IACBA Conference 2020

Friday 27th November 2020

Attendance 4 CPD Points

Welcome Address

Good afternoon and welcome to the annual conference of the Immigration Asylum and Citizenship Bar Association in what is its traditional last Friday in November slot. However there has been little else traditional about 2020, which has been a tough year for Members and colleagues throughout the profession, as it has been for the entire country. As practitioners, we are especially aware of the impact of Covid-19 on the myriad of applications which arise in the international protection and Immigration area in particular, the operation of the protection adjudication bodies, the Department of Justice and of course the courts. Our Members represent Clients in all these fora and there is no area within this field of practice which has not suffered difficulties and constraints. The efforts made by all involved across the spectrum of activity, within the restrictions of Government guidelines, is to be commended. One of the most notable and perhaps dramatic changes arising has been the migration of court hearings to a remote platform. Since March, the Appeal courts followed by the High Court all moved online, with a steep learning curve for all. The continued pace of hearings is a testament to the adaptive skills of practitioners.

Since we were together last year, the courts have continued to hear and determine cases and appeals notwithstanding the challenges of 2020. Almost 40 judgments have been delivered by the Supreme Court and the Court of Appeal in this area of law - dealing with citizenship; family rights; marriages of convenience; the meaning of 'child'; the Dublin III Regulation; the performance of statutory functions; EU free movement; the concept of 'family member' in the Citizens Directive; statutory interpretation; the procedure for subsidiary protection; disclosure of reasons to highlight but some. Many of you here today were a part of those cases. Our Conference speakers today will be addressing many of key issues of law they identify and clarify. In the High Court, we lost Mr Justice Humphreys after three years in charge of the List and Mr Justice Barrett, both of whose tireless efforts had delivered a prolific number of judgments over their respective tenures. We wish them both well in their respective new areas of responsibility. We have gained the talents of Ms Justice Burns who took charge of the List in October this year and the Association warmly welcomes her to this varied area of the law.

Throughout the volatility of the last year, IACBA has continued to be very active, delivering more than monthly CPD presentations to its Members with twelve speakers have contributing on a wide range of topics including restriction of free movement under EU law on grounds of health; marriages of convenience; revocation of citizenship; reception conditions; challenges to IPAT decisions and family reunification; engaging with the judiciary and communicating updates / practice messages to its Members. We are indebted to the many colleagues who freely give of the their time to share their expertise for the ongoing enrichment of all.

When we gathered this time last year, where we could meet and mingle for all the additional social enjoyment a Conference can bring, none of us could then have envisaged what Conference 2020 would have to be. This new virtual delivery model however eliminates geographical challenges and made it possible to bring together an exceptional line-up of EU-based and colleague Speakers which we hope you will enjoy this afternoon. The Conference Schedule reflects the diversity and currency of the law we practice and I can assure you there will be many stimulating 'take-aways' from the contributions you will hear today. IACBA are immensely grateful to Michael Lynn SC; Professor Cathryn Costello; Professor Steve Peers and Jonathan Tomkin all of whom will participate in the first session and Advocate General Hogan; Suzanne Kingston SC; Aoife McMahon BL and Sara Moorhead SC who take over after the coffee break. They make for a fascinating afternoon.

The effort necessary to bring you Conference 2020 has been enormous and while a simple 'thank you' seems inadequate to do justice to all the time and effort the Committee have voluntarily invested, or to the incredible talents and patience of Aoife Kinnarney and her team on the Bar Council, I enthusiastically pass on all our appreciation.

Which brings me to the other significant development which has occurred in the time since our last Conference - the appointment of our Conference Chair today, Mr Justice Brian Murray to the Court of Appeal. Mr Justice Murray is well familiar with this area of law, having appeared in some seminal cases in the course of his stellar career at the Bar. He has delivered 2 notable judgments of the Court of Appeal in the area, in *Habte* and *U.M.* dealing with certificates of naturalisation and reckonable residency for derivative citizenship purposes respectively, both of which bear his hallmarks of incisive thought and clarity. We are honoured to have him Chair this afternoon's event and thank him for his time.

Please enjoy the afternoon.

Denise Brett SC
Chair, IACBA

Opening Remarks by Mr Justice Brian Murray

Michael Lynn SC

Gorry v Minister for Justice [2020] IESC 55 & its implications

Michael Lynn SC is a graduate of Trinity College, Dublin, with a practice in both criminal and civil law. He has had an interest in immigration and asylum law for many years, and has represented applicants in cases in the Superior Courts, the Court of Justice of the European Union and the European Court of Human Rights. He helped establish the Immigration and Asylum Law Module in the Kings' Inns, and is consultant editor of the textbook, National Security Law in Ireland, O'Connor, Bloomsbury, 2018.

Gorry and fundamental rights

Michael Lynn S.C.

IACBA annual conference
27th November 2020

1

Themes for discussion

- Process/Substance
- Constitution/ECHR
- Co-habitation – a right?
- The approach
- "length and duration" of a marriage
- EU contrast

2

Process/Substance

Of the approach in the judgment of McKechnie J., which upheld the Court of Appeal's analysis, O'Donnell J. (delivering 'the majority judgment') stated:

"16. … The Minister is told that the *way* in which he or she made the decision is wrong, but not what weight should be given to the relevant factors in these cases. But, the values involved in this balance are almost entirely constitutional, and therefore the weight is assigned by the Constitution as interpreted by the Courts ... The issue is whether the exercise of the power is invalid as interfering impermissibly with rights protected by the Constitution or the E.C.H.R. That is a legal matter rather than an issue for ministerial discretion. Unless there is guidance as to the weight which the Constitution requires, in particular, to be afforded to the factors at play, and in particular the fact of marriage, then it is inevitable that, even if the Minster were to address the matter in any similar case in the way outlined at para. 10 above, the decision could be the subject of challenge".

Process/Substance

Consider *R (SB) v. Governors of Denbigh High School* [2007] 1 AC 100, paras. 29-31, 63-8:

Lord Bingham

"29. … the focus at Strasbourg is not and has never been on whether a challenged decision or action is the product of a defective decision-making process, but on whether, in the case under consideration, the applicant's Convention rights have been violated …

"30. … Proportionality must be judged objectively, by the court (*Williamson*, above, para 51). As Davies observed in his article cited above, "The retreat to procedure is of course a way of avoiding difficult questions". But it is in my view clear that the court must confront these questions, however difficult. The school's action cannot properly be condemned as disproportionate, with an acknowledgement that on reconsideration the same action could very well be maintained and properly so.

"31. … what matters in any case is the practical outcome, not the quality of the decision-making process that led to it."

Process/Substance

R (SB) v. Governors of Denbigh High School [2007] 1 AC 100:

Lord Hoffmann

"68. … In domestic judicial review, the court is usually concerned with whether the decision-maker reached his decision in the right way rather than whether he got what the court might think to be the right answer. But article 9 is concerned with substance, not procedure. It confers no right to have a decision made in any particular way. What matters is the result: was the right to manifest a religious belief restricted in a way which is not justified under article 9.2? …"

Process/Substance

"76. It is apparent that [the] approach [of the majority] shares a number of features with the test which McKechnie J. would apply … I would expect that the adoption of either approach would reach the same result in most cases, and a decision must be scrutinised by reference to the considerations addressed rather than the use of any particular form of language."

See, also, paras. 11 and 26.

Para. 10 summaries McKechnie J's reasoning, including that the:

- the rights in Article 41.1.1 should enjoy the highest possible legal protection which might realistically be afforded in a modern society
- they include *the right of a married couple to cohabit* and *to decide to cohabit in Ireland*
- they are not absolute, and can be subject to restriction if there is "compelling justification", which might include considerations such as *the need to uphold the integrity of the asylum system, the interest in controlling entry to the State, maintaining an orderly immigration system, preventing disorder or crime, and ensuring the integrity of the social security and health system*.

Constitution/ECHR

In appearing to also treat the analysis by reference to the constitutional rights as if it was identical to, and perhaps derivative of, the E.C.H.R. analysis, the Minister addressed himself incorrectly to the constitutional rights and values involved, such that the decision must be quashed: the majority judgment, para. 27.

"77. … the test under the E.C.H.R. should not be applied in the consideration of issues arising under the Constitution. While the Constitution and the E.C.H.R. together provide extensive overlapping protection for families and marriage, it is necessary to recognise the different contexts."

7

Constitution/ECHR

YY v. Minister for Justice and Equality [2018] 1 ILRM 109; [2017] IESC 61.

31. The argument in this case is focused almost entirely on Article 3 of the European Convention on Human Rights. At the outset it is necessary to observe that the approach to litigation in this jurisdiction, particularly in this field is clearly influenced by the jurisprudence of the ECtHR and also the experience of the UK jurisdictions which have considerable experience of dealing with contentious immigration asylum and deportation cases, in the context of a common law jurisdiction with a sub constitutional incorporation in domestic law of the ECHR. This is natural and for the most part helpful. But it is necessary to recall that there are differences in the manner in which the Convention is incorporated here, most notably in that the Courts are not public bodies for the purpose of the Act, and in any event there are significant limitations on the remedies available. In principle therefore it is always advisable, and indeed necessary, to address the question as to the impact of the Constitution, which in most cases has an equal if not greater reach than the Convention and more powerful remedies. Here however the Minister is undoubtedly a public authority bound to act in accordance with the Convention and it has not been suggested that the standard required by the Constitution is higher than that required by Article 3 of the Convention which has been much litigated, and was the centrepiece of the argument in the High Court and this Court. Accordingly the Court will adopt this analysis for the purposes of the present case…

8

Constitution/ECHR

A further example of the secondary, and limited, role of the ECHR in our domestic law.

See, in the context of a claim for damages in tort, *Simpson v. Governor of Mountjoy Prison*, Supreme Court, 14th November 2019.

"74. The appellant's case ultimately rests on this "overlap" or mingling of constitutional and ECtHR jurisprudence. It derives from what can only be described as a "category error", and is contra-textual. It effectively seeks to give direct application of Article 3 of the ECHR in Irish law as constituting elements of a tort claim sounding in damages. This is constitutionally impermissible.

75. Indeed, it is not simply that the words, or even the principles enunciated in the Article 3 deliberations, are *different* from those to be found in the Constitution; the very purpose of those principles differs. It is the Constitution which identifies the fundamental rights which are justiciable in Irish courts and which may, where appropriate, give rise to an action sounding in damages."

Cohabitation – a right?

The majority judgment disagreed with McKechnie J.'s view that there is a right to co-habitation protected by Article 41, or at all by the Constitution. O'Donnell J. stated:

"62. I do not consider, therefore, that I am required to approach this case through the prism of a constitutionally protected right to cohabit, still less one said to be protected by Article 41.1. The judgment of McKechnie J. would appear to be the first time this court would hold that there is a general right to cohabitation protected by Article 41 with all that such entails. For the reasons set out above, I do not agree. Cohabitation by a married couple, and indeed by any couple in a committed and enduring relationship is, however, something the State is required to have regard to in its decision making and to respect."

Cohabitation – a right?

Article 23 of the ICCPR

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Cohabitation – a right?

The Human Rights Committee's *General Comment No. 19 on Article 23 (Family)*, adopted on 27th July 1990 states, inter alia (underlining added):

5. The right to found a family implies, in principle, the possibility to procreate and live together. When States parties adopt family planning policies, they should be compatible with the provisions of the Covenant and should, in particular, not be discriminatory or compulsory. Similarly, the possibility to live together implies the adoption of appropriate measures, both at the internal level and as the case may be, in cooperation with other States, to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons.

Re the ECHR - in *Tanda-Muzinga v. France*, App. No. 2260/10, 10th July 2014, the ECtHR held that France violated its positive obligations under Article 8 in its delay in processing a refugee's application for family reunification with his wife and children.

The approach

At para. 75 of the majority judgment.

The Minister is required to have regard to:

(a) The right of an Irish citizen to reside in Ireland;

(b) The right of an Irish citizen to marry and found a family;

(c) The obligation on the State to guard with special care the institution of Marriage;

(d) The fact that cohabitation – the capacity to live together – is a natural incident of marriage and the Family and that deportation will prevent cohabitation in Ireland and may make it difficult, burdensome, or even impossible anywhere else for so long as the deportation order remains in place.

"length and duration"

The majority judgment refers to the potential relevance of the "length and duration" of the marriage, or relationship.

66. This is not to say that the length and duration of a relationship is irrelevant. It is, however, weighed under that heading: that is, an enduring relationship of considerable duration rather than that of marriage.

See, also paras. 71, 72 and 74.

"length and duration"

What exactly is the relevance?

The marriage confers a status.

If it is suspected to be a marriage of convenience, then say that and examine it in a fair procedure.

Risk of imposing a cultural presumption of the propriety of courtship, or requiring a period of residence abroad unjustifiably.

EU contrast

Majority judgment:

28. While the outcome in many cases would be the same whatever approach is taken, there is a risk of creating a default position where certain family rights are held to exist which must be overcome in any given case. The correct starting point, in my view, is the opposite. It is that a non-citizen does not have a right to reside in Ireland and does not acquire such a right by marriage to an Irish citizen.

Metock, Case C-127/08, no difference whether the couple married before or after entering the State, para. 92.

EU contrast

Lounes, Case C-165/16

Article 21(1) TFEU:

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

"52. The rights which nationals of Member States enjoy under that provision include the right to lead a normal family life, together with their family members, in the host Member State …"

EU contrast

"60. …if the rights conferred on Union citizens by Article 21(1) TFEU are to be effective, citizens in a situation such as Ms Ormazabal's must be able to continue to enjoy, in the host Member State, the rights arising under that provision, after they have acquired the nationality of that Member State in addition to their nationality of origin and, in particular, must be able to build a family life with their third-country-national spouse, by means of the grant of a derived right of residence to that spouse."

Right under Art 21(1) only arose because she had exercised her right to free movement, para.51.

Only a derived right for the 3CN, no autonomous right, para. 47. NB – *Singh*, Case C-218/14, and *NA*, C-115/15

For application of Article 45 TFEU (right to move freely within the EU for the purpose of work), see *S. and G.*, C-457/12

Final thought

"One of the many discussions between Kant and Hegel regarded the constitution of marriage and the place of the family in society. Kant, who reportedly died as a virgin, described marriage in rather graphic terms as a purely contractual relationship between two individuals granting them the mutual right to use each other's genitalia. Hegel, who is known to have been a family man, criticised Kant and defined marriage as an ethical unity between husband and wife, and saw the family as the basis of and a model for the ideal society": '*Between Fact and Fiction: an Analysis of the Case Law on Article 12 ECHR*', B. van der Sloot, Child and Family Law, 2014-4.

Art. 41.1: the family is "the natural primary and fundamental unit group of Society" and the "necessary basis of social order and … indispensable to the welfare of the Nation and the State".

Prof. Cathryn Costello, Hertie School

Strategic Litigation to Vindicate the Rights of Refugees and Migrants: The Right to Work and Family Reunification in Global Context

Cathryn Costello is a Professor of Fundamental Rights at the Hertie School and Co-Director of the Centre for Fundamental Rights. She is an expert in European and international refugee and migration law, and has written about EU asylum and migration law, international refugee law, and the relationship between migration and labour law. Costello is also part-time Professor II at the Norwegian Centre for Human Rights at the University of Oslo, and is on leave from her previous post as Professor of Refugee and Migration Law at the Refugee Studies Centre, University of Oxford. She is currently the Principal Investigator of RefMig, a five-year ERC-funded research project exploring refugee mobility, recognition and rights. She holds a DPhil in Law from the University of Oxford. She began her academic career as Lecturer in European Law at the Law School, TCD, where she was also Director of the Irish Centre for European Law (2000-2003). She served on the boards of both the Irish Refugee Council and the Immigrant Council of Ireland.

However, it is suggested that changes in law and social policy are most likely to be achieved where litigation is part of a broader campaign for change, alongside activism from civil society, human rights bodies, and refugees and migrants themselves.

Strategic Litigation to Vindicate the Rights of Refugees and Migrants: Pyrrhic Perils and Painstaking Progress

Cathryn Costello*

Introduction

This contribution considers strategic litigation taken to vindicate the rights of asylum-seekers, refugees and migrants. Strategic litigation refers to

> …a form of public interest litigation where a case is pursued on behalf of an applicant or group of applicants, with a view to achieving a law reform goal beyond the individual case. While legal ethics dictate that the clients' interests are paramount in litigation, strategic litigation seeks an additional social or political impact beyond the remedy sought by the individual.[55]

As non-citizens, refugees and migrants are usually un-enfranchised in the political communities to which they move or seek to move. As outsiders to the political process, they cannot rely on majoritarian political institutions to protect their rights. Their rights are also often obscured by the basic assumption that states have a wide discretion to control entry to their territory. This statist migration control assumption is often invoked to mask human rights violations, and to undermine the rule of law. In this context, it is tempting to look to human rights law as a secure source of protection for the rights of refugees and migrants. The basic human dignity and equality that underpins human rights law means that many forms of migration control are amenable to challenge if they violate human rights.

* Andrew W Mellon Associate Professor in International Human Rights and Refugee Law, Refugee Studies Centre & Faculty of Law, University of Oxford.

However, human rights bodies and courts often defer to the right of states to control their borders.[56] So, while human rights law is important, it offers no panaceas for refugees and migrants. Moreover, litigation has inherent limits. Winning in court depends on who brings the cases, the persuasiveness of their arguments, and in turn the receptiveness of judges. Even if cases go the "right" way, there is no guarantee that rulings will be implemented in a fulsome way. They may be undermined politically in the implementation process. In some national systems, courts are subject to legislative override, so must tailor their rulings accordingly. In other contexts, such as where EU law is at issue, or where bills of rights provide for strong judicial review, courts may be in a stronger position. But irrespective of their formal constitutional position, courts depend on politics for the implementation of rulings.

Accordingly, strategic litigation comes with risks. Losing is always a risk, and the litigant herself gains nothing. Some losses also come as a political set-back. If a court upholds a rights-restrictive policy, that may be seen to confer legitimacy on it. Sometimes, wins may mask losses, as there is no guarantee that progressive rulings will be implemented in a manner that is faithful to their ethos. For organisations and individuals engaging in strategic litigation, all these potential risks ought to be carefully considered. There is now a rich social scientific literature on strategic litigation in the human rights field,[57] which those engaged in strategic litigation would do well to consult.

This contribution examines three different strategic litigation sagas, and distils some general observations from them. They concern three distinct issues – access to asylum, detention of asylum-seekers and the integrity of the asylum process. This short contribution cannot do justice to this potentially vast topic, and my selection does not claim to be comprehensive. I have selected some cases that broke important new legal ground. Success took great and long-standing efforts.

1. Courting Access to Asylum[58]

Considering access to asylum, it has been acknowledged for the past decades that there are few, if any, legal routes to asylum for refugees who seek protection in the Global North, particularly in

EU Member States. While there may be some limited humanitarian admission programmes and formal resettlement for small numbers of refugees, in general, would-be asylum-seekers have to enter the EU illegally. Visas and carrier sanctions are just two of the many forms of extraterritorial border controls used by states in the Global North to stop refugees reaching their shores. Some of these border control practices are currently legal, others are not. But, in general, policies that prevent refugees from arriving allow states to avoid their responsibilities to refugees. Once refugees reach the territory of a state, in particular liberal-democratic states that respect the rule of law, at least their basic right to *non-refoulement* must be respected, requiring an examination of protection needs. However, if that arrival can be prevented, responsibility is avoided. Strategic litigation comes in as a way of asserting legal accountability over extraterritorial border control practices.

One of the main barriers to access to asylum is the lack of a specific visa for claiming asylum. Such a visa can easily be created, but states generally choose not to issue such visas.[59] If asylum-seekers do not have visas, then they cannot board regular flights and ferries due to carrier sanctions. It is difficult, but not impossible, to establish legal obligations on embassies to consider protection needs of those who apply for visas.[60] As well as visa processing, another common form of extraterritorial border control are juxtaposed border controls, when officials from a country of destination are posted to airports and ports in third countries. A further practice is maritime push-backs, in particular, in international waters and in the territorial waters of third countries.

On juxtaposed controls, the case of *R v Immigration Officer at Prague Airport*[61] is illustrative. This case concerned a UK immigration control pre-clearance procedure at Prague airport. A policy was in place to refuse entry if UK immigration officers concluded that a would-be passenger was likely to claim asylum once she arrived in the UK. The Roma Rights NGO gathered data to demonstrate the racially discriminatory fashion in which the border controls in Prague Airport were being conducted, and brought a legal challenge in the UK courts. This case failed as a refugee case, but succeeded in establishing that equality guarantees had been violated. The United Nations High Commissioner for Refugees (UNHCR) had intervened in the case

(the intervention was penned by Professor Guy S Goodwin-Gill of the University of Oxford), arguing that the controls were not a good faith application of the Refugee Convention,[62] but this argument was rejected.

On interdiction at sea and migrant push-backs, the leading case is *Hirsi Jamaa v Italy*.[63] The case concerned Italy's practice of interdicting and returning irregular migrants in international waters, and returning them to Italy, pursuant to an Italy-Libya agreement. The Italian authorities intercepted a boatful of migrants at sea in international waters, took them on board and brought them back to Libya. The European Court of Human Rights (ECtHR) held that, although Italy had been acting extraterritorially, its actions were nonetheless within its "jurisdiction", as it had exercised effective control over the persons in question. On the substance, it held that returning the applicants to Libya without examining their case exposed them to a risk of inhuman and degrading treatment, in violation of Art 3 of the European Convention on Human Rights (ECHR). Italy was also in violation of the prohibition of collective expulsions under Art 4 of Protocol 4. As a strategic case, *Hirsi* was challenging. The difficulties faced by the Italian lawyers were considerable. After all, the applicants had been returned to Libya, without ever having landed on Italian soil. The ECtHR had deemed a similar previous case inadmissible, as the lawyers could not demonstrate that they had proper authority to bring the case.[64]

These cases illustrate a gradual expansion of legal accountability over extraterritorial border control practices. *Hirsi* contrasts sharply with the US Supreme Court ruling in *Sale*, where push-backs were permitted.[65] The cases have established that some forms of extraterritorial acts will trigger the human rights obligations of the state in question, but many forms of cooperation still escape legal scrutiny. To illustrate, while European states would be held accountable for directly returning migrants to Libya, paying the Libyan authorities to prevent migrants leaving would not obviously involve an exercise of "jurisdiction" on the part of European States. This is not to suggest there is no way to establish state responsibility, but merely that other legal avenues must be sought other than via human rights courts.[66]

2. Detaining Asylum Seekers[67]

In light of the access barriers sketched in the previous section, when asylum-seekers arrive in Europe, they tend to do so irregularly. This places them at risk of detention, in spite of the provisions of Art 31 of the Refugee Convention, under which refugees should generally not be penalised for their illegal entry.[68] Strategic litigation around detention of asylum-seekers, particularly in the UK, shows some of the pitfalls of losing significant cases early. When the UK introduced a fast-track detention process for some asylum-seekers, it was quickly challenged in the domestic courts. Unfortunately, Strasbourg upheld the detention practice in *Saadi v United Kingdom*.[69] Thereafter, the detention practices expanded greatly, so much more domestic litigation was required to demonstrate its illegality.

