

POSITION PAPER ON FAMILY REUNIFICATION

0. INTRODUCTION

The Irish Human Rights Commission (IHRC) recently provided legal assistance to two naturalised Irish citizens in relation to a visa matter. In the course of providing assistance in that case, the IHRC became aware of aspects of Irish law and practice which raise issues around the right to family reunification, as well as a number of other issues. In this Position Paper the IHRC aims to (i) set out the present position in the State in relation to family reunification as it understands it; (ii) set out the human rights standards which apply in this area; and (iii) make recommendations on how Irish law and practice with respect to family reunification might be brought into line with Ireland's international human rights obligations and with the human rights standards contained in the Constitution.

1. RELEVANT HUMAN RIGHTS STANDARDS

The IHRC has set out its position on family reunification in its recent submission to the Department of Justice, Equality and Law Reform on the Department's Immigration and Residence in Ireland Discussion Document. In that submission the IHRC summarised the relevant international human rights law and the Irish constitutional law which supports a right to family reunification, although it did not address the specific question of the family reunification rights of Irish citizens. Some of the main relevant standards are:

- The UN Convention on the Rights of the Child (CRC) provides that a child shall not be separated from his or her parents against their will, except where such separation is in the best interests of the child. Article 10 of CRC provides that applications by a child or his or her parents to enter or leave a State for the purpose of family reunification shall be dealt with in a *positive, humane and expeditious manner*.
- Article 8 of the European Convention on Human Rights (ECHR) guarantees the right to respect for private and family life, home and correspondence. In its case law on immigration, the European Court of Human Rights has pointed out that the Convention does not guarantee the right of a non-national to enter or remain in a member State of the Council of Europe. However, the Court has stated that immigration controls must be exercised consistently with Convention obligations, and the exclusion of a person from a State where members of the person's family are living may raise issues under Article 8 in certain contexts.¹ Section 3(1) of the European Convention on Human Rights

¹ *Abdulaziz, Cabales, and Balkandali v. United Kingdom*, Application nos. 9214/80; 9473/81 and 9474/81, para. 59, as subsequently expanded by the jurisprudence of the European Court.

Act 2003 compels all organs of State to act in manner compatible with the State's obligations under the ECHR.

- Article 14 of the ECHR provides that the enjoyment of the rights and freedoms in the ECHR shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. The ECHR similarly requires States to secure to *everyone* within their jurisdiction the rights and freedoms defined in Section I of that Convention. Therefore, where Article 8 rights are triggered, the State is also required to ensure respect for family life is applied without discrimination.
- The International Covenant on Civil and Political Rights (ICCPR) requires States to ensure to *all individuals within its territory and subject to its jurisdiction* the rights recognised in the Covenant. In particular, Article 26 of the ICCPR is a free standing equality guarantee which states,

“...the law shall prohibit *any* discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

- Although Article 1(2) of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) states that the Convention does not apply to distinctions, exclusions, restrictions or preferences made by a State Party between citizens and non-citizens, in its most recent General Comment 30, the Committee on the Elimination of Racial Discrimination deals with the question of discrimination on the basis of citizenship. In particular the Committee states,

“Differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim”.

2. PRESENT IRISH LAW AND PRACTICE IN RELATION TO FAMILY REUNIFICATION

In the case in question, two naturalised Irish citizens sought to have their minor child reunited with the family in the State (the family also requested that a parent of one of the naturalised Irish citizens be allowed to come to Ireland). They experienced a serious dearth of information in attempting to identify the correct procedure they should follow. Eventually they appear to have received advice that their child should apply for a short-term visitor's visa, but when he did so, he was refused the visa and this decision was upheld on appeal. The Department of Justice, Equality and Law Reform (the Department) later identified that there may have been some element of confusion and that this may have affected the decisions taken on the visa applications.

Following correspondence between the IHRC and the Department, the Department subsequently issued an entry visa to the child to join the family in the State.

