The right to family reunification for beneficiaries of international protection

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Contents

Summary

In the two years that have passed since enactment of the International Protection Act 2015 the Irish Human Rights and Equality Commission has repeatedly expressed concerns about the changes to family reunification law particularly in the context of the migration situation in Europe and the introduction of the Irish Refugee Protection Programme. Moreover, since the Act came into force on 31 December 2016, a number of operational issues have arisen in practice throughout the course of 2017.

The Commission is of the view that the removal of the right of international protection beneficiaries to apply for family reunification with extended family members under the International Protection Act 2015 and the introduction of a statutory time limit for applications constitutes retrogressive measures.

In this policy statement the Commission calls for family reunification law and policy to be strengthened and expanded, to facilitate safe and legal pathways for family members of refugee communities here in Ireland.

To this end the Commission specifically recommends that law reform should be carried out as follows:

- Section 56(9) of the International Protection Act 2015 should be amended
    - to define a member of family in sufficiently broad terms in order to ensure compliance with the States international human rights obligations. This may be achieved through a restoration of the dependent family member category set out in section 18(4) of the Refugee Act 1996 on a non-discretionary basis;
    - to allow individuals who have entered into a customary marriage, or those who have established long-term partnerships, to apply for family reunification;
    - to ensure that spouses and civil partners are eligible for family reunification where the marriage or civil partnership was subsisting on the date of the application for family reunification; and
    - to provide for the recognition of relations that are not formally registered civil partnerships or marriages.

- Sections 56(8) and 57(7) of the International Protection Act 2015, which introduced a 12 month time limitation within which applications for family reunification should be made, should either be repealed or amended. In the case of amendment, the Commission recommends that provision should be made to allow for an extension of time where good and sufficient reasons exist.
- The right of Programme Refugees to family reunification should be clarified in law.
- Naturalised refugees should not be excluded from the statutory family reunification regime following naturalisation.

In addition, the Commission recommends policy reform should be carried out as follows:

- The Department of Justice and Equality *Policy Document on Non-EEA Family Reunification* should be amended
    - to ensure that the description of dependency aligns with international standards;
    - to provide guidance on the operation of the duty to co-operate set out in sections 56(3) and 57(3) of the International Protection Act 2015;
    - to afford applicants an opportunity to present information on family relationships at interview and facilitate the right to be accompanied at such interview, for example, by their legal representative; and
    - to provide information on the types of evidence that may be offered to demonstrate family links.

Furthermore, the Commission recommends that an independent appeals procedure should be introduced or added to the existing appeals mechanisms of the State in order to protect the right to an effective remedy.

Introduction

The Irish Human Rights and Equality Commission ('the Commission') is both the national human rights institution and the national equality body for Ireland, established under the Irish Human Rights and Equality Commission Act 2014.

The Commission has a statutory mandate to keep under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights and equality and to make recommendations to the Government to strengthen and uphold human rights and equality in the State. Section 10(2)(c) of the Irish Human Rights and Equality Commission Act 2014 also provides that the Minister for Justice and Equality may request that the Commission consider the human rights and equality implications of particular legislation.

In accordance with the 2014 Act, the Minister for Justice and Equality referred the General Scheme of the International Protection Bill 2015 to the Commission. In its observations on the General Scheme, the Commission welcomed the overall purpose of the Bill which was to introduce a single procedure allowing for the assessment of all aspects of a protection claim. However, the Commission also raised specific human rights and equality issues of concern, particularly in relation to the amendments to family reunification, which restrict the right to family life.[1]

The International Protection Bill 2015 was enacted on 30 December 2015. Following the commencement of the legislation on 31 December 2016, the Department of Justice and Equality revised its *Policy Document on Non-EEA Family Reunification.* In the two years that have passed since the enactment of the International Protection Act 2015 the Commission has repeatedly expressed concerns about the changes to family reunification law particularly in the context of the migration situation in Europe and the introduction of the Irish Refugee Protection Programme.[2] On World Refugee Day 2017, the Commission restated its call to strengthen and expand family reunification policies, to facilitate safe and legal pathways for family members of refugee communities here in Ireland[3].

[1] IHREC (2015) *Legislative observations on the General Scheme of the International Protection Bill 2015,* pp. 3, 15, 18.
[2] https://www.ihrec.ie/children-families-key-focus-scrutiny-irish-international-protection-measures/

Since the commencement of the International Protection Act 2015 on 31 December 2016, concerns have been raised by various actors, including parliament[4], civil society[5] and the Council of Europe's Commissioner for Human Rights,[6] about the impact that changes to family reunification law is having on the rights of beneficiaries of international protection. Efforts are also being made to reverse the changes brought about by the International Protection Act 2015 by means of a Private Members Bill which was awaiting Final Stage in Seanad Éireann at the time of writing.[7]

Following on from the Commission's legislative observations on the General Scheme of the International Protection Bill 2015, this paper comments on the right to family reunification for beneficiaries of international protection.

