal shall be null and void in so far as it lays down or authorises discriminatory conditions in respect of workers who are nationals of the other Member States.

9.3 Family Members of Union Citizens' Rights

Beneficiaries of the Citizenship Directive are not only the EU citizens, but also their family members defined in Article 2, and 'other' family members, depending on the facts of a case, under Article 3.

Family Members

Articles 2 & 3 Directive 2004/38:

- Union Citizen's spouse
- Registered partner if the State treats such partnerships as equivalent to marriage
- Children under 21
- Grandchildren under 21
- Dependent children or grandchildren over 21
- Dependent parents or grandparents

'Other' Family Members

Article 3 Directive 2004/38:

(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;

(b) the partner with whom the Union citizen has a durable relationship, duly attested.

Entry to the State

Article 5(2) Directive 2004/38:

2. Family members who are not nationals of a Member State shall only be required to have an entry visa in accordance with Regulation (EC) No 539/2001 or, where appropriate, with national law. For the purposes of this Directive, possession of the valid residence card referred to in Article 10 shall exempt such family members from the visa requirement.

Member States shall grant such persons every facility to obtain the necessary visas. Such visas shall be issued free of charge as soon as possible and on the basis of an accelerated procedure.

Key Case re Visas & Entry for the State for beneficiaries or EU Treaty Rights

In *Raducan & Anor v The Minister for Justice & Anor*, unreported, [2011] IEHC 224, 3rd June 2011), Ms Raducan, a Moldovan wife of an EU national residing in the State, in possession of a 'residence card for family members', was refused permission to land in the State, and detained for almost three full days, and was to be removed from the State in October 2010, when she successfully brought an application under Article 40.4.2 of the Constitution of Ireland. In the case, an immigration officer averred that he did not know what a 'residence card for family members' was, and that there were no facilities for processing visas at Dublin airport.

Hogan J declared Ms Raducan's detention unlawful, and declared that by refusing to admit her to the State or by failing to offer a visa processing facility within the State, the State had failed to comply with its obligations under Arts. 5(2) and 5(4) of Directive 2004/38. The Court also awarded Ms Raducan €7,500 damages for her three day deprivation of liberty. It is notable that although Ms Raducan, as the holder of an EU family residence card, did not need a visa, the Court focused on the fact that there was no visa processing facility at the airport.

Residence up to Three Months

Article 6(2) Directive 2004/38

2. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen.

Residence Beyond Three Months

Article 7(2) Directive 2004/38

2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).

Residence without the Union Citizen

- Death/Departure of the Union Citizen (Article 12 – EU family members only re departure)
- Divorce/Annulment/Termination of Partnership (Article 13)
- *Baubast* provision
- Personal capacity prior to permanence

Permanent Residence

2. Paragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years.

Key Cases:

- *Case C-267/83 Diatta v Land Berlin* [1985] ECR 567 (rights apply whether or not a couple lives together).
- *Case C-413/99 Baumbast v SHHD* [2002] 3 CLMR 23.
- *Case C-127/08 Metock v Minister for Justice, Equality and Law Reform* (rights accrue irrespective of when the marriage took place, and how the foreign national spouse joined his or her Union citizen spouse).
- *KG (Sri Lanka) v SSHD* [2008] EWCA Civ 13 (dependency of 'other' family members should exist in the country from which the Union citizen has come).
- *Zhu & Chen v SHHD* [2004] Imm Ar 33.
- *Case C-34/09 Zambrano*, Unreported, 9 March 2011.
- *Case C-434/09 McCarthy*, Unreported, 5 May 2011.

9.4 Removal, Exclusion & Detention of Beneficiaries of EU Rights

Removal

Regulation 20 of SI 656 of 2006 provides for removal:

20. (1) (a) Subject to paragraph (6), the Minister may by order require a person to whom these Regulations apply to leave the State within the time specified in the order where-

- (i) the person has been refused a residence card or a permanent residence certificate or card,*
- (ii) the person refuses to comply with a requirement under Regulation 19 or 22,*
- (iii) the person is no longer entitled to be in the State in accordance with the provisions of these Regulations, or*
- (iv) in the opinion of the Minister, the conduct or activity of the person is such that it would be contrary to public policy or it would endanger public security or public health to permit the person to remain in the State.*

...

(c) The Minister may impose an exclusion period on the person concerned in a removal order and that person shall not re-enter or seek to re-enter the State during the validity of that period.

...

(3) (a) In determining whether to make a removal order and whether to impose an exclusion period in respect of a person the Minister shall take account of-

- (i) the age of the person,*
- (ii) the duration of residence in the State of the person,*
- (iii) the family and economic circumstances of the person,*
- (iv) the nature of the person's social and cultural integration with the*

*State, if any,
(v) the state of health of the person, and
(vi) the extent of the person's links with his or her country of origin.*

...
(6) (a) A removal order may not, except on serious grounds of public policy, or public security, be made in respect of a person to whom these Regulations apply, where the person has an entitlement to reside permanently in the State.

(b) A removal order may not, except on imperative grounds of public security, be made in respect of a Union citizen who -

(i) has resided in the State for the previous 10 years, or

(ii) subject to subparagraph (c), is a minor.

(c) Subparagraph (b)(ii) shall not apply where it is in the best interests of the minor concerned that he or she should be removed from the State.

Exclusion

Regulation 23 of SI 656 of 2006 provides for exclusion:

23. (1) The Minister may, if he or she considers it necessary in the interest of public security or public policy, by order exclude a person to whom these Regulations apply from the State.

(2) (a) A person the subject of an exclusion order may apply to the Minister to have the exclusion order revoked.

Detention

Regulation 20(4) of SI 656 of 2006 provides for detention:

(4) (a) A person to whom a notice under paragraph (3)(b)(ii) has been issued may without further notice be arrested and detained under warrant of an immigration officer or member of the Garda Síochána in any of the places listed in Schedule 10 in the custody of the officer or member of the Garda Síochána for the time being in charge of that place for the purpose of ensuring his or her departure from the State in accordance with the removal order concerned.

...
(c) A person arrested and detained under subparagraph (a) may be detained only until such time (being as soon as is practicable) as he or she is removed from the State in compliance with the removal order concerned.

9.5 EU Citizens' Fundamental Rights

The decision in *Zambrano*²⁸ appears to imply that there are some matters so fundamental to the genuine enjoyment of the substance of rights conferred on Union citizens that Member States are precluded from applying measures that have the effect of depriving citizens of such rights, or that so fundamentally impact such rights that future free movement is seriously jeopardized. It appears that among the protected rights under EU citizenship (Article 20 TFEU) is the free standing right to reside in a Member State of nationality, the right of a minor child citizen to the company and care in a Member State of nationality, of his or

²⁸ *Case C-34/09 Zambrano*, Unreported, 9 March 2011.

her parent upon whom she is dependent, and the right of such a parent to reside and work in the child's Member State of nationality.