At present there appears to be a number of distinct processes by which persons legally resident in Ireland can apply for non-national family members to come to reside in Ireland, distinguished on the basis of the legal status of the person in the State. Five distinct legal categories of persons who may apply for family reunification in Ireland will be considered. (The legal rights of asylum-seekers who, while they may enjoy some limited rights to respect for family life within the State are generally excluded from statutory and administrative provision for family reunification will not be dealt with in this Paper.) The five categories are -

(i) Refugees

Section 18 of the Refugee Act 1996 provides for a procedure whereby a person who has been recognised as a refugee in Ireland may apply to the Minister for Justice, Equality and Law Reform (the Minister) for permission to be granted to a member of his or her family to enter and to reside in the State. The Minister shall then refer the application to the Refugee Applications Commissioner who prepares a report on the case, and if the Minister is satisfied that the person is a member of the refugee's family, a visa will be granted. "Family" is defined in the Act as covering a refugee's spouse, his or her child under the age of 18 or, in the case of a refugee who is under the age of 18, the refugee's parents. Where such a family relationship can be shown to exist, the Minister must allow reunification of the family.

In addition the Act puts in place a discretionary system by which the Minister may also grant permission to reside in the State to a dependent member of the refugee's extended family, which is defined in the Act as any grandparent, parent, brother, sister, child, grandchild, ward or guardian of the refugee who is "dependent on the refugee or is suffering from a mental or physical disability to such extent that it is not reasonable for him or her to maintain himself or herself fully". The Department has published an Information Note setting out in detail the procedures for consideration of all applications for family reunification in relation to refugees and their families.

(ii) Citizens of EU States who migrate within the EU

Under EU Regulation 1612/68 (Article 10), where any citizen of a European Union member State moves to another EU State, that citizen is entitled to install in that State his or her spouse; any children under the age of 21 irrespective of dependency; and any ascendants who can be shown to be dependant on the citizen. Thus a citizen of another EU State who moves here can install his or her family in Ireland even where those family members may not themselves be nationals of an EU State.

Similarly an Irish citizen may move to another member State and install his or her family in that State. It appears from a decision of the European Court of Justice that the rights of the EU citizen who moves to another State also extend, in certain circumstances, to bringing his or her family members if he or she returns to the home State.² This provision of European law may have significance for a number of categories of Irish citizens: for example, where an Irish citizen establishes a family

² In the case of *R v. Immigration Appeals Tribunal and Surinder Singh ex parte Secretary of State for the Home Department* 370/90 [1992] ECR I-4265.

unit in another EU State with a non-EU national and his or her children, this family may have rights to return to Ireland, even where there is no direct legal relationship between the Irish citizen and the children of their non-EU national spouse.

As has been highlighted by a number of recent cases before the European Court of Justice, including the case of *Chen v. United Kingdom*,³ the rights and entitlements of non-EU citizen family members to remain in the European Union may depend on the economic circumstances of the family and their length of stay in the Union. In this regard the Commission notes that, as outlined in the recent European Migration Network Report, Ireland opted out of the recent EU Council Directive on family reunification from 2003, which attempted to clarify law in this area, citing problems relating to the Common Travel Area with the United Kingdom.

(iii) Non-EU migrant workers

In relation to immigrant workers, the Department of Justice, Equality and Law Reform has indicated that an administrative scheme is in place to deal with applications for family reunification from immigrant workers employed under the work permit or working visa systems. From the IHRC's examination of this scheme, there appear to be substantial difficulties in relation to accessing transparent and accurate information in relation to the existing procedures. From what the IHRC can glean from the Department, applications are considered through the application channels for (i) general visa categories in the case of persons from countries requiring a visa to enter Ireland i.e. for temporary or long-stay visas, or (ii) for residency, in respect of persons with visas or who do not require visas to enter the State.

However there does not appear to be any facility for making available information on what visa a family member can apply for. The IHRC highlighted many of the difficulties with the existing system for migrant workers in its 2004 joint publication with National Consultative Committee on Racism and Interculturalism, *Safeguarding the Rights of Migrant Workers and their Families*.

(iv) Students

In general persons resident in Ireland on student visas enjoy no statutory rights to family reunification and can apply for visas or residency for non-national family members through the same administrative channels as immigrant workers.