Prior to *Saadi v United Kingdom*,[70] the ECtHR had mainly considered pre-deportation detention under Art 5(1)(f) ECHR,[71] and not detention "to prevent unauthorised entry". Asylum-seekers cannot be deemed to be in "pre-deportation detention" until their legal status is determined. So the question was whether they could be treated as "unauthorised entrants". There were many interveners in the case, including the UNHCR, who argued for a very limited detention power. However, the ECtHR gave a ruling that established in principle a broad power to detain, and deemed administrative convenience an acceptable aim of detention. It also held that asylum-seekers were "unauthorised entrants" until the state decided otherwise. This power was not *carte blanche*, and a range of caveats was established to ensure the detention was not arbitrary, going to its duration, place and conditions. There was a powerful dissent, and the case was generally criticised for failing to vindicate the right to liberty.

In the following years, the UK detained fast-track system expanded in terms of its capacity and application, and has become synonymous with the rejection of asylum claims, and harsh conditions. A small NGO, *Detention Action*, continued to challenge both the procedural implications of the detained fast-track, and its basis in law. It took three years of litigation, a dozen hearings, and two Court of Appeal rulings, but ultimately both the procedural fairness and the legal basis of the detained fast-track were found lacking.[72] The two Court of Appeal rulings went to the fairness and the legal basis of

the detention. Immediately thereafter, it was feared that the ruling would be a pyrrhic victory, and that a new detained fast-track would be introduced on a clearer statutory footing, but it now appears that the practice will end.[73]

The application to Strasbourg in *Saadi v UK* should perhaps not have been made at the time it was. The detention in question was for a short period, and at that point in time, the UK Government's claims about the administrative utility of the detained fast-track seemed plausible (if not demonstrative of the necessity of the practice). By taking the Strasbourg case prematurely, the ECHR ruling gave wide leeway to detain asylum-seekers. It then fell to the domestic courts in the UK applying domestic administrative law principles to check the practice of detention on arrival, which expanded greatly in the intervening years.

3. Restoring the Integrity of the Asylum System

Canada's asylum system had long been commended for its high quality adjudication. However, the Conservative government of Stephen Harper had adopted many European-style policies to limit access to asylum, and "deter" asylum-seekers from certain countries.

A trio of cases represents a concerted effort to root out the restrictive practices, using the Canadian Charter and international refugee law to challenge the restrictive legislation. The cases concerned limitations on access to health-care for asylum-seekers (*Canadian Doctors for Refugee Care v Canada)*[74]; a system of "designated countries of origin" which limited the procedural rights of asylum-seekers from certain countries (*YZ and the Canadian Association of Refugee Lawyers v Minister for Citizenship and Immigration*)[75]; and a challenge to anti-smuggling laws which were alleged to be overbroad, in that they prohibited assistance by family members and humanitarian organisations to those who sought to enter Canada to seek refuge (*R v Appulonappa*).[76]

Space precludes a detailed examination of the cases, but suffice to note that the Canadian Charter's human rights and equality guarantees were interpreted to protect asylum-seekers from harsh and discriminatory treatment. On the smuggling prohibition, the Supreme Court of Canada held that the legislation was overbroad, and

that it ought to be interpreted to permit a humanitarian exception. All of the cases were supported by public interest litigants, and in the *Canadian Doctors* case, the Canadian medical profession had staged industrial action to protest against the new laws. The Federal Court ruled that the government intentionally targeted poor and vulnerable refugees and refugee claimants "for the express purpose of inflicting predictable and preventable physical and psychological suffering on many of those seeking the protection of Canada".[77] Two of the cases were likely to be appealed, were it not for the change of government. The Liberal government of Justin Trudeau has not sought to appeal against these rights-protective rulings. In addition, his government is making good on an election promise to resettle 25,000 Syrian refugees.

Conclusion

Perhaps the selection of cases has been somewhat eclectic, but my aim was to illustrate some of the perils, as well as progressive potential, of strategic litigation on refugee rights. Some state practices are difficult to bring to the attention of courts. When states act extraterritorially, or in concert with other states, it takes great efforts to even gather the requisite evidence to bring cases to court. An NGO that specialises in strategic litigation[78] brought the *Roma Rights* case, while Professor Andrea Saccucci, renowned human rights law specialist practitioner and academic, represented *Hirsi et al*.[79] Without such institutional or professional support beyond the norm, such cases would never come to court. Most migrants and refugees excluded by extraterritorial practices would not have the resources or opportunity to challenge their exclusion. Few individual litigants would have the tenacity, strategic vision or resources to bring such cases to court. The cases made important clarifications of principle, but in practice, asylum-seekers still have few if any legal means to access asylum. There is much further work to be done on this front, both in political and legal *fora*.

Bringing the wrong case, and losing, has high costs, as *Saadi v UK* illustrates. By clarifying the scope of Art 5 ECHR prematurely, detention of asylum-seekers on arrival was normalised. It took a small, tenacious British NGO a decade more to demonstrate the legal shortcomings of the detained fast-track. But *Saadi v UK* remains the

leading Strasbourg ruling, creating, in my view, far too great a leeway for detention.

My contribution concludes with the Canadian cases, as they represent strong rulings on equality and dignity for asylum-seekers. The Canadian courts have deemed unconstitutional the sorts of practices that have regrettably been normalised in Europe. The Canadian Charter has some particular features that may help explain the rulings, in particular its robust equality guarantee. But also noteworthy is the strong role of public interest litigants and interventions in the cases, and the civil society campaigns that supported the litigation. Strategic litigation does not take place in a vacuum, and the political winds were also blowing in a more refugee-friendly direction in the wake of the rulings.

All in all, the cases I have described illustrate some of the potential and the pitfalls of strategic litigation on refugee and migrant rights. The costs of failure may be high, but in a context where human rights violations are normalised, legal challenges remain a powerful force.

Notes

1 This chapter is based on the proceedings of the third seminar, 'Immigration, Asylum and Legal Change', organised with the Immigrant Council of Ireland (ICI), which took place on 18 September 2015.

2 *Mallak v Minister for Justice, Equality and Law Reform* [2012] IESC 59, [2012] 3 IR 297 (SC).

3 [2012] IESC 59, [2012] 3 IR 297 (SC).

4 In *Meadows v Minister for Justice, Equality and Law Reform* [2010] 2 IR 701 (SC) [188], Hardiman J stated: "Judicial review of administrative action is a very significant part of the workload of the High Court and of this court on appeal. Asylum and immigration matters account in turn for a very significant portion of judicial review applications: between 2004 and December 2008 the percentage of judicial review matters represented by asylum and immigration cases varied from 47% the first year to 54% in the last, and in two years, 2006 and 2007, constituted almost 60% of the total judicial review workload (59% in each year). This seems to suggest, though no figures appear to be available, that a very high percentage of applications for asylum which are decided unfavourably to the applicant, and/or subsequent deportation orders, rapidly become the subject of judicial review applications". However, given the extraordinarily high rate of refusal (at one stage 99 percent of refugee applications were refused at first instance), as will be set out below, it might be thought that the rate of judicial review could in fact have been higher.

5 See, generally, Susan Kneebone (ed), *Refugees, Asylum Seekers and the Rule of Law*

(Cambridge, Cambridge University Press 2009).

6 See, for example, Juliet Cohen, 'Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers' (2001) 13 *International Journal of Refugee Law* 293; Michael Kagan, 'Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determinations' (2003) 17 *Georgetown Immigration Law Journal* 367; Audrey Macklin, 'Truth or Consequences: Credibility Determinations in the Refugee Context' in International Association of Refugee Law Judges, *The Realities of Refugee Determination on the Eve of a New Millennium: The Role of the Judiciary–IARLJ 3rd Conference Ottawa, 14–16 October 1998* (International Association of Refugee Law Judges 1998); Jane Herlihy, 'Evidentiary Assessment and Psychological Difficulties' in Gregor Noll (ed), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Leiden, Martinus Nijhoff 2005) 123–40.

7 *Camara v Minister for Justice, Equality and Law Reform* (HC, 26 July 2000) (Kelly J).

8 *Nguejdo v Office of the Refugee Applications Commissioner* (HC, ex tempore, 23 July 2003) (White J).

9 *AMT v Refugee Appeals Tribunal* [2004] 2 IR 607 (HC).

10 *Carciu v Refugee Appeals Tribunal* [2003] IEHC 41.

11 *IR v Refugee Appeals Tribunal* [2009] IEHC 353.

12 *AAMO v Refugee Appeals Tribunal* [2014] IEHC 49.

13 See, for example, Aoife Drudy, 'Credibility assessments and victims of FGM: a re-evaluation of the refugee determination process' (2006) 14 ISLR 84; Samantha Arnold, 'The culture of credibility in the United Kingdom and Ireland and the sexual minority refugee' (2012) 30 *Irish Law Times* 55; Sue Conlan, Sharon Waters and Kajsa Berg, *Difficult to believe: the assessment of asylum claims in Ireland* (Dublin, Irish Refugee Council 2012); Carol Coulter, 'Call for review of up to 1000 rejected asylum applications', *The Irish Times*, 10 March 2008.

14 Office of the Refugee Applications Commissioner, 'Annual Report 2010' (2011) Appendix 3, Table 11.

15 Anthony Albertinelli, *Asylum applicants and first instance decisions on asylum applications in 2010* (Eurostat 2011).

16 Office of the Refugee Applications Commissioner (n 14).

17 Sue Conlan, Sharon Waters and Kajsa Berg, *Difficult to believe: the assessment of asylum claims in Ireland* (Dublin, Irish Refugee Council 2012) 1.

18 United Nations High Commissioner for Refugees (UNHCR), 'Irish Asylum Trends 2014' (6 May 2015).

19 *Nawaz v Minister for Justice* (HC, 29 July 2009) (Clark J).

20 *Salman v Minister for Justice* [2011] IEHC 481.

21 [2012] 3 IR 297 (SC), [2013] 1 ILRM 73 (SC).

22 As provided by ss 15 and 16 of the Irish Nationality and Citizenship Act 1956 (as amended).

23 [2012] 3 IR 297 (SC), 312, [2013] 1 ILRM 73 (SC), 87.

24 [2012] 3 IR 297 (SC), 322, [2013] 1 ILRM 73 (SC), 95-96.

25 Catherine Cosgrave, *Living in Limbo – Migrants' Experiences of Applying for Naturalisation in Ireland* (Dublin, Immigrant Council of Ireland and NASC 2011).

26 *AP v Minister for Justice and Equality (No 2)* [2014] IEHC 241.

27 Department of Justice and Equality, 'Minister Shatter introduces major changes to citizenship application processing regime' (16 June 2011).
28 Jamie Smyth, 'Government to bring in citizenship ceremony after successful pilot event' *The Irish Times*, 25 June 2011.
29 [2014] IEHC 241.
30 As noted by UNHCR, 'Conclusions of UNHCR Global Consultations on International Protection' (Expert Roundtable, Geneva, 8-9 November 2001), para 6, "maintaining and facilitating family unity helps to ensure the physical care, protection, emotional well-being and economic support of individual refugees and their communities. The protection that family members can give to one another multiplies the efforts of external actors. In host countries, family unity enhances refugee self-sufficiency, and lowers social and economic costs in the long term".
31 *POT v Minister for Justice, Equality and Law Reform* [2008] IEHC 361.
32 *RX v Minister for Justice* [2011] 1 ILRM 444 (HC).
33 *Hassan v Minister for Justice* [2013] IESC 8.
34 *Hamza v Minister for Justice* [2013] IESC 9.
35 *AMS v Minister for Justice (No 1)* [2012] IEHC 72.
36 *AMS v Minister for Justice (No 2)* [2014] IEHC 57, [2014] IESC 65.
37 *AAM v Minister for Justice* [2013] IEHC 68.
38 [2013] IEHC 68 [28].
39 See Colm Keena, 'Council of State to test validity of asylum Bill' *The Irish Times*, 29 December 2015 who noted "Mr Higgins's office has said it is concerned that sections 56 and 57 of the Bill, which are concerned with family reunification, might be in conflict with the Constitution".
40 Free Legal Advice Centre (FLAC), 'Direct Discrimination? An analysis of the scheme of Direct Provision in Ireland' (FLAC 2003) 8, which states "in November 1999, the Minister for Justice, Equality and Law Reform stated the government's intention to introduce Direct Provision as a matter of 'extreme urgency', commenting that the number of applications for asylum were 'spiralling out of control' and announcing the need for the burden to be spread throughout the country. The Minister also expressed concern that 'the welfare scheme must not act as a pull factor for non-genuine asylum seekers.' The United Kingdom was introducing Direct Provision in April 2000 and the Minister was of the view that if Ireland did not have a similar scheme up and running by that time, the country would be overwhelmed by the numbers of asylum applicants."
41 See, for example, FLAC, 'Direct Discrimination? An analysis of the scheme of Direct Provision in Ireland' (FLAC 2003); FLAC, *One Size Doesn't Fit All: A Legal Analysis of the Direct Provision and Dispersal Policy in Ireland Ten Years On* (Dublin, FLAC 2009); Irish Refugee Council, 'Direct Provision: Framing an Alternative Reception System for People Seeking International Protection' (Irish Refugee Council 2013).
42 For example, Liam Thornton, 'Upon the Limits of Rights Regimes: Reception Conditions of Asylum Seekers in the Republic of Ireland' (2007) 24(2) *Refuge* 86; Irish Human Rights and Equality Commission, 'Policy Statement on the System of Direct Provision in Ireland' (IHREC 2014); UN Human Rights Committee, 'Concluding Observations on the fourth periodic report on Ireland' (UNHRC 2014), which expressed concern about "delays in the processing of asylum claims and prolonged accommodation of asylum-seekers in direct provision centres which

is not conducive to family life" and the lack of an accessible and independent complaints mechanism in direct provision centres, and Kitty Holland, 'Ireland challenged on children's rights record' *The Irish Times*, 14 January 2016 in respect of Ireland's most recent appearance before the UN Committee on the Rights of the Child, where one of the committee members noted "many child asylum seekers had spent "the whole of their childhoods" in direct provision centres".

43 For example, Barry Roche, 'Asylum seekers mount protest at Cork direct provision centre' *The Irish Times*, 15 September 2014; Eoin English, 'Asylum seekers' protest extends to fifth centre' *Irish Examiner*, 19 September 2014; Barry Roche, '160 asylum seekers protest at Waterford direct provision centre' *The Irish Times*, 8 October 2014.

44 *CA and TA (a minor) v Minister for Justice and Equality, the Minister for Social Protection, Attorney General and Ireland* [2014] IEHC 532.

45 The court declined to rule on the substantive human rights complaints on the basis that the applicants had sought to rely on a number of reports and statements such as: the Human Rights Committee, 'List of issues in relation to the fourth periodic report of Ireland' (OHCHR 2013); Irish Human Rights Commission, 'Submission to the UN CERD Committee on the Examination of Ireland's Combined Third and Fourth Periodic Reports' (IHRC 2010); Geoffrey Shannon, 'Fifth Report of the Special Rapporteur on Child Protection, A Report Submitted to the Oireachtas' (2011); Joint Committee on Justice, Defence and Women's Rights, 'Asylum Policy and Practice and Gender Issues: Discussion' (Houses of the Oireachtas Committee Debates, 7 July 2010); European Commission against Racism and Intolerance, 'ECRI Report on Ireland' (ECRI 2013); Council of Europe, Parliamentary Assembly, 'Refugees and the right to work' (Report of the Committee on Migration, Refugees and Displaced Persons – Rapporteur: Mr Christopher Chope) (Parliamentary Assembly of Council of Europe 2014), including a 'Resolution 1994 of the Parliamentary Assembly on Refugees and the right to work'; UN General Assembly, 'Report of the independent expert on the question of human rights and extreme poverty, Magdalena Sepúlveda Carmona, on her Mission to Ireland' (Seventeenth session, Human Rights Council 7 May 2011); FLAC, *One Size Doesn't Fit All: A Legal Analysis of the Direct Provision and Dispersal Policy in Ireland Ten Years On* (Dublin, FLAC 2009); Corona Joyce and Emma Quinn, *The Organisation of Reception Facilities for Asylum Seekers in Ireland* (Dublin, ESRI 2014). However, the court ruled that, because none of the authors of those reports had been called to give evidence in the case, it would be inappropriate to have regard to those reports.

46 Ronan McGreevy, 'Working group announced to examine direct provision' *The Irish Times*, 14 October 2014.

47 A letter by 123 academics to *The Irish Times* was highly critical of this limitation in the terms of reference and said that the process was thereby clearly a "cosmetic exercise" only: see letter to the editor on the working group on direct provision, *The Irish Times* (Dublin, 28 October 2014).

48 Working Group to Report to Government on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers, 'Final Report' (Working Group on the Protection Process 2015).

49 For example, Kitty Holland and Stephen Collins, 'Asylum seekers should get

decision within 12 months' *The Irish Times*, 30 June 2015, which noted that "clear differences" had emerged between Minister for Justice and Equality Frances Fitzgerald TD, and the junior minister Aodhán Ó Ríordáin TD, at the launch of the McMahon report (hereinafter "McMahon report"); then Minister Ó Ríordáin spoke of a "moral obligation" in respect of implementation while Minister Fitzgerald said only that the report provided "food for thought".

50 'A Programme for a Partnership Government' (May 2016).

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54 *NHV v Minister for Justice and Equality* [2016] IESCDET 51.

55 Andrea Coomber, 'Strategically litigating equality – reflections on a changing jurisprudence' (2012) 15 *European Anti-Discrimination Law Review* 11.

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57 For a sample, Austin Sarat and Stuart A Scheingold, *Cause Lawyers and Social Movements* (Stanford, Stanford University Press 2006); Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago, Chicago University Press 1991); Charles R Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (Chicago, University of Chicago Press 1998).

58 See further, Cathryn Costello, 'Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored' (2012) *Human Rights Law Review* 287.

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60 Kate Ogg, 'Protection Closer to Home? A Legal Case for Claiming Asylum at Embassies and Consulates' (2014) 33 *Refugee Survey Quarterly* 81.

61 *R v Immigration Officer at Prague Airport (Roma Rights)* [2004] UKHL 55.

62 *UNHCR intervention before the House of Lords in the case of European Roma Rights Centre and Others v Immigration Officer at Prague Airport, Secretary of State for the Home Department* (28 September 2004) <www.refworld.org/docid/41c1aa654.html> accessed 9 August 2016.

63 *Hirsi Jamaa v Italy* (2012) 55 EHRR 21.

64 *Hussun and Others v Italy* App Nos 10171/ 05, 10601/ 05, 11593/ 05 and 17165/

05 (ECtHR, 19 January 2010).

65 See Harold Hongju Koh, 'YSL Sale Symposium: Sale's Legacies' (Opinio Juris, 17 March 2014) <http://opiniojuris.org/2014/03/17/yls-sale-symposium-sales-legacies/> accessed 9 August 2016.

66 For a comprehensive survey, see James C Hathaway and Thomas Gammeltoft-Hansen, 'Non-refoulement in a world of cooperative deterrence' (2014) University of Michigan Law & Economics Working Papers, Paper 106/2014 <http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1216&context=law_econ_current> accessed 23 August 2016.

67 Cathryn Costello, 'Immigration Detention: The Grounds Beneath our Feet' (2015) 68(1) *Current Legal Problems* 143.

68 For extensive commentary, see Gregor Noll, 'Article 31 (Refugees Unlawfully in the Country of Refuge)' in Andreas Zimmermann, Jonas Dörschner and Felix Machts (eds), *The 1951 Convention Relating to the Status of the Refugees and its 1967 Protocol: A Commentary* (Oxford, Oxford University Press 2011) 1243; Guy S Goodwin-Gil, *Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection* (Cambridge, Cambridge University Press 2003).

69 *Saadi v UK* (2008) 47 EHRR 17. See also, Helen O'Nions, 'No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience' (2008) 10 EJML 149.

70 *Ibid.*

71 Article 5 of the European Convention on Human Rights states:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

72 *R (Detention Action) v Secretary of State for the Home Department* [2014] EWCA Civ 1634; *The Lord Chancellor v Detention Action* [2015] EWCA Civ 840.

73 Jerome Phelps, 'The Fast Track is dead' (Open Democracy, 20 May 2016).

74 *Canadian Doctors for Refugee Care v Canada* 2014 FC 651.

75 *YZ and the Canadian Association of Refugee Lawyers v Minister for Citizenship and Immigration* 2015 FC 892. I provided an expert affidavit in the litigation, some of the contents of which are reflected in this contribution. See further, Catheryn Costello 'Safe Country? Says Who?' (2016) IJRL (forthcoming).

76 *R v Appulonappa* 2015 SCC 59, [2015] 3 SCR 754.

77 2014 FC 651 [587].

78 See further, the account of its Director, Adam Weiss, 'What is Strategic Litigation?' (ERRC, 1 June 2015) <www.errc.org/blog/what-is-strategic-litigation/62> accessed 9 August 2016.

79 Readers are recommended to watch his oral arguments in that case: Andrea Saccucci, 'Corte europea dei diritti dell'uomo–Hirsi e altri c. Italia–Strasburgo 5 luglio 2011' (2011) <www.youtube.com/watch?v=p2HgMXR52nI> accessed 9 August 2016.

