

Annual Policy Report on Migration and Asylum 2014: Ireland

Corona Joyce and Susan Whelan

November 2015



EMN Ireland





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This European Migration Network Study, compiled according to commonly agreed specifications, provides a coherent overview of migration, asylum trends and policy developments for 2014. The report consists of information gathered primarily for the EU-level synthesis report of the *EMN Annual Report on Immigration and Asylum 2014*. All reports are available at http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/index_en.htm

The opinions presented in this report are those of the authors and do not represent the position of the Economic and Social Research Institute, the Irish Naturalisation and Immigration Service, the Department of Justice and Equality, or the European Commission, Directorate-General Migration and Home Affairs.

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Abbreviations and Irish Terms

CJEU	Court of Justice of the European Union
CTA	Common Travel Area
Dáil	Parliament, lower house
EASO	European Asylum Support Office
ECHR	European Convention on Human Rights
ECRE	European Council on Refugees and Exiles
ECRI	European Commission Against Racism and Intolerance
ECtHR	European Court of Human Rights
EDAL	European Database of Asylum Law
ERF	European Return Fund
EU	European Union
FRONTEX	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the EU
Gardaí/ Garda Síochána	Police
GNIB	Garda National Immigration Bureau
HEA	Higher Education Authority
HIQA	Health Information and Quality Authority
HSE	Health Services Executive
ICCL	Irish Council for Civil Liberties
ICI	Immigrant Council of Ireland
IIP	Immigrant Investor Programme
INIS	Irish Naturalisation and Immigration Service
IOM	International Organization for Migration
IRC	Irish Refugee Council
LGBTI	Lesbian, Gay, Bisexual, Transgender, Intersex
MRCI	Migrant Rights Centre Ireland

NASC	The Irish Immigrant Support Centre
NERA	National Employment Rights Authority
OPMI	Office for the Promotion of Migrant Integration
ORAC	Office of the Refugee Applications Commissioner
Oireachtas	Parliament, both houses
PPSN	Personal Public Service Number
QQI	Quality and Qualifications Ireland
RAT	Refugee Appeals Tribunal
RIA	The Reception and Integration Agency
SIS	Schengen Information System
STEP	Start-up Entrepreneur Programme
Tánaiste	Deputy Prime Minister
Taoiseach	Prime Minister
TUSLA	Child and Family Agency
UKBA	United Kingdom Border Agency
UNHCR	United Nations High Commissioner for Refugees
UNODC	United Nations Office on Drugs and Crime
VIS	Visa Information System

Executive Summary

The purpose of this report is to provide an overview of trends, policy developments and significant debates in the area of asylum and migration during 2014 in Ireland.

STATISTICAL OVERVIEW

Provisional end of year figures for 2014 show 95,000 non-EEA nationals had permission to remain in the State, a decrease of 11 per cent year-on-year. The majority of those registered were in Ireland for work or study purposes and from Brazil (12 per cent), India (11 per cent), China (9 per cent), USA (7 per cent), Nigeria (6 per cent) and the Philippines (5 per cent).

The estimated population of Ireland in the 12 months to April 2014 stood at 4.61 million; an overall increase in population of 16,500, which was due to the combined natural increase of the population together with negative net migration. Central Statistics Office (CSO) 2014 figures estimate the number of immigrants coming to Ireland increased year-on-year to 60,600 from 55,900. The *Population and Migration Estimates 2014* detail almost half of the 81,900 people who emigrated in the 12 months to April 2014 were Irish nationals (40,700 persons, or 49.7 per cent). In relation to non-EEA nationals, there was an inflow of 25,500 non-EEA nationals during the year, with a corresponding outflow of 14,400 non-EEA nationals. Net migration among non-Irish nationals from outside the EU is estimated to be 11,200 (of which almost 20 per cent were Brazilian).

A total of 2,475 persons were refused entry at Ireland's external borders during 2014, with 900 persons found to be illegally present in the territory. 2014 saw a decrease of almost a half in the number of persons deported from Ireland in comparison to 2013. A total of 114 persons were returned as part of forced return measures during the year, with 242 persons availing of voluntary return.

There were 769 permissions granted to remain in Ireland under Section 3 of the *Immigration Act 1999* during 2014.

There was a sharp rise in applications for asylum (1,448) received by the Office of the Refugee Applications Commissioner (ORAC) during 2014, an increase of 53

per cent on 2013 figures and the highest since 2010. There were 132 positive recommendations for a declaration of refugee status at first instance. The Refugee Appeals Tribunal received 703 new appeals throughout the year. The Tribunal issued decisions in relation to 206 cases during 2014, with 115 affirmations of ORAC's original recommendation. ORAC received applications for asylum from 30 unaccompanied minors in 2014, representing 2 per cent of all applications for asylum. The main nationalities of first instance applicants for refugee status were Pakistani, Nigerian, Albanian, Bangladeshi and Zimbabwean. Nigerian nationals lodged the highest number of appeals with the Refugee Appeals Tribunal, followed by nationals of Pakistan, Zimbabwe, DR Congo and Algeria.

During 2014, ORAC handled a total caseload of 3,970 applications for subsidiary protection. At year end, some 826 reports were completed, with 251 recommendations made to grant subsidiary protection. The Refugee Appeals Tribunal received 296 appeals for refusals of the grant of subsidiary protection, of which 13 were processed to completion and ten cases saw the Tribunal confirm the decision of ORAC. The main nationalities of applicants for subsidiary protection to ORAC were Nigerian, Pakistani, DR Congolese, Zimbabwean and Afghans.

A total of 167 applications for family reunification in respect of recognised refugees were received by ORAC during the year.

During 2014, a total of 46 alleged victims of human trafficking were reported or detected. Regarding traffickers arrested as suspects and convicted, there were nine convictions and 14 criminal proceedings initiated during the year.

LEGISLATION

Several pieces of legislation relevant to the migration and international protection area were introduced in 2014. Relevant Acts of the Oireachtas were the *Employment Permits (Amendment) Act 2014*, the *Social Welfare and Pensions Act 2014* and the *Civil Registration (Amendment) Act 2014*. The *Irish Human Rights and Equality Commission Bill* was enacted during 2014, with the new Commission formally established as from 1 November 2014.

Relevant statutory instruments included:

- *European Union (Recognition of Professional Qualifications relating to the Professions of Dentist, Medical Practitioner, Nurse and Midwife) Regulations 2014* (S.I. No. 7 of 2014)

- *Immigration Act 2004 (Visas) (Amendment) Order 2014* (S.I. No. 195 of 2014)
- *Immigration Act 2004 (Visas) Order 2014* (S.I. No. 473 of 2014)
- *European Communities (Lawyers' Establishment) Regulations 2003 (Qualifying Certificate 2015) Regulations 2014* (S.I. No. 580 of 2014)
- *Employment Permits (Amendment) Act 2014 (Commencement of Certain Provisions) Order 2014* (S.I. No. 430 of 2014)
- *Employment Permits Regulations 2014* (S.I. No. 432 of 2014)
- *European Union (Dublin System) Regulations 2014* (S.I. No. 525 of 2014).

Ireland ratified the International Labour Organization (ILO) *Convention concerning decent work for Domestic Workers* during 2014.

On 25 November 2014 the Minister for Justice and Equality signed into law the *European Union (Dublin System) Regulation 2014* (S.I. No. 525 of 2014) for the purpose of supporting the implementation in Ireland of *Regulation (EU) No. 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining applications for international protection lodged in one of the Member States by a third-country national or stateless person (recast)*.

During 2014 the Immigration, Residence and Protection Bill was split into separate Protection, and Immigration, Bills 'owing to the complexity and scale of the reforms now envisaged'.¹ The *General Scheme of the International Protection Bill* was published in March 2015 and provides for a single application procedure for international protection as well as related provisions. Work will proceed with the remaining aspects of the original Immigration, Residence and Protection Bill once the International Protection Bill has been enacted.²

CASE LAW

There were a number of significant cases related to migration and asylum during 2014. The area of international protection included decisions such as *A.M. v. Refugee Appeals Tribunal*,³ showing that refugee status can be granted to full conscientious objectors under Section 2 of the *Refugee Act 1996*. *L.R.C. v. Refugee Appeals Tribunal*⁴ held that parents who claim to have infringed China's one child policy can constitute a 'particular social group' for the purpose of the

¹ Irish Naturalisation and Immigration Service, August 2015.

² Ibid.

³ *A.M. v. Refugee Appeals Tribunal* [2014] IEHC 388.

⁴ *L.R.C. v. Refugee Appeals Tribunal* [2014] IEHC 500.

refugee definition. In *H.O. v. Refugee Appeals Tribunal*,⁵ the court upheld the exclusion of an applicant from refugee status on the basis of his commission of serious non-political crimes in his country of origin.

In the area of subsidiary protection, the decision of the CJEU in C-285/12 *Diakite* clarified the circumstances in which the concept of ‘internal armed conflict’ contained in Article 15(c) of Council Directive 2004/83/EC was to be interpreted. In *Nawaz v. Minister for Justice*,⁶ the Supreme Court applied the decision of the CJEU in C-604/12 (8 May 2014) that it is not permissible to make a ‘stand-alone’ application for subsidiary protection and that a person wishing to claim such status must first fail to qualify for refugee status.

More generally, the *C.A. v. Minister for Justice*⁷ case saw the rejection of an attempt by applicants to impugn the legality of the direct provision system. The 14-day time limit for challenging decisions in the field of asylum and immigration was held to be compatible with the EU law principles of equivalence and effectiveness in *T.D. v. Minister for Justice*.⁸

A number of cases also considered rights of free movement under EU law. In *OA v. Minister for Justice*⁹ it was held that the right to work in a host Member State was implicit in the right of residence stemming from the decision of the ECJ in *Zhu and Chen v. Secretary of State for the Home Department*.¹⁰ The removal of EU citizens from a host Member State was considered and upheld in *Kovalenko v. Minister for Justice*.¹¹

IRELAND’S REPORTING UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)

Ireland made its fourth appearance before the UN Human Rights Committee in July 2014 in its periodic examination of Ireland’s compliance with its obligations under the *International Covenant on Civil and Political Rights (ICCPR)*. Issues raised included the lack of a single application procedure for asylum applications and living conditions in direct provision centres (including the lack of an independent oversight procedure). Other issues raised by other states included the position of victims of domestic violence whose residence permission is

⁵ *H.O. v. Refugee Appeals Tribunal* [2014] IEHC 494.

⁶ *Nawaz v. Minister for Justice* [2014] IESC 30.

⁷ *C.A. v. Minister for Justice* [2014] IEHC 532.

⁸ *T.D. v. Minister for Justice* [2014] IESC 29.

⁹ *O.A. v. Minister for Justice* [2014] IEHC 384.

¹⁰ See [2004] ECR I-9925.

¹¹ *Kovalenko v. Minister for Justice* [2014] IEHC 624.

dependent on that of their violent partner, and the availability of a temporary residence permission for suspected victims of trafficking in the asylum process.

ECONOMIC MIGRATION

Changes to the Employment Permit Regime

Part 3 of the *Employment Permits (Amendment) Act 2014* amends the *Employment Permits Act 2006* to make further provision in respect of the employment permit system. The Department of Jobs, Enterprise and Innovation has commented that it provides the flexibility to deal with changing labour market, work patterns and economic development needs which often require rapid response. Different types of permits, additional criteria and rules for determining whether or not to grant applications for permits are outlined in the legislation. Specific provisions also take account of the needs of start-up companies.

Nine types of employment permits are now provided for in legislation: Critical Skills Employment Permit, Intra-Company Transfer Employment Permit, Dependant/Partner/ Spousal Employment Permit, General Employment Permit, Contract for Services Employment Permit, Reactivation Employment Permit, Internship Employment Permit, Sports and Cultural Employment Permit, Exchange Agreement Employment Permit.

Extension of the Atypical Working Scheme

The 2013 pilot Atypical Working Scheme was amended and extended during 2014. It provides for certain categories of workers such as those employed in the State for the purposes of atypical, short-term employment (e.g. contract basis [between 14 and 90 calendar days inclusive]), and other categories of employment not covered by the Employment Permits Acts. During 2014 approximately 1,350 applications were approved, with four refused. The United States, India and Japan were the most common nationalities of applicants.¹² Changes introduced in 2014 saw an extension of the remit to include locum doctors employed and paid by an agency, and non-EEA nurses on clinical adaptation placements.

¹² Irish Naturalisation and Immigration Service, January 2015.

Changes to the Start-Up Entrepreneur Programme (STEP)

Changes to the Start-Up Entrepreneur Programme (STEP) were announced in March 2014. It was indicated that there would be greater emphasis on the marketing and promotion of the Programme. The main changes related to:

- A reduction in the required minimum investment from €75,000 to €50,000. In cases where more than one principal is involved in establishing a business, the minimum investment for the second and subsequent investors will be €30,000 per principal.
- A 12-month immigration permission will be made available for two categories of persons: foreign national entrepreneurs attending ‘incubators or innovation bootcamps’ in Ireland; and non-EEA students who graduate with advanced STEM (Science, Technology, Engineering, and Mathematics) degrees in Ireland and who wish to work on preparing an application to the Programme.

New Guidelines for Members of Diplomatic Missions to Ireland Intending to Employ Private Domestic Workers

New guidelines for members of diplomatic missions to Ireland who intend to employ private domestic workers were introduced in September 2014. The Guidelines were drawn up following an interagency consultative process involving the Departments of Foreign Affairs; Justice and Equality; Enterprise, Jobs and Innovation; NERA and An Garda Síochána.

CHANGES RELATED TO INTERNATIONAL STUDENTS

Following closure of a number of private education colleges during the year, in May 2014 the Ministers for Education and Skills, and for Justice and Equality, announced the establishment of a Task Force on Students Affected by the Closure of Private Colleges. A report of the Task Force and a policy statement detailing *Regulatory Reform of the International Education Sector and the Student Immigration Regime* was published jointly by the Department of Education and Skills and Department of Justice and Equality in September 2014. New rules are to take effect from 1 January 2015. Broadly speaking, three pillars of reform were proposed in the Regulatory Reform:

- a new list of eligible programmes,
- an enhanced inspection and compliance regime, and
- changes to the student work concession.

REVIEW OF THE NATIONAL INTEGRATION STRATEGY

The Cross Departmental Group on Integration was reconstituted during 2014 to review activities taken across Departments and agencies in the area, with a view to producing an updated ‘overall integration strategy’. A number of thematic discussions took place and a call for public participation was made in national and ethnic media, with over 80 submissions received. Five consultation sessions were held with those who made submissions to further explore issues raised. A draft Integration Strategy was under preparation at year end, following consultation with key stakeholders and is expected in 2015.

A total of €1,331,322 in funding was allocated by OPMI during 2014, with €265,950 provided to local authorities during the year.

CITIZENSHIP

Year-end statistics for 2014 showed a decrease in application processing times from 31 months to less than six months in the majority of cases. In remarks made in early 2015, it was noted by Minister of State at the Department of Justice and Equality that of a total of 10,596 persons declared refugees in Ireland up to the end of 2014, some 6,900 had naturalised.

CHANGES TO BORDER TECHNOLOGY AND ARRANGEMENTS

The *Employment Permits (Amendment) Act 2014* provided for the transfer of responsibility for border control functions from the Garda National Immigration Bureau (GNIB) to the Irish Naturalisation and Immigration Service (INIS), including immigration permission registration.¹³

An earlier pilot project to ‘civilianise’ certain border control functions at Dublin Airport was mainstreamed during 2014. The stated aim is to have Terminal 1 port of entry duties carried out on a 24/7 basis by civilian personnel by Summer 2015, with Terminal 2 to follow by Autumn. A major programme to civilianise immigration functions previously carried out by Gardaí was announced in September 2014, with 125 Gardaí released for other core policing duties. It was announced that 80 civilian staff are to be deployed at the airport at border control booths on a 24/7 basis. A recruitment process for civilian immigration officers took place during 2014, with 42 subsequently starting in January 2015.

¹³ Irish Naturalisation and Immigration Service (16 September 2014). ‘Minister Fitzgerald announces major immigration civilianisation initiative’. *Press Release*. Available at www.inis.gov.ie.

Automated border e-gates continued in operation during 2014 at Dublin Airport when they were extended on a 24/7 basis. More than 260,000 passengers used the gates during 2014; one of the 'highest per-gate productivity levels in Europe'.

INTERNATIONAL PROTECTION

During 2014, in light of the CJEU ruling in the case of *H.N. v. The Minister for Justice, Equality and Law Reform, Ireland and the Attorney General*,¹⁴ arrangements were made by the Irish State to enable a person with a 'live' asylum application to also make an application for subsidiary protection to ORAC. In addition, a person who makes a new application for refugee status may also make an application for subsidiary protection at the same time to ORAC. On 19 March 2014, the Refugee Applications Commissioner announced that he was to accord priority to certain classes of applications for subsidiary protection under the *European Union (Subsidiary Protection) Regulations 2013*, with the legal basis for the prioritisation of applications set out in the 2013 Regulations. Priority was to be accorded to a number of classes of applications under two processing streams which will run concurrently.

During 2014, for the first time, and as part of the wider extension of Freedom of Information (FOI) to all public bodies in Ireland, both the Office of the Refugee Applications Commissioner and the Refugee Appeals Tribunal became subject to FOI legislation.

Activities continued to assist the Courts in streamlining the processing of judicial review applications. An October 2014 amendment to the *Illegal Immigrants (Trafficking) Act 2000* saw the removal of the 'on notice' provision in relation to the taking of judicial reviews, which had contributed to the significant backlog of cases before the Courts. The period of time for making an application for judicial review was extended from 14 to 28 days. The Amendment harmonised and, in some cases, reduced the time limits for certain types of protection and immigration decisions (such as subsidiary protection decisions) which previously could be judicially reviewed within a six-month timeframe.

Reception for Protection Applicants

The issue of direct provision for applicants of international protection continued to attract much media and parliamentary discussion during 2014. The Irish Human Rights and Equality Commission produced a *Policy Statement on the System of Direct Provision in Ireland* in December 2014 in which they made a number of

¹⁴ C-604/12 *H.N. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, delivered on 8 May 2014 (Fourth Chamber). An appeal is currently before Ireland's Supreme Court.

recommendations including the introduction of a single protection procedure, an increase in the weekly allowance for residences in direct provision, and the extension of the remit of the Office of the Ombudsman and the Ombudsman for Children to include the investigation of issues relating to the asylum process. Children living in direct provision continued to attract particular attention during the year. In August 2014, *The Irish Times* cited more than 1,500 child protection or welfare notifications concerning young people living in direct provision accommodation. Geoffrey Shannon, the State's Special Rapporteur on Child Protection, commented on the length of time spent by children in the setting and the longer-term impacts. Calls for an independent body outside of RIA (such as HIQA) were made, as well as for inspections to cover staff and to engage with residents.

Working Group to Examine Improvements to the Protection Process and System of Direct Provision

Following on from a commitment contained in the *Statement of Government Priorities 2014-2016* to establish an independent working group and an NGO roundtable in September 2014, in October the composition and terms of reference were announced of a Working Group to examine improvements to the protection process and system of direct provision, including supports to applicants. The terms of reference of the Working Group include to recommend to Government what improvements should be made to existing processes in order to: improve arrangements for processing of applications; show greater respect for the dignity of persons within the system; and improve the quality of life of applicants for international protection while their applications are under investigation. A report was received by Government in mid-2015.

RESETTLEMENT

Ireland agreed to accept the resettlement of 90 persons under the 2014 UNHCR-led resettlement quota which was dedicated to Syrian refugees. Some 97 persons arrived in Ireland during the year. Ireland pledged an additional 220 resettlement places for 2015-2016.

SYRIAN HUMANITARIAN ADMISSION PROGRAMME (SHAP)

In March 2014 Ireland announced a Syrian Humanitarian Admission Programme (SHAP) to assist vulnerable persons in Syria and surrounding countries affected by conflict in the region. The SHAP offers temporary Irish residence to vulnerable persons present in Syria, or who have fled from Syria to surrounding countries since the outbreak of the conflict in March 2011, who have close family members residing in the State. By early December, a total of 308 applications had been received under the programme with 111 persons from Syria and the surrounding

region granted admission to reside in Ireland and entitlement to work, establish a business or invest in the State.

STATELESSNESS

Ireland issued two declarations of statelessness for the first time during 2014.¹⁵ Although a party to the UN *1954 Convention Relating to the Status of Stateless Persons*, Ireland does not have a formal procedure for status determination. While an ad hoc procedure between UNHCR and INIS to facilitate the identification of any potential stateless persons has been in place since 2009, NGO commentary has centred on increasing evidence of it becoming an issue in immigration-related applications,¹⁶ with rights in domestic law, such as access to citizenship, remaining inaccessible to stateless persons.¹⁷

UNACCOMPANIED MINORS

TUSLA, the Child and Family Agency, was established in January 2014 under the *Child and Family Agency Act 2013* as an independent legal entity. Child and family services are now the sole focus of a single dedicated State agency, overseen by a single dedicated Government Department, the Department of Children and Youth Affairs. The Social Work Team for Separated Children Seeking Asylum (Dublin) now sit under TUSLA.

ACTIONS AGAINST TRAFFICKING

At the end of 2014, the Immigrant Council of Ireland (ICI) highlighted that they had represented 19 victims of trafficking for sexual exploitation during the year; more than half were from Nigeria. The MRCI assessed nine cases for indicators of trafficking in human beings for the purpose of criminal activities during the year. MRCI assessed and assisted 14 new suspected victims of trafficking for labour exploitation during the year.

Work continued during 2014 to develop a follow up to the *National Action Plan to Prevent and Combat Trafficking in Human Beings in Ireland 2009-2012*.

In 2014 the Office of Refugee Applications Commissioner (ORAC) revised its internal guidance and training paper for ORAC staff on human trafficking and related refugee status determination and subsidiary protection issues.

¹⁵ Catherine Cosgrave (22 April 2015). *Statelessness in Ireland – international obligations and national reality*. Available at www.statelessness.eu. Media discussion refers to a single first case during 2014.

¹⁶ For example, residence permits and travel document applications. Immigrant Council of Ireland, April 2015.

¹⁷ Catherine Cosgrave (22 April 2015). *Statelessness in Ireland – international obligations and national reality*. Available at www.statelessness.eu.

The *US State Department Trafficking in Persons Report (TIP) 2014* included recommendations for Ireland to consider ‘policy or legal changes’ to ensure all potential victims are afforded a reflection period before deciding whether to assist law enforcement and to ensure that investigations efficiently move forward to prosecution. Improved training of officials such as labour inspectors regarding identifying victims of forced labour is also recommended, alongside the implementation of a ‘government-wide victim services database and case management system to improve the tracking of delivery of services across multiple government agencies’.

Chapter 1

Introduction

This report is the eleventh in a series of Annual Policy Reports, a series which is intended to provide a coherent overview of migration and asylum trends and policy development during consecutive periods beginning in January 2003. Previous comparable Annual Policy Reports are also available for a number of other EU countries participating in the European Migration Network.

In accordance with Article 9(1) of Council Decision 2008/381/EC establishing the EMN, the National Contact Point (NCP) in each Member State and Norway will provide a yearly report detailing the migration and asylum situation in the Member State, which shall include policy developments and statistical data. The purpose of the EMN report is to provide an insight into the most significant political and legislative (including EU) developments at Member State level, as well as public debates, in the area of migration and asylum. Since 2009, EMN Annual Policy Reports also contribute to the Commission's Annual Reports on Immigration and Asylum, reviewing progress made in the implementation of asylum and migration policy.

All current and prior reports are available at www.emn.ie.

The EMN *Annual Policy Report on Migration and Asylum 2014: Ireland* covers the period 1 January 2014 to 31 December 2014.

1.1 METHODOLOGY

For the purpose of the 2014 report, specific criteria regarding the inclusion of significant developments and/or debates have been adopted to ensure standard reporting across all national country reports. On an EMN central level, the definition of a 'significant development/debate' within a particular year was an event that had been discussed in parliament and had been widely reported in the media. The longer the time of reporting in the media, the more significant the development. Developments will also be considered significant if they subsequently led to any proposals for amended or new legislation.

A significant development is defined in the Irish report as an event involving one or more of the following:

- All legislative developments
- Major institutional developments
- Major debates in parliament and between social partners
- Government statements
- Media and civil society debates
- If the debate is also engaged with in parliament, or
- Items of scale that are discussed outside a particular sector and as such are considered newsworthy while not being within the Dáil remit
- Academic research.

In terms of sources and types of information used, these generally fall into several categories:

- Published and adopted national legislation
- Government press releases, statements and reports
- Published government schemes
- Media reporting (both web-based and print- media)
- Other publications (e.g. European Commission publications; I/NGO Annual Reports; publications and information leaflets)
- Case Law reporting.

Statistics, where available, were taken from published first-source material such as Government/Other Annual Reports and published statistics from the Central Statistics Office. Where noted, and where not possible to access original statistical sources, data were taken from media articles based on access to unpublished documents. Where possible, verified data have been used; where provisional data have been included, this has been highlighted accordingly.

In order to provide a comprehensive and reflective overview of national legislative and other debates, a representative sample of core partners were contacted with regard to input on a draft report:

- Department of Jobs, Enterprise and Innovation
- Department of Justice and Equality
- Child and Family Agency, TUSLA

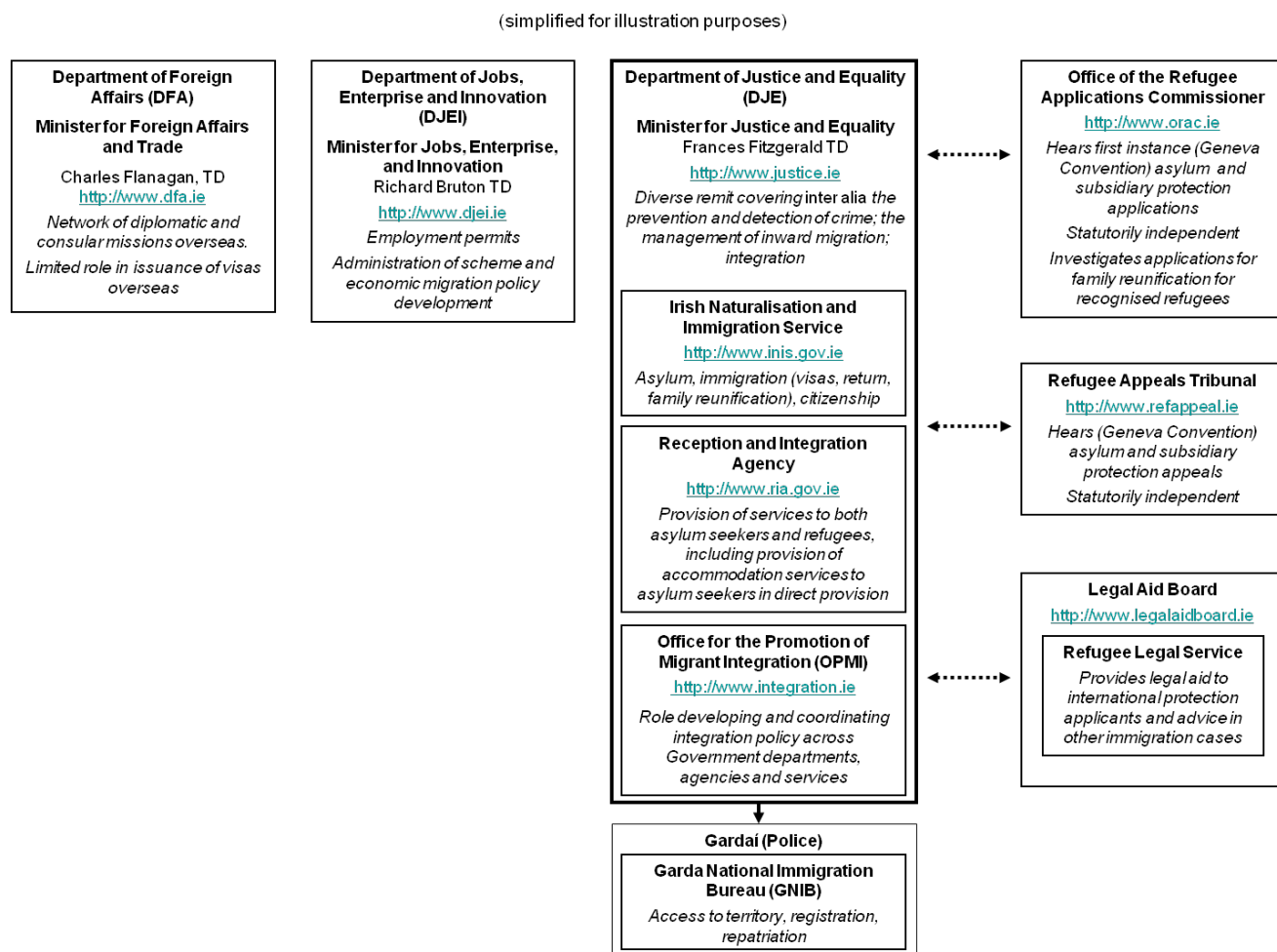
- Crosscare
- Immigrant Council of Ireland (ICI)
- International Organization for Migration (IOM)
- Irish Refugee Council (IRC)
- Migrant Rights Centre Ireland (MRCI)
- Office of the Refugee Applications Commissioner (ORAC)
- Refugee Appeals Tribunal
- UNHCR Ireland.

All definitions for technical terms or concepts used in the study are as per the *EMN Migration and Asylum Glossary 3.0*, available at www.emn.ie and http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/glossary/index_a_en.htm.

1.2 STRUCTURE OF ASYLUM AND MIGRATION POLICY

1.2.2 Institutional Context

FIGURE 1 Institutions in Ireland with Responsibility for Asylum and Immigration (April 2015)¹⁸



Three departments are involved in migration management in Ireland.

In addition, the Child and Family Agency, TUSLA, is responsible for administration of the care for unaccompanied third-country minors in the State and sits under the Department of Children and Youth Affairs.¹⁹

1.2.2.1 Department of Justice and Equality

The Department of Justice and Equality²⁰ is responsible for immigration management. The minister of that Department has ultimate decision-making

¹⁸ See www.emn.ie.

¹⁹ www.dcy.gov.ie. On 1 January 2014, the Child and Family agency became an independent legal entity, comprising HSE Children and Family Services, Family Support Agency and the National Educational Welfare Board as well as

powers in relation to immigration and asylum. The Garda National Immigration Bureau (GNIB) is responsible for all immigration related to Garda (police) operations in the State and is under the auspices of An Garda Síochána and, in turn, the Department of Justice and Equality. The GNIB enforces deportations and border control, and carries out investigations related to illegal immigration and trafficking in human beings. An Garda Síochána has personnel specifically dealing with immigration in every Garda district, at all approved ports and airports, and at a border control unit attached to Dundalk Garda Station.

In addition the Anti-Human Trafficking Unit²¹ is part of the Department. Within Ireland, in addition to the Anti-Human Trafficking Unit within the Department of Justice and Equality, there are three other dedicated units dealing with this issue which includes the Human Trafficking Investigation and Co-ordination Unit in the Garda National Immigration Bureau (GNIB), the Anti-Human Trafficking Team in the Health Service Executive (HSE) and a specialised human trafficking legal team in the Legal Aid Board (LAB). Dedicated personnel are assigned to deal with prosecution of cases in the Director of Public Prosecutions (DPP) Office, as well as in the New Communities and Asylum Seekers Unit within the Department of Social Protection which is tasked with providing assistance to suspected victims not in the asylum system, to assist with their transition from direct provision accommodation to mainstream services for the duration of their temporary residency.

The Irish Naturalisation and Immigration Service (INIS)²² is responsible for administering the statutory and administrative functions of the Minister for Justice and Equality in relation to asylum, visa, immigration and citizenship processing, asylum, immigration and citizenship policy and repatriation. The INIS also brings the Reception and Integration Agency (RIA)²³ under its aegis. The Reception and Integration Agency (RIA) is responsible for co-ordinating the provision of services to persons seeking international protection.²⁴ It also co-ordinates the provision of services such as health and education to asylum seekers in RIA accommodation. Since 2004, it has also been responsible for supporting the repatriation, on an ongoing basis and for the Department of Social Protection,²⁵ of destitute nationals of the 12 new EU Member States. It also

incorporating some psychological services and a range of services responding to domestic, sexual and gender based violence. See www.tusla.ie.

²⁰ www.justice.ie.

²¹ www.justice.ie/en/JELR/Pages/WP09000005.

²² www.inis.gov.ie.

²³ www.ria.gov.ie.

²⁴ Direct provision provides for full board accommodation supports while a final decision is awaited by a person on their protection or any related leave to remain application. See Parliamentary Question No. 323 (18 November 2014). Available on www.oireachtasdebates.oireachtas.ie and www.ria.gov.ie.

²⁵ www.welfare.ie.

provides accommodation to suspected victims of trafficking pending a determination of their case and during the 60-day recovery and reflection period.

With regard to applications for asylum and decision-making regarding the granting of refugee status under the *1951 Geneva Convention relating to the status of refugees*, a two-tier structure exists for asylum application processing, consisting of the Refugee Applications Commissioner (commonly referred to as the Office of the Refugee Applications Commissioner [ORAC]) and the Refugee Appeals Tribunal (RAT). These bodies have responsibility for processing first-instance asylum claims and for hearing appeals, respectively. On 14 November 2013, responsibility for processing all existing and future subsidiary protection applications transferred from the Irish Naturalisation and Immigration Service (INIS) to the Office of the Refugee Applications Commissioner (ORAC) under *Statutory Instrument No 426 of 2013, the European Union (Subsidiary Protection) Regulations 2013* (see Section 4.2.1.2). Both bodies make recommendations on asylum and subsidiary protection applications to the Minister of Justice and Equality who retains a residual discretion in making a final decision on whether refugee status is granted or refused²⁶ but who is bound to follow their recommendations with respect to subsidiary protection.²⁷ Both ORAC and the Refugee Appeals Tribunal have their own independent statutory existence. The Department also ensures they have input into the co-ordination of asylum policy.

The Refugee Applications Commissioner is also responsible for investigating applications by refugees to allow family members to enter and reside in the State and for providing a report to the Minister on such applications. Applications for family reunification from beneficiaries of subsidiary protection status are submitted directly to the Minister for Justice and Equality for investigation and decision.

The Refugee Documentation Centre (RDC)²⁸ is an independent library and research service within the Legal Aid Board.²⁹ The specialised Services for Asylum Seekers office within the Legal Aid Board also provides ‘confidential and independent legal services’ to persons applying for asylum in Ireland. Legal aid and advice is also provided in ‘appropriate cases’ on immigration and deportation matters.³⁰ Additionally, the Legal Aid Board provides legal services on certain matters to persons identified by the Human Trafficking Investigation and Co-ordination Unit of An Garda Síochána as ‘potential victims’ of human trafficking under the *Criminal Law (Human Trafficking) Act 2008*.

²⁶ Section 17 of the *Refugee Act 1996*.

²⁷ It is bound by Regulation 20(1) and (3) of 2013 Regulations.

²⁸ www.legalaidboard.ie/lab/publishing.nsf/Content/RDC.

²⁹ www.legalaidboard.ie.

³⁰ *ibid.*

The Office for the Promotion of Migrant Integration (OPMI) also comes under the auspices of the Department of Justice and Equality.³¹ With a focus on the promotion of the integration of legal immigrants into Irish society, the OPMI has a cross-Departmental mandate to develop, lead and co-ordinate integration policy across government departments, agencies and services. Ireland joined the UNHCR-led resettlement scheme in 1998. The OPMI co-ordinates the resettlement of refugees admitted by Ireland under the Programme, as well as the administration of EU and national funding for the promotion of migrant integration.

1.2.2.2 Department of Jobs, Enterprise and Innovation

The Department of Enterprise, Jobs and Innovation³² administers the employment permit schemes under the general auspices of the Labour Affairs Development Division:

- The Economic Migration Policy Unit³³ contributes to the Department's work in formulating and implementing labour market policies by leading the development and review of policy on economic migration and access to employment in Ireland.
- The Employment Permits Section³⁴ implements a skills oriented employment permits system in order to fill those labour skills gaps which cannot be filled through EEA supply. The Employment Permits Section processes applications for employment permits, issues guidelines, information and procedures, and produces online statistics on applications and permits issued.³⁵
- The Office of Science, Technology and Innovation deals with the administration of applications from research organisations seeking to employ third-country national researchers pursuant to *Council Directive 2005/71/EC on a specific procedure for admitting third-country nationals for the purposes of scientific research*.

1.2.2.3 The Department of Foreign Affairs

The Department of Foreign Affairs³⁶ has responsibility for the issuance of visas via Irish Embassy consular services in cases where the Department of Justice and Equality does not have a dedicated Visa Office present within the country.³⁷ The Department of Foreign Affairs has operative function only and is not responsible

³¹ www.integration.ie.

³² www.djei.ie.

³³ www.djei.ie/labour/migration/index.htm.

³⁴ www.djei.ie/labour/workpermits.

³⁵ Department of Jobs, Enterprise and Innovation, April 2015.

³⁶ www.dfa.ie.

³⁷ See Quinn (2009) for further discussion.

for visa policy or decisions, which are the remit of the Department of Justice and Equality.

1.2.3 General Structure of the Legal System

Of interest, Quinn (2009) notes how the Irish asylum process sits outside the Court system. Immigration matters are dealt with on an administrative basis by the Minister for Justice and Equality. In accordance with the Constitution, justice is administered in public, in courts established by law, with judges appointed by the President on the advice of the Government. Independence is guaranteed in the exercise of their functions. The Irish court system is hierarchical in nature and there are five types of courts in Ireland which hear different types and levels of cases. In ascending hierarchical order the five types of courts are:

- The District Court
- The Circuit Court
- The High Court
- The Court of Appeal
- The Supreme Court.

In a referendum in 2013, the establishment of a new Court, the Court of Appeal, was approved by the Irish people and this court was officially established on 29 October 2014. A general right of appeal from the High Court to the Supreme Court was replaced by a general right of appeal to the Court of Appeal. The Court of Appeal now occupies an appellate jurisdictional tier between the High Court and the Supreme Court. The relevance of the Courts in relation to asylum and immigration cases is generally limited to judicial review. Judicial review focuses on assessing the determination process through which a decision was reached to ensure that the decision-maker made their decision properly and in accordance with the law. It does not look to the merits or the substance of the underlying case.³⁸

As discussed in previous reports in this series, prior to the mid-1990s Irish asylum and immigration legislation was covered under such instruments as the *Hope Hanlon* procedure, the *Aliens Act 1935* (and Orders made under that Act),³⁹ together with the relevant EU free movement Regulations and Directives⁴⁰ which

³⁸ Available at www.citizensinformation.ie.

³⁹ *Aliens Order 1946* (S.I. No. 395 of 1946); *Aliens (Amendment) Order 1975* (S.I. No. 128 of 1975).

⁴⁰ Relevant EU legislation included *Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC on freedom of movement for workers within the Community, 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, 72/194/EEC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, 73/148/EEC on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, 75/34/EEC concerning the right of nationals of a Member State to*

came into effect in Ireland after it joined the European Union in 1973. Following a sharp rise in immigration flows from the mid-1990s, several pieces of legislation were introduced to deal with immigration and asylum issues in Ireland.

Regarding domestic legislation dealing with refugees and asylum seekers, the most notable piece of legislation is the *Refugee Act 1996*, as amended. In addition, the *European Communities (Eligibility for Protection) Regulations 2006* (S.I. No. 518 of 2006) seeks to ensure compliance with EU Directive 2004/83/EC.⁴¹ S.I. No. 310 of 2008 amended the *European Communities (Free Movement of Persons)(No. 2) Regulations 2006* (S.I. No. 656 of 2006) following the *Metock* judgment of the European Court of Justice (ECJ).

The *European Union (Subsidiary Protection) Regulations 2013* (S.I. 426 of 2013) amended S.I. 518 of 2006. The 2013 Regulations were made following the judgement in the ‘MM’ case and provided for, amongst other things, the transfer of responsibility for the processing of subsidiary protection applications from the Minister for Justice and Equality to the Office of the Refugee Applications Commissioner; personal interviews for each applicant at first instance; and the opportunity for an applicant to appeal a negative recommendation of the ORAC to the Refugee Appeals Tribunal (RAT).

Ireland is also a signatory to the ‘Dublin Convention’, and is subject to the ‘Dublin Regulation’ which determines the EU Member State responsible for processing asylum applications made in the EU. Regulation 604/2013⁴² (‘the Dublin III Regulation’) came into force on 29 June 2013. The *European Union (Dublin System) Regulations 2014* were adopted for the purpose of giving further effect to the Dublin III Regulation.⁴³

Domestic immigration law in Ireland is based on various legislation including the *Aliens Act 1935* and Orders made under it; the *Illegal Immigrants (Trafficking) Act 2000*; and the *Immigration Acts 1999, 2003 and 2004*.⁴⁴

remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity, 90/364/EEC on the right of residence, 90/365/EEC on the right of residence for employees and self-employed persons who have ceased their occupational activity, and 93/96/EEC on the right of residence for students.

⁴¹ 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. Quinn (2009) discusses both current and past development of legislation in great detail.

⁴² Regulation (EU) No 604/2013 (Dublin III Regulation) lays down the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person. See EMN *Asylum and Migration Glossary 3.0*. Available at www.emn.ie.

⁴³ See Section 4.2.1 for further discussion.

Regarding the situation of Ireland concerning an ‘opt-in’ provision regarding EU measures in asylum and migration, under the terms of the *Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on the European Union and to the Treaty on the Functioning of the European Union*, Ireland does not take part in the adoption by the Council of proposed measures pursuant to Title V of the TFEU unless it ‘opts into’ the measure. Ireland has given an undertaking to opt into measures that do not compromise the Common Travel Area with the UK, which also has an opt-in/opt-out facility.⁴⁵ Under Declaration number 56 to the TFEU, Ireland has declared its

*firm intention to exercise its right under Article 3 of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice to take part in the adoption of measures pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union to the maximum extent it deems possible.*⁴⁶

⁴⁴ See Quinn (2009) for further discussion on this issue, particularly legislative development.

⁴⁵ As noted in Quinn, E. and Kingston, G. (2012). *Practical Measures for Reducing Irregular Migration: Ireland*. Available at www.emn.ie and www.esri.ie.

⁴⁶ Declaration by Ireland on Article 3 of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice (TFEU). Ireland also ‘affirms its commitment to the Union as an area of freedom, security and justice respecting fundamental rights and the different legal systems and traditions of the Member States within which citizens are provided with a high level of safety’. An example is Ireland’s participation in Council Directive 2005/71/EC (‘the Researchers’ Directive’).

Chapter 2

Overview of Asylum and Migration Policy Developments

2.1 POLITICAL DEVELOPMENTS

2.1.1 *Cabinet Reshuffle*

Frances Fitzgerald T.D. was appointed as Minister for Justice and Equality on 8 May 2014, replacing Alan Shatter T.D.

Aodhán Ó Ríordáin T.D. was appointed Minister of State at the Department of Justice and Equality and the Department of Arts, Heritage and the Gaeltacht, with special responsibility for New Communities, Culture and Equality, on 15 July, 2014.

2.1.2 *Government Priorities and Review*

A *Statement of Government Priorities 2014-16* was launched in July 2014. Commitments in the asylum and migration area include to address the current direct provision system to ‘make it more respectful to the applicant and less costly to the taxpayer’ including legislating for a single application procedure via a Protection Bill. Work is to continue on an Immigration Bill. A commitment was also made to establish an independent Working Group to make recommendations on improvements within the protection process.⁴⁷ An Independent Working Group to report to Government on recommended improvements to the protection process, including direct provision and supports to asylum seekers was established in October 2014. The Group reported to Government in mid-2015 (see Section 4.2.2 for further information).