In its submission to the Minister for Justice on the draft Irish Nationality and Citizenship (Amendment) Bill 2004 (now the Irish Nationality and Citizenship Act 2004), the IHRC questioned the differential treatment of students in relation to their enjoyment of certain rights relating to family life:

“Although student visas are generally intended to be temporary in nature, the Commission would question why the child of someone legally resident in the State on a student visa for a considerable duration should be excluded completely from citizenship. There are a number of categories of students, including students of the medical sciences, doctoral students and post-doctoral students, who would ordinarily fall into this category. These students

³ Case C-200/02 *Zhu & Chen v Secretary of State for the Home Department*, judgment delivered on the 19th May 2004.

participate actively in the academic and economic life of the country and many will go on to work in Ireland for extended periods after the completion of their studies. Such student parents of children born in the State must surely be considered to have a substantial link with the State, the main criteria set out in the Government's own Proposals Paper for distinguishing the categories of persons entitled to citizenship for their children.

The Commission would question what reasonable grounds could be found to discriminate between the link and bond with the State of a person engaged directly in economic activity in the State and that of a person who is contributing to the economic life of the State through research or professional training.”⁴

In its submission on that Bill, the IHRC also made particular reference to the applicability of the general non-discrimination protections contained in Article 26 of the ICCPR. The IHRC believes that the points which it made then are also relevant to the question of whether students who have been in the State for an extended period of time should be able to avail of a transparent family reunification process. It is particularly concerned that, while most students will be in the State for short periods of time, some students may be in the State for longer periods and the rights of this group to respect for family life may present pressing cases for reunification.

(v) Irish citizens

The Department of Justice, Equality and Law Reform has informed the Commission that the provisions of the Refugee Act 1996 constitute the only statutory provision for family reunification in the State. Accordingly, there does not appear to be any particular system whereby Irish citizens can apply for family reunification of family members living abroad. Rather, the administrative arrangement operating for migrant workers (see above) also applies for applications by Irish citizens for family reunification.

In practice, there are three main categories of Irish citizens who may be significantly affected by the absence of a specific scheme for processing family reunification requests of citizens: (a) naturalised citizens who have non-national family members; (b) Irish citizens who have formed family units with non-EU nationals; and (c) Irish children who have non-national family members.

In relation to naturalised Irish citizens, they may have an uncontested family relationship with the persons with whom they seek to be reunited (although in the present case a visa application was refused in relation to a minor child), yet they must still rely on a discretionary administrative process whereby other factors may be used to refuse an application for a visa or residency.

In relation to Irish citizens who form family units with non-EU nationals, particular difficulties may arise where the Irish citizen marries a non-EU national with non-EU citizen children. The Irish citizen is again reliant on an administrative discretionary process to determine the validity of his or her family relationship and the rights that may accrue to the members of that family. In such a case, even where the Irish

⁴ At page 11.

citizen's spouse may enjoy limited rights to reside in Ireland, unless the Irish citizen adopts the children of his or her spouse, their applications for entry and residency may also be rejected on the discretionary grounds available under the existing administrative system.

Finally, in relation to Irish children with non-national family members, following the decision of the Supreme Court in the case of *Lobe and Osayande v Minister for Justice, Equality & Law Reform and ors*,⁵ an administrative scheme has been put in place to process applications for residency for the parents of Irish citizen children born in the State prior to January 2003. The IHRC understands that a large number of cases have now been processed through this system, with residency being granted in the majority of cases. However, this system does not deal with the question of the residency of other family members of the Irish citizen children, including their minor siblings. Furthermore, the system still retains a discretionary element and a proportion of Irish children continue to be denied basic rights of access to their parents.

Among the many anomalies this situation may precipitate is the fact that a refugee enjoys stronger rights to the continuing residency of his or her family in Ireland *qua* refugee than a citizen would enjoy in equivalent circumstances, or even than the refugee himself or herself would enjoy should the refugee apply for and acquire citizenship through naturalisation. A further anomaly is that an EU citizen who comes to live in Ireland may enjoy greater rights to reside with his or her non-EU citizen family than an Irish citizen in an equivalent position with a family of the same nationality.