10 IRISH CITIZENSHIP & NATURALISATION

10.1 The Constitutional Basis of Citizenship

Article 2 of the Constitution of Ireland provides:

It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish Nation. That is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland. Furthermore, the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage.

Article 9 of the Constitution of Ireland provides:

1. 1° On the coming into operation of this Constitution any person who was a citizen of Saorstát Éireann immediately before the coming into operation of this Constitution shall become and be a citizen of Ireland.

2° The future acquisition and loss of Irish nationality and citizenship shall be determined in accordance with law.

3° No person may be excluded from Irish nationality and citizenship by reason of the sex of such person.

2. 1° Notwithstanding any other provision of this Constitution, a person born in the island of Ireland, which includes its islands and seas, who does not have, at the time of the birth of that person, at least one parent who is an Irish citizen or entitled to be an Irish citizen is not entitled to Irish citizenship or nationality, unless provided for by law.

2° This section shall not apply to persons born before the date of the enactment of this section.

3. Fidelity to the nation and loyalty to the State are fundamental political duties of all citizens.

10.2 Legislative Regulation of Citizenship

- *Citizenship by Birth*

Section 6A(1) of the 1956 Act:

A person born in the island of Ireland shall not be entitled to be an Irish citizen unless a parent of that person has, during the period of 4 years immediately preceding the person's birth, been resident in the island of Ireland for a period of not less than 3 years or periods the aggregate of which is not less than 3 years

- *Citizenship by Descent*

Section 7(1) of the 1956 Act:

A person is an Irish citizen from birth if at the time of his or her birth either parent was an Irish citizen or would if alive have been an Irish citizen.

- *Citizenship of Children Otherwise Stateless*

Section 6(3) of the 1956 Act:

A person born in the island of Ireland is an Irish citizen from birth if he or she is not entitled to citizenship of any other country.

- *Citizenship of Foundlings*
Section 10 of the 1956 Act:
Every deserted newborn child first found in the State shall, unless the contrary is proved, be deemed to have been born in the island of Ireland to parents at least one of whom is an Irish citizen.
- *Citizenship of Adopted Children*
Section 11(1):
Upon an adoption order being made, under the Adoption Act 1952 (No. 25 of 1952), in a case in which the adopter or, where the adoption is by a married couple, either spouse is an Irish citizen, the adopted child, if not already an Irish citizen, shall be an Irish citizen.
- *Citizenship by Naturalisation*
Section 14 of the 1956 Act:
Irish citizenship may be conferred on a non-national by means of a certificate of naturalisation granted by the Minister.

Section 15(1) and (2):

(1) Upon receipt of an application for a certificate of naturalisation, the Minister may, in his absolute discretion, grant the application, if satisfied that the applicant—

(a)(i) is of full age, or

(ii) is a minor born in the State;

(b) is of good character;

(c) has had a period of one year's continuous residence in the State immediately before the date of the application and, during the eight years immediately preceding that period, has had a total residence in the State amounting to four years;

(d) intends in good faith to continue to reside in the State after naturalisation; and

(e) has made, either before a Justice of the District Court in open court or in such manner as the Minister, for special reasons, allows, a declaration in the prescribed manner, of fidelity to the nation and loyalty to the State.

(2) The conditions specified in paragraphs (a) to (e) of subsection (1) are referred to in this Act as conditions for naturalisation.

Section 16 – power to dispense with the conditions for naturalisation:

The Minister may, in his absolute discretion, grant an application for a certificate of naturalisation in the following cases, although the conditions for naturalisation (or any of them) are not complied with:

(a) where the applicant is of Irish descent or Irish associations;

(b) where the applicant is a parent or guardian acting on behalf of a minor of Irish descent or Irish associations;

(c) where the applicant is a naturalised Irish citizen acting on behalf of a minor child of the applicant;

...

(f) where the applicant is or has been resident abroad in the public service;

(g) where the applicant is a person who is a refugee...

(2) For the purposes of this section a person is of Irish associations if—

(a) he or she is related by blood, affinity or adoption to a person who is an Irish citizen or entitled to be an Irish citizen, or

(b) he or she was related by blood, affinity or adoption to a person who is deceased and who, at the time of his or her death, was an Irish citizen or entitled to be an Irish citizen.

- *Citizenship by Naturalisation for Spouse of Irish Citizen*

Section 20 of the 1956 Act:

Acquisition of Irish citizenship by a person shall not of itself confer Irish citizenship on his or her spouse.

Section 15A(1) & (2):

(1) Notwithstanding the provisions of section 15, the Minister may, in his or her absolute discretion, grant an application for a certificate of naturalisation to the non-national spouse of an Irish citizen if satisfied that the applicant—

(a) is of full age,

(b) is of good character,

(c) is married to that citizen for a period of not less than 3 years,

(d) is in a marriage recognised under the laws of the State as subsisting,

(e) and that citizen are living together as husband and wife and that citizen submits to the Minister an affidavit in the prescribed form to that effect,

(f) had immediately before the date of the application a period of one year's continuous residence in the island of Ireland,

(g) had, during the 4 years immediately preceding that period, a total residence in the island of Ireland amounting to 2 years,

(h) intends in good faith to continue to reside in the island of Ireland after naturalisation, and

(i) has made, either before a judge of the District Court in open court or in such manner as the Minister, for special reasons, allows, a declaration in the prescribed manner, of fidelity to the nation and loyalty to the State.

(2) The Minister may, in his or her absolute discretion, waive the conditions at paragraph (c), (f), (g) or (h) of subsection (1) or any of them if satisfied that the applicant would suffer serious consequences in respect of his or her bodily integrity or liberty if not granted Irish citizenship.

- *Revocation of Citizenship*

Section 19(1) 1856 Act:

(1) The Minister may revoke a certificate of naturalisation if he is satisfied—

(a) that the issue of the certificate was procured by fraud,

misrepresentation whether innocent or fraudulent, or concealment of material facts or circumstances, or
(b) that the person to whom it was granted has, by any overt act, shown himself to have failed in his duty of fidelity to the nation and loyalty to the State, or
(c) that (except in the case of a certificate of naturalisation which is issued to a person of Irish descent or associations) the person to whom it is granted has been ordinarily resident outside the State or, in the case of an application for a certificate of naturalisation granted under section 15A, resident outside the island of Ireland (otherwise than in the public service) for a continuous period of seven years and without reasonable excuse has not during that period registered annually in the prescribed manner his name and a declaration of his intention to retain Irish citizenship with an Irish diplomatic mission or consular office or with the Minister, or
(d) that the person to whom it is granted is also, under the law of a country at war with the State, a citizen of that country, or
(e) that the person to whom it is granted has by any voluntary act other than marriage acquired another citizenship.