Prof. Cathryn Costello, Hertie School

Strategic Litigation to Vindicate the Rights of Refugees and Migrants: The Right to Work and Family Reunification in Global Context

In addition to the discussion paper and PowerPoint slides, Professor Costello also provided the two links below;

Overcoming Refugee Containment and Crisis
Cathryn Costello
German Law Journal , Volume 21 , Special Issue 1: 20 Challenges in the EU in 2020 , January 2020 , pp. 17 - 22
Available at:
https://www.cambridge.org/core/journals/german-law-journal/article/overcoming-refugee-containment-and-crisis/9BCD16C5E35F95CD849332F5E896783A

Border Justice: Migration and Accountability for Human Rights Violations
Cathryn Costello and Itamar Mann
German Law Journal , Volume 21 , Special Issue 3: Border Justice: Migration and Accountability for Human Rights Violations , April 2020 , pp. 311 - 334
Available at:
https://www.cambridge.org/core/journals/german-law-journal/article/border-justice-migration-and-accountability-for-human-rights-violations/F43189E2B5EA3801157277E8C80F8623

Strategic Litigation to Vindicate the Rights of Refugees and Migrants: Pyrrhic Perils and Painstaking Progress

Hertie School
Centre for
Fundamental Rights

Cathryn Costello,
Professor of Fundamental Rights
Co-Director, Centre for Fundamental Rights, Hertie School, Berlin &

Professor of Refugee and Migration Law, University of Oxford

27 November 2020

1

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Overview

1. **Strategic Litigation Scholarship**
2. **Examples**
    1. Access to Asylum
    2. Family Reunification
    3. Right to Work

2

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Strategic Litigation

3

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Strategic Litigation Literature

'Strategic Litigation to Vindicate the Rights of Refugees and Migrants: Pyrrhic Perils and Painstaking Progress' in I Bacik and M Rogan (eds) *Legal cases that changed Ireland* (Clarus, 2016).

Moritz Baumgartel *Demanding Rights: Europe's Supranational Courts and the Dilemma of Migrant Rights* (CUP 2019)

4

4

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Law

Multilevel Account

International and regional human rights

EU law – fundamental rights

National Constitutional / administrative law

Others?

5

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Basak Çali, Cathryn Costello & Stewart Cunningham 'Hard Protection through Soft Courts? Non-refoulement before the United Nations Treaty Bodies' (2020) 21 *German Law Journal*

6

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Law

Nikolas Feith Tan and Thomas Gammeltoft-Hansen
'A Topographical Approach to Accountability for Human Rights Violations in Migration Control'
2020 *German Law Journal*

7

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1. Access to Protection

8

Visa Listing - by Nationalities

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Fundamental Rights

Maarten den Heijer
'Visas and Non-discrimination' (2018) European Journal of Migration and Law

9

9

EU Visa Practices

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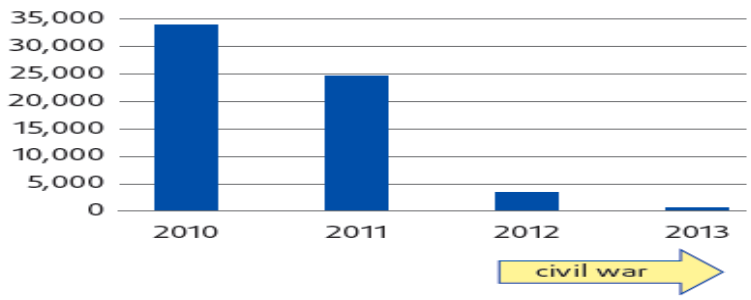
Figure 1: Number of Schengen visas issued to Syrians, trend 2010–2013



Source: European Commission, DG Home, Visa statistics, 2014

Source: FRA Focus
Legal entry channels to the EU for persons in need of international protection: a toolbox (2015)

10

10

Access to Asylum – 'humanitarian visas'

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CJEU

Case C-638/16 PPU
X and X v Belgium,
7 March 2017

ECtHR

Application No
3599/18
*M.N. and Others v.
Belgium*,
Grand Chamber
5 May 2020

Spain

Constitutional Court
(Nov 2020)
ELENA Update

11

'Humanitarian Admissions'

Hertie School
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Fundamental Rights

Luc Leboeuf and Marie-Claire Foblets
Humanitarian Admission to Europe. From Policy Developments to Legal Controversies and Litigation
(2020)

12

'Humanitarian Admissions'

Hertie School
Centre for
Fundamental Rights

Tom de Boer & Marjoleine Zieck 'The Legal Abyss of Discretion in the Resettlement of Refugees: Cherry-Picking and the Lack of Due Process in the EU' (2020) *International Journal of Refugee Law*

13

13

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Audrey Macklin & Susan Kneebone 'Resettlement' in Costello, McAdam, Foster *Oxford Handbook of International Refugee Law* (2021)

14

14

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2. Family Reunification

15

Family Reunification

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ECtHR

Article 8, but 'elsewhere' approach

Realising the Right to Family Reunification of Refugees in Europe (co-authored with Kees Groenendijk and Louise Halleskov Storgaard) Council of Europe: Commissioner for Human Rights, June 2017,

CJEU

Right, but limited by scope of EU law, esp.
link to EU Citizens (C-127/08 *Metock*)

National

MAM & KN [2020] IESC 32

C Costello 'Child Citizens & *De Facto* Deportation: Tender Years, Fragile Ties & Security of Residence' in *Of Courts and Constitutions: Liber Amicorum in Honour of Nial Fennelly* (2014)

16

16

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ZAT (UK)

Gina Starfield 'Forging Strategic Partnerships: How civil organisers and lawyers helped unaccompanied children cross the English Channel and reunite with family members' *RSC Working Paper* (2020) https://www.rsc.ox.ac.uk/publications/forging-strategic-partnerships-how-civil-organisers-and-lawyers-helped-unaccompanied-children

17

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3. Right to Work

18

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Cathryn Costello & Colm O'Cinnéide 'The Right to Work' in Costello, Foster & McAdam *The Oxford Handbook of International Refugee Law* (OUP 2021)

19

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Multiple Sources

<u>International</u>

Direct Protection

- ICESCR Article 6
- Article 15 of the African Charter of Human and Peoples' Rights - right to work
- Refugee Convention
- Article 1 ESC

Indirect Protection

- Article 8 ECHR
- Article 3 ACHR, the right to juridical personality

20

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European Protection

MSS v Belgium and Greece (Article 3 ECHR)

Chowdury and Others v Greece (Article 4 ECHR) (2017)
See Vladislava Stoyanova 'Sweet Taste with Bitter Roots: Forced Labour and Chowdury and Others v Greece (2018) European Human Rights Law Review

21

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EU Law

Article 15 EUCFR

Advocate General Jean Richard de la Tour's Opinion of 3 September 2020 in *KS & MHK*
dual value of the right to work
citing

- ICESCR General Comment No 18,
- Supreme Court of Ireland
- Application No 63542/11 *ALK v Greece* 11 December 2014.

22

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National Constitutions

South Africa

s 10 of the Bill of Rights: 'Everyone has inherent dignity and the right to have their dignity respected and protected'. *Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 (SCA) (right to work); *Somali Association of South Africa v Limpopo Department of Economic Development, Environment and Tourism* (48/2014) ZASCA 143 (26 September 2014) (self-employment).

23

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Ruvi Ziegler, 'Access to Effective Refugee Protection in South Africa: Legislative Commitment, Policy Realities, Judicial Rectifications' (2020) Constitutional Court Review (forthcoming)

24

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Ireland
N.V.H. v Minister for Justice & Equality and ors, 30 May 2017 [2017] IESC 35

Liam Thornton, 'Clashing Interpretations of EU Rights in Domestic Courts' (2020) 26(2) European Public Law (forthcoming).

25

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Conclusions

26

Hertie School
Centre for
Fundamental Rights

Hertie School | Centre for Fundamental Rights
Friedrichstraße 194
10117 Berlin, Germany
T +49 (0)30 259219-0
F +49 (0)30 259219-11
fundamentalrights@hertie-school.org
www.hertie-school.org

27

Prof. Steven Peers

The new asylum proposals from the EU

EU Asylum law: new proposals

Prof. Steven Peers

IACBA Annual Conference

27th November 2020

1

EU Asylum Law - Background

- Pre-Amsterdam treaty: Dublin Convention and soft law
- Treaty of Amsterdam: 'first pillar' competence
- Tampere: Common European Asylum System planned
- First phase minimum standards; second phase more harmonisation

First phase CEAS: 2003-05

- Dublin II Reg
- Eurodac
- Qualification Directive
- Asylum procedures Directive
- Reception conditions Directive (IE opt-out)

Second phase CEAS: 2010-13

- Dublin III Reg (IE opt-in)
- Eurodac (IE opt-in)
- EU asylum agency (IE opt in)
- Qualifications Directive (opt out)
- Procedures Directive (opt out)
- Reception conditions directive (belated opt in)
- Nb applies fully to subsidiary protection

Refugee crisis proposals

- Relocation decisions x2 – 2015 – expired 2017
- Proposals re Dublin, safe country list - fail
- 2016 overhaul – fail
- Qualification Reg; asylum procedures Reg; asylum agency Reg; Dublin IV reg; Eurodac reg; resettlement reg; reception directive
- 2018 returns directive proposal - linked

2016 proposals to date

- Asylum agency – agreed, but later Commission proposed revision is controversial
- Qualification, reception, resettlement – quasi-agreed but Council wouldn't accept
- Eurodac – partly agreed
- Procedures, Dublin – not agreed in Council
- 2018 returns proposal – mostly agreed in Council, EP no position

2020 relaunch

- Asylum agency, Qualification, reception, resettlement, returns – should get back to talks on quasi-agreed texts
- Eurodac, procedures – revised proposals
- Dublin – new proposal
- Force majeure – new proposal
- Screening - new proposal

2020 proposals – Irish position

- Asylum agency, Qualification, reception, resettlement, returns – IE apparently opted out of initial proposals
- Eurodac, procedures – IE opt out; can it opt in to revised proposals now?
- Dublin, force majeure – new proposals, 3 month deadline
- Screening – builds on Schengen, must opt-out

Opt-out consequences

- After adoption, EU can kick IE out of measures which the new laws amend
- High threshold – 'inoperable' etc – never previously applied to IE or UK
- Possibly applies to asylum agency?
- IE can opt in after adoption
- Or new laws applying to 25 MS co-exist with Ireland applying earlier version

Ireland, Asylum and CJEU

- C-175/11 HID – asylum procedures, first phase still applied across EU
- C-277/11 M – qualification directive applies to subsidiary protection; asylum procedure directive does not, unless there is a single procedure (not in IE at the time); however right to be heard applies to SP applications

Irish CJEU Asylum Cases

- C-604/12 – IE can have separate procedures; but SP application can't be delayed until after refugee application decided, and procedure cannot take an unreasonable time
- C-560/14 MM II – more detail on procedural rights in SP applications – in particular an interview

Irish CJEU Asylum Cases

- C-429/15 Danqua – effectiveness of EU law precludes Irish rule re timing of a SP application
- C-661/17 MA – Dublin reg: Brexit issues; discretionary clauses; rights of the child
- C-322/19 and C-385/19 – reception (access to employment) and Dublin system
- C-616/19 – Dublin III/asylum procedures – inadmissible due to having SP in MS?

First analysis of the EU's new asylum proposals

Professor Steve Peers, Law School, University of Essex*

This week the EU Commission published its new package of proposals on asylum and (non-EU) migration – consisting of proposals for legislation, some 'soft law', attempts to relaunch talks on stalled proposals and plans for future measures. The following is an explanation of the new proposals (not attempting to cover every detail) with some first thoughts. Overall, while it is possible that the new package will lead to agreement on revised asylum laws, this will come at the cost of risking reduced human rights standards.

Background

Since 1999, the EU has aimed to create a 'Common European Asylum System'. A first phase of legislation was passed between 2003 and 2005, followed by a second phase between 2010 and 2013. Currently the legislation consists of: a) the Qualification Directive, which defines when people are entitled to refugee status (based on the UN Refugee Convention) or subsidiary protection status, and what rights they have; b) the Dublin III Regulation, which allocates responsibility for an asylum seeker between Member States; c) the Eurodac Regulation, which facilitates the Dublin system by setting up a database of fingerprints of asylum seekers and people who cross the external border without authorisation; d) the Asylum Procedures Directive, which sets out the procedural rules governing asylum applications, such as personal interviews and appeals; e) the Reception Conditions Directive, which sets out standards on the living conditions of asylum-seekers, such as rules on housing and welfare; and f) the Asylum Agency Regulation, which set up an EU agency (EASO) to support Member States' processing of asylum applications.

The EU also has legislation on other aspects of migration: (short-term) visas, border controls, irregular migration, and legal migration – much of which has connections with the asylum legislation, and all of which is covered by this week's package. For visas, the main legislation is the visa list Regulation (setting out which non-EU countries' citizens are subject to a short-term visa requirement, or exempt from it) and the visa code (defining the criteria to obtain a short-term Schengen visa, allowing travel between all Schengen states). The visa code was amended last year, as discussed here.

For border controls, the main legislation is the Schengen Borders Code, setting out the rules on crossing external borders and the circumstances in which Schengen states can reinstate controls on internal borders, along with the Frontex Regulation, setting up an EU border agency to assist Member States. On the most recent version of the Frontex Regulation, see discussion here and here.

For irregular migration, the main legislation is the Return Directive. The Commission proposed to amend it in 2018 – on which, see analysis here and here.

For legal migration, the main legislation on admission of non-EU workers is the single permit Directive (setting out a common process and rights for workers, but not regulating admission); the Blue Card Directive (on highly paid migrants, discussed here); the seasonal workers' Directive (discussed here); and the Directive on intra-corporate transferees (discussed here). The EU also has legislation on: non-EU students, researchers and trainees (overview here); non-EU family reunion (see summary of the legislation and case

law here) and on long-term resident non-EU citizens (overview – in the context of UK citizens after Brexit – here). In 2016, the Commission proposed to revise the Blue Card Directive (see discussion here).

The UK, Ireland and Denmark have opted out of most of these laws, except some asylum law applies to the UK and Ireland, and Denmark is covered by the Schengen and Dublin rules. So are the non-EU countries associated with Schengen and Dublin (Norway, Iceland, Switzerland and Liechtenstein). There are also a number of further databases of non-EU citizens as well as Eurodac: the EU has never met a non-EU migrant who personal data it didn't want to store and process.

The Refugee 'Crisis'

The EU's response to the perceived refugee 'crisis' was both short-term and long-term. In the short term, in 2015 the EU adopted temporary laws (discussed here) relocating some asylum seekers in principle from Italy and Greece to other Member States. A legal challenge to one of these laws failed (as discussed here), but in practice Member States accepted few relocations anyway. Earlier this year, the CJEU ruled that several Member States had breached their obligations under the laws (discussed here), but by then it was a moot point.

Longer term, the Commission proposed overhauls of the law in 2016: a) a Qualification Regulation further harmonising the law on refugee and subsidiary protection status; b) a revised Dublin Regulation, which would have set up a system of relocation of asylum seekers for future crises; c) a revised Eurodac Regulation, to take much more data from asylum seekers and other migrants; d) an Asylum Procedures Regulation, further harmonising the procedural law on asylum applications; e) a revised Reception Conditions Directive; f) a revised Asylum Agency Regulation, giving the agency more powers; and g) a new Resettlement Regulation, setting out a framework of admitting refugees directly from non-EU countries. (See my comments on some of these proposals, from back in 2016)

However, these proposals proved unsuccessful – which is the main reason for this week's attempt to relaunch the process. In particular, an EU Council note from February 2019 summarises the diverse problems that befell each proposal. While the EU Council Presidency and the European Parliament reached agreement on the proposals on qualification, reception conditions and resettlement in June 2018, (Update, 1 October 2020: for the texts of the deals reached on qualification and reception conditions, see the Statewatch website). Member States refused to support the Presidency's deal and the European Parliament refused to renegotiate (see, for instance, the Council documents on the proposals on qualification and resettlement; see also my comments on an earlier stage of the talks, when the Council had agreed its negotiation position on the qualification regulation).

On the asylum agency, the EP and Council agreed on the revised law in 2017, but the Commission proposed an amendment in 2018 to give the agency more powers; the Council could not agree on this. On Eurodac, the EP and Council only partly agreed on a text. On the procedures Regulation, the Council largely agreed its position, except on border procedures; on Dublin there was never much prospect of agreement because of the controversy over relocating asylum seekers. (For either proposal, a difficult negotiation with the European Parliament lay ahead).

In other areas too, the legislative process was difficult: the Council and EP gave up negotiating amendments to the Blue Card Directive (see the last attempt at a compromise here, and the Council negotiation mandate here), and the EP has not yet agreed a position on the Returns Directive (the Council has a negotiating position, but again it leaves out the difficult issue of border procedures; there is a draft EP position from February). Having said that, the EU has been able to agree legislation giving more powers to Frontex, as well as new laws on EU migration databases, in the last few years.

The attempted relaunch

The Commission's new Pact on asylum and immigration (see also the roadmap on its implementation, the Q and As, and the staff working paper) does not restart the whole process from scratch. On qualification, reception conditions, resettlement, the asylum agency, the returns Directive and the Blue Card Directive, it invites the Council and Parliament to resume negotiations. But it tries to unblock the talks as a whole by tabling two amended legislative proposals and three new legislative proposals, focussing on the issues of border procedures and relocation of asylum seekers.

Screening at the border

This revised proposals start with a new proposal for screening asylum seekers at the border, which would apply to all non-EU citizens who cross an external border without authorisation, who apply for asylum while being checked at the border (without meeting the conditions for legal entry), or who are disembarked after a search and rescue operation. During the screening, these non-EU citizens are not allowed to enter the territory of a Member State, unless it becomes clear that they meet the criteria for entry. The screening at the border should take no longer than 5 days, with an extra 5 days in the event of a huge influx. (It would also be possible to apply the proposed law to those on the territory who evaded border checks; for them the deadline to complete the screening is 3 days).

Screening has six elements, as further detailed in the proposal: a health check, an identity check, registration in a database, a security check, filling out a debriefing form, and deciding on what happens next. At the end of the screening, the migrant is channelled either into the expulsion process (if no asylum claim has been made, and if the migrant does not meet the conditions for entry) or, if an asylum claim is made, into the asylum process – with an indication of whether the claim should be fast-tracked or not. It's also possible that an asylum seeker would be relocated to another Member State. The screening is carried out by national officials, possibly with support from EU agencies.

To ensure human rights protection, there must be independent monitoring to address allegations of non-compliance with human rights. These allegations might concern breaches of EU or international law, national law on detention, access to the asylum procedure, or *non-refoulement* (the ban on sending people to an unsafe country). Migrants must be informed about the process and relevant EU immigration and data protection law. There is no provision for judicial review of the outcome of the screening process, although there would be review as part of the next step (asylum or return).

Asylum procedures

The revised proposal for an asylum procedures Regulation would leave in place most of the Commission's 2016 proposal to amend the law, adding some specific further proposed amendments, which either link back to the screening proposal or aim to fast-track decisions and expulsions more generally.

On the first point, the usual rules on informing asylum applicants and registering their application would not apply until after the end of the screening. A border procedure *may* apply following the screening process, but Member States *must* apply the border procedure in cases where an asylum seeker used false documents, is a perceived national security threat, or falls within the new ground for fast-tracking cases (on which, see below). The latter obligation is subject to exceptions where a Member State has reported that a non-EU country is not cooperating on readmission; the process for dealing with that issue set out under the 2019 amendments to the visa code will then apply. Also, the border process cannot apply to unaccompanied minors or children under 12, unless they are a supposed national security risk. Further exceptions apply where the asylum seeker is vulnerable or has medical needs, the application is not inadmissible or cannot be fast-tracked, or detention conditions cannot be guaranteed. A Member State might apply the Dublin process to determine which Member State is responsible for the asylum claim during the border process. The whole border process (including any appeal) must last no more than 12 weeks, and can only be used to declare applications inadmissible or apply the new ground for fast-tracking them.

There would also be a new border expulsion procedure, where an asylum application covered by the border procedure was rejected. This is subject to its own 12-week deadline, starting from the point when the migrant is no longer allowed to remain. Much of the Return Directive would apply – but not the provisions on the time period for voluntary departure, remedies and the grounds for detention. Instead, the border expulsion procedure would have its own stricter rules on these issues.

As regards general fast-tracking, in order to speed up the expulsion process for unsuccessful applications, a rejection of an asylum application would have to either incorporate an expulsion decision or entail a simultaneous separate expulsion decision. Appeals against expulsion decisions would then be subject to the same rules as appeals against asylum decisions. If the asylum seeker comes from a country with a refugee recognition rate below 20%, his or her application must be fast-tracked (this would even apply to unaccompanied minors) – unless circumstances in that country have changed, or the asylum seeker comes from a group for whom the low recognition rate is not representative (for instance, the recognition rate might be higher for LGBT asylum-seekers from that country). Many more appeals would be subject to a one-week time limit for the rejected asylum seeker to appeal, and there could be only one level of appeal against decisions taken within a border procedure.

Eurodac

The revised proposal for Eurodac would build upon the 2016 proposal, which was already far-reaching: extending Eurodac to include not only fingerprints, but also photos and other personal data; reducing the age of those covered by Eurodac from 14 to 6; removing the time limits and the limits on use of the fingerprints taken from persons who had crossed the border irregularly; and creating a new obligation to collect data of all irregular migrants over age 6 (currently fingerprint data for this group cannot be stored, but can simply be checked, as an option, against the data on asylum seekers and irregular border crossers). The 2020 proposal additionally provides for interoperability with other EU migration databases, taking of personal data during

the screening process, including more data on the migration status of each person, and expressly applying the law to those disembarked after a search and rescue operation.

Dublin rules on asylum responsibility

A new proposal for asylum management would replace the Dublin regulation (meaning that the Commission has withdrawn its 2016 proposal to replace that Regulation). The 2016 proposal would have created a 'bottleneck' in the Member State of entry, requiring that State to examine first whether many of the grounds for removing an asylum-seeker to a non-EU country apply before considering whether another Member State might be responsible for the application (because the asylum seeker's family live there, for instance). It would also have imposed obligations directly on asylum-seekers to cooperate with the process, rather than only regulate relations between Member States. These obligations would have been enforced by punishing asylum seekers who disobeyed: removing their reception conditions (apart from emergency health care); fast-tracking their substantive asylum applications; refusing to consider new evidence from them; and continuing the asylum application process in their absence.