3. ISSUES ARISING AND RECOMMENDATIONS

With the exception of refugees and citizens of EU States who are exercising freedom of movement rights between EU member States, there is no legal right to family reunification under Irish law. In particular, there does not appear to be any system whereby Irish citizens can apply for family reunification of family members living abroad. It appears that the only route available for a non-national family member to apply for family reunification is through the visa application system, which also caters for the families of migrant workers legally resident in Ireland. This system seems to be *ad hoc* and the administrative system by which decisions are made lacks transparency (see page 2 above).

The absence of any legal right to family reunification for Irish citizens appears to be a lacuna in Irish law and is of particular concern to the IHRC given the increasing diversity of Irish citizens, and the likelihood that an increasing number of naturalised Irish citizens may have family members in non-EU States in the coming years. Among the issues that arise are:

(i) The rights of naturalised Irish citizens

Irish citizens (other than certain categories of those who have exercised freedom of movement rights within the EU) have no legal right to family reunification and in this regard they have a lower level of legal protection of their rights to respect for family

⁵ Judgment of 28th January 2003.

life than refugees. This distinction on the basis of citizenship appears to the IHRC to be without objective justification and to be a disproportionate interference with the rights of Irish citizens. It appears to the IHRC that in no circumstances should the rights of citizens be less than those of non-citizens resident in the State.

Any discriminatory treatment of citizens in this regard raises issues under Article 40 of the Irish Constitution; Article 14 of the ECHR, when read in conjunction with Article 8 of the ECHR; Article 26 of the ICCPR; and Articles 1 and 5 of CERD, as outlined in the recent General Recommendation 30 of the CERD Committee. Indeed there may also be broader policy grounds for contending that citizens should always enjoy at least the same level of rights as non-citizens: for example, citizens generally enjoy a higher level of protection in relation to political rights and certain economic and social rights. The anomalies highlighted above, whereby refugees may have diminished rights on becoming citizens and whereby EU nationals may have greater rights than Irish citizens highlight the arbitrary nature of the existing law in this area.

Any fears that recently naturalised citizens may have minor children living abroad unknown to the Department can be dispelled by reference to the fact that the relevant regulations under which one applies for citizenship requires the applicant to disclose one's children and indeed family members.

Recommendation

- **With respect to Irish citizens, there should be a statutory right to family reunification in the State for Irish citizens with non-national family members. This system should be based on a definition of the family which is *at least as broad* as the definition contained in the Refugee Act 1996, and which reflects developing conceptions of the family under international human rights law.**

(ii) Family reunification rights of refugees

With the exception of refugees and their families, there appears to be no transparent system of determining family reunification applications for the families of migrants. The IHRC believes that any change to family reunification procedures or regulations should preserve the existing rights of refugees and their families, while at the same time aiming to bring the family rights of refugees and their families in line with the rights of Irish citizens. In this regard the definition of “family” under the 1996 Act should be reviewed.

Recommendation

- **The existing statutory scheme relating to family reunification for refugees and their families should be retained. Consideration should be given to broadening the definition of “family” under section 18 of the Refugee Act 1996 to reflect developing conceptions of the family under international human rights law.**

(iii) Standardisation of family reunification procedures for non-citizens

In its submission on the Immigration and Residence in Ireland Discussion Document, the IHRC made the following recommendations:

“The IHRC is of the view that applications for family reunification should be considered in light of the criteria under Articles 8 and 14 of the ECHR. In particular, the State should seek to strike a fair and humane balance between the right to respect for family life of the migrant and the State’s interest in controlling immigration. Where such applications involve children the best interests of the child should be a primary consideration and factors such as the age of the child, their situation in their country of origin and their degree of dependence on their parents should be taken into account.