Loss of Citizenship

Section 21(1) 1956 Act:

If an Irish citizen of full age is or is about to become a citizen of another country and for that reason desires to renounce citizenship, he or she may do so, if ordinarily resident outside the State, by lodging with the Minister a declaration of alienage in the prescribed manner, and, upon lodgment of the declaration or, if not then a citizen of that country, upon becoming such, shall cease to be an Irish citizen.

10.3 Absolute Discretion

The 1956 Act states that “the Minister may, in his absolute discretion” grant naturalisation where the conditions are met. The High Court has made the following comments about this absolute discretion:

- *B v Minister for Justice, Equality and Law Reform, Cooke J, 18 June 2009: Section 15 provides that when the Minister is satisfied that an applicant fulfils the naturalisation conditions he may nevertheless refuse to grant the certificate in his absolute discretion. In such event the court cannot act as a court of appeal from the decision and while the Minister’s discretion is not an unfettered one, the court cannot interfere so long as it has been exercised by the Minister in accordance with the powers granted under the section and has been exercised fairly and in accordance with the principles of natural justice.*
- *Abuissa v Minister for Justice, Equality and Law Reform, Clark J, 1 July 2010, at para. 69: As the grant of naturalisation is neither a right nor a benefit to which any applicant has a legal entitlement, the effect of a refusal without reasons of an application for naturalisation does not have the consequence or effect of*

withholding from the applicant a benefit which would be withheld or granted “to a class of persons of significant size having regard to all the circumstances and of which the person is a member”. As previously stated, the application here was for the exercise of the Minister’s absolute discretion to confer a privilege which the applicant accepts is not entitlement even if the conditions for naturalisation are met.

- C.F., *Hussain v Minister for Justice, Equality and Law Reform*, Hogan J, 13 April 2011, at para. 18:
Yet if the Minister could act entirely upon his own personal conceptions of what was entailed by good character on the basis that the Oireachtas had thereby vested him with an “absolute” discretion, the way would be opened for the imposition of private morality and arbitrary choice in the sphere of public law. In fairness, counsel for the Minister, Ms. Stack, fairly disclaimed any such contention, although she did argue that the words gave the maximum possible degree of leeway to the Minister in making an assessment of this kind.

10.4 Irish Citizenship & EU Law

Irish citizenship is a gateway to EU citizenship. The following ECJ/CJEU decisions should be noted:

- Case C-369/90 *Micheletti v Delegación del Gobierno Cantabria*, at para 10:
Under international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality.
- Case C-192/99 *Kaur*, at para 19:
As the Court held in paragraph 10 of Micheletti and Others, cited above, [u]nder international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality.
- Case 200/02 *Zhu and Chen*, at para 37
Nevertheless, under international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality (see, in particular, Case C-369/90 Micheletti and Others [1992] ECR I-4329, paragraph 10, and Case C-192/99 Kaur [2001] ECR I-1237, paragraph 19).
- Case C-135/08 *Rottmann* (unreported), 2 March 2010
The Court of Justice ruled that it was for that Court to rule on questions referred to it by a Member State which concerned the conditions under which a Union citizen may, because he loses his nationality, lose his status of citizen of the Union, and thereby be deprived of the rights attaching to that status.

10.5 The Substance of Citizenship

Section 29 of the Irish Nationality and Citizenship Act 1956 as amended

An Irish citizen, wherever born, shall be entitled to all the rights and privileges conferred by the terms of any enactment on persons born in the State.

In *ZH (Tanzania)*²⁹, Baroness Hale referred approvingly to the Australian decisions in *Vaitaiki*³⁰, and *Wan*³¹, and opined that “although nationality is not a “trump card” it is of particular importance in assessing the best interests of any child. The UNCRC recognises the right of every child to be registered and acquire a nationality (Article 7) and to preserve her identity, including her nationality (Article 8).”³² Baroness Hale further noted relevant principles arising from the best interests of the child:

- In all decisions concerning children, their best interests must be paramount, and a primary consideration; (paras. 21; 25)
- The important thing in such cases is to consider those best interests first; (para 26)
- Any decision taken without due regard to safeguarding and promoting the welfare of any children involved will not be in accordance with law; (para. 24)

Judicial opinions in Irish law have both broadly asserted the importance of a strong participatory right in one’s community (e.g., Fennelly J in his dissenting judgment in *A.O. & D.L.*³³), and have proffered a more restrictive view (e.g., Clarke J in *Alli*³⁴). And these differing views have somewhat analogous counterparts in the opinions of Advocates General Sharpston in the recent CJEU decisions in *Zambrano* and Kokott in *McCarthy*.

In *Oguekwe & Ors v Minister for Justice, Equality and Law Reform*, unreported, 1 May 2008, the Supreme Court held in deciding whether to deport a parent of an Irish child, the Minister for Justice had to consider the facts relevant to the personal rights of the citizen child protected by the Constitution, if necessary by due enquiry in a fair and proper manner, identify a substantial reason which required the deportation of a foreign national parent of an Irish born child, and make a reasonable and proportionate decision.

In *Alli (a minor) & Anor v the Minister for Justice, Equality and Law Reform* [2009] IEHC 595, Clark J held that “the aim of the State to maintain control of its own borders and operate a regulated system for control, processing and monitoring of

²⁹ *ZH (Tanzania) v Secretary of State for the Home Department* (unreported), 1st February 2011.

³⁰ *Vaitaiki v Minister for Immigration and Ethnic Affairs* [1998] FCA 5, (1998) 150 ALR 608.

³¹ *Wan v Minister for Immigration and Multi-cultural Affairs* [2001] FCA 568.

³² Baroness Hale also cited (at para. 30) with approval the following list of matters which the Court in *Wan* regarded as important:

“(a) the fact that the children, as citizens of Australia, would be deprived of the country of their own and their mother’s citizenship, ‘and of its protection and support, socially, culturally and medically, and in many other ways evoked by, but not confined to, the broad concept of lifestyle’...;

(b) the resultant social and linguistic disruption of their childhood as well as the loss of their homeland;

(c) the loss of educational opportunities available to the children in Australia; and

(d) their resultant isolation from the normal contacts of children with their mother and their mother’s family.”

³³ *A.O. & D.L v Minister for Justice* [2003] 1 IR 1

³⁴ *Alli v Minister for Justice, Equality and Law Reform* (unreported), High Court, 2nd December 2009.

non national persons in the State” constituted a substantial reason allowing deportation of a non national parent of an Irish citizen. By contrast, in the decision of *L.D. v The Secretary of State for the Home Department* [2010] UKUT 278 (IAC), Blake J held that “[i]mmigration control is not a legitimate end in itself, though it is a well established means of protecting the economic well being of the country and rights of others by regulating borders in such manner as the general immigration policy of the country approved by Parliament considers fit.” Blake J went on to overturn the decision of the lower body requiring the departure from the UK of an unlawfully resident father of resident (but not citizen) children.