The *Programme for Government: Annual Report 2015* noted the new Irish Human Rights and Equality Commission had been established on 1 November 2014, merging the Irish Human Rights Commission and the Equality Authority. In the area of asylum, work was reported on efforts to ‘overhaul’ the asylum seeker protection service via the Independent Working Group established in October 2014. Looking at education, a new *International Education Strategy 2016-2020*

has been under review and is expected towards the end of 2015. The *Programme for Government: Annual Report 2015* noted that there had been a 36 per cent growth in the number of full-time non-EEA students in Irish institutions since the International Education Strategy had been published. Citing the first Higher Education System Performance report by the Higher Education Authority (HEA), it noted that the ‘higher education system is broadly on target to have international students accounting for 15 per cent of total full-time student numbers by 2020.’ The September 2014 reform of the international education sector was noted as taking place following the closure of several private colleges, with the stated aim of protecting

the consumer and educational interests of genuine international students, to tackle abuse of the labour market and the immigration regime, and to safeguard the strong international reputation of high-quality Irish education providers.

It was noted that the working year for non-EEA student work concession purposes had been standardised in order to ‘clamp down on abuse and to make the situation clearer for students and employers alike’.⁴⁸

2.2 OVERVIEW OF DEVELOPMENTS IN ASYLUM AND MIGRATION

2.2.1 Legislation

Several pieces of legislation relevant to the migration and international protection area were introduced in 2014.

Relevant Acts of the Oireachtas were the *Employment Permits (Amendment) Act 2014*,⁴⁹ the *Social Welfare and Pensions Act 2014* and the *Civil Registration (Amendment) Act 2014*.

Relevant statutory instruments included the following:

- The *European Union (Recognition of Professional Qualifications relating to the Professions of Dentist, Medical Practitioner, Nurse and Midwife) Regulations 2014* (S.I. No. 7 of 2014)
- The *Immigration Act 2004 (Visas) (Amendment) Order 2014* (S.I. No. 195 of 2014)
- The *Immigration Act 2004 (Visas) Order 2014* (S.I. No. 473 of 2014)

⁴⁷ Government of Ireland (11 July 2014). *Statement of Government Priorities 2014-2016*. Available at www.merrionstreet.ie.

⁴⁸ Government of Ireland (March 2015). *Programme for Government: Annual Report 2015*. Available at www.taoiseach.gov.ie.

- The *European Communities (Lawyers' Establishment) Regulations 2003 (Qualifying Certificate 2015) Regulations 2014* (S.I. No. 580 of 2014)
- *Employment Permits Regulations 2014* (S.I. No. 432 of 2014)
- The *European Union (Dublin System) Regulations 2014* (S.I. No. 525 of 2014).

2.2.2 International Covenant on Civil and Political Rights (ICCPR) Periodic Review

In July 2014, Ireland made its fourth appearance before the UN Human Rights Committee in its Periodic Examination of Ireland's compliance with its obligations under the *International Covenant on Civil and Political Rights (ICCPR)*.⁵⁰

The Committee issued a series of questions to Ireland on its compliance with obligations under the Convention⁵¹ to which the State responded.⁵² Of most relevance to this Report are those areas where the examination concerned the rights of migrants set out in Article 13 of the ICCPR. The questions in this area focused on the asylum application process, living conditions in direct provision centres, and other issues related to the situation of migrants in Ireland.

Ireland submitted its written response to the List of Issues in February 2014 and this was followed by oral examination hearings which took place in Geneva before the Human Rights Committee over two days in July 2014. As part of the examination process, the Irish Human Rights Commission and a number of NGOs made submissions to the Committee at various different points in the examination process. They also made shadow submissions in response to the questions raised in the List of Issues for Ireland.

In the oral hearings, the issue of Ireland as the only EU Member State without a single application procedure for asylum applications was raised, including the status of the proposed Immigration, Residence and Protection Bill.⁵³ In its response, Ireland outlined that a new Immigration, Residence and Protection Bill was at an advanced stage and was expected to be enacted during the year.⁵⁴ The

⁴⁹ Parts 1, 2, 3 (other than Section 15(5)(b) and Section 15(6)), and 6 came into operation on 30 September 2014 by virtue of the *Employment Permits (Amendment) Act (Commencement of Certain Provisions) Order 2014* (S.I. No. 430 of 2014).

⁵⁰ International Covenant on Civil and Political Rights was signed on 16 December 1966 and entered into force 23 March 1976, 999 UNTS 171. It was ratified by Ireland on 8 December 1989.

⁵¹ UN Human Rights Committee (22 November 2013). *List of issues in relation to the fourth periodic report of Ireland*. Available at www.ohchr.org.

⁵² Government of Ireland (27 February 2014). *International Covenant on Civil and Political Rights Human Rights Committee Replies of Ireland to the List of Issues*. Available at www.ohchr.org.

⁵³ UN Human Rights Committee (15 July 2014). *Summary recording of the 3079th meeting*. Available at www.ohchr.org.

⁵⁴ At the time of writing, the Heads of a new 'International Protection Bill 2015' had been published which, when enacted, will provide for a single assessment procedure in relation to asylum application. Available at

Committee recommended the establishment of a single application procedure without further delay and that the State seeks to 'ensure that the duration of stay for asylum seekers in direct provision centres is as short as possible'.⁵⁵

The lack of an independent oversight and independent complaints procedure in reception centres⁵⁶ was also raised during the proceedings, where it was noted that direct provision centres 'were unsuitable for long stays as they impeded family life, were not in the best interest of children, contributed to isolation and prevented integration'.⁵⁷ Ireland noted that an independent complaints procedure had been the subject of discussion by a Review Group⁵⁸ and that it believed the structure of the complaints procedure contained within the revised RIA House Rules to be 'fair and [that it] is broadly in line with the guidelines set out by the Office of the Ombudsman for internal complaints systems'.⁵⁹ In its concluding observations published in August 2014,⁶⁰ the Committee recommended the introduction of an accessible and independent complaints procedure for direct provision.⁶¹

In relation to protection for victims of domestic violence, Ireland outlined that any individual who is a victim of domestic violence and whose immigration status is dependent on another person may apply for an independent immigration status in Ireland.⁶² The Committee, in its concluding comments, noted the measures which had been taken by Ireland to enhance the protection of women from perpetrators of violence.⁶³ It went on to express its concern at the 'existence

www.justice.ie/en/JELR/General%20Scheme%20of%20the%20International%20Protection%20Bill%20_final_.pdf/Files/General%20Scheme%20of%20the%20International%20Protection%20Bill%20_final_.pdf.

⁵⁵ UN Human Rights Committee (19 August 2014). *Concluding observations on the fourth periodic report of Ireland*. Available at www.ohchr.org.

⁵⁶ Including the fact that issues relating to asylum seekers in reception centres do not fall within the remit of the Ombudsman, the Ombudsman for Children or the Health Information and Quality Authority (HIQA).

⁵⁷ UN Human Rights Committee (15 July 2014). *Summary recording of the 3079th meeting, Geneva*. Available at www.ohchr.org.

⁵⁸ A Review Group whose function was to review the House Rules and Procedures had been in place since 2002, had an independent chairman and included representatives from NGOs including the Irish Refugee Council and the Refugee Information Service, the Health Service Executive, the RIA, Centre Management, and An Garda Síochána. This Group met on 13 occasions and a subgroup also met with residents and local NGOs in four accommodation centres. No clear model had been agreed by the Review Group for such an independent complaints mechanism.

⁵⁹ Government of Ireland (27 February 2014). *International Covenant on Civil and Political Rights Human Rights Committee Replies of Ireland to the List of Issues*. Available at www.ohchr.org.

⁶⁰ UN Human Rights Committee (19 August 2014). *Concluding observations on the Fourth Periodic Report of Ireland*. Available at www.ohchr.org.

⁶¹ In the case of *C.A. and T.A. v. Minister for Justice and Equality* [2014] IEHC 532, the applicants successfully contended that the complaints procedure governing disputes between residents in direct provision and the operators of their accommodation lacked independence, given that the final arbiter in resolving any complaint, the Reception and Integration Agency, had both drafted the relevant rules and appointed the operators in question. See Section 4.6 for further analysis of this case.

⁶² It was noted in the response that the procedures to do so are outlined in the 'Victims of Domestic Violence Immigration Guidelines' published by INIS. Government of Ireland (27 February 2014). *International Covenant on Civil and Political Rights Human Rights Committee Replies of Ireland to the List of Issues*. Available at www.ohchr.org.

⁶³ During the oral hearings, Minister Fitzgerald outlined Ireland's intention to ratify the Council of Europe Convention Preventing and Combating Violence Against Women and Domestic Violence. See UN Human Rights Committee (14 July 2014). *Summary recording of the 3078th meeting*. Available at www.ohchr.org.

of administrative and financial obstacles for marginalised women to access essential support services’ as they must first apply for an independent immigration status with INIS. Further legislative and policy measures were recommended by the Committee to ensure that all women, particularly women whose immigration status is dependent on their partner, ‘have equal access to protection against perpetrators of violence’.⁶⁴

Regarding victims of trafficking, the Committee queried whether there was a difference between asylum-seeking victims of trafficking and non asylum-seeking victims of trafficking in relation to their access to the ‘reflection and recovery’ period or temporary residence permission as provided for under the *Administrative Immigration Arrangements for the Protection of Victims of Human Trafficking*.⁶⁵ Ireland outlined that the Arrangements apply solely to those who otherwise would not have permission to be in the State, but that all suspected victims of trafficking have access to equivalent residence permissions and support services.⁶⁶ ICCL commented in their submissions on the differences regarding reckonable residency calculations in relation to making an application to change immigration status in Ireland.⁶⁷ Ireland confirmed that suspected victims of trafficking who have had their asylum application refused are ‘entitled to temporary residence permission under the Administrative Immigration Arrangements.’⁶⁸

2.2.3 Irish Human Rights and Equality Commission Bill

The *Irish Human Rights and Equality Commission Bill* was enacted during 2014, with the new Commission formally established as from 1 November 2014. Some 14 members of the new Commission were initially selected in April 2013, ‘according to a process independent of Government and appointed initially to the Equality Authority and the Human Rights Commission’,⁶⁹ and appointed formally on 31 October 2014.⁷⁰

⁶⁴ UN Human Rights Committee (19 August 2014). *Concluding observations on the Fourth Periodic Report of Ireland*. Available at www.ohchr.org

⁶⁵ UN Human Rights Committee (14 July 2014). *Summary recording of the 3078th meeting*. Available at www.ohchr.org

⁶⁶ Government of Ireland (27 February 2014). *International Covenant on Civil and Political Rights Human Rights Committee Replies of Ireland to the List of Issues*. Available at www.ohchr.org.

⁶⁷ Irish Council for Civil Liberties (2013). *Civil Society Report on the List of Issues for the Fourth Periodic Examination of Ireland under the International Covenant on Civil and Political Rights*. Available at www.iccl.ie.

⁶⁸ Government of Ireland (27 February 2014). *International Covenant on Civil and Political Rights Human Rights Committee Replies of Ireland to the List of Issues*. Available at www.ohchr.org.

⁶⁹ Government of Ireland (2014). *Universal Periodic Review Ireland National Interim Report March 2014*. Available at www.rightsnow.ie.

⁷⁰ Irish Naturalisation and Immigration Service (31 October 2014). ‘*Appointments to the Irish Human Rights and Equality Commission*’. Available at www.inis.gov.ie.

The Government stated that it

*remains committed to doing everything possible to ensure that the Commission has the resources in place to carry out its mandate fully and in full compliance with the Paris Principles and, notwithstanding the current difficult economic climate, has made provision in 2014 for a 45 per cent increase in State funding for the Commission, to €6.299 million.*⁷¹

Upon announcement of the initial Bill in April last year, it was declared that the new body would in due course 'seek accreditation with the United Nations as Ireland's national human rights institution'.⁷²

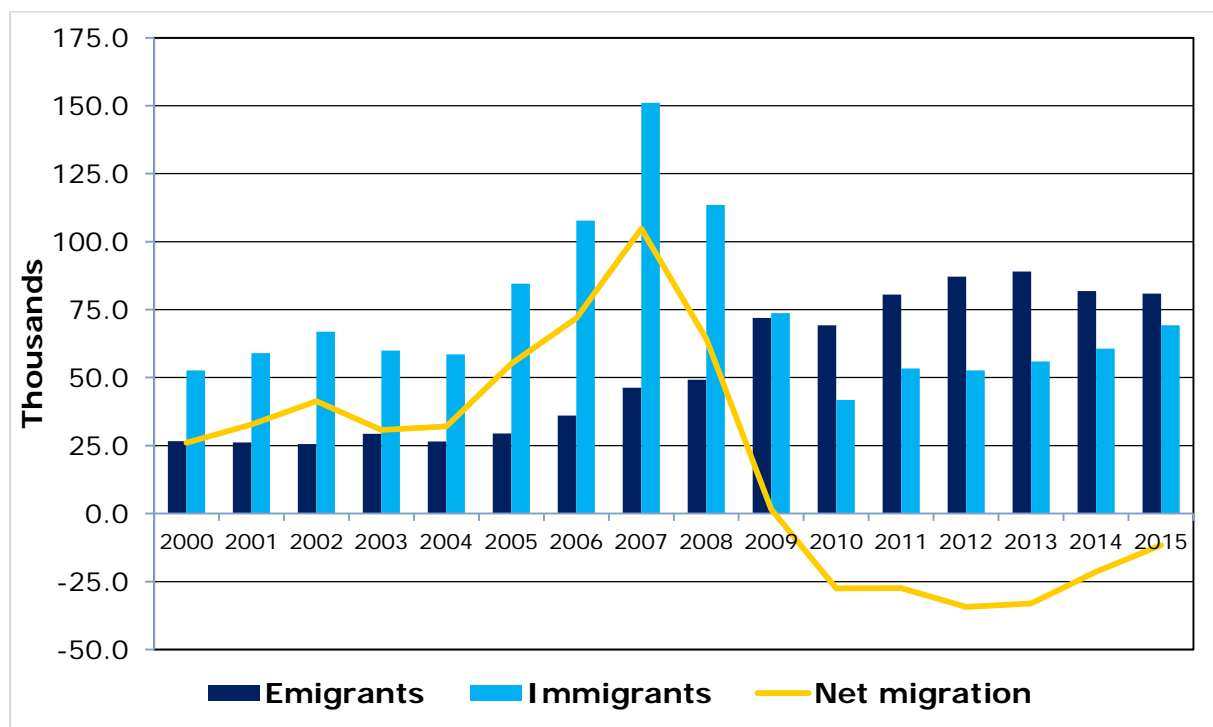
2.2.4 Population and Migration Estimates 2014

The *Population and Migration Estimates 2014* issued by the Central Statistics Office (CSO) provided an analysis of emigration by economic status for the first time. Data for 2014 show that the majority of those emigrating were either at work or a student in the period prior to departing, with fewer than one in five being unemployed.⁷³ The combined natural increase of the population together with negative net migration resulted in an overall increase in population of 16,500, bringing the population estimate to 4.61 million in April 2014.

⁷¹ Government of Ireland (2014). *Universal Periodic Review Ireland National Interim Report March 2014*. Available at www.rightsnow.ie.

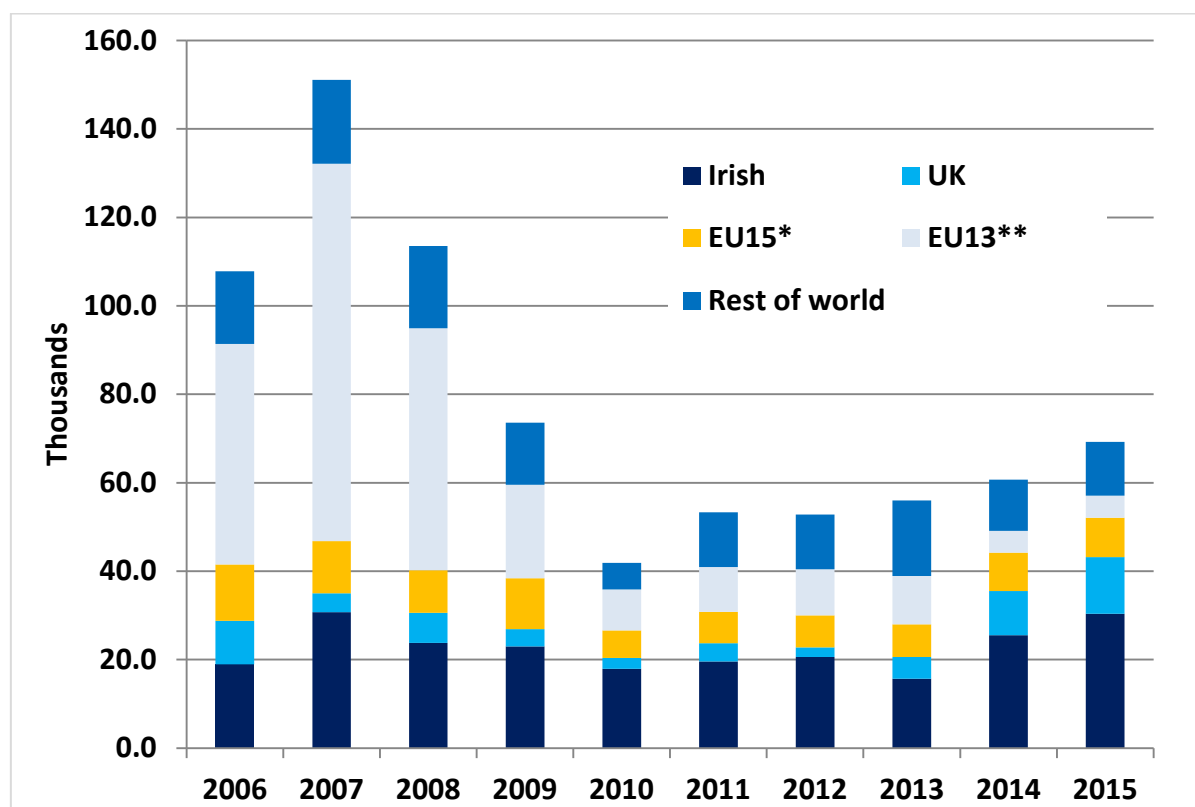
⁷² *The Irish Times* (9 April 2014) 'Human Rights and Equality Commission joined under new Bill' Available at www.irishtimes.com.

⁷³ Central Statistics Office (2014). *Population and Migration Estimates*. Available at www.cso.ie.

FIGURE 2 Gross and Net Migration, Ireland 2000-2014

Source: *Population and Migration Estimates*, CSO (with revisions from April 2007 to April 2011). 2012, 2013 and 2014 data are preliminary. See www.emn.ie.

The estimated total number of immigrants coming to Ireland increased year-on-year to 60,600 in the 12 months to April 2014 with the second largest group being 11,600 returning Irish nationals. An estimated 81,900 people left Ireland during the period, of which almost half (47,700 persons) were Irish nationals. An estimated total 25,500 non-EEA nationals came to Ireland during the period, with a corresponding outflow of 14,400 non-EEA nationals during the same time. Overall, there was a total net outward migration of 21,400 persons between April 2013 and April 2014, a decrease on the previous year's figure of 33,100. Among non-Irish nationals this trend was reversed, with a net inflow of 11,200 persons from outside the EU during the period (of which almost 20 per cent were Brazilian). This represents a year-on-year increase in net inward migration for non-EEA nationals from 6,800 in 2013.

FIGURE 3 Estimated Immigration to Ireland, 2006-2014

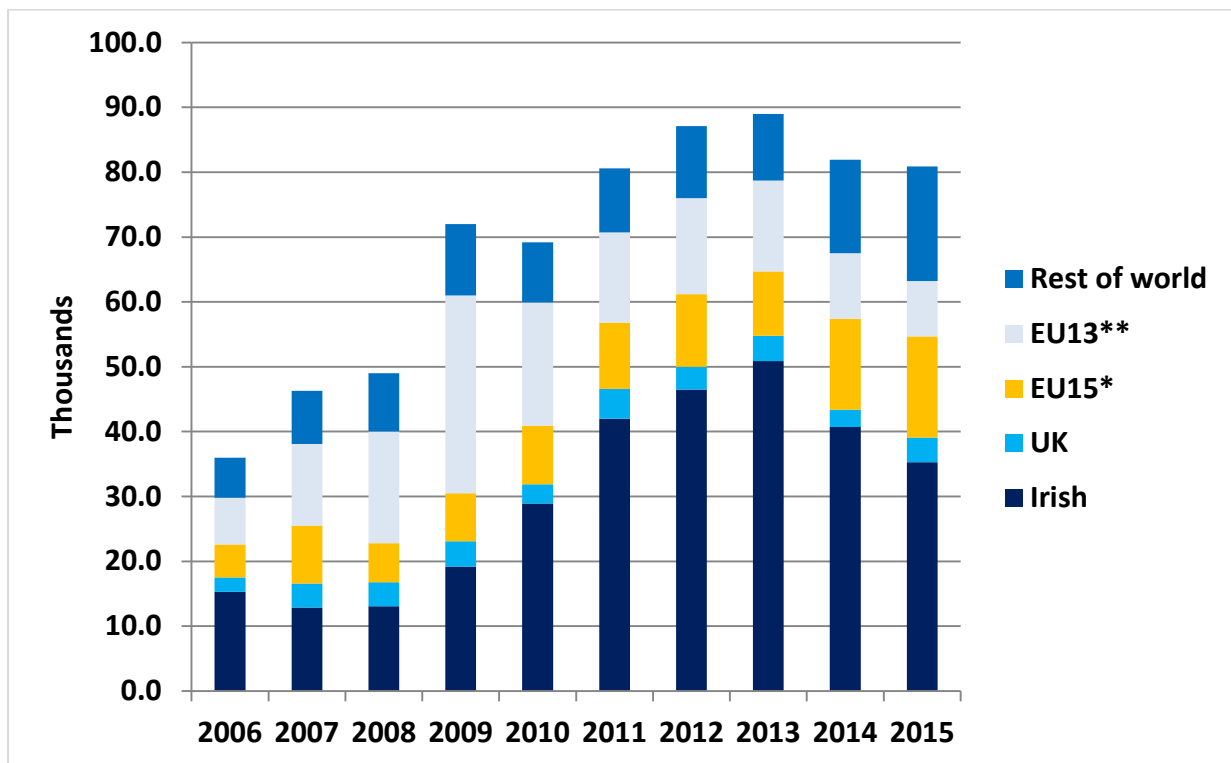
Source: *Population and Migration Estimates*, CSO (with revisions from April 2007 to April 2011). 2012, 2013 and 2014 data are preliminary. 2011 data: Census of Population for immigration only.

Notes: * EU15 excluding UK and Ireland.

** EU13 Member States that joined in 2004, 2007 and 2013.

Regarding immigration into Ireland in the 12 months to April 2014, non-EU nationals comprised the largest group of migrants entering the country during the period. From a total of 60,600 people entering Ireland in the year up to April 2014, the main group at 42 per cent (or 25,500) were non-EU nationals. This was an increase of 8,400 on the comparable 2013 figure. Returning Irish nationals were the second largest group of estimated migrants entering Ireland at 11,600, whilst nationals of the EU13 comprised the third largest group at 10,000.

FIGURE 4 Estimated Emigration from Ireland, 2006-2014



Source: *Population and Migration Estimates*, CSO (with revisions from April 2007 to April 2011). 2012, 2013 and 2014 data are preliminary. 2011 data: Census of Population for immigration only.

Notes: * EU15 excluding UK and Ireland.
 ** EU13 Member States that joined in 2004, 2007 and 2013.

Almost half of the estimated 81,900 people who emigrated from Ireland in the year to April 2014 were Irish nationals (40,700 persons, or 49.7 per cent), whilst one-third were other EU nationals (26,800). However, it should be noted that the numbers of Irish nationals emigrating fell by over 10,000 from the 2013 figure of 50,900. There was also a 40 per cent year-on-year increase in the numbers of non-EU nationals leaving the country, with an additional 4,100 departing during 2014 in comparison with 2013 figures (10,300 emigrated during 2013).

Chapter 3

Legal Migration and Mobility

Provisional end of year figures for 2014 show 95,000 non-EEA nationals with permission to remain in Ireland, a decrease of 11 per cent year-on-year.⁷⁴ The majority of those registered were in Ireland for work or study purposes and from Brazil (12 per cent), India (11 per cent), China (9 per cent), USA (7 per cent), Nigeria (6 per cent) and the Philippines (5 per cent).⁷⁵

3.1 ECONOMIC MIGRATION

3.1.1 Legislation

3.1.1.1 Employment Permits Legislation 2014

Employment permits in Ireland are governed by the *Employment Permits Act 2003* and the *Employment Permits Act 2006*. The *Employment Permits (Amendment) Act 2014*⁷⁶ was enacted to introduce reforms to the employment permits system in line with the Government's *Action Plan for Jobs* and *ICT Skills Action Plan 2014-2018* with the aim of making Ireland a top global location for ICT skills. It is designed to codify the law in this area to make the system more transparent and obligations clearer to businesses.⁷⁷

Part 2 of the Act of 2014 is designed to amend the *Employment Permits Act 2003*, arising out of the High Court's decision in *Hussein v. Labour Court*,⁷⁸ which overturned a decision of the Labour Court to award a third-country national back-pay and other money, on the basis that his contract of employment was unlawful by reason of what the High Court considered to be his failure to have an employment permit.⁷⁹ The 2014 Act provides for a defence to a charge of having been employed without an employment permit, where it can be proved that the foreign national took all reasonable steps to ensure compliance with the section.

⁷⁴ The MRCI has remarked that this reduction in non-EEA registration can be partly explained by the increased rate of naturalisation (MRCI, April 2015). McGinnity et al. (2014) note that a sharp fall in live residence permissions for work between 2008 and 2012 (the years of reference of the report) may perhaps be attributable to the 'much increased number of naturalised citizens' as well as the impact of the recession.

⁷⁵ Irish Naturalisation and Immigration Service (January 2015). 'Immigration in Ireland – 2014'. *Press Release*. Available at www.inis.gov.ie.

⁷⁶ Available at www.oireachtas.ie/documents/bills28/acts/2014/a2614d.pdf.

⁷⁷ Department of Jobs, Enterprise and Innovation (2014). 'New law to reform work permit system as part of plan to make Ireland the Internet capital of Europe – Minister Bruton'. Available at www.djei.ie/press/2014/20140423a.htm.

⁷⁸ *Hussein v. Labour Court* [2012] IEHC 364.

⁷⁹ The High Court's decision was overturned on appeal: see *Hussein v. Labour Court* [2015] IEHC 58.

It also allows the foreign national to seek compensation against an employer, despite the illegality of the contract.⁸⁰

Part 3 of the Act of 2014 amends the *Employment Permits Act 2006* to make further provision in respect of the employment permit system. The amendments provide for inter alia different types of permits for different purposes, and additional criteria and rules for determining whether or not to grant applications for permits. Specific provisions also take account of the needs of start-up companies in that regard. The Act of 2014 aims to provide flexibility to deal with changing labour market, work patterns and economic development needs. Nine types of employment permits are now provided for and detailed in Section 3.1.2.

Part 4 of the Act of 2014 provided for amendment of the *Illegal Immigrants (Trafficking) Act 2000* by changing the procedure by which certain decisions in the fields of asylum, immigration and residence can be challenged in the courts, and by specifying the time limits within which such challenges must be brought. Such challenges are to be brought within 28 days of the notification of the decision to the person concerned. Before the amendment, certain classes of decisions listed in it, such as those in connection with the making of negative decisions on applications for asylum, the making of deportation orders, and the refusal of leave to land in the State, had to be challenged within 14 days. As far as these are concerned, the time limit has therefore been extended. On the other hand, certain other classes of decision included in the amendment, namely the refusal of applications for subsidiary protection, the making of removal orders and exclusion orders under the *European Communities (Free Movement of Persons)(No. 2) Regulations 2006* (S.I. 656 of 2006), as amended, and the refusal of requests for revocation of deportation orders under Section 3(11) of the *Immigration Act 1999*, used to be governed by the time limits provided under Order 84 of the Rules of the Superior Courts, which at the time of the amendment was three months where a person sought an order quashing such a decision. That time limit has therefore been reduced to the 28-day period provided for in the amendment. It may be noted that the amendment also empowers the Minister for Justice and Equality to prescribe other decisions which may be subject to the new time limit. Part V of the Act of 2014 also provided for changes to the *Immigration Act 2004* and the *Aliens Order 1946* (S.I. No. 395 of 1946) relating to designated areas and responsible persons for registration of non-Irish nationals.

The *Employment Permits Regulations 2014* came into effect on 1 October 2014 and prescribe the different classes of employment permit that may be granted by

⁸⁰ See www.emn.ie.

the Minister for Jobs, Enterprise and Innovation for the purposes referred to in Section 3A(2) of the *Employment Permits Act 2006*, as amended, and the qualifying criteria, application process, fees, review process with regard to decisions taken, and other matters in respect of such classes:

- Part 1 of the Regulations of 2014 set out preliminary matters, including relevant definitions
- Part 2 contains general provisions, dealing with such matters as applications for employment permits and the renewal thereof, the information and documentation to be furnished with them, and the fees and time-periods for applications
- Part 3 deals with critical skills employment permits
- Part 4 with dependant/partner/spouse employment permits
- Part 5 with general employment permits
- Part 6 with intra-company transfer employment permits
- Part 7 with contract for services employment permits
- Part 8 with reactivation employment permits
- Part 9 with exchange agreement employment permits
- Part 10 with sport and cultural employment permits
- Part 11 with internship employment permits.

The Regulations also prescribe the forms that are to be used by applicants for the different classes of employment permits and the form in which such permits, if granted or renewed, will be issued. Part 12 provides that the Regulations revoke the *Employment Permits Act 2006 (Prescribed Fees and Miscellaneous Procedures) Regulations 2006*.

The *Employment Permits (Amendment) Act 2014 (Commencement of Certain Provisions) Order 2014* appointed the 30 September 2014 as the date upon which the following provisions of the Act of 2014 were to come into effect, namely (a) Part 1; (b) Part 2; (c) Part 3 (other than subsections (5)(b) and (6) of section 15); and (d) Part 6.

3.1.2 Changes to Employment Permit System

As discussed above, Part 3 of the *Employment Permits (Amendment) Act 2014* amends the *Employment Permits Act 2006* to make further provision in respect of the employment permit system.⁸¹ The Department of Jobs, Enterprise and Innovation has commented that it provides the flexibility to deal with changing

⁸¹ The amendments provide for inter alia different types of permits for different purposes, and additional criteria and rules for determining whether or not to grant applications for permits. Specific provisions also take account of the needs of start-up companies in that regard.

labour market, work patterns and economic development needs which often require rapid response. They have further remarked that it balances the needs of enterprise for skilled personnel, particularly those skilled in evolving sectors such as ICT, with the needs of the indigenous and European labour market.⁸² Upon announcing the new legislation, the Minister for Jobs, Enterprise and Innovation stated that he viewed the new legislation as enabling the employment permits system to ‘respond quickly and allow our economy benefit from quickly emerging opportunities’.⁸³ MRCI welcomed the passage of the Act and termed it ‘progressive legislation’, in particular its provisions to enable workers to apply for a work permit in cases where they had become undocumented through no fault of their own.⁸⁴

Nine types of employment permits are now provided for:

Type of Employment Permit	
Critical Skills Employment Permit	<p>This replaces the previous Green Card Permit and is designed to attract highly skilled persons to the Irish labour market for occupations deemed critically important to the Irish economy or which are experiencing skills shortages. Occupations deemed critically important (e.g. ICT professionals, professional engineers, technologists) are in high demand, highly skilled and in ‘significant shortage of supply’ in the Irish labour market.⁸⁵ Eligibility is mostly determined by the occupation type, and proposed salary level. A restricted number of strategically important occupations with a minimum annual remuneration of €30,000 as contained in the Highly Skilled Eligible Occupations List are permitted (a relevant degree qualification or higher is required). All occupations with a minimum annual remuneration of over €60,000, other than those on the Ineligible Categories of Employment for Employment Permits or which are contrary to the public interest are eligible.⁸⁶</p> <p>A Labour Market Needs Test is not required, immediate family reunification is provided for, and dependants/partners/spouses may then seek immediate employment and apply to the Department of Jobs, Enterprise and Innovation for a Dependant/Partner/Spousal Employment Permit. Upon completion of the permit, holders may apply to the Irish Naturalisation and Immigration Service (INIS) for permission to live and work without the requirement for an employment permit.⁸⁷</p>

⁸² Department of Jobs, Enterprise and Innovation, January 2015.

⁸³ *The Irish Times* (24 April 2014). ‘New work permits aim to make Ireland ICT hub’. Available at www.irishtimes.com.

⁸⁴ MRCI (16 July 2014) ‘New legislation will help prevent exploitation of undocumented migrants in Ireland, say campaigners’ *Press Release*. Available at www.mrci.ie.

⁸⁵ www.djei.ie. Eligible occupations are ‘largely’ determined in line with the analyses of the Expert Group on Future Skills Needs and detailed in the Highly Skilled Eligible Occupations List. See www.djei.ie/labour/workpermits/highlyskilledeligibleoccupationslist.htm.

⁸⁶ A non-EEA national who does not have a degree qualification or higher must have the necessary level of experience.

⁸⁷ The employment permit holder may change employer after one year of employment with the original employer as specified on the employment permit (subject to a new permit application and policy at the time). Either the employee or the employer can apply for a Critical Skills Employment Permit. The employment permit will issue to the prospective employee. See www.djei.ie/labour/workpermits/criticalskillsep.htm. It is noted that an employment permit will not be granted to companies unless 50 per cent or more of the employees in the firm are EEA nationals at the time of application. However, this restriction may be waived in respect of start-up companies within two years of their establishment.

Type of Employment Permit *Contd.*

Intra-Company Transfer Employment Permit	This facilitates the transfer of ‘senior management, key personnel or trainees who are non-EEA nationals from an overseas branch of a multinational corporation (Foreign Employer) to its Irish branch (Connected Person)’. Particular reference is made to ‘initial establishment of a foreign direct investment company’ and their role in contributing to job growth ambitions. ⁸⁸
Dependant/ Partner/ Spousal Employment Permit	This applies primarily to dependents of Critical Skills Employment Holders and also to Researchers. ⁸⁹ Eligible persons are dependent unmarried children, recognised partners (where recognised as such by the Department of Justice and Equality), civil partners, and spouses, who have been admitted to the State as family members of holders of these categories of Employment Permits and Researchers under a Hosting Agreement may apply. Apart from domestic employment, all occupations are eligible, including certain carers in the home. Occupations with remuneration of less than €30,000 are provided for, but not less than the National Minimum Wage. A Labour Market Needs Test is not required and the application is free of charge.
General Employment Permit	This is the ‘primary vehicle’ used by Ireland to attract third-country nationals for occupations experiencing a labour or skills shortage. ⁹⁰ All occupations are assumed to be eligible unless excluded under the list of <i>Ineligible Categories of Employment for Employment Permits</i> or which are deemed contrary to the public interest. All occupations under the Highly Skilled Eligible Occupations List are deemed eligible. Either the employee or employer may apply for the permit. It can be issued for an initial period of two years, and renewed for up to a further three years. Remuneration is generally €30,000 per year, however it is €27,000 in certain cases. ⁹¹ A Labour Market Needs Test is required in most cases.

⁸⁸ See www.djei.ie/labour/workpermits/intracompanytransferep.htm.

⁸⁹ Under the ‘Scheme for admission of third-country researchers to Ireland’. See www.djei.ie.

⁹⁰ See www.djei.ie/labour/workpermits/generalep.htm.

⁹¹ See www.djei.ie/labour/workpermits/generalep.htm. Lower annual remuneration includes:

A non-EEA student – who has graduated in the last 12 months, from an Irish third-level institution, and has been offered a graduate position from the Highly Skilled Eligible Occupations List; the minimum annual remuneration must be €30,000 at renewal stage;

A non-EEA student – who has graduated in the last 12 months, from an overseas third-level institution, and has been offered a graduate position as an ICT professional from the Highly Skilled Eligible Occupations List; in such cases the minimum annual remuneration must be €30,000 at renewal stage; and

An employment which requires a person fluent in the official language of a state which is not a Member State of the EEA, where the employment is supported by an enterprise development agency and the employment is in:

- (i) a customer service and sales role with relevant product knowledge,
- (ii) a specialist online digital marketing and sales role, or
- (iii) a specialist language support and technical sales support role.

Type of Employment Permit *Contd.*

Contract for Services Employment Permit	Previously considered under the Work Permits Scheme, this category is now provided for under a separate scheme. It facilitates the movement of non-EEA staff working in Ireland in instances where a foreign Contractor has won a contract to provide services to an Irish entity on a contract for services basis. Permits can only be considered for the term of the contact, with applications granted for a maximum 24 months initially and may be renewed up to a maximum overall period of five years. The employee in question must have been working for a minimum period of six months with the Contractor prior to transfer in order to support the contention that the Contractor was awarded the contract on the basis of the skills and service they could provide. ⁹²
Reactivation Employment Permit	This permit applies to a foreign national who entered the State on a valid Employment Permit but who fell out of the system through no fault of their own or who have been badly treated or exploited in the workplace, to work again. Either the person or employer can apply for a permit, with the permit issued to the individual. The Minister will, except in very exceptional circumstances, consider the issue of one new Reactivation Employment Permit for a foreign national under the scheme. ⁹³ An application must first be made to INIS, for permission to remain in Ireland for the purpose of making an application under the Scheme.
Internship Employment Permit	This permit replaces the old Internship class of work permit and is designed to facilitate the employment of foreign nationals who are 'are full-time students, enrolled in a third-level institution outside the State, for the purpose of gaining work experience'. Either the employee or employer can apply, for a maximum period of 12 months, non-renewable. ⁹⁴
Sports and Cultural Employment Permit	This permit replaces the older sports professional class within the work permit category and now covers the entertainment sector. Either the employee or employer can apply, with the permit issued to the foreign national. A permit can be issued for different periods depending on the contract of employment or seasonal nature, however a maximum of two years is permitted. ⁹⁵
Exchange Agreement Employment Permit	This replaces the old category within the work permit employment permits and caters for permits under international reciprocal agreements. Either the employee or employer may apply, with the permit issued to the foreign national. Permits may be issued for differing periods up to a maximum of two years, depending on the type of agreement. ⁹⁶

⁹² See www.djei.ie/labour/workpermits/contractforservicesep.htm.

⁹³ See www.djei.ie/labour/workpermits/reactivationep.htm.

⁹⁴ See www.djei.ie/labour/workpermits/internshipep.htm.

⁹⁵ See www.djei.ie/labour/workpermits/sportandculturalep.htm.

⁹⁶ See www.djei.ie/labour/workpermits/exchangeagreementep.htm.

The *ICT Skills Action Plan 2014-2018* was released during the year, and informed by the EGFSN report *Addressing Future Demand for High Level ICT Skills*. The report indicates a continuing strong demand for high-level ICT skills with 44,500 job openings forecast to arise over the period to 2018. The Minister for Jobs, Enterprise and Innovation stated that it was the ambition to fill the majority, 75 per cent, from ‘the Irish-based education system’.⁹⁷ It concludes that attraction of ‘experienced international talent, including expatriate talent’ will be required as part of a comprehensive strategy. Measures to ‘streamline the operation of the employment permit regime and... to promote Ireland as a destination for skilled ICT professionals’ are also highlighted.⁹⁸

3.1.3 Atypical Working Scheme

An Atypical Working Scheme came into force in September 2013, on a pilot basis. It provides for certain categories of workers such as those employed in the State for the purposes of atypical, short-term employment (e.g. contract basis [between 14 and 90 calendar days inclusive]), and other categories of employment not covered by the Employment Permits Acts. It applies where:

- A skill shortage has been identified
- To provide a specialised or high skill to an industry, business or academic institution
- To facilitate waged/funded short-term employment/internship where beneficial or integral/necessary to the course being studied in respect of third-level students studying outside the State in approved/accredited institutions (medical and unwaged internships are excluded)
- As a locum doctor
- As a nurse on Clinical Adaptation Placement.⁹⁹

During 2014 approximately 1,350 applications were approved, with four refused. The United States, India and Japan were the most common nationalities of applicants.¹⁰⁰ Following a review of the Scheme in 2014, a decision was taken to continue with the pilot. It was agreed that the Scheme would include locum

⁹⁷ *The Irish Times* (24 April 2014). ‘New work permits aim to make Ireland ICT hub’. Available at www.irishtimes.com.

⁹⁸ Department of Education and the Department of Jobs, Enterprise and Innovation (2014). *ICT Skills Action Plan 2014-2018*. Available at www.skillsireland.ie/media/14042014-ICT_Skills_Action_Plan-Publication.pdf.

⁹⁹ Excluded from the Scheme are:

(i) persons already resident in the State (excepting locum doctors per above)

(ii) persons entering the State for employment purposes of up to 14 calendar days (inclusive/consecutive)

(iii) persons entering the State for business purposes of up to 90 calendar days (inclusive/consecutive) e.g. attending meetings/seminars/conferences, sales trips etc.

(iv) persons who may avail of permission under the Van Der Elst Judgment

(v) persons who avail of the Highly Skilled Job Interview Authorisation initiative

(vi) persons in possession of an Employment Permit issued by the Department of Jobs, Enterprise and Innovation. See www.inis.gov.ie/en/INIS/Pages/Atypical%20Working%20Scheme%20Guidelines.

¹⁰⁰ Irish Naturalisation and Immigration Service (January 2015).

doctors employed and paid by an agency (effective from 1 July 2014), and non-EEA nurses on clinical adaptation placements (applicable from early/mid-September 2014).¹⁰¹

The July 2014 Expert Group on Future Skills and Needs (EGFSN) *National Skills Bulletin* identified skills shortages within the ICT sector. Shortages within the health sector (General Practitioners and non-consultant hospital doctors, nurses, radiographers and sonographers) were also found as well as within the engineering, science, business/finance, sales and other sectors.¹⁰² During 2013, professionals (ICT, doctors, nurses, auditors at 68 per cent) were the most frequently sourced from outside the EEA via a form of employment permit.¹⁰³ Associate professionals constituted 15 per cent of all such permits (ICT, financial, sales), with managers representing 6 per cent (chief executives, financial, manufacturing) and skilled trades at 4 per cent (chefs, engineering).¹⁰⁴

3.1.4 Changes to Start-Up Entrepreneur Programme (STEP)

Changes to the Start-Up Entrepreneur Programme (STEP) were announced in March 2014. The STEP provides for residency for business development purposes for approved migrants with a viable proposal for a High Potential Start-up Company (HPSU)¹⁰⁵ and where there is:

- An innovative business idea for a 'High Potential Start-Up'¹⁰⁶

¹⁰¹ In the cases of non-EEA nurses on adaptation placements, applications must be made from outside the State. On successful completion of the adaption placement, non-EEA nurses may apply to the Department of Jobs, Enterprise and Innovation for an employment permit under the Atypical Working Scheme.

Permission is not granted to take up employment as a registered nurse/midwife until the Clinical Adaptation and Assessment Programme has been successfully completed, registration granted and an Employment Permit has been acquired from the Department of Jobs, Enterprise and Innovation. The Employment Permit must be in respect of the Irish based host body (Hospital/Nursing Home) named on the Atypical Working Scheme Application Form. A copy of the Atypical Working Scheme Letter of Approval must be submitted with other supporting documentation when applying for an Employment Permit. See www.inis.gov.ie/en/INIS/Pages/Atypical%20Working%20Scheme%20Guidelines.

¹⁰² www.skillsireland.ie. See Expert Group on Future Skills and Needs (July 2014). *National Skills Bulletin 2014*. Available at www.skillsireland.ie/publication/egfsnSearch.jsp?ft=/publications/2014/title,12498,en.php. See also Presentation: *National Skills Bulletin*. Available at www.skillsireland.ie/media/23072014-National_Skills_Bulletin_2014-Presentation.pdf.

¹⁰³ Employment permits, Green Cards, intra-company transferees, spousal permits.

¹⁰⁴ See Presentation: *National Skills Bulletin*. Available at www.skillsireland.ie/media/23072014-National_Skills_Bulletin_2014-Presentation.pdf.