It would no longer be possible for asylum seekers to provide additional evidence of family links, with a view to being in the same country as a family member. Overturning a CJEU judgment (see further discussion here), unaccompanied minors would no longer have been able to make applications in multiple Member States (in the absence of a family member in any of them). However, the definition of family members would have been widened, to include siblings and families formed in a transit country. Responsibility for an asylum seeker based on the first Member State of irregular entry (a commonly applied criterion) would have applied indefinitely, rather than expire one year after entry as it does under the current rules. The 'Sangatte clause' (responsibility after five months of living in a second Member State, if the 'irregular entry' criterion no longer applies) would be dropped. The 'sovereignty clause', which played a key part in the 2015-16 refugee 'crisis' (it lets a Member State take responsibility for any application even if the Dublin rules do not require it, cf Germany accepting responsibility for Syrian asylum seekers) would have been sharply curtailed. Time limits for detention during the transfer process would be reduced. Remedies for asylum seekers would have been curtailed: they would only have seven days to appeal against a transfer; courts would have fifteen days to decide (although they could have stayed on the territory throughout); and the grounds of review would have been curtailed.

Finally, the 2016 proposal would have tackled the vexed issue of disproportionate allocation of responsibility for asylum seekers by setting up an automated system determining how many asylum seekers each Member State 'should' have based on their size and GDP. If a Member State were responsible for excessive numbers of applicants, Member States which were receiving fewer numbers would have to take more to help out. If they refused, they would have to pay €250,000 per applicant.

The 2020 proposal drops some of the controversial proposals from 2016, including the 'bottleneck' in the Member State of entry (the current rule, giving Member States an *option* to decide if a non-EU country is responsible for the application on narrower grounds than in the 2016 proposal, would still apply). Also, the sovereignty clause would now remain unchanged.

However, the 2020 proposal also retains parts of the 2016 proposal: the redefinition of 'family member' (which could be more significant now that the bottleneck is removed, unless Member

States choose to apply the relevant rules on non-EU countries' responsibility during the border procedure already); obligations for asylum seekers (redrafted slightly); *some* of the punishments for non-compliant asylum-seekers (the cut-off for considering evidence would stay, as would the loss of benefits except for those necessary to ensure a basic standard of living: see the CJEU case law in *CIMADE* and *Haqbin*); dropping the provision on evidence of family links; changing the rules on responsibility for unaccompanied minors; retaining part of the changes to the irregular entry criterion (it would now cease to apply after three years; the Sangatte clause would still be dropped; it would apply after search and rescue but not apply in the event of relocation); curtailing judicial review (the grounds would still be limited; the time limit to appeal would be 14 days; courts would not have a strict deadline to decide; suspensive effect would not apply in all cases); and the reduced time limits for detention.

The wholly new features of the 2020 proposal are: some vague provisions about crisis management; responsibility for an asylum application for the Member State which issued a visa or residence document which expired in the last three years (the current rule is responsibility if the visa expired less than six months ago, and the residence permit expired less than a year ago); responsibility for an asylum application for a Member State in which a non-EU citizen obtained a diploma; and the possibility for refugees or persons with subsidiary protection status to obtain EU long-term resident status after three years, rather than five.

However, the most significant feature of the new proposal is likely to be its attempt to solve the underlying issue of disproportionate allocation of asylum seekers. Rather than a mechanical approach to reallocating responsibility, the 2020 proposal now provides for a menu of 'solidarity contributions': relocation of asylum seekers; relocation of *refugees*; 'return sponsorship'; or support for 'capacity building' in the Member State (or a non-EU country) facing migratory pressure. There are separate rules for search and rescue disembarkations, on the one hand, and more general migratory pressures on the other. Once the Commission determines that the latter situation exists, other Member States have to choose from the menu to offer some assistance. Ultimately the Commission will adopt a decision deciding what the contributions will be. Note that 'return sponsorship' comes with a ticking clock: if the persons concerned are not expelled within eight months, the sponsoring Member State must accept them on its territory.

Crisis management

The issue of managing asylum issues in a crisis has been carved out of the Dublin proposal into a separate proposal, which would repeal an EU law from 2001 that set up a framework for offering 'temporary protection' in a crisis. Note that Member States have never used the 2001 law in practice.

Compared to the 2001 law, the new proposal is integrated into the EU asylum legislation that has been adopted or proposed in the meantime. It similarly applies in the event of a 'mass influx' that prevents the effective functioning of the asylum system. It would apply the 'solidarity' process set out in the proposal to replace the Dublin rules (ie relocation of asylum seekers and other measures), with certain exceptions and shorter time limits to apply that process.

The proposal focusses on providing for possible exceptions to the usual asylum rules. In particular, during a crisis, the Commission could authorise a Member State to apply temporary derogations from the rules on border asylum procedures (extending the time limit, using the

procedure to fast-track more cases), border return procedures (again extending the time limit, more easily justifying detention), or the time limit to register asylum applicants. Member States could also determine that due to *force majeure*, it was not possible to observe the normal time limits for registering asylum applications, applying the Dublin process for responsibility for asylum applications, or offering 'solidarity' to other Member States.

Finally, the new proposal, like the 2001 law, would create a potential for a form of separate 'temporary protection' status for the persons concerned. A Member State could suspend the consideration of asylum applications from people coming from the country facing a crisis for up to a year, in the meantime giving them status equivalent to 'subsidiary protection' status in the EU qualification law. After that point it would have to resume consideration of the applications. It would need the Commission's approval, whereas the 2001 law left it to the Council to determine a situation of 'mass influx' and provided for the possible extension of the special rules for up to three years.

Other measures

The Commission has also adopted four soft law measures. These comprise: a Recommendation on asylum crisis management; a Recommendation on resettlement and humanitarian admission; a Recommendation on cooperation between Member States on private search and rescue operations; and guidance on the applicability of EU law on smuggling of migrants – notably concluding that it cannot apply where (as in the case of law of the sea) there is an obligation to rescue (see further analysis here).

On other issues, the Commission plan is to use current legislation – in particular the recent amendment to the visa code, which provides for sticks to make visas more difficult to get for citizens of countries which don't cooperate on readmission of people, and carrots to make visas easier to get for citizens of countries which *do* cooperate on readmission. In some areas, such as the Schengen system, there will be further strategies and plans in the near future; it is not clear if this will lead to more proposed legislation.

However, on legal migration, the plan is to go further than relaunching the amendment of the Blue Card Directive, as the Commission is also planning to propose amendments to the single permit and long-term residence laws referred to above – leading respectively to more harmonisation of the law on admission of non-EU workers and enhanced possibilities for long-term resident non-EU citizens to move between Member States (nb the latter plan is separate from this week's proposal to amend this law as regards refugees and people with subsidiary protection already). Both these plans are relevant to British citizens moving to the EU after the post-Brexit transition period – and the latter is also relevant to British citizens covered by the withdrawal agreement.

Comments

This week's plan is less a complete restart of EU law in this area than an attempt to relaunch discussions on a blocked set of amendments to that law, which moreover focusses on a limited set of issues. Will it 'work'? There are two different ways to answer that question.

First, will it unlock the institutional blockage? Here it should be kept in mind that the European Parliament and the Council had largely agreed on several of the 2016 proposals already; they would have been adopted in 2018 already had not the Council treated all the proposals as a

package, and not gone back on agreements which the Council Presidency reached with the European Parliament. It is always open to the Council to get at least some of these proposals adopted quickly by reversing these approaches.

On the blocked proposals, the Commission has targeted the key issues of border procedures and allocation of asylum-seekers. If the former leads to more quick removals of unsuccessful applicants, the latter issue is no longer so pressing. But it is not clear if the Member States will agree to anything on border procedures, or whether such an agreement will result in more expulsions anyway – because the latter depends on the willingness of non-EU countries, which the EU cannot legislate for (and does not even address in this most recent package). And because it is uncertain whether they will result in more expulsions, Member States will be wary of agreeing to anything which either results in more obligations to accept asylum-seekers on their territory, or leaves them with the same number as before.

The idea of 'return sponsorship' – which reads like a grotesque parody of individuals sponsoring children in developing countries via charities – may not be appealing except to those countries like France, which have the capacity to twist arms in developing countries to accept returns. Member States might be able to agree on a replacement for the temporary protection Directive on the basis that they will never use that replacement either. And Commission threats to use infringement proceedings to enforce the law might not worry Member States who recall that the CJEU ruled on their failure to relocate asylum-seekers after the relocation law had already expired, and that the Court will soon rule on Hungary's expulsion of the Central European University after it has already left.

As to whether the proposals will 'work' in terms of managing asylum flows fairly and compatibly with human rights, it is striking how much they depend upon curtailing appeal rights, even though appeals are often successful. The proposed limitation of appeal rights will also be maintained in the Dublin system; and while the proposed 'bottleneck' of deciding on removals to non-EU countries before applying the Dublin system has been removed, a variation on this process may well apply in the border procedures process instead. There is no new review of the assessment of the safety of non-EU countries – which is questionable in light of the many reports of abuse in Libya. While the EU is not proposing, as the wildest headbangers would want, to turn people back or refuse applications without consideration, the question is whether the fast-track consideration of applications and then appeals will constitute merely a Potemkin village of procedural rights that mean nothing in practice.

Increased detention is already a feature of the amendments proposed earlier: the reception conditions proposal would add a new ground for detention; the return Directive proposal would inevitably increase detention due to curtailing voluntary departure (as discussed here). Unfortunately the Commission's claim in its new communication that its 2018 proposal is 'promoting' voluntary return is therefore simply false. Trump-style falsehoods have no place in the discussion of EU immigration or asylum law.

The latest Eurodac proposal would not do much compared to the 2016 proposal – but then, the 2016 proposal would already constitute an enormous increase in the amount of data collected and shared by that system.

Some elements of the package are more positive. The possibility for refugees and people with subsidiary protection to get EU long-term residence status earlier would be an important step toward making asylum 'valid throughout the Union', as referred to in the Treaties. The wider

definition of family members, and the retention of the full sovereignty clause, may lead to some fairer results under the Dublin system. Future plans to improve the long-term residents' Directive are long overdue. The Commission's sound legal assessment that no one should be prosecuted for acting on their obligations to rescue people in distress at sea is welcome. The quasi-agreed text of the reception conditions Directive explicitly rules out Trump-style separate detention of children.

No proposals from the EU can solve the underlying political issue: a chunk of public opinion is hostile to more migration, whether in frontline Member States, other Member States, or transit countries outside the EU. The politics is bound to affect what Member States and non-EU countries alike are willing to agree to. And for the same reason, even if a set of amendments to the system is ultimately agreed, there will likely be continuing issues of implementation, especially illegal pushbacks and refusals to accept relocation.

Barnard & Peers: chapter 26

JHA4: chapter I:3, chapter I:4, chapter I:5, chapter I:6, chapter I:7

Photo credit: DW

*I have worked as an independent consultant for the impact assessment regarding the background of some of this week's proposals. My views are, however, independent of any EU institution or Member State.

Jonathan Tomkin

Strings attached": the derived rights of third country national spouses and carers of EU citizens - an update on recent case-law

Jonathan Tomkin is a Member of the Legal Service of the European Commission and an affiliated member of the Institute for European Law, KU Leuven. He is a barrister (Bar of Ireland, Bar of England and Wales - Inner Temple), former Director of the Irish Centre for European Law (Trinity College, Dublin) and Legal Secretary (Référendaire) at the Court of Justice of the European Union.

Jonathan appears regularly before the Union Courts and EFTA Courts, in particular, in the field of EU citizenship, migration and asylum law.

Jonathan has published and lectured extensively in the field of EU Citizenship and Free Movement law. Together with Steve Peers and Elspeth Guild, he has co-edited and co-authored commentaries on EU Immigration and Asylum law (Brill, 2012) and the EU Citizenship Directive (OUP, 2019). He is also co-editor of the Commentary on the EU Treaties and the Charter of Fundamental Rights (OUP, 2019).

Immigration, Asylum and Citizenship
Bar Association

"Strings attached": the derived rights of third country national spouses and carers of EU citizens

Jonathan Tomkin
Friday 27 November 2020

1

Today's Menu

- Introduction
- **5 Categories** of rights asserted / rights contested before EU courts
- Selected case-law :
  - C-93/18 *Bajratari:* the right to work of TCN parents
  - C-218/14 *Singh:* Residence in the case of family breakdown
  - C-754/18 – *Ryanair:* conditions for travel within the Union
  - E-1/20 *Kerim:*– Sham marriages
- Conclusions

2

A. Intro: rights claimed / contested (1)

- Category 1: TCN considered not to qualify as **family member** within scope of Directive 2004/38
  - Case C-129/18 *SM (legal guardian - kefala)*
  - Case C-165/16 *Lounes (acquisition of nationality)*
  - Case C-673/16 *Coman* (*same sex marriage covered regardless of host MS law*) [incidentally: Case C-490/20 V.M.A (pending) – (*Birth cert for child of same sex marriage)*]

3

A. Intro: rights claimed / contested (2)

- Category 2 : Failure to facilitate entry - delays in granting entry visas to TCN spouses
  - Case C-89/17 *Banger* (facilitation under Article 3(2))
  - Case C-169/18 *Mahmood and Shabina Atif and others* (settled before oral hearing – therefore no judgment)

4

A. Intro: rights claimed / contested (3)

- Category 3: TCN considered not to meet [or no longer meet] **conditions for lawful residence** and/the rules for consequent expulsion
  - Case C-247/20 V.I. (pending)
  - Case C-94/18 *Chenchooliah*
  - **Case C-93/18 *Bajratari***
  - Case C-115/15 *NA*
  - **Case C-218/14 *Singh***

5

A. Intro: rights claimed / contested (4)

- Category 4: TCN considered not to meet conditions for **free movement**
  - Failure to recognise status or evidentiary value of residence card
  - **Case C-754/18 *Ryanair Designated Activity company***
  - Case C-202/13 *McCarthy*

6

A. Overview: rights claimed / contested (5)

- Category 5: TCN alleged not to be acting in **good faith**:
  - Article 35 of Directive 2004/38
  - Abuse of law doctrine / Marriage of convenience
  - **Case E-1/20 *Kerim v Norwegian Govt***

7

1. Bajratari: the right to work of TCN parents

- Formal interpretation of Article 23 of Directive 2004/38 results in Chicken and Egg scenario:
  - EU citizen child will need:
    - sufficient resources for lawful residence
    - lawful residence for TCN parent to have a right to work
    - TCN right to work for sufficient resources
- Impact for sequencing: It should be possible to treat family as a unit and permit TCN worker to work at the moment of the exercise of free movement rights
- Application to spouses?

8

2. Singh: residence after family breakdown

- Status remains for *as long as* divorce is not actually granted even if separated
  - Case C-267/83 *Diatta*
  - *Case C-244/13* Ogieriahkhi
- *The "flip side" : if Union citizen leaves MS (and marriage) prior to divorce decree*
  - Case C-218/14 *Singh*
  - Case C-115/15 *NA*
- If TCN family member loses rights, Union law safeguards to expulsion continue to apply:
  - Case C-94/18 *Chenchooliah*

9

3. Ryanair: TCN free movement rights

- Recognition of residence cards issued by another MS and the rights they entail
  - Case C-202/13, *McCarthy*
  - Case C-754/18 – *Ryanair Designated Activity company*

10

4. Kerim: Marriages of Convenience (1)

- Efta Case E-1/20 *Kerim v Norwegian Govt (pending)*
  - What are the criteria for a "sham marriage"
  - Is there abuse if "**Sole purpose**" (recital 23) to obtain residence rights or "**predominant purpose**"?
  - Do authorities have to prove abusive intent from both spouses or is the intention the TCN spouse alone enough?
- The fact that an EEA national wishes to exercise his or her rights as conferred upon by them by the Treaties does not in itself constitute an abuse of such a right
  - Case C-200/02 *Zhu and* Chen, paras 34-41
  - Case C-212/97 *Centros*, paras 23-30
- Sham Marriages just one form of abuse –subject to general abuse case-law

11

4. Kerim: Marriages of Convenience (2)

General Abuse of law Case law:

Case C-251/16, *Cussens, Jennings and Kingston*
Case C-110/99, *Emsland-Stärke*

- Combination of objective and subjective elements.
- The **objective element** requires that it be evident from the specific set of circumstances in question that despite the fact that the **formal conditions** laid down in law appear to have been adhered to, the **underlying purpose of** those rules has not been achieved.
- The **subjective element** requires there to be an obvious intention by the party in question to attain an **improper benefit** resulting from the application of Union law through artificially establishing the conditions which are necessary to obtain it.

12

4. Kerim: Marriages of Convenience (3)

- What are the criteria for a "sham marriage"

Issues to consider:

- The distinction between "**Sole purpose**" (recital 23) to obtain residence rights or "**predominant purpose**" not decisive.
- Genuine relationship v "artificial construct" for "improper benefit"
- Genuine couples may decide to marry for sole purpose to secure residence? (Not abusive)
- Possible to marry for many abusive reasons including right of residence (abusive).
- Marriages of convenience v Marriages of deception
- "Green card question": When is relevant time to determining intention: at time of contracting marriage or at time of requesting application?

13

4. Kerim: Marriages of Convenience (4)

- Commission Guidance
  - The Commission's 2009 Guidelines on the Application of Directive 2004/38/EC (COM(2009) 313 final).
  - The Communication entitled "Free movement of EU citizens and their families: Five actions to make a difference" (COM/2013/0837 final).
  - The Communication entitled "Helping national authorities fight abuses of the right to free movement" {COM(2014) 604 final}.accompanied by a Staff Working Document entitled "Handbook on addressing the issue of alleged marriages of convenience between EU" (the "Handbook"). SWD (2014)284 final.
- Handbook:
  - Use is not abuse: not surprising that couples would want to live together
  - Burden of Proof is on competent authorities
  - Case by case assessment of all facts (those in favour and those against)
  - Where well founded suspicious, Applicants may be requested to provide more info

14

4. Kerim: Marriages of Convenience (5)

- Abuse of Law in EU Law:
  - Case C-251/16, *Cussens, Jennings and Kingston (General principle of EU law)*
  - Case C-255/02, '*Halifax*'
  - Case C-110/99, *Emsland-Stärke*,

Use and abuse in the free movement of persons:

- Case E-4/19 *Campbell* (Efta Court)
- Case C-202/13, *McCarthy*
- Joined Cases C-58/13 and C-59/13, *Angelo Alberto Torresi*
- Case C-456/12 *O. and* B, Case C-202/13
- Case C-200/02, *Zhu and* Chen,

- Marriages of Convenience
  - Case E-1/20 *Kerim v Norwegian Govt (Efta Court - pending)*

15

Selection of TCN Cases (1)

- Case C-490/20 V.M.A (pending)
- Case C-247/20 V.I. (pending)
- Case C-754/18 *Ryanair Designated Activity company*
- Case C-129/18 *SM*
- Case C-94/18 *Chenchooliah*
- Case C-93/18 *Bajratari*
- Case C-89/17 *Banger*
- Case C-673/16 *Coman*
- Case C-165/16 *Lounes*
- *Case C-113/15 Chavez-Vilchez*
- Case C-115/15 *NA*

16

Selection of TCN Cases (2)

- Case C-218/14 *Singh*
- *Case C-165/14 Rendón Marín*
- *Case C-244/13* Ogieriahkhi
- *Case C-456/12 O and B*
- *Case C-40/11 Ida*
- Case C-34/09 *Ruiz Zambrano*
- Case C-127/08 *Metock*
- Case C-200/02 *Zhu and Chen*
- Case C-413/99 *Baumbast and R*

17

Selection of TCN Cases (3)

EFTA Court

- Case E-1/20 *Kerim v Norwegian Govt*
- Case E-4/19 *Campbell v Norwegian Govt*
- Case E-28/15 *Jabbi v Norwegian Govt*

18

Advocate General Gerard Hogan, Court of Justice

Recent developments in EU immigration law (recast Qualification and Procedures Directive)

Appointed Judge of the High Court: 2010

Apointed Judge of the Court of Appeal:2014

Appointed Advocate General at the Court of Justice of the European Union:2018

RECENT DEVELOPMENTS IN EU IMMIGRATION LAW

ADVOCATE GENERAL GERARD HOGAN, COURT OF JUSTICE OF THE EUROPEAN UNION

IACBA Annual Conference 2020

27th November 2020

1

SOME THOUGHTS ON CASE C-94/18 *CHENCHOOLIAH*

- The decision of the CJEU in C-94/18 *Chenchooliah* (EU:C: 2019: 693) raises once again the question of the extent to which the rights of a third country national (TCN) are entirely derivative of the rights of the EU spouse. Is that a satisfactory situation or does it potentially weaken the power dynamic within a marriage if the TCN's entitlement to reside within the EU is made contingent on decisions made by the other spouse to continue, eg working or attending college or even residing within the State in question?

IGUNMA v. GOVERNOR OF CLOVERHILL PRISON [2014] IEHC 218 April 2014

- Deportation order made in. October 2010 in respect of a Nigerian national which order is never challenged. Later marries Czech national in February 2011 and no question as to validity of marriage.
- Czech national (apparently) attending college in Ireland, but his application for residence card turned down on the ground that she was not exercising her free movements rights by genuinely studying.
- In 2014 Gardai seek to give effect to deportation order by arresting him and he seeks Article 40.4.2 inquiry on the ground that he is within Directive 2004/38/EC and can only be "removed" and not deported.

Judgment of Hogan J. in *Igunma*

- Applicant within the Directive by virtue of the fact that he is married to free mover and therefore can only be removed and not deported in view of Article 28 of the Directive. Partially right, partially wrong in view of *Chenchooliah.*

JUDGMENT OF CJEU IN *CHENCHOOLIAH*: FACTS

- Here the TCN spouse was married to a Portuguese national who had exercised free movement rights in Ireland. The couple were married in 2011 and there was some evidence that the husband had worked here intermittently. The Minister refused a residency card on the ground that the spouse was not exercising free movement rights.
- In July 2014 the TCN told the Minister that her husband had been removed to Portugal where he was serving a prison sentence. In 2016 the Minister indicated that she proposed to deport the TCN spouse. The High Court referred two questions to the CJEU: essentially was the applicant within the Directive and, if not, could she be deported?