11 PEOPLE IN NEED OF INTERNATIONAL PROTECTION

11.1 Asylum Seekers

Access to the Asylum Procedure

The Refugee Act 1996 provides that a person who at any time is in the State and is seeking refugee status may apply to the Minister for Justice for a declaration of refugee status. Note that Ireland applies the EU Treaty Protocol on asylum for nationals of Member States of the EU, which provides that applications for declarations of refugee status from EU nationals shall be inadmissible for processing by another EU Member State except in exceptional circumstances.

Investigation by the Refugee Applications Commissioner

Council Directive 2005/85 (the Procedures Directive) sets out procedures relating to the interview of an applicant, including the provision of a personal interview, that such an interview shall take place under conditions which ensure appropriate confidentiality, that the person conducting the interview is sufficiently competent to take account of the personal or general circumstances surrounding the application, that a written report is made of every personal interview, that there is timely access to the report, where an applicant refuses to approve the contents of the report, that the reasons for a refusal shall be entered into an applicant's file, and that a refusal shall not prevent the decision maker from taking a decision on the application. Section 11(1) of the Refugee Act 1996 requires the Refugee Applications Commissioner to investigate an asylum seeker's application in line with EU minimum standards, after which the authorised officer prepares a report and recommendation pursuant to s 13(1) of the Refugee Act 1996.

Where an applicant receives a positive recommendation, he or she is notified by registered post and the recommendation is submitted to the Minister who will make a declaration that the applicant is a refugee, as the Minister for Justice is the person who technically grants or refuses a declaration. In cases where the recommendation is negative, the applicant may appeal the decision to the Refugee Appeals Tribunal pursuant to s 16 of the Refugee Act 1996. The appeal procedure is dependent on the type of negative recommendation made.

Appeal to the Refugee Appeals Tribunal

The Refugee Appeals Tribunal, an independent body established by section 15 of the Refugee Act 1996 (as amended) examines appeals against recommendations of the Refugee Applications Commissioner, and makes recommendations arising from those appeals to the Minister. Under section 16 of the 1996 Act the Tribunal may either affirm a recommendation of the Minister, or set aside a recommendation and recommend that an applicant should be declared to be a refugee. Section 16(16A) states that the Tribunal shall affirm a recommendation of the Commissioner unless it is satisfied that the applicant is a refugee.

If the decision is to set aside the Commissioner's recommendation, the Minister is obliged under section 17(1) of the 1996 Act to declare the appellant to be a refugee, subject to considerations of national security or public policy. There is

no appeal from a decision of the Tribunal affirming the Commissioner's recommendation, after which the Minister notifies the failed appellant that he proposes to make a deportation order in his or her case, and explains the remaining options.

Rights of Refugees

Council Directive 2004 83/EC (the Qualification Directive) sets out the rights of refugees in respect of residence permits, travel documents freedom of movement access to employment, access to education, social welfare, health care, accommodation, and integration. In Irish legislation, the rights of a declared refugee are mainly set out in sections 3 and 18 of the Refugee Act 1996 (as amended). Section 3 provides that a refugee shall generally have the same rights and privileges as citizens, and enumerates particular rights.

Section 18 of the Refugee Act 1996 provides that a refugee may apply for permission to be granted to a member of his or her family to enter and reside in the State. The Minister for Justice is obliged to grant permission to a member of the family of the refugee.³⁵ The Minister has discretion to grant permission to enter and reside in the State to a dependent member of the family of a refugee³⁶, provided that person is dependent on the refugee or suffering from a mental or physical disability to such an extent that they cannot maintain him/herself fully. The Minister refers the application to the Commissioner for investigation under the Refugee Act 1996, and on completion of the investigation, the Commissioner submits a report to the Minister for a decision. Where the Minister grants permission to enter and reside to a member of the family or dependent member of the family of a refugee, the individual is entitled to such rights and privileges as are specified in section 3 of the Refugee Act 1996 for such a period as the refugee is entitled to remain in the State.

Under section 15(1) of the Irish Nationality and Citizenship Act, 1956 (as amended), the Minister for Justice may grant an application for naturalisation if he is satisfied that an applicant satisfies certain 'conditions for naturalisation'. The Minister has discretion under section 16 the 1956 Act to grant naturalisation to certain categories of applicant, including refugees, where the conditions for naturalisation are not satisfied. Typically, a non-Irish national is entitled to apply for citizenship after five years of lawful residence in Ireland, and must also establish that they are in good standing, intend in good faith to continue to reside in the State after naturalisation, and undertake an oath of fidelity to the nation and loyalty to the State. The five-year residency requirement, and the other conditions of naturalisation can be waived at the Minister's discretion in the case of refugees.

11.2 People Eligible for Subsidiary Protection

The Subsidiary Protection Procedure

In order to apply for subsidiary protection, an applicant must first have applied for, and have been refused, refugee status. The Minister for Justice considers

³⁵ I.e., spouse, parent (if the applicant is under 18 years old), or unmarried child (under 18 years).

³⁶ E.g., a child, parent, brother, sister grandparent, grandchild, ward or guardian of the refugee.

applications for subsidiary protection pursuant to Regulation 4(3) of the European Communities (Eligibility for Protection) Regulations, 2006 after the proposal to deport.

In the event that the Minister decides that the applicant is not a person eligible for subsidiary protection, and refuses the application, the Minister will then proceed to consider whether or not to make a deportation order, and will consider matters set out in section 3 of the Immigration Act, 1999. Consideration of subsidiary protection precedes consideration of whether to make a deportation order. There is no appeal from a negative subsidiary protection decision, and there is no legal provision to suspend removal pending determination of an application.

Rights of People with Subsidiary Protection

People granted subsidiary protection are entitled to the same medical care, services and social benefits as an Irish citizen.³⁷ Under Regulation 19(1)(b) people who are granted subsidiary protection are also entitled to seek and enter employment, to carry on any business, trade or profession in the State in the like manner and to the like extent in all respects as an Irish citizen. People with subsidiary protection are also entitled to have access to education and training in the State in the like manner and to the like extent in all respects as an Irish citizen.

Persons granted subsidiary protection 'shall be entitled to the same rights of travel in or to or from the State, other than to his country of origin, as those to which Irish citizens are entitled'.³⁸ A person who has been found eligible for subsidiary protection and has received a determination to that effect may apply to the Minister for permission to be granted to a member of his or her family to enter and to reside in the State.³⁹ The Regulations' provisions in this regard are similar to those in the 1996 Act in respect of refugees.

There is no legislative provision giving the Minister for Justice discretion to waive conditions of naturalisation in respect of people who are granted subsidiary protection. Accordingly, a person who has been granted subsidiary protection may apply for citizenship only after fulfilling the naturalisation condition of being resident in the State for five years or more.