[3] IHREC (2017) 'On World Refugee Day Commission Calls for Greater Protection for Child Refugees and an Expansion of Family Reunification Policies', Press release, 20/06/2017.
[4] Joint Oireachtas Committee on Justice and Equality (2017) *Report on Immigration, Asylum and the Refugee Crisis.*
[5] For example: https://www.oxfamireland.org/sites/default/files/upload/pdfs/refugee-family-reunion-ireland.pdf
[6] Council of Europe Commissioner for Human Rights (2017) *Realising the right to family reunification of refugees in Europe.*
[7] International Protection (Family Reunification) (Amendment) Bill 2017.

Protection of the family, the right to family life and the right to family reunification

The right to family life has long been recognised in international law, European law and domestic law. The right to family reunification flows from the right to family life. This section outlines the scope of this important right and traces how the concept of the family has evolved over time to reflect lived experiences of family life.

Protection of the family and the right to family life

Constitution of Ireland

Article 41 of the Constitution of Ireland, Bunreacht na hÉireann, provides:

> 1 1° The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.
>
> 2° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.[8]

While the family is not expressly defined in the Constitution, the Supreme Court has interpreted the references to the family in Article 41 as the family founded on marriage.[9] Similarly, marriage was not originally defined in the Constitution but the interpretation of marriage has now broadened to include same-sex marriage following a constitutional amendment in 2015.[10] Therefore, married same-sex couples now fall within the constitutional definition of the family. At the same time as this amendment, the Children and Family Relationships Act 2015 introduced a significant change to the rights of unmarried

[8] Article 41.1 of the Constitution of Ireland, Bunreacht na hÉireann.

[9] *State (Nicolaou) v An Bord Uchtála* [1996] IR 567. This narrow judicial interpretation has been the subject of much litigation and debate, see for example: Bergin-Cross (2015) 'The Evolution of the Definition of Marriage and the Family under the Irish Constitution', *Irish Journal of Family Law*, 15(2).

[10] Article 41.4 provides that 'marriage may be contracted in accordance with law by two persons without distinction as to their sex'. Previously the High Court defined marriage as between a man and a woman in *Zappone & Gilligan v. Revenue Commissioners & Ors* [2006] IEHC 404.

fathers who may now be afforded automatic guardianship of their children in certain circumstances.[11]

The Supreme Court has found that the constitutional rights of the family are not limited to Irish citizens.[14] Hogan and Whyte note that since family rights derive from natural law, 'it would seem to follow that such rights cannot be restricted to citizens'.[15] Much of the case law in this area has emerged in light of challenges to ministerial deportation orders and refusals of residency to family members. A settled view has not emerged from the superior courts on the extent to which certain familial relationships are protected by Article 41 of the Constitution.

In some cases, a broad interpretation of the types of familial relationships are protected by Article 41 of the Constitution has emerged. For example, in *RX, QMA & CX v Minister for Justice, Equality and Law Reform,* Hogan J stated:

> … it cannot have been intended by the People in 1937 that the family contemplated by Article 41 should be confined exclusively and for all possible purposes to what nowadays would be described as the nuclear family of parents and children. The fact

[11] Section 6 of the Guardianship of Infants Act 1964, as amended by the Children and Family Relationships Act 2015. For an overview of the amendments see: O'Toole and Mahon, 'Guardianship and the family' (2016) *The Bar Review*, 21(4).
[12] Berkerey (2017) 'Through the Looking Glass: the Definition, Protection and Regulation of the Family from a Child's Rights Perspective', *Irish Journal of Family Law*, 20(2).
[13] *Murray v Ireland* [1985] IR 532.
[14] *Fajujonu and Ors v Minister for Justice, Equality and Law Reform and Ors* [1990] 10 ILRM 234.
[15] Hogan and Whyte (2003) *JM Kelly: The Irish Constitution* (4th ed., Dublin: Tottel), para. 7.6.40.

> that marriage was (and, of course, is) regarded as the bedrock of the family contemplated by the Constitution does not mean that other close relatives could not, at least under certain circumstances, come within the scope of Article 41. In this regard, it must be borne in mind that grandparents and adult siblings form part of many family units which are (or, at least, were originally) formed by married couples and this was probably at least as true in 1937 as it is today.[16]

Commenting on the inclusion of a grandparent within the scope of Article 41, Hogan J stated:

> … it is, however, necessary to demonstrate that they have such ties of dependence and inter-action with other family members that they would come within the rubric of that family and that the family itself is based on marriage. This normally pre-supposes that a person such as a grandparent would share the same house as the other family members in question and that they would have an active role in the comings and goings of the family in question.[17]

Considering this case in *O'Leary & Lemiere v Minister for Justice,* Hogan J granted an application for leave to apply for judicial review 'on the general basis that the Minister's decision represented a disproportionate interference with Ms. O'Leary's Article 41 rights and that the reasoning for the refusal was not based on a fair and reasonable assessment of the underlying facts and considerations'.[18]

However, diverging views have emerged in other cases. For example, in *Y(O) v Minister for Justice, Equality and Law Reform,* Charleton J found that there were no 'substantial grounds for arguing that there is any entitlement to assert family life rights under Article 8 [ECHR]' in circumstances where the applicant, a 22 year old Nigerian woman who wished to remain in Ireland with her Nigerian mother, on whom she was not dependant, and with her two younger sisters who are Irish citizens.