WAS THE TCN WITHIN THE DIRECTIVE?

- In principle - yes, but one important qualification.
- The applicant had lived with her spouse in Ireland and he had exercised free movement rules, so came within C -127/08 *Metock.*
- But residency is a dynamic concept and the applicant lost her TCN status when he moved back to Portugal. She "no longer fulfils the requirement of accompanying or joining a Union citizen imposed by Article 3(1) of Directive 2004/38" (para 60) and so *Metock* no longer applies (para. 66).

COMPARE WITH *IGUNMA* AND *OGIERAKHI*

- Compare and contrast with the reasoning in C-244/13 *Ogierakhi* where the Court held that a TCN still enjoyed derivative rights under the Directive even where the couple had separated and were living with other partners (even if they intended to divorce):

  "… if Article 16(2) of the directive were to be interpreted literally, a third-country national could be made vulnerable because of unilateral measures taken by his spouse, and that would be contrary to the spirit of that directive, of which one of the objectives is precisely — according to recital 15 thereto — to offer legal protection to family members of citizens of the Union who reside in the host Member State, in order to enable them, in certain cases and subject to certain conditions, to retain their right of residence exclusively on a personal basis."

- Would *Igunma* have been different given that the EU national still resided in Ireland? But note a residence card had been refused in *Igunma* and this was regarded as a significant adverse factor in *Chenchooliah*.

IGUNMA AT LEAST PARTIALLY CORRECT?

- CJEU holds that Articles 27 and 28 guarantees only apply to TCN's with derivative rights - so to that extent *Igunma* was wrong.
- But Article 15 applies Article 30 and Article 31 procedural safeguards to all TCN's, including review of facts and law in judicial review proceedings. Any expulsion decision cannot include re-entry ban: see Article 15(3). So to that extent *Igunma* was correct in that the standard deportation process contained in s. 3 of the Immigration Act 1999 does not apply.

CASE C-255/19 *OA* AND THE GENEVA CONVENTION

- OA arrived in the UK from Somalia by virtue of his membership of a minority clan and was granted status. Now that Somalian situation had changed could be sent back? Specifically, did the availability of a clan and family support structure in Somalia mean that he no longer had a well founded fear of persecution within the Article 2(c) of the Qualification Directive?

OPINION OF ADVOCATE GENERAL

- Geneva Convention remains the cornerstone of international human rights protection, but Article 78(1) TFEU and Article 18 of the Charter make it clear that EU law must respect these principles, so that (para 42) "any legislative measures such as the Qualification Directive must conform as nearly as possible with both the letter and the spirit of the Geneva Convention."

CONCEPT OF PROTECTION

- Article 7(1)(b) of the Qualification Directive departs from the express text of the Geneva Convention in that it envisages that protection can be offered by non-State actors.
- BUT this must be interpreted with basic objectives of Geneva Convention in mind, so that the private actors must seek to duplicate the functions of the State with a legal system based on the rule of law.

- Article 7(1)(b) is not satisfied by protection offered by purely private actors (eg private security firm guarding gated community), but rather "the traditional protection offered by a State, namely, a functioning legal and policing system based on the rule of law" (para. 78).
- *RH v. Sweden* (2015) held breach of Article 3 ECHR if returned to face "extreme material poverty and destitution" and so the availability of financial support from clan or family is a relevant consideration in that particular context. But this is a different test from that of 'protection" for the purposes of the Qualification Directive.

- NB Judgment of the Court is awaited.

Suzanne Kingston SC

The EU Citizens' Directive - Recent Irish case-law

Suzanne Kingston is Senior Counsel and Professor of Law, University College Dublin. She was previously *référendaire* at the Court of Justice of the European Union, Luxembourg, and practised EU law in Brussels. She has published widely in the fields of EU and human rights law and has held a variety of visiting positions, most recently as Adjunct Professor and International Visiting Professor of Law at Columbia University, New York.

THE EU CITIZENS' DIRECTIVE – RECENT IRISH CASE-LAW

Professor Suzanne Kingston SC

IACBA Annual Conference

1

Today's session

- Permitted family members / Partners – Art 3(2)
- Dependency – Art 2
- Marriages of convenience / Abuse of rights and fraud – Art 35
- [***Zambrano*** rights / Equal treatment]

2

Permitted Family Members / Partners

- ***Pervaiz v MJE*** [2020] IESC 27
  - TCN Permitted family member of EU citizen in "durable relationship"
  - Residence application refused: Failure to demonstrate durable relationship; Review upholds decision
  - Barrett J: Certiorari granted
    - General language in Regs and lack of legislative/non-legislative guidance meant no adequate transposition
    - Internal review mechanism vs Art 47 Charter
- Art 3(2) Directive

  2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

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

  The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people."
- Reg 5(1)(b) 2015 Regulations: permitted family members includes "*the partner with whom a Union citizen has a durable relationship, duly attested*"

Permitted Family Members / Partners

- Baker J:
- **Standing**: Confirms that EU citizen has standing to assert family member's derived rights (***Safdar v MJE*** [2019] IECA 329)
  - Applying C-89/17 ***Banger***: § 40 "*the requirement of effectiveness means that a remedy must be available to the person asserting breach of his or her rights to bring an application for entry and residence, and any other conclusion would be contrary to the object of the Citizens Directive. A narrow approach to the question of standing to challenge a decision does not meet that test.*"
- Argument that situation of qualifying and permitted family members differs as concerns standing rejected

Permitted Family Members / Partners

- Concept of "durable relationship duly attested" (cf ***Safdar*** CA; ***AR v MJE*** [2019] IECA 328)
- Approval of Humphreys J in ***A. R. v. Minister for Justice and Equality*** [2018] IEHC 785, § 21:
  - it is "*normally a legitimate transposition of a directive to simply adopt the language of the directive concerned without seeking to define terms that are undefined in the directive itself", and "the obligation to transpose does not require that every element of the directive must be given statutory language in full in every circumstance*"; Keane J in ***Safdar*** HC
- § 62: "*The discretionary decision-making process, and a decision on the characterisation of an applicant and whether he or she meets the definition, will always engage the analysis by the decision maker of the facts and a testing of those facts against the legislative requirements. **General language may more readily permit the exercise of this discretionary decision-making process in that it does not limit the approach to the facts by specifying detailed qualifying requirements**"; "the identifying features of those persons who come within the category of permitted family member in article 3(2) of the Directive are difficult to set out in exhaustive terms, and **a list may not be useful. The category is sufficiently broadly defined to admit a range of persons who could qualify, and permit the true exercise of discretion in the light of the individual facts"***

Permitted Family Members / Partners

- What does "durable" mean?
- § § 76-77:

  "*Durability connotes a relationship which carries indicia of permanence and commitment such that the couple live a life where each of them is connected to the other by a number of identifiable threads, **such as their social life and social network, their financial interconnectedness or interdependence, their living arrangements, and the extent to which they are recognised and acknowledged by their family circle and their friends as a couple**.*

  *While all of the elements of a durable partnership might not be easy to list, it is probably true to say that most persons would be aware when their friends, acquaintances, or family members are in a durable partnership. For that reason, it seems to me that the language of the 2015 Regulations can readily be understood in its plain terms as connoting **a committed personal interconnectedness which is recognised and recognisable between the couple and by the members of their circle or broader acquaintances, whether social or business, and which is anticipated as being likely to continue for the foreseeable future**."*
  - Duration of relationship an important but not essential factor
  - Durable does not mean permanent
  - Cohabitation generally a "useful yardstick" (Form EU1A) – at a minimum they must intend cohabiting
  - Normally sexual relationship although evidential difficulties recognised
  - No lack of clarity in application form

Permitted Family Members / Partners

- Meaning of "*Facilitate*":
- ***Rahman*** CJEU applied: "*extensive examination of personal circumstances*"
- § 115: "***What is required…is something more than mere assertion***. *To say that the evidence must be "duly attested" requires that it be "evidenced", and may, in a suitable case, be evidenced by oral evidence or narrative. Were an applicant required to notarise or establish definitely by documentary evidence that he and the Union citizen are in a committed relationship, the test would be impossibly high.* ***What is required is evidence by which the relationship is proved or substantiated, and a proper reading of the Citizens Directive means that the criteria, whatever they are and however they are stated, must not impose too high a standard and make it impossible for a person to meet that standard***."
- Minister must "*assess the documentary evidence furnished by the applicant and examine all the individual and personal circumstances of the particular case without applying a blanket or general approach*"
- Decision-making was justified in having regard to the fact that insufficient evidence was provided of alleged 2 year cohabitation: a "*degree of scepticism*" was justified from failure to disclose prior deportation order – vs Barrett J

Permitted Family Members / Partners

- Effective remedy: ***AAA v MJE*** [2017] IESC 80; ***Okujaye v MJE*** [2018] IESC 56 applied; JR as an effective remedy; vs Barrett J
- Cf ***FM v MJE*** [2020] IECA 184 Faherty J (jurisprudence "*very clear*")
- Judgment overturned but open to As to make fresh application

Test of Dependency

- ***Rachid v MJE*** [2020] IEHC 333 (Humphreys J)
  - Dependency: Directive "*seeks to have given rise to a cottage industry whereby once one family member manages to acquire EU citizenship, he or she can send any amount of money, modest or otherwise, to one or more relatives, remote or otherwise, and then launch a legal right to enter the Union territory on the basis of dependency*"
  - Intention of CJEU/EU legislature is that "*real dependency*" be at issue; "*actual dependants*"
  - Minister's decision refusing residence card upheld
- JR not an appeal on the facts
- Decision must be read as a whole: "*Not appropriate for the court to be invited to sift through every minute detail of the materials to see whether it can be represented that the Minister tripped up in some modest way*"
- Case C-423/12 ***Reyes*** considered ("*regular payment of sums of money for a significant period*" demonstrating financial dependence); ***VK v MJE*** [2019] IECA 232 applied
  - Claim of irrationality is a "*high bar*" and must be shown that decision is "*not open to the decision-maker*"
  - Evidence of payments to brother not enough; not enough to say that sum transferred would be large in Pakistani terms; Minister is "*not required to write a legal essay*"
  - Decision was taken on a "*sufficiently solid factual basis*"

Marriages of Convenience

- ***MKFS (Pakistan) v MJE***, McKechnie J, 24 July 2020
  - Residence card had been refused under 2015 Regulations on MOC grounds
  - Challenge to deportation order
- Humphreys J [2018] IEHC 103: marriage of convenience is a nullity at law for all purposes and no rights could arise therefrom – leave to appeal refused
  - Civil Registration Act 2004 – defined MOC as ground for impediment to marriage; Registrar must refer the matter for decision
- "*[w]here it is determined that the applicants' relationship is based on fraud, no 'rights' can arise from such a relationship; and an absolutely necessary consequence is that no obligation arises under the Constitution, the ECHR or EU law to consider any such 'rights'*" (para. 16)
- In the alternative: MOC is a nullity at law (***Izmailovic v Commissioner of An Garda Siochana*** [2011] IEHC 32, Hogan J, not followed)

Marriages of Convenience

- McKechnie J
- Minister can rely on MOC decision taken under 2015 Regs in considering deportation; A hadn't pointed to any material change in the interim
  - Can be relied upon in applying any law "concerning the entry and residence of foreign nationals in the State" (Reg 28)
- MOC is not void *ab initio*
- Concept of marriage has changed considerably in Ireland
- ***HAH v SAA*** [2017] IESC 40 applied (O'Malley J): "*the defining characteristic of marriage as envisaged by the Constitution in this era is that it entails to voluntary entry into mutual personal and legal commitments on the basis of an equal partnership between two persons*" with capacity, in accordance with the requirements laid down by law

Marriages of Convenience

- § 73: "*…a great number of people marry for love, but it would be a naïve view of the world to assume that this holds true for everyone. Some marry for money, or security, or status, or fame. Others marry to secure some tax or inheritance advantage. Certainly there are some others…who marry to secure an immigration advantage for one or other of them…some people are still married off to secure some advantage for others: to gain power, to form alliances…*"
- Decision of MOC is not a declaration in rem giving rise to nullity: Reg 28 simply empowers Minister to "*disregard the marriage as a factor bearing*" on his determination under those Regs
- Consequences of finding strictly tied to "*residency matters and the overall immigration process*" / "*immigration issues*"
- 2014 Act = prospective marriages only

Marriages of Convenience

- Wider issue whether MOC is nullity for all purposes parked: § 97 – for a case where party to a marriage seeks annulment on that ground
- Family and private life rights must nevertheless be taken into account (even if the conclusion may be that they carry little weight where MOC found) in Art 8 ECHR assessment at the deportation stage
- On the facts: Minister had failed to engage in proper Art 8 analysis
- Threshold for refusal of discretionary relief not reached (***PNS v MJE*** [2020] IESC 11)

Marriages of Convenience

- ***Mascarenhas v MJE*** [2020] IEHC 69 (Barrett J)
- Challenge to deportation decision on ground of MOC rejected; as EUTR residence had been unlawful, residence had been unlawful

Abuse of Rights / Fraud

- ***Aziz v MJE*** [2020] IEHC 61 (Barrett J) –
  - Minister entitled to refuse residence card; Burden of proof rests on As to establish the requisite family relationship on the basis of the documents before him (applying ***Khan***; ***Badshah***)
  - Minister entitled to find that no genuine exercise of free movement rights via enquiries of landlord
- ***Ahsan v MJE*** [2020] IEHC 179
  - Finding of abuse of rights leading to refusal of residence card upheld (Barrett J); free movement of persons not designed to facilitate the by-passing of national immigration rules enabling a TCN to enter the EU by means of "*falsehood and fabrication*"

Zambrano rights

- ***EO v MJE*** [2020] IECA 246 (Power J)
  - Refusal of TCN visa application of partner; ***Zambrano*** principle applied and interpreted (cf Case C-256/11 ***Dereci*** "*denial of the genuine enjoyment of the substance of the rights…refers to situations in which the Union citizen has, in fact, to leave…the territory of the Union as a whole*"; ***Bakare v MJE*** [2016] IECA 292 (Hogan J)
  - § 92 "*The critical question that falls to be considered is whether the refusal decision of the Minister gives rise to or creates a situation which would force the minor appellants to leave the territory of the EU*"
  - Not enough to rely on averred intention of mother to leave the State; on the facts, partner had lived in various MS and family "*meets on regular occasions and…are in regular contact by telephone and video calling*"; this can continue
  - Choice to leave Ireland would not be "*compulsion*"; Charter does not apply, because Zambrano does not apply: purely national law; Requirement to assess the circumstances (CJEU ***Tjebbes***) satisfied
  - Fact that the other partner can remain in the EU (as an EU citizen) a factor legitimately taken into account (CJEU ***Chavez***; ***KA*** applied); Minister had fulfilled obligation to identify the child's primary carer; Not dependent on the partner here
    - Minister could validly have regard to the legitimate public security interest of the State due to partner's criminal convictions in Nigeria (CJEU ***KA*** applied)

Equal treatment / Social advantages

- Other developments
- ***Kozinceva*** [2020] IECA 7 (Haughton J) – Proof of specific residence cannot be required in the case of a homeless person, in order to claim a social benefit
- ***Voican*** [2020] IEHC 258 (Simons J) – Direct dependant family members entitled to claim social assistance

Aoife McMahon BL

Tensions in EU law between Art 4 Charter of Fundamental Rights of the EU and concept of mutual trust

Following a masters in human rights law obtained from the University of Evry Val d'Essonne in France, Aoife obtained a PhD in immigration law from TCD. She has lectured in EU law, Immigration law and refugee law in TCD, UCD, Maynooth University, Griffith College and the Law Society of Ireland and has had a number of articles published in this area. Her book, The Role of the State in Migration Control was published by Brill Nijhoff in December 2016. In 2011, she worked with Siofra O'Leary in the Irish judge's Chambers of the CJEU. Prior to this, she obtained experience in the international human rights sphere through her work at Unesco and Médecins du Monde in Paris. She now has 11 years of experience as a practising barrister and has been involved in a number of preliminary references to the CJEU.

Growing tensions within the EU between the protection of article 4 of the Charter and the principle of mutual trust

Aoife McMahon BL

IACBA Conference
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1

- The **principle of mutual trust** between the member states is, in EU law, of fundamental importance given that it allows an area without internal borders to be created and maintained. More specifically, it requires, particularly with regard to the AFSJ, each of those States, save in exceptional circumstances, to consider all the other member states to be complying with EU law and particularly with the fundamental rights recognised by EU law.

- **Article 4 of the Charter** (identical in terms to article 3 ECHR):
- "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

Overview

I. Dublin III transfers
II. EAW surrenders
III. Progression from procedural expulsion to substantive decisions on immigration status
IV. Implications of the CJEU judgment of *Ibrahim*

I. Dublin III transfers

5

- *M.S.S. v. Belgium and Greece* (app. no. 30696/09)
- *N. S. and M.E.* (Joined cases C-411/10 and C-493/10)
- *Sharifi and ors. v. Italy and Greece* (app. no. 16643/09)
- *Tarakhel v. Switzerland* (app. no. 29217/12)
- *C.K.* (C-578/16 PPU)

6

II. EAW surrenders

- *Aranyosi and Căldăraru* (Joined decisions C-404/15 and C-659/15 PPU)
- *LM* (Case C-216/18 PPU) (*MJE v. Celmer*)
- *R.O.* (Case C-327/18 PPU)

III. Progression from procedural expulsion to substantive decisions on immigration status

Jawo (C-163/17)

- Proposed Dublin transfer from Germany to Italy
- Beyond reception conditions for applicants
- Reports that beneficiaries of international protection in Italy were exposed to a risk of becoming homeless and reduced to destitution
- Relevant consideration in determining whether transfer precluded by article 4 CFR

Ibrahim (Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17)

- Applicant granted SP in Bulgaria
- Made second IP application in Germany – found inadmissible (33(2)(a) of PD 2013/32/EU)
- Challenge to inadmissibility decision

Relevant findings in *Ibrahim:*

- EU law precludes a finding of inadmissibility under the recast PD where the living conditions of those benefiting from subsidiary protection granted by another member state infringe article 4 CFR.
- EU law does not preclude a finding of inadmissibility where the asylum procedure in the other member state that has granted subsidiary protection leads to a systematic refusal, without real examination, to grant refugee status (article 18 CFR right to asylum).

Ibrahim (Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17)

"It is immaterial, for the purposes of the application of article 4, that it is at the very time of transfer, in the course of the asylum procedure or on the conclusion of that procedure, that the person concerned would be exposed to a serious risk of suffering such treatment" (para 87).

- **Jawo** – future risk "on conclusion of procedure" (article 4 applied at expulsion stage)
- **Ibrahim** – article 4 applied "in the course of the asylum procedure"(at admissibility stage)
- Future risk of treatment contrary to article 4 CFR
- Stage of application of article 4 CFR

H.Z. (Iran) v. IPAT and ors. [2020] IEHC 146

- "article 4 CFR cannot be infringed merely because of a decision declaring an application inadmissible. That possibility only arises at the expulsion stage" (para. 14)
- *MS (Afghanistan) and ors.* [2019] IEHC 477 (C-616/19) – pending preliminary reference

15

- Second question referred - whether it is an abuse of rights under EU law for a person who has been granted IP in the form of SP in one member state to make a second such application in another member state.
- Opinion of Advocate General Saugmandsgaard Øe delivered on 3 September 2020

16

IV. Implications of Ibrahim

A. Implications of the move from expulsion to substantive immigration status

- *Ibrahim* has extended the traditional stage of article 4 application from the expulsion stage to an earlier decision on admissibility – where a real risk of treatment contrary to article 4 exists in one member state, a second member state is precluded from finding IP application to be inadmissible
- Flows from this – the second member state must proceed to carry out a substantive examination of the IP application

➢**Not a targeted remedy** – definition of IP – protection from persecution or serious harm in a person's country of origin / nationality.

➢ **risk of a proliferation** of international protection decisions in different member states in respect of the same person, the same country of origin and the same original fear of persecution or serious harm.

19

➢Ibrahim does not sit well with a number of **features of the traditional functioning of the CEAS**:

- "subsequent application" – article 40(1) recast PD confines this to a subsequent application "in the same member state".
- premise of the Dublin system that only one member state may be responsible for examining an application for international protection.
- beneficiaries of IP do not enjoy the right to free movement across the territory of the EU.

20

B. An exceptional remedy for exceptional circumstances

When a person who has been granted IP in an initial member state but travels to a second member state and

where they have a genuine, well-founded fear of treatment contrary to article 4 CFR if sent back to the initial member state,

what application are they to make?

- an application for international protection is not targeted to their current fears (such application relates to protection from country of origin / nationality)
- an application for a proposal to deport to issue to permit representations to be made on article 4 concerns under s. 3 of the Immigration Act 1999?

- While not targeted to their current fears, permitting such persons to make a second application for international protection would in fact give them **effective protection** from being returned to the former member state.

- AG Wathelet described the circumstances in which article 4 concerns would require a second member state to find a second IP application as admissible as "**a wholly exceptional situation**".
- This may have been to recognise that this less than ideal remedy may be the best **exceptional remedy** in such exceptional circumstances

C. Evidence of the limits of the principle of mutual trust

- **M.S.S. v. Belgium and Greece** - reports from the CPT, Amnesty International, ECRE, the UNHCR and Human Rights Watch.
- **N. S. and M.E.** - the findings of the ECtHR in *M.S.S. v. Belgium and Greece*.
- **Tarakhel v. Switzerland** - UNHCR, the Commissioner for Human Rights of the Council of Europe and the IOM.

- **Aranyosi and Căldăraru** - judgments of the ECtHR in respect of prison conditions in Hungary (*Varga and Others v. Hungary*) and prison conditions in Romania (*Voicu v. Romania; Bujorean v. Romania; Mihai Laurenţiu Marin v. Romania*, and *Constantin Aurelian Burlacu v. Romania*). The CJEU also relied on reports of the CPT in respect of both Hungary and Romania.
- **Jawo** - report of the Swiss Refugee Council.

C. Evidence of the limits of the principle of mutual trust

- **Infringement proceedings** initiated by the Commission in the sphere of the CEAS:
- European Commission v. Hungary, (Case C-808/18)
- European Commission v. Hungary, (Case C-821/19)
- European Commission v. Poland, Czech Republic and Hungary (Joined Cases C 715/17, C 718/17 and C 719/17)

➢**Role of the Commission** in ensuring that exceptions to the principle of mutual trust remain the exception.