11.3 People at Risk of Refoulement

The Procedure for Ensuring Against a Breach of Non Refoulement

Prior to October 2006 (i.e., prior to transposition of Directive 2004/83 – the Qualification Directive) Ireland did not have a legislative scheme for subsidiary or complementary protection. Applicants who were not recognised as refugees and who sought international protection would typically seek protection by making representations against the making of a deportation order in the context of section 3 of the Immigration Act 1999 (see section 5 above) in order to get

³⁷ Regulation 19(1)(c) of the European Communities (Eligibility for Protection) Regulations, 2006.

³⁸ Under Regulation 19(1)(a).

³⁹ Regulation 16(1).

leave to remain in the State. Applicants can, and usually do, still make such representations.

Rights of People Benefitting from the Principle of Non Refoulement

The rights of people granted leave to remain are not codified in legislation, and people granted leave to remain for non-refoulement reasons are given similar rights to those granted leave to remain for discretionary reasons. The rights granted to people with leave to remain do, however, vary dependent depending on circumstances. Grantees are usually allowed to work. A requirement that an applicant not be 'burden on the State' is often stipulated in the grant. Grantees are entitled to access to third level education in the same manner as citizens. People granted leave to remain have no statutory entitlement to be granted family reunification. The duration of leave to remain in the State and applications for renewal are subject to Ministerial discretion. Persons granted leave to remain must be legally resident in the State for five years before they are eligible to apply for citizenship pursuant to the Irish Nationality and Citizenship Act, 1956 (as amended).

12 VICTIMS OF HUMAN TRAFFICKING

12.1 Irish Law on Human Trafficking

The Criminal Law (Human Trafficking) Act 2008

The Criminal Law (Human Trafficking) Act, 2008, which sought to implement the Framework Decision on Combating Trafficking in Human Beings and the Framework Decision on Combating the Sexual Exploitation of Children and Child Pornography,⁴⁰ created offences criminalising, *inter alia*, trafficking in persons for the purposes of sexual or labour exploitation, and the trafficking of children into, through or out of the State (section 3), and trafficking in adults (section 4). The regulatory impact analysis for the 2008 Act stated that this legislation was solely concerned with the criminal law response to trafficking, and that the protection of victims of trafficking would be dealt with administratively.

Administrative Scheme to Combat Trafficking of Human Beings

The Minister published *The National Action Plan to Combat Trafficking of Human Beings in Ireland 2009 – 2012* (the National Action Plan) in June 2009. The Action Plan's measures include the provision of a recovery and reflection period of sixty days and temporary residency permits for six months (renewable) where suspected victims are cooperating with an investigation or prosecution. Access to the labour market for persons not in the asylum system who are granted six months temporary residence permits is also outlined.

Recovery & Reflection Period

Under this administrative scheme, a person, who has been identified by a member of the Garda Síochána (not below the rank of Superintendent) in the GNIB, as a suspected victim of human trafficking shall be granted a permission to remain lawfully in the State for a 'recovery and reflection period' of sixty days⁴¹ to allow the person time to recover, to escape the influence of the alleged perpetrators of the trafficking, and to take an informed decision as to whether to assist the Garda Síochána or other relevant authorities in relation to any investigation or prosecution arising in relation to the alleged trafficking.⁴² The Minister will issue such a person with a notice confirming the fact that the person has been granted permission to be in the State for sixty days.⁴³ During the period of recovery and reflection, the victim of trafficking will not be made the subject of removal proceedings.⁴⁴

Temporary Residence Permission

In circumstances where the Minister for Justice is satisfied that "the person has severed all relations with the alleged perpetrators of the trafficking" and "it is necessary for the purpose of allowing the suspected victim to continue to assist the Garda Síochána or other relevant authorities in relation to an investigation or

⁴⁰ Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography, OJ L 13 of 20 January 2004,

⁴¹ Department of Justice, Equality and Law Reform; *Administrative Immigration Arrangements for the Protection of Victims of Human Trafficking* (November 2008). Available at www.justice.ie.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.*

prosecution arising in relation to the trafficking”, the Minister will grant the person concerned a temporary residence permission valid for a period of six months. Temporary residence permission may be granted during the recovery and reflection period or following the expiry of that period, as the Minister considers appropriate.⁴⁵

A temporary residence permission will be renewed in circumstances where the Minister is satisfied that the person has not renewed contact with the alleged perpetrators of the trafficking, and it is necessary for the purpose of allowing the suspected victim to continue to assist the Garda Síochána or other relevant authorities in relation to an investigation or prosecution arising in relation to the trafficking.

Revocation

Under the current administrative arrangements, the Minister may revoke temporary residence permission in cases where:

- (a) the person concerned has actively, voluntarily and on his or her own initiative renewed contact with the alleged perpetrators of the trafficking,*
- (b) the person concerned no longer wishes to assist the Garda Síochána or other relevant authorities in the investigation or prosecution of the trafficking,*
- (c) the allegation of trafficking is fraudulent or unfounded,*
or
- (d) any investigation or prosecution arising in relation to the trafficking has been finalized or terminated, or*
- (e) the Minister is satisfied that it is in the interest of national security or public policy to do so.⁴⁶*

Where the person is under the age of eighteen years, the Administrative Arrangements state that regard will be had to the best interests of the child in the granting and revocation of a temporary residence permission.⁴⁷ The granting of a temporary residence permission is said not to create any right to long-term or permanent residence.⁴⁸

The National Action Plan states that the recovery and reflection period was to be increased to sixty days.⁴⁹ The National Action Plan also states that suspected victims may be granted a residence permit to allow them assist the Garda Síochána or other relevant authorities in an investigation or prosecution. The Plan states that a six-month period of temporary residence may also be granted thereafter if the suspected victim has severed all ties with the alleged traffickers and is willing to assist in an investigation or prosecution arising in relation to trafficking.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ The draft legislation was amended to provide for the sixty-day recovery and reflection period.

The Plan outlines a number of other measures for suspected victims of human trafficking, including: support services for victims of crime, legislative provisions protecting the identity of suspected victims during criminal proceedings, legislative provisions that create offences aimed at protecting victims of crime, witnesses and their families, and the Voluntary Assisted Return and Reintegration Programme.

Victim's Personal Situation

It is notable that the administrative scheme has no provision for temporary residency on the basis of a victim's personal situation (c.f., Article 14 of the Convention). It is unclear how the State can ensure that a victim will receive effective and appropriate protection unless there is an assessment of his or her personal situation.

And without an investigation into the personal situation of a suspected victim, it is unclear how the State would be in a position to have adequate information from which to ascertain whether there are reasonable grounds to believe that the life, the freedom or the physical integrity of a person (Article 28(1) of the Convention).