¹⁰⁵ STEP applies the definition of a HPSU as used by Enterprise Ireland, which classifies a HPSU as a start-up venture that is:

- Introducing a new or innovative product or service to international markets.
- Involved in manufacturing or internationally traded services.
- Capable of creating ten jobs in Ireland and realising €1 million in sales within three to four years of starting up.
- Led by an experienced management team.
- Headquartered and controlled in Ireland.
- Less than six years old.

See Irish Naturalisation and Immigration Service (13 March 2014). 'Minister Shatter announces targeted changes in the Start-up Entrepreneur Programme'. *Press Release*. Available at www.inis.gov.ie.

¹⁰⁶ Defined as introducing a new or innovative product or service to international markets; capable of creating ten jobs in Ireland and realising €1 million in sales within three to four years of starting up; led by an experienced management

- Funding of €75,000
- No possibility of a ‘drain on public funds’.¹⁰⁷

In March 2014 the Minister for Justice and Equality announced changes following a review of the STEP, effective from mid-month. It was indicated that there would be greater emphasis on the marketing and promotion of the Programme, and on aligning it with the ‘national strategy to promote Ireland as a world class business location’.¹⁰⁸ The main changes related to:

- A reduction in the required minimum investment from €75,000 to €50,000. In cases whereby more than one principal is involved in establishing a business, the minimum investment for the second and subsequent investors will be €30,000 per principal.
- A 12-month immigration permission will be made available for two categories of persons: foreign national entrepreneurs attending ‘incubators or innovation bootcamps’ in Ireland;¹⁰⁹ and non-EEA students who graduate with advanced STEM (Science, Technology, Engineering, and Mathematics) degrees in Ireland and who wish to work on preparing an application to the Programme.

By the end of 2014, a total of 30 projects and 12 applications for residence were approved under STEP.¹¹⁰

An additional 25 applications for residence were approved under the Immigrant Investor Programme (IIP) during 2014, with a total of 41 projects approved under the same programme by the end of the year. During 2014 INIS produced updated Guidelines to assist those who wish to submit an application under the programme. The Guidelines provided clarity regarding the residence permission which successful applicants are to be provided with a ‘Stamp 4’ permission.¹¹¹

team; headquartered and controlled in Ireland; and less than six years old. See Irish Naturalisation and Immigration Service (2012). *Investor and Entrepreneur Schemes*. Available at www.inis.gov.ie/en/INIS/Pages/New%20Programmes%20for%20Investors%20and%20Entrepreneurs.

¹⁰⁷ See Irish Naturalisation and Immigration Service (February 2012) ‘Speech by Minister for Justice and Equality Mr Alan Shatter T.D. on Entrepreneur and Investor Schemes Seanad Éireann 9 February 2012’. *Press Release*. Available at www.justice.ie. In addition, applicants must be of good character and be able to support themselves while in Ireland. Family reunification of a spouse/partner and children is provided for as long as they can be supported by the entrepreneur, investor or other private means, and no social benefits will be provided.

¹⁰⁸ Irish Naturalisation and Immigration Service (13 March 2014). ‘Minister Shatter announces targeted changes in the Start-up Entrepreneur Programme’. *Press Release*. Available at www.inis.gov.ie.

¹⁰⁹ The aim of the immigration permissions is to allow entrepreneurs to ‘prepare an application to the STEP’ and to ‘provide an identifiable route for migrant entrepreneurs to move from the start-up to realisation phase of their projects’.

¹¹⁰ Irish Naturalisation and Immigration Service (26 January 2015). ‘Immigration in Ireland – 2014’. *Press Release*. Available at www.inis.gov.ie.

¹¹¹ Irish Naturalisation and Immigration Service (2014) *Immigrant Investor Programme 2014 Guidelines*. Available at www.inis.gov.ie.

This permission allows investors and their family members to reside in Ireland to either work or study.

A new part of the IIP was outlined in relation to availability of a ‘discount for education’ expenses. During the application process, investors may discount their approved investment with eligible education expenses that they commit to incur within the first five years after their permission has been granted. The proposed education expenses must be in an Irish higher education institution for either the investor themselves or a family member. The maximum discount allowable is €50,000 and retrospective education expenses cannot be included.¹¹²

In a year-end review, the Minister for Justice and Equality reported that projects under both STEP and IIP represented a combined investment commitment of over €40 million in Ireland.¹¹³

3.1.5 Domestic Workers

Ireland ratified the *ILO Domestic Workers Convention* during 2014. The MRCI broadly welcomed the move, and its applicability to the ‘thousands of childminders, cleaners, au pairs and carers in private homes across Ireland’ of whom ‘the majority are women, and many are migrants’. It added that conditions of work are generally poor and exploitation is ‘rampant’ within this sector, and the MRCI had seen cases of ‘extreme exploitation, trafficking and abuse... widespread underpayment and disregard for the basic employment rights of workers’.¹¹⁴ MRCI has noted an increase in their 2014/2015 case referrals of domestic workers being exploited by employers while working as an au pair in Ireland in order to ‘circumvent employment legislation’. These au pair case referrals have reported labour exploitation and/or breaches of employment legislation. The MRCI has called for clarity on measures in place for au pairs to allow them to ‘vindicate their employment rights’.¹¹⁵

During 2014, the National Employment Rights Authority (NERA) issued an information leaflet outlining the Employment Rights of Domestic Workers in

www.inis.gov.ie/en/INIS/Immigrant%20Investor%20Programme%20Guidelines%202014.pdf/Files/Immigrant%20Investor%20Programme%20Guidelines%202014.pdf.

¹¹² Irish Naturalisation and Immigration Service (2014). *Immigrant Investor Programme 2014 Guidelines*. Available at www.inis.gov.ie.

¹¹³ Irish Naturalisation and Immigration Service (26 January 2015). ‘Immigration in Ireland – 2014’. *Press Release*. Available at www.inis.gov.ie.

¹¹⁴ MRCI (9 July 2014). ‘Landmark day for workers in private homes as Ireland ratifies Domestic Workers Convention’. *Press Release*. Available at www.mrci.ie.

¹¹⁵ Correspondence with MRCI (April and August 2015). The MRCI 2015 report, ‘Childcare in the Domestic Work Sector’ (May 2015) made a number of related recommendations including to reintroduce an eligible employment permit for domestic work to respond to the Irish labour market need and ‘mitigate exploitation’. Increased inspections of private homes, with a focus on au pairs, is also called for. See www.mrci.ie.

Ireland. This leaflet is available in French, Hindi, Mandarin, Spanish and Portuguese. NERA is also carrying out ongoing investigations into cases of domestic workers who are termed *au pairs* for the purposes of avoiding obligations under employment legislation.

New guidelines for members of diplomatic missions to Ireland who intend to employ private domestic workers were introduced in September 2014. The Guidelines were drawn up following an interagency consultative process involving the Departments of Foreign Affairs; Justice and Equality; Enterprise, Jobs and Innovation; NERA and An Garda Síochána. As a guiding principle, ‘respect for Irish laws and good employment practice’ is expected to be shown. The Guidelines outline expectations regarding pay, employment records, health insurance and social security.¹¹⁶ Announcing the new Guidelines, the Minister for Foreign Affairs and Trade said their introduction was consistent with Ireland’s recent ratification of the *International Labour Organisation (ILO) Convention on Decent Work for Domestic Workers*. MRCI welcomed the guidelines as a ‘first progressive step’ but warned that enforcement might remain problematic due to the protection provided by diplomatic immunity under the 1961 Vienna Convention.¹¹⁷ Of a total of 28 forced labour trafficking cases reported to Gardaí since 2008, MRCI has referred nine cases of human trafficking for forced labour as domestic workers in embassies and diplomatic households.¹¹⁸ During 2014, much media attention was garnered following the recall of the UAE Ambassador to Ireland following the awarding of €80,000 to three former domestic workers by the Employment Appeals Tribunal (EAT) for ‘horrific’ working conditions. The EAT accepted that they had been employed at the home of the Ambassador and ‘forced to work 15 hours a day, seven days a week for €170 per month’. The Ambassador did not attend the hearings and claimed diplomatic immunity. The MRCI has called for all diplomatic staff in Ireland to be treated ‘according to the laws of this country’.¹¹⁹

3.1.6 Recognition of Qualifications

3.1.6.1 Legislation

The European Union (Recognition of Professional Qualifications relating to the Professions of Dentist, Medical Practitioner, Nurse and Midwife) Regulations 2014 (S.I. No. 7 of 2014) implement Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, as amended, insofar as such legislation concerns the professions of

¹¹⁶ Irish Naturalisation and Immigration Service (15 September 2014). ‘Minister Flanagan announces new guidelines for diplomatic staff employing private domestic employees’. Available at www.dfa.ie.

¹¹⁷ Vienna Convention on Diplomatic Relations 1961.

¹¹⁸ *The Irish Times* (12 September 2014). ‘Guidelines issues to protect domestic staff in embassies.’ Available at www.irishtimes.com.

¹¹⁹ *The Irish Times* (30 November 2014). ‘UAE recalls ambassador who treated women ‘like slaves’.’ Available at www.irishtimes.com.

dental practitioner, specialised dental practitioner, medical practitioner, nurse responsible for general care and midwife.

The *European Communities (Lawyers' Establishment) Regulations 2003 (Qualifying Certificate 2015) Regulations 2014* (S.I. No. 580 of 2014) is intended to give effect to the *Lawyers' Establishment Directive 98/5/EC* as provided for in the *European Communities (Lawyers' Establishment) Regulations 2003*. They impose an obligation on every registered lawyer (other than a registered lawyer in the full-time service of the State or a registered lawyer solely engaging in conveyancing services for a non-registered lawyer employer) who practices, or is deemed to practice, in the State to hold a qualifying certificate. They set out provisions concerning such matters as applications for such certificates, implications of providing false or misleading information, and fees.

3.2 FAMILY REUNIFICATION

3.2.1 Statistics

ORAC received 167 files regarding family reunification during 2014, concerning 337 dependants. The main countries of nationality of files received were Somalia (32 applications), Sudan (23 applications), Afghanistan (19 applications), Iraq (14 applications) and Syria (10 applications).¹²⁰

IOM Ireland assisted 23 persons to travel to Ireland for the purposes of family reunification during 2014.¹²¹

3.2.2 Case Law

There were a number of cases before the Irish courts in 2014 concerning family reunification.

A.M.S. v. Minister for Justice and Equality [2014] IESC 65

The applicant was a Somali national, recognised as a refugee in Ireland, who applied for family reunification with his mother, wife, daughter, two sisters and two brothers under Section 18(4) of the *Refugee Act 1996*. In support of his application, he submitted details of financial transfers from him to his family. The Minister for Justice and Equality refused his application in the exercise of his discretion under the sub-section. Whilst accepting that the family members were

¹²⁰ Office of the Refugee Applications Commissioner (2015). *Monthly statistical report December 2014*. Available at www.orac.ie.

¹²¹ IOM Ireland, April 2015.

financially dependent on the applicant and that his mother was suffering from a physical disability to such an extent that it is not reasonable for her to maintain herself fully, he refused it by reference to the lawful operation of immigration control, the impact of granting the application on the economic well-being of the State, in that the family would likely become a burden on the State, and the impact on the health and welfare systems of the State. The applicant challenged the decision by way of judicial review.

The High Court quashed the Minister's decision, and the Minister appealed to the Supreme Court.

The High Court had found that the Minister was not entitled to regard as a factor which could weigh against the granting of family reunification the potential financial dependency of the applicant's family members on the State, in the event of family reunification being granted. The Minister argued that Section 18(4) conferred on him a broad discretion to manage and control the immigration system of the State and that an interpretation which sought to exclude the possibility of taking into account financial consequences was contrary to that broad discretion and was, thus, an inaccurate interpretation of it.

The Supreme Court held that the Oireachtas had conferred a wide discretion on the Minister, and that it would be necessary, in order to exclude a factor from the Minister's proper consideration, for it to be specified as being outside the scope of matters which could properly be taken into account, under the legislation, in a family reunification application. It held that the legitimate economic interests of the State could not fall outside the scope of the Minister's considerations. It would require clear language in the legislation which either expressly provided or necessarily implied that such economic interests were not to be taken into account in order to interpret Section 18 in a way which prevented the Minister from having regard to the State's economic interests in reaching an overall conclusion in an application under Section 18(4). It held that the fact that the discretion under Section 18(4) existed at all clearly implied that there might be countervailing factors which should also be taken into account in deciding an application for family reunification.

It therefore held that the High Court had been incorrect to infer from the general purpose of the Act of 1996 that the Minister could never have regard to financial considerations involving the State in determining how lawfully to exercise the discretion conferred by Section 18(4).

The Supreme Court added, however, that lack of financial support enjoyed by the subjects of the application was one factor to be taken into account, amongst others, in deciding an application for family reunification. It could not, on its own, lead to its rejection. It pointed out that the fact that the legislation expressly provided that persons who had the benefit of a successful family reunification application qualified for state benefits was inconsistent with an interpretation which suggested that, by itself, the fact that particular family members might be a burden on the State could operate as a factor for rejecting an application in respect of them.

Accordingly, it concluded that the question of the potential cost to the State of meeting its obligations to members of the family of a refugee was a factor which could properly be taken into account in an overall assessment of an application for family reunification. However, some significant weight had to be given to the fact that the Oireachtas had chosen to confer a special entry status on dependent members of the extended family of a refugee and had also decided to confer on such persons, should they be admitted to the State, the same social welfare and health benefit entitlements as applied to a citizen of the State. The mere fact that there might be some limited cost to the State of admitting a dependent member of the extended family of a refugee to enter the State, without more, could not be the decisive factor in the rejection of an application.

Considering the proportionality of the refusal, the Supreme Court said that it was faced with assessing the proportionality of, on the one hand, depriving persons who were acknowledged to be dependent on the applicant from the opportunity of family reunification, and exposing the State to what would, in the overall circumstances of the case, be the extremely limited costs of meeting the welfare and health requirements of that very small number of persons. It noted that a system could be put in place in the State enabling information to be provided as to the costs estimates of allowing reunification in cases where that might impose a financial burden on the State, and that it might be possible to form a judgment as to whether a particular approach, which might be restrictive of allowing such applications, might not be justified on the basis of the economic consequences for the State of allowing dependent applicants to enter the State. It observed that no such analysis was carried out by the Minister in the instant case.

The court acknowledged that the Minister enjoyed some reasonable margin of appreciation in weighing the factors which favoured and opposed the grant of discretionary family reunification, and that it should only interfere where his consideration of that balancing exercise was clearly unreasonable and disproportionate. It was, however, satisfied that it was justified in interfering in the instant case. In light of the fact that special and enhanced application status

given to dependent family members under Section 18(4) of the Act of 1996, the weight to be attached to the general entitlement of the State to exercise immigration control was significantly less than in an ordinary case. Also, in the absence of any consideration of the broader economic consequences of granting family reunification applications, the financial consequences for the State on the facts of the instant case were extremely limited. Accordingly, it could not reasonably be held that they outweighed, in a proportionate fashion, the family and other rights which had to be balanced on the other side.

The decision of the Supreme Court confirms the entitlement of the Minister for Justice to have regard to the financial impact upon the State of granting family reunification applications. If the Minister wishes to exercise discretion to refuse applications for family reunification on behalf of dependent family members on that basis, the judgment indicates that a system would need to be put in place which would apprise the Minister of the potential costs to the State of allowing reunification in such cases, as might justify a more restrictive approach to the grant of such applications.

F.B. v. Minister for Justice [2014] IEHC 427 (05/09/14)

The applicant was an elderly Nigerian national who had been granted refugee status in Ireland. She applied for family reunification with two alleged granddaughters who were said to have been dependent on her in Nigeria, pursuant to Section 18(4) of the *Refugee Act 1996*. She claimed that she had left them in the care of an individual when she left to seek asylum in the State, and that the person concerned could no longer care for them. In support of her application, she submitted details of financial transfers from her to the granddaughters.

The Refugee Applications Commissioner prepared a report on foot of the application which had identified a number of inconsistencies in her case. However, in refusing her application, the Minister for Justice and Equality did not rely upon those inconsistencies, and relied instead on the matter of dependency, holding that the evidence did not show that the grandchildren were financially dependent on the applicant, as she had alleged.

The applicant challenged the decision by way of judicial review, complaining that there had been inadequate consideration of the sums of money remitted by her to the grandchildren and of the fact that she had made arrangements in the past for their continuing care and accommodation in Nigeria. The Minister contended that the sum remitted, €144.00 in total over a lengthy period, was too low to be regarded as assistance upon which they could be dependent.

The High Court (McDermott J.) quashed the decision. It was not satisfied that the Minister had applied the appropriate test in respect of ‘dependency’ to the relationship between the applicant and her granddaughters, either in respect of the issue of financial dependency or the wider dependency based on their relationship with her since infancy, which it considered also needed to be taken into account. Insofar as the financial contributions were concerned, it noted that the only yardstick taken into account by the Minister was that of per capita income in Nigeria for a particular year. There was no meaningful inquiry as to the costs of maintaining and educating children in Nigeria, nor as to how much support had been provided by their carer in Nigeria before its alleged withdrawal. It considered that the circumstances in which they might find themselves following its withdrawal and if they were without accommodation, would have to be relevant to the question of whether or not the very low payments made by their grandmother, who was herself not wealthy, were capable of making a valuable contribution to their subsistence.

The court also noted that there had not been any consideration of the rights of the applicant or her granddaughters as a family under Article 8 of *the* European Convention on Human Rights. It considered that to be an error of law.

Accordingly, it quashed the Minister’s decision.

3.3 STUDENTS AND RESEARCHERS

3.3.1 Students

There was an 8 per cent year-on-year increase in the number of persons given permission to be in Ireland for the purposes of being a student for the January–November period from 2013 (45,800) to 2014 (49,500).¹²²

Much media commentary during 2014 centred on the closure of private education colleges and the situation for third-country students. From the beginning of 2014 a number of private education colleges closed, impacting around 2,000 non-EEA students enrolled in these colleges. In May, the Irish Council for International Students (ICOS) cited 700 queries from students affected by such closures.¹²³ In order to assist the affected students, in May 2014 the

¹²² Irish Naturalisation and Immigration Service (26 January 2015). ‘Immigration in Ireland – 2014’. *Press Release*. Available at www.inis.gov.ie.

¹²³ *The Irish Times* (17 May 2014) ‘Keeping faith with foreign students who come to Ireland to learn English’. Available at www.irishtimes.com.

Ministers for Education and Skills, and Justice and Equality, announced the establishment of a Task Force on Students Affected by the Closure of Private Colleges. INIS was represented on the task force along with other stakeholders, including the industry group Marketing English in Ireland, the Irish Council for International Students (ICOS), and regulators Quality and Qualifications Ireland (QQI). At the time, the Minister for Education stated that the Government ‘wants to assist and co-ordinate a sympathetic response’ for genuine students and that it was important to note that ‘the students who have been affected are being given grace periods with regard to their immigration status so that they can remain in Ireland, continue to work to support themselves and have the time to plan their next steps.’ In a news article of May 2014 it was noted that a number of students had complained that they were unable to obtain written reassurance of this grace period from INIS to allow them to continue working.¹²⁴

A report of the Task Force was submitted to the two Ministers in July 2014 and published in September.¹²⁵ Following the closure of the colleges, INIS allowed all relevant students to be on academic holiday¹²⁶ allowing them time to make alternative arrangements. In the report, the Task Force stated they worked closely with the representative bodies of education providers to develop solutions which could provide ‘reasonable accommodation’ for impacted students according to their subject area. The Minister for Justice and Equality said the solutions agreed were ‘pragmatic and compassionate’ and offered ‘genuine international students an excellent opportunity to study at a discount in quality assured colleges with proper learner protection arrangements’.¹²⁷ Responding to the report, MRCI noted its disappointment with the absence of a consultative process with students or interested groups, and with the lack of diversity on the Taskforce. The MRCI also highlighted the Taskforce’s failure to address the issue of ensuring protections are in place for current and future students when a school closes abruptly. The commitment to increase inspections and compliance of colleges and to address rogue operators was welcomed.¹²⁸

A policy statement detailing *Regulatory Reform of the International Education Sector and the Student Immigration Regime* was published jointly by the two

¹²⁴ *The Irish Times* (21 May 2014) ‘Task force to ‘accommodate’ language students’. Available at www.irishtimes.com.

¹²⁵ Department of Education and Skills (2 September 2014). ‘Ministers O’Sullivan and Fitzgerald launch major reform of student immigration and the international education sector’. *Press Release*. See www.education.ie/en/Press-Events/Press-Releases/2014-Press-Releases/PR14-09-02.html#sthash.RjaJMfF9.dpuf.

¹²⁶ Until 1 September 2014, this removed any doubt for the affected students about their immigration status in Ireland and allowed them to continue to work in Ireland during the summer months whilst they made alternative education arrangements.

¹²⁷ *The Irish Times* (2 September 2014) ‘Tighter regime for issuing student visas announced’. Available at www.irishtimes.com.

¹²⁸ MRCI (2 September 2014). ‘New Taskforce Report Fails to Protect International Students.’ *Press Release*. www.mrci.ie/press-centre/new-taskforce-report-fails-to-protect-international-students.

Departments in September 2014.¹²⁹ New rules are to take effect from 1 January 2015. The Minister for Justice and Equality stated that these reforms are intended to

*provide certainty and clarity for international students coming to Ireland, to prioritise education over work, to give effect to an enhanced inspection and compliance regime and to further align the student migration system with the strategic objective.*¹³⁰

Three pillars of reform were proposed in the Regulatory Reform:

- a new list of eligible programmes
- an enhanced inspection and compliance regime
- changes to the operation of the student work concession.

Firstly, the current Internationalisation Register will be replaced with an Interim List of Eligible Programmes for Student Immigration Permission (ILEP) from 1 January 2015, to be replaced by an International Education Mark (IEM),¹³¹ estimated to be in 2016. Aspects to be considered for inclusion under this award include programme accreditation (generally only programmes ‘accredited or recognised by Irish awarding bodies in the English language and higher education sectors will be permitted’ and ‘in line with the strategic priorities identified under the International Education Strategy and with current overseas promotion of education services by Irish State bodies’);¹³² immigration compliance;¹³³ overall

¹²⁹ Department of Education and Skills and Department of Justice and Equality (September 2014). Policy Statement *Regulatory Reform of the International Education Sector and the Student Immigration Regime*. See more at: www.education.ie.

¹³⁰ Irish Naturalisation and Immigration Service (26 January 2015). ‘Immigration in Ireland – 2014’. Press Release. Available at www.inis.gov.ie.

¹³¹ Provision is made for an International Education Mark (IEM) and Code of Practice for international learners. The Code of Practice will address a range of matters of relevance to international students, including ‘protection for enrolled learners, recruitment and admission, information provision, student welfare, cultural awareness and academic support provisions’. Once arrangements for quality assurance have been agreed with the QQI, public and private providers of education and training will be eligible to apply for the IEM; QQI will authorise the use of the IEM by providers where they can demonstrate compliance with the Code of Practice and any associated specific eligibility criteria. See Department of Education and Skills and Department of Justice and Equality (September 2014). Policy Statement *Regulatory Reform of the International Education Sector and the Student Immigration Regime*. See more at www.education.ie.

¹³² Examples include higher education programmes leading to major awards at the National Framework of Qualifications Level 6 and above which are made by statutory Irish awarding bodies; higher education programmes leading to non-major awards at NFQ 6 and above which are made by statutory Irish awarding bodies and which have an associated workload of at least 60 ECTS credits per year; ACELS/QQI-recognised English language provision, with duration requirements attached; foundation programmes of at least one year in duration which are linked to entry to specified Irish higher education institutions and which lead to awards of statutory Irish awarding bodies or are recognised by ACELS; ACCA professional accountancy programmes at providers that have been designated as Platinum Providers; and on a transitional basis, until 1 January 2016, overseas Bachelors and Masters Degree Programmes currently listed on the International Register where providers are able to demonstrate ‘a track record of high-quality delivery and strong oversight by the relevant accrediting body’. See Department of Education and Skills and Department of Justice and Equality (September 2014). Policy Statement *Regulatory Reform of the International Education Sector and the Student Immigration Regime*. See more at: www.education.ie.

‘track record’ (e.g. for both Irish and EU students); and authorisation to use the IEM once introduced.

Secondly, an ‘enhanced inspection and compliance regime’ is to be introduced and to include a greater inspection function for INIS and GNIB regarding attendance management and student immigration permission compliance. Wider linkage to overall tax compliance, social protection issues and investigation of the potential for abuse of the student work concession will take place ‘where necessary.’ Periodic review as part of the International Education Mark regime will take place as will monitoring by the Quality and Qualifications Ireland (QQI) of private providers. The Departments of Justice and Equality, and Education and Skills, the QQI and ‘other relevant State bodies and provider representative bodies with an interest in the operation of the non-EEA student sector’ will take part in a compliance working group looking at the operation of such providers and the work concession in place for non-EEA students.

The third pillar relates to the terms of the Student Work Concession. While the terms of the concession remain unchanged (non-EEA students attending a full-time programme on the Internationalisation Register are permitted to work up to 20 hours per week during term and up to 40 hours per week outside of term time), the Regulatory Reform statement standardises how the concession operates. The previous ability of the education providers to set the programme timetable has been replaced, with the work concession now to be aligned with the traditional academic year. Holiday time permitting 40 hours of work will now apply only in May-August and from 15 December-15 January. Further guidelines on other types of work e.g. au pair work and restrictions on the type of work etc. are intended to be published. The MRCI expressed concern at an increased risk of social exclusion and poverty for international students as a result of the Student Work Concession and that it will incentivise exploitation and non-compliance.¹³⁴

The reform of this area has not been without difficulty. In 2014, the Department of Education and Skills sought to impose a new and more regulated regime for the accreditation of English language schools in Ireland which involved establishing an interim list of eligible programmes available to students. In order to be included on the interim list, colleges offering programmes had to be accredited under the ‘Accreditation and Co-ordination of English Language Services’ system (ACELS). The Minister for Justice and Equality decided that she would only grant a visa to a person to enter the State to study English if the course in question was ACELS accredited. In *National Employment Development*

¹³³ Where INIS is satisfied with the history and operation of the provider, including those involved in the ownership and ‘past conduct of personnel’. Liaison with authorities in the UK and other States will also take place.

¹³⁴ MRCI, April 2015.

Training Centre and Another v. Minister for Justice and Qualifications and Quality Assurance Authority of Ireland,¹³⁵ the first applicant had unsuccessfully applied for ACELS accreditation, whilst the second applicant's application was under consideration. They instituted proceedings in the High Court challenging the Minister's decision and were successful in setting it aside on the basis that she had fettered her discretion by indicating, in advance of determining any application of a prospective student, that she would not consider eligible a course of study which did not have ACELS accreditation. They also successfully persuaded the court that the second respondent lacked power under the legislation which created it to administer the ACELS system.

Information campaigns for non-EEA student recruitment under the Education in Ireland umbrella continued during 2014. The Education in Ireland brand (under the authority of the Minister of the Education and Skills) is managed by Enterprise Ireland¹³⁶ who is responsible for the promotion of Irish Higher Education Institutions overseas. A 'Study in Ireland Tweetup' for India took place in June 2014 and was designed to bring prospective students considering studying in Ireland together with the industry experts. 14 Irish colleges took part.¹³⁷ Four Education in Ireland fairs took place in India in November 2014: Delhi, Pune, Chennai and Bangalore.¹³⁸ The National College of Ireland (NCI) issued 40 scholarships for the January intake of their most popular Masters programmes at these fairs for the MSc in Cloud Computing, MSc in Data Analytics and the MSc in Management; ten vouchers were to be issued per city with a value of €1,500 each.¹³⁹ Further fairs took place in Brazil in November/December at the Euro Pos education fairs in Sao Paulo and then Curitiba. The NCI issued an additional 60 scholarships for the January intake of their Foundation, Pre-Masters and most popular Masters programmes at these fairs for similar programmes as listed above.¹⁴⁰

¹³⁵ *National Employment Development Training Centre and Another v. Minister for Justice and Qualifications and Quality Assurance Authority of Ireland* [2015] IEHC 140.

¹³⁶ The State agency responsible for 'supporting the development of manufacturing and internationally traded services companies'. See www.educationinireland.com/en/About-Us.

¹³⁷ Participating colleges included Cork Institute of Technology, Dublin Business School, Dublin City University, Dublin Institute of Technology, Galway Mayo Institute of Technology, Griffith College Dublin, Limerick Institute of Technology, Shannon College of Hotel Management, National College of Ireland, National University of Ireland Galway, National University of Ireland Maynooth, University College Cork, University College Dublin and Trinity College Dublin.

¹³⁸ Participating colleges included Cork Institute of Technology; Dublin City University; Dublin Business School; Galway-Mayo Institute of Technology; Maynooth University; National College of Ireland; ICD Business School; University of Limerick; National University of Ireland, Galway; Shannon College of Hotel Management; Smurfit Business School; University College Dublin; Trinity College Dublin; University College Cork; Waterford Institute of Technology.

¹³⁹ Education in Ireland (2014). 'NCI to issue 40 scholarships at Education in Ireland Fairs in India'. Available at www.educationinireland.com.

¹⁴⁰ Education in Ireland (2014). 'NCI to issue 60 scholarships at Euro Pos Brazil'. Available at www.educationinireland.com.

3.3.2 Researchers

Ireland continued to participate in the ‘Researchers Directive’¹⁴¹ during 2014.

3.3.3 Qualifications Recognition

As discussed in previous reports in this series, the new Quality and Qualifications Ireland (QQI) integrated agency was established in November 2012, with functions outlined under Part 2 (9) (1) of the 2012 Act. QQI is responsible for the external quality assurance of further and higher education and training (including English language provision) and validates programmes and makes awards for certain providers in these sectors. QQI is also responsible for the maintenance, development and review of the National Framework of Qualifications (NFQ). Since its establishment, QQI has undertaken the development of its qualifications and quality assurance services. A *White Paper: Policy on Authorisation to use the International Education Mark* was published in May 2014 and submissions were invited for *Guidelines for Pre-Higher Education Foundation Awards for International Students* in October 2014.¹⁴²

3.4 INTEGRATION

3.4.1 New Integration Strategy

As referenced earlier, the Cross Departmental Group on Integration was reconstituted during 2014 to review activities taken across Departments and agencies in the area, with a view to producing an updated ‘overall integration strategy’.¹⁴³ Chaired by the Department of Justice and Equality, the Group includes representation from a wide range of Departments and Offices which have a ‘significant role in integration’. A number of thematic discussions took place including:

- Promoting Intercultural Awareness and Combating Racism and Xenophobia
- Education
- Social Inclusion and Access to Public Services
- Employment and Pathways to Work
- Active Citizenship.

¹⁴¹ Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research.

¹⁴² www.qqi.ie.

¹⁴³ Irish Naturalisation and Immigration Service (28 March 2014). ‘Government to Prepare New Integration Strategy’. *Press Release*. Available at www.inis.gov.ie.

A call for public participation was made in national and ethnic media, with over 80 submissions received. Some five consultation sessions were held with those who made submissions to further explore issues raised.

A draft Integration Strategy was under preparation at year end, following consultation with key stakeholders and is expected in 2015.¹⁴⁴

3.4.2 Funding

A total of €1,331,322 in funding was allocated by The Office for the Promotion of Migrant Integration (OPMI) during 2014.¹⁴⁵ Some €265,950 was provided to local authorities during the year.¹⁴⁶ OPMI continued to have responsibility for the social, employment and integration of migrants elements of the Human Capital Investment Operational Programme (HCIOP) 2007-2013.

On behalf of OPMI, Business in the Community Ireland (BITC) manages the Employment of People from Immigrant Communities (EPIC) programme. The programme aims to assist European Economic Area nationals and immigrants who can work in Ireland without a work permit to find employment and/or further training and education in Ireland. The training programme includes workplace language and social skills training, CV preparation, one-on-one coaching, interview skills, living and working in Ireland and IT. There were 308 engagements with EPIC during 2014, with 66 per cent of clients placed or engaged in training or work. A total of €468,000 was provided to Business in the Community (EPIC Funding) during 2014.¹⁴⁷

OPMI increased the grant to the New Communities Partnership for the Citizenship Application Support Service, a no-charge service aimed at supporting migrants in completing applications for citizenship. OPMI has stated that this provides continued support to applicants and promotes the uptake of citizenship.¹⁴⁸ Details regarding the right to vote, a link to information on how to register for elections and registration forms were also provided to persons naturalised at citizenship ceremonies.¹⁴⁹

¹⁴⁴ See www.integration.ie.

¹⁴⁵ Including €468,000 for the EPIC programme of which 50 per cent was co-funded under the ESF. See www.integration.ie.

¹⁴⁶ www.integration.ie.

¹⁴⁷ www.integration.ie. Co-financed (50 per cent) by the European Social Fund.

¹⁴⁸ Office for the Promotion of Migrant Integration, January 2015.

¹⁴⁹ *ibid.*

3.4.3 Grassroots Integration through Volunteering Experiences (GIVE) Project

During 2014, IOM Ireland implemented the Grassroots Integration through Volunteering Experiences (GIVE) project which was an integration initiative which sought to promote the integration of migrants through community volunteering. Managed by IOM Ireland in partnership with IOM missions in The Hague, Vienna and London, national volunteer agency partners were also involved such as Volunteer Ireland (Dublin); Caritas Graz (Vienna/Graz); PEP - Participatie Emancipatie Professionals (The Hague) and Community Service Volunteers (London/Ipswich). The aim of the project is to promote integration of third-country nationals or non-EEA nationals in their new communities through increased participation in local volunteer schemes. The project contributed to enhanced public perception of migration and diversity through a public awareness campaign. The project was developed and piloted in four city/country settings: Dublin, Ireland; The Hague, the Netherlands; Vienna, Austria and Ipswich, UK.¹⁵⁰

3.4.4 Social Security

The *Person or Number? 2* report produced by Crosscare, Doras Luimní, Nasc, FLAC and Dublin City Centre Citizens Information Service, looked at access to social protection rights by immigrants. The report uses documentary analysis, a 35-case sample and an online survey of development managers of Citizens Information Services to produce findings. The report notes that the Social Protection Migrant Consultative Forum (MCF) had met several times since it was instituted in October 2012 (and following the first 'Person or Number?' report), and that Minister for Social Protection and officials have been engaged. The main findings of the report include issues regarding the quality of first instance decision-making on payment applications, with many 'not up to standard' and resulting in a 'high level of incorrect refusals' by Deciding Officers and Designated Persons. The results suggest that inappropriate behaviour, rudeness and racism were found within customer service in the Department of Social Protection, with the Community Welfare Service in particular found to have poor service levels. The report notes the lack of a consistent level of interpretation. Recommendations proposed in the report include the establishment of a performance monitoring, evaluation and implementation unit within the Department to address poor communication of decisions and administrative issues; more regular and organised MCF meetings; compulsory training of staff; adequate supports for local office management; and accountability via the introduction of name badges for frontline staff. The combatting of racism for customers is recommended in the report as requiring a strong internal Departmental plan to tackle it, including

¹⁵⁰ IOM Ireland, April 2015 and www.giveproject.eu. The project has been funded by the European Union and has also received co-funding from the Austrian Federal Ministry for the Interior (Austria), Community Service Volunteers, Dublin City Council (Ireland), and IOM UK (United Kingdom) and PEP - Participatie Emancipatie Professionals (the Netherlands).

commissioning of an independent survey, mandatory anti-racism training for staff, and a commitment to ‘working respectfully with an ethnically diverse population’ within the Customer Charter and Customer Action Plan. The better use of interpreters is also called for in the report, with the Community Welfare Service called to be held to the same Departmental standards as other sections of the Department with regard to all recommendations.¹⁵¹

Quinn et al. (2014) examined policies and practices in place regarding migrant access to social security and healthcare. The study provides an overview of the welfare system in Ireland, outlining policies and administrative practices that influence migrant access to social security and healthcare, particularly focusing on ‘discretionary conditions’. Unless an individual has been resident within the Common Travel Area for two years prior to making an application for social welfare, or there are other clear indications that he or she is ‘habitually resident’ in the State, his or her application may be assessed under the *Habitual Residence Condition* (HRC). The HRC decision-maker is required to exercise discretion, particularly regarding whether or not the available evidence indicates that the applicant’s ‘centre of interest’ is in Ireland. Furthermore, Irish immigration and social security policies have evolved separately and limited evidence exists of a deliberate nexus between migration and social security policymaking in Ireland. The authors noted that while there is a widespread perception that migrants are dependent on social security to a greater extent than the native population, available data on the proportions of Irish and non-Irish nationals in receipt of key welfare payments show no evidence of a large or systematic over-representation of non-Irish nationals among welfare recipients in Ireland.¹⁵²

3.5 CITIZENSHIP AND NATURALISATION

3.5.1 Citizenship Statistics

As discussed in previous reports in this series, reforms to the citizenship application process began in 2011. Year-end statistics for 2014 showed a decrease in application processing times from 31 months to less than six months in the majority of cases. The backlog of naturalisation applications waiting for a decision for more than six months, stated as standing at more than 22,000 in March 2011, was also highlighted as ‘comprehensively dealt with’. Some 18 citizenship ceremonies took place throughout 2014.¹⁵³

¹⁵¹ Crosscare et al. (2014). *Person or Number?2*. Available at www.flac.ie.

¹⁵² Quinn et al. (2014).

¹⁵³ Irish Naturalisation and Immigration Service (January 2015). ‘Immigration in Ireland – 2014’. *Press Release*. Available at www.inis.gov.ie.

In remarks made in early 2015, it was noted by Minister of State at the Department of Justice and Equality, Aodhán Ó Riordáin that of a total of 10,596 persons declared refugees in Ireland up to the end of 2014, 6,900 had naturalised.¹⁵⁴

3.5.2 Case Law

A.P. v. Minister for Justice and Equality (No. 1) [2014] IEHC 17

Order 31, r. 15 Rules of the Superior Courts entitles a party to proceedings to notify the other party in whose affidavit reference is made to a document, to produce that document for inspection and permit copies thereof to be taken. If the other party fails to comply, he may not rely on the document(s) in question in evidence, unless he can satisfy the court that he had some sufficient cause or excuse for not complying.

Order 31, r. 18 empowers the court to make an order for inspection in such place and in such manner as it may think fit, but it shall not make an order if 'it is not necessary either for disposing fairly of the cause or matter or for saving costs'.

The applicant applied to the Minister for Justice for a certificate of naturalisation and his application was refused, no reasons being provided. He was granted leave by the High Court to apply for judicial review of the refusal on the basis that the refusal to disclose reasons was unlawful.

Opposition papers were filed by the Minister and the verifying affidavit disclosed the existence of certain documents, in respect of which the applicant applied for inspection pursuant to O. 31, r. 18 RSC. They included a confidential note attached to the recommendation on the application for naturalisation which had been furnished to the Minister. The note was said to refer to certain information concerning the applicant which had been provided to the Minister in the strictest confidence. The Minister refused to disclose them on the basis that they were privileged by reference to public interest and the security of the State. At its request, the court was furnished with three documents over which privilege had been claimed in order to assist in its determination of the relevance, if any, of them to the issues that arose between the parties.

The parties were agreed that the legal principles applicable to the determination of whether a public interest privilege was properly asserted were as set out in

¹⁵⁴ Irish Naturalisation and Immigration Service (3 March 2015). 'Address by Minister of State Ó Riordáin at the launch of the Refugee Integration in Europe (RICE) Report'. *Press Release*. Available at www.inis.gov.ie.

*Ambiorix v. Minister for the Environment*¹⁵⁵ which established that where a conflict arose during the exercise of judicial power between the aspect of public interest involved in the production of evidence on the one hand, and the confidentiality or exemption from production of documents pertaining to the exercise of the executive powers of the State on the other, it was the judicial power which would decide which public interest would prevail.

The court noted that the affidavit evidence on behalf of the Minister explained that, when examining applications for naturalisation, rigorous checks were carried out, which included obtaining information from external agencies, including security agencies. This information was provided on a strictly confidential basis and the Minister was said to be dependent upon the goodwill of the external agencies currently providing it. In order to ensure the continuity of such information, the Minister had decided that it had to be kept confidential and would not be disclosed to an applicant whose application might be refused as a result of it. It was said, in addition, that information obtained in the course of the examination of an application could relate to issues of national importance including national security, which would render it inimical to the State's own interest to disclose it to a disappointed applicant. The Minister maintained that to disclose to the applicant the reasons or the specific nature of the reasons would be inimical to the interests of the State. In the light of the contents of the refusal letter, the court took this to mean that even to describe both the reason and the failure to disclose as being related to the security of the State or the defence of the State or international relations, or that it was based on confidential information from a reliable source, would compromise the interests of the State.

The court observed that, in the instant case, no reasons related to the public interest had been disclosed even in the most general terms. It noted that the provisions of Section 15(1)(b) of the *Irish Nationality and Citizenship Act 1956*, as amended, enabled the Minister to decline to grant a certificate of naturalisation if he was not satisfied that an applicant complied with the requirement that he be of 'good character'. It pointed out that that provision had not been furnished as the basis for the refusal, notwithstanding the Minister's acceptance that matters of good character provided the basis upon which the rigorous checks were carried out.

The Minister submitted that disclosure of the documents was not relevant to the determination of question of whether the refusal to give reasons for refusing the applicant's application was unlawful because, inter alia, it prevented him from examining whether the refusal was lawful and impaired him in bringing an

¹⁵⁵ *Ambiorix v. Minister for the Environment (No. 1)* [1992] 11.R. 277.

effective application in the future. The court, however, observed that the documents which it had seen were clearly relevant to a consideration of the refusal and the applicant's ability to challenge it, and that it was difficult to see how he could be expected to address in any future application the issues raised against him if he simply had no knowledge of them, even in general terms. The court permitted inspection of some of the documents.

Its reasoning was as follows. It acknowledged the State's legitimate interest in the area of naturalisation and the desirability of maintaining confidentiality in order to ensure that external agencies would continue to provide it with information when assessing applications for declarations of naturalisation, noting that that was an essential feature of the process which ultimately enabled the State to protect the process from abuse. It observed that the information obtained might be from confidential sources, the exposure of which might compromise their safety and/or the effective operation of the agencies from which the information was obtained. It noted that, in some cases, the protection of the information would be of vital importance to the State.

It drew an analogy with the use of confidential information and intelligence by An Garda Síochána in criminal proceedings, such as where members of the force, having formed a requisite opinion, obtain or issue a warrant to search homes or business premises or effect an arrest, in circumstances where the opinion was based entirely or partly upon confidential information received from a usually reliable source. It noted that the reasons for the formation of the requisite opinion were often explored in open court during the course of a trial and could become the subject of challenge and cross-examination, subject to claims of confidentiality or public interest or informant privilege. It pointed out that even that limited ability to challenge the basis of an opinion formed relying upon confidential information, was unavailable to the applicant in the instant case. However, it noted that its availability in criminal trials demonstrated that it was possible to formulate and scrutinise a reason for an opinion whilst protecting the confidential source from disclosure.

The court held that the three documents furnished to it were clearly relevant to the determination of whether the refusal to furnish reasons for the refusal of a grant of a certificate of naturalisation to the applicant was unlawful, and whether the decision to refuse the certificate itself was unlawful. They contained information which might directly or indirectly enable the applicant to advance his case or damage that of the Minister.

Turning to the first document, a note concerning the applicant's application for a certificate of naturalisation and containing a recommendation for the Minister,

the court held that it was relevant and that inspection did not pose any risk to the public interest.

The second document was a confidential note referring to certain information concerning the applicant which had been provided to the Minister in the strictest confidence. The court was satisfied that it was a confidential document and that the asserted claim of privilege should apply to a considerable portion of its contents. It held that there was a public interest in maintaining the confidentiality of the information and information-gathering process referred to in it, but that elements of it, disclosure of which it held would be inimical to the interests of the State, could be safely redacted. The court allowed inspection of the document and specified the redactions which should be made to it.