[16] [2010] IEHC 446, [2011] 1 I.L.R.M. 444
[17] [2010] IEHC 446, [2011] 1 I.L.R.M. 444
[18] [2011] IEHC 256.

International standards

The family has also been afforded similar protection in a number of treaties at both the international (United Nations) and regional (Council of Europe) level. At the United Nations level, the Universal Declaration of Human Rights, which forms the basis for a number of other human rights treaties, recognises that 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the State'.[19] This is echoed in Article 23(1) of the International Covenant on Civil and Political Rights (ICCPR). At the Council of Europe level, Article 8 of the European Convention on Human Rights (ECHR), which has been indirectly incorporated into Irish law by the European Convention on Human Rights Act 2003, recognises the right to family life.

In contrast to the interpretation of the family adopted by the Irish superior courts, international bodies have taken a more expansive view of the definition of the family. For example, the United Nations Human Rights Committee, the expert body monitoring compliance with ICCPR, has stated that the family 'must be understood broadly as to include all those comprising a family as understood in the society concerned'.[20] This sentiment is also expressed in Article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) which states that

In assessing whether or not family life exists, the European Court of Human Rights does not require formal legal recognition of family life through the existence of a marriage; instead the Court considers the existence of family life as a question of fact depending upon the existence of close personal ties, i.e. *de facto* family ties.[21]

[19] Article 16(3) of the Universal Declaration of Human Rights.
[20] *Benjamin Ngambi and Marie-Louise Nébol v France,* No. 1179/2003, CCPR/C/72/D/930/2003 (2004), para 6.4.
[21] For an overview of the Court's jurisprudence in this area see: http://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf

(2) A child whose parents reside in different States shall have the right to maintain on

Article 24 of the Charter of Fundamental Rights of the European Union also recognises the right

The right to family reunification

International Standards

It has been recognised that the right to family life is not necessarily limited by the family member's presence in the State. For example, the UN Human Rights Committee has stated:

> The protection of such family is not necessarily obviated … by the absence of formal marriage bonds, especially where there is a local practice of customary or common law marriage. Nor is the right to protection of family life necessarily displaced by geographical separation … [23]

Article 19(6) of the Revised European Social Charter actively obliges States Parties to 'facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory'. The right to family reunification was more clearly articulated in the Final Act to the 1951 Convention Relating to the Status of Refugees which stated that 'the unity of the family … is an essential right of the refugee' and recommends that Governments take the necessary measures for the protection of the refugee's family.[24] The Executive Committee of the United Nations High Commissioner for Refugees has adopted a number of conclusions underlining the importance of the principle of family reunion and the need for the unity of the refugee's family to be protected.[25] In its conclusion on family reunification, the Executive Committee expresses the view that countries of

[22] See further: UNCRC (2005) *General comment No. 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin.*
[23] *Benjamin Ngambi and Marie-Louise Nébol v France,* No. 1179/2003, CCPR/C/72/D/930/2003 (2004), para 6.4.
[24] United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Final Act and Convention Relating to the Status of Refugees, July 1951, available at: http://www.refworld.org/docid/40a8a7394.html.
[25] See ExCom Conclusions No. 9(XXVIII), 1997; No. 88(L), 1999. Available: http://www.refworld.org/pdfid/4b28bf1f2.pdf

asylum should 'apply liberal criteria in identifying those family members who can be admitted with a view to promoting a comprehensive reunification of the family'.[26]

European Union Law

The right to family reunification is also enshrined in the law of the European Union (EU). Council Directive 2003/88/EC on the right to family reunification, referred to as the Family Reunification Directive, provides for the right of refugees to family reunification. The right to family reunification for beneficiaries of subsidiary protection is set out in Article 23 of Council Directive 2004/83, referred to as the Qualification Directive. Although Ireland has not opted into either of these Directives they have had an impact on the development of Irish law and policy in relation to family reunification. For example, in *Hamza & Anor v. The Minister for Justice, Equality and Law Reform*, the High Court held:

> The rationale of family reunification as an objective in this area is well expressed in Recital (4) to the Council Directive:
>
> 'Family reunification is a necessary way of making family life possible. It helps to create socio-cultural stability facilitating the integration of third country nationals in the Member State, which also serves to promote economic and social cohesion, a fundamental Community objective stated in the Treaty.'
>
> Notwithstanding the non-binding nature of these sources, it is desirable in the view of the Court, that the provisions of S. 18 should be construed and applied so far as statutory interpretation permits in a manner which is consistent with these policies and with the consensus apparent among the Member States of the Union in the objectives of the Council Directive.[27]

The relationship between Irish law and the Family Reunification Directive will be discussed further later in this paper.