12.2 EU Law on Human Trafficking

Council Directive 2004/81, to which Ireland has not opted in, requires Member States to:

- Apply the Directive to third country nationals who are, or have been victims of offences relating to trafficking, even if they have illegally entered the territory of the Member States (Article 3)
- Inform a third country national whom the competent authorities believe falls into the scope of the Directive of the possibilities offered under the Directive (Article 5)
- Ensure that third country nationals concerned are granted a reflection period allowing them to recover and escape the influence of the perpetrators of the offences so that they can take an informed decision as to whether to co-operate with the competent authorities (Article 6)
- Not enforce an expulsion order against during the recovery and reflection period.
- Provide a certain basic level of treatment (Articles 7, 9 - 12)
- Take due account of safety and protection needs (Article 7)
- Issue a residence permit in certain circumstances (Article 8)

Article 8 of the Council Directive details the procedure for issue and renewal of the residence permit:

1. After the expiry of the reflection period, or earlier if the competent authorities are of the view that the third-country national concerned has already fulfilled the criterion set out in subparagraph (b), Member States shall consider:

(a) the opportunity presented by prolonging his/her stay on its territory for the investigations or the judicial proceedings, and

(b) whether he/she has shown a clear intention to

cooperate and

(c) whether he/she has severed all relations with those suspected of acts that might be included among the offences referred to in Article 2(b) and (c).

2. For the issue of the residence permit and without prejudice to the reasons relating to public policy and to the protection of national security, the fulfillment of the conditions referred to in paragraph 1 shall be required.

3. Without prejudice to the provisions on withdrawal referred to in Article 14, the residence permit shall be valid for at least six months. It shall be renewed if the conditions set out in paragraph 2 of this Article continue to be satisfied.

As it chose not to opt in, Ireland is not bound by or subject to the Directive's application.

12.3 International Law on Human Trafficking

Chapter III of the Council of Europe Convention on Action against Trafficking in Human Beings requires state parties to, inter alia:

- Take measures to identify victims of trafficking and special protections are required for unaccompanied children (Article 10)
- Protect the private life of the victims (Article 11)
- Assist victims in their physical, psychological and social recovery and a minimum level of assistance is mandated to include subsistence through such measures as: appropriate accommodation and psychological and material assistance; access to medical treatment, translation and interpretation services, counseling and information (particularly as regards rights and services available to them), assistance to enable rights to be represented in criminal proceedings and access to education for children (Article 12)
- Take due account of the victim's safety and protection needs, to provide medical assistance to lawfully resident victims without adequate resources. States are required to adopt rules under which lawfully resident victims can access the labour market and education and to co-operate with non- governmental organisations and civil society (Article 12)
- Provide measures to assure assistance to a victim is not to be conditional on his or her willingness to act as a witness (Article 12)
- Provide in its internal law a recovery and reflection period of at least 30 days, when there are reasonable grounds to accept that the person concerned is a victim. (Article 13)
- Provide for a residence permit for victims in one or other of the two following situations or in both:(a) the competent authority considers that it is necessary owing to their own personal situation, (b) the competent authority considers that their stay is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings." (Article 14)
- Ensure that victims have access to legal redress and compensation (Article 15)

- Facilitate (preferably voluntary) return of victims to their territories. (Article 16)

In *R v O⁵⁰* Lord Justice Laws opined that article 10 of the Council of Europe Convention required state parties to identify and protect victims of trafficking, and that as a signatory to that Convention, the UK was obliged by article 18 of the Vienna Convention on the Law of Treaties to refrain from acts which would defeat the purpose of the Trafficking Convention. The Law Lords noted that the relevant international human rights instruments re trafficking had been incorporated into the Code for Crown Prosecutors, but made no appearance in *Archbold, Criminal Pleading Evidence and Practice 2008* or *Blackstone's Criminal Practice 2008*. Their Lordships hoped that that omission would swiftly be corrected. Ireland acceded to the Vienna Convention on 7 August 2006, and the Convention entered into force with respect to Ireland on 8 September 2006.

The Palermo Protocol

The United Nations Convention Against Transnational Organised Crime (the Palermo Protocol) requires state parties to, inter alia:

- Protect victims of trafficking by protecting the privacy and identity of victims of trafficking in persons, including by making legal proceedings confidential, by ensuring the domestic legal or administrative system contains measures to provide information on court and administrative proceedings to victims and assistance to enable the victim's views to be heard in criminal proceedings and to ensure domestic measures providing for possibility of obtaining compensation (Article 6)
- Take into account the age, gender and special needs of victims, and in particular the needs of children (Ibid)
- Endeavour to provide for the physical safety of victims (Ibid)
- Consider implementing measures to provide for physical, psychological and social recovery of victims, including the provision of housing, counseling and information (in particular as regards legal rights), medical, psychological and material assistance and employment, education and training opportunities (Ibid)
- Consider allowing victims to remain temporarily or permanently in its territory (Article 7)
- Facilitate the return of victims to their territories where the victim is a national or had a permanent right of residence at the time of entering the receiving State (Article 8).

⁵⁰ Court of Appeal, Criminal Division, published 2 October 2008.

13 STATELESS PEOPLE

Section 6(3) of the Irish Nationality and Citizenship Act 1956, as amended, provides that a person born in the island of Ireland is an Irish citizen from birth if he or she is not entitled to citizenship of any other country. Thus, children born in the State who would otherwise be stateless have their status regularized as Irish citizens. Otherwise, while stateless people with a well-founded fear of persecution may seek asylum, there is no statutory or dedicated administrative mechanism for the identification of stateless people.

Article 1 of the 1954 Convention on the Status of Stateless Persons provides

1. For the purpose of this Convention, the term "stateless person" means a person who is not considered as a national by any State under the operation of its law.

The International Law Commission has observed that this definition of a stateless person is now part of customary international law.

The UNHCR's "The Concept of Stateless Persons under International Law Summary Conclusions" (Expert meeting organized by the Office of the UNHCR, Prato, Italy, 27-28 May 2010) provides the latest guidance on how to assess Article 1 statelessness (emphases added).

8. "National" should be given its ordinary meaning of representing a legal link (nationality) between an individual and a particular State.

9. For the purposes of the 1954 Convention, "national" is to be understood by reference to whether the State in question regards holders of a particular status as persons over whom it has jurisdiction on the basis of a link of nationality. Several participants were of the view that in practice it is difficult to differentiate between the possession of a nationality and its effects, including, at a minimum, the right to enter and reside in the State of nationality and to return to it from abroad, as well as the right of the State to exercise diplomatic protection. Otherwise, according to this view, nationality is emptied of any content.

10. Article 1(1) does not require a "genuine and effective link" with the State of nationality in order for a person to be considered as a "national". The concept of "genuine and effective link" has been applied principally to determine whether a State may exercise diplomatic protection in favour of an individual with dual or multiple nationalities, or where nationality is contested. It is therefore possible to be a "national" even if the State of nationality is one in which the individual was neither born nor habitually resides. The relevant criterion is whether the State in question considers a person to be its national.

...

12. Whether an individual actually is a national of a State under the operation of its law requires an assessment of the viewpoint of that State. This does not mean that the State must be asked in all cases for its views

about whether the individual is its national in the context of statelessness determination procedures.