The third document formed part of, and was attached to, the second document. The court was satisfied that it was confidential and, having considered its contents, that it was in the public interest that it and its contents remained confidential.

A.P. v. Minister for Justice and Equality (No. 1) [2014] IEHC 241

The applicant applied to the Minister for Justice for a certificate of naturalisation and his application was refused, no reasons being provided. He was granted leave by the High Court to apply for judicial review of the refusal on the basis that the refusal to disclose reasons was unlawful.

The court noted that, following the decision of the Supreme Court in *Mallak v. Minister for Justice*¹⁵⁶ the Minister accepted that he was required to give a reason or to provide a justification for not giving the reason(s) for the refusal of the application. The Minister claimed that, in line with his new policy, he had informed the applicant that he had decided not to disclose the reason for the decision, having considered his obligations under the provisions contained in an extract from the *Freedom of Information Act 1997* which had been attached to the refusal letter. He claimed that to give any more specific justification would, in his view, conflict with the interests of the State.

The court noted that the first notification given to the applicant that the Minister had relied upon confidential information, on the basis of which he formulated a reason or reasons to refuse a certificate of naturalisation, was to be found in the affidavit evidence sworn on behalf of the Minister. The affidavit evidence also

¹⁵⁶ *Mallak v. Minister for Justice* [2012] IESC 59.

gave notice of the existence of documents containing that information and over which the Minister claimed privilege.

The applicant challenged the claim of privilege and obtained inspection of some of the three documents disclosed by the Minister in *A.P. v. Minister for Justice and Equality (No.1)* [2014] IEHC 17.

The court noted that the first document stated:-

I would not recommend this applicant for a certificate of naturalisation as I am not satisfied that the applicant meets the condition of good character in Section 15 of the Act, as above.

I would not recommend that the Minister, in his absolute discretion, waives the condition for naturalisation under Section 16 of the Act, as above, and grant the application for a certificate of (naturalisation).

I would not recommend that the Minister disclose to this applicant the reason for his decision not to grant a certificate of naturalisation, having considered his obligations under the Freedom of Information Act 1997, as amended, with particular reference to Section 18, 24, 25, and 26 of that Act.

The redacted version of the second document stated:

The Gardaí state that they have some concerns in relation to the application from A.P.

I am of the view that this individual is of concern to the Gardaí, we should not naturalise her(sic) on the basis that the Minister cannot be satisfied that she(sic) meets the good 'character' requirement of the Irish Nationality and Citizenship Act 1956, as amended.

If the individual concerned applies again for naturalisation, similar checks will be carried out and a recommendation made on the basis of the information available at that time.

The Minister will be aware that, as a result of a decision by the Information Commissioner in May 2003, the Department is obliged to give reasons for a decision on an application for naturalisation, if these are sought under Section 18 of the Freedom of Information Act 1997. The Minister will also be aware that notwithstanding the Information Commissioners decision, we are releasing reasons for such decisions at the time we inform the applicant of the decision.

In this particular case, it is intended not to release the reason for the decision. If such reasons are sought under the Freedom of

Information Act 1997, we will consider the request under Section 24(3) of that Act and will not disclose the existence of this page, and the Garda report on which it is based, on the basis that to do so will adversely affect the 'security of the State'.

The court quashed the refusal of the application for naturalisation. Having considered the decision of the Supreme Court in *Mallak*, it held that it was open to the Minister to state clearly that there were reasons related to the public interest which justified the withholding of reasons in this case. It noted that the Minister contended that the refusal letter clearly stated that he had decided not to disclose the reasons for his decision to the applicant having considered his obligations under the *Freedom of Information Act 1997*, with particular reference to Sections 18, 24, 25 and 26 thereof.

The court observed, however, that the letter had not stated which of the several obligations outlined in the sections were considered to be relevant to the decision. It held that their invocation and their enclosure with the refusal letter did not assist in understanding the decision-making process or the reasons for the decision. The reader was left to deduce which reasons were withheld from disclosure, and upon what basis it noted that it might or might not be the security of the State, the defence of the State, the international relations of the State, matters relating to Northern Ireland, records containing information conveyed to the Minister in confidence on the basis that it would be treated by him as confidential, information the disclosure of which would be likely to prejudice the giving to the Minister of further similar information from the same person, and/or that the disclosure of the information concerned, would constitute a breach of a duty of confidence provided for by an agreement of some kind.

The court pointed out that the essential starting point for the consideration of judicial review was an understanding of the reason for the decision, and that the Minister had failed to give one. It held that, having regard to the existence of the reason as disclosed in the first document, the understanding of which was assisted to a limited degree by the second document, the Minister was clearly in a position to furnish a reason for the refusal of the certificate, namely the failure on the part of the applicant to fulfil the 'good character' condition set out in 15(1)(b) of the *Irish Nationality and Citizenship Act 1956*.

It observed that it was clear from the affidavit evidence on the part of the Minister that he had no difficulty in highlighting the applicant's character as the matter which was under consideration when describing the rigorous checks as to character and conduct carried out by him and on his behalf. It was clearly implied

in the affidavit that the rigorous checks as to character and conduct resulted in the secret recommendation formulated for the Minister and ultimately disclosed in the first document. The court was therefore satisfied that there was nothing to inhibit the Minister from giving notice of his reason or his concern about the 'good character' of the applicant. The difficulty for the Minister was that he did not wish to disclose the information upon which that recommendation or conclusion was based. The court held that, in those circumstances, he was obliged having regard to paragraph 79 of the *Mallak* decision to provide a justification for not doing so. Any challenge to the conclusion reached in respect of 'good character' or any justification proffered for refusing to give reasons for that justification could then be the subject of challenge, if that was considered appropriate.

The court held that that was without prejudice to the entitlement of the Minister to rely upon any appropriate privilege. However, it held that the utmost transparency was required in such cases and that the Minister should have informed the applicant that the reason for the refusal of the certificate was that he had failed to fulfil the condition of 'good character' under Section 15(1)(b) of the Act of 1956 and, if it was considered appropriate to refuse to give any further reasons, to furnish a justification in that regard based on the fact that the recommendation was made on the basis of information which was properly the subject of privilege. The court held that a cryptic general reference to provisions of the *Freedom of Information Act 1997* was, in the instant case, insufficient.

Adopting such a procedure would enable the applicant to be furnished with some understanding at the earliest possible opportunity of the reason for the refusal and/or the justification, if any, for the withholding of the basis for it. The court was critical of the fact that the reason for the refusal of the certificate and/or the reasons for refusing to disclose the underlying basis for that decision were revealed for the first time after the initiation of judicial review proceedings.

GKN v. Minister for Justice and Equality [2014] IEHC 478 (22/10/14)

The applicant held a declaration of refugee status and applied to the Minister for Justice for a certificate of naturalisation. It was disclosed in the course of the application that he had been arrested and convicted of hit and run and leaving the scene of the accident, in respect of which he was fined €300 in respect of both offences. The incident in question resulted in an unoccupied vehicle being grazed by the applicant's vehicle.

His application was refused. The letter of refusal stated the Minister's decision was based on the offences in question and referred to a submission which had

been prepared for him, which stated that he had come to the adverse attention of the Gardaí, as set out in an attached report. It stated that the resulting fine had been paid, that the applicant had two Irish-born children and that he was a self-employed taxi driver. However, the view was taken that the offence was serious, and that his application for a certificate of naturalisation was not being recommended.

The applicant contended that the decision ought to be quashed because it was taken in breach of fair procedures and the right to constitutional justice arising from the alleged failure of the Minister to have regard to certain matters which were on file, the most important of which was the fact that the episode which resulted in a criminal conviction was a very minor incident involving the grazing of a vehicle. In addition, he contended that critical facts were not weighed by the Minister, including the fact that he was married, that he had two children (Irish citizen children), the date of his refugee status and that he was tax-compliant.

The court noted that the offence in question arose under Section 106 of the *Road Traffic Act 1961*, which criminalised failure to stop and failure to remain at the scene of an incident whereby injury was caused to a person or to property. It observed that the documents before the Minister did not indicate that the injury in this instance was not to a person, but to a vehicle, nor that the injury was of a very minor nature, involving only the grazing of the vehicle in question. It considered the statement in the submission that the offence was 'serious' to be unclear. In its view, if it was being suggested thereby that the offence under Section 106 was serious, it considered that that was too broad an analysis upon which to build a negative naturalisation recommendation, because offences under Section 106 of failing to stop and failing to remain at a scene of an incident could involve extremely minor occurrences or serious events involving loss of life. Thus, the mere fact that an offence under Section 106 was recorded against an applicant could not, of itself, rationally ground a negative naturalisation recommendation. On the other hand, if it was being suggested thereby that the offence committed by the applicant was serious, it held that it would have been irrational. It agreed with sentiments expressed in an English case, *Hiri v. Secretary of State for the Home Department* [2014] EWHC 254 (Admin), namely that, in order to conduct a proper assessment, the Minister ought to have regard to the outline facts of any offence and to any mitigating factors, and also to the severity of the sentence, within the sentencing range, as that might be a valuable indicator of the gravity of the offending behaviour in the eyes of the sentencing court.

The court also held that, the Minister's officials having obtained information from the applicant about the circumstances of the incident, which from his perspective was exculpatory in nature, it was incumbent upon the author of the submission to

draw that to the Minister's attention, and that the failure to do so breached the applicant's constitutional rights.

The court accordingly quashed the Minister's decision.

3.6 VISA POLICY

3.6.1 Statistics

Provisional 2014 figures show approximately 101,500 entry visa applications (both short and long stay) during 2014, representing an increase of 6 per cent year-on-year. There was an overall approval rate of 91 per cent, similar to 2013 figures. Over half of all applications were received from nationals of India (17 per cent), Russia (14 per cent), China (11 per cent), Nigeria (6 per cent) and Saudi Arabia (5 per cent).¹⁵⁷

There were 90,382 visas issued during 2014, a year-on-year increase of 4 per cent on 2013 figures. The majority of visas were issued to nationals of India, Russia and China and lodged in Russia (12,900), followed by India (11,800), China (8,358), the UK (8,094) and Saudi Arabia (6,121).¹⁵⁸

3.6.2 Legislation

Two statutory instruments relevant to visa policy were introduced during 2014.

The *Immigration Act 2004 (Visas) (Amendment) Order 2014* (S.I. No. 195 of 2014) removed Venezuela from the list of countries whose citizens are exempt from the requirement to hold a valid Irish visa when landing in the State.

The *Immigration Act 2004 (Visas) Order 2014* (S.I. No. 473 of 2014) contains a list of countries whose citizens are exempt from the requirement to hold a valid Irish visa when landing in the State. It revoked the *Immigration Act 2004 (Visas) Order 2012* (S.I. No. 417 of 2012).

3.6.3 Common Travel Area

A British-Irish Visa Scheme was launched by the Irish Minister for Justice and Equality and the UK Home Secretary in October 2014, with a new agreement signed at the same time regarding the sharing of immigration data between both

¹⁵⁷ Irish Naturalisation and Immigration Service (January 2015). 'Immigration in Ireland – 2014'. *Press Release*. Available at www.inis.gov.ie.

¹⁵⁸ Irish Naturalisation and Immigration Service, August 2015.

countries.¹⁵⁹ The Scheme will allow nationals requiring a short-stay visa to travel freely within the Common Travel Area (between Ireland and the UK) on a single visa issued by either country. China and India were the first countries to benefit from the Scheme. It is to be reviewed in early 2015. Subject to completion of that review, a timetable for an extended 'roll-out' of the Scheme to all countries is to take place by the end of 2015. The Scheme builds on the previous Irish Short-Stay Visa Waiver Programme which was launched in 2011; at the launch of the 2014 Visa Scheme, the Minister for Justice and Equality noted that

*As a result [of the Scheme], almost 45,000 additional visitors travelled to Ireland last year compared to 2010 and we want this number to grow even further.*¹⁶⁰

Ireland will incorporate biometric collection as part of the Irish visa application process, with new systems put in place with the UK to facilitate the 'automated and seamless sharing and cross-checking of information'. INIS and the UK Home Office also agreed for Ireland to share services such as lodging of applications, courier services, informational services and online payments at UK Visa Application Centres (of which there are over 200 worldwide).¹⁶¹

The new agreement for the sharing of immigration data between both countries' immigration authorities was noted as being aimed at protecting the CTA from abuse as well as to facilitate the extension of 'borderless travel' such as the British-Irish Visa Scheme. Over 100,000 Irish visa applicants were checked against UK records during the year.¹⁶²

The requirement for visa applicants from Pakistan and China to provide their fingerprints as part of the application process was introduced during 2014; previously this applied to nationals from Nigeria only. This took place in the context of the British-Irish Visa Scheme, with a roll-out to other countries due to continue during 2015.¹⁶³ The introduction of an online appointment system for re-entry visas is planned for the first quarter of 2015.¹⁶⁴

¹⁵⁹ Irish Naturalisation and Immigration Service (6 October 2014). Minister Fitzgerald and UK Home Secretary launch landmark British-Irish Visa Scheme. Available at www.inis.gov.ie.

¹⁶⁰ Ibid.

¹⁶¹ Irish Naturalisation and Immigration Service (6 October 2014). Minister Fitzgerald and UK Home Secretary launch landmark British-Irish Visa Scheme. Available at www.inis.gov.ie.

¹⁶² Irish Naturalisation and Immigration Service (January 2015). 'Immigration in Ireland – 2014'. *Press Release*. Available at www.inis.gov.ie.

¹⁶³ Ibid.

¹⁶⁴ Ibid.

3.6.4 Case Law

T.A.R. and I.H. v. Minister for Justice and Equality [2014] IEHC 385 (30/07/14)

The applicants were Iraqi nationals. The first named applicant was retired and his wife, the second named applicant, was a teacher. They sought visas from the Minister for Justice to enter the State to visit their son, a naturalised Irish citizen. Their application was refused. They unsuccessfully appealed the refusal. The Minister affirmed it and held that their obligations to return to Iraq were insufficient and that they might overstay if granted visas.

The applicants obtained leave to challenge the decision on inter alia the basis that the short-form reasons given were inadequate, unreasonable, irrational and lacked an evidential basis.

The High Court (McDermott J.) held that the decision was not void for uncertainty, in that the reasons were given. The Minister raised a number of concerns about the applicants' intentions to return to Iraq. First, the first named applicant had relied on the existence of an Iraqi pension as constituting a reason for him to return there. The Minister contended that the frequency of the pension payments was unclear and that no accounts or financial information had been furnished in that regard. Secondly, the Minister contended that the first named applicant had failed to provide a letter concerning his pension containing full contact details for verification purposes.

Thirdly, the Minister pointed to a concern over the permanency of the second named applicant's employment as a teacher. Fourthly, doubts were expressed over the applicants' alleged ownership of land in Iraq. The court noted that this could have been pursued with the applicants if it had been intended to refuse their application by reference to it.

The High Court quashed the decisions for inadequacy of reasons, pointing to the extent to which counsel for the Minister had sought to justify the refusals by reference to matters which had not been expressed in the impugned decisions as underpinning the short-form reasons which had been given.

It held that the shortness of the reasons given rendered it difficult for the court to understand the basis for the decision and, therefore, to exercise its jurisdiction as to whether the determination was unreasonable within the meaning of the test for unreasonableness in Irish law.

In particular, it held that it was not possible on the basis of the course of correspondence or the material submitted to ascertain from the course of dealing between the parties or the context in which the decision was made, what the shortcomings in proofs were and, consequently, whether the conclusion reached in respect of the applicants was reasonable.

It cautioned, however, that it was not to be taken as condemning the use of a short-form reason in such decisions, as the sheer volume of applications submitted for visas suggested that such an approach might well be prudent in most cases.

However, the reasons given had to be clear and cogent, and give the applicants such information as was necessary to enable them to consider whether they had a reasonable chance of appeal or judicially reviewing the decision. In the instant case, it was not possible to determine accurately what the reasons meant in the context of the particular case, or to divine from them why the application had been refused. If the Minister had concerns about a particular aspect of the application, then it could have been raised by letter, telephone call or email, thus obviating the need to take the proceedings.

The court accordingly quashed the visa refusal decision.

3.7 BORDER MONITORING

3.7.1 *Civilianisation of Border Control*

A pilot project to ‘civilianise’ certain border control functions at Dublin Airport took place during 2013; this was mainstreamed during 2014, and is a ‘key priority’ for the Minister for Justice and Equality during 2015. It is aimed to have Terminal 1 port of entry duties carried out on a 24/7 basis by civilian personnel by Summer 2015, with Terminal 2 to follow by Autumn.¹⁶⁵

A major programme to civilianise immigration functions previously carried out by Gardaí was announced in September 2014, with 125 Gardaí subsequently released for other core policing duties.¹⁶⁶ It was announced that some 80 civilian

¹⁶⁵ Irish Naturalisation and Immigration Service (January 2015). ‘Immigration in Ireland – 2014’. *Press Release*. Available at www.inis.gov.ie.

¹⁶⁶ Of this, 75 were released as a result of the civilianisation of checks at Dublin Airport and 50 from the transfer of the immigration permission registration function from An Garda Síochána to the Irish Naturalisation and Immigration Service of the Department of Justice and Equality (INIS). See Irish Naturalisation and Immigration Service (16 September 2014). ‘Minister Fitzgerald announces major immigration civilianisation initiative’. *Press Release*. Available at www.inis.gov.ie.

staff are to be deployed at the airport at border control booths on a 24/7 basis.¹⁶⁷ Additional benefits of the transfer of functions were to include a reduction in costs (later cited as €4 million approximately in savings annually from the release of 75 Gardaí from airport duty alone)¹⁶⁸ as well as overall efficiency.¹⁶⁹ A recruitment process for civilian immigration officers took place during 2014, with 42 subsequently starting in January 2015.

With the above-detailed civilianisation of passport and immigration control functions, the Irish Naturalisation and Immigration Service (INIS) is to take over responsibility for border control functions from the Garda National Immigration Bureau (GNIB), including immigration permission registration.¹⁷⁰ The *Employment Permits (Amendment) Act 2014* provided for this transfer; current arrangements where the immigration registration function is carried out by An Garda Síochána at the GNIB headquarters in Dublin (for the Dublin Metropolitan Area), and in some 75 or so police stations around Ireland, will be replaced with a ‘streamlined regional structure’ of a small number of offices in locations around the State.¹⁷¹ INIS has indicated that relevant action plans and protocols will be put in place as required.¹⁷²

3.7.2 Automated Border Control Technology

During 2013, automated border e-gates were tested at Dublin Airport for the first time. This continued during 2014 with the gates extended to a 24/7 basis. More than 260,000 passengers used the gates during 2014; one of the ‘highest per-gate productivity levels in Europe’.¹⁷³ As of year-end 2014, the Department of Justice and Equality was in discussions with the Dublin Airport Authority (DAA) regarding an extension of the use of e-gates throughout the airport, a priority for 2015.¹⁷⁴ At the launch of further civilianisation initiatives including staffing of airport booths in September 2014, it was noted that Minister Fitzgerald had held discussions with the Dublin Airport Authority (DAA) regarding ‘greater use’ of border management technologies such as advance passenger information systems and automatic border controls, and that INIS was ‘currently preparing a comprehensive business case for the expansion of the e-Gates initiative’. The

¹⁶⁷ Irish Naturalisation and Immigration Service (16 September 2014). ‘Minister Fitzgerald announces major immigration civilianisation initiative’. *Press Release*. Available at www.inis.gov.ie.

¹⁶⁸ Irish Naturalisation and Immigration Service (26 January 2015). ‘Minister Fitzgerald welcomes significant progress in civilianising Garda duties at Dublin Airport’. *Press Release*. Available at www.inis.gov.ie.

¹⁶⁹ Irish Naturalisation and Immigration Service (16 September 2014). ‘Minister Fitzgerald announces major immigration civilianisation initiative’. *Press Release*. Available at www.inis.gov.ie.

¹⁷⁰ *Ibid.*

¹⁷¹ Irish Naturalisation and Immigration Service (16 September 2014). ‘Minister Fitzgerald announces major immigration civilianisation initiative’. *Press Release*. Available at www.inis.gov.ie.

¹⁷² Irish Naturalisation and Immigration Service December 2014.

¹⁷³ Irish Naturalisation and Immigration Service (January 2015). ‘Immigration in Ireland – 2014’. *Press Release*. Available at www.inis.gov.ie.

¹⁷⁴ *Ibid.*

Minister noted that this extended use of border technology was to be seen as a 'critical element of Garda reform'.¹⁷⁵

3.7.3 Frontex

During 2014 Ireland continued to participate in activities of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex). The legal base of the Frontex Regulation falls within those provisions of the Schengen *acquis* in which Ireland does not participate and, as such, Ireland is excluded from participating as a full member.

Limited cooperation between Frontex and Ireland is provided for via an annual application approved by the Frontex Management Board.

3.8 DERIVATIVE RIGHTS OF RESIDENCE UNDER EU LAW

3.8.1 Case Law

O.A. and Another v. Minister for Justice and Equality [2014] IEHC 384

The first named applicant was a Kenyan national who arrived in the State with her infant daughter and applied unsuccessfully for asylum. Shortly after her arrival in Ireland, she met a Nigerian born German national, and they began a relationship. She became pregnant with his child, the second named applicant, who was born in 2010 and was a German national by descent. Her relationship with the German national ended. She then purported to apply to the Minister for Justice for a Stamp 4 permission, which would entitle her to work in the State, pursuant to the *European Communities (Free Movement of Persons)(No. 2) Regulations 2006* (S.I. No. 656 of 2006). The Minister replied, requesting the first named applicant to provide further information and documentation. In the course of that letter, the Minister stated 'please note that in the event that your application under 'Chen' is successful, this will provide for a right of residence Stamp 3 only'. She challenged this by way of judicial review, contending that it represented an unlawful refusal of her application.

The court dealt with a number of preliminary issues. First, it had to decide whether or not the letter constituted a refusal of her application for Stamp 4. It held that it did and, in the ordinary course of things, was amenable to judicial review. It then turned to consider whether she was entitled to seek judicial review or ought to have proceeded by way of a review application under the

¹⁷⁵ Irish Naturalisation and Immigration Service (16 September 2014). 'Minister Fitzgerald announces major immigration civilianisation initiative'. *Press Release*. Available at www.inis.gov.ie.

Regulations of 2006. It noted that Reg. 21(1) thereof provided that a person 'to whom these Regulations apply' could seek a review of any decision concerning his or her entitlement to be allowed to enter or reside in the State. It held, however, that she was not a person to whom the Regulations applied, being neither a permitted or qualifying family member of a Union citizen as defined therein. The court therefore held that judicial review was the only remedy available to her with respect to her grievance with the decision. Finally, it rejected the contention of the Minister that certain inconsistencies in her affidavits with regard to when her relationship broke up and the extent of her qualifications to engage in employment as a nurse, entitled it to dismiss her proceedings for want of candour.

Turning to the substance of the case, it noted that the first named applicant was the mother and primary carer of the second named applicant, a German national.

The applicants submitted that second named applicant was exercising her right to freedom of movement by electing to reside in Ireland. The first named applicant claimed that she had a derived right to remain in Ireland with the second named applicant, relying on the decision of the ECJ in *Zhu and Chen v. Secretary of State for the Home Department* [2004] ECR I-9925. On the basis of that case, the second named applicant would be entitled to reside in Ireland if she could satisfy the requirements of Article 7(1)(b) of Directive 2004/38/EC, i.e. had 'sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State'.

The Minister contended that if her application under *Chen* was successful, the first named applicant would have a right to reside only, i.e. a Stamp 3 residency. The applicants submitted that the Minister was mistaken and that *Chen* residence, by implication, encompassed a right to work, i.e. a Stamp 4 residency. They further argued that in determining whether or not the second named applicant met the sufficient resources requirement, the Minister had to take into account the potential future resources of her primary carer, the first named applicant, such as a job offer. The first named applicant submitted that if she was permitted to work, she would be able to meet the sufficient resources requirement and prevent either herself or her daughter becoming a burden on the Irish social welfare system. If she was not permitted to work, then she would not be in a position to satisfy the sufficient resources condition and she and her daughter would not, consequently, qualify for residence in the State.

Insofar as the decision of the ECJ in *Chen* was concerned, the applicants conceded that it did not explicitly hold that Mrs. Chen's right of residence in the United Kingdom included a right to work, since that question had not been referred to it.

Nevertheless, they submitted that having regard to the nature of the residence permit sought by Mrs. Chen, as well as the fact that her employment was the means by which her Irish daughter had sufficient resources to reside in the United Kingdom, it was implicit that the right declared in that judgment did not contemplate any restriction on the right of residence of the primary parental carer which would exclude an entitlement to work. The Minister, on the other hand, pointed out that Mrs. Chen did not apply for a work permit, or a right to work in the United Kingdom: she applied for residency *simpliciter*.

The applicants also relied upon the decision of the CJEU in C-86/12 *Alokpa*. There, the applicant, Mrs. Alokpa, a citizen of Togo, applied for a right to remain in Luxembourg on behalf of herself and her two French national children, who had been born in Luxembourg. The Luxembourg authorities refused her application. She appealed that decision to the administrative court which stayed the proceedings and submitted a preliminary reference to the CJEU, which held that the citizenship provisions of the TFEU had to be interpreted as meaning that they precluded a Member State from refusing to allow a third-country national to reside in its territory, where that third-country national had sole responsibility for her minor children who were citizens of the European Union, and who had resided with her in that Member State since their birth, without possessing the nationality of that Member State and having made use of their right to freedom of movement.

They relied, in particular, on the opinion of the Advocate General there that the condition of 'sufficient resources' was capable of being satisfied by the definite prospect of future resources which would stem from a job offer to which a Union citizen or a member of his family responded successfully in another Member State. In his view, a different interpretation would deprive the freedom of movement enjoyed by citizens of the Union of its practical effect, whereas the objective of Directive 2004/38/EC was to strengthen the right to freedom of movement.

They contended that it followed axiomatically that the residency of the third-country national had to include the right to work, and that that had been implicitly confirmed by the CJEU, which held that there was no requirement whatsoever as to the origin of a minor Union citizen's resources, since they could be provided by the EU minor's parents. In their view, the resources did not have to be in existence at the time of the application for a Stamp 4. If the first named applicant would be in a position to provide those resources through future employment, then she was entitled to a right of residence and a right to work to provide those resources.

The court agreed with the submissions of the applicants. It noted, first, that in *Alokpa* the CJEU had reiterated its approach in *Chen* that

the expression 'have' sufficient resources.. must be interpreted as meaning that it suffices that such resources are available to the Union citizens, and that that provision lays down no requirement whatsoever as to their origin.

The court held that at no point did the CJEU attempt to limit that broad interpretation by, for example, holding that the resources had to be extant at the time the application was made. It pointed out that the *Chen* decision expressly stated that a broad interpretation was to be preferred when interpreting provisions relating to the free movement of persons.

Secondly, it observed that the stated objective of Article 7(1)(b) of Directive 2004/38/EC was to prevent EU migrants from becoming a burden on the social assistance system of the host Member State during their period of residence. If an applicant could satisfy the sufficient resources requirement with income that would be derived from employment, then he or she could not be said to be a burden on the host Member State. It therefore held that the imposition of a condition as to the origin of the resources, such as that as posited by the Minister, that they be extant at the time of the application, was not necessary for the attainment of the objective pursued, namely the protection of the public finances of the Member States. In its view, the Minister's interpretation would constitute a disproportionate interference with the exercise of the fundamental right of freedom of movement and would be inconsistent with the CJEU's preference for a broad interpretation of the freedom of movement provisions, as clearly expressed in *Chen*.

It therefore held that the right to work in a host Member State was implicit in the right of residence stemming from the *Chen* case. Accordingly, it quashed the Minister's decision refusing the first named applicant's application for Stamp 4 permission to work in the State. It also made a declaration that: (i) the first named applicant was entitled to apply for Stamp 4 residency pursuant to EU law; and (ii) when assessing whether the applicant has 'sufficient resources', the Minister had to take into account the definite prospect of future resources, such as those arising from a job offer which the applicant had accepted.

In the aftermath of the judgment, the Minister for Justice and Equality decided to grant a Stamp 4 permission to the first applicant.

Kovalenko v. Minister for Justice and Equality, Commissioner of An Garda Siochana, Ireland and the Attorney General [2014] IEHC 624

The second named applicant was a Latvian national and, therefore, a Union citizen. He had been living in the State since December, 2003. He married a Latvian in 2005 and had lived with his wife since his removal on foot of a removal order made pursuant to the *European Communities (Free Movement of Persons)(No. 2) Regulations 2006* (S.I. No. 656 of 2006), as amended, in June, 2013. They had one child, who was born in Ireland in 2006.

The making of the removal order arose out of the fact that, in 2006, the applicant was convicted of rape contrary to Section 48 of the *Offences Against the Person Act 1861*, and Section 2 of the *Criminal Law (Rape) Act 1981*, as amended. He was sentenced to a period of imprisonment of seven years. He was also convicted of rape contrary to Section 4 of the *Criminal Law (Rape) Amendment Act 1990*, and sentenced to a concurrent term of seven years' imprisonment. He was released from prison in May, 2011.

The Minister for Justice issued a proposal to remove him under the Regulations of 2006, on the basis that his conduct or activity in the State was contrary to public policy. He made representations in response and contended that his removal would be disproportionate for the following reasons:-

- he was not a habitual offender and the offences in respect of which he was imprisoned arose out of a single incident;
- he had not come to the adverse attention of the Gardaí since his release; and
- his removal would sunder the ties between him and his wife and child, as his wife intended to remain in the State.

The Minister decided to make a removal order, including an order excluding him from the State for ten years. He considered that allowing him to remain in the State would represent a serious risk to public policy and security in light of his conviction for rape and that his removal would protect the citizens and residents of the State. It was considered open to the family to remain together either in Latvia or another EU Member State, their child being of an adaptable age. It was considered that his removal would not breach Article 8 ECHR and that there was no less restrictive process available which would achieve the objectives of preventing disorder and crime.

The applicant applied for a review of the decision to make a removal order against him, relying upon the earlier representations and including some additional evidence. He maintained that he was aware of the serious nature of his

crime but was cooperating fully with the probation authorities and he was determined to rehabilitate himself.

Having considered the matter, the Minister decided to affirm the order. In reaching that view, the Minister relied not only upon the matters previously relied upon, but also upon a number of matters of which he had been apprised during the review from the Irish Prison Service ('IPS'), and of which he had not put to the applicant. These concerned his behaviour in prison. The Minister held that his removal would not breach Article 8 ECHR, as it was justified by Article 8(2) ECHR.

The applicant obtained leave from the High Court to challenge the affirmation of the order on a number of grounds, which can be summarised as follows. First, he contended that the decision was unlawful as it was based solely on a previous conviction arising out of a single incident; that the Minister failed to consider or determine whether his personal conduct represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society; and/or that the Minister erred in determining that his removal and exclusion was necessary in order to prevent disorder and crime. Secondly, he impugned the reliance by the Minister on the IPS information which had not been put to him for comment. Thirdly, he contended that the timescale within which the decision was made (i.e. three days from receipt of the request for review) was so short that it could not have allowed for full and proper consideration of his and his family's rights. Fourthly, he argued that the review breached the Regulations of 2006 as a departmental official who had been involved in it had also been involved in the first instance decision. Lastly, he claimed that the Minister had erred in law by deciding that he had not obtained permanent residence in the State on account of excluding from his reckoning the time spent by him in prison.

At the post-leave stage, the High Court quashed the affirmation of the order on the basis of the reliance on the IPS information and of the departmental official's involvement in the decision-making process at both the first instance and review stage.

First, turning to the public policy basis for removal of the applicant, it noted that the offences of which he had been convicted carried the potential for a maximum sentence of life imprisonment to be imposed and ranked amongst the most serious offences in the criminal code. The policy underlying the offences made clear that not only was the conduct leading to such offences to be condemned and punished, but also that females be protected from such vicious assaults. It noted the continuing efforts made by the Oireachtas to improve the protections available to citizens of either sex from sexual crimes, and adverted to the

enactment of the *Sex Offenders Act 2001*, which applied to the applicant as a sexual offender for an indefinite period, and obliged him to report his place of residence to the Gardaí at all times. It pointed out that Court of Justice caselaw, such as *C-30/77 Bouchereau*, afforded the Member States a degree of discretion with regard to recourse to removal on public policy ground.

The court held that it was satisfied that the Minister was entitled to rely upon the criminal conduct of the applicant as conduct which, of itself, might constitute a threat to the requirements of public policy. It noted, in addition, that it was not the only factor considered by the Minister, who acknowledged that, whilst it was a single incident, it did not detract from the seriousness of the offences and the threat which their nature posed to the citizens and residents of the State. It also observed that the Minister had had regard to his attitude to the offences, noting that he had not expressed any remorse or regret for them. It held that the nature and seriousness of criminal conduct and the attitude and subsequent behaviour of a person in respect of offences committed might alone or, in appropriate circumstances, be considered cumulatively with other factors under the heading of 'public policy' when deciding to remove or exclude him or her from the State.

It held that it was well established that, when considering the expulsion of a Union citizen offender, account had to be taken by the host Member State of his or her fundamental rights, including the protection of family life as guaranteed by Article 8 ECHR and Article 7 of the *Charter of Fundamental Rights*. It held that the Minister had properly considered and weighed all relevant matters, including the risk posed by the applicant to public order, his social and cultural bonds, his family relationships, and his claim to have been of good behaviour since his release.

It rejected the reliance placed by the applicant upon the fact that he had not committed any offences since his release from prison in 2011, that the convictions arose out of a single incident, and the assertion that there was no likelihood of reoffending on his part and that his conduct could not be regarded as representing a genuine, present or sufficiently serious threat to public policy. It held that that submission failed to take account of the overall assessment which the Minister had made, including the nature of the offences, the absence of remorse or apology, and the significant and important matter of public policy.

Secondly, the court turned to the alleged breach of fair procedures represented by the reliance placed by the Minister on the information obtained from the IPS. It held that, whilst no express adverse conclusion had been stated in relation to that material in the affirmation decision, it had clearly been taken into account,

implicitly to the prejudice of the applicant. It had not formed part of the initial consideration and consequently did not form part of any of the submissions made on his behalf in respect of the review. He had not been given any notice of the proposed reliance on it and the court held that that breached fair procedures, as a result of which the order had to be quashed.

Thirdly, the court rejected the applicant's complaint that the timescale within which the order was affirmed once the request for review had been received meant that no proper consideration had been given to the applicant's circumstances. It held that there was no evidence to support the proposition that the officials concerned were incapable of dealing with this decision within one or two days.

Finally, the court upheld the complaint that the affirmation decision was unlawful because of the involvement in it of an official who had been involved in the making of the first instance decision. It noted that, under Reg. 21 of the Regulations of 2006, the review had to be carried out by ministerial official who was not the person who had made the initial decision, and was of a grade senior to the grade of the person who had made it. The court held that the applicant was entitled to an independent review of the first instance decision. The involvement of the official in question in making recommendations leading to the ultimate decisions at both levels breached fair procedures and the spirit and intention of the Regulations. Accordingly, the decision was quashed on that account too.

The court therefore quashed the affirmation of the removal order.

3.9 OTHER FORMS OF LEGAL MIGRATION

3.9.1 *Syrian Humanitarian Admission Programme*

In March 2014 Ireland announced a Syrian Humanitarian Admission Programme (SHAP) to assist vulnerable persons in Syria and surrounding countries affected by conflict in the region. The SHAP offers temporary Irish residence to vulnerable persons present in Syria, or who have fled from Syria to surrounding countries since the outbreak of the conflict in March 2011, who have close family members residing in the State. Naturalised Irish citizens of Syrian birth and Syrian nationals already lawfully residing in Ireland may apply for ('sponsor') up to four¹⁷⁶

¹⁷⁶ Up to four of their most vulnerable family members, two of whom should be prioritised by the sponsor for admission in the first instance, as a 'quota'. At the time of announcement of the Programme it was highlighted by the Minister for Justice and Equality that it was intended to apply this rule flexibly in order to 'protect family unity and to address individual family circumstances in a considered, humane and reasonable way... to avoid the breaking up of family units

vulnerable close family members to be most at risk to join them in Ireland on a temporary basis for up to two years. Persons admitted under the Programme will be entitled to work, establish a business, or invest in the State; a key condition is that they should ‘not become a burden on the State’.¹⁷⁷ A six-week period was announced for applications under the Programme. At the date of announcement, the Irish State had provided €19.3 million in financial assistance for Syria and the wider region, bringing its overall funding commitment to the crisis to €26 million from 2011 to year-end 2014.¹⁷⁸

By early December, a total of 308 applications had been received under the programme with 111 persons from Syria and the surrounding region granted admission to reside in Ireland and entitlement to work, establish a business or invest in the State.¹⁷⁹ At the time of announcement, the Minister for Justice and Equality noted that when considering each case, ‘the individual family circumstances of each family’ were taken into account, ‘relying on UNHCR guidelines in granting the applications’. Priority was given to applicants in a vulnerable situation and not presenting any community or State security issues, namely elderly parents, children, unaccompanied mothers and their children, single women and girls at risk and disabled persons.¹⁸⁰

having regard to an overall quota of entrants into the state being established for the Programme.’ It was further noted that the quotas would be kept under review. See Irish Naturalisation and Immigration Service (12 March 2014). ‘Minister Shatter announces Humanitarian Admission Programme to assist vulnerable persons suffering in Syria and surrounding countries.’ Available at www.inis.gov.ie.

¹⁷⁷ Irish Naturalisation and Immigration Service (12 March 2014). ‘Minister Shatter announces Humanitarian Admission Programme to assist vulnerable persons suffering in Syria and surrounding countries.’ Available at www.inis.gov.ie.

¹⁷⁸ Ibid.

¹⁷⁹ Irish Naturalisation and Immigration Service (9 December 2014). ‘Minister Fitzgerald: 111 Syrians admitted under sponsorship programme’. *Press Release*. Available at www.inis.gov.ie.

¹⁸⁰ Ibid.

Chapter 4

International Protection, Including Asylum

4.1 INTERNATIONAL PROTECTION PROCEDURES

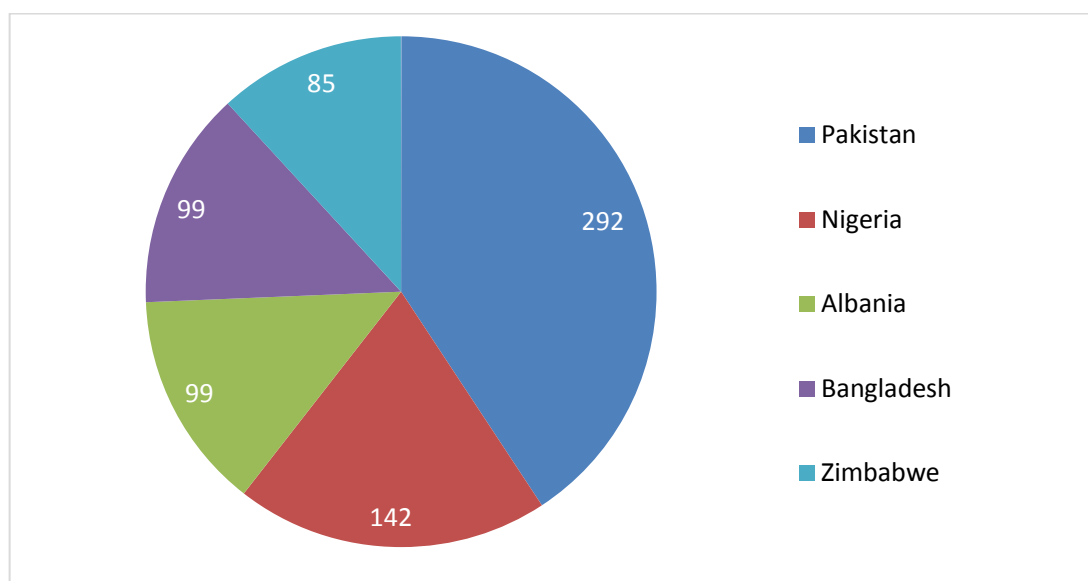
4.1.1 *International Protection Statistics*

There were 1,448 asylum applications submitted to the Office of the Refugee Applications Commissioner (ORAC) during 2014; a sharp increase (53 per cent) on 2013 figures and the highest since 2010.¹⁸¹ Of the 1,060 cases finalised by ORAC during the year, 12.5 per cent were positive recommendations for a declaration of refugee status at first instance. Nearly two-thirds of applications were refused, with a quarter withdrawn (or deemed withdrawn) from the process. At the end of 2014, there were 743 cases awaiting a first instance decision at ORAC, of which 73 cases had been on hand for more than six months. The Refugee Appeals Tribunal completed 295 asylum appeals during the year. Decisions were issued in relation to 206 cases, with ORAC's original recommendation reaffirmed in 56 per cent of cases. The Tribunal received 703 new asylum appeals throughout the year, with 1,023 cases awaiting a final decision at year end.¹⁸²

The main nationalities of first instance applicants for refugee status were Pakistani, Nigerian, Albanian, Bangladeshi and Zimbabwean.

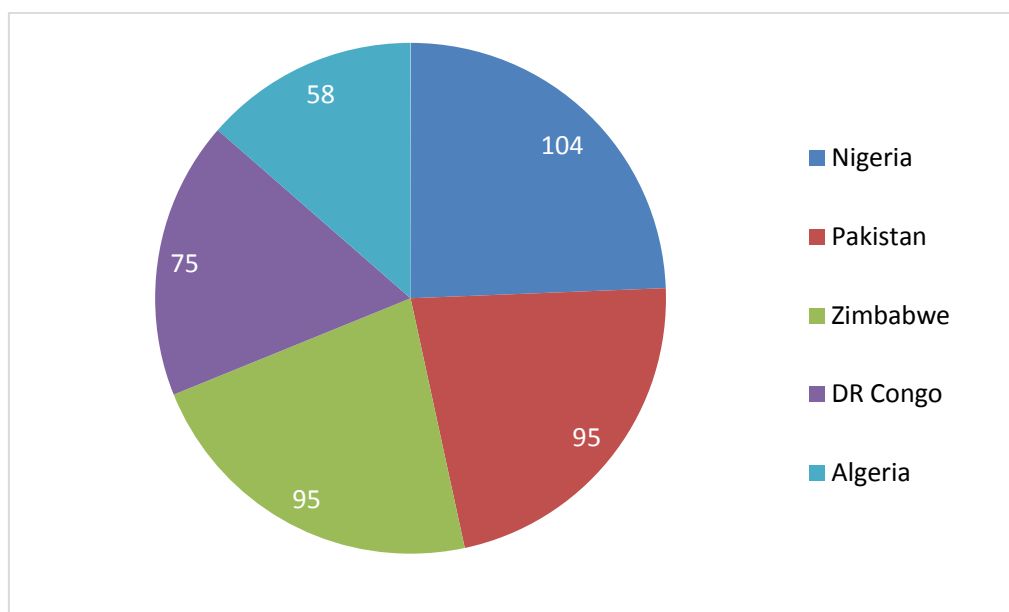
¹⁸¹ Office of the Refugee Applications Commissioner (2014). *Annual Report 2014*. Available at www.orac.ie.

¹⁸² These figures include both substantive 15-day appeals numbers which include an oral hearing as part of the appeals process and accelerated appeals which did not have an oral hearing.

FIGURE 5 Asylum Applications by Nationality, 2014

Source: Office of the Refugee Applications Commissioner (2015). *Annual Report 2014*. Available at www.orac.ie.

In terms of appeals lodged with the Refugee Appeals Tribunal, Nigerian nationals lodged the highest number of appeals,¹⁸³ followed by Pakistan, Zimbabwe, DR Congo and Algeria.

FIGURE 6 Asylum Appeals Lodged by Nationality, 2014

Source: Refugee Appeals Tribunal (2014). *Annual Report 2014*. Available at www.refappeal.ie.