[26] See ExCom Conclusion No. 24(XXXII), 1981. Available: http://www.refworld.org/pdfid/4b28bf1f2.pdf
[27] [2010] IEHC 427 at 31-34. This High Court judgment was subsequently upheld in the Supreme Court, see: [2013] IESC 9.

The right to family reunification under the International Protection Act 2015

Family reunification for beneficiaries of international protection is governed by sections 56-57 of the International Protection Act 2015, which came into force on 31 December 2016.[28] The right to family reunification was previously set out in section 18 of the Refugee Act 1996[29], which was repealed and replaced by the International Protection Act 2015.

This section examines the changes brought about by the International Protection Act 2015, namely the amendments to the definition of the family as well as procedural issues such as time limits, documentary evidence and the right of appeal.

Amendments to statutory definition of 'family' under the International Protection Act 2015

Commenting on the Refugee Act 1996 following its 2011 examination of Ireland, the Committee on the Elimination of Racial Discrimination (CERD) expressed concerns about 'the current narrow meaning ascribed to the word 'family' for purposes of family reunification'.[30] At that time, section 18(3)(b) of the Refugee Act 1996 defined family members as follows:

> (i) in case the refugee is married, his or her spouse (provided that the marriage is subsisting on the date of the refugee's application pursuant to subsection (1)),
>
> (ii) in case the refugee is, on the date of his or her application pursuant to subsection (1), under the age of 18 years and is not married, his or her parents, or
>
> (iii) a child of the refugee who, on the date of the refugee's application pursuant to subsection (1), is under the age of 18 years and is not married.

[28] International Protection Act (Commencement) (No.3) Order 2016 (S.I. No. 663 of 2016).
[29] Beneficiaries of subsidiary protection could apply for family reunification in accordance with European Union (Subsidiary Protection) Regulations 2013 (SI No 426 of 2013).
[30] CERD (2011) *Concluding observations of the Committee on the Elimination of Racial Discrimination: Ireland,* para. 25.

Section 18(4) of the Refugee Act 1966 also provided for a discretionary regime for dependent family members, which encompassed a much broader definition of family as follows:

> (a) The Minister may, at his or her discretion, grant permission to a dependent member of the family of a refugee to enter and reside in the State and such member shall be entitled to the rights and privileges specified in section 3 for such period as the refugee is entitled to remain in the State.
>
> (b) In paragraph (a), "dependent member of the family", in relation to a refugee, means 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.

Section 56(9) of the International Protection Act 2015 now defines family members as follows:

> (a) where the sponsor is married, his or her spouse (provided that the marriage is subsisting on the date the sponsor made an application for international protection in the State),
>
> (b) where the sponsor is a civil partner, his or her civil partner (provided that the civil partnership is subsisting on the date the sponsor made an application for international protection in the State),
>
> (c) where the sponsor is, on the date of the application under subsection (1) under the age of 18 years and is not married, his or her parents and their children who, on the date of the application under subsection (1), are under the age of 18 years and are not married, or
>
> (d) a child of the sponsor who, on the date of the application under subsection (1), is under the age of 18 years and is not married.

In summary, section 56(9) of the International Protection Act 2015 has brought about a number of changes to the definition of family, namely the removal of the dependant family

member category, amendments to the rights of siblings and parent/child relationships as well as amendments to the rights of civil partners. Each of these changes will be discussed in turn below.

Exclusion of extended family members

The definition of family set out in the International Protection Act 2015 omitted the 'dependent family member' category which was enshrined in the Refugee Act 1996 and has therefore limited an international protection beneficiary's statutory rights to family reunification with the nuclear family. The new definition of family has led to the complete exclusion of grandparents, grandchildren, wards or guardians from the statutory regime.[31] There has also been some amendments to the rights of siblings and parent/child relationships. While the extension of family reunification to siblings of a child refugee or person with subsidiary protection status is to be welcomed,[32] siblings of adult protection applicants no longer come within the scope of the statutory regime. Similarly, parents and children of adult protection applicants are excluded from the statutory scheme.