The IHRC recommends that the category of persons entitled to enjoy family reunification should not be so narrowly defined and should be broadened to include non-marital partnerships, same sex partnerships and other adult relationships where there is a situation of dependence such as grandparents and dependent adults.”⁶

The Commission also recommended that any system of family reunification should be placed on a statutory basis:

“The IHRC believes that it is essential that the substantive issues around immigration and residence should be dealt with by way of primary legislation so that these legislative provisions are the subject of full parliamentary scrutiny and debate. In particular, the IHRC believes that issues such as family reunification should also be addressed in primary legislation and should be provided for as a matter of statutory right.”⁷

Recommendation

- **A statutory scheme should be put in place in relation to family reunification applications by legally resident immigrants in Ireland, including students, which would reflect the standards of international human rights law and be transparent, accessible and timely.**

(iv) Naturalisation procedures

The IHRC wishes to emphasise that nothing in the present Position Paper should be taken to support a negative change in existing naturalisation procedures. The acquisition of citizenship through naturalisation is presently governed by the Irish Citizenship Acts 1956-2004. In its recent submission to the Department of Justice on its Immigration and Residence in Ireland Discussion Document, the IHRC pointed out that the Document did not address the question of citizenship and recommended that the creation of a new category of long-term residency should not make access to citizenship more difficult.

Recommendation

- Naturalisation should remain an important aspect of Irish immigration and residency policy and no substantial changes to residency or family

⁶ At page 18.

⁷ At page 17.

reunification legislation should make it more difficult for long-term residents to acquire Irish citizenship. Furthermore, naturalisation should never lead to a diminution of legal rights.

(v) Definition of the family

A more general point of concern across all of the categories examined above is the definition of family that is set out in statute or applied administratively. Of particular concern to the IHRC is the position of persons in committed relationships, who continue to enjoy a lower level of protection of rights than married persons. In its recent submission on the Department of Justice on its Immigration and Residence in Ireland Discussion Document, the IHRC made the following observations:

“The discussion document limits the family members in relation to whom an immigrant can claim family reunification to spouses and non-married dependent children. This is quite a narrow definition of the concept of family and excludes situations such as dependent grandparents or dependent adults such as adults with intellectual disabilities for example. The IHRC also notes with concern that the situation of non-marital partnerships and same sex partnerships will not be recognised under the forthcoming Immigration and Residence legislation given the present stage of development of the Irish law generally in this area. The IHRC notes in this regard that international human rights instruments are living documents that are interpreted to reflect changing legal and social realities. The IHRC recommends that the category of persons entitled to enjoy family reunification should not be so narrowly defined and should be broadened to include non-marital partnerships, same sex partnerships and other adult relationships where there is a situation of dependence such as grandparents and dependent adults.”⁸

In particular, the Commission is cognisant of the developing jurisprudence of the European Court of Human Rights in relation to the definition of the family and the right to respect for private and family life and the right to freedom from discrimination under Articles 8 and 14 of the ECHR.

Recommendation

- **The IHRC recommends that the category of persons entitled to enjoy family reunification should not be narrowly defined and should be broadened, in line with developing conceptions of the family under international human rights law, to include non-marital partnerships, same sex partnerships and other adult relationships where there is a situation of dependence, as may be the case with grandparents and dependent adults.**

⁸ At page 12.

SUMMARY OF RECOMMENDATIONS:

- 1. With respect to Irish citizens, there should be a statutory right to family reunification in the State for Irish citizens with non-national family members. This system should be based on a definition of the family which is *at least as broad* as the definition contained in the Refugee Act 1996, and which reflects developing conceptions of the family under international human rights law.**
- 2. The existing statutory scheme relating to family reunification for refugees and their families should be retained. Consideration should be given to broadening the definition of “family” under section 18 of the Refugee Act 1996 to reflect developing conceptions of the family under international human rights law.**
- 3. A statutory scheme should be put in place in relation to family reunification applications by legally resident immigrants in Ireland, including students, which would reflect the standards of international human rights law and be transparent, accessible and timely.**
- 4. Naturalisation should remain an important aspect of Irish immigration and residency policy and no substantial changes to residency or family reunification legislation should make it more difficult for long-term residents to acquire Irish citizenship. Furthermore, naturalisation should never lead to a diminution of legal rights.**
- 5. The category of persons entitled to enjoy family reunification should not be narrowly defined and should be broadened, in line with developing conceptions of the family under international human rights law, to include non-marital partnerships, same sex partnerships and other adult relationships where there is a situation of dependence, as may be the case with grandparents and dependent adults.**

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