¹⁸³ These figures include total applications per nationality for substantive 15-day appeals, accelerated appeals and subsidiary protection appeals.

Cases accorded priority status for refugee determination by ORAC¹⁸⁴ were processed within a median time of 4.4 weeks from date of application, with the remaining cases processed in 15.3 weeks. Cases which were processed by the Tribunal as substantive 15-day appeals¹⁸⁵ took approximately 49 weeks to complete, with accelerated appeals processed in a 38-week timeframe.¹⁸⁶

Under the Dublin Regulation,¹⁸⁷ a total of 202 requests¹⁸⁸ from other EU Member States were received by Ireland of which 139 were accepted (an acceptance rate of 68 per cent).¹⁸⁹ Ireland made 17 requests to other EU Member States under the same Regulation, with 28,¹⁹⁰ requests accepted by other EU Member States during the year (an acceptance rate of 79 per cent). The Refugee Appeals Tribunal completed 42 appeals related to transfer decisions under the Regulation during the year, with 35 decisions affirming the ORAC recommendation.

ORAC received applications for asylum from 30 unaccompanied minors in 2014, an increase of ten compared with 2013 applications. This represented 2 per cent of all applications for asylum.

ORAC received 167 applications for family reunification during 2014.¹⁹¹

As discussed in previous reports in this series, responsibility for processing subsidiary protection applications was transferred from INIS to ORAC in November 2013, with responsibility for hearing related appeals transferred to the Refugee Appeals Tribunal.¹⁹² On the transfer date, some 3,720 'live cases' were transferred to ORAC. Of this number: 43 per cent of applicants subsequently confirmed that they wished to pursue their application; 39 per cent were deemed to be withdrawn for non-cooperation; and 18 per cent voluntarily withdrew their application during the course of the year.

¹⁸⁴ A total of 50 cases during 2014 under the Ministerial Prioritisation Directive.

¹⁸⁵ Substantive 15-day appeals include an oral hearing as part of the appeal process whereas accelerated appeals do not include an oral hearing.

¹⁸⁶ Refugee Appeals Tribunal (2014). *Annual Report 2014*. Available at www.refappeal.ie.

¹⁸⁷ Regulation (EU) No 604/2013 (Dublin III Regulation) which lays down the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person. See *EMN Asylum and Migration Glossary 3.0*. Available at www.emn.ie.

¹⁸⁸ This total 202 figure includes 156 'take back' and '46 'take charge' requests. Refugee Appeals Tribunal (2014). *Annual Report 2014*. Available at www.refappeal.ie.

¹⁸⁹ The replies to formal requests include a number of requests received in 2013.

¹⁹⁰ This also refers to requests made in 2013.

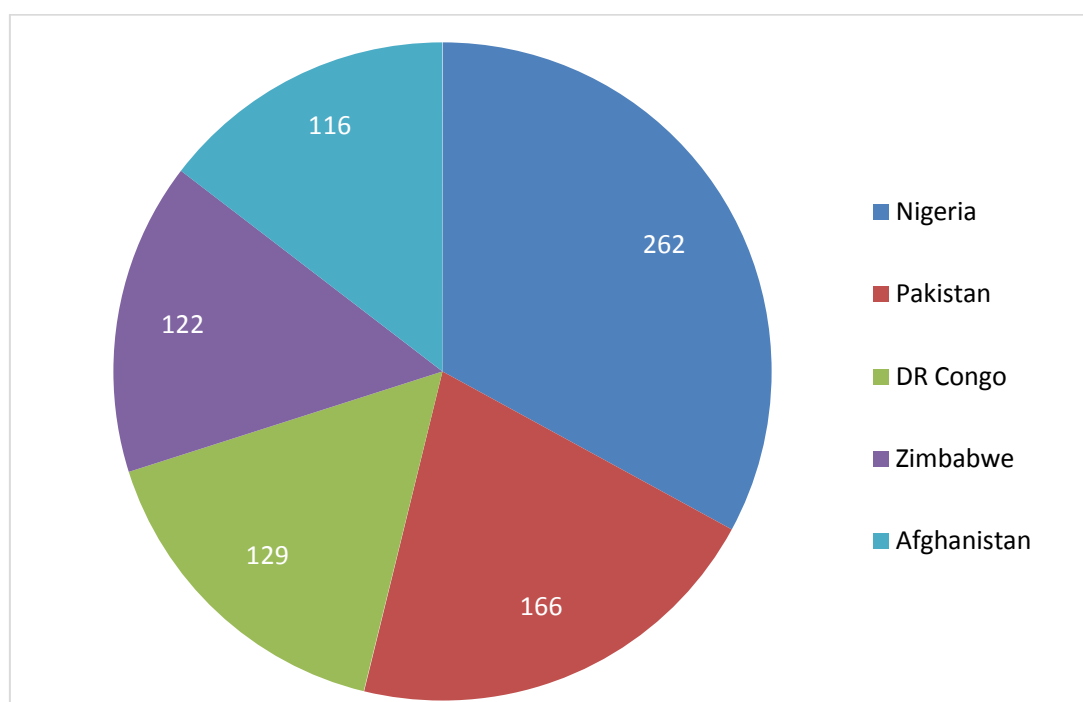
¹⁹¹ Office of the Refugee Applications Commissioner (2014). *Annual Report 2014*. Available at www.orac.ie.

¹⁹² Following the commencement of the *European Union (Subsidiary Protection) Regulations 2013*, (S.I. No. 426 of 2013), on 14 November 2013.

During 2014, ORAC handled a total caseload of 3,970 applications for subsidiary protection.¹⁹³ At year end, ORAC reported an outstanding caseload of 1,659 applications, with 2,311 cases processed to completion during the year. Some 826 reports were completed, representing 875 applicants. Of this, 251 recommendations were made to grant subsidiary protection, with 575 refusals. By year end, there were 977 overall subsidiary protection applications pending a first instance decision with ORAC.¹⁹⁴ During 2014, the Refugee Appeals Tribunal received 296 appeals for refusals of the grant of subsidiary protection, of which 13 were processed to completion. In ten cases, the Tribunal confirmed the first instance decision of ORAC. The median processing time for these appeals was 28 weeks.¹⁹⁵

The main nationalities of applicants for subsidiary protection to ORAC¹⁹⁶ were Nigerian, Pakistani, DR Congolese,¹⁹⁷ Zimbabwean and Afghan.¹⁹⁸

FIGURE 7 Subsidiary Protection Applications by Nationality, 2014



Source: Office of the Refugee Applications Commissioner (2015). *Annual Report 2014*. Available at www.orac.ie.

¹⁹³ This included 1,619 cases from the October 2013 transfer caseload who had confirmed they wished to continue with their application, as well as 250 new applications made directly to ORAC during 2014.

¹⁹⁴ In addition, from the October 2013 transferred caseload, 43 applications were pending a final decision by ORAC on closing their application due to voluntary withdrawal and 639 applications were pending their application being deemed withdrawn and closed by ORAC.

¹⁹⁵ Refugee Appeals Tribunal (2014). *Annual Report 2014*. Available at www.refappeal.ie.

¹⁹⁶ These figures include the combined number of applications from the backlog caseload and new applications per nationality where available. Office of the Refugee Applications Commissioner (2014). *Annual Report 2014*. Available at www.orac.ie.

¹⁹⁷ The 129 applications in respect of DR Congo are only in respect of the backlog caseload transferred, they were not part of the top five nationality figures of the 250 new applications received during 2014.

4.2 JUDICIAL REVIEW

As discussed in previous reports, a backlog of asylum cases in the Irish High Court exists. At a conference during 2014, the Chairman of the Refugee Appeals Tribunal was quoted as estimating that it would take ‘four years and seven months to get through the current cases on the list, without any new ones being added’, with delays in appeals one of the main reasons for extended periods spent by applicants in direct provision. It was noted that the Tribunal had reviewed all judicial reviews it had on hand, and having settled some cases and had others withdrawn, its list of pending cases was cut from ‘928 last August to 654 today’.¹⁹⁹ During 2014, the High Court assigned four judges exclusively to the asylum list.²⁰⁰

Asylum-related judicial review applications represented 22 per cent of all judicial review applications submitted to the High Court in 2014, with 187 applications lodged. During the year, 11 appeals were lodged with the Supreme Court.²⁰¹ First instance (ORAC) decisions were the subject of 23 judicial review applications,²⁰² with four applications relating to the Refugee Appeals Tribunal.²⁰³ ORAC reported 95 ongoing judicial review cases during 2014. The Refugee Appeals Tribunal reported 326 judicial reviews as determined during the year, in which the applicant was unsuccessful in 215 cases.²⁰⁴ In a news article in August 2014, it was noted that the State had paid at least €30 million to barristers specialising in asylum cases over the past decade. The high expenditure on asylum cases, despite a decline in asylum seekers arriving in Ireland, is linked to a backlog of cases with some 1,300 asylum-related cases currently before the High Court.²⁰⁵

4.2.1 Legislative and Administrative Changes

4.2.1.1 Legislative Changes

Under the *Social Welfare and Pensions Act 2014*, Section 246 of the *Social Welfare Consolidation Act 2005* was amended to provide that an applicant within the meaning of the *EU (Subsidiary Protection) Regulations 2013*, or any other person awaiting a grant of permission to reside in the State under Regulations 23, 25 or 26 of those Regulations, will not be regarded as being ‘habitually resident’ in the State for the purpose of the Act of 2005. The 2014 Act also effects an amendment of Section 246 of the Act of 2005 so that the same applies to (i)

¹⁹⁸ Office of the Refugee Applications Commissioner (2014). *Annual Report 2014*. Available at www.orac.ie.

¹⁹⁹ *The Irish Times* (21 June 2014). ‘High Court facing 4½-year asylum case backlog, conference hears’. Available at www.irishtimes.com.

²⁰⁰ Refugee Appeals Tribunal (2014). *Annual Report 2014*. Available at www.refappeal.ie.

²⁰¹ Courts Service (2014). *Annual Report 2014*. Available at www.courts.ie.

²⁰² Office of the Refugee Applications Commissioner (2014). *Annual Report 2014*. Available at www.orac.ie.

²⁰³ Refugee Appeals Tribunal (2014). *Annual Report 2014*. Available at www.refappeal.ie.

²⁰⁴ *Ibid.*

persons whose applications for subsidiary protection under Regulation 4 or 16 of the *EC (Eligibility for Protection) Regulations 2006* have been refused, or whose permissions under same have been revoked, (ii) persons whose applications under Regulation 3 of the Regulations of 2013 for subsidiary protection have been refused, or whose subsidiary protection status has been revoked under the Regulations, or (iii) persons whose applications under Regulations 25 or 26 of the Regulations of 2013 have been refused, or whose permission under same has been revoked. The Act also amends Section 246(8) of the 2005 Act to provide that where a person is granted permission to reside in the State under Regulations 23, 25 or 26 of the Regulations of 2013, he or she shall not be regarded as having been habitually resident in the State for any period before the date on which the declaration referred to was given or the permission referred to was granted. Regulation 23 refers to permission granted to a successful applicant, and Regulations 25 and 26 relate to family members of that person.

As discussed, Section 5 of the *Illegal Immigrants (Trafficking) Act 2000* provided, inter alia, that applications for judicial review in relation to decisions taken in the asylum/immigration area, such as decisions on applications for asylum and decisions to make deportation orders, had to be made be 'on notice' to the respondent(s) and within 14 days of notification of the decision, determination, recommendation, refusal or making of the order concerned. The effect of the 'on notice' requirement in relation to asylum/immigration cases gave rise to lengthy pre-leave hearings and contributed to a significant backlog of cases in the Courts. It was taking a number of years for many of these cases to be finalised by the Courts and this had an adverse impact on asylum processing times. To deal with this problem, in October 2014, Section 5 of the 2000 Act was amended by Section 34 of the *Employment Permits (Amendment) Act 2014* to provide, inter alia, for the removal of the 'on notice' provision in relation to the taking of judicial reviews, to extend the period of time for making an application for judicial review from 14 to 28 days, and to add a number of other decisions in the areas of international protection, immigration and free movement of persons under EU law, to the list of those governed by the section. INIS has stated that the aim of these amendments is to 'assist the Courts in streamlining the processing of judicial review applications, thereby reducing waiting times, volumes of cases on hand and costs to the State'.²⁰⁶ Leave applications for judicial review will now normally be heard ex parte.

On 25 November 2014 the Minister for Justice and Equality signed into law the *European Union (Dublin System) Regulation 2014* (S.I. No. 525 of 2014) for the purpose of supporting the implementation in Ireland of *Regulation (EU) No.*

²⁰⁵ *The Irish Times* (11 August 2014). 'State has paid at least €30m to asylum-case barristers'. Available at www.irishtimes.com.

*604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining applications for international protection lodged in one of the Member States by a third-country national or stateless person (recast).*²⁰⁷

The Immigration Residence and Protection Bill, introduced in 2007, has gone through several revisions since it was first published. Most recently the Government has decided to split the Bill into separate Protection and Immigration and Residence Bills, with the Protection Bill to be given priority.²⁰⁸ In this regard, INIS has remarked that the *Statement of Government Priorities 2014-2016* provides that legislative reform aimed at establishing a single procedure, by way of a Protection Bill, remains a ‘key Government priority as it is essential to removing the structural delays which are a feature of the existing protection system’.²⁰⁹ In addition, INIS have indicated that they believe the reform will

*simplify and streamline existing arrangements and provide applicants with a final decision on their protection application in a more straightforward and timely fashion and will also, as a consequence, reduce the length of time that applicants spend in the direct provision system.*²¹⁰

The *General Scheme of the International Protection Bill* was published in March 2015.

4.2.1.2 Administrative Changes

Responsibility for the determination of applications for subsidiary protection in Ireland was transferred from the Minister for Justice and Equality to the Office of

²⁰⁶ Irish Naturalisation and Immigration Service, January 2015.

²⁰⁷ Under the 2013 Regulations, the key functions of a determining, requesting and a requested Member State are conferred on the Refugee Applications Commissioner. The functions of a transferring Member State are conferred on the Minister for Justice. The Regulations provide for the carrying out of a personal interview of an applicant for the purpose of determining the responsible Member State. The Commissioner is required to notify the applicant of the making of a decision to transfer his or her application to the responsible Member State. The applicant is entitled to appeal that decision and to remain in the State pending its outcome. The appeal embraces matters of fact and law, and this represents a significant change in Irish law as previously an appeal could only consider whether the criteria for deciding the responsible Member State had been correctly applied. The Regulations confer powers on the Gardaí for the purpose of effecting transfer. Detention of an applicant for the purpose of transfer is permissible, but only where it is considered that there is a significant risk of his or her absconding. In reaching such a conclusion, regard may be had to such matters as the failure by an applicant to comply with a requirement imposed on him or her under the Regulations, such as to remain at a specified address, and a failure to cooperate with arrangements for his or her transfer. The Regulations also make specific provision for ‘taking charge of’ and ‘taking back’ certain categories of applicants in respect of whom Ireland is the responsible Member State and consequent entitlements, which include applying to have a withdrawn application for protection completed or appealing an application which was refused at first instance.

²⁰⁸ Irish Naturalisation and Immigration Service, April 2015.

²⁰⁹ Ibid.

²¹⁰ Ibid.

the Refugee Applications Commissioner (ORAC) under the *European Union (Subsidiary Protection) Regulations 2013* (S.I. No. 426 of 2013). During 2014, in light of the CJEU's ruling in the case of *H.N. v. The Minister for Justice, Equality and Law Reform, Ireland and the Attorney General*,²¹¹ arrangements were made by the State as of 8 October 2014 to enable new applicants for refugee status and persons with live refugee applications also to make an application for subsidiary protection to ORAC.²¹² It remains the case that such applications will not be investigated until a final decision has issued with respect to refugee status.²¹³ Under the ruling of the CJEU, a person who makes a new application for refugee status may also make an application for subsidiary protection at the same time to ORAC. The *European Union (Subsidiary Protection)(Amendment) Regulations 2015* (S.I. No. 137 of 2015), which will give legislative effect to these arrangements, came into effect on 20 April 2015.

On 19 March 2014, the Refugee Applications Commissioner announced that he was to accord priority to certain classes of applications for subsidiary protection under the *European Union (Subsidiary Protection) Regulations 2013*; the legal basis for the prioritisation of applications is set out in the 2013 Regulations.²¹⁴ Priority was to be accorded to a number of classes of applications under two processing streams which will run concurrently:

In **stream one**, applications will be prioritised for interview scheduling mainly on the basis of oldest applications first.

In **stream two**, the following classes of cases will be prioritised for interview scheduling, also mainly on the basis of oldest cases first:

- Unaccompanied minors in the care of the HSE
- Applicants who applied as unaccompanied minors, but who have now aged out
- Applicants over 70 years of age, who are not part of a family group
- Applications which include a medico-legal report indicating likely well-foundedness
- Applications relating to the following countries on the basis of country of origin information, protection determination rates in EU Member States and

²¹¹ C-604/12 *H.N. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, delivered on 8 May 2014 (Fourth Chamber). An appeal is currently before Ireland's Supreme Court.

²¹² [www.orac.ie/website/orac/oracwebsite.nsf/page/AJNR-9PPBG593188-en/\\$File/SP%20Notice%2008%20Oct%2014%20final%20version.pdf](http://www.orac.ie/website/orac/oracwebsite.nsf/page/AJNR-9PPBG593188-en/$File/SP%20Notice%2008%20Oct%2014%20final%20version.pdf)

²¹³ UNHCR Ireland, May 2015.

²¹⁴ Office of the Refugee Applications Commissioner (2014). *Prioritisation of Applications for subsidiary Protection in line with the European Union (Subsidiary Protection) Regulations 2013*. Available at www.orac.ie

UNHCR position papers indicating the likely well-foundedness of applications from such countries: Afghanistan; Chad; Eritrea; Iraq; Mali; Somalia; South Sudan; Sudan; Syria.

ORAC has indicated that UNHCR provided advice to the Refugee Applications Commissioner on the issue of prioritisation.²¹⁵

During 2014 a number of measures were introduced by the Refugee Appeals Tribunal to enhance the quality of decisions taken and to provide for appropriate governance and accountability of the Tribunal. These included the Chairperson issuing a number of Guidelines:

- Public access to the databases of Tribunal decisions has been granted for the first time under one of the Chairperson's 2014 Guidelines. Previously, only applicants and their legal advisors could access these decisions solely for the purposes of preparing an appeal. Information which could identify the applicants has been redacted from the decisions.²¹⁶
- A Guideline on how the Tribunal will deal with appeals from child applicants was prepared in 2014.²¹⁷

During the year the RAT also prepared a draft set of procedures for public consultation. The new procedures will provide a comprehensive set of rules for the operation of the Tribunal, notably with the introduction of a new procedure where a hearing date for an appeal would only be allocated when all parties had confirmed in writing that all documentation relevant to the appeal had been lodged with the Tribunal. Once the hearing date has been allocated, it is proposed that no further documentation would be accepted without leave of the Tribunal.

The Tribunal developed a number of decision-making templates and other quality tools in 2014 through the assistance of UNHCR.²¹⁸ The purpose of these new templates is to provide decision-makers with a 'logical and legally robust framework within which to make their decision' by setting out the series of issues

²¹⁵ Office of the Refugee Applications Commissioner, January 2015.

²¹⁶ Each person wishing to have access to the database must first apply to the Tribunal for a username and password. Refugee Appeals Tribunal (11 March 2014) '*Access to Previous Decisions of the Tribunal*' Guidance Note No: 2014/1. Available at www.refappeal.ie.

²¹⁷ At the time of writing, this Guideline had been published RAT (15 January 2015) '*Appeals from Child Applicants*' Guidance Note No: 2015/1.

²¹⁸ UNHCR has worked with a number of domestic determination authorities in developing Refugee Status Determination decision templates which balance international obligations under the Convention with domestic protection procedures and policies. For further information on this, see O'Connell, S. (2 October 2014). 'The use of Decision Templates for Refugee Status Determination' *The Researcher*. Available at www.legalaidboard.ie/lab/publishing.nsf/content/The_Researcher.

which need to be considered in each case. A new decision template has been designed to provide applicants and their legal advisors with a clear decision as to the reasons underpinning why their application has been accepted or rejected. This approach has led to only one application for Judicial Review out of 84 decisions issued using the new template, which represents just 1.2 per cent of negative decisions issued. This is in contrast with the previous figure whereby an average 10 per cent of Tribunal decisions which upheld the original decision were the subject of a Judicial Review application to the High Court.²¹⁹ UNHCR also provided assistance in a co-ordinating role regarding training to a number of new Tribunal Members.²²⁰

During 2014, for the first time, as part of the wider extension of Freedom of Information (FOI) to all public bodies in Ireland, both the Office of the Refugee Applications Commissioner and the Refugee Appeals Tribunal became subject to FOI legislation under a new piece of legislation. On 14 October 2014, the *Freedom of Information Act 2014* came into effect and repealed the *Freedom of Information Act 1997* as amended by the *Freedom of Information 2003*. Under the 2014 Act, anyone is entitled to apply for access to information not otherwise publicly available subject to certain exceptions. Any record created by both bodies from the October date will be subject to FOI, and records held in relation to a person's personal information, irrespective of when they were created, subject to certain exemptions, also come within the scope of the Act.²²¹

4.2.2 Working Group on the Protection Process and Direct Provision System

Following on from a commitment contained in the *Statement of Government Priorities 2014-2016* to establish an independent working group and an NGO roundtable in September 2014, in October the composition and terms of reference were announced of a Working Group to examine improvements to the protection process and system of direct provision, including supports to applicants. In his comments regarding the establishment of the Working Group, Minister of State Ó Ríordáin stated that an independent working group process would best allow for necessary changes to the direct provision system to be

²¹⁹ B. Magee (2 October 2014). 'Recent Changes at the Refugee Appeals Tribunal'. *The Researcher*. Available at www.legalaidboard.ie/lab/publishing.nsf/content/The_Researcher.

²²⁰ UNHCR Ireland, May 2014.

²²¹ As per the commencement order contained in S.I. No. 148 of 2015 available at [www.refappeal.ie/website/rat/ratweb.nsf/en/\\$File/FREEDOM%20OF%20INFORMATION%20ACT%202014%20\(EFFECTIVE%20DATE%20FOR%20CERTAIN%20BODIES\)%20ORDER%202015.pdf](http://www.refappeal.ie/website/rat/ratweb.nsf/en/$File/FREEDOM%20OF%20INFORMATION%20ACT%202014%20(EFFECTIVE%20DATE%20FOR%20CERTAIN%20BODIES)%20ORDER%202015.pdf).

The Act also provides for the extension of the FOI legislation to non-public bodies which receive significant funding from the State. The *Freedom of Information Act 2014* establishes a legal right for each person to:

- access information held by public bodies,
- have official information relating to himself/herself amended where it is incomplete, incorrect or misleading,
- obtain an explanation for the reasons for decisions affecting them.

identified and managed effectively through its forensic, structured and cooperative approach.²²²

Prior to the establishment of the Working Group, Senators were circulated a nine-page position paper prepared by Department of Justice and Equality officials which acknowledged the system is ‘not perfect’, but makes a strong case against changing direct provision as any alternative may result in a ‘pull factor’ for those seeking to abuse the asylum system. It remarked that the Common Travel Area between Ireland and Britain would ‘possibly be abused by those using the asylum system to avail of better State provision here’. It also stated the cost of facilitating asylum seekers to live independently, with access to regular social welfare payments, would be double the cost of the direct provision system.²²³

Chaired by a retired High Court Judge, the members of the Group include representatives of UNHCR Ireland, the Irish Refugee Council, Jesuit Refugee Service, NASC (Irish Immigrant Support Centre), SPIRASI, Children’s Rights Alliance, IRC Core Group of Asylum Seekers and Refugees, as well representatives of academia, and-relevant Government departments and offices. The terms of reference of the Working Group included to recommend to Government what improvements should be made to existing processes in order to improve arrangements for processing of applications; to show greater respect for the dignity of persons within the system; and to improve the quality of life of applicants for international protection while their applications are under investigation.²²⁴ A report was submitted in mid-2015.²²⁵

The work of the Group was approached on a thematic basis as shown in Table 1.

²²² See ‘Response by Minister of State to Seanad Private Member’s Motion on Direct Provision (17 September 2014) and ‘Statements on Direct Provision (Seanad), Opening Statement from Minister of State at the Department of Justice and Equality, Aodhan Ó’Riordáin T.D.’ (23 January 2015).

²²³ *The Irish Times* (18 September 2014). ‘State fears alternative to direct provision will attract asylum seekers’. Available at www.irishtimes.com.

²²⁴ Irish Naturalisation and Immigration Service (13 October 2014). ‘Ministers Fitzgerald and O Riordáin announce composition of Working Group to examine improvements to the Protection process and the Direct Provision system’. Available at www.inis.gov.ie.

²²⁵ This report was issued in June 2015. It contains some 173 recommendations across the three themes identified in the terms of reference. Included are recommendations to extend the mandate of the Ombudsman and Ombudsman for Children to cover complaints in relation to the direct provision system; to increase the financial support to asylum applicants to €38.74 per adult (from €19.10) and €29.80 (from €9.60) per child; and the early enactment of a single procedure for future international protection applicants as contained in the published International Protection Bill.

TABLE 1 Work Programme - Working Group to Report to Government on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers

	Themes	Topics include
Reception Conditions	Theme 1: Improvements to the direct provision system (i.e. living conditions while in designated centres) aimed at showing greater respect for the dignity of persons in the system and improving their quality of life.	<p>Policy governing the transfer of residents between centres</p> <p>Complaints process available to residents</p> <p>System for monitoring centres /sanctions for breach of contractual obligations by centres and mechanisms for dealing with breaches by residents of RIA house rules</p> <p>Arrangements for families within centres</p> <p>Sleeping /living arrangements for families with young children, families with teenage children</p> <p>Play/homework/study facilities for young children /teenagers</p> <p>Child safety and protection</p> <p>Arrangements for single adults within centres</p> <p>Sleeping/living arrangements</p> <p>Catering facilities within centres in the context of direct provision</p> <p>Nature and variety of foods</p> <p>Scope for residents to prepare their own meals within existing or new physical structures.</p> <p>Whether limitations should be placed on the length of time persons spend in the direct provision system</p> <p>Training of staff within centres</p>
	Theme 2: Improved supports (e.g. financial, educational, health) for protection applicants aimed at showing greater respect for the dignity of persons in the system and improving their quality of life.	<p>Financial supports</p> <p>Scope to increase the weekly allowance paid to residents</p> <p>Access to discretionary social protection supports</p> <p>Access to the labour market</p> <p>Access to education opportunities</p> <p>Improved linkages with local communities</p> <p>Mental health supports to residents including survivors of torture and others experiencing post traumatic stress disorder</p> <p>Services relating to sexual health</p> <p>Supports for residents who are LGBTI</p> <p>Training of other persons e.g. members of An Garda Síochána to ensure that they are equipped to deal with specific issues affecting applicants</p> <p>Transitional supports for aged-out minors entering the system from Tusla care</p> <p>Transitional supports for persons granted status including ease of access to mainstream State services.</p>
Determination Process	Theme 3 Improvements to existing arrangements for the processing of protection applications with particular regard to the length of the process.	<p>Quality decision-making including</p> <p>supports to assist applicants in putting forward their case fully at the earliest possible stage</p> <p>supports to assist vulnerable applicants, including victims of torture, to put forward their case fully at the earliest possible stage</p> <p>Improved processing times at all stages - first instance and appeal for both refugee and subsidiary protection applications and 'leave to</p>

		<p>remain' consideration</p> <p>The early conclusion of judicial review applications</p> <p>The efficient operation of the deportation process including the option of voluntary return before order is signed and engagement of International Organisation for Migration</p> <p>The situation of persons with deportation orders which have not been effected within a 12-month period</p> <p>Communications to applicants at all stages of the process, including those with judicial reviews and/or deportation</p>
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Source: Work Programme, *Working Group report to Government on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers*. Irish Naturalisation and Immigration Service.²²⁶

Three summary progress reports had been made public by year end. A call for written submissions from residents of direct provision centres was made, with 107 received by the closing date of 9 January 2015. Regional consultation sessions with applicants are proposed for early 2015, alongside visits to centres and consultations with particular groups of applicants (including children, victims of torture, trafficking/sexual violence victims, and members of the LGBTI community). In a year-end summary report, it was acknowledged that

*the complexity and interconnectedness of the issues under consideration, the importance of awaiting the outcome of the consultation process with those in the protection system, and the need to consider the cumulative cost of all recommendations militated against the submission of any interim recommendations to Government.*²²⁷

4.3 RECEPTION

In December 2014, a total of 4,364 persons were accommodated within 34 centres under contract to the Reception and Integration Agency (RIA). This figure included some of the 1,114 new asylum applicants who presented to ORAC during the year.²²⁸ The year-end occupancy rate was at 85.8 per cent of the contracted capacity. Overall, 33.9 per cent of residents were under 18 years of age. By the end of 2014, 63.6 per cent of RIA residents had first claimed international protection in Ireland three or more years previously, with 34 per cent of applicants having made their initial asylum application six or more years previously.²²⁹ In their *Annual Report 2014*, RIA noted an upward trend in the numbers of single male asylum seekers entering Ireland, resulting in a change in profile of those accommodated within direct provision. At year end, while the

²²⁶ www.inis.gov.ie.

²²⁷ See various Summary of Progress reports, www.justice.ie.

²²⁸ A total of 1,141 new asylum applicants were accommodated by RIA during the course of the year but not all of these new applicants made an application for ongoing accommodation with RIA beyond the initial accommodation period. For further information see Reception and Integration Agency (2015). *Annual Report 2014*. Available at www.ria.gov.ie.

²²⁹ Reception and Integration Agency (2015). *Annual Report 2014*. Available at www.ria.gov.ie.

majority of those accommodated were part of a family group (61 per cent),²³⁰ single males (29 per cent) formed a significant grouping. The total cost of the direct provision system in 2014 was €57.22 million, a slight decrease (3.6 per cent) on the 2013 spend.²³¹

The issue of direct provision for applicants of international protection continued to attract much media and parliamentary discussion during 2014.

RIA has undertaken to 'pilot' a woman-only centre in the Park Lodge centre in Co. Kerry following its refurbishment in 2014.²³² In April 2014, RIA published the *RIA Policy and Practice Document on safeguarding RIA residents against Domestic, Sexual and Gender-based Violence & Harassment (GBVH)*. The policy applies to all residents in RIA accommodation centres, RIA staff and the staff employed in each accommodation centre. It sets out in detail the definitions of the various types of violence and harassment which are covered in the policy and the procedures which are to be followed to report an incident. It also includes a template report form to be completed by the designated Reporting Officer in each Centre. The Policy Document is to be made available in English and translated into four languages, French, Arabic, Russian and Farsi with copies distributed to all RIA accommodation centres.²³³ The Dublin Rape Crisis Centre and Women's Aid have been contracted to provide training to reporting officers in each centre as well as to RIA staff on this policy, with training planned to commence during 2015.²³⁴

In December 2014 the Irish Human Rights and Equality Commission produced a *Policy Statement on the System of Direct Provision in Ireland*. The Policy Statement outlined a number of child protection concerns for children and unaccompanied minors present in the system. It included a number of

²³⁰ With 34 per cent being lone parent families and 27 per cent being married/partner headed families.

Reception and Integration Agency (2015). *Annual Report 2014*. Available at www.ria.gov.ie.

²³¹ Reception and Integration Agency (2015). *Annual Report 2014*. Available at www.ria.gov.ie.

²³² Reception and Integration Agency (April 2014). *RIA Policy and Practice Document on safeguarding RIA residents against Domestic, Sexual and Gender-based Violence & Harassment*. Available at www.ria.gov.ie/en/RIA/RIA%20Policy%20Document%20on%20Domestic%20%20Gender%20Based%20Violence%20%20Agreed%20Report.pdf/Files/RIA%20Policy%20Document%20on%20Domestic%20%20Gender%20Based%20Violence%20%20Agreed%20Report.pdf.

²³³ This Policy Document emerged from the Working Group on safeguarding RIA residents against domestic, sexual and gender based violence. The Working Group met five times between November 2012 and October 2013 to consider how to address the issues of sexual harassment and gender based violence for those residents in direct provision centres. It was noted that the document will be officially implemented once the training programme for staff in centres has been completed. It also considered whether a reconfiguration of RIA accommodation for single gender accommodation was necessary. It decided to 'pilot' the Park Lodge centre in Co. Kerry as a woman-only centre. Reception and Integration Agency (April 2014). *RIA Policy and Practice Document on safeguarding RIA residents against Domestic, Sexual and Gender-based Violence & Harassment*. Available at www.ria.gov.ie/en/RIA/RIA%20Policy%20Document%20on%20Domestic%20%20Gender%20Based%20Violence%20%20Agreed%20Report.pdf/Files/RIA%20Policy%20Document%20on%20Domestic%20%20Gender%20Based%20Violence%20%20Agreed%20Report.pdf.

²³⁴ Reception and Integration Agency (2015). *Annual Report 2014*. Available at www.ria.gov.ie.

recommendations including the introduction of a single protection procedure; a time limited period (6-9 months) after which any person who has not yet received a decision, on either first instance or appeal, should be able to leave direct provision, live independently, and access relevant social welfare payments and employment; for victims of trafficking to be accommodated in single gender facilities with access to a range of necessary support services; and for the weekly allowance for residents in direct provision to be increased to a realistic amount. The introduction of an independent complaints mechanism was also called for, as was the extension of the remits of the Office of the Ombudsman and the Ombudsman for Children to include the investigation of issues relating to the asylum process.²³⁵

The issue of children living in direct provision continued to attract attention during the year. In August 2014, *The Irish Times* cited more than 1,500 child protection or welfare notifications concerning young people living in direct provision accommodation, for issues such as ‘inappropriate sexualised behaviour among children, the inability of parents to cope, young people not being supervised and mental health problems’. It was noted that reported concerns were between three and four times the rate for young people living in the general community.²³⁶ In a short series on the topic of direct provision run by the same newspaper, Geoffrey Shannon, the State’s Special Rapporteur on Child Protection, commented on the length of time spent by children in the setting and the longer-term impacts:

*Apart from the human cost caused by mental health and other issues linked to direct provision, there is likely to be a cost to the State, as regards mental health and social services. [This] has yet to be estimated.*²³⁷

RIA have commented that the ‘highest priority’ is accorded to children’s safety, with a specific child and family service in place. The primary responsibility of parents in direct provision centres for the care of their children ‘who reside with them’ was also highlighted.²³⁸ In October 2014 an updated *Child Protection and Welfare Policy and Practice Document* was published by RIA, containing a step-by-step guide on how to make a referral to the Child and Family Agency, TUSLA by the Designated Liaison Person in each centre who has undertaken the relevant

²³⁵ Irish Human Rights and Equality Commission (10 December 2014). ‘Policy Statement on the System of Direct Provision in Ireland’. Available at www.ihrec.ie.

²³⁶ *The Irish Times* (9 August 2014). ‘Social Services alerted to 1,500 cases of young asylum seekers’. Available at www.irishtimes.com.

²³⁷ *The Irish Times* (11 August 2014) ‘Lives in Limbo - the children: ‘It’s like being stuck in a cage’. Available at www.irishtimes.com.

²³⁸ *The Irish Times* (9 August 2014). ‘Social Services alerted to 1,500 cases of young asylum seekers’. Available at www.irishtimes.com.

training.²³⁹ A related topic of educational opportunities for children in centres was also raised by the Minister for Education and Skills during the year, including opportunities to proceed to higher education.²⁴⁰

As from October 2013, RIA has published reports of inspections of direct provision accommodation centres on a dedicated website, available at www.ria-inspections.gov.ie. In general, each centre is inspected three times per year: twice by the internal RIA inspection team and once by the independent inspection company QTS. The purpose of an inspection is to ‘assess the physical condition of the centre and to ensure that the services contracted by RIA are being delivered by the contractor’. During 2014, a total of 87 inspections were completed, 51 by RIA and 36 by QTS.²⁴¹ All inspections are unannounced. A new inspection regime for conditions was described as being ‘urgently required’ by the Minister of State Ó Ríordáin in October 2014. Calls for an independent body outside of RIA (such as HIQA) were made by NGOs and parliamentarians, as well as for inspections to cover staff and to engage with residents.²⁴²

4.3.1 Research

Conlan (2014) interviewed 20 people who had spent a minimum of three years²⁴³ in direct provision to explore their experience of finding work after they had been given permission to stay in Ireland and left direct provision accommodation. Participants were interviewed generally after they had been out of direct provision for a year; six months in some instances. The overall level of ‘trauma, stress and depression’ amongst interviewees was reported, as was a general lack of knowledge about support services and how to access them. A key issue raised in the report relates to practical issues such as obtaining documentary evidence or proof of identity in order to move out of State accommodation; if a person is granted leave to remain, a 21-day period is provided in which they are required to register their permission with the Gardaí. The report notes that for some, this can mean remaining in direct provision longer as they cannot prove their identity (e.g. to immigration and social welfare offices).

The educational background of those interviewed varied considerably from primary education to a post-graduate or professional qualification. The report remarks that the prohibition on work while in direct provision, combined with an

²³⁹ Reception and Integration Agency (October 2014). *Child Protection and Welfare Policy and Practice Document*. Available at www.ria.gov.ie.

²⁴⁰ *The Irish Times* (15 September 2014). ‘Children in Direct Provision denied ‘normal family life’. Available at www.irishtimes.com.

²⁴¹ Reception and Integration Agency (2015). *Annual Report 2014*. Available at www.ria.gov.ie.

²⁴² *The Irish Times* (6 October 2014). ‘Call for new inspection regime for direct provision’. Available at www.irishtimes.com. See also *The Irish Times* (10 August 2014). ‘Direct Provision not humane, says Minister’. Available at www.irishtimes.com

²⁴³ 17 had spent more than five years in Direct Provision.

‘inability to undertake any significant education or training’ places people in an ‘insidious position, increasing vulnerability and the potential for the much longer term problem’; for most people it created a case of ‘forced idleness’. It is noted that voluntary work proved to ‘be a lifeline’ for some during this time, and that some participants had studied in their own time while in direct provision. However, the lack of confidence that ‘accompanied their time in direct provision has had consequences for their ability to become self-sufficient when they moved out’. Greater resilience levels were noted amongst the younger age group. The report notes that education and training was used as much as possible after moving out of direct provision, however overseas student fees are applied as time spent in direct provision is not considered as part of the residency condition for fees or citizenship. Recommendations include the introduction of a single protection procedure to reduce delays, provision of specialist support and advice upon transition, and information for employers. A mentoring scheme with local authorities is recommended for persons unable to get work within a year of leaving direct provision.²⁴⁴

In May 2014 Nasc launched a report *What’s Food Got to Do With It: Food Experiences of Asylum Seekers in Direct Provision*. The aim of the study was to gain a greater understanding of the lived reality and food experience of asylum seekers living in direct provision through a series of one-on-one interviews. The main findings of the report were that food provided in direct provision centres is not of satisfactory quality and is often seen as unhealthy, with the cultural and multi-faith religious needs of residents not represented. The lack of access to self-catering and communal cooking areas was outlined as disempowering and as eroding of parental authority. The majority of asylum seekers interviewed recommended that self-catering options be introduced and that communal cooking spaces be made available.²⁴⁵

4.4 RESETTLEMENT

Ireland joined the UNHCR-led resettlement scheme in 1998. Ireland agreed to accept the resettlement of 90 persons under the 2014 quota which was dedicated to Syrian refugees. Some 97 persons arrived in Ireland during the year. A family of seven persons, originally approved during 2013 and from the DRC, were delayed due to a birth. A total of 90 Syrian refugees were resettled from Lebanon and Jordan, including three serious medical cases (where needs could only be met through resettlement) and nine cases with serious medical conditions requiring follow up post-resettlement.²⁴⁶

²⁴⁴ Conlan, S. (2014). *Counting the Cost. Barriers to employment after Direct Provision*. Irish Refugee Council. Available at www.irishrefugeecouncil.ie.

²⁴⁵ NASC (May 2014). *What’s Food got to Do with it: Food Experiences of Asylum Seekers in Direct Provision*. Available at www.nascireland.org.

²⁴⁶ Office for the Promotion of Migrant Integration, December 2014.

In 2014, 67 programme refugees were assisted by IOM Ireland to resettle in Ireland.²⁴⁷

At the end of 2014 the Minister for Justice and Equality stated that Ireland had pledged an additional 220 resettlement places for 2015-2016 (100 in 2015; 120 places the following year), with the majority of these places ‘for the resettlement of refugees displaced by the Syrian conflict currently resident in Jordan and Lebanon’.²⁴⁸

4.5 STATELESSNESS

Ireland issued two declarations of statelessness during 2014.²⁴⁹ Although a party to the UN *1954 Convention Relating to the Status of Stateless Persons*, Ireland does not have a formal procedure for status determination. NGO commentary has centred on increasing evidence of it becoming an issue in immigration-related applications,²⁵⁰ with rights in domestic law, such as access to citizenship, remaining inaccessible to stateless persons.²⁵¹

In October 2014, UNHCR produced ‘*Scoping Paper: Statelessness in Ireland*’ to map the scale of the issue in Ireland.²⁵² The paper noted the creation in July 2009 of an ad hoc procedure between UNHCR and INIS to facilitate the identification of any potential stateless persons. UNHCR has also provided training to INIS officials on the issue including the legal framework, determination procedures, and the causes and consequences of statelessness.²⁵³ The paper noted that Ireland is not alone in its lack of a determination procedure. In response to a parliamentary question on the possibility of introducing a statelessness determination procedure in June 2014, the Minister for Justice and Equality stated that she had no immediate plans to introduce such a measure but would keep the matter under review ‘having regard also to developments in other jurisdictions and the nature of their determination procedure’. Outlining the reasoning, the Minister cited international experience whereby only a small number of countries who have ratified the 1954 Convention have a specific determination procedure for

²⁴⁷ IOM Ireland, April 2015.

²⁴⁸ Irish Naturalisation and Immigration Service (9 December 2014). ‘Minister Fitzgerald: 111 Syrians admitted under sponsorship programme’. *Press Release*. Available at www.inis.gov.ie. See *The Irish Times* (28 June 2014). ‘Government agrees to resettle 220 refugees’. Available at www.irishtimes.com.

²⁴⁹ INIS (August 2015).

²⁵⁰ For example, residence permits and travel document applications. Immigrant Council of Ireland, April 2015.

²⁵¹ Catherine Cosgrave (22 April 2015). *Statelessness in Ireland – international obligations and national reality*. Available at www.statelessness.eu.

²⁵² UNHCR Ireland (October 2014) *Scoping Paper: Statelessness in Ireland*. Available at www.refworld.org/pdfid/5448b6344.pdf.

²⁵³ Also referenced was the UNHCR Geneva (30 June 2014). *Handbook on Protection of Stateless Persons Under the 1954 Convention Relating to the Status of Stateless Persons*. Available at www.refworld.org/docid/53b676aa4.html.

non-protection statelessness claims; and only four EU countries (Spain, Latvia, Hungary and UK).²⁵⁴ This parliamentary question arose in context of a call by the European Network on Statelessness (a civil society coalition of 50 members which campaigns on this issue) for

*All European states without a functioning statelessness determination procedure to make a clear commitment during 2014 to take necessary steps to introduce one by the end 2016.*²⁵⁵

Wider discussion on the issue of statelessness, and State responses in Ireland, have centred on ‘ad hoc and inconsistent’ decision-making, and the need for a durable solution for stateless persons in Ireland. The ICI has highlighted particular vulnerabilities related to client experiences in a ‘prolonged situation of legal limbo due to the sheer length of time and difficulties’ in progressing determinations, when work, travel and access to ‘basic services’ has been impacted. Prosecution for a lack of identity documents has taken place in cases. It is acknowledged that it is ‘clear from administrative decisions that the applicants’ statelessness is implicitly recognised by the authorities but no formal declaration has been issued’. Commenting on the 2014 statement by the Minister for Justice and Equality regarding no immediate plans to introduce a determination measure, it is noted that ‘in the absence of political will to introduce determination procedure, it will remain necessary to litigate in individual cases.’ The ICI acknowledged reluctance on behalf of stateless persons (often residing on a residence permission) to start court proceedings for a declaration of statelessness, with barriers including no access to legal aid (for those with residence permission such as an employment permit) and concerns that any future citizenship application may be in jeopardy.²⁵⁶

4.6 CASE LAW - ASYLUM

A number of important judgments were delivered during 2014 in relation to international protection and subsidiary protection law in Ireland.