In its observations on the General Scheme of the Bill, the Commission recommended that consideration be given to the range of family relationships to which Article 8 ECHR can apply.[33] As mentioned above, Article 8 ECHR protects the right to family life. In its jurisprudence on Article 8, the European Court of Human Rights (ECtHR) has paid particular attention to what constitutes a 'family'.[34] The ECtHR has held that the right to family life extends beyond the nuclear family to relationships between grandparents and grandchildren[35], uncle and aunts with nieces and nephews,[36] and adult siblings.[37]

A number of non-governmental organisations and UNHCR have expressed concern at the narrowing of the definition of family member and have called for an expansion of family

[31] These individuals were eligible under section 18(4) of the Refugee Act 1996.
[32] The Commission previously welcomed this developed in its observations on the General Scheme of the Bill. See: IHREC (2015) *Legislative observations on the General Scheme of the International Protection Bill 2015,* p 16.
[33] IHREC (2015) *Legislative observations on the General Scheme of the International Protection Bill 2015,* p 16.
[34] See *L. v. The Netherlands* (Application no. 45582/99), para 36; *Brauer v. Germany* (Application no. 3545/O4), para 30.
[35] *Marckx v Belgium* (Application no. 6833/74) 13 June 1979, para 45.
[36] *Nsona v the Netherlands* (Application no. 23366/94) 28 November 1996.
[37] *Boughenemi v France* (Application no. 16/1995/522/608), 27 March 1986.

reunification in order to secure legal migration pathways.[38] During the Second Stage debate on the International Protection (Family Reunification) (Amendment) Bill 2017, the impact of the new definition set out in section 56(9) of the International Protection Act 2015 was discussed. For example, a hypothetical case study, based on practitioner experience, demonstrated that an applicant would be refused family reunification with her minor dependent sister in circumstances where their parents had been killed due to the fact that siblings do not fall within the scope of the new definition.[39]

Refugees and subsidiary protection holders may now only apply for reunification with extended family members on an administrative and discretionary basis in accordance with the *Policy Document on Non-EEA Family Reunification.* The regime under section 18(4) of the Refugee Act 1996 had previously been criticised for a restrictive exercise of discretion. The Commission has previously recommended that discretion should be exercised in a manner that accords with the standards of equality before the law and other provisions of the ECHR[40].

The discretionary regime was also criticised due to the narrow interpretation of 'dependency'.[41] The Court of Justice of the European Union has held that dependency is an autonomous concept in EU law which is the result of 'a factual situation characterised by the fact that legal, financial, emotional or material support for that family member is provided by his/her spouse/partner.'[42] In the *Policy Document on Non-EEA Family Reunification* 'dependency means that the family member is (i) supported financially by the sponsor on a continuous basis and (ii) that there is evidence of social dependency between the two parties'. This definition demonstrates a clear focus on financial dependency, which has previously been criticised as a barrier to family reunification given that refugees often find themselves in a weak economic position.[43] The Council of Europe's Commissioner for Human

[38] Samantha Arnold and Emma Quinn (2017) *Family Reunification of Non-EU Nationals in Ireland,* Research Series No. 62. (Dublin: European Migration Network. Economic and Social Research Institute), p. 32.
[39] Senator Colette Kelleher, Second Stage debate, Vol. 253 No. 2, 19 July 2017, available: http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/seanad2017071900002?opendocument#QQ00300
[40] IHREC (2015) *Legislative observations on the General Scheme of the International Protection Bill 2015,* p 9.
[41] Gotzelmann (2016) 'The implementation and administration of family reunification rights in Ireland' *Irish Jurist,* p. 84.
[42] European Commission (2014) *Guidance for application of Directive 2003/86/EC on the right to family reunification,* p. 6.
[43] Gotzelmann (2016) 'The implementation and administration of family reunification rights in Ireland' *Irish Jurist,* p. 84.

Rights has recommended that States should ensure a 'flexible assessment' of dependency, which is in keeping with the jurisprudence of the Court of Justice of the European Union.

Recommendations

Recalling its recommendations in its observations on the General Scheme of the International Protection Bill 2015, the Commission recommends that sections 56(9) of the International Protection Act 2015 be amended to define a member of family in sufficiently broad terms in order to ensure compliance with the State's international human rights obligations. This may be achieved through a restoration of the dependant family member category set out in section 18(4) of the Refugee Act 1996 on a non-discretionary basis.

The Commission recommends that provision be made for the recognition of relations that are not formally registered civil partnerships or marriages.

The Commission recommends that the Policy Document on Non-EEA Family Reunification should be amended to ensure that the description of dependency aligns with international standards.

Civil partners

The Commission welcomes the inclusion of civil partners in the definition of family member.[44] This is in keeping with the evolving definition of the family in Irish law. However, in its observations on the General Scheme of the Bill, the Commission raised concerns that formal relationship recognition may not be available to many protection applications who are same-sex couples in their countries of origin.[45] This point was also echoed by the Council of Europe's Commissioner for Human Rights in his 2017 *Issues Paper on Family Reunification*, which concluded that the inclusion of civil partner is 'unlikely to enable the reunion of same-sex couples, given that most refugees flee states where this status is not legally available'.[46]

[44] Section 56(9)(b) of the International Protection Act 2015.
[45] IHREC (2015) *Legislative observations on the General Scheme of the International Protection Bill 2015,* p 17.
[46] Council of Europe Commissioner for Human Rights (2017) *Realising the right to family reunification of refugees in Europe,* p. 37.