Growing tensions within the EU between the protection of article 4 of the Charter and the principle of mutual trust

Overview

Since the Greek transfer cases, a line of judgments from both the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) have set out guidance on the circumstances which may give rise to a risk of inhuman or degrading treatment contrary to article 3 of the European Convention on Human Rights (the ECHR) or article 4 of the Charter of Fundamental Rights of the EU (CFR) such as to preclude the transfer of a person from one member state to another member state under the Dublin system. A similar line of cases in the context of the European Arrest Warrant (EAW) system set out guidance on when a member state may be precluded from surrendering a person to another member state under the EAW Framework Decision. This caselaw endeavours to achieve a balance between maintaining the fundamental principle of mutual trust between member states of the EU and ensuring the absolute protection of article 3 ECHR and article 4 CFR.

A recent case of *Ibrahim* (Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17) marks a significant development in this line of caselaw. In this judgment, there is a progression from a consideration of whether expulsion measures may be precluded by article 4 CFR to a consideration of whether this article may require a substantive decision to be taken in respect of a person's immigration status.

This paper provides an overview of the caselaw since the Greek transfer cases and considers the implications of the development marked by the judgment in *Ibrahim*.

I. Dublin III transfers

The procedure under the Dublin III Regulation 604/2013 is intended to be a summary procedure for the transfer of an international protection applicant to the responsible member state designated in accordance with the criteria set out in that Regulation. For the purposes of this paper, it could be considered as a form of procedural expulsion. It is based on the principle of mutual trust between member states of the EU, that each of these member states will apply the same minimum standards for the processing of international protection applications.

The "Greek transfer" cases identified certain circumstances in which member states could be precluded from transferring an applicant under the then Dublin II Regulation. Such a transfer was precluded where substantial grounds were shown for believing that the person concerned faced a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the receiving country contrary to article 3 ECHR.

M.S.S. v. Belgium and Greece (app. no. 30696/09) was the first of these cases. The applicant was transferred under the Dublin II Regulation from Belgium to Greece. The ECtHR observed that since 2006, reports had regularly been published by national, international and non-governmental organisations deploring the reception conditions of

asylum-seekers in Greece. These reports included reports from the CPT, Amnesty International, ECRE, the UNHCR and Human Rights Watch. The court summarised some of the key findings of these reports as follows:

> C. Living conditions
> …
> 168. [According to the people interviewed for the reports] it appears that they are given no information about the possibilities of accommodation. In particular, the people interviewed reported that no one told them that they should inform the authorities that they had nowhere to live, which is a prerequisite for the authorities to try to find them some form of accommodation.
> 169. Those persons who have no family or relations in Greece and cannot afford to pay rent just sleep on the streets. As a result, many homeless asylum-seekers, mainly single men but also families, have illegally occupied public spaces, like the makeshift camp in Patras, which was evacuated and torn down in July 2009, or the old appeal court and certain parks in Athens.
> 170. Many of those interviewed reported a permanent state of fear of being attacked and robbed, and of complete destitution generated by their situation (difficulty in finding food, no access to sanitary facilities, etc.).
> 171. Generally, the people concerned depend for their subsistence on civil society, the Red Cross and some religious institutions.
> 172. Having a "pink card" does not seem to be of any benefit in obtaining assistance from the State and there are major bureaucratic obstacles to obtaining a temporary work permit. For example, to obtain a tax number the applicant has to prove that he has a permanent place of residence, which effectively excludes the homeless from the employment market. In addition, the health authorities do not appear to be aware of their obligations to provide asylum-seekers with free medical treatment or of the additional health risks faced by these people.

The court reiterated its caselaw on the interpretation of the protections of article 3 ECHR, "which enshrines one of the most fundamental values of democratic societies and prohibits in absolute terms torture and inhuman or degrading treatment or punishment irrespective of the circumstances and of the victim's conduct" (para. 218). "To fall within the scope of Article 3 the ill-treatment must attain a minimum level of severity. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment and its physical or mental effects and, in some instances, the sex, age and state of health of the victim" (para. 219). The court considered treatment to be "inhuman" when it was "premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering". Treatment was considered to be "degrading" when it "humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance" (para. 220).

The court found that Greece had violated article 3 ECHR. By reason of the inaction of the Greek authorities, they were responsible for the situation in which the applicant found himself "for several months, living on the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs". The court considered that the applicant had been the victim of humiliating treatment showing a lack of respect for his dignity and that this situation had, without doubt, aroused in him feelings of fear, anguish or inferiority capable of inducing desperation. It considered that such living

conditions, combined with the prolonged uncertainty in which he had remained and the total lack of any prospects of his situation improving attained the level of severity required to fall within the scope of article 3 ECHR (para. 263).

The court also found that Belgium had violated article 3 ECHR by transferring the applicant to Greece. The court considered that the general situation in Greece was known to the Belgian authorities and that the applicant should not have been expected to bear the entire burden of proof (para. 352).

In the follow-on "Greek transfer case" before the CJEU, *N. S. and M.E.* (Joined cases C 411/10 and C 493/10), a number of applicants challenged their proposed transfer to Greece under the Dublin II Regulation. The court expressly relied on the findings of the ECtHR in *M.S.S. v. Belgium and Greece* and notably held in the operative part that:

> European Union law precludes the application of a conclusive presumption that the member state which article 3(1) of Regulation No 343/2003 [the Dublin II Regulation] indicates as responsible observes the fundamental rights of the EU.
>
> Article 4 CFR … must be interpreted as meaning that the member states, including the national courts, may not transfer an asylum seeker to the 'member state responsible' within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that member state amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision.

This latter finding was then incorporated into article 3(2) of the Dublin III Regulation.

The case of *Sharifi and ors. v. Italy and Greece* (app. no. 16643/09) concerned the collective return of a number of Afghan (and other) nationals from Italy to Greece. The court held that no form of collective and indiscriminate returns could be justified by reference to the Dublin system, which had, in all cases, to be applied in a manner compatible with the ECHR. The court reiterated that it was for the State carrying out the return to ensure, even in the context of the Dublin system, that the destination country offered sufficient guarantees in the application of its asylum policy to prevent the person concerned being removed to his country of origin without an assessment of the risks faced. It held that there had been a violation by Greece of article 13, taken together with article 3, on account of the lack of access to the asylum procedure and the risk that the applicants would be deported to Afghanistan, where they were likely to be subjected to inhuman and degrading treatment.

As to Italy's responsibility resulting from the applicants' removal to Greece, the court found no reason to depart from its findings in the judgment in the case of *M.S.S. v. Belgium and Greece*, and held that it had been for the Italian authorities to examine the applicants' individual situations and to verify, before returning them, how the Greek authorities applied their legislation on asylum in practice. The court found that in failing to do this, Italy had violated article 3 ECHR.

With *Tarakhel v. Switzerland* (app. no. 29217/12), the spotlight moved from Greece to Italy. Relying on articles 3 and 8 ECHR, the applicants alleged that if they were returned to Italy they would be exposed to inhuman and degrading treatment on account of the risk of

being left without accommodation or being accommodated in inhuman and degrading conditions. The risk stemmed, in their submission, from the absence of individual guarantees as to how they would be taken charge of, in view of the systemic deficiencies in the reception arrangements for asylum seekers in Italy. According to the applicants, living conditions in the reception centre in which they had previously been held were poor, particularly on account of the lack of appropriate sanitation facilities, the lack of privacy and the climate of violence among the occupants.

The Grand Chamber of the ECtHR set out findings of a number of reports on the conditions for asylum seekers in Italy, notably of the UNHCR, the Commissioner for Human Rights of the Council of Europe and the IOM. The court held that if the applicants were to be returned to Italy without the Swiss authorities having first obtained individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together, there would be a violation of article 3 ECHR.

In a number of judgments, the CJEU has given further guidance on the circumstances in which a Dublin III transfer may be impermissible as giving rise to a real risk of a breach of article 4 CFR. This is identical in terms to article 3 ECHR: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

In *C.K.* (C-578/16 PPU), the Slovenian authorities sought to transfer the applicants to Croatia under the Dublin III Regulation. The applicants claimed in particular that their transfer would have negative consequences for the state of health of C. K., also likely to affect the well-being of her new-born child. In this regard, they argued, supported by a number of medical certificates, that
C. K. had had a high-risk pregnancy and that she had suffered psychiatric difficulties since giving birth. A specialist psychiatrist, it was stated, had accordingly diagnosed her as having post-natal depression and periodic suicidal tendencies. Furthermore, it was apparent from several medical opinions that the poor state of health of C. K. was mainly caused by uncertainty regarding her status and the resulting stress. It was stated that the deterioration in her psychological state could result in aggressive behaviour on her part towards herself and others, which might require hospital care. The illness suffered by C. K., according to that psychiatrist, required that she and her child remain at the reception centre in Ljubljana to receive care there.

The court notably held in the operative part of the judgment that article 4 CFR must be interpreted as meaning that even where there were no substantial grounds for believing that there were systemic flaws in the member state responsible for examining the asylum application, a Dublin transfer could take place only in conditions which excluded the possibility that that transfer might result in a real and proven risk of the person concerned suffering inhuman or degrading treatment, within the meaning of that article. In circumstances in which the transfer of an asylum seeker with a particularly serious mental or physical illness would result in a real and proven risk of a significant and permanent deterioration in the state of health of the person concerned, that transfer would constitute inhuman and degrading treatment, within the meaning of that article. In such circumstances, that member state could either temporarily suspend the execution of the transfer or choose to conduct its own examination of that person's application by making use of the 'discretionary clause' laid down in article 17(1) of the Dublin III Regulation.

II. EAW surrenders

The European Arrest Warrant (EAW) framework decision 2002/584/JHA of 13 June 2002 also concerns a summary procedure of surrender of a person from one member state to another in order that a substantive decision may be made in the latter member state. In the EAW framework, the substantive decision concerns the prosecution and/or sentencing of that person. Again, for the purposes of this paper, the surrender decision can be considered as a form of procedural expulsion.

Aranyosi and Căldăraru (Joined decisions C-404/15 and C-659/15 PPU) concerned EAWs sent from Hungary and Romania to Germany seeking the surrender of Mr. Aranyosi and Mr. Căldăraru for prosecution and sentence respectively. The German court possessed the following information which suggested that the conditions of incarceration to which both individuals would be exposed would pose a real risk of treatment contrary to article 4 CFR:

> 43. The ECtHR has found Hungary to be in violation by reason of the overcrowding in its prisons (ECtHR, *Varga and Others v. Hungary*, Nos 14097/12, 45135/12, 73712/12, 34001/13, 44055/13 and 64586/13, of 10 March 2015). The ECtHR held that it was established that Hungary was in violation of Article 3 ECHR by imprisoning the applicants in cells that were too small and that were overcrowded. The ECtHR treated those proceedings as a pilot case after 450 similar cases against Hungary were brought before it with respect to inhuman conditions of detention.
>
> 44. The [referring court] states that specific evidence that the conditions of detention to which Mr Aranyosi would be subject, if he were surrendered to the Hungarian authorities, do not satisfy the minimum standards required by international law is also to be found in a report issued by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment [CPT]. The findings in that report refer in particular to the significant prison overcrowding identified in the course of visits made between 2009 and 2013.
>
> …
>
> 60. In a number of judgments issued on 10 June 2014, the ECtHR found Romania to be in violation by reason of the overcrowding in its prisons (ECtHR, *Voicu v. Romania*, No 22015/10; *Bujorean v. Romania*, No 13054/12; *Mihai Laurenţiu Marin v. Romania*, No 79857/12, and Constantin *Aurelian Burlacu v. Romania*, No 51318/12). The ECtHR held it to be established that Romania was in violation of Article 3 ECHR by imprisoning the applicants in cells that were too small and overcrowded, that lacked adequate heating, that were dirty and lacking in hot water for showers.
>
> 61. The [referring court] states that specific evidence that the conditions of detention to which Mr Căldăraru would be subject, if he were to be surrendered to the Romanian authorities, do not satisfy the minimum standards required by international law is also to be found in a report issued by the [CPT]. The findings in that report refer in particular to the significant prison overcrowding identified in visits made between 5 and 17 June 2014.

By its questions the referring court sought in essence to ascertain whether article 1(3) of the Framework Decision must be interpreted as meaning that, where there is solid evidence that detention conditions in the issuing member state are incompatible with fundamental rights, in particular with article 4 CFR, the executing judicial authority may or must refuse to execute a EAW issued in respect of a person for the purposes of conducting a criminal prosecution or executing a custodial sentence. The referring court also sought clarity on whether it may or must make the surrender of that person conditional on there being obtained from the issuing member state information enabling it to be satisfied that those detention conditions are compatible with fundamental rights.

Similar to the Dublin III cases set out above, the CJEU emphasised the importance of the principle of mutual trust within the EU:

> 78. Both the principle of mutual trust between the member states and the principle of mutual recognition are, in EU law, of fundamental importance given that they allow an area without internal borders to be created and maintained. More specifically, the principle of mutual trust requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other member states to be complying with EU law and particularly with the fundamental rights recognised by EU law …
>
> 79. In the area governed by the Framework Decision, the principle of mutual recognition, which constitutes, as is stated notably in recital (6) of that Framework Decision, the 'cornerstone' of judicial coope ration in criminal matters, is given effect in article 1(2) of the Framework Decision, pursuant to which Member States are in principle obliged to give effect to a European arrest warrant …

The operative part of the decision held that article 1(3), article 5 and article 6(1) of the EAW Framework Decision must be interpreted as meaning that, where there is objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing member state that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention, the executing judicial authority must determine, specifically and precisely, whether there are substantial grounds to believe that the individual concerned by a EAW will be exposed, because of the conditions for his detention in the issuing member state, to a real risk of inhuman or degrading treatment, within the meaning of article 4 CFR, in the event of his surrender to that member state.

The CJEU added that in such circumstances the executing judicial authority must postpone its decision on the surrender of the individual concerned until it obtained supplementary information that allowed it to discount the existence of such a risk. If the existence of that risk could not be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end.

In *LM* (Case C 216/18 PPU) (*MJE v. Celmer*), Mr. Celmer objected to his surrender to Poland on the basis that wide and unchecked powers of the system of justice in the Republic of Poland were inconsistent with those granted in a democratic State subject to the rule of law and that there was a real risk that he would be subjected to arbitrariness in the course of his trial in the issuing member state. He submitted that his surrender would result in breach of his rights under article 6 ECHR and should, accordingly, be refused, in accordance with

Irish law and with Article 1(3) of Framework Decision 2002/584 read in conjunction with recital 10 thereof.

While that case concerned article 6 ECHR rather than article 3 ECHR, similar comments to those made in *Aranyosi and Căldăraru* were made by the CJEU in respect of the importance of the principle of mutual trust. Also of note is the court's observations on the level of supporting documentation required to establish a requirement on the part of the executing member state to refuse to surrender an individual. Mr. Celmer had relied, in particular, on the Commission's reasoned proposal of 20 December 2017 submitted in accordance with article 7(1) TEU regarding the rule of law in Poland (COM(2017) 835 final) and on the documents to which the reasoned proposal referred. The CJEU held that it was only if the European Council were to adopt a decision determining, as provided for in article 7(2) TEU, that there was a serious and persistent breach in the issuing member state of the principles set out in article 2 TEU, such as those inherent in the rule of law, and the Council were then to suspend Framework Decision 2002/584 in respect of that member state, that the executing judicial authority would be required to refuse automatically to execute any EAW issued by it, without having to carry out any specific assessment of whether the individual concerned runs a real risk that the essence of his fundamental right to a fair trial will be affected.

The court held that in the absence of such a decision of the European Council:

> 73. …the executing judicial authority may refrain, on the basis of article 1(3) of Framework Decision 2002/584, to give effect to a [EAW] issued by a member state which is the subject of a reasoned proposal as referred to in article 7(1) TEU only in exceptional circumstances where that authority finds, after carrying out a specific and precise assessment of the particular case, that there are substantial grounds for believing that the person in respect of whom that [EAW] has been issued will, following his surrender to the issuing judicial authority, run a real risk of breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial.

R.O. (Case C-327/18 PPU) was the case in which the implications of Brexit were relied on to challenge a proposed EAW surrender. R.O. raised two principle objections to his surrender to the UK for the purposes of prosecution. First, on the basis of the withdrawal of that member state from the EU and second, on the basis of a risk of treatment contrary to article 3 ECHR. In respect of the latter, he claimed that he could suffer inhuman and degrading treatment if he were to be imprisoned in Maghaberry prison in Northern Ireland.

By its questions the referring court sought to ascertain whether article 50 TEU must be interpreted as meaning that a consequence of the notification by a member state of its intention to withdraw from the EU in accordance with that article was that, in the event that that member state issued a EAW with respect to an individual, the executing member state must refuse to execute that EAW or postpone its execution pending clarification as to the law that will apply in the issuing member state after its withdrawal from the EU.

In his Opinion, Advocate General Szpunar commented that "Brexit constitutes *terra incognita* in
terms of EU law, [but until such time as withdrawal is official], it is still business as usual".

Mutual trust was again a key feature of the decision of the CJEU. The court notably held, however, that the UK was party to the ECHR and had incorporated the provisions of article 3 ECHR into its national law. Since its continuing participation in that convention was in no way linked to its being a member of the EU, the decision of that member state to withdraw from the Union had no effect on its obligation to have due regard to article 3 ECHR and, consequently, could not justify the refusal to execute a EAW on the ground that the person surrendered would run the risk of suffering inhuman or degrading treatment within the meaning of those provisions (para. 52).

The operative part of that decision held that article 50 TEU must be interpreted as meaning that mere notification by a member state of its intention to withdraw from the EU did not have the consequence that, in the event that that member state issued a EAW with respect to an individual, the executing member state must refuse to execute that EAW or postpone its execution pending clarification of the law that will be applicable in the issuing member state after its withdrawal from the EU. In the absence of substantial grounds to believe that the person who was the subject of that EAW was at risk of being deprived of rights recognised by the Charter and the EAW Framework Decision following the withdrawal from the EU of the issuing member state, the executing member state could not refuse to execute that EAW while the issuing member state remained a member of the EU.

III. Progression from procedural expulsion to substantive decisions

The above caselaw all relates to summary, procedural decisions to transfer a person under the Dublin system or surrender a person under the EAW framework decision: forms of procedural expulsion. The substantive decision on whether to grant international protection or prosecute or sentence that person will be taken by another member state following transfer or surrender.

More recent caselaw of the CJEU has progressed from a consideration of whether expulsion measures may be precluded by article 4 CFR to a consideration of whether this article may require a substantive decision to be taken in respect of a person's immigration status.

Jawo (C-163/17)

While *Jawo* (C-163/17) again concerned a proposed Dublin III transfer to Italy, the German referring court believed that in considering whether there was a real risk of exposure to inhuman or degrading treatment contrary to article 4 CFR, not only should the living conditions of applicants in Italy while their application remained pending be considered, but also their living conditions post-grant of international protection. The referring court submitted as follows:

> 44. Finally, the referring court is uncertain as to whether, in order to assess the lawfulness of the transfer, it must take account of the living conditions to which the applicant would be subject in the requested Member State if his request for international protection were accepted there and, *inter alia*, the serious risk of his being subjected to treatment contrary to Article 4 CFR.
> 45. That court considers, in that regard, that the examination of whether there are systemic flaws, within the meaning of the second subparagraph of Article 3(2)

of the Dublin III Regulation, cannot be confined to the asylum procedure and the reception conditions during that procedure, but must also include the situation thereafter. Thus, the granting of optimal reception conditions during that procedure would be insufficient if, having been granted international protection, the person concerned is subsequently threatened with destitution. The obligation to carry out such an overall examination of the applicant's situation before his transfer is the necessary reverse side of the Dublin system, which denies those seeking protection a free choice of country of refuge. In any event, that obligation stems from Article 3 ECHR.

…

47. The referring court refers, *inter alia*, to the report of the Swiss Refugee Council, entitled '*Reception Conditions in Italy*', of August 2016, which contains specific information supporting a conclusion that beneficiaries of international protection in that Member State are exposed to a risk of becoming homeless and reduced to destitution in a life on the margins of society. According to that report, the inadequately developed social system of that member state is, in respect of the Italian population, offset by support in family structures, which is lacking in respect of the beneficiaries of international protection. That report also states that there are almost no countervailing integration programmes in Italy and that, in particular, access to essential language courses is left more or less to chance. Finally, it is apparent from that report that, in view of the sharply increased refugee numbers in Italy in the past few years, the major structural deficiencies of the State social system cannot be effectively compensated for by non-governmental organisations and churches.

In considering the third question referred by the German court, whether article 4 CFR must be interpreted as precluding a Dublin III transfer where, in the event of protection being granted in the receiving member state, the applicant would be exposed to a serious risk of suffering inhuman or degrading treatment, within the meaning of Article 4 CFR, on account of the living conditions that he could be expected to encounter as a beneficiary of international protection in that member state, the CJEU recalled some fundamental principles of EU law:

80. … it should be recalled that EU law is based on the fundamental premise that each member state shares with all the other member states, and recognises that they share with it, a set of common values on which the EU is founded, as stated in article 2 TEU. That premise implies and justifies the existence of mutual trust between the member states that those values will be recognised, and therefore that the EU law that implements them will be respected … and that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised by the Charter, particularly Articles 1 and 4 thereof, which enshrine one of the fundamental values of the Union and its member states …

81. The principle of mutual trust between the member states is, in EU law, of fundamental importance given that it allows an area without internal borders to be created and maintained. More specifically, the principle of mutual trust requires, particularly as regards the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other member states to be complying with EU law and particularly with the fundamental rights recognised by EU law …

82. Accordingly, in the context of the [CEAS], and in particular the Dublin

> III Regulation, which is based on the principle of mutual trust and which aims, by streamlining applications for international protection, to accelerate their processing in the interest both of applicants and participating States, it must be presumed that the treatment of applicants for international protection in all member states complies with the requirements of the Charter, the Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 …
>
> 83. It is not however inconceivable that that system may, in practice, experience major operational problems in a given member state, meaning that there is a substantial risk that applicants for international protection may, when transferred to that member state, be treated in a manner incompatible with their fundamental rights …
>
> 84. In those circumstances, the application of an irrebuttable presumption that the fundamental rights of the applicant for international protection are observed in the member state which, pursuant to the Dublin III Regulation, is designated as responsible for examining the application is incompatible with the duty to interpret and apply that regulation in a manner consistent with fundamental rights …

The court agreed with the referring court that the Common European Asylum System (CEAS) and the principle of mutual trust depend on the guarantee that the application of that system will not result, at any stage and in any form, in a serious risk of infringements of article 4 CFR. "It would, in that regard, be contradictory if the existence of such a risk at the stage of the asylum procedure were to prevent a transfer, while the same risk would be tolerated when that procedure has been completed with the recognition of international protection" (para. 89).