By virtue of the *European Union (Subsidiary Protection) Regulations 2013* (S.I. No. 426 of 2013), as mentioned previously, responsibility for the processing of applications for subsidiary protection was given to the Refugee Applications Commissioner. A number of judicial reviews were taken against the Minister and the Commissioner during 2014, challenging this and other elements of the Regulations. In December 2014 the High Court delivered judgment on the first of

²⁵⁴ Parliamentary Question (12 June 2014). *Determination Procedure for Statelessness*.

²⁵⁵ Cited by the Minister for Justice and Equality in Parliamentary Question (12 June 2014). *Determination Procedure for Statelessness*.

²⁵⁶ Catherine Cosgrave (22 April 2015). *Statelessness in Ireland – international obligations and national reality*. Available at www.statelessness.eu.

these cases, *B.A. & R.A.*²⁵⁷ It found that the transfer of the Minister's function regarding the processing of subsidiary protection applications to the Commissioner by means of these regulations was valid.²⁵⁸ It also found that the definition of torture embodied in the regulations was invalid as being inconsistent with Article 15(c) of the Qualification Directive.²⁵⁹

T.D. v. Minister for Justice [2014] IESC 29

The applicants were failed asylum seekers and sought to quash, by way of judicial review, a number of decisions whereby the asylum authorities, and ultimately the Minister for Justice, refused them recognition as refugees. They invoked provisions and principles of EU law for that purpose. The State argued that their application for judicial review was out of time, not being brought within the period of 14 days laid down by Section 5 (2) of the *Illegal Immigrants (Trafficking) Act 2000* ('the Act of 2000'). In the High Court, Hogan J. held that the time limit imposed by Section 5(2) was incompatible with the principles of equivalence and effectiveness under EU law.

However, he granted leave to appeal to the Minister on the basis that the matter was a point of law of exceptional public importance.

The Supreme Court held, unanimously, that the provision did not breach the principle of effectiveness and, by a majority, that it did not breach the principle of equivalence.

Insofar as the principle of effectiveness was concerned, it pointed out that the applicants had the benefit of professional legal advice throughout their asylum applications and that they had never made the case that there was some particular difficulty which prevented them from initiating proceedings earlier than they did or indeed within the 14-day period.

As regards the principle of equivalence, the Supreme Court held that the essential subject matter of the acts to which the time limit applied was the control by the State of entry into or remaining on its territory by persons from other countries. It applied without distinction both to claims based on EU law and to those made under national law, and did not infringe the principle of equivalence.

²⁵⁷ *B.A. & R.A. v. The Minister for Justice and Equality and the Refugee Applications Commissioner* [2014 No. 31 JR] delivered on 12 December 2014.

²⁵⁸ Office of the Refugee Applications Commissioner, January 2015.

²⁵⁹ Office of the Refugee Applications Commissioner, January 2015.

It declined to refer any question to the CJEU on the matter, holding that the principles were well-settled and that no new issue of interpretation of EU law arose. Moreover, it pointed out that it was for the national court to form its own judgment as to whether the national rules infringed the principle because only that court had the capacity to know and understand the operation of the national rules within the context of the system as a whole.

The entitlement of the State to put in place a short time limit of 14 days was therefore upheld in this decision as being compatible with the provisions of effectiveness and equivalence. This was important as it enables the State to require persons who wish to challenge asylum and immigration decisions to do so expeditiously and within the time limits laid down by statute, subject to the provision entitling a court to extend time.

MARA v. Minister for Justice (Unreported, Supreme Court, 12 December, 2014)

The applicant was a non-Irish national infant, born in Ireland. Application for asylum was made on her behalf and a negative recommendation was made by the Refugee Applications Commissioner. Judicial review proceedings were instituted to challenge that and the Commissioner successfully issued a motion to have them dismissed as being bound to fail, reliance being placed on caselaw indicating that an applicant should appeal a decision of the Commissioner to the Refugee Appeals Tribunal. The applicant appealed against that to the Supreme Court. She also proceeded with an appeal she had lodged to the Tribunal, and when that was refused, applied for subsidiary protection.

The Supreme Court decided that the appeal before it was moot, the applicant having proceeded to a conclusion with her appeal before the Tribunal.

Without prejudice to that, it pointed out that the appeal to the Tribunal was a full re-hearing, with the Tribunal being able to make such findings of fact and law as were appropriate. The result of the appeal could be the affirmation of the Commissioner's decision in whole or in part or, indeed, its rejection. The appeal overturned the record of what had been decided by the Commissioner, save and insofar as on appeal it was affirmed. In the instant case, the court noted that the Tribunal had made findings of fact against the applicant and had affirmed the Commissioner's decision.

The court also held that persons who applied for asylum in the State were entitled to anonymity under Section 19 of the *Refugee Act 1996*, subject to Section 9(15) and 26. Whilst noting that Section 19 of the Act of 1996 should be given as narrow an interpretation as its wording required consistent with Article

34.1, it observed that the definition of who was an ‘applicant’ for refugee status was surprisingly wide, being defined as ‘a person who has made an application for a declaration under Section 8’ of the Act of 1996 and being unlimited as to time or as to the result of the application. It held that the plain and unambiguous result of the wording was that once a person had applied for refugee status, he retained anonymity with regard to any litigation relevant thereto in perpetuity. Should there be unrelated litigation, such as in connection with an accident, that protection remained and, whilst the tort case might be reported normally, any mention of any prior failed application for refugee status could not.

The decision of the Supreme Court accordingly copperfastens the two-step system provided for in Irish law for the assessment of protection applications, whereby the Commissioner deals with the first-instance application and the Tribunal with any appeal from the Commissioner’s decision. Although it did not have to rule on the issue as the determination of the appeal to the Tribunal rendered the appeal before the Supreme Court moot, it is clear from its decision that an applicant should not seek judicial review of a decision of the Commissioner, but instead appeal it to the Tribunal, which has power to conduct a full re-hearing and make new findings of fact and law on the evidence before it, including any new evidence the applicant wishes to adduce.

The decision also indicates that applicants for asylum have, in effect, lifelong anonymity in Ireland and that, subject to the narrow exceptions in the *Refugee Act 1996*, the identity of a person who applied for asylum at any stage cannot be published. It is possible that the legislature might wish to amend that provision.

P.B.N. v. Minister for Justice [2014] IESC 9

The applicant, a national of the Democratic Republic of Congo (‘DRC’), was the subject of a deportation order and she sought unsuccessfully to re-enter the asylum process by making an application pursuant to Section 17(7) of the *Refugee Act 1996*. Her application was refused and she issued judicial review proceedings seeking leave to challenge it. She also sought an interlocutory injunction to enjoin her deportation pending the hearing of those proceedings. She argued that it was unsafe for failed asylum seekers to be returned to the DRC. The High Court refused an injunction and the applicant appealed to the Supreme Court.

The Supreme Court allowed the appeal and, applying the test for the grant of a stay or injunction set out in its earlier decision in *Okunade v. Minister for Justice* [2012] IESC 49, held that the applicant had made out an arguable case for the granting of an injunction.

The decision of the Supreme Court provides important guidance for courts on how to deal with injunction applications seeking to enjoin deportation to a country where the proposed deportee argues that such deportation would breach the prohibition on *refoulement*. Such a person must make out an arguable case that an injunction should be granted. The balance of convenience may then favour granting it pending the hearing of an application to challenge the validity of a deportation order, so long as a credible basis has been shown on the evidence that there is a real risk of significant harm to the applicant if he or she were deported pending that hearing.

C.A. and T.A. v. Minister for Justice and Others [2014] IEHC 532 (14/11/14)

The first named applicant was a Ugandan national who arrived in Ireland in 2010 and whose son, the second named applicant, was born in Ireland in 2011. She made an application for asylum on arrival in the State. She was initially given accommodation in Dublin but was moved to Galway shortly thereafter. She was living there for more than three and a half years. Their asylum claims were unsuccessful and they applied for subsidiary protection and for leave to remain in the State.

The applicants argued that the direct provision system, as it currently operated, was in breach of the principle of the separation of powers, breached and/or disproportionately interfered with constitutional and fundamental rights, was unlawful or ultra vires, and that the statutory ban on access to social welfare benefits and/or the labour market was unlawful.

The court then held that the issues before it for decision were:-

- Did ‘direct provision’, either in part or because of cumulative effect, breach the applicants’ fundamental human rights?
- Was Article 15.2 of the Constitution breached because ‘direct provision’ was an administrative scheme without legislative basis (apart from the prohibitions on work and social welfare)?
- Was the weekly cash payment (adults €19.10 and children €9.50) known as the Direct Provision Allowance ultra vires the *Social Welfare Consolidation Act 2005* or otherwise unlawful?

First question

As to the first question, the court noted that there was a conflict of evidence before it. The applicants had made allegations about the harm caused by direct provision, which had been denied by the respondents. As there had been no cross-examination of witnesses, or any evidence from persons appropriately

qualified to give opinions as to whether harm had been suffered by the applicants, the court held that it was not possible for the applicants to sustain a claim that 'direct provision' was a form of inhuman and degrading treatment because of its negative effects, contrary to the ECHR or any provision of Irish law.

The court held, however, that particular aspects of the direct provision system breached the applicants' rights, particularly in relation to the right to respect for private and family life under Article 8 ECHR. This related to the accommodation centre's rules and, in particular, the daily registration requirement, the requirement to notify proposed absences, unannounced searches of bedrooms with or without permission, the rule against having guests in the bedroom, and an inadequate complaints procedure.

The court rejected the applicants' claim that the *Charter of Fundamental Rights* applied to their situation in the direct provision system. The manner in which Ireland provided material support to protection applicants was not a form of implementation of Union law and therefore, in accordance with Article 51 of the Charter, it did not govern Ireland's actions in this area.

Second question

The court rejected the applicants' argument that direct provision system was invalid for having no legislative basis. It held that the government was entitled to exercise executive powers independently of the legislature, and that that did not amount to usurping the law-making function of the legislature within the meaning of Article 15 of the Constitution.

Third question

The court rejected the applicants' argument that the Direct Provision Allowance was ultra vires the *Social Welfare Consolidation Act 2005* or otherwise unlawful. Whilst the *Social Welfare Consolidation Act 2005* provided that no allowance was payable under that Act to persons who had sought subsidiary protection, the State was not prohibited from making cash payments to protection applicants. Neither was it prohibited from using the systems used for social welfare payments to make such payments. Additionally, it held that the applicants had no standing to challenge such payments and that, to have it, they would have to show that the illegality caused injury to them.

It can therefore be seen that the main challenge to aspects of the legality of the direct provision system for accommodating applicants for asylum and subsidiary protection failed in this case. This was largely due to the fact that the applicants

had chosen to proceed by way of judicial review and that there was a conflict on the evidence regarding the adequacy of the accommodation and the effects on them which it found itself unable to resolve. Nonetheless, the judgment leaves open the possibility that, if appropriate evidence was given, particularly in the context of a plenary hearing, a person in the direct provision system for a sufficiently long period of time might be able to substantiate a claim that he suffered harm as a result. This will likely lead the State to putting in place a system for a more expeditious assessment of applications for international protection, in order to reduce the time spent by applicants in the system. A working group has been set up to examine the system, chaired by a retired High Court judge.

Insofar as the illegality of the accommodation centre's rules is concerned, those rules will now have to be amended pending any appeal.

A.M. v. Refugee Appeals Tribunal [2014] IEHC 388

The applicants were brother and sister. They were born in Kazakhstan in the early 1990s and were ethnic Russian and Orthodox Christians. They left for Israel in 2006 with their parents, and became Israeli citizens, being entitled to do so because at least one of their grandparents was Jewish. They remained there for one year and two months before leaving with their parents and making their way to the State, where they claimed asylum. They claimed that they were full conscientious objectors and said that they feared being forced to participate in compulsory military service in Israel once they reached the age of 18 years.

The Refugee Applications Commissioner rejected the claims and they appealed to the Refugee Appeals Tribunal, which affirmed the recommendation. It found that there was a right to apply for an exemption from military service in Israel from the Minister of Defence, and that the applicants were obliged to exhaust domestic remedies in that regard before claiming asylum.

Leave was obtained from the High Court to challenge the Tribunal's decision on three grounds, the third of which concerned the female applicant only. The grounds were as follows:-

- (i) The Tribunal erred in finding, in relation to mandatory military service that there was a right to genuine absolute objection in Israel.
- (ii) The Tribunal acted unreasonably in finding that the applicant should have exhausted domestic legal remedies, where country of origin information showed that availing of them might involve the possibility of imprisonment and prolonged legal challenge over the course of several years.

- (iii) The Tribunal erred in holding that Israeli law granted a special exemption from military service for female, as opposed to male, conscientious objectors, as the law in question had been struck down by the Israeli Supreme Court.

The court at the post-leave stage upheld the Tribunal's decision.

In respect of the first ground, it noted that it was clear from the materials before the Tribunal, that the Israeli Minister of Defence had discretion to exempt a person claiming 'full' conscientious objection from service in the Israeli Defence Forces, though there was no absolute right to exemption. It therefore held that the Tribunal did not err in stating that there was a 'right to genuine absolute objection' in Israel.

The court rejected an alternative argument by the Tribunal in relation to the first ground that there was no consensus in refugee law that full conscientious objectors were persons entitled to refugee status. It held that Section 2 of the *Refugee Act 1996* was to be interpreted in accordance with the right to freedom of conscience under Article 40.3 of the Constitution and required that international protection should be accorded to a full conscientious objector who has a well-founded fear of persecution on that basis. It considered that case law of the European Court of Human Rights supported that conclusion.

Turning to the second ground, the court pointed out that there was no evidence before the Tribunal to suggest that decisions of the Israeli committee established to consider claims for exemption were so compromised or flawed as to be inherently unfair or biased. It did not necessarily follow that a refusal of an exemption or a subsequent prosecution and short term of imprisonment would, in itself, amount to persecution within the meaning of Section 2 of the Act of 1996, if matters were not taken any further, although the repeated prosecution of a person who refused on a number of occasions to present for military service when directed might be regarded as so oppressive as to reach the level of persecution, if it were established that the accused was a full conscientious objector who was refused an exemption and/or alternative civic service by the prosecuting state. The applicants' claims for refugee status were premature. Accordingly, the second ground was not made out.

Finally, the court held that the third ground had not been substantiated either, as the female applicant's basis for an exemption from military service fell, under current Israeli law, to be dealt with under a provision which applied to males and females alike.

The court accordingly refused the reliefs sought by the applicants and upheld the Tribunal's decision.

As a result of this decision, protection decision-makers in Ireland must interpret Section 2 of the *Refugee Act 1996* in accordance with the right to freedom of conscience under Article 40.3 of the Constitution and, in an appropriate case, grant protection to a full conscientious objector who has a well-founded fear of persecution on that basis.

J.M.O. v. Refugee Applications Commissioner [2014] IEHC 467

The applicant was a Russian national, who claimed to be of Chechen ethnicity. He applied for asylum in the State on that account and gave a history which was untrue in that he failed to disclose he had applied for asylum in Slovakia. This was brought to his attention and he made representations as to why, notwithstanding the entitlement of the Irish authorities to ask their Slovak counterparts to take him back under the Dublin II Regulation, his application should be dealt with in the State. His representations were considered by the Refugee Applications Commissioner. The Slovak authorities agreed to take him back and the Minister then decided to make a transfer order against him. He issued judicial review proceedings to quash the respondents' decisions on a number of grounds.

He claimed that the Slovakian authorities did not grant asylum to persons in his position and that he was in danger of chain *refoulement* to Russia. He also claimed that there was a real risk to his life and/or health if he was transferred to Slovakia. He contended further that he was ill and dependent on a relative, and that Article 15(2) of the Regulation was thereby applicable.

The court pointed out that the Commissioner had addressed the complaint made by the applicant concerning the low success rate of applicants for asylum from Russia in Slovakia and did not refuse to consider the evidence produced on that matter. The Commissioner was satisfied that local remedies were available before the Slovakian courts and the European Court of Human Rights in respect of any violations of the Convention or breaches of European Union law. It noted that the Commissioner had also ascertained that no question regarding Slovak practices or procedures had been circulated by the European Commission to other Member States or from the UNHCR. The court held that there was little or no evidence to support the proposition that the Slovak authorities had failed fundamentally to apply European law in respect of asylum applications or discriminated against Chechens and/or Russians making such applications. The

evidence available fell well short of that which might give rise to the exercise of a derogation under Article 3(2) of the Regulation.

The court held that the same care was taken by the Commissioner in his consideration of the issue of *non-refoulement*, and that he had satisfied himself, having consulted the same sources, that no instance of unlawful *refoulement* had been reported from Slovakia. The court held that there was no evidence to suggest that the Slovak republic would not abide by the obligations of the Geneva Convention as applied under European Union law, or in respect of any of its other international obligations.

The court also pointed out that, in his assessment, the Commissioner had referred to relevant caselaw of the European Court of Human Rights, which informed the assessment made by the respondents of the alleged risk faced by the applicant to his rights under Article 3 ECHR if returned to Russia by the Slovakian authorities, and the adequacy of the assessment of his claim for asylum and the alleged threat of chain *refoulement*. The principles applied in the assessment were, it held, compliant with those set out in relevant caselaw of the European Court. The court held that the evidence adduced by the applicant in support of his claims was far less cogent and detailed than that submitted by an applicant in one of the European Court's cases open to it and in which, it noted, a breach of Article 3 ECHR had not been made out.

It rejected the applicant's argument that systemic deficiencies existed in the asylum system in Slovakia. The presumption was that the Slovakian authorities would apply European Union law and the provisions of the ECHR and the Commissioner found that they had not been rebutted.

The court noted that caselaw of the Court of Justice of the European Union showed that the provisions of EU law precluded the application of a conclusive presumption that the Member State to which an applicant might be returned observed the fundamental rights of the European Union (*N.S. v. Secretary of State for the Home Department* (C-411/10) and *M.E. and Others v. Refugee Applications Commissioner and Minister for Justice* (C-493/10) (Grand Chamber, 21 December, 2011)). However, it was to be presumed that the treatment of asylum seekers in all Member States complied with the requirements of the Charter, the Geneva Convention and the ECHR, which presumption was rebuttable. Not every infringement of the various Directives precluded the transfer of an applicant. The court concluded that the applicant had failed to rebut the presumption.

The court noted that applicant claims that he was suffering from a serious illness and was dependent on the assistance of his nephew who was resident in Ireland. He submitted that the respondents failed to consider adequately or at all the provisions of Article 15 of the Dublin II Regulation, he said, allowed them to deal with his application for asylum by reference to the presence of a family member in the State.

The court held, however, that the applicant did not qualify as a family member of his nephew, nor was he dependent on his assistance within the meaning of the Article 15(2). It noted that the Commissioner had also considered the application of the ECHR and was satisfied that the provisions of Article 15 of the Dublin II Regulation were not at variance with the provisions of Article 8 thereof. The court held that the Commissioner's consideration of the application of Article 8 ECHR was correct in the absence of evidence of dependency and the existence of family ties in the country of origin.

The court accordingly concluded that the applicant had not established that the decision to return him to Slovakia was flawed on the grounds advanced. It therefore dismissed his proceedings and upheld the respondents' decisions.

The decision of the court in this case provides important guidance for the Irish authorities charged with deciding whether or not a person who has made an application for asylum in Ireland should be transferred to another Member State under the Dublin Regulation. The decision, which took account of relevant EU and ECHR law, indicates that cogent evidence will be required to rebut the presumption that the treatment of asylum seekers in the Member State to which the person is proposed to be transferred will not comply with the requirements of the *Charter of Fundamental Rights*, the Geneva Convention and the ECHR.

Hussein and Another v. Minister for Justice and Equality [2014] IEHC 130

The appellant was a Sudanese national who had been granted a declaration of refugee status in the State by the Minister for Justice. It subsequently came to light that his application contained false information and the Minister revoked his refugee status. He appealed that decision to the High Court, which upheld the decision.

The court held where a person is appealing a decision of the Minister for Justice to revoke his or her declaration of refugee status, such an appeal can only be successful if the High Court is persuaded that the Minister incorrectly decided to revoke the declaration. The burden is on the applicant to demonstrate that the Minister's decision was incorrect. The High Court is entitled to consider whether

the Minister's decision to revoke was correct, having regard not only to the material before the Minister when making it, but also to the evidence adduced by the appellant orally and on affidavit in the appeal. The High Court must seek to identify false and misleading information and, should such be found, to enquire as to the effect of that on the appellant's application for refugee status. In order for it to dismiss the appeal, it must be satisfied that the false or misleading information would have produced a negative decision on the application for refugee status.

The decision of the High Court is important in that it reiterates that the appeal against revocation of refugee status is one in which the court can have regard to information that was not before the Minister at the time refugee status was granted or revoked. This is significant in the light of increased cooperation between Ireland and other Member States with a view to detecting fraud in the asylum process, and should enable the revocation of declarations of refugee status which have been granted on the basis of false and misleading information.

E.O.I. v. Refugee Appeals Tribunal [2014] IEHC 107

The applicant, a Nigerian national, arrived in the State in 2007 and claimed asylum. His application was based on membership of a particular social group, arising out of his membership of the so-called Niger Delta Volunteer Force ('NDVF'). He claimed to have carried out kidnappings on behalf of the group, as well as other crimes. He said that he fell foul of the NDVF when he decided to leave and feared being targeted by it if returned.

The Refugee Appeals Tribunal rejected his application. It was not satisfied that he was a political activist or that his crimes were political in nature. It held that he was fleeing prosecution, not persecution, at the hands of the Nigerian authorities. The applicant challenged the Tribunal's decision by way of judicial review.

The court upheld the decision. It noted that kidnapping or false imprisonment was properly regarded as a criminal offence in Nigeria, and that there was no evidence to suggest that the punishment applicable to the offences committed by the applicant was excessive. It pointed out that it was well-established that not every person who committed an offence in the course of political struggle was entitled to the benefit of the claim that his offence was 'political' in nature. It upheld the Tribunal's conclusion that the crimes carried out by the applicant bore no relationship whatever to the political aim sought to be achieved by the NDVF, and that he was fleeing prosecution rather than persecution. Accordingly, it refused leave and upheld the Tribunal's decision.

The decision of the court provides important guidance for protection decision-makers in respect of how to deal with claims by applicants that they have committed so-called 'political' crimes in their country of origin. It shows that, in assessing whether or not such an applicant is fleeing prosecution or persecution, it is necessary to consider whether or not the criminal activity carried out by him bears any relationship to the political aim sought to be achieved by the activity.

R.S. (a minor) v. Refugee Appeals Tribunal [2014] IEHC 55

The non-Irish national applicant was a minor who had been born in Ireland. Her mother had previously unsuccessfully claimed asylum. She had claimed to be a Somali national. Her claim had been found to lack credibility, in particular because she had not persuaded the asylum authorities that she was, as she alleged, a Somali national of Bajuni ethnicity. Credibility was also rejected because it was discovered that, contrary to what the mother had claimed in her asylum application, she had obtained a visa on a Tanzanian Passport in Dar es Salaam, Tanzania to enter and study in the United Kingdom.

The Refugee Applications Commissioner recommended that the applicant not be declared a refugee, and she appealed unsuccessfully to the Refugee Appeals Tribunal, whose decision she challenged by way of judicial review.

The High Court refused leave to challenge the Tribunal's decision. It noted the primary basis upon which the decision was challenged, namely that the Tribunal had failed to determine the applicant's nationality. The court held that, whilst it was imperative that a finding of nationality be made, because otherwise it would be impossible to declare a person a refugee, it did not follow that in a case where an asserted claim as to nationality was rejected, the Tribunal or decision-maker then had to identify the nationality of the claimant. It found that such a finding would serve no purpose in circumstances where an asserted claim as to nationality had been rejected. In those circumstances, an applicant's credibility as to the very core of a claim would have been rejected and no further analysis of any aspect of the claim would be required.

The decision of the court assists with regard to the manner in which protection applications are determined by the asylum authorities. A failure by an applicant to substantiate his or her claimed nationality is an important aspect of a decision by the authorities to reject the claim. The court's decision confirms that, if they do that, it is not incumbent upon them to identify another country of nationality in respect of the applicant.

A.M. (a minor) v. Refugee Appeals Tribunal [2014] IEHC 501

The applicant was a minor who was born in the State in 2012. Her mother was from Sierra Leone and her father was from Rwanda. Both parents were asylum seekers in the State. Her mother applied for asylum on her behalf and said that she would fear FGM in Sierra Leone at the hands of her uncle or wider family. Her mother claimed to be circumcised. Country of origin information showed that around 90 per cent of the female population of Sierra Leone had undergone FGM. She also contended that she would be persecuted if she refused to undergo it.

The Refugee Applications Commissioner made a negative recommendation on her application for asylum. The applicant appealed to the Refugee Appeals Tribunal, which affirmed the recommendation. It held that, as the applicant's mother was not in favour of FGM, there was no reason to believe that the applicant would be subject to it. The applicant challenged the decision of the Tribunal by way of judicial review.

The court upheld the Tribunal's decision. It held that, whilst country of origin information showed that FGM was extremely prevalent in Sierra Leone, this was because mothers wanted the procedure to be carried out on their daughters. It was not established that this would be carried out against the wishes of the parents. Where, as in the instant case, the mother was against the practice, it held that the child would not be at risk of FGM.

The court's decision shows that a protection decision-maker will be entitled to conclude that a female applicant will not be at risk of FGM if country of origin information indicates that it is open to her parent(s) to refuse to subject her to the procedure. This is significant because, in many countries where FGM is carried out, it is done with the consent of a child's parents. Therefore, if a parent is opposed to the procedure, it tends to show that any fear of it being carried out would not be well-founded for the purpose of making out a claim for refugee status.

A.P. (Albania) v. Refugee Appeals Tribunal [2014] IEHC 493

The applicant was an Albanian who claimed asylum in the State. He said that in March, 2007, his father killed a young boy in a road traffic accident in Albania. This gave rise to a blood feud between the boy's family and the applicant's family. The applicant feared that the boy's family would try to kill him in revenge for the death of the boy. The Refugee Applications Commissioner made a negative recommendation on his application for asylum. The applicant appealed to the Refugee Appeals Tribunal, which affirmed the recommendation.

In its decision, the Tribunal made an adverse credibility finding because the applicant did not know the name of the boy's family. The applicant contended that this arose out of a mistake caused by unsatisfactory interpretation at the hearing, as the interpreter spoke a different dialect of Albanian. He argued that, when he pointed out the problem, he should have been granted an adjournment of the hearing to enable a competent interpreter to be provided.

The court quashed the decision. It held that the Tribunal had erred in not granting the adjournment so as to obtain the services of an interpreter who spoke the same dialect of Albanian as the applicant which, it held, was a fundamental element of fair procedures in order to enable him to understand what was going on and to make himself properly understood.

The decision shows that protection decision-makers must afford a high standard of interpretation during their procedures to applicants who are unable to communicate properly or at all in English. It emphasises that a fundamental element of fair procedures is that such persons be provided with a competent interpreter at any hearing in order to enable them to follow proceedings and to make themselves properly understood. Where this is not done, a protection decision is likely to be set aside as having been made in breach of fair procedures, particularly where an interpreter's inability to convey the applicant's evidence properly has led to a material mistake of fact by the protection decision-maker. Where genuine interpretation difficulties arise, the decision shows that a protection decision-maker should consider granting an adjournment to enable the services of a suitable interpreter to be obtained.

L.R.C. v. Refugee Appeals Tribunal [2014] IEHC 500

The applicant and her husband were Chinese nationals. They claimed asylum in the State and argued that they were at risk of persecution in China because they infringed the country's one child policy. She claimed that her husband would be forcibly sterilised, and that their children would be adversely affected.

The Refugee Applications Commissioner made negative recommendations on their application for asylum. They appealed unsuccessfully to the Refugee Appeals Tribunal. They then issued proceedings to quash the Tribunal's decision.

The High Court (Barr J.) quashed the Tribunal's decision. It held that it was arguable that the applicant and her husband constituted a particular social group within the meaning of the Geneva Convention and Section 2 of the *Refugee Act*

1996, and that they would be persecuted as a result. It considered that their shared characteristic was that they were parents of more than one child born in China without official permission, which characteristic could not be changed by them. On foot of that, they arguably faced persecution in the form of forced sterilisation, large fines, loss of employment, and discriminatory treatment in relation to such matters as medical and educational benefits.

The decision provides important guidance to protection decision-makers on the issue of whether parents who claim to have infringed China's one child policy can be said to constitute a 'particular social group' capable of being persecuted in China within the meaning of Section 2 of the *Refugee Act 1996*.

The Tribunal successfully applied for a certificate of leave to appeal against the decision of the High Court: see the decision of the High Court dated 22 January, 2015.

H.O. v. Refugee Appeals Tribunal [2014] IEHC 494

The applicant was a national of Mauritius. He sought asylum in the State and claimed to fear of persecution there from Islamic terrorists. He said that he had been a member of the Hezbollah party in Mauritius and worked as a driver for its leader. He was also a member of its armed wing. He participated in the murder of three junior activists of the opposition Labour Party in 1996. In 2000, he confessed to police, and was granted a form of witness protection, along with his family, in return for testifying against his former colleagues at their trials. This entailed their living in a secure compound. He claimed that, over time, his protection was withdrawn. He eventually left Mauritius and, in his asylum application, argued that he was a member of a particular social group, namely persons who were granted state protection in exchange for testifying in criminal trials against former associates and/or accomplices, and whose state protection was subsequently withdrawn.

His application was refused by the Refugee Applications Commissioner and this was affirmed by the Refugee Appeals Tribunal on the basis of lack of credibility and availability of state protection. In addition, the Tribunal found that he was excluded from refugee status on the basis of his participation in the murders of the three opposition activists, pursuant to Section 2(c)(ii) of the *Refugee Act 1996*, which provided for the exclusion of a person from the definition of a refugee where there were serious grounds for considering that he or she had committed a serious non-political crime outside the State prior to his or her arrival in the State.

The applicant sought to set aside the decision of the Tribunal by way of judicial review, challenging all three findings made by it.

The court upheld the findings on credibility and state protection. On the issue of exclusion, it noted that the applicant argued that the exclusion provided for in Section 2(c)(ii) of the *Refugee Act 1996* should not have been invoked because he had served a sentence of imprisonment in Mauritius in respect of some of the charges brought against him and had received immunity in respect of the remainder of them. He contended that to invoke the exclusion provision would amount a breach of the principle of penal law that a person who had been punished for an offence should not be punished twice. He also contended that excluding him from refugee status was disproportionate.

The court noted that the applicant did not contend that his crimes were political in nature. Rather, he argued that they were not of sufficient seriousness to amount to a 'serious non-political offence' within the meaning of Section 2(c)(ii) of the Act of 1996. The court held, however, that the applicant had committed serious crimes and that the Tribunal had correctly applied Section 2(c)(ii) of the Act of 1996 to his case. It held that the Tribunal was entitled to have regard to the fact that he had admitted participating in serious criminal activity, including the murder of three people, robbery, and arson. The fact that he received a partial immunity from prosecution and only served five years of an eight year sentence of imprisonment did not mean that the Tribunal was precluded from invoking the exclusion provisions against him.

Case law concerning challenges to exclusion from refugee status is rare in Ireland and this decision provides important guidance for protection decision-makers who consider that such a finding is warranted. It shows that an applicant who has committed serious non-political crimes in his country of origin may be excluded from refugee status pursuant to Section 2(c)(ii) of the *Refugee Act 1996*, notwithstanding that he has served a sentence of imprisonment for his crimes in his country of origin. In deciding to apply the exclusion clause, a protection decision-maker is not required to carry out a separate proportionality analysis over and above its assessment of the seriousness of the crimes committed by the applicant, his or her personal responsibility for them, and all the circumstances surrounding them.

N.M. v. Minister for Justice [2014] IEHC 638

The applicant applied to the Minister for Justice for permission to re-enter the asylum system under Section 17(7) of the *Refugee Act 1996*. Her application was refused and a review was available to her, which would be carried out by a more

senior official in the Minister's department. The applicant instituted proceedings claiming that the review available was not compatible with the right to an effective remedy under Article 39 of the Procedures Directive (Directive 2005/85/EC). The Minister conceded that point, but contended that the remedy of judicial review before the High Court constituted an effective remedy. The applicant disputed that, pointing to the limited jurisdiction of the court. She argued that the court could not reverse the decision under challenge or substitute its own findings of fact on the substantive issues. It could only annul it and remit it to the earlier decision-maker. It could not look at information that was not before the earlier decision-maker.

The High Court upheld the applicant's complaint. It held that neither the first instance decision-maker nor the reviewer was a 'court or tribunal' within the meaning of Article 39 of the Procedures Directive and as defined in the jurisprudence of the CJEU. In its view, the combination of remedies, even taken as a whole, did not at any stage provide for a remedy to a court or tribunal which was capable of reversing the first instance refusal.

Therefore, subject to any appeal and a decision on it, the judgment of the High Court suggests that a specific independent appellate body will have to be put in place to determine appeals against refusals by the Minister for Justice to refuse an applicant permission to re-enter the asylum system.

4.7 CASE LAW - SUBSIDIARY PROTECTION

C-604/12 H.N. v. Minister for Justice

The applicant purported to make a stand-alone application for subsidiary protection in Ireland in 2009. The Minister for Justice declined to determine it, on the basis that the applicant had not applied for and been refused a declaration of refugee status, which the Minister said was a condition precedent to his being eligible to apply for subsidiary protection. The applicant issued judicial review proceedings and lost in the High Court. On appeal to the Supreme Court, the issue between the parties was referred to the CJEU, which upheld the Minister's interpretation of the law, rejecting the applicant's contention that he was entitled to make a stand-alone application for subsidiary protection.

The CJEU emphasised that the Geneva Convention was recognised in the Qualification Directive (Directive 2004/83/EC) as the cornerstone of international protection, and the complementary and secondary nature of the subsidiary protection put in place by that Directive. In the light of this, it held that an application for subsidiary protection should not, in principle, be considered

before the competent authority has reached the conclusion that the person did not qualify for refugee status.

Accordingly, it held that the Qualification Directive did not preclude Irish national legislation which provided that the requirements for granting refugee status had to be considered before those relating to subsidiary protection.

The CJEU also held that the procedural rule which required the applicant to exhaust the refugee determination process before becoming entitled to have his subsidiary protection application considered, was not precluded by other rules of EU law. It agreed with the Minister that, in the absence of EU rules concerning the procedural requirements attaching to the examination of an application for subsidiary protection, the Member States remained competent, in accordance with the principle of procedural autonomy, to determine those requirements. It also held that the procedural rule at issue between the parties was not at odds with the right to good administration.

Finally, the CJEU held that it should be possible to submit an application for refugee status and an application for subsidiary protection at the same time.

In the light of this decision, the Office of the Refugee Applications Commissioner (hereafter 'ORAC') published a notice on its website entitled 'Important Notice regarding the making of applications for Subsidiary Protection by Applicants for Refugee Status', which stated that the *European Union (Subsidiary Protection) Regulations 2013* (S.I. No. 426 of 2013) were to be amended in the light of the CJEU's ruling on the reference. However, pending the coming into force of the amended Regulations, and with immediate effect, the following arrangements applied:-

- any person who **currently** had an application for refugee status pending might also make an application for subsidiary protection in ORAC; and
- any person who made a **new** application for refugee status might also make an application for subsidiary protection in ORAC.

The notice stated that such applications for subsidiary protection would be determined by ORAC in accordance with the provisions of the Regulations of 2013 and investigated, should the person's application for refugee status be refused by the Minister for Justice and Equality.

The *European Union (Subsidiary Protection)(Amendment) Regulations 2015*, which will give effect to these arrangements, came into effect on 20 April 2015.

The matter returned to the Supreme Court in order for the ruling of the CJEU to be applied, and in its judgment of 27 March, 2015, it dismissed the applicant's appeal against the decision of the High Court.

By virtue of the *European Union (Subsidiary Protection) Regulations 2013* (S.I. No. 426 of 2013), responsibility for the processing of applications for subsidiary protection was given to the Refugee Applications Commissioner. A number of judicial reviews were taken against the Minister and the Commissioner, challenging this and other elements of the Regulations during the year. In December, 2014 the High Court delivered judgment on the first of these cases, *B.A. & R.A. v. Minister for Justice and Equality and Another*.²⁶⁰

The applicants challenged the validity of the *European Union (Subsidiary Protection) Regulations 2013*, under which inter alia responsibility for determining applications for subsidiary protection were transferred from the Minister for Justice to the Refugee Applications Commissioner.

Firstly, they contended that the Regulations of 2014 were ultra vires the *European Communities Act 1972* because vesting the Commissioner with the power to take decisions in respect of subsidiary protection applications could not be achieved using secondary legislation in the form of a statutory instrument made under Section 3 of the 1972 Act, and would have to be done by way of primary legislation. Secondly, they claimed that the definition of 'torture' provided for in the Regulations of 2013 was an unlawful transposition of the definition contained in the Qualification Directive (2004/83/EC). The court held that secondary legislation could only be made in order to ensure the achievement by the State of a binding obligation placed upon it by a measure of EU law and could only be used to achieve implementation of an EU rule contained therein if the measure in question established adequate principles and policies governing the area.

Insofar as the first question was concerned, the court held that the binding obligation on the State resulting from the Qualification Directive was the identification of an agency, office or person empowered to receive and determine an application for international protection and to assess it in accordance with the rules set out in the Directive. That was the only choice the State had. Accordingly, there was nothing to prevent the transfer of the function

²⁶⁰ *B.A. & R.A. v. The Minister for Justice and Equality and the Refugee Applications Commissioner* [2014] IEHC 618. To date there has been no appeal to the Supreme Court nor to the Court of Appeal.

of receiving and determining subsidiary protection applications from the Minister to the Commissioner, and to do so by way of secondary legislation under Section 3(1) of the Act of 1972. In the alternative, it held that the transfer provided for in the Regulations of 2013 was an incidental, supplementary or consequential provision considered necessary by the Minister for the purpose of implementing the obligation in the Qualification Directive, and was compatible with Section 3(2) of the Act of 1972.

Secondly, the applicants contended that the definition of ‘torture’ contained in the Regulations of 2013 failed to transpose lawfully the provisions of the Qualification Directive. Under the Directive, torture at the hands of both state and non-state actors could form the basis of a claim for subsidiary protection, whereas under the Regulations of 2013, such a claim was restricted to cases where torture was feared from state agents only. In addition, they contended that the definition in the Regulations of 2013 expressly excluded any such act that arose solely from, or was inherent in or incidental to, lawful sanctions, whereas no such limitation was imposed by the Directive.

The High Court agreed, noting that the applicants claimed to fear torture from family members, and that the restrictive definition of the concept was therefore capable of affecting them. It was not appropriate to hold that a decision-maker should apply a teleological approach and give a broader definition to the concept. The court accordingly granted a declaration that the definition of torture in the Regulations of 2013 was invalid as being inconsistent with that contained in the Qualification Directive.

Accordingly, the court found that the transfer of the Minister’s function regarding the processing of subsidiary protection applications to the Commissioner by means of the regulations was valid. It also found that the definition of torture embodied in the regulations was invalid as being inconsistent with Article 15(c) of the Qualification Directive.²⁶¹

²⁶¹ Office of the Refugee Applications Commissioner (January 2015).

Chapter 5

Unaccompanied Minors and Other Vulnerable Groups

5.1 UNACCOMPANIED MINORS

TUSLA, the Child and Family Agency, was established in January 2014 under the *Child and Family Agency Act 2013* as an independent legal entity. Child and family services are now the sole focus of a single dedicated State agency, overseen by a single dedicated Government Department, the Department of Children and Youth Affairs. The Agency brings together key services relevant to children and families including child protection and welfare services previously operated by the Health Service Executive (HSE); the Family Support Agency; and the National Educational Welfare Board.²⁶² The Social Work Team for Separated Children Seeking Asylum (Dublin) now sits under TUSLA.

The policy of unaccompanied minors turning 18 being transferred from their current living arrangements to direct provision centres attracted media commentary during 2014, particularly in relation to the impact on those who had been awarded scholarships for further education and who may not be able to pursue their studies due the change in their living arrangements.²⁶³

5.1.1 Research

The Irish Refugee Council, the Social Work Team for Separated Children (TUSLA) and the Department of Applied Social Science of University College Dublin are joint lead partners in a Pilot Project on Unaccompanied Minors 2013 on the methodology behind arriving at a durable solution for a child, with funding from the European Commission Directorate-General Home Affairs, Asylum and Migration Fund.²⁶⁴ The final outputs will be published in 2015 and include eight national reports for the participating countries, one international comparative report highlighting good practice, as well as guidance and tools for service providers relating to the methodology of determining the durable solution.²⁶⁵ The

²⁶² Department of Children and Youth Affairs (30 January 2014). 'Child and Family Agency launched today'. *Press Release*.

²⁶³ *The Irish Times* (30 August 2014). 'Young Asylum Seekers ordered to move' Available at www.irishtimes.com.

²⁶⁴ Participating partners, in conjunction with the Separated Children in Europe Programme (SCEP) are: the Greek Council for Refugees; The Children's Society, United Kingdom; Hope for Children UNCRC Policy Centre, Cyprus; Defence for Children – ECPAT, the Netherlands; The People for Change Foundation, Malta; Service Droit de Jeunes, Belgium; Bundesfachverband Unbegleitete Minderjährige Flüchtlinge, Germany; and Human Rights League, Slovakia.

²⁶⁵ See www.irishrefugeecouncil.ie.

Social Work Team for Separated Children (TUSLA) is also a lead partner in the SUMMIT project ‘Safeguarding Unaccompanied Migrant Minors from going Missing by Identifying Best Practices and Training Actors on Interagency Cooperation’ funded by the European Commission. The project aims to identify best practices in the prevention and response to vulnerable UAMs going missing from reception centres, including guidance for interagency cooperation.

The Children’s Rights Alliance (CRA) *Report Card 2015* looks back on 2014 activity. It calls for an Immigration and Residence Bill, in addition to an International Protection Bill, to provide for full protection for migrant children in general, including children at risk of trafficking and undocumented children. The principles of the UN *Convention on the Rights of the Child* should apply to practices, and all legislation should pay ‘special attention’ to vulnerable groups, with particular reference to separated children, children of asylum seekers and children at risk of trafficking. The Report Card welcomes the recognition of migrant children as ‘a cohort in need of specific action and social inclusion supports in the *National Policy Framework for Children and Young People 2014-2020*.’ Ireland is urged to sign up to the recast Reception Conditions Directive which requires signatories to ‘ensure that the best interests of the child are a primary consideration in decision-making’ as well as care arrangements.²⁶⁶

Quinn et al. (2014) looked at the policies and practices in place for unaccompanied minors in Ireland. The study investigates: the availability of data on the group; the motivations and circumstances of unaccompanied minors seeking entry to Ireland; the policy and practices at play at the border and when claiming asylum; and the policies and practices in place on age assessment and guardianship. The authors of the study noted that significant improvements have been made to the model of care provided to unaccompanied minors in Ireland since the publication of the previous EMN Ireland report on this subject.²⁶⁷ Since 2010 there has been a transition from emergency hostel-based care, to a model of care-placements dispersed nationally, based on a principle of equity of treatment among children in care. Overall the declining numbers of unaccompanied minors presenting in recent years may also have impacted positively on service provision by easing pressure on resources. The decline in unaccompanied minors going missing from State care represents significant progress, although the issue remains a priority concern among those consulted as part of this research. The study identified a recent move to establish a stronger legal basis for having children in TUSLA²⁶⁸ care, especially for those in longer-term care placements. However Section 5 of the *Child Care Act 1991* is still used by

²⁶⁶ Children’s Rights Alliance (2015). *Report Card 2015*. Available at www.childrensrights.ie.