As noted above, the European Court of Human Rights has adopted a broad interpretation of the family which focuses on the existence of close personal ties or 'de facto' family relationships.[47] The ECtHR has also recognised the right to family life in circumstances where relationships have not been formally recognised by the State, for example, unmarried couples[48], same-sex couples[49], adoptive parents and children[50], and couples in a committed non-cohabiting relationship.[51]

Recommendation

Recalling its observations on the General Scheme of the International Protection Bill 2015, the Commission recommends that sections 56(9) of the International Protection Act 2015 be amended to allow individuals who have entered into a customary marriage, or those who have established long-term partnerships, to apply for family reunification.

Documentary proof of the existence of family ties

The Executive Committee of the United Nations High Commissioner for Refugees has expressed the view that 'when deciding on family reunification, the absence of documentary proof of the formal validity of a marriage or of the filiation of children should not per se be considered as an impediment'.[52]

Although common law marriages have been recognised for the purposes of family reunification,[53] issues have arisen in relation to the certification. For example, in *M. v. F.* the applicant, was initially refused family reunification with his spouse on the basis that the relationship was a customary marriage.[54] Following a legal challenge, the High Court held that when considering recognition of a marriage for the purposes of a family reunification

[47] See *L. v. The Netherlands* (Application no. 45582/99), para 36; *Brauer v. Germany* (Application no. 3545/O4), para 30.
[48] *X, Y and Z v UK* (Application no. 75/1995/581/667) 22 April 1997.
[49] *Schalk and Kopf v Austria* (Application no. 30141/04) 24 June 2010, para. 94.
[50] *Pini and Others v Romania* (Application no.'s 78028/01 and 78030/01) 22 September 2004.
[51] *Abdulaziz, Cabales and Balkandali v the UK* (1985) 7 EHRR 300, para 62-63.
[52] See ExCom Conclusion No. 24(XXXII), 1981. Available: http://www.refworld.org/pdfid/4b28bf1f2.pdf
[53] *Hamza & Anor v. The Minister for Justice, Equality and Law Reform* [2010] IEHC 427.
[54] *M. v. F.* [2011] IEHC 415.

application, a marriage should be recognised if it has been recognised according to the laws and customs of the place in which it is contracted.[55]

The Council of Europe's Commissioner for Human Rights has recommended that flexible approaches should be adopted to consider a range of evidence to demonstrate family ties and that guidelines should be developed to provide information on the sorts of evidence that may be offered to demonstrate family links.[56]

The Commission notes that sections 56(3) and 57(3) of the International Protection Act 2015 require the applicant and the sponsor to co-operate with the Minister's investigation into an application for family reunification through the provision of information relevant to the application. The Commission is of the view that this duty should allow the applicant to provide evidence of the existence of family ties. In circumstances where the applicant does not have access to documentary proof, the applicant should be given an opportunity to explain the existence of family ties in person, by means of an interview.

Recommendation

The Commission recommends that the *Policy Document on Non-EEA Family Reunification* be amended to provide guidance on the operation of the duty to co-operate set out in sections 56(3) and 57(3) of the International Protection Act 2015. The Commission recommends that the applicant be afforded an opportunity to present such information by means of an interview and should be entitled to be accompanied at such interview, for example, by their legal representative. The Commission recommends that the Policy Document on Non-EEA Family Reunification be amended to provide information on the types of evidence that may be offered to demonstrate family links.

[55] *M. v. F.* [2011] IEHC 415.
[56] Council of Europe Commissioner for Human Rights (2017) *Realising the right to family reunification of refugees in Europe,* p. 9.

Definition of a 'qualified person'

Sections 56-57 of the International Protection Act 2015 provide that a 'qualified person' is entitled to apply for family reunification. A 'qualified person' is defined as follows:

> '(a) a refugee and in relation to whom a refugee declaration is in force, or
>
> (b) a person eligible for subsidiary protection and in relation to whom a subsidiary protection declaration is in force.'[57]

Programme Refugees

Guidance issued by the Irish Naturalisation and Immigration Service (INIS) indicates that one may apply to the Minister for family reunification under sections 56-57 of the International Protection Act 2015 if: 'You have a current declaration as a: Convention Refugee; Programme Refugee or; you are a current Beneficiary of Subsidiary Protection.'[58]

The Commission is concerned that there may be a lack of sufficient clarity regarding the application of sections 56-57 to programme refugees. Programme Refugees are subject to a separate process. Section 59(1) of the 2015 Act defines a programme refugee as:

> a person to whom permission to enter and remain in the state for resettlement, or for temporary protection provided for in section 60, has been given by the Government or the Minister and whose name is entered in a register established and maintained by the Minister, whether or not such person is a refugee within the meaning of the definition of "refugee" in section 2.

Section 59(2) of the 2015 Act specifies that the programme refugee is a 'qualified person' for the purposes of sections 53a 54 of the Act (covering employment, residency and travel documentation), but does not make the same provision with regard to sections 56 and 57 on family reunification.