The CJEU held that the particularly high level of severity required for a breach of article 4 CFR to be established was attained "where the indifference of the authorities of a member state would result in a person wholly dependent on state support finding himself, irrespective of his wishes and personal choices, in a situation of extreme material poverty that does not allow him to meet his most basic needs, such as, *inter alia*, food, personal hygiene and a place to live, and that undermines his physical or mental health or puts him in a state of degradation incompatible with human dignity" (para. 92).

The operative part of the decision held that article 4 CFR must be interpreted as not precluding the transfer of an applicant for international protection to the member state which was responsible under the Dublin III Regulation for examining the application, unless the court hearing an action challenging the transfer decision found, on the basis of information that was objective, reliable, specific and properly updated and having regard to the standard of protection of fundamental rights guaranteed by EU law, that that risk was real for that applicant, on account of the fact that, should he be transferred, he would find himself, irrespective of his wishes and personal choices, in a situation of extreme material poverty. Such analysis must include the living conditions that he could be expected to encounter as a beneficiary of international protection in that member state.

Ibrahim (Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17)

The decision in *Ibrahim* (Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17) was delivered by the CJEU on the same day as *Jawo* and at first sight seems to flow naturally from the latter. The applicants in *Ibrahim* were applicants for asylum who were stateless

Palestinians that had resided in Syria. They left Syria and were granted subsidiary protection in Bulgaria. They travelled on to Germany and lodged new applications for asylum in that member state.

By the third and fourth questions, the referring court sought to ascertain, first, whether article 33(2)(a) of the recast Procedures Directive 2013/32/EU must be interpreted as precluding a member state from exercising the option granted by that provision to find an application inadmissible on the ground that the applicant had already been granted subsidiary protection by another member state, where the living conditions of those granted subsidiary protection in that other member state were in breach of article 4 CFR, or did not satisfy the provisions of Chapter VII of the Qualification Directive, without however being such as to be in breach of article 4 CFR.

A second limb to these questions was whether article 33(2)(a) of the Procedures Directive (recast) must be interpreted as precluding a member state from exercising that option where the asylum procedure in the other member state was and continued to be vitiated by systemic flaws.

The court recalled the fundamental principles of EU law that it had set out in *Jawo* (C-163/17), notably the implications of the principle of mutual trust in the CEAS. That principle applied, in particular, to the application of article 33(2)(a) of the Procedures Directive (recast) (a finding of inadmissibility), which constituted an expression of the principle of mutual trust.

Against that background and having regard to the general and absolute nature of the prohibition laid down in article 4 CFR, which was closely linked to respect for human dignity, the court notably held that "it is immaterial, for the purposes of the application of article 4, that it is at the very time of transfer, in the course of the asylum procedure or on the conclusion of that procedure, that the person concerned would be exposed to a serious risk of suffering such treatment" (para 87). This is significant. This finding served to extend the protection of article 4 from decisions on expulsion to a decision "in the course of the asylum procedure" such as a decision on admissibility. To make the distinction between these two types of decisions clear, even if the international protection application in *Ibrahim* had been found to be inadmissible, a separate decision on expulsion would still have fallen to be made thereafter. Traditionally, it is in the context of this subsequent expulsion decision that article 4 CFR protection issues arise. It is not clear why the CJEU felt it necessary to extend the scope of article 4 to an initial decision on admissibility and why a consideration of article 4 at the later expulsion stage would not have offered adequate protection. The implications of this considerable leap in the caselaw on article 4 will be considered in the final section of this paper.

The court held that accordingly, in the context of a determination on admissibility, where an applicant produced evidence to establish the existence of a risk of treatment contrary to article 4 in the member state that had previously granted subsidiary protection, a national court was obliged to assess, on the basis of information that was objective, reliable, specific and properly updated and having regard to the standard of protection of fundamental rights guaranteed by EU law, whether there was such a risk.

The court made clear that having regard to the importance of the principle of mutual trust for the CEAS, "infringements of the provisions of Chapter VII of the Qualification Directive

which do not result in a breach of article 4 CFR do not prevent the member states from exercising the option granted by article 33(2)(a) of the Procedures Directive" (para. 92).

In respect of this article 4 CFR submission, the court followed the proposals of Advocate General Wathelet, in his Opinion:

> 90. I consider that it is apparent by analogy from … *M.S.S v. Belgium and Greece* … and … *N. S. and Others* … that a member state would infringe article 4 CFR if beneficiaries of international protection, who are wholly dependent on public aid, were faced with indifference from the authorities such that they found themselves in a situation of serious deprivation or want incompatible with human dignity.
>
> 91. In other words, in order to consider that there are substantial grounds for believing that the beneficiaries of international protection would face a real risk of being subjected to inhuman or degrading treatment within the meaning of article 4 CFR, on account of their living conditions in the member state responsible under the Dublin III Regulation, they must find themselves in a situation that is particularly serious resulting from systemic flaws in their regard in that member state.
>
> 92. In such a wholly exceptional situation, a member state cannot apply the ground for inadmissibility provided for in article 33(2)(a) of Directive 2013/32 to an application for international protection and must examine the application for international protection that has been lodged with it.
>
> 93. In the light of the foregoing and, in particular, the absolute nature of the inhuman or degrading treatment, laid down in article 4 CFR, I consider that EU law precludes the application by a member state of the ground for inadmissibility provided for in article 33(2)(a) of Directive 2013/32 to an application for international protection where the living conditions of those benefiting from subsidiary protection granted by another State infringe article 4 CFR.

As regards the second limb to these questions as dealt with by the court, it was apparent from the request for a preliminary ruling that the deficiencies in the asylum procedure identified by the referring court consisted, according to that court, in the fact that the member state which granted subsidiary protection (Bulgaria) could be predicted to refuse, contrary to the Qualification Directive, to grant refugee status to applicants for international protection. Contrary to article 40(3) of the Procedures Directive (recast), that member state also did not examine subsequent applications, notwithstanding that there may be new evidence or findings that significantly increased the probability of the applicant satisfying the conditions required to claim refugee status. The court held that "if the asylum procedure in a member state were to lead to a systematic refusal, without real examination, to grant refugee status to applicants for international protection who satisfy the conditions laid down in Chapters II and III of the Qualification Directive, the treatment of applicants for asylum in that member state could not be regarded as compliant with the obligations stemming from article 18 CFR" (para. 99). Nevertheless, the court found that "the other member states may reject a further application submitted to them by the person concerned as being inadmissible, pursuant to Article 33(2)(a) of the Procedures Directive, read with due regard to the principle of mutual trust. In such circumstances, it is for the member state that granted subsidiary protection to resume the procedure for the obtaining of refugee status" (para. 100).

The operative part of this decision notably held as follows:

> Article 33(2)(a) of Directive 2013/32 must be interpreted as not precluding a member state from exercising the option granted by that provision to reject an application … as being inadmissible on the ground that the applicant has been previously granted subsidiary protection by another member state, where the living conditions that that applicant could be expected to encounter as the beneficiary of subsidiary protection in that other member state would not expose him to a substantial risk of suffering inhuman or degrading treatment, within the meaning of article 4 CFR … The fact that the beneficiaries of such subsidiary protection do not receive, in that member state, any subsistence allowance, or that such allowance as they receive is markedly inferior to that in other member states, though they are not treated differently from nationals of that member state, can lead to the finding that that applicant would be exposed in that member state to such a risk only if the consequence is that that applicant would, because of his or her particular vulnerability, irrespective of his or her wishes and personal choices, be in a situation of extreme material poverty.
>
> Article 33(2)(a) of the Procedures Directive must be interpreted as not precluding a member state from exercising that option, where the asylum procedure in the other member state that has granted subsidiary protection to the applicant leads to a systematic refusal, without real examination, to grant refugee status to applicants for international protection who satisfy the conditions laid down in Chapters II and III of the Qualification Directive.

Recent Irish judgments

The Irish High Court has had occasion to deal with similar issues. In *H.Z. (Iran) v. IPAT and ors.* [2020] IEHC 146. The applicant, an Iranian national, had been granted refugee status in Greece, but had left that country and travelled to Ireland where he made another application for international protection. This application was deemed to be inadmissible at first instance and on appeal and the latter decision was challenged by way of judicial review.

The applicant submitted that his living conditions in Greece amounted to inhuman or degrading treatment contrary to article 4 CFR. He did not speak Greek and suffered from depression for which he was prescribed anti-depressants and was awaiting a psychiatric appointment. He claimed that he had no access to accommodation or healthcare and was living on the streets in the past and relied on a report of the PRO Asyl Foundation "*Protected only on paper: beneficiaries of international protection in Greece*" dated from 23 July 2017 (though the IPAT relied on a more recent country report of the Asylum Information Database (AIDA), which, it found, showed certain progress on the social and economic facilities available to persons in the applicant's situation). The applicant also claimed that accommodation that could be available was overcrowded.

Of particular relevance is the court's observation that "article 4 CFR cannot be infringed merely because of a decision declaring an application inadmissible. That possibility only arises at the expulsion stage" (para. 14; see also para. 22).

The court proceeded to distinguish *Ibrahim* on this issue:

> 14. … As against that, *Ibrahim* notes the right to asylum in article 18 CFR (see para. 6), and, unlike article 4, that right can arise at the inadmissibility stage. That presumably explains the reference in *Ibrahim* to the consideration of conditions in the country in which asylum was granted as being something that can arise at the admissibility stage of the process rather than the removal stage.

Difficulties in distinguishing *Ibrahim* from the facts in *HZ (Iran)* on the basis of the right to asylum in article 18 CFR (*i.e.* in the former, only subsidiary protection had been granted in the first member state, whereas in the latter full refugee status had been granted) are considered in the next section.

It is of note here however that despite having raised the issue of the traditional point of protection for article 4 CFR purposes being an expulsion decision rather than an earlier decision on admissibility, the court nevertheless proceeded to make findings in accordance with the rationale of *Ibrahim*. The court held that, in its decision on admissibility, the IPAT had not acted irrationally in finding that substantial grounds of a risk of treatment contrary to article 4 were not established (para. 18). The court also held that there was no need for the IPAT to seek assurances from Greece as to how the applicant would be treated in that member state as it was "inherent in the system of mutual confidence between members of the EU that member states do not seek assurances from each other or make enquiries regarding conditions, unless a significant threshold is first overcome. Had the applicant demonstrated a *prima facie* case that article 4 rights would be breached, the question of undertakings or information might have arisen, but he did not do so" (para. 34).

The fact that the High Court proceeded in this manner may have been on a "but if I am wrong on this issue, I will consider the remaining arguments in this case" basis. However, it renders the position unclear as to whether article 4 issues may be considered in the context of an admissibility decision where full refugee status has been granted by an initial member state or whether article 4 issues should be considered at the later expulsion stage.

More recently, the Irish High Court has made a preliminary reference which remains pending in *MS (Afghanistan) and ors.* [2019] IEHC 477 (C-616/19). This case concerns a number of applicants from Afghanistan and Georgia who had all be granted subsidiary protection in Italy but who had left that member state and applied for international protection in Ireland. Their applications in Ireland were deemed to be inadmissible and the applicants took judicial review proceedings to challenge these decisions on inadmissibility. These cases primarily concern an anomaly between the initial Procedures Directive 2005/85 (into which Ireland has opted) and the recast Procedures Directive 2011/95 (into which Ireland has not opted). However, the second question referred by the High Court is of relevance for the purposes of this paper. This question essentially asks whether it is an abuse of rights under EU law for a person who has been granted international protection in the form of subsidiary protection in one member state to make a second such application in another member state.

In his Opinion delivered on 3 September 2020, Advocate General Saugmandsgaard Øe found that, given his analysis of the other questions referred, there was no need to address the 'abuse of rights question'. Nevertheless, he briefly pointed out that in his view "an application for international protection made by a third-country national after being granted subsidiary protection in a first Member State does not constitute an abuse of rights *per se*. The EU legislature has recognised that third-country nationals may lawfully seek protection within

the European Union where circumstances compel them to do so" (para. 94). The next section of this paper will consider the implications of *Ibrahim* and will include issues that are relevant to this 'abuse of rights question' and which may need to be considered by the CJEU if it determines that this question needs to be addressed.

IV. Implications of *Ibrahim*

A. Implications of the move from expulsion to substantive immigration status

The progression in *Ibrahim* from a consideration of whether expulsion measures may be precluded by article 4 CFR to a consideration of whether this article may require a substantive decision to be taken in respect of a person's immigration status marks a significant development of the jurisprudence on both article 3 ECHR and article 4 CFR. Traditionally, both were confined to situations where a person was faced with such treatment in the country in which he was present or faced being expulsed to such a country. *Ibrahim* has opened this up to precluding a member state from finding an international protection application to be inadmissible, from which it flows that that member state must proceed to carry out a substantive examination of the application.

It is worth recalling here what an application for international protection entails, as this will highlight that it is not a remedy targeted to the concerns of a third country national fearing treatment contrary to article 4 CFR in another EU member state. The definition of a refugee under the initial Qualification Directive 2004/83/EC and the recast Qualification Directive 2011/95/EU is the same and is broadly based on the definition in the Geneva Convention on the Status of Refugees 1951. "Refugee" means "a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it".

"Subsidiary protection" is a newer concept and is broadly based on the protection of article 3 ECHR. In accordance with both Qualification Directives, a "person eligible for subsidiary protection" means "a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country".

"Serious harm" consists of:

(a) death penalty or execution; or
(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
(c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

So, where an applicant has a nationality, the protection relates to their country of nationality or origin. Where they are stateless, the protection relates to their country of former habitual residence.

Two particular facts in *Ibrahim* are notable: the applicants were stateless and they had been granted subsidiary protection, as opposed to refugee status (in circumstances where there was evidence to suggest that Bulgaria could be predicted to refuse refugee status and did not examine subsequent applications, even where there was a material change in circumstances).

The relevant operative part of *Ibrahim* was two-fold. First, article 33(2)(a) (the inadmissibility provision) of the recast Procedures Directive 2013/32 could be exercised to find an application inadmissible where the applicant had been granted subsidiary protection in another member state where the living conditions that that applicant could be expected to encounter as the beneficiary of subsidiary protection in that other member state would not expose him to a substantial risk of suffering inhuman or degrading treatment, within the meaning of article 4 CFR. Essentially, a member state was not permitted to find an application inadmissible if there were substantial grounds of a risk of treatment contrary to article 4 in the member state in which the person benefits from international protection (the 'article 4 limb').

Second, this inadmissibility provision did not preclude a member state from exercising that option where the asylum procedure in the other member state (that had granted subsidiary protection) led to a systematic refusal, without real examination, to grant refugee status to applicants for international protection who satisfied the conditions for that status laid down in the Qualification Directive (the 'right to asylum limb').

So, from the 'article 4 limb', if substantive grounds are established for a real risk of exposure to treatment contrary to article 4 CFR in the member state in which the person benefits from international protection, an applicant is entitled to have an inadmissibility decision overturned. This would result in a second international protection application being processed in the second member state.

A number of issues arise from these two limbs of this operative part of *Ibrahim*. First, the 'article 4 limb' may result in a proliferation of international protection decisions in different member states in respect of the same person, the same country of origin and the same original fear of persecution or serious harm. If the 'right to asylum limb' had been determined to the contrary, this might have confined the decision to situations where a person never had an opportunity to have their application for refugee status (as opposed to subsidiary protection) fully processed, but that is not the case. It is not clear how the court sought to distinguish *Ibrahim* on this basis in *H.Z. (Iran) v. IPAT and ors.* [2020] IEHC 146. To recall, in that case, the High Court noted that the possibility of article 4 CFR being infringed only arose at the expulsion stage, whereas the "right to asylum in article 18 CFR … unlike article 4,

[could] arise at the inadmissibility stage". In *Ibrahim*, however, the CJEU expressly rejected that the second member state could be precluded from finding an application inadmissible where the first member state was routinely not granted refugee status (*i.e.* routinely not protecting the right to asylum under article 18 CFR) as "with due regard to the principle of mutual trust … it is for the member state that granted subsidiary protection to resume the procedure for the obtaining of refugee status".

Second, the question arises as to whether the principle of the 'article 4 limb' would apply if the first member state had granted refugee status as opposed to subsidiary protection. This would essentially be a "subsequent application". This seems contrary to the express terms of both Procedures Directives. Both the initial Procedures Directive 2005/85/EC (article 32(1)) and the recast Procedures Directive 2013/32/EU (article 40(1)) seem to define a "subsequent application" as being confined to a single member state: "where a person who has applied for asylum in a member state makes further representations or a subsequent application in the same member state, that member state may examine these further representations or the elements of the subsequent application …". While these Directives must be applied in accordance with the protections of article 4 CFR, the difficulty is that *Ibrahim* does not make any reference to or acknowledge this anomaly.

Both the judgment of the CJEU and the Opinion of Advocate General Wathelet set out article 40 subss. (2) to (4) of the recast Procedures Directive 2013/32/EU, but both omit article 40(1). It is arguable that article 40(1) (which confines a "subsequent application" to a subsequent application made in the same member state as where the initial application was made) should inform the interpretation of article 40(2) to (4).

Third, the decision in *Ibrahim* seems contrary to the premise of the Dublin system that only one member state may be responsible for examining an application for international protection. Furthermore, it does not sit easy with the fact that beneficiaries of international protection do not enjoy the right to free movement across the territory of the EU. The difficulty here is that, not only is the judgment in *Ibrahim* contrary to the traditional means of ensuring article 4 protection at the stage of an expulsion decision, but it also seems contrary to these features of the functioning of the CEAS, in opening the door to international protection applications being made in more than one member state. Given that these issues were not addressed by the CJEU or advocate general in *Ibrahim*, a concern arises that this significant development has happened by accident rather than by design.

Ibrahim marks a considerable development in EU law from a consideration of whether expulsion measures may be precluded by article 4 CFR to a consideration of whether this article may require a substantive decision to be taken in respect of a person's immigration status. In *H.Z. (Iran) v. IPAT and ors.* [2020] IEHC 146, the High Court sets out the traditional position: "article 4 CFR cannot be infringed merely because of a decision declaring an application inadmissible. That possibility only arises at the expulsion stage". In *Ibrahim*, there is no reason given as to why a later decision on expulsion, which would follow as of course from a decision finding an international application to be inadmissible, would not have offered adequate protection from treatment contrary to article 4 CFR.

B. An exceptional remedy for exceptional circumstances

While not clear in the reasoning of the CJEU or of Advocate General Wathelet, the decision in *Ibrahim* may serve to acknowledge the existence of a protection lacuna in some exceptional cases where substantial grounds for a real risk of treatment contrary to article 4 CFR can be established.

Even where a person has been refused international protection in an initial member state, it has been recognised from the initial Greek transfer cases that there may be legitimate reasons for a person to challenge their expulsion and return to that member state. Where a person has in fact been granted international protection in an initial member state, there must be some significant reason for them to then seek to abandon this in making a later application in another member state. While this may be for any number of different significant reasons, included among these may be a legitimate fear of being exposed to treatment contrary to article 4 CFR in the initial member state.

If a person in the latter scenario does move on to another member state and does have a well- founded fear of treatment contrary to article 4 CFR in the former member state, what application are they to make in the second member state? While making an application for international protection is not an ideal, targeted remedy addressing their current fears (being confined to protection in respect of their country of nationality / origin or former place of habitual residence for stateless persons), it would in fact serve to give them effective protection from being returned to the former EU member state. Advocate General Wathelet in his Opinion described the circumstances in which article 4 concerns would require a second member state to find a second international protection application as admissible as "a wholly exceptional situation". This may have been to recognise that this less than ideal remedy may be the best exceptional yet effective remedy that may be offered to a person in such exceptional circumstances.

Alternatively, should they be required to enter the deportation process and make submissions in respect of their article 4 fears in that context (e.g. under Irish law, representations pursuant to s. 3 of the Immigration Act 1999)? If a person has genuine protection needs, it is at least arguable that they should be entitled to make an application for some form of substantive immigration status and have this processed before facing the prospect of the deportation process.

C. Evidence of the limits of the principle of mutual trust

It is not only individual applicants who have submitted that article 4 risks arise for them if they are returned to a member state of the EU. There is increasing evidence published by international human rights bodies, NGOs and the European Court of Human Rights that such risks arise. Furthermore, while the CJEU cannot make findings on whether or not substantial grounds of a real risk of treatment contrary to article 4 CFR have, on the facts of a given case, been established, it can make similar findings in the context of infringement proceedings brought by the European Commission against member states.

In *M.S.S. v. Belgium and Greece* (app. no. 30696/09) the ECtHR relied on reports from the CPT, Amnesty International, ECRE, the UNHCR and Human Rights Watch in making its finding of a violation of article 3 ECHR by both Belgium and Greece. In *N. S. and M.E.* (Joined

cases C 411/10 and C 493/10), the CJEU in turn relied on the findings of the ECtHR in *M.S.S. v. Belgium and Greece*. *Tarakhel v. Switzerland* (app. no. 29217/12), the ECtHR set out findings of a number of reports on the conditions for asylum seekers in Italy, notably of the UNHCR, the Commissioner for Human Rights of the Council of Europe and the IOM. In the EAW context, in *Aranyosi and Căldăraru* (Joined decisions C-404/15 and C-659/15 PPU) the CJEU relied on factual findings set out in judgments of the ECtHR in respect of prison conditions in Hungary (*Varga and Others v. Hungary*, Nos 14097/12, 45135/12, 73712/12, 34001/13, 44055/13 and 64586/13, of 10 March 2015) and prison conditions in Romania (ECtHR, *Voicu v. Romania*, No 22015/10; *Bujorean v. Romania*, No 13054/12; *Mihai Laurenţiu Marin v. Romania*, No 79857/12, and Constantin *Aurelian Burlacu v. Romania*, No 51318/12). The CJEU also relied on reports of the CPT in respect of both Hungary and Romania. In *Jawo* (C-163/17), the CJEU referred to a report of the Swiss Refugee Council, entitled '*Reception Conditions in Italy*', of August 2016, which contained specific information supporting a conclusion that beneficiaries of international protection in that Italy were exposed to a risk of becoming homeless and reduced to destitution in a life on the margins of society.