²⁶⁷ Joyce, C. and E. Quinn (2009). *Policies on Unaccompanied Minors in Ireland*. European Migration Network, Economic and Social Research Institute: Dublin.

²⁶⁸ Child and Family Agency. See www.tusla.ie.

social work teams consulted in Limerick and Cork to provide care to unaccompanied minors, albeit in the context of low numbers of referrals; the social work team for separated children seeking asylum (SWTSCSA) continues to use Section 4 as a short-term measure.²⁶⁹ The application of the Act may have implications for the model of care provided, in particular regarding legal guardianship and aftercare. This variability in care provision to unaccompanied minors indicates a need for national strategy and oversight. The particular vulnerabilities of the group may also mean that additional supports may be needed on, for example, follow up of family reunification.²⁷⁰

5.2 OTHER VULNERABLE GROUPS

5.2.1 Health

5.2.1.1 FGM Health Services

The first specialist service for the treatment of female genital mutilation (FGM) was announced by the HSE in May 2014.

5.2.1.2 Research

Mental Health Reform, in their May 2014 document, *Ethnic Minorities and Mental Health: A position paper*, make a number of recommendations developed in conjunction with their Ethnic Minorities and Mental Health Group. A number of overarching barriers are identified including an overall lack of information on ethnic minorities' mental health needs; service provision and experiences of services and supports; communication barriers; a lack of cultural competence within mental health and primary care services; the need for capacity in the area amongst community leaders; and the need to cross-cut issues and to address the social determinants of mental health for people from ethnic minority communities.

Recommendations include the development of a programme and plan by the HSE to develop cultural competence in primary and mental health care, including establishing cultural liaison officers. The addition of mental health awareness training requirements in direct provision contracts by the Department of Justice and Equality is also suggested, as is the inclusion of an ethnic identifier in data collected in mental health service utilisation and further research in the area.²⁷¹

²⁶⁹ If a child is expected to be in care for longer than two years, a care order is often sought from the District Court.

²⁷⁰ Quinn, E. et al. (2014). *Policies and Practices on Unaccompanied Minors in Ireland*. European Migration Network, Economic and Social Research Institute: Dublin.

²⁷¹ Mental Health Reform (2014). *Ethnic Minorities and Mental Health: A position paper*. Available at www.mentalhealthreform.ie.

A report on sexual violence experienced by asylum-seekers and refugees, *Asylum Seekers and refugees surviving on hold*, was published by Rape Crisis Network Ireland (RCNI) in October 2014.²⁷² The report concerned 61 individuals, 54 asylum-seekers and seven refugees who attended rape crisis centres in Ireland during 2012, having experienced 69 incidents of sexual violence in total. Over 90 per cent of these incidents involved rape; the majority of attacks had occurred in the victim's country of origin (usually in conflict situations), with the remainder being perpetrated in transit or in Ireland. Almost one-third were minors at the time the sexual violence took place, and two were under the age of 13. The majority of those presenting were African. More than half of the victims experienced sexual violence at the hands of multiple perpetrators, with one in ten incidents involving five or more perpetrators. Almost half of the victims of sexual violence were assaulted by security forces. The report commented that the direct provision system system creates 'particular difficulties for survivors of sexual violence' due to the sharing of mixed sex accommodation, the lack of privacy and 'further increases vulnerability to sexual violence'. It also includes references to incidences where 'a number of asylum seekers have reported being solicited for sex or offers of pimping'. Launching the report, former Supreme Court Judge Catherine McGuinness noted that 'in 46 per cent of cases the sexual violence had been suffered at the hands of security forces in the victim's country of origin, meaning they often did not trust authority'.²⁷³

5.2.2 Domestic Violence

During 2014, Women's Aid noted that one-third of new clients to the phone service in 2013 were immigrant women experiencing domestic violence. Women who do not meet the habitual residence condition may go to a refuge, however the refuge will not be entitled to any payment. The Women's Aid Telephone Interpretation Service ensures a caller can speak to someone in their native language within a minute. It operates seven days a week from 10am to 10pm on a confidential basis. All languages are covered in this service with Polish speakers being the largest language group in 2013. Other languages which accessed the service included EU languages such as Hungarian, Italian, Lithuanian, Portuguese, Romanian and Slovak. Among the non-EU languages were Amharic, Arabic, Bengali, Dari, Farsi, Georgian, Kurdish, Mandarin, Russian, Somali, Thai and Yoruba. Women's Aid noted that domestic violence is not culturally specific.²⁷⁴

²⁷² RCNI (October 2014). *Asylum Seekers and refugees surviving on hold*. Available at www.rcni.ie.

²⁷³ *The Irish Times* (29 October 2014). 'Direct Provision system poses risk of sexual violence – report'. Available at www.irishtimes.com.

²⁷⁴ *The Irish Times* (8 October 2014). 'Migrant women experience high level of domestic violence'. Available at www.irishtimes.com.

5.2.2.1 Case Law – Domestic Violence

Parhiar v. Minister for Justice and Equality [2014] IEHC 445 (14/10/14)

The applicant was a 24-year-old woman and a Pakistani national. In 2008, when she was 17, she entered into an arranged marriage with her cousin. At the time of the marriage, he had been living lawfully in the State for a number of years. After the marriage, which took place in Pakistan, he returned to Ireland and successfully applied for a long-stay visa to allow the applicant to join him. She entered the State in 2009 and was given a Stamp 3 permission to reside in the State as a dependant of her husband, which allowed her to reside here but not to work.

Upon arrival in the State, she secured a place at the Dundalk Institute of Technology to study for a Bachelor of Science degree in pharmaceutical sciences. This did not meet with her husband's approval and their marriage deteriorated, which resulted in her being thrown out of the family home. She moved in with an uncle living in Dundalk where she remained to the time of the proceedings. Her husband returned to Pakistan and her parents tried to force her to return to him. An immigration officer contacted her and told her she had to apply to the Minister for an independent immigration permission.

The applicant duly applied for a change of permission from Stamp 3 to Stamp 4 (which would allow her to work), but the Minister refused her application, stating that, following consideration of the individual circumstances of this case, her position did not warrant a change in immigration status. The letter went on to say that, as an exceptional measure, the Minister had decided to grant her permission to remain in the State on Stamp 2 conditions for one year subject to conditions. No reasons were given for the refusal.

Her solicitors sought a review of the decision. In support of this, they included a number of additional documents which included a personal statement from the applicant detailing her experiences of domestic violence at the hands of her husband, a corroborating joint statement of her uncle and aunt and a further letter from her general practitioner. Her doctor confirmed that the applicant had attended him a few times complaining of a lot of stress relating to the marriage, and had told him that she was mentally and physically abused by her husband, and complained of stress-related insomnia and tension related headaches. Her solicitors explained that she did not report the incidents of domestic violence to the Gardaí owing to her lack of familiarity with the available supports and remedies for dealing with this issue and to the cultural and familial constraints which applied to her at the time.

The Minister refused the review application, saying simply that she did not meet the criteria under the INIS *Victims of Domestic Violence Immigration Guidelines*. It was said that under Stamp 2 permission, she could finish her studies and then apply for a work permit if she wished to take up employment in the State.

The applicant complained that the Minister's decision was unlawful on a number of grounds but primarily because that it failed to give any, or any adequate, reasons. She also contended that the Minister's decision was in disregard of his own guidelines and other relevant matters.

The High Court (Noonan J.) referred to the Guidelines, which he held gave rise to a reasonable expectation on the part of persons to whom they related that the Minister would exercise his discretion in such matters in a manner broadly consistent with them. It held *en passant* that the Minister was not entitled to disregard them.

The court observed that, at every stage of the application procedure, the applicant had complied with the Minister's requirements and he had never suggested otherwise to her. It noted that, at the hearing, the Minister had relied upon the lack of any report from the Gardaí capable of corroborating her claim to have suffered domestic violence at her husband's hands. If the Minister had entertained such a concern, the court noted that he had not averred to it on affidavit. It observed that the applicant, on the other hand, had done everything during her interactions with the Minister to comply with the Guidelines. She furnished comprehensive documents under three of the six categories identified in the Guidelines as requirements which needed to be addressed, and in respect of the remainder, all of which related to the intervention of State agencies, gave clear and readily understandable reasons why such documents did not exist.

The court held that no reasonable person reading the documents and the Minister's letter refusing the review application would know why the application had failed. Simply to say that the applicant failed to meet the criteria under the Guidelines could not be construed as enabling the applicant or the court to understand the rationale behind the decision. It needed to be elaborated on and the Minister had failed to do that. The reason given was therefore inadequate.

The court accordingly quashed the Minister's decision.

5.2.3 Migrant Family Support Service

A new free service, the Migrant Family Support Service, was established to help migrant parents who have had their children taken into State care or are in need of child support interventions. It was officially launched in June 2014, and began providing services in January that year. It is a national initiative from the New Communities Partnership (NCP).²⁷⁵ The Director of the Service commented that there is a 'general lack of understanding and stigma surrounding migrant families going through child protection interventions'. The Service is run by a team of trained, multi-lingual and multi-faith staff and volunteers. As part of its functions, the Service helps front-line professionals to deliver child protection interventions to families in a culturally sensitive and 'mutually co-operative manner'. Since January 2014, 90 per cent of referrals had been from social workers.²⁷⁶

²⁷⁵ This is a network of more than 175 ethnic minority-led organisations in Ireland which aims to support migrant families and foster parents.

²⁷⁶ *The Irish Times* (11 June 2014). 'Support service to help migrants care for children launched'. Available at www.irishtimes.com

Chapter 6

Actions Addressing Trafficking in Human Beings

6.1 STATISTICS REGARDING TRAFFICKING

During 2014, a total of 46 alleged victims of human trafficking were reported or detected.²⁷⁷

Preliminary Trafficking Data Ireland 2014	
Gender	31 were female and 15 were male.
Age	33 were adults and 13 were children.
Type of Exploitation	32 were victims of sexual exploitation, seven were victims of labour exploitation and seven were victims of other forms of exploitation.

Source: Anti-Human Trafficking Unit, Department of Justice and Equality.

Note: Provisional.

Alleged victims from Romania, Brazil and Ireland were the largest discernible groups.²⁷⁸

Regarding traffickers arrested as suspects and convicted, there were nine convictions and 14 criminal proceedings initiated during the year.²⁷⁹

At the end of 2014, the Immigrant Council of Ireland (ICI) highlighted that they had represented 19 victims of trafficking for sexual exploitation during the year; more than half were from Nigeria. Nine cases had secured protection and supports, with the others pending.

In 2014 the Migrant Rights Centre Ireland (MRCI) was included in the Criminal Legal Aid Scheme as a national assessment centre for trafficking for forced labour. The MRCI assessed nine cases for indicators of trafficking in human beings for the purpose of criminal activities during the year; in six of those cases they found indicators and recommended an investigation. MRCI assessed and assisted 14 new suspected victims of trafficking for labour exploitation during the year.

²⁷⁷ Anti-Human Trafficking Unit, Department of Justice and Equality, June 2015. *Human Trafficking in 2013 and 2014 – a cross-border analysis*. Available at www.blueblindfold.gov.ie

²⁷⁸ Anti-Human Trafficking Unit, Department of Justice and Equality, August 2015.

²⁷⁹ Ibid.

MRCI continues to assist 32 victims who were referred to GNIB for investigation since 2008. Cases are at different stages some awaiting identification, others in the process of investigation, compensation or application for permanent residency.²⁸⁰

6.2 NATIONAL ACTIVITIES

Work continued during 2014 to develop a follow up to the *National Action Plan to Prevent and Combat Trafficking in Human Beings in Ireland 2009-2012*.²⁸¹

Ireland allocated funding to two NGOs for the purpose of assistance to victims of human trafficking during the year. A total of €172,000 was allocated to Ruhama, with €4,000 allocated to the Migrants Rights Centre of Ireland (MRCI); similar figures to 2013.

The Anti-Human Trafficking Unit of the Department of Justice and Ruhama were also successful in obtaining EU funding under a PROGRESS Grant Scheme related to Violence Against Women. The REACH project²⁸² is a two-year project aimed at activities that promote zero tolerance of human trafficking as a form of violence against women.²⁸³

In 2014 the Office of Refugee Applications Commissioner (ORAC) revised its internal guidance and training paper for ORAC staff on human trafficking and related refugee status determination and subsidiary protection issues. It has been drafted in the context of ORAC's responsibilities for determining applications for refugee status (under the *Refugee Act 1996*) and for subsidiary protection (under the *European Union (Subsidiary Protection) Regulations 2013*).²⁸⁴

6.3 UNODC GLOBAL TRAFFICKING IN PERSONS REPORT 2014

The UNODC *Global Trafficking in Persons Report 2014* found that 159 cases of suspected trafficking were investigated between 2010 and 2012, with 15 convictions. A total of 183 victims were detected by police during this time, mainly adult women (108 persons). The largest single nationality group was Nigerian nationals (53 persons), followed by Irish nationals (31 persons). The

²⁸⁰ Migrant Rights Centre Ireland, April 2015.

²⁸¹ Anti-Human Trafficking Unit, Department of Justice and Equality, January 2015.

²⁸² The REACH project is an 'all island of Ireland' initiative whose purpose is to address trafficking of women and girls through a multi-agency partnership which includes State actors and civil society organisations. It is co-funded by the European Commission under the PROGRESS Action Grants on Violence Against Women. Further information available <http://www.reachproject.eu>

²⁸³ Ibid.

²⁸⁴ Office of the Refugee Applications Commissioner, January 2015.

majority (132) of cases concerned sexual exploitation, followed by forced labour (38 cases).²⁸⁵ Commenting on the report, the ICI remarked that it ‘is clear our laws are not working... a conviction rate of less than one-in-ten’ and called for a number of measures including sex buyer laws, the introduction of an independent Rapporteur on trafficking to report to the Oireachtas (parliament) and the immediate publication of a National Action Plan on Human Trafficking to include ‘greater support and protection’ for victims.²⁸⁶

The Anti-Human Trafficking Unit (AHTU) has commented that the low conviction rates in regard to human trafficking is an international phenomenon and not specific to Ireland. The 2014 UNODC Report states

In spite of the legislative progress mentioned above, there are still very few convictions for trafficking in persons. Only four in ten countries reported having ten or more yearly convictions, with nearly 15 per cent having no convictions at all.

The AHTU adds that the Global Slavery Index ranks Ireland in the top ten countries in terms of the State’s response to human trafficking particularly in regard to its criminal justice response, and that the

*State is currently reviewing its policies in the context of the Second National Action Plan in addition to examining a range of measures to tackle the issue of demand for trafficked persons.*²⁸⁷

6.4 TRAFFICKING IN PERSONS REPORT 2014

The *US State Department Trafficking in Persons Report (TIP) 2014* saw Ireland remain a Tier 1 country that fully complies with the minimum standards for the elimination of trafficking. The 2014 TIP report notes that Ireland is a ‘a destination, source, and transit country for women, men, and children subjected to sex trafficking and forced labor’, with victims identified from Nigeria, Cameroon, the Philippines, Poland, Brazil, Pakistan, South Africa, Lithuania, the Democratic Republic of the Congo, Zimbabwe, Kuwait, and other countries in Asia, and Eastern Europe. The 2014 report notes that some domestic workers ‘primarily women, employed by foreign diplomats on assignment in Ireland work under poor conditions and are at risk of labor trafficking.’

The report noted that during the reporting period additional support services to victims had been provided, with amended legislation introduced. Decreased

²⁸⁵ UNODC (2014). *Global Report on Trafficking in Persons 2014*. Available at www.unodc.org.

²⁸⁶ Immigrant Council of Ireland (2014). ‘Global Report confirms women and girls far more likely to be trafficked’. *Press Release*. Available at www.immigrantcouncil.ie.

²⁸⁷ Anti-Human Trafficking Unit, Department of Justice and Equality, April 2015.

funding for NGOs providing services for victims was noted, as well as the prosecution of a ‘high number of non-trafficking crimes, including child molestation cases, as trafficking cases’ and prosecution (and imprisonment) of potential victims of forced labour in cannabis production. Of note, low take up of free legal aid (provided to all potential trafficking victims) was highlighted, with only eight persons in receipt. The report notes that the legal support provided to victims was

inadequate; as early legal representation is not available, the legal advice did not suffice to permit victims to navigate the immigration system, and victims lacked representation throughout the criminal investigation and prosecution process.

Recommendations for Ireland included to consider ‘policy or legal changes’ to ensure all potential victims are afforded a reflection period before deciding whether to assist law enforcement and to implement the 2008 legislation to ensure that offenders are ‘held accountable through convictions and dissuasive sentences’. Further suggestions include to ensure that investigations move forward more efficiently to prosecution. Improved training of officials such as labour inspectors regarding identifying victims of forced labour is recommended, as is the implementation of a ‘government-wide victim services database and case management system to improve the tracking of delivery of services across multiple government agencies’. An enhanced role for NGOs in the identification process for victims is also recommended.²⁸⁸

6.5 TRAINING

A conference for 120 senior Gardaí in October 2014 took place on the management of human trafficking at which it was noted that provisional 2013 figures indicated that 44 trafficking victims were reported or detected by the police – mainly women and girls for sexual exploitation.²⁸⁹ In a speech to mark the event, the Minister for Justice and Equality remarked that efforts need to be focused on ‘intelligence, international cooperation and ‘following the money’ alongside reducing overall demand for services’. The Minister also announced that further measures to reduce the demand for human trafficking for adults and children were also being explored. At the time of the conference, almost 4,000 Gardaí had been trained in indicators of human trafficking in Ireland.²⁹⁰

²⁸⁸ US State Department *Trafficking in Persons Report (TIP) 2014*. Available at www.state.gov.

²⁸⁹ Department of Justice and Equality (13 October 2014). ‘Address by Minister for Justice and Equality, Frances Fitzgerald T.D. – Garda Conference on Tackling Trafficking in Human Beings.’ *Press Release*. Available at www.justice.ie.

²⁹⁰ *Ibid.*

IOM Ireland continued to co-ordinate and deliver training for government officials and the Irish police on counter-trafficking issues during 2014, in addition to the publication of research materials on the subject.²⁹¹

6.6 CALLS FOR ENHANCED SUPPORTS FOR VICTIMS OF TRAFFICKING

During 2014, MRCI called for protections for victims of trafficking to be ‘put on a legal footing in Ireland’ as part of the transposition of the Directive on Supporting Victims of Crime.²⁹² At the time, the NGO noted that during the year they had found evidence of people who were trafficked to Ireland to work in cannabis growhouses ‘are potentially being imprisoned for a crime they were forced to commit’.²⁹³

The accommodation of victims of trafficking in direct provision centres continued to attract commentary during 2014. Joyce and Quinn (2014) outline the debates in the area, notably calls by the first Council of Europe GRETA report on Ireland in September 2013 for Irish authorities to ‘review the policy of accommodating suspected victims of trafficking in accommodation centres for asylum seekers and to consider setting up specialised shelters for victims of trafficking, with the involvement of NGOs as support providers’.²⁹⁴

In a piece for the *Evening Echo* in July 2014, the CEO of the ICI remarked that direct provision accommodation was ‘unacceptable’ for victims, given the mixed sex nature and ‘where they can be reached and intimidated by the very criminals who exploited them’.²⁹⁵

Following ongoing calls to provide full access to legal supports, a 24-month project funded by the European Commission was launched later in the year to provide early legal support to victims. The Early Legal Intervention (ELI) project will run in Ireland, Croatia and Bulgaria. Lead by the ICI in Ireland, during a 12-month pilot, the ICI will work with other frontline agencies to explore the

²⁹¹ IOM Ireland, April 2015.

²⁹² *Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*. See MRCI (17 October 2014). ‘On EU Anti-Trafficking Day, MRCI calls for a victim-centred approach to human trafficking’. Available at www.mrci.ie.

²⁹³ *Ibid.*

²⁹⁴ Joyce and Quinn (2014) further note that: ‘RIA has stated that the direct provision system allows for levels of security and monitoring of residents that would not necessarily be possible in alternative accommodation solutions; the centres are staffed on a 24/7 basis. In making placements of suspected victims of trafficking RIA consults with the HSE and GNIB, to ensure the best fit for the suspected victims.’

²⁹⁵ Denise Charlton, Immigrant Council of Ireland (30 July 2014). ‘We must act to end misery of trafficked women’. *Evening Echo*.

procedures needed to ensure that ‘victims are not left in a position of vulnerability without proper legal support’.²⁹⁶

The AHTU has remarked that the issue of the provision of services to victims of human trafficking is being considered in the context of the second *National Action Plan*.²⁹⁷

6.7 RESEARCH

MRCI research on forced labour, *Trafficking for Forced Labour in Cannabis Production: The Case of Ireland*, was conducted as part of a European study to explore responses against trafficking for forced criminal activity led by Anti-Slavery International (ASI)-RACE in Europe. The Irish study looked at the scope of trafficking for cannabis production, specifically incidences involving Vietnamese and Chinese nationals.²⁹⁸ It found that potential victims are ‘being prosecuted, convicted and imprisoned for crimes they may have been forced to commit, while their traffickers enjoy impunity.’ The level of discretion afforded to the Director of Public Prosecutors (DPP) when pursuing a prosecution in trafficking for forced labour cases is noted, although ‘an application can be made by way of judicial review to prohibit the trial of a victim as an abuse of process’ although this would be linked to the level at which the offence was linked to the exploitation. It is noted that there are general DPPs Guidelines for Prosecutors (2010) which provide guidance on the factors to be considered in assessing whether to commence or continue with a prosecution; however it does not detail ‘the elements of what constitutes human trafficking or forced labour for criminal exploitation’. The research outlines media and cases studies (nationality, circumstances and offences) and remarks that it

is clear... that potential victims of forced labour in cannabis production are not being identified as such and are being prosecuted and imprisoned for crimes they may have been forced to commit.

It also notes that as of mid-2013, ‘no cases of trafficking for forced labour have been identified by An Garda Síochána’. Findings include an overall lack of information in the area, few investigations despite indicators of trafficking for forced labour presenting in cannabis production and no identified victims. The creation of an independent Rapporteur is called for, as is a role for the HSE (together with MRCI) in identifying victims.

²⁹⁶ Immigrant Council of Ireland (2014). ‘Protecting victims of trafficking – 24-month project launched’. *Press Release*. Available at www.immigrantcouncil.ie.

²⁹⁷ Anti-Human Trafficking Unit, Department of Justice and Equality, April 2015.

²⁹⁸ The report states that this focus was based on a trend identified by ASI of victims being trafficked from Vietnam to Ireland via the UK.

The AHTU has commented that the phenomenon of persons who have been found in cannabis growhouses ‘asserting that they are victims of human trafficking is one that is recognised both domestically and internationally’. It adds that in cases where

such an assertion is made, or for any other reason a suspicion arises, that such a person may be a victim of human trafficking, a full investigation into the potential crime of human trafficking is carried out, in addition to any investigation of the crimes related to drugs offences.

Investigations ‘of this nature’, the AHTU comments, can be ‘extremely complex, comprising as they may do of the investigation of potentially two separate crimes; where the perpetrator of one crime may be the victim of another’. The AHTU added that comprehensive training arrangements are in place for An Garda Síochána ‘to deal with all issues relating to human trafficking, including situations such as this’.²⁹⁹

Reaching women and girls vulnerable to or experiencing trafficking for sexual exploitation was a small qualitative study produced in September 2014 by the REACH Project.³⁰⁰ The focus of the study was to identify mechanisms to enhance cooperation between relevant statutory agencies and NGOs, to improve the identification of victims of trafficking and to support their access to protection and services. A consultation process with formerly trafficked women took place in Ireland and Northern Ireland to gather their experiences of accessing services, as well as their views on effective ways to reach others in need protection and support. For trafficked women, specialist service access occurred mainly through contact with the police service and solicitors who referred them. Knowledge of trafficking indicators to identify trafficked women, in particular for the police and solicitors, was highlighted as being of critical importance to enable immediate referral to appropriate services. The report recommends ongoing training in trafficking indicators for all service providers. Ongoing targeted police operations to reach victims of trafficking who are ‘highly vulnerable, controlled and isolated’ was also recommended. The availability of emotional support from service providers to victims emerged as ‘the most critical factor in helping women to disclose initially’ being in prostitution and to recover from their experiences. The Women’s Health Service (WHS) and sexual health clinics were identified as being, in many cases, the only contact migrant women had where they can make an initial disclosure. These services also provide a link to exit programmes from

²⁹⁹ Anti-Human Trafficking Unit, Department of Justice and Equality, April 2015.

³⁰⁰ O’Connor, M. (2014). *Reaching women and girls vulnerable to or experiencing trafficking for sexual exploitation*. REACH project. Available at <http://www.reachproject.eu>.

prostitution. The report recommends they are fully resourced along with specialist services for victims of trafficking. The formalising of existing inter-agency cooperation is supported.

6.8 CASE LAW

Lin v. Governor of Cloverhill Prison [2014] IEHC 214

The applicant, a Chinese national, had been found in a premises in Dublin which had been turned into a cannabis growhouse. He was charged with various drugs offences under the *Misuse of Drugs Act 1977*, as amended. He pleaded guilty to one offence and was in custody, awaiting trial, on the others. He claimed that his detention was unlawful and that he ought not to be prosecuted as he was a victim of human trafficking, relying on Directive 2011/36/EU and, in particular, Article 8 thereof, which provided:-

Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that the competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of any of the acts referred to in Article 2.

He accordingly sought an inquiry by the High Court into the legality of his detention under Article 40.4 of the Constitution. The applicant had no passport or identity documents. His claim was that his father ended up in financial difficulty in China, and that he had been forced to travel to the State to work and repay it. The trial judge considered his account of his travel to the State to be implausible in some respects, noting that he could not give any specific details at all of how or when he arrived in it. He said that his traffickers made him work in a number of Chinese restaurants. However, his claim to have been deprived of his liberty by them was inconsistent with pictures found on a phone in his possession, which depicted various locations throughout the State and indicated he had been able to travel around it freely for a number of months. He then said that he accepted a job in a premises in Dublin city watering plants, which turned out to be cannabis plants. His claim that he thought they were innocuous was held to lack credibility by the trial judge, bearing in mind the clandestine nature of his activities and his guilty plea. He claimed to have been held for several weeks in the growhouse.

During the course of an investigation into the complaint of human trafficking made by him, the Gardaí discovered that the lessee of the premises where the applicant was found, also a Chinese national albeit one lawfully in the State, had in her possession a number of passports of Chinese nationals. However, the

investigation was unable to conclude, on the basis of the evidence, that the applicant had been trafficked into the State.

The High Court considered relevant legislation. It noted that the *Criminal Justice (Human Trafficking) Act 2008* ('the Act of 2008') gave effect to a Council Framework Decision of the 19 July, 2002 on human trafficking, which was replaced by the Directive of 2011, which was to be transposed by the 6 April, 2013 at the latest. It noted that the main effect of the Act of 2008 was to create specific criminal offences penalising persons who engaged in the trafficking of adults and children and that it did not, as such, confer any rights or entitlements on any trafficked person. There was, however, an administrative notice entitled *Administrative Immigration Arrangements for the Protection of Victims of Human Trafficking* from 2008 which did confer certain benefits on foreign nationals in respect of whom there were reasonable grounds for suspecting that they were victims of human trafficking. The court also considered United States and European Court of Human Rights caselaw on the topic of slavery and involuntary servitude, including the decision of the latter in *Siliadin v. France* [2005] ECHR 545, where it was held that a Togolese national was in a position of servitude, but not slavery, in France.

The court accepted the assessment of the Gardaí that the applicant had not been trafficked into the State. Drawing on the decision in *Siliadin* it held, however, that he had been held in conditions of servitude within the meaning of the definition of 'labour exploitation' in Section 1 of the Act of 2008. It noted that he was a vulnerable individual who could not speak or otherwise communicate in English, had been the subject of an extreme deprivation of liberty, and had been subjected to a real threat of violence from the criminals responsible for the greenhouse. The fact that he had consented to work in it was, he held, irrelevant.

It then turned to the applicant's claim that he should not be prosecuted by virtue of Article 8 of the Directive. It held that Article 8 imposed no direct obligation in that regard on the prosecution. It permitted the relevant prosecuting authorities not to prosecute the victims of trafficking where the crimes which they had committed were the direct consequence of their exploitation by traffickers. The crucial matter was that, for Article 8 to apply, the applicant would have to be a victim of trafficking and that there would have to be a real and substantial connection between his status as a person who had been trafficked and the crimes which had actually been committed. It stated that if he had been trafficked into the State and coerced to work in the greenhouse, then serious consideration would have to have been given by the Director of Public Prosecutions as to whether he should have been prosecuted at all.

However, the court was not satisfied that he had been trafficked into the State, there being no independent evidence to support his testimony in that regard. He had no evidence of identity and could not say how or when he arrived here. A thorough Garda investigation had been unable to advance the matter any further. The fact that the lessee of the premises held a number of Chinese passports did not assist him, the evidence which had been gathered in the course of the Garda investigation exonerating her of any role in trafficking. The fact that the applicant had been able to travel around the State for a number of months was critical independent and objective evidence tending to suggest that he had not been trafficked.

The court therefore held on the basis of the available evidence that the applicant had not been trafficked into the State and that it followed that any offences committed by him in the greenhouse had not been as a 'direct consequence' of being trafficked, the essential requirement of Article 8 of the Directive of 2011. He therefore had no locus standi to challenge the manner in which the Directive had been transposed into Irish law. It therefore concluded that he was in lawful detention.

Chapter 7

Irregular Migration

7.1 LEGISLATION

The *Civil Registration (Amendment) Act 2014* was enacted in December 2014 and amends the *Civil Registration Act 2004* on this topic. Marriage and civil partnerships of convenience are defined. Procedures and guidelines for registrars in determining such an opinion are also contained in the Act.³⁰¹ The Minister for Justice and Equality welcomed the Act, stating that it would ‘strengthen the arm of the State in tackling marriages of convenience and associated immigration abuses’.³⁰²

The new rules surrounding the procedures for suspected marriages and civil partnerships of convenience are inserted into Section 58 of the *Civil Registration Act 2004*. This section sets out the procedures in relation to lodging an objection to a proposed marriage or civil partnership. The grounds upon which a registrar may refer a proposed marriage for review to the Superintendent Registrar includes such considerations as whether the intended couple speak a common language, the length of time a couple have known each other prior to notifying the registrar of their intention to marry, the number and frequency of their meetings prior to notifying the registrar of their intention to marry, how well each party is familiar with their partner’s personal details, the extent to which the parties intend to continue existing mutual emotional and financial support, the immigration status of any foreign national party to the intended marriage and any other information providing reasonable grounds for considering the marriage to be a marriage of convenience.

Marriages and civil partnerships which took place in an embassy in Ireland were not carried out in accordance with Irish marriage or civil partnership law. As such, these marriages and civil partnerships are not valid in Ireland. On a once-off basis, there are procedures contained within the Act which will validate those marriages and civil partnerships which have already taken place in Ireland and which are still in existence should those couples wish to have their marriages or civil partnerships recognised in Ireland.

³⁰¹ See www.oireachtas.ie/documents/bills28/acts/2014/a3414.pdf.

³⁰² Irish Naturalisation and Immigration Service (16 September 2014). ‘Minister Fitzgerald announces major immigration civilianisation initiative’. *Press Release*. Available at www.inis.gov.ie.

Apart from Section 19(2) of the Act, which relates to the validation of marriages solemnised in an embassy or a diplomatic mission in the State before the coming into effect of the amendments to the Act of 2004 wrought by Sections 19(1), and 26(2) thereof, which makes similar provision in respect of civil partnerships which took place between 1 January 2011 and the day before the coming into effect of the amendments effected by Section 26(1), the other provisions of the Act have yet to be commenced and are scheduled for commencement in 2015.

The Minister also noted that as the legislation commences in 2015, close cooperation between immigration authorities and the General Register's Office would take place, as well as with NERA and the Department of Social Protection to 'target employers of illegal migrants'.³⁰³

7.2 RESEARCH

A 2014 policy paper by the Migrant Rights Centre Ireland (MRCI) estimates that there are between 20,000 and 26,000 undocumented migrant adults living in Ireland currently, with the majority having entered the country legally. The paper is based on research with 540 undocumented migrants in Ireland, gathered by undocumented migrants within their own communities and collected anonymously. An analysis of over 2,600 MRCI case files supplemented and supported the data. Using a residual method, the MRCI paper uses data from INIS and informed by their own case management system, with a result of a range of between 20,541 and 25,506 adult undocumented migrants in Ireland, and 2,423 and 5,106 undocumented children. The majority of overall migrants had been living in Ireland for more than five years (81 per cent), and had entered the country legally (86.5 per cent). The policy paper finds that the majority of undocumented migrants are in employment (87 per cent), typically lower-paid work. Over two-thirds have been in the same job for over two years (66.5 per cent). Of those surveyed, the main nationalities were Filipino, Chinese, Mauritian, Brazilian and Pakistani, however it is recognised that undocumented migrants come from a diverse range of nationalities. Almost half of those surveyed had children under 18 years (44 per cent), with just under a third accompanied by children in Ireland.

The main issues raised included difficulties in accessing basic services such as healthcare, and specific residency and education (third-level) problems for children of undocumented migrants. It is also noted that undocumented workers are 'highly vulnerable' to exploitation. The main sectors of employment are

³⁰³ Irish Naturalisation and Immigration Service (16 September 2014). 'Minister Fitzgerald announces major immigration civilianisation initiative'. *Press Release*. Available at www.inis.gov.ie.

restaurant and catering at 37.5 per cent, domestic work at 32.5 per cent and cleaning and maintenance at 10.5 per cent. Other sectors include retail, hotel, medical, healthcare and agriculture. The policy paper calls for the MRCI proposal, first developed in 2010, of an earned regularisation scheme where set criteria and procedures would be established.³⁰⁴

³⁰⁴ Migrant Rights Centre Ireland (November 2014). *Ireland is Home. An analysis of the current situation of undocumented migrants in Ireland*. Available at www.mrci.ie.

Chapter 8

Return

8.1 DEPORTATION ORDERS, TRANSFERS AND REMOVAL FROM THE STATE

A total of 2,475 persons were refused entry at Ireland's external borders during 2014, an increase of over a quarter year-on year. Some 900 persons were found to be illegally present in the territory.³⁰⁵

2014 saw a decrease of almost a half in the number of persons deported from Ireland in comparison to 2013 when 209 persons were deported from the State. The 2013 case, *Omar v. Governor of Cloverhill Prison*³⁰⁶ highlighted that while there is a power to arrest a person with a deportation order under certain conditions set out in Section 5(1) of the *Immigration Act 1999*, there is no corresponding legal provision for a power of entry to private dwellings for the purposes of enforcing a deportation order. UNHCR has remarked that this has had a significant impact on the implementation of deportation orders, with no legislative proposal having been brought forward to address that lacuna to date.³⁰⁷

There were 769 permissions granted to remain in Ireland under Section 3 of the *Immigration Act 1999* during 2014.

During 2014, a total of 114 persons were returned as part of forced return measures, with 242 persons availing of voluntary return.

TABLE 2 Returns from Ireland, 2014

Year	Returned as part of forced return measures	Returned voluntarily	Returned through an Assisted Voluntary Return Programme
2014	114	242	192

Source: Irish Naturalisation and Immigration Service, August 2015.

³⁰⁵ Eurostat.

³⁰⁶ *Omar v. Governor of Cloverhill Prison* [2013] IEHC 579.

³⁰⁷ UNHCR Ireland (May 2015).

Ireland continued to participate in the European Refugee Fund (ERF) during 2014.

8.2 ASSISTED RETURN

Provisional figures show 237 assisted returns during the year, including persons provided with administrative assistance (e.g. return of documents) by INIS and in receipt of voluntary assisted return by IOM Ireland.³⁰⁸

The International Organization for Migration (IOM) Ireland office continued to provide voluntary return assistance during 2014. The combined Voluntary Assisted Return and Reintegration Project (VARRP/IVARRP 2014) facilitated the voluntary return and reintegration of asylum seekers (both pending and rejected) and irregular migrants. Its main target group is non-EEA nationals who are currently seeking asylum, or who have been refused asylum, with an additional target group of needy irregular migrants who meet specific vulnerability criteria. The programme aims to assist up to 400 persons on average per year. All AVRR applicants are eligible to apply for a small reintegration grant, which can be used towards an income-generating activity, such as professional training or a small business set-up.

Some 192 voluntary assisted returns took place during the year, to 29 countries.

TABLE 3 Main Countries of Assisted Voluntary Return (IOM Ireland), 2014

Country	Number
Brazil	58
China	17
Mauritius	14
Moldova	12
Malawi	11

Source: IOM Ireland.

The majority of returnees were male (108 persons) with 84 females. In terms of family breakdown, it was mainly individuals returning (103 persons), with 75 family units, 12 couples and two unaccompanied minors.

In addition, IOM Ireland provided 13 victims of trafficking with assisted voluntary return and reintegration services during 2014, with services tailored to meet their specific needs through IOM country offices in Ireland and upon return.³⁰⁹

8.3 READMISSION AGREEMENTS

Following approval by government in 2013, Ireland completed the necessary parliamentary procedures (in accordance with Article 4 of the protocol to the TFEU) to opt-into 11 EU readmission agreements (Sri Lanka, Russia, Pakistan, Macao, Albania, Bosnia, Macedonia, Montenegro, Moldova, Serbia and Georgia) in early 2014. The Council and Commission were notified accordingly and in the second half of 2014 the Commission decision accepting Ireland's application was adopted.

INIS has noted that since then all the third countries concerned have been informed that Ireland is now bound by these agreements. Arrangements have begun to draw up bilateral protocols etc. with the relevant countries to provide for the smooth operation of the EU readmission agreements between Ireland and the country concerned.³¹⁰

8.4 CASE LAW

A.L. v. Minister for Justice and Equality [2014] IEHC 503

The applicant was a Chinese citizen who had entered the State on the basis of a student visa in 2004. Her permission to be in the State expired in 2005 and she remained illegally in the State thereafter. Pursuant to Section 3 of the *Immigration Act 1999*, a proposal to deport her was made in 2008 on the ground that her deportation would be conducive to the common good. The proposal entitled her to leave the State voluntarily, to consent to the making of a deportation order, or to make representations for leave to remain temporarily in the State which, if not successful, would result in the making of a deportation order against her. She chose the latter course and, in 2013, the Minister for Justice refused to grant her leave to remain and made a deportation order against her under Section 3 of the Act of 1999. By then, she was married to a fellow Chinese national, QL: see *QL v. Minister for Justice* [2014] IEHC 507.

She challenged the Minister's decision on the basis that her lack of entitlement to leave the State voluntarily without a deportation order being made against her immediately following his decision to refuse to grant her leave to remain, breached her right to make representations pursuant to Articles 40 and 41 of the Constitution, Articles 8 and 13 of the European Convention on Human Rights, and the principle of proportionality. In support of her claim to remain on humanitarian reasons, she relied on the length of time she had spent in the State,

³⁰⁸ Irish Naturalisation and Immigration Service (January 2015). 'Immigration in Ireland – 2014'. *Press Release*. Available at www.inis.gov.ie. To note that the year-end document showed 189 assisted by IOM Ireland.

³⁰⁹ IOM Ireland, April 2015.

³¹⁰ Irish Naturalisation and Immigration Service (February 2015).

i.e. ten years, during which she had married her husband, against whom a deportation order was also extant, and had a daughter, who was being raised in China.

The Minister contended that neither Article 41 of the Constitution nor Article 8 ECHR conferred a right on non-Irish nationals to enter and/or reside in the State. He submitted that no separation of the applicant from any of her family members was going to occur as a result of the making of the deportation order against her. Both the applicant and her husband had been in the State on an unlawful basis for a long number of years and, as such, Article 41 and Article 8 ECHR were not engaged by the making of the deportation order, as the only issue before the Minister was the right of residence in the State and those articles did not confer any such right. The Minister submitted that the issue of proportionality did not arise, proportionality being a test to judge whether interference with rights was justified, and there being no interference with the applicant's rights under either Article 41 or Article 8 ECHR at all, as it was intended to deport her to China with her husband. Without prejudice thereto, the Minister submitted that, even if proportionality were an issue, legitimate immigration control would, in any event, justify the making of the deportation order.

Turning to the procedures pursuant to Section 3 of the *Immigration Act 1999*, the Minister submitted that because no constitutional or ECHR rights of the applicant were engaged as her family life and/or family rights would not be affected by her deportation, she was not in a position to point to any constitutional right which was breached by the alleged inadequacies in the section, and therefore lacked locus standi to challenge its constitutionality on the basis of such rights.

Without prejudice thereto, the Minister submitted that neither Article 41 of the Constitution nor Article 8 ECHR prescribed any particular procedure by reference to which the rights they conferred were to be vindicated, and that Irish caselaw showed that the Section 3 procedure was adequate to respect and/or vindicate the rights in question.

Of its own motion, the High Court referred in its decision to the Supreme Court's decision in *Dellway Investments v. National Asset Management Agency* [2011] 4 I.R. 1, holding that it was authority for the proposition that a person who was or might be 'affected' or 'adversely affected' by a discretionary decision of a public body had a constitutional right to fair procedures, which encompassed the right to be heard. It therefore held that it was not necessary to establish that the decision to make a deportation order would affect legal or constitutional rights in order for the right to fair procedures to be triggered, and that the applicant accordingly did not have to show that she had family rights; rather, it was

sufficient that she was a person who would be 'affected' by the Minister's decision under Section 3 of the Act of 1999. That being so, she had a constitutional right to fair procedures, including the right to make representations.

The court concluded that the applicant had a constitutional right to make representations to the Minister before he decided to make a deportation order against her. That right was reflected in Section 3 of the Act of 1999, which entitled her to make written representations to the Minister for leave to remain, which representations were considered by the Minister before making the deportation order. It held that that right was not impeded by the fact that a deportation order would be made if the representations for leave to remain were not successful. Whilst that might be a possible consequence of the making of representations, and whilst it might deter some persons from making them at all, it was not an unconstitutional or unlawful interference in the exercise of the right to make such representations.

The court accordingly refused the relief sought by the applicant.

The decision accordingly shows that the procedure provided for in Section 3 of the *Immigration Act 1999* safeguards the right of a proposed deportee to make representations to the Minister before any deportation order is made, and constitutes sufficient protection of the right to make representations under Article 41 of the Constitution and Article 8 ECHR. The lack of an entitlement on the part of the proposed deportee to leave the State before a deportation order is made if the representations do not succeed in persuading the Minister for Justice to grant the proposed deportee leave to remain, does not amount to a breach of the proposed deportee's rights under the Constitution or Article 8 ECHR. A person who was or might be 'affected' or 'adversely affected' by a discretionary decision of a public body has a constitutional right to fair procedures, which encompasses the right to be heard.

See, also, the decision of Barr J. in *Shaheen Javed v. Minister for Justice* [2014] IEHC 508.

B.S. v. Minister for Justice [2014] IEHC 502

The applicant was a national of Albania. She claimed asylum and claimed to have come to Ireland for a better life. She subsequently revised her claim and contended that she was fleeing traffickers in Albania, who had previously forced her into prostitution in Italy. It transpired that she had been in Belgium during the

timeline contained in her narrative, and when this came to light, she revised her narrative once more. Her application for asylum was refused by the Minister for Justice and a deportation order was made against her in 2006. In 2006, before the order was notified to her, she had apparently attempted suicide by taking an overdose of medication, and had been treated in hospital. She subsequently applied unsuccessfully for subsidiary protection.