[57] Section 2 of the International Protection Act 2015.
[58] Irish Naturalisation and Immigration Service (INIS), *Family Reunification FAQ*, Updated 30 December 2016. Available at http://www.inis.gov.ie/en/INIS/Pages/Family_Reunification_Information_Leaflet

Given the Government's commitments under the Irish Refugee Protection Programme,[59] the Commission is concerned that a large number of programme refugees may risk being denied the right to family reunification without further clarity on this matter.

Recommendation

The Commission recommends that the right of Programme Refugees to family reunification be clarified in law.

Refugees who become Irish citizens through naturalisation

As mentioned above, a qualified person under the International Protection Act 2015 is defined as an individual to whom a refugee or subsidiary protection declaration 'is in force'. Section 47(9) of the International Protection Act 2015 states:

> A refugee declaration or a subsidiary protection declaration given, or deemed to have been given, under this Act shall cease to be in force where the person to whom it has been given becomes an Irish citizen.

It appears that a refugee who acquires Irish citizenship through naturalisation does not fall within the definition of a qualified person, and may be excluded from the statutory family reunification regime under the International Protection Act 2015.

The Commission notes that this represents a change in the rights accorded to refugees who become naturalised citizens as there was no equivalent provision in the Refugee Act 1996. It has been possible for a person who gained refugee status under the 1996 Act, and who has become a naturalised citizen, to apply to the Minister for permission for a family member to reside in the State.

In addition, the Commission notes that concerns have been raised regarding the retroactive application of the 2015 Act to applications made for family reunification by '1996 Act'

[59] See further: http://www.justice.ie/en/JELR/Pages/Irish_Refugee_Protection_Programme_(IRPP)

naturalised refugees.[60] The Commission understands that in this respect, section 47(9) of the International Protection Act 2015 is currently the subject of litigation pending before the superior courts.

Recommendation

The Commission is of the view that naturalised refugees should enjoy the same right to family reunification as refugees who have not been naturalised and recommends that naturalised refugees should not be excluded from the statutory family reunification regime following naturalisation.

Procedural issues

A study on the implementation and administration of family reunification rights in Ireland has concluded that 'the actual degree to which refugees and subsidiary protection status holders enjoy family reunification rights was low despite their statutory entitlements'.[61] That research identified a number of obstacles to the realisation of family reunification, including delays in processing applications and refusals on the grounds of insufficient documentation.[62] These barriers are also common in other European Members States according to a report published by the European Union Agency for Fundamental Rights (FRA) which cited delays in processing applications, procurement of all necessary documents and time limits among the obstacles to family reunification.[63] The Commission notes that the Irish Naturalisation and Immigration Service has stated that the new 12a month time limit within which to apply and the narrower definition of family member, will speed up the process in part by reducing the number of applications received.[64] However, the

[60] Website of Berkeley Solicitors, 'Change in Policy for Family Reunification for Naturalised Refugees', 12 January 2018: 'recent refusals appear to be applying the International Protection Act 2015 retrospectively. In effect these refusals are applying section 47 (9) of the 2015 Act to refugees who are declared refugees under the 1996 Act, in finding that their refugee status is revoked upon naturalisation. We submit that this is wholly contrary to the fundamental concept that law cannot have retroactive effect.' Available at https://berkeleysolicitors.ie/change-policy-family-reunification-naturalised-refugees/.

[61] Gotzelmann (2016) 'The implementation and administration of family reunification rights in Ireland', *Irish Jurist,* p. 109.

[62] Gotzelmann (2016) 'The implementation and administration of family reunification rights in Ireland' *Irish Jurist*, p. 82–84.

[63] FRA (2016) *Monthly data collection on the current migration situation in the EU – Thematic focus: family tracing and family reunification, September 2016 monthly report, 1–31 August 2016,* p. 14.

[64] Samantha Arnold and Emma Quinn (2017) *Family Reunification of Non-EU Nationals in Ireland,* Research Series No. 62. (Dublin: European Migration Network. Economic and Social Research Institute), p. 31.

Commission is of the view that limiting the rights of beneficiaries of international protection to apply for family reunification is not an acceptable means of addressing delays in processing applications. The other procedural issues, namely time limits and documentary proof, as well as the right to appeal will be considered below.

Time limits

The International Protection Act 2015 introduces a time limit for family reunification applications. Sections 56(8) and 57(7) of the Act prescribes that an applicant must apply within 12 months of the grant of refugee status or subsidiary protection status. In its observations on the General Scheme of the Bill, the Commission cautioned that the imposition of a twelve month limitation period on the right to apply for family reunification may result in a breach of family rights in some cases.[65] Furthermore, the Commission stated that such a restriction may be incompatible with the right to respect for family life under Article 8 of the ECHR and/or Article of the 10 of the UNCRC, particularly where there are genuine reasons for the failure to make the application within twelve months.[66] The Council of Europe's Commissioner for Human Rights has also recommended that States should allow for provisional applications to be made, allowing for documentation and further details to be submitted at a later date.[67]

It has been observed that the 12 month time limit may prove impossible for many refugees due to difficulties tracing family members, collating documentation and arranging for family members to liaise with embassies.[68] A number of challenges to tracing family members have been outlined in a study published by the Fundamental Rights Agency, which include the following:

- Refugees move very quickly between countries, so by the time the Red Cross office has a reply to search requests, the persons have already left for another country.