The European Commission has also stepped up to the mark in initiating infringement proceedings against member states who fail to ensure that basic minimum standards of human rights protection in the sphere of the CEAS are in place. On 21 December 2018, the Commission lodged an action before the CJEU against Hungary (*European Commission v. Hungary*, (Case C-808/18)) seeking declarations that by taking a series of actions, Hungary had failed to fulfil its obligations under a number of provisions of the Procedures Directive, the Reception Conditions Directive and the Charter. On 8 November 2019, the Commission lodged an action against Hungary (*European Commission v. Hungary*, (Case C-821/19) seeking declarations that by adding a new ground of inadmissibility of asylum applications to those expressly established in Directive 2013/32/EU in relation to the inadmissibility of asylum applications, Hungary had failed to fulfil its obligations under article 33(2) of that directive and that by adopting measures which criminalise organising activity carried out to assist international protection applicants, Hungary had failed to fulfil its obligations under a number of provisions of the Procedures Directive and the Reception Conditions Directive. Following actions brought by the Commission against Poland, Czech Republic and Hungary (Joined Cases C 715/17, C 718/17 and C 719/17), the CJEU delivered its judgment on 2 April 2020 making declarations and adverse costs orders against these member states for failing to fulfil their relocation obligations under Council Decisions 2015/1523 and 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece. While these infringement proceedings do not relate to concerns under article 4 CFR, they demonstrate that the Commission is active in seeking to ensure that member states fulfil their obligations under the CEAS. Where real concerns arise in respect of a violation of article 4 CFR by a member state, steps should be taken to inform the Commission of this. The Commission has an important role in ensuring that exceptions to the principle of mutual trust remain the exception

The above reports and caselaw have a two-fold utility: in the long-term, they assist in ensuring that minimum standards are respected by member states across the EU. In the short-term, they can assist individuals in demonstrating the well-founded nature of their claims to fear adverse treatment, amounting in exceptional cases to treatment contrary to article 4 CFR, if returned to the member state in question. They demonstrate the circumstances which may compel third country nationals to seek protection within the EU (as relied upon

by Advocate General Saugmandsgaard Øe in his opinion in *MS (Afghanistan)* (C-616/19) to form the view that an application for international protection made by a third-country national after being granted subsidiary protection in a first Member State does not constitute an abuse of rights *per se*). This growing source of evidence is not an implication of *Ibrahim* but sets this judgment in context. It gives the CJEU cause to reflect carefully on how it will further progress its caselaw concerning the balance between the absolute protection of article 4 CFR and the fundamental principle of mutual trust on which the European project is based.

Sara Moorhead SC

Recent updates in Citizenship law in Ireland

Sara Moorhead is a Senior Counsel and a CEDR Accredited Mediator. She is primarily a trial lawyer / courtroom advocate. She has extensive expertise in the areas of Judicial Review, Personal Injuries, Administrative and Contract Law, Medical Negligence, Professional Negligence, Insurance Law, non-Jury, Asylum and Immigration law. She has represented the Government in proceedings before the European Court of Justice. She has also advised the Office of the Parliamentary Legal Adviser and acted as Legal Counsel in a number of Tribunals of Inquiry.

She is the Bar Council representative on the Legal Services Regulatory Authority which will govern the Bar of Ireland in the future.

Recent Developments in Citizenship Law

Introduction

Irish nationality law is contained in the provisions of the *Irish Nationality and Citizenship Acts 1956 to 2004* and in the relevant provisions of the Irish Constitution. A person may be an Irish citizen through birth, descent, marriage to an Irish citizen or through naturalisation. The law grants citizenship to individuals born in Northern Ireland under the same conditions as those born in the Republic of Ireland.

Law

Revocation of certificates of naturalisation.

19.(1) The Minister may revoke a certificate of naturalisation if he is satisfied—
(a) that the issue of the certificate was procured by fraud, misrepresentation whether innocent or fraudulent, or concealment of material facts or circumstances, or

(b) that the person to whom it was granted has, by any overt act, shown himself to have failed in his duty of fidelity to the nation and loyalty to the State, or

(c) 45 that (except in the case of a certificate of naturalisation which is issued to a person of Irish descent or associations) the person to whom it is granted has been ordinarily resident outside the State or, in the case of an application for a certificate of naturalisation granted under section 15A, resident outside the island of Ireland (otherwise than in the public service) for a continuous period of seven years and without reasonable excuse has not during that period registered annually in the prescribed manner his name and a declaration of his intention to retain Irish citizenship with an Irish diplomatic mission or consular office or with the Minister, or

(d) that the person to whom it is granted is also, under the law of a country at war with the State, a citizen of that country, or

(e) that the person to whom it is granted has by any voluntary 46act, other than marriage or entry into a civil partnership, acquired another citizenship.

(2) Before revocation of a certificate of naturalisation the Minister shall give such notice as may be prescribed to the person to whom the certificate was granted of his intention to revoke the certificate, stating the grounds therefor and the right of that person to apply to the Minister for an inquiry as to the reasons for the revocation.

(3) On application being made in the prescribed manner for an inquiry under subsection (2) the Minister shall refer the case to a Committee of Inquiry appointed by the Minister consisting of a chairman having judicial experience and such other persons as the Minister may think fit, and the Committee shall report their findings to the Minister.

(4) Where there is entered in a certificate of naturalisation granted to a person under the Act of 1935 the name of any child of that person, such entry shall for the purposes of this Act be deemed to be a certificate of naturalisation under the Act of 1935.

(5) A certificate of naturalisation granted or deemed under subsection (4) to have been granted under the Act of 1935 may be revoked in accordance with the provisions of this section and, upon such revocation, the person concerned shall cease to be an Irish citizen.

(6) Notice of the revocation of a certificate of naturalisation shall be published in Iris Oifigiúil.

***Damache v The Minister for Justice* [2020] IESC 63**

The Supreme Court earlier this year in the case of *Damache v The Minister for Justice* [2020] IESC 63 ruled that the law governing the procedure under which Irish citizenship can be revoked is unconstitutional.

The five-judge court ruled the procedure to revoke citizenship set out under the Irish Nationality and Citizenship Act 1956, specifically Section 19 of the Act, is unconstitutional on natural justice grounds.

In the High Court where the Appellant was unsuccessful, the Trial Judge, Mr. Justice Humphries had indicated at Paragraph 34:-

> *"The control of the entry and presence, and therefore of removal of non-Irish Nationals is an aspect of the executive power of the State."*

He made reference to Laurentiu –v- Minister for Justice [2016] 2.I.R. 403 which emphasised that the courts have recognised that the power to control the entry and residence of non-nationals in the State is an aspect of the executive power of the State.

Under section 19, the Minister for Justice initiates the revocation procedure, ultimately makes the decision whether to revoke or not and is not bound by findings of a three-person committee of inquiry appointed by the Minister, the court noted.

This process did not meet the high standards of natural justice applicable to a person facing such severe consequences as loss of citizenship and is therefore constitutionally invalid, it ruled.

The court made the finding of unconstitutionality when granting an appeal by Ali Damache, a native of Algeria who became a naturalised Irish citizen in 2008, over a notice of intention to revoke his Irish citizenship.

The October 2018 notice served by the Minister on Mr Damache outlined intent to revoke his Irish citizenship on the basis of having shown disloyalty to the State.

The appeal centred on the process around citizenship revocation, procedural safeguards and consequences of loss of citizenship on other rights.

The Supreme Court rejected the appellant's first argument, finding that the revocation of citizenship was an executive function, and not a judicial function.

The Court then proceeded to find in favour of the appellant's second point, holding that the fact the executive both initiated the proposal to revoke and made the decision to confirm or dismiss it, was contrary to fair procedures.

The Supreme Court ruled that the loss of Citizenship is a matter of *"grave significance"* and ruled that the process for revocation must be robust.

In delivering the Supreme Court ruling Ms. Justice Dunne set out that:

"Given the importance of the status of citizenship to an individual, I think it is quite clear that the process by which citizenship may be lost must be robust and at the very least …must observe minimum procedural standards in order to comply with the State's human rights obligations".

While the Court held that there was nothing to suggest that the members of the Committee of Inquiry were anything but independent in the exercise of their functions, it went on to find that the necessary procedural safeguards were not in place. Ms. Justice Dunne concluded that Section 19 is unconstitutional.

Ms Justice Dunne said an individual facing the prospect of revocation of citizenship must be entitled to a process which provides minimum procedural safeguards, including an independent and impartial decision-maker.

She noted, before a certificate of naturalisation can be revoked, the Minister shall give notice to the affected person who can apply for an inquiry as to the reasons for revocation. Any such application is then referred to a committee of inquiry appointed by the minister, consisting of a chairperson with judicial experience and other persons as the minister may think fit.

The committee comprises two lawyers and a former member of the Dáil.

The judge said she was satisfied there was nothing to demonstrate the committee is anything but independent in the exercise of their functions and she would not find a breach of natural justice by reason of a lack of independence on its part.

However, the issue with section 19 comes from the fact the process provided for does not meet the high standards of natural justice applicable to a person facing such severe consequences as are at issue in this case, she said.

> *"An individual facing the prospect of revocation of a certificate of naturalisation must be entitled to a process which provides minimum procedural safeguards, including an independent and impartial decision-maker".*

While the committee of inquiry is independent, its functions are limited, its findings are not binding on the Minister and there is no right of appeal from the Minister's decision, she noted.

This resulted in a situation where the same person who initiated the revocation process, and whose representatives make the case for revocation before the committee, ultimately makes the decision to revoke.

On that basis, she concluded Section 19 does not meet the high standards of natural justice required and is therefore invalid having regard to the provisions of the Constitution.

In delivering the Judgment of the Supreme Court, Ms. Justice Dunne references *Laurentiu* and the case of *Sivsivadze v. Minister for Justice and Equality* [2015] IESC 53, [2016] 2 I.R. 403 .Paragraph 37.

In discussing those cases, she states at Paragraph 36

> *"It can be seen therefore that from an historical point of view it has long been the function of the executive to decide on issues of naturalisation and it has never been the role of the courts to make such decisions. The decision at issue in this case, is of course not a decision to grant a certificate of naturalisation but rather the question of revocation of such a certificate. However, as a matter of logic I cannot see how that decision of itself is something outside the function of the executive or, in this case, the Minister to whom the function has been delegated by legislation."*

This can be seen in the context of the debate as to whether the revocation of citizenship was part of the administration of justice or otherwise. The court held that it was not part of the administration of justice and it is interesting to note that while the court enquired as to whether there was much information or evidence of precedents in other jurisdictions regarding revocation of citizenship, very little was available.

The court then went on to make reference to the Habte Judgment which I have dealt with earlier in the paper. It is interesting to note that at Paragraph 129 of the Judgment, the view of Mr. Justice Murray delivering the Judgment that the process of revocation is the exercise of an executive function.

While the court accepted that there was a Committee, the fact that the Minister was not bound by the Committee and ultimately made the decision, was the key aspect of the success of Mr. Damache's claim.

There is an interesting historical parallel with the United Kingdom and in particular the fact that there was an equivalent to Section 19 until 2002. The court believed that to be noteworthy. (See Para 80**)** However, despite that, since 1960 in the UK the practice had developed whereby the views of the Committee concerned were considered to be binding. Ultimately, the decision was made on the basis that the Minister having proposed the revocation is the person who makes the final decision on the revocation of the Certificate.

The Appellant's case to a large extent depended on a Canadian Federal Case of *Hassouna v. Minister for Citizenship* [2017] FC 473. It would have to be said that the Supreme Court appears to have taken on board much of the views in that particular case in respect of the grave consequences for a person whose citizenship is revoked. Much of the argument centred on the issue that if there is a significant impact on your rights, that would lead to the decision in question being one that could be classified as administration of justice. While the court rejected that argument, they did acknowledge it was a key factor in an analysis of fair procedures and the more significant the impact of a particular decision on a person's rights, the more robust the procedural safeguards must be.

The court went on to place much reliance on the decision of *A.P. v. Minister for Justice and Equality* [2019] IESC 47, **(**See Para 93 of Damache**)** citing Mr. Justice O' Donnell stated as follows:-

> "*The procedures under the 1956 Act are a clear example of this, since, by definition, they apply only to non-citizens seeking naturalisation. That decision relates to status, and does not, at least directly, engage other rights. There is no doubt, however, that fair procedures must be applied to any such decision. Accordingly, I would approach this question as it was approached in in Mallak v. Minister for Justice [2012] IESC 59, [2012] 3 I.R. 297: that is, as a question of fair procedures in administrative law. It is apparent, without in any way depreciating the significant concerns that arise in this case from the point of view of Mr. P., that nevertheless different considerations may be involved where a decision can be said to directly affect constitutionally protected rights*."

In concluding and determining that there had been a breach of fair procedures, the Supreme Court went on to consider the case of Habte –v- Minister for Justice [2020] IECA 22. In that case the Court of Appeal had accepted that there was power to cancel or amend a Certificate of Naturalisation and proceeded to consider whether in the circumstances of that case the Minister was entitled to embark on the Section 19 procedure. The court went on to set out an overview of the Section 19 procedure. However, as is noted, much of the argument focused on the contention of Ms. Habte that the proposition put forward in accordance with Section 19.2 amounted to a decision which itself resulted in revocation. The Court of Appeal rejected that suggestion.

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> *"The Supreme Court pointed out it did not address the question of fair procedures following the commencement of the inquiry process and therefore the conclusion in Habte that Section 19 was not invalid having regard to the provisions of the Constitution was not of assistance."*

I would respectfully suggest that that it is hard to reconcile the two decisions simply based on the stage of the process. While the court in this particular instance accepted that the prematurity argument should fail because of the nature of the rights affecting the Appellant, it seems to me that there may have been a desire not to engage with other stages of the process but this may be litigated again..

Iurescu (A Minor) v The Minister for Justice and Equality **[2019] IEHC 535**

Iurescu is an interesting case. It is an application by a child quashing a decision of the Minister to refuse her a Certificate of Naturalisation. It arose against a background where the father had applied for Naturalisation as an Irish Citizen in 2014. While his application was pending, he made a separate application on behalf of the minor. He made a Statutory Declaration and as is common in all these cases he was asked about convictions in the State and confirmed he had a Traffic Offence, Public Order Offences and had been convicted for assault. He was refused a Certificate of Naturalisation and the separate application on behalf of his child was also refused.

In the High Court Mr. Justice Keane reviewed the provisions of Section 15 of the Act of 1956 and the case turned on the proper interpretation of Section 15.3 of the Act of 1956 which states:-

> "*In this Section, applicant means, in relation to an applicant for a Certificate of Naturalisation by a minor, the parent or guardian of, or person who is in loco parentis, to the minor."*

Mr. Justice Keane then went on to look at the history of citizenship and the various amendments to the 1956 Act including the 2004 Act. The argument made in the case by the Applicant was that she was a separate applicant who was entitled to apply for naturalisation. The Minister's position was that it is the parent or guardian who must meet the conditions for naturalisation. Ms. Justice Keane comments in the Judgment on various absurdities, namely, if one parent applied and they are of good character, then the child gets citizenship but in the alternative if the other parent is of bad character they don't. He went on then to accept that the Minister's submission as to how it could be established whether the child could have formed a character, good or bad, could have a meaningful intention of good faith to reside in the State, and make the meaningful declaration had some force.

Mr. Justice Keane at Paragraph 50 stated as follows

> *"The interpretation of s. 15(3) that I believe to be at once more consistent with justice and with the purpose of the Act of 1956 is that whereby the 'applicant' in that section in relation to an application for a certificate of naturalisation by a minor born in the State is the parent or guardian of, or person in loco parentis to, the minor, whereas the applicant who must meet the conditions of naturalisation to the satisfaction of the Minister is the minor born in the State."*

I understand that this Judgment was not appealed. I also understand however that it has given rise to some practical difficult problems.

It is difficult to see how the definition can be split in this way and like many citizenship provisions in outdated legislation it requires revisiting.

Roderick Jones Case

High Court

***Jones v Minister for Justice and Equality* [2019] IEHC 519**

In finding against Mr Jones, Mr Justice Barrett said the Minister's discretionary practice of allowing applicants six weeks out of the country, for holiday or other reasons, and more time in exceptional circumstances, is not permitted by law.

He noted section 15.1 provides, on receipt of an application for a certificate of naturalisation, the Minister "may, in his absolute discretion, grant the application if satisfied that the applicant has had a period of one year's continuous residence in the State immediately before the date of the application".

The judge found section 15.1 allows the Minister no discretion in relation to the "continuous" residence requirement. He said, according to the Oxford Dictionary of Current English, "continuous" means "unbroken, uninterrupted, connected throughout in space or time".

While disagreeing with how the Minister concluded Mr Jones is ineligible at this time for a certificate of naturalisation under section 15.1, the refusal conclusion was still correct, he found.

There was thus no point in granting Mr Jones the reliefs sought because of the court's interpretation of the word "continuous" in section 15.1.

The judge said his decision "might seem unfair" in a world where many people travel abroad for work and take foreign breaks more than once a year but it is what the relevant law requires. The cure for any such unfairness "lies in the gift of the legislature", he added.

Court of Appeal

***Jones v Minister for Justice and Equality* [2019] IECA 285;**

The court overturned the continuous residency finding of the High Court requiring a person's physical presence in the state, allowing for no absences whatsoever, in the 365-day period prior to an application.

The court also found that the policy of the Minister in allowing absences from the state for work, and other reasons, and more time in exceptional circumstances, was not a rigid or inflexible policy and that the policy was reasonable.

Looking at the specific findings regarding the unbroken residence in the previous 365 day period, the Court of Appeal ruled as follows:

1. *That the High Court judge erred in law in his interpretation of the term "continuous residence" provided in section 15(1)(c) of the 1956 Act. It found that the construction is unworkable, over unworkable, overly literal, unduly rigid and gives rise to an absurdity. "Continuous residence" within the meaning of the sub-section does not require uninterrupted presence in the State throughout the entirety of the relevant year nor does it impose a complete prohibition on extra-territorial travel as the High Court suggests.*

2. *That such an approach creates an anomaly which defeats one of the fundamental purposed of the legislation by introducing a significant obstacle to compliance with one of the conditions for eligibility to apply for naturalisation which most applicants would find impossible to meet.*

3. *The construction accorded to the relevant part of s. 15(1) (c) by the High Court have rise to a clear absurdity so as to engage s. 5(1)(b) of the Interpretation Act 2005, allowing an objective assessment of the "plain intention" of the provision.*

4. *The term "continuous residence" is wholly distinct and separate from the concept of "ordinary residence" or "residence" per se. The term of words ought to be construed harmoniously. The words "continuous residence" in the context in which they appear in s. 15(1)(c) (first part) do not impose an obligation on an applicant that he be wholly precluded from leaving the jurisdiction at any time during the relevant year.*

5. *The task of ascribing ordinary meaning to the words "continuous residence" requires that they be construed harmoniously. Contrary to the contentions advanced on behalf of the appellant to the effect that the Minister should merely have examined whether the appellant was continuously resident in the State for the previous year "in the sense of continuously having his home here and not being resident elsewhere" as meeting the test of "continuous residence" such an approach does not withstand scrutiny. The concepts of "residence" and "ordinary residence" are*

materially different from the concept of "continuous residence". Such an approach would disproportionately elide the weight to be attached to "continuous" and render that word nugatory – a word which does not appear in the second part of s. 15(1) (c).

6. *In ascertaining the plain intention of the Oireachtas for the purposes of section 5(1)(b) of the Interpretation Act 2005 with respect to the words "one year's continuous residence" it is to be inferred that the legislature attached significant importance to physical presence within the State during the relevant year.*

Six Weeks Policy

The court found that the Minister is permitted to operate the six weeks absence policy and ruled specifically as follows:

1. *The Minister's approach to the construction of "one year's continuous residence" in the first part of s.15(1)(c) is to operate a clearly communicated practice or policy of allowing Applicants six weeks absence from the state, for work and other reasons, and more time in exceptional circumstances. An Applicant must otherwise generally be physically present in the State during the particular year and an application may be refused if there are significant absences.*

2. *The Minister has not adopted a rigid or inflexible policy in construing compliance with the first part of s.15(l)(c). It is apparent that the objective of the Minister is to adopt a purposive, reasonable and pragmatic approach to the operation of that part of the sub-section. It is to be inferred from the criteria referenced in the decision sought to be impugned that a reasonable level of absences in connection with an applicant's employment or otherwise is not inconsistent with "continuous residence in the State" during the relevant one year.*

3. *The non-statutory rule or policy operated by the Minister whereby the requirement in the first part of s.15(1)(c) of "one year's continuous residence in the State immediately before the date of his*

application" could not generally be satisfied in circumstances where the applicant is absent from the State for in excess of six weeks during the relevant year immediately prior to the application in the absence of wholly exceptional circumstances does not amount to a fettering of discretion. Neither does it amount to the imposition of an extra-statutory barrier to naturalisation nor is it unlawful.

4. *The ministerial approach does not fetter discretion but rather facilitates flexibility, clarity and certainty in the operation of the first limb of the sub-section and assists applicants in establishing with certainty how the criterion of "one year's continuous residence in the State" is to be satisfied for the purposes of eligibility to apply for a Certificate of Naturalisation. The approach is sensible and is within the terms of the legislation and is consonant with the public good having regard to the nature of the decision in question and in particular in circumstances where it pertains to what has been described in the jurisprudence as "the purely gratuitous conferring of a privilege in exercise of the sovereign authority of the State.*

The court concluded that the approach taken in the case of the Applicant himself was "reasonable" and that the Minister for Justice was correct in finding that the Applicant did not satisfy the continuous residency requirement. They found the fact that most of the Applicants absences from the state were not work related was "material" and thereof the Ministers Policy is not unlawful.

Sara Moorhead SC
Paul Hughes BL