13. Rather, in assessing the State's view it is necessary to identify which of its authorities are competent to establish/confirm nationality for the purposes of Article 1(1). This should be assessed on the basis of national law as well as practice in that State. In this context, a broad reading of "law" is justified, including for example customary rules and practices.

14. If, after having examined the nationality legislation and practice of States with which an individual enjoys a relevant link (in particular by birth on the territory, descent, marriage or habitual residence) – and/or after having checked as appropriate with those States – the individual concerned is not found to have the nationality of any of those States, then he or she should be considered to satisfy the definition of a stateless person in Article 1 (1) of the 1954 Statelessness Convention.¹

15. "Under the operation of its law" should not be confused with "by operation of law", a term which refers to automatic (ex lege) acquisition of nationality. Thus, in interpreting the term "under the operation of its law" in Article 1(1), consideration has to be given to non-automatic as well as automatic methods of acquiring and being deprived of nationality.

16. The Article 1(1) definition employs the present tense ("who is...") and so the test is whether a person is considered as a national at the time the case is examined and not whether he or she might be able to acquire the nationality in the future.

17. In the case of non-automatic modes of acquisition, a person should not be treated as a "national" where the mechanism of acquisition has not been completed.

18. The ordinary meaning of Article 1(1) requires that a "stateless person" is a person who is not considered a national by a State regardless of the background to this situation. Thus, where a deprivation of nationality may be contrary to rules of international law, this illegality is not relevant in determining whether the person is a national for the purposes of Article 1(1) – rather, it is the position under domestic law that is relevant. The alternative approach would lead to outcomes contrary to the ordinary meaning of the terms of Article 1(1) interpreted in light of the Convention's object and purpose. This does not, however, prejudice any obligation that States may have not to recognize such situations as legal where the illegality relates to a violation of jus cogens norms.

19. There is no requirement for an individual to exhaust domestic remedies in relation to a refusal to grant nationality or a deprivation of his/her nationality before he or she can be considered as falling within Article 1(1).

20. The definition in Article 1(1) refers to a factual situation, not to the manner in which a person became stateless. Voluntary renunciation of nationality does not preclude an individual from satisfying the requirements of Article 1(1) as there is no basis for reading in such an implied condition to the definition of “stateless person”. Nonetheless, participants noted that diverging approaches have been adopted by States. It was also noted that the manner in which an individual became stateless may be relevant to his or her treatment following recognition and for determining the most appropriate solution.

21. The consequences of a finding of statelessness for a person who could acquire nationality through a mere formality are different from those for a person who cannot do so and a distinction should be drawn in the treatment such persons receive post-recognition. On the one hand, there are simple, accessible and purely formal procedures where the authorities do not have any discretion to refuse to take a given action, such as consular registration of a child born abroad. On the other hand, there are procedures in which the administration exercises discretion with regard to acquisition of nationality or where documentation and other requirements cannot reasonably be satisfied by the person concerned.

The following principles would appear to follow from the foregoing:

- “National” should be given its ordinary meaning of representing a legal link (nationality) between an individual and a particular State.
- “National” is to be understood by reference to whether the State in question regards holders of a particular status as persons over whom it has jurisdiction on the basis of a link of nationality.
- The relevant criterion is whether the State in question considers a person to be its national. Whether an individual actually is a national of a State under the operation of its law requires an assessment of the viewpoint of that State.
- If the individual concerned is not found to have the nationality of any of those States, then he or she should be considered to satisfy the definition of a stateless person in Article 1 (1) of the 1954 Statelessness Convention.
- The test is whether a person is considered as a national at the time the case is examined and not whether he or she might be able to acquire the nationality in the future.
- The ordinary meaning of Article 1(1) requires that a “stateless person” is a person who is not considered a national by a State regardless of the background to this situation.
- It is the position under a State’s domestic law that is relevant.
- The manner in which an individual became stateless may be relevant to his or her treatment following recognition and for determining the most appropriate solution.

The UNHCR text “Nationality and Statelessness: A Handbook for Parliamentarians, UNCHR, 20 October 2005) sets out best practice guidelines for cases relating to statelessness. Page 19 & ff states:

While the 1954 Convention defines a stateless person, it does not elaborate a procedure for identifying who is stateless. It is thus in the interests of States, and of the individuals to whom the Convention might apply, that States adopt legislation that guides the manner in which a stateless person is identified. Such legislation should also designate a decision-maker and establish the consequences of identifying a person as stateless.

Some States have adopted implementing legislation that designates specific agencies within the government – offices that deal specifically with asylum, refugees, and stateless persons, or the Ministry of the Interior, for example – that will examine and adjudicate claims of statelessness. Other States that have no specific legislation establishing a procedure to recognize statelessness have instituted an administrative or judicial authority that is tasked with determining whether an individual is stateless. Many more States, however, have no specific procedure in place. In many of these cases, the question of statelessness often arises during refugee status determination procedures. Stateless persons may then be “processed” within that framework, which includes humanitarian or subsidiary protection. Stateless persons may, in fact, be obliged to channel their application through the asylum regime simply because there is no other procedure available to them.

Some countries do not have specific recognition procedures for stateless persons, but the issue may arise when an individual applies for a residency permit or a travel document, or if an application for asylum is rejected and a claim is made to remain in an asylum country on other grounds. Without specific procedures to identify stateless persons, it is impossible to determine how many cases of statelessness remain unidentified, and it is thus impossible to determine the exact magnitude of the problem.

On page 20 it states, inter alia (emphasis added):

Qualified personnel who are specialized in the field of statelessness and who can impartially and objectively examine the application and evidence supporting it should be designated to make determinations of statelessness. A central authority responsible for such determinations would reduce the risk of inconsistent decisions, would be more effective in obtaining and disseminating information on countries-of-origin, and would, by its focused work, be better able to develop its expertise in matters related to statelessness. The determination of statelessness status requires the collection and analysis of laws, regulations, and the practices of other States. Even without a central authority, decision-makers benefit from collaborating with colleagues knowledgeable about nationality legislation and the issue of statelessness both within the government and in other States.

Page 21 of the 2005 UNHCR text sets out the ingredients of a proper process:

If an individual has made an application to be recognized as stateless, or if the authorities are trying to determine whether or not an individual is stateless, then it may be necessary to provide for temporary stay while the process is underway. The Convention is silent on whether a legal stay shall be

granted while the request for recognition of stateless status is being assessed. Practices among the States with dedicated procedures vary.

The principle of due process requires that applicants be given certain guarantees including:

- the right to an individual examination of the claim in which the applicant may participate;*
- the right to objective treatment of the claim;*
- a time limit on the length of the procedure;*
- access to information about the procedure in language the claimant can understand;*
- access to legal advice and an interpreter;*
- the right to confidentiality and data protection;*
- delivery of both a decision and the reasons that underlie the decision;*
- and*
- the possibility to challenge the legality of that decision.*

Some categories of applicants for stateless status, particularly unaccompanied children, have special needs that require distinct procedural provisions. These provisions may include the appointment of a guardian to represent or assist the unaccompanied child during the administrative procedure.