By letter dated 11 June, 2010, the applicant sought revocation of the deportation order, which was primarily based on the applicant's mental health and changed country conditions in Albania. A number of documents were submitted in support of the request. Whilst some of them related to matters already submitted to the Minister, or were capable of having been submitted in the leave to remain or subsidiary protection applications, three matters were new. The first was a report by one Dr Giller, who interviewed the applicant on 11 November, 2009. She expressed the view that the applicant's psychological distress was of such a degree that she had attempted suicide on one occasion and currently expressed suicidal ideation. Her opinion was that if the applicant were to be returned to Albania or threatened with return, her risk of suicide would be high. The second new matter was a report of Dr O'Donovan, the applicant's general practitioner. In his report, which was dated 19 November, 2009, he stated that she suffered from post-traumatic stress disorder with depressive features. He also referred to her overdose in 2006. His view was that she would not be able to purchase or afford in Albania the medication she was receiving in Ireland for her mental condition. The third document was a *New York Times* article suggesting that human trafficking might increase in Albania following a 50 per cent decrease in recent years.

By letter dated 3 May, 2011, the applicant's solicitors submitted a report from her general practitioner dated 21 April, 2011. He stated that she suffered from post-traumatic stress disorder with depressive features and also from severe anxiety. He asked that she be granted leave to remain so that she could recover.

On foot of the request for revocation, an examination of the applicant's file was carried out on 3 May, 2011. The report was signed off by departmental officials and the order was affirmed the following day, the applicant being deported that same day.

The applicant unsuccessfully challenged the affirmation of the deportation order by way of judicial review.

The court held that the question for determination was whether the medical evidence before the Minister disclosed a real and substantial risk to the life of the applicant as of the date of the decision to affirm the deportation order, which could only be avoided by revoking it. The court noted that, in that regard, the evidence before the Minister was a report from Dr Giller based on an interview with the applicant in November 2009, which had not been submitted until 11 June 2010, and was almost 18 months out of date at the time of the Minister's decision. The court held that Dr Giller's opinion about the risk of suicide faced by the applicant appeared to have been based on her narrative of persecution. It considered it notable that the history of the applicant which had been held to be 'relevant' by Dr Giller, differed in some material particulars from the narrative related by her at various points to the Irish asylum authorities. The court also considered it notable that Dr Giller was not a psychologist or psychiatrist, and that her experience lay in dealing with asylum seekers' medical conditions. The court noted that the only other report before the Minister was a report of the applicant's general practitioner dated 19 November, 2009. That report did not state that deportation in and of itself would give rise to a risk of suicide.

The court held that it was open to the Minister to reach the conclusion that the medical reports did not establish that deportation would pose a real and substantial risk to the applicant's life which could not be avoided other than by revoking the deportation order. It also held that there was no basis for quashing the decision on account of the lack of consideration of the second report of the applicant's general practitioner. It pointed out that the report had been submitted too late for consideration as part of the applicant's file.

H.K. and Others v. Minister for Justice [2014] IEHC 506

The first named applicant was a 40-year-old mother of the second, third, fifth and sixth named applicants and the stepmother of the fourth named applicant. They were all Nigerian nationals. Her youngest child, A.K., was born in Ireland on 2 May, 2006. The applicants sought to quash decisions of the Minister for Justice refusing to revoke deportation orders made against them.

Before deportation orders had been made against them, the applicants had submitted leave to remain applications, in which the mother contended that one of her children had been subjected to female genital mutilation ('FGM'). She had not specified the child in question. The Minister took this into account and consulted country of origin information on the matter of FGM in Nigeria when assessing their applications.

Their then solicitors submitted a request for revocation of the deportation orders in respect of the applicants, which was based upon, inter alia, evidence of the circumcision of N.K., the fifth named applicant in the form of confirmation from Irish-based medical practitioners that there was evidence of grade 1 circumcision in respect of her.

The Minister decided to affirm the deportation orders, noting that, when deportation orders were being made, regard had been given to country of origin information in relation to FGM, despite not knowing which of the children had allegedly undergone FGM.

The applicants sought to impugn the making and affirmation of the deportation orders. They claimed that, in considering the question of revocation of the deportation orders, the Minister had failed to have regard to the specific documentation which had been presented in relation to the FGM carried out on the fifth named applicant. The Minister, on the other hand, argued that the applicants could not challenge the validity of the orders because they were out of time to do so and, by seeking revocation of them, they had acknowledged that they had been lawfully made. The Minister also pointed to the fact that the incidence of FGM had decreased in Nigeria and that the possibility of exposure to FGM had been addressed before the deportation orders were made and also been noted when deciding whether or not to revoke them.

The court upheld the Minister's objection to the applicants' attempts to set aside the deportation orders. It noted that the orders had been communicated to them in September, 2010 and that the proceedings had issued in January, 2011. No explanation had been forthcoming as to why the orders had not been challenged within the 14-day statutory time limit and, on that basis, they could not challenge them. Additionally, it held that the applicants were stopped by their conduct from challenging the orders. They had treated them as valid when they sought revocation of them and could not now seek to claim that they were invalid.

However, the court decided to quash the affirmation of the orders. It held that new and very significant documents relating to the circumcision of the fifth named applicant had been produced, which had not been before the Minister when the orders were being made. They established as a fact that the fifth named applicant had been subjected to FGM. It considered that, in the light of that, the relevance of general country of origin information on FGM was lessened considerably, particularly that showing that the numbers undergoing FGM were decreasing and that Nigeria had become a signatory to the UN Convention on the Rights of the Child.

In the circumstances, it was not sufficient to refer back to the original decision to make deportation orders, which was made in the absence of such medical evidence.

J.S. and Others v. Minister for Justice [2014] IEHC 195

The second applicant, M.A., was a Nigerian national who entered the State lawfully on 17 December, 2002, having been given permission to do so. He failed to comply with the conditions of his permission to work and claimed social welfare. He also committed a series of criminal offences. His application for renewal of his permission was refused in 2004.

In 2004, he met the first applicant, J.S., and formed a relationship, which resulted in the birth of three children, who were Irish and European Union citizens. He was convicted of numerous offences between 2000 and 2008, including theft, dishonesty and drugs offences. He spent time in prison on foot of many of the convictions.

A deportation order was made in respect of him by the Minister for Justice in 2009, following consideration of representations made pursuant to Section 3 of the *Immigration Act 1999*. He applied to the Minister for revocation of the order in May, 2009 and the order was affirmed in January, 2010. In April, 2011, a second revocation application was made, relying on the decision of the Court of Justice of the European Union in *C-34/09 Zambrano*, the first and second applicants' respective medical conditions, and the welfare of their children. That application was refused and the deportation order was affirmed in March, 2012. The applicants challenged that decision by way of judicial review. They never challenged the deportation order or the refusal of the first revocation application.

Leave was granted by the High Court (Cooke J.) to challenge the refusal of the second revocation application on the following grounds:-

- The Minister erred in law in applying the principles of the *Zambrano* case to the personal and family circumstances of the applicants;
- The Minister erred in law in construing and applying to the personal and family circumstances of the applicants the protections afforded to them by Articles 40.3, 41 and 42 of the Constitution and Articles 3 and 8 ECHR;
- The conclusions reached and the reasons given for them in refusing to revoke the deportation order were unreasonable and disproportionate to the

permanent impact of the order on the personal and family circumstances of the applicants.

The court upheld the validity of the decision. It began its assessment of the first ground by reviewing the decision of the CJEU in *Zambrano* and subsequent decisions, including C-256/11 *Dereci*, C-356, 357/11 *O, S and L*, C-40/11 *Iida and C-87/12 Ymeraga*. It noted that, in the light of those cases, the applicants had accepted that the derivation of a right of residence for a third-country national from the rights of EU citizen children who had not exercised a right of free movement would be the exception rather than the rule. It noted that the applicants submitted that J.S.'s ill-health gave rise to the basis for an exception to be applied to them, she being unlikely to bring the couple's children to Nigeria on that account. However, it held that the children would not be obliged for any reason to leave the State or the territory of the European Union. The health issue in those circumstances fell to be determined in accordance with the provisions of Article 40.3 of the Constitution and Articles 3 and 8 ECHR. It concluded that the Minister had not erred in law in refusing to accord them so-called *Zambrano* rights in the circumstances.

The applicants contended that Article 7 (right to respect for private and family life) and Article 24 (best interests of children a primary consideration in actions concerning children) of the *Charter of Fundamental Rights* were not properly considered in refusing the application, bearing in mind that the children were EU citizens.

The court rejected this. It noted that Article 51 of the Charter provided that its provisions were addressed to the institutions, bodies, office and agencies of the Union with due regard for subsidiarity and 'to the Member States only when they are implementing Union law'. It further noted that Article 52(3) also provided that insofar as rights in the Charter corresponded to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the ECHR. It held that the provisions of Section 3(1) and 3(11) of the Act of 1999 were part of domestic legislation concerned with the implementation of immigration policy, and that Article 7 of the Charter had no application to the applicants. It noted that the citizen applicants had not been denied the substantive enjoyment of their EU citizen rights. It also held that the right to family life fell to be considered under Article 8 ECHR, and involved the same considerations as those applicable under Article 7 of the Charter. It was therefore satisfied that the principles of EU law were properly considered and applied to the personal and family circumstances of the applicants.

The court then went on to consider the second and third grounds, noting that they related primarily to the additional evidence in the application concerning allegedly new facts and circumstances based on the medical evidence furnished at that time. In particular, it had been alleged that MA would die due to his illness if deported.

The court upheld as reasonable and rational the Minister's finding in refusing the revocation application that there were no exceptional circumstances as would warrant not deporting M.A. The reports before the Minister did not indicate a threat to his life or anything remotely close to the exceptional circumstances required to establish that deporting him would breach Article 3 ECHR. Indeed, they indicated that he would be able to avail of treatment in Nigeria for both of the conditions from which he suffered.

The court also upheld as reasonable and rational the conclusion that deporting M.A. in pursuance of immigration controls did not constitute a breach of his right to respect for his private life under Article 8 ECHR. It noted that further information had also been submitted from his solicitor to the effect that he had committed a further six theft offences between August and September, 2009 and that he had demonstrated that he had a propensity to re-offend which gave rise to a compelling public interest in his deportation.

Turning to the question of family life, the court rejected the applicants' contention that the introduction of new evidence of M.A.'s medical condition should have resulted in an overall reassessment of their rights under Article 40.3 of the Constitution and Article 8 ECHR. It held that no new facts had arisen since the previous consideration relevant to their family life. It held that any failure to consider aspects of their family life rights afresh was not unlawful, having regard to the extensive consideration of their family rights in previous decisions and the absence of any additional evidence relevant to the consideration and balancing of those rights with the rights and interest of the State and the proportionality of the decision.

In the light of the above, the court upheld the legality of the Minister's refusal of the second revocation application.

P.O. and S.O. (a minor) v. Minister for Justice [2014] IEHC 141

The applicants were Nigerian nationals. The first named applicant arrived in the State in 2006 and unsuccessfully applied for asylum, a claim which was based on her fear of persecution at the hands of the family of a friend whom she had

converted to Christianity, and against whom she said the police would not act. Subsequently, the Minister signed deportation orders against them in 2012, and notified them thereof. They subsequently sought revocation of the orders, which were affirmed by the Minister, whose decision was challenged in these proceedings, leave to pursue an order of certiorari having been granted by Clark J. previously. The court at the post-leave stage declined to grant the reliefs sought, and upheld the refusal of the revocation application.

The applicants contended that the Minister's decision ought to be quashed because it breached fair procedures in that reliance was placed by him on deficient country of origin information, and because he ignored country of origin information submitted on their behalf.

The court observed that, in order to substantiate the claim that the Minister had relied on incorrect country of origin information, the applicants had to demonstrate that some fundamental mistake had occurred in the use or interpretation of the available information, or where the conclusion reached was manifestly at variance with the content and obvious effect of the documentation.

The court noted that the information sourced by the Minister was more recent than that supplied by the applicants' solicitors, and indicated that state protection would be available to the applicants in the form of a reformed and reforming police force underpinned by a governmentally inaugurated code of conduct. It noted that the Minister's duty was to ensure that all up-to-date information available was considered fairly. It held that the applicants had failed to demonstrate the existence of a fundamental mistake or error in his consideration of the information.

The court observed that the decision of the Supreme Court in *Smith v. Minister for Justice* [2013] IESC 4, made clear that it was only when new material was advanced that a revocation application could be looked on favourably. The court found that the applicants had not advanced much that was new in their application, or that could not have been advanced in their earlier application for leave to remain.

The court rejected the complaint that the procedures adopted by the Minister were unfair, because he failed to make them aware of his intention to rely on information other than that submitted on their behalf before making his decision.

It pointed out that the new documentation relied upon by the Minister was freely available to the public and did not come from private sources. Nor did it alter the scope and nature of the inquiry carried out by him. The information was not new and amounted to an updating of previous documentation furnished by the applicants, to whom it was readily available from sources well-known to those practicing immigration and asylum law.

It rejected the complaint that the Minister had failed to inform the applicants of the principles, policies and guidelines pertaining to the making of decisions on revocation applications. It held that it was clear that the Minister had to focus carefully on the circumstances of each particular case, and that the absence of guidelines or policy did not vitiate his decision, the nature of which had to be understood in the context of an overall consideration of the statutory scheme, the relationship between Section 3(1) and Section 3(11) of the Act of 1999, and previous decisions taken in the asylum process. It relied on *Sivsivadze v. Minister for Justice and Equality* [2012] IEHC 244 and *M.A. v. Minister for Justice* (Unreported, High Court, 17 December, 2009) in reaching that conclusion.

The court concluded by holding that most of the material taken into account in the examination of the revocation application had been previously considered and available in the examination of file which preceded the making of the deportation orders, and that some additional materials had also been referenced and quoted in the examination. It was satisfied that those materials had been readily available to the applicants, and that they did not afford any basis upon which to challenge the Minister's decision refusing to revoke the deportation orders.

It rejected the applicants' complaint that their rights under Article 8 ECHR had been engaged to the point where affirming their deportation from the State would be unlawful, and that there was a failure to provide a rationale for the Minister's contrary conclusion. It noted that that matter had also been considered in the examination of file which preceded the making of deportation orders against them.

It rejected the contention that Article 8 ECHR was breached simply because the second named applicant had commenced school and, if he were allowed to remain, would benefit from the Irish education and health systems. It concluded that that did not amount to such exceptional circumstances as would entitle them to remain in Ireland. It relied on the decision of Feeney J. in *Agbonlahor v. Minister for Justice, Equality and Law Reform* [2007] 4 I.R. 309 in that regard.

In the light of all the above, the court refused the application for an order quashing the Minister's refusal to revoke the deportation orders in respect of the applicants.

F.E. and Others v. Minister for Justice [2014] IEHC 62

The applicants sought to quash a deportation order made against the father applicant, M.E. on the basis of preventing crime and disorder. They obtained leave to do so, but at the post-leave stage, the court declined to grant the reliefs sought. They then sought a certificate of leave to appeal to the Supreme Court.

The applicants sought to canvass whether the court, when considering whether or not to quash a deportation order in respect of a non-EU national who was the parent of minor Irish citizens, and in applying the test of reasonableness set out by the Supreme Court in the case of *Meadows v. the Minister for Justice*, had acted correctly in exercising its jurisdiction on the basis that (i) it was not sufficient for the applicants to assert that the decision was irrational, unreasonable and disproportionate and invite it to reassess the balance of reasonableness as between the interests of the State and the rights and interests of the applicant and the child or family concerned and (ii) was entitled to require the applicants to identify the particular error, omission or other flaw in the reasons underpinning the making of the order which allegedly rendered the decision irrational, unreasonable or disproportionate.

The applicants contended that the principle of proportionality required the court to assess the balance which the Minister had struck and exercise its own judgment as to whether his decision affecting fundamental rights was disproportionate in its effects. The court was not constrained to uphold the assessment of proportionality merely because it had not been reached unreasonably or irrationally. It was entitled to exercise its own judgment as to what, in the circumstances, was a disproportionate impact on those rights, rather than to assess proportionality in a manner circumscribed by the common law rules applicable to judicial review.

They identified the following matters in support of the contention that the decision to deport M.E. was disproportionate:-

- The deportation order required him to remain outside the State, indefinitely resulting in a permanent disruption of family life which engaged the rights under Articles 41 and 42 of the Constitution.
- the best interests of the children were not served by the making of the deportation order;

- it was unreasonable to expect his wife and children to move to Nigeria to be with him;
- his wife would be left to look after the children alone in the State without his support;
- the children were not of an adaptable age and it was not in their best interests that their father be deported;
- if the children were required to live in Nigeria they would suffer disadvantages in their upbringing there and would not be able to avail of the same level of education and other opportunities (including health protection) as would be available in this State; and
- the deportation order was unreasonable because M.E. had been convicted of an offence in respect of which a relatively short term of imprisonment had been imposed, which he had served and following which he had a clean record and had not come to the adverse attention of the authorities up to the time of the making of the order.

The court held that the threshold required to obtain a certificate of leave to appeal had not been satisfied. In its view, the applicants had not discharged the onus of proof required to establish that the decision was unreasonable in the sense that it was disproportionate within the meaning of *Meadows*. It pointed out that judicial review was not a form of appeal and that the onus of proof lay upon the applicant to demonstrate that the impugned decision was fundamentally flawed. It held that, in the case before it, the applicants had failed to discharge that onus.

Having considered the decisions of the Supreme Court in *Meadows* and in *Donegan v. Dublin Co. Council* [2012] IESC 18, which emphasised that, when reviewing administrative decisions, a court was not entitled to substitute its own view for the administrative body, the court concluded that the applicants' assertion that the High Court had a jurisdiction and an obligation to examine the substantive merits of the impugned decision and effectively to substitute its own decision if it considered the Minister's decision to be disproportionate was incorrect, and did not give rise to a point of law of exceptional public importance that required resolution by the grant of a certificate.

Moreover, it said that it was not satisfied that the question as framed arose out of the court's decision in the case, which was a precondition to obtaining a certificate in the light of the decision in *Glancre Teoranta v. An Bord Pleanála* [2006] IEHC 205.

The decision reiterates the important point that, when reviewing administrative decisions like decisions to make deportation orders, a court is not entitled to substitute its own view for that of the administrative decision-maker. It is not entitled to examine the substantive merits of an impugned decision and substitute its own decision if it considers the administrative decision to be disproportionate.

Annex A

Implementation of EU Legislation in Ireland, 2014

A.1 LITIGATION RELATING TO IRELAND'S TRANSPOSITION OF DIRECTIVE 2004/83/EC

The most significant decision in 2014 concerning Ireland's transposition of Directive 2004/83/EC was that of the CJEU in **C-604/12 H.N. v. Minister for Justice**. In that case, the applicant had purported to make a stand-alone application for subsidiary protection in Ireland in 2009. The Minister for Justice declined to determine it, on the basis that the applicant had not applied for and been refused a declaration of refugee status, which the Minister said was a condition precedent to his being eligible to apply for subsidiary protection. The applicant issued judicial review proceedings and lost in the High Court. On appeal to the Supreme Court, the issue between the parties was referred to the CJEU, which upheld the Minister's interpretation of the law, rejecting the applicant's contention that he was entitled to make a stand-alone application for subsidiary protection.

The CJEU emphasised that the Geneva Convention was recognised in the Qualification Directive (Directive 2004/83/EC) as the cornerstone of international protection, and the complementary and secondary nature of the subsidiary protection put in place by that Directive. In the light of this, it held that an application for subsidiary protection should not, in principle, be considered before the competent authority has reached the conclusion that the person did not qualify for refugee status.

Accordingly, it held that the Qualification Directive did not preclude Irish national legislation which provided that the requirements for granting refugee status had to be considered before those relating to subsidiary protection.

The CJEU also held that the procedural rule, which required the applicant to exhaust the refugee determination process before becoming entitled to have his subsidiary protection application considered, was not precluded by other rules of EU law. It agreed with the Minister that, in the absence of EU rules concerning the procedural requirements attaching to the examination of an application for

subsidiary protection, the Member States remained competent, in accordance with the principle of procedural autonomy, to determine those requirements. It also held that the procedural rule at issue between the parties was not at odds with the right to good administration.

Finally, the CJEU held that it should be possible to submit an application for refugee status and an application for subsidiary protection at the same time.

In the light of this decision, the Office of the Refugee Applications Commissioner (hereafter 'ORAC') published a notice on its website entitled 'Important Notice regarding the making of applications for Subsidiary Protection by Applicants for Refugee Status', which stated that the *European Union (Subsidiary Protection) Regulations 2013* (S.I. No. 426 of 2013) were to be amended in the light of the CJEU's ruling on the reference. However, pending the coming into force of the amended Regulations, and with immediate effect, the following arrangements applied:-

- any person who **currently** had an application for refugee status pending might also make an application for subsidiary protection in ORAC; and
- any person who made a **new** application for refugee status might also make an application for subsidiary protection in ORAC.

The notice stated that such applications for subsidiary protection would be determined by ORAC in accordance with the provisions of the Regulations of 2013 and investigated, should the person's application for refugee status be refused by the Minister for Justice and Equality.

The *European Union (Subsidiary Protection) (Amendment) Regulations 2015*, which will give effect to these arrangements, came into effect on 20 April 2015.

The matter returned to the Supreme Court in order for the ruling of the CJEU to be applied, and in its judgment of 27 March, 2015, it dismissed the applicant's appeal against the decision of the High Court.

A.2 LITIGATION RELATING TO IRELAND'S TRANSPOSITION OF DIRECTIVE 2004/38/EC

Ogieriakhi v. Minister for Justice and Others (No. 2) [2014] IEHC 582

The plaintiff was a naturalised Irish citizen of Nigerian origin. In October, 2007, he was dismissed from his employment as a postal sorter with An Post on the sole

ground that he could not establish at the time to the satisfaction of his employer that he had the right to work in the State.

In High Court proceedings for damages for breach of his rights under the Citizens' Directive (Directive 2004/38/EC), he claimed that he had acquired the status of permanent resident under Article 16 of that Directive, which Ireland had purported to transpose by the *European Communities (Free Movement of Persons)(No. 2) Regulations 2006* (S.I. No. 656 of 2006). This was, he said, by virtue of his marriage to a French national, who had been employed in the State between the years 1999 to 2004. The marriage had broken up in or around 2001/2002. He then entered into a relationship with an Irish woman. He and his French wife divorced in January, 2009 and he married the Irish woman later that year.

The High Court (Hogan J.) decided to refer a number of questions to the CJEU in the proceedings pursuant to Article 267 TFEU. By decision of 10 July, 2014, the CJEU ruled in the plaintiff's favour so far as the proper interpretation of Article 16(2) of the 2004 Directive was concerned: see C-244/13 *Ogieriakhi*. It stated:-

Article 16(2) of Directive 2004/38/EC...must be interpreted as meaning that a third-country national who, during a continuous period of five years before the transposition date for that directive, has resided in a Member State as the spouse of a Union citizen working in that Member State, must be regarded as having acquired a right of permanent residence under that provision, even though, during that period, the spouses decided to separate and commenced residing with other partners, and the home occupied by that national was no longer provided or made available by his spouse with Union citizenship.

The High Court held that, in the light of the ruling, it was clear that the State had failed properly to apply EU law because the plaintiff had been wrongly refused residency up to and including 30 April, 2006, being the date upon which the Directive had come into force. It held that, as the plaintiff had been previously married to an EU national for the period of five years in respect of which she had exercised her free movement rights in the State, he had become entitled to permanent residency in the State.

The plaintiff sued the State in the instant proceedings in a *Francovich*-style action for damages claiming that it had failed properly to transpose the provisions of the Directive into domestic law or else to apply its provisions in a manner compatible with EU law.

The High Court noted that the CJEU had summarised the requirements to succeed in a Francovich-style claim, namely:-

- The principle of State liability for loss and damage caused to individuals as a result of infringements of EU law for which the State can be held responsible is inherent in the system of the Treaty;
- EU law confers a right to reparation where three conditions are met: (i) the rule of law infringed must be intended to confer rights on individuals; (ii) the infringement must be sufficiently serious; and (iii) there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties;
- As regards the second condition, after stating that the decisive test for finding that an infringement of EU law is sufficiently serious is whether the Member State concerned manifestly and gravely disregarded the limits of its discretion, the Court indicated that the criteria which national courts may take into account includes the degree of clarity and precision of the rule infringed.

The High Court held that right of residence under Article 16(2) was personal to the third-country national, and that the first condition was accordingly satisfied. It also held that the second condition was satisfied, for the breach of Article 16(2) which took place was a very serious one with grave consequences for the plaintiff. It was not satisfied that the interpretation placed on the Directive was excusable having regard to its recitals and operative provisions. The third condition was satisfied too, in that there was a causal link between the breach of EU law and the damage suffered by him. He had been dismissed from his employment simply because it could not be established that he had the right to work or reside in the State, and the reason why his entitlement to reside in it was not acknowledged was entirely attributable to the Minister's incorrect interpretation of the scope of application of Article 16(2) of the 2004 Directive, namely that periods of five-year residency completed prior to 30 April 2006 simply did not count for that purpose.

The court therefore concluded that the plaintiff was entitled to damages.

Turning to the question of their quantum, it estimated on the basis of the evidence before it that his gross loss over the six-year period was €133,944. It accepted that he had a duty to mitigate his loss. It noted that he had rejected an offer from his former employer to re-engage him once an appropriate vacancy arose, and that he had acted unreasonably in doing so. However, it held that the offer ought to have been made in writing so as to assess the terms upon which he

might have been re-engaged. It also noted that he had sought re-engagement in 2011 following the decision of the CJEU in C-162/09 *Lassal* which showed that Article 16 of the Directive had retroactive effect. It considered that the invalidity of his dismissal as amounting to a breach of EU law was manifest in the light of that decision and that the failure of his former employer to redress the wrong occasioned by it could not be objectively defended. It held that it was therefore inappropriate to impose a reduction on his damages for his failure to mitigate from the date of the decision in *Lassal*. It therefore assessed his damages as €107,905.00, subject to the payment by him of appropriate income tax and fiscal charges.

Turning to his claim for damages for breach of his constitutional rights, the court held that his dismissal from his employment brought about by operation of law clearly engaged the protection of the property rights protected by Article 40.3.2. However, it held that the *Francovich* remedy provided him with effective and adequate protection of the property rights in question and represented an adequate and just compensation for the wrongful interference with them.

The court held, however, that he was entitled, in the special circumstances of the case, to sue directly for damages for breach of his constitutional right to a good name under Article 40.3.2, as the ordinary common law rules regarding claims for damages for breach of contract following the wrongful dismissal from employment would be 'basically ineffective' to protect and to vindicate that right. It decided to award him the sum of €20,000 under that heading.

A.3 DECISIONS OF COURT OF JUSTICE OF EUROPEAN UNION AND OF EUROPEAN COURT OF HUMAN RIGHTS OF RELEVANCE TO IRELAND

A.3.1 CJEU DECISIONS

C-542/13 *M'Bodj*

Under Belgian law, a foreign national residing in Belgium who could prove his identity and who suffered from an illness occasioning a real risk to his life or physical integrity or a real risk of inhuman or degrading treatment where there was no appropriate treatment in his country of origin or in the country in which he resided was entitled to apply for leave to reside in Belgium. The applicant successfully submitted such an application. However, a later application for payment to him of disability allowances was rejected and he appealed. The appellate court referred a number of questions to the CJEU arising out of his case.

The CJEU noted that, by its first question, the referring court was asking, in essence, whether Articles 28 and 29 of the Qualification Directive (Directive 2004/83/EC), read in conjunction with Articles 2(e), 3, 15 and 18 thereof, were to be interpreted as requiring a Member State to grant the social welfare and health care benefits provided for in those measures to a third-country national who had been granted leave to reside on its territory under national legislation like that at issue in the proceedings.

The CJEU considered the various categories of 'serious harm' set out in Articles 15(a) to (c) of the Qualification Directive. It held that any risks faced by such a person of a deterioration in his state of health arising out of a situation where he was not intentionally deprived of health care, were not covered by Article 15(a) and (c) of the Qualification Directive 2004/83/EC, because 'serious harm', as defined by those provisions, consisted of the 'death penalty or execution' and 'serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict,' respectively.

Nor, it held, were such risks covered by Article 15(b) of the Qualification Directive 2004/83/EC, under which 'serious harm' constituted 'torture, inhuman or degrading treatment.' It held that that did not encompass a situation where appropriate treatment was not available in the person's country of origin, unless he was to be intentionally deprived of health care there.

It noted that, Article 3 of the Qualification Directive allowed Member States to introduce or retain more favourable standards for determining, inter alia, who qualified as a person eligible for subsidiary protection, 'insofar as those standards were compatible with the Directive'. However, it held that the latter reservation precluded a Member State from introducing or retaining provisions granting subsidiary protection status provided for in the Directive to a third-country national suffering from a serious illness on the ground that there is a risk that that person's health would deteriorate as a result of the fact that adequate treatment was not available in his country of origin, as such provisions would, it said, be incompatible with the directive.

It held that, in the light of those considerations, it would be contrary to the general scheme and objectives of the Qualification Directive to grant refugee status and subsidiary protection status to third-country nationals in situations which had no connection with the rationale for international protection.

C-562/13 *Abdida*

Under Belgian law, a foreign national residing in Belgium who could prove his identity and who suffered from an illness occasioning a real risk to his life or physical integrity or a real risk of inhuman or degrading treatment where there was no appropriate treatment in his country of origin or in the country in which he resided was entitled to apply for leave to reside in Belgium. The applicant submitted such an application on the basis that he was suffering from a particularly serious illness. His application was rejected and he appealed. The appellate court referred a number of questions to the Court of Justice of the European Union ('CJEU') arising out of his case.

The CJEU noted that the referring court was asking, in essence, whether Directives 2003/9, 2004/83 and 2005/85, taken, where appropriate, in conjunction with Articles 1 to 4, 19(2), 20, 21 and 47 of the *Charter of Fundamental Rights*, were to be interpreted as meaning that a Member State whose competent authorities had adopted a decision refusing the application of a third-country national for leave to reside in that Member State under national legislation such as that at issue in the proceedings, which provides that leave was to be granted to a foreign national suffering from an illness occasioning a real risk to his life or physical integrity or a real risk of inhuman or degrading treatment where there was no appropriate treatment in his country of origin or in the 'third country' in which he resided previously, and ordering him to leave its territory, was obliged to provide for a remedy with suspensive effect in respect of that decision and to make provision for his basic needs to be met pending a ruling on his appeal.

The CJEU noted that, on foot of its judgment in C-542/13 *M'Bodj*, applications of the sort made by the applicant did not constitute applications for international protection within the meaning of Article 2(g) of the Qualification Directive. It observed that the parties accepted that the decision under appeal was a 'return decision' within the meaning of Article 3(4) of Directive 2008/115.

It held that any remedy available to the applicant would have to be effective, as per Article 47 of the Charter. It noted that, under Article 19(2) of the Charter, no one was to be removed to a State where there was a serious risk that he would be subjected to inhuman or degrading treatment. In interpreting that provision, it had regard to caselaw of the European Court of Human Rights to the effect that, whilst non-nationals subject to a decision authorising their removal could not, in principle, claim any entitlement to remain in the territory of a State in order to continue to benefit from medical, social or other forms of assistance and services provided by that State, a decision to remove such a person suffering from a serious physical or mental illness to a country where the facilities for the

treatment of the illness were inferior to those available in that State, could well raise an issue under Article 3 ECHR in very exceptional cases, where the humanitarian grounds against removal were compelling.

Bearing that in mind it held that, in such exceptional cases, Member States were precluded from proceeding with such removal, having regard to both Article 5 of Directive 2008/115 and Article 19(2) of the Charter.

It further held that, in order to have an effective appeal against a return decision whose enforcement might expose the third-country national concerned to a serious risk of grave and irreversible deterioration in his state of health, he had to be provided with a remedy with suspensive effect, which would ensure that the decision was not enforced before a competent authority had the opportunity of examining an objection alleging infringement of Article 5 of Directive 2008/115, read in conjunction with Article 19(2) of the Charter. It held further that Member States were required to provide such a person the safeguards, pending return, established in Article 14 of Directive 2008/115, including appropriate medical treatment.

C-481/13 *Qurbani*

In this case, the applicant was arrested in Germany when he was discovered to be travelling on a false passport. He was charged with (i) unauthorised entry, unauthorised stay and unauthorised stay without a passport and (ii) forgery of documents. The court acquitted him, on the basis that the right of asylum, enshrined in the German Constitution, precluded him from being convicted of unauthorised stay and unauthorised stay without a passport, whilst the exemption from penalties provided for in Article 31 of the Geneva Convention applied to the offences of unauthorised entry and forgery of documents. Its decision was appealed by the prosecutor and a reference was made to the CJEU seeking a ruling on the interpretation of Article 31 of the Geneva Convention in the context of the case.

The CJEU noted that the referring court asked, in essence, whether Article 31 of the Geneva Convention was to be interpreted as precluding a person, on the one hand, from being punished under criminal law, in the Member State in which he sought asylum, for offences connected with his unauthorised entry into that Member State's territory, such as, in particular, unauthorised entry with the assistance of human traffickers and use of a forged identity document, and, on the other, from relying on the exemption from penalties provided for in that Article, where the person concerned had entered that Member State's territory after passing through another Member State of the European Union.

The CJEU held, however, that it lacked jurisdiction to interpret, in preliminary ruling proceedings, international agreements concluded between Member States and non-member countries. It said that it only had such jurisdiction where the European Union had assumed powers previously exercised by the Member States in the field to which an international convention not concluded by the European Union applied and the provisions of which had the effect of binding the European Union.

It held that, in the instant case, although several pieces of EU legislation had been adopted in the field to which the Geneva Convention applied as part of the implementation of a Common European Asylum System, it was undisputed that the Member States had retained certain powers falling within that field, in particular relating to the subject matter covered by Article 31 of that Convention. Therefore, it did not have jurisdiction to interpret directly Article 31, or any other article, of that Convention.

C-148 to 150/13 A, B and C

The applicants for asylum in The Netherlands claimed to be homosexual. Their applications were rejected for lack of credibility on various grounds. They challenged those decisions and the court seised of the challenges referred a question to the CJEU, asking what limits did Article 4 of the Qualification Directive (Directive 2004/83/EC) and the *Charter of Fundamental Rights*, in particular Articles 3 and 7 thereof, impose on the method of assessing the credibility of a declared sexual orientation, and whether those limits differed from the limits which applied to assessment of the credibility of the other grounds of persecution and, if so, in what respect?

The CJEU noted that the referring court considered that the mere fact of putting questions to an applicant for asylum might, to a certain extent, infringe the rights guaranteed by the aforementioned provisions of the Charter, and that, whatever method was adopted to verify the declared sexual orientation, it could not be ruled out that there was a risk of infringing the fundamental rights of the applicants for asylum, such as those guaranteed by Articles 3 and 7 of the Charter.

The CJEU held that, although it was for the applicant for asylum to identify his sexual orientation, which was an aspect of his personal identity, applications for the grant of refugee status on the basis of a fear of persecution on grounds of that sexual orientation might, in the same way as applications based on other

grounds for persecution, be subject to an assessment process, provided for in Article 4 of the Qualification Directive.

It cautioned, however, that the methods used by the competent authorities to assess the statements and documentary or other evidence submitted in support of such applications had to be consistent with both the provisions of the Qualification Directive and the Procedures Directive (Directive 2005/85) and, as was clear from recitals 10 and 8 respectively to the preambles to those directives, with the fundamental rights guaranteed by the Charter, such as the right to respect for human dignity, enshrined in Article 1 of the Charter, and the right to respect for private and family life guaranteed by Article 7 of it.

It held that, even though Article 4 of the Qualification Directive was applicable to all applications for international protection, whatever the ground for persecution relied on in support of those applications, it was for the competent authorities to modify their methods of assessing statements and documentary or other evidence having regard to the specific features of each category of application for asylum, in observance of the rights guaranteed by the Charter.

Under Article 4 of the Qualification Directive, a two-step assessment took place: the first stage concerned the establishment of factual circumstances which might constitute evidence that supported the application; and the second stage related to the legal appraisal of that evidence, in order to decide whether the substantive conditions were satisfied for the grant of international protection.

The CJEU turned to assess compatibility with the Qualification Directive, the Procedures Directive and the Charter of, first, the verifications carried out by the competent authorities based on, in particular, stereotypes as regards homosexuals and detailed questioning as to the sexual practices of an applicant for asylum and the option, for those authorities, of allowing the applicant to submit to 'tests' with a view to establishing his homosexuality and/or of allowing him to produce, of his own free will, films of his intimate acts and, secondly, the option of making a finding of a lack of credibility on the basis of the sole fact that the applicant in question did not rely on his declared sexual orientation on the first opportunity he had to set out the grounds for persecution.

The CJEU held, first, that assessments based on questioning as to the knowledge on the part of the applicant for asylum concerned of organisations for the protection of the rights of homosexuals and the details of those organisations, suggested that the authorities based their assessments on stereotyped notions as to the behaviour of homosexuals and not on the basis of the specific situation of

each applicant for asylum. It pointed out that Article 4(3)(c) of the Qualification Directive required the competent authorities to carry out an assessment that took account of the individual position and personal circumstances of the applicant, and that Article 13(3)(a) of the Procedures Directive required those authorities to conduct the interview in a manner that took account of the personal and general circumstances surrounding the application.

It held that, whilst questions based on stereotyped notions might be a useful element at the disposal of competent authorities for the purposes of the assessment, the assessment of applications for the grant of refugee status on the basis solely of stereotyped notions associated with homosexuals did not satisfy the requirements of the provisions referred to in the previous paragraph, in that it did not allow those authorities to take account of the individual situation and personal circumstances of the applicant for asylum concerned.

It held, accordingly, that an inability of an allegedly homosexual applicant for asylum to answer such questions could not, in itself, constitute sufficient grounds for concluding that the applicant lacked credibility, for such an approach would contravene the requirements of Article 4(3)(c) of Directive 2004/83 and of Article 13(3)(a) of Directive 2005/85.

Secondly, the CJEU held that whilst the national authorities were entitled to carry out interviews in order to determine the facts and circumstances as regards the declared sexual orientation of an applicant for asylum, questions concerning details of the sexual practices of that applicant were contrary to the fundamental rights guaranteed by the Charter and, in particular, to the right to respect for private and family life as affirmed in Article 7 thereof.

Thirdly, it considered the option available to the national authorities of allowing, as certain applicants in the proceedings had proposed, the performance of homosexual acts, the submission of the applicants to possible 'tests', and the production by those applicants of evidence such as films of their intimate acts. It held that, besides the fact that such evidence did not necessarily have any probative value, its nature would infringe human dignity, the respect of which was guaranteed by Article 1 of the Charter. Furthermore, it held that the effect of authorising or accepting such types of evidence would be to encourage other applicants to offer the same and would lead to requiring them to provide it.

Fourthly, it held that whilst Article 4(1) of the Qualification Directive provided that Member States might consider it the duty of the applicant to submit 'as soon as possible' all elements needed to substantiate the application for international

protection, it could not be concluded that an applicant's alleged homosexuality lacked credibility simply because, due to his reticence in revealing intimate aspects of his life, he or she did not declare it at the outset of the asylum procedure. To hold that an applicant for asylum was not credible, simply because he did not reveal his sexual orientation on the first occasion that he was given to set out the grounds of persecution, would be to fail to have regard to the requirement under Article 13(3)(a) of the Procedures Directive and Article 4(3) of the Qualification Directive to conduct an interview which took account of the personal or general circumstances surrounding the application, in particular, the vulnerability of the applicant, and to carry out an individual assessment of the application, taking account of his individual position and personal circumstances.

C-285/12 *Diakite*

In this case, the Belgian Conseil d'Etat referred a question to the CJEU for a preliminary ruling, essentially raising the matter of whether the concept of 'internal armed conflict' contained in Article 15(c) of the Qualification Directive (Council Directive 2004/83/EC) was to be interpreted by reference to international humanitarian law, in particular the four Geneva Conventions of 12 August 1949, or whether it was to be given an independent interpretation, in which case, it asked what were the criteria for determining whether such an 'internal armed conflict' existed.

The CJEU held that, in deciding whether such a conflict existed, it was not necessary for all the criteria referred to in the four Geneva Conventions, and other relevant provisions, to be satisfied. It pointed out that international humanitarian law and the subsidiary protection regime introduced by the Qualification Directive, pursued different aims and established quite distinct protection mechanisms. In deciding whether 'internal armed conflict' existed, that was to be determined by considering the usual meaning of that phrase in everyday language, while also taking into account the context in which it occurs and the purposes of the rules of which it was part. It noted that the usual meaning of the phrase in everyday language concerned a situation in which a state's armed forces confronted one or more armed groups, or in which two or more armed groups confronted each other.

It emphasised that the existence of an internal armed conflict was a cause for granting subsidiary protection only where confrontations between a state's armed forces and one or more armed groups or between two or more armed groups were exceptionally considered to create a serious and individual threat to the life or person of an applicant for subsidiary protection for the purposes of Article 15(c) of Directive 2004/83 because the degree of indiscriminate violence which characterised those confrontations reached such a high level that

substantial grounds were shown for believing that a civilian, if returned to the relevant country or, as the case may be, to the relevant region, would – solely on account of his presence in the territory of that country or region – face a real risk of being subject to that threat.

A.3.2 EUROPEAN COURT OF HUMAN RIGHTS

***Mohammadi v. Austria* (European Court, 3 July, 2014)**

The applicant was an Afghan national. He applied for asylum in Austria. His application was transferred to Hungary under the Dublin II Regulation. His removal was suspended on the basis of an interim measure granted by the European Court of Human Rights. The applicant contended that, if transferred to Hungary, he would be at risk of imprisonment in atrocious conditions, and at risk of chain *refoulement* to Serbia, through which he travelled en route to Hungary, without his asylum claim being examined on the merits.

The European Court held that a Contracting State was precluded under the ECHR from transferring a person where substantial grounds had been shown for believing that he would face a real risk of being subjected to treatment contrary to Article 3 ECHR in the receiving country. In applying the Dublin II Regulation, the Contracting States were obliged to ensure that the receiving country's asylum procedure afforded sufficient guarantees to avoid the removal of an asylum-seeker, directly or indirectly, to his country of origin without any evaluation of the risks he faced under Article 3 ECHR.

The European Court noted that the information showed that, in Hungary, there was still a practice of detaining asylum-seekers, including Dublin II Regulation returnees. However, there was no systematic detention of asylum-seekers, and alternatives to detention were provided for by law. There had also been improvements in the detention system. It also noted that the UNHCR had never issued a position paper requesting EU member States to refrain from transferring asylum-seekers to Hungary under the Dublin II or Dublin III Regulation. Accordingly, it concluded that the applicant would be exposed to a real and individual risk of being subjected to treatment in violation of Article 3 ECHR if transferred to Hungary under the Dublin II Regulation.

The European Court also considered the issue of sufficient access to asylum proceedings allowing an examination of the merits of the applicant's claim in Hungary and the alleged risk of chain *refoulement* to a 'third country'.

It observed that inter alia the UNHCR in its latest report had stated that Dublin Regulation returnees to Hungary whose claims had not been examined and decided there had access to an examination of the merits of their claims upon their return. The European Court therefore concluded that he would have the chance to reapply for asylum if returned to Hungary and to have his application duly examined.

As regards the alleged risk of *refoulement* to Serbia, the European Court noted that recent reports, including a report by the UNHCR, confirmed that Hungary no longer relied on the safe third-country concept and, in particular, examined asylum applications by Dublin returnees on the merits, as long as there had not yet been a decision on the case. Following changes in legislation, deportation could no longer be imposed on asylum-seekers during the asylum procedure.

The European Court accordingly concluded that the information on the situation in Hungary for asylum-seekers, and Dublin II Regulation returnees in particular, did not indicate systematic deficiencies in the Hungarian asylum and asylum detention system. It therefore concluded that the applicant would not be at a real, individual risk of being subject to treatment in contrary to Article 3 ECHR if returned to Hungary.

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