Currently no process such as that recommended by the UNHCR appears to exist in Ireland.

14 UNDOCUMENTED MIGRANTS

As noted above, section 4 of the Immigration Act, 2004 provides the Minister for Justice, or an immigration officer on his or her behalf, with a discretion to provide a non-Irish national with permission to land or be in the State and to impose conditions on such permission in relation to engagement in employment or duration of stay as he deems fit. Officials of the Department of Justice, Equality and Law Reform have indicated that they consider this discretion necessary to allow the Minister to deal with individual cases,⁵¹ but are of the view that the Minister is not obliged to consider applications for residency made pursuant to section 4(1) of the 2004 Act where a person is in the country without permission.⁵² Section 5(1) of the 2004 Act states:

'No non-national may be in the State other than in accordance with the terms of any permission given to him or her before the passing of this Act, or a permission given under this Act after such passing, by or on behalf of the Minister.'

And, as noted above, under s. 5(2) of the Immigration Act 2004, a non Irish national in the State without permission under s. 4 of that act is “for all purposes” unlawfully in the State.

Departmental officials have also indicated that an individual who is already in the state without permission cannot subsequently apply for permission under section 4(1), but that a person who has been granted permission under section 4(1) on entry may apply under section 4(7) for that permission to be renewed or varied by the Minister for Justice, Equality and Law Reform, or by an immigration officer on his or her behalf.⁵³ The Departmental officials stated that they are of the view that that section 4(1) of the 2004 Act only applies to permission to land, and that section 4(7) only applies to renewing or varying permission already granted.⁵⁴

Nonetheless, and as also already noted, Cooke J in Saleem opined:

If one leaves aside the special arrangements applicable to migrant workers who are nationals of a Member State of the European Union or of a state in the European Economic Area, the arrangements governing an entitlement to enter or land in the State and to remain within the jurisdiction thereafter, derive in effect from ss. 4 and 5 of the Immigration Act 2004. Section 5 of that Act provides that no non-national may be in the State other than in accordance with the terms of a permission given under the Act by or on behalf of the Minister, or given before the passing of that Act. Section 4 provides that an Immigration Officer may on behalf of the Minister give a non-national, either by means of a document or by placing a stamp on his passport, “an authorization to land or be in the State”.

⁵¹ Stanley et al; *The Practices in Ireland Concerning the Granting of Non-EU Harmonised Protection Schemes* (ESRI, Dublin, 2010)

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid.*

Representatives of the Department of Justice, Equality and Law Reform confirmed that there have been instances where the Minister has granted migrants leave to remain under section 4 of the Immigration Act, 2004. The Minister has also set up what have been referred to as administrative schemes in order to grant leave to remain (e.g., the IBC 05 scheme).

GLOSSARY

Asylum Applicant

A person who has made an application for a declaration of refugee status under the Refugee Act 1996.

Certificate of Registration

Certificate issued by the Garda National Immigration Bureau (GNIB) to lawfully resident non-Irish nationals resident in the State for more than three months.

Common Travel Area

Area encompassing Ireland, England, Scotland, Wales, Northern Ireland, the Channel Islands and the Isle of Man without passport control for Irish and UK citizens.

Deportation Order

Order made by the Minister for Justice requiring a non-Irish national to leave the State within such period as may be specified, and to remain thereafter out of the State.

Direct Provision

State support system for asylum seekers providing accommodation and meals.

Dublin Regulation

Regulation 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national. It allows for the transfer of an asylum applicant to a Member State deemed responsible for processing the claim.

EEA National

A national of a Member State of the European Economic Area (EEA), i.e., the EU Member States, Iceland, Liechtenstein and Norway.

Employment Permit

Document generally required by non-EEA nationals to work in the State.

EU Citizen

A person with citizenship of an EU Member State.

Foreign National

A person who is not a national of an EU/EEA Member State.

Human Trafficking

The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control of another person, for the purpose of exploitation.

IBC 05 Scheme

Scheme by which the Minister for Justice allowed permission to remain in the State from non-Irish national parents of Irish children born before 2005.

Leave to Remain

Permission granted by the Minister for Justice to a non-Irish national to stay in the State, often referred to as “Humanitarian Leave to Remain”.

Naturalisation

The procedure whereby citizenship is granted to non-Irish nationals.

Non national

A non-Irish national.

Non Refoulement

Principle prohibiting returning a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Palermo Protocol

UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

Permanent Residence Card

Document issued to a non-EU national family member of an Union citizen who has lived in the State for five years or more.

Permanent Residence Certificate

Document issued to an EU citizen who has lived in Ireland for five years or more.

Procedures Directive

Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

Qualification Directive

Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

Reception Directive

Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, including the right to work.

Recovery and Reflection Period

A period allowed to victims of human trafficking said to allow them to recover and escape the influence of the perpetrators of the offences so that they can take an informed decision as to whether to cooperate with the competent authorities.

Refugee

Someone who, owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality or habitual residence and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.

Residence Card

Card issued to a non-EEA national family member of an EU citizen who has lived in the State for three or more months.

Subsidiary Protection

A third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.

Third Country National

A person who is not a national of an EU/EEA Member State.

Visa

Pre clearance certificate indicating that the Minister for Justice has permitted a non Irish national to present at the frontier of the State for the purpose of seeking permission to enter the State. Visas can be for a short stay – up to three months - (C class visas), or long stay – over three months - (D class visas)

FURTHER READING

Clayton, Gina; *Textbook on Immigration & Asylum Law*, 3rd Ed. (OUP, 2011)

Macdonald, Ian & Toal, Ronan; *Macdonald's Immigration Law and Practice*, 8th Ed. (LexisNexis, 2010)

Moriarty et al; *Human Rights Law*, 3rd Ed. (OUP, 2010), chapters 15 and 16.

Phelan & Gillespie; *Immigration Law Handbook*, 7th Ed. (OUP, 2010)

Quinn et al; *Handbook on Immigration and Asylum in Ireland 2007* (Dublin: ESRI, 2008)

USEFUL WEBSITES

Citizens' Information
www.citizensinformation.ie

Doras Luimni
www.dorasluimni.org

Immigrant Council of Ireland
www.immigrantcouncil.ie

Irish Naturalisation and Immigration Service
www.inis.gov.ie

Irish Refugee Council
www.irishrefugeecouncil.ie

Jesuit Refugee Service
www.jrs.ie

Migrant Rights Centre Ireland
www.mrci.ie

Nasc
www.nascireland.org

Refugee Appeals Tribunal
www.refappeal.ie

Refugee Applications Commissioner
www.orac.ie