[65] IHREC (2015) *Legislative observations on the General Scheme of the International Protection Bill 2015,* p 17.
[66] IHREC (2015) *Legislative observations on the General Scheme of the International Protection Bill 2015,* p 17.
[67] Council of Europe Commissioner for Human Rights (2017) *Realising the right to family reunification of refugees in Europe,* p. 9.
[68] Council of Europe Commissioner for Human Rights (2017) *Realising the right to family reunification of refugees in Europe,* p. 41.

- Names are often noted down in different spellings by the various offices involved in one or more countries; this makes it difficult to match names in the databases.
- Smugglers and other asylum seekers often advise asylum seekers not to provide their real names.
- Many asylum seekers arrive in Europe without documents; therefore, it is very difficult or even impossible to verify whether or not the persons are truly related to each other.
- Refugees often do not know where they are or where they were separated from family members, as they have no geographical knowledge of Europe. People come to tracing services looking for relatives "in Europe". The Red Cross then also searches in the country of origin, as refugees who do not manage to reach Europe often go back and can be found there.
- Tracing and meeting with the asylum seekers in question is particularly difficult when they are in an immigration detention centre, as their ability to communicate from there is more limited.
- Persons who drown in the Mediterranean Sea are identified only slowly, if at all. State authorities are responsible for identifying bodies, but all coastal countries use different forensic methods and there is no common database for registering bodies. The Red Cross has started to work together with forensic experts. It includes information in tracing requests that can be useful for the experts – such as physical size, past injuries and tattoos – if there is an indication that a person might have drowned, and if the person searching for the relative agrees, to make it possible to match tracing requests with forensic databases.
- In cases of missing children, a further challenge is to find ways of cooperating with Member State authorities without sharing personal data.[69]

In Ireland, a testimonial from a Somalian unaccompanied minor who had used the Irish Red Cross's family tracing service notes that it took over a year to locate one of her brothers but her other family members had not yet been found.[70] During the Second Stage debate on the

[69] FRA (2016) *Monthly data collection on the current migration situation in the EU – Thematic focus: family tracing and family reunification, September 2016 monthly report, 1–31 August 2016,* p. 10.

[70] Irish Red Cross 'Testimonials' [webpage], accessed on 21 December 2017, available at: https://www.redcross.ie/testimonials/

International Protection (Family Reunification) (Amendment) Bill 2017 the inflexibility of statutory time limits was also discussed. For example, a hypothetical case study, based on practitioner experience, demonstrated that an applicant would be refused family reunification with her spouse even though she had initiated a family tracing search with the Red Cross immediately but only became aware of her husband's whereabouts a number of years later.[71]

The International Protection Act 2015 also limits family reunification for spouses and civil partners to cases where the marriage or civil partnership was subsisting on the date of the application for international protection.[72] In contrast, section 18 of the Refugee Act 1996 and Regulation 16 of the European Communities (Eligibility for Protection) Regulations 2006 previously required that the relationship is subsisting on the date of the application for family reunification. In its observations on the General Scheme of the Bill, the Commission noted that in light of the lengthy time periods between an original application for international protection and the stage at which an individual may be granted status, this proposal potentially excludes family ties that are formed during the time period after the initial application for international protection and a final decision.[73] The Commission also expressed concern that this may diminish the enjoyment of the right to family life for a specific category of protection applicant in a manner that raises questions of compatibility with Articles 8 and 14 of the ECHR.[74]

Recommendations

Sections 56(8) and 57(7) of the International Protection Act 2015, which introduced a 12 month time limitation within which applications for family reunification should be made, should either be repealed or amended. In the case of amendment, the Commission

[71] Senator Colette Kelleher, Second Stage debate, Vol. 253 No. 2, 19 July 2017, available: http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/seanad2017071900002?opendocument#QQ00300

[72] Section 57(6) of the International Protection Act 2015. Full text reproduced on page

[73] IHREC (2015) *Legislative observations on the General Scheme of the International Protection Bill 2015,* p 17.

[74] See ECtHR cases of *Mugenzi v. France* (application no. 52701/09), *Tanda-Muzinga v. France* (no. 2260/10) and *Senigo Longue and Others v. France* (no. 19113/09), concerning the difficulties encountered by applicants, who themselves were either granted refugee status or lawfully residing in France, in obtaining visas for their children so that their families could be reunited. In each case, the Court held unanimously that there had been a violation of Article 8, right to private and family life, stating that the procedure for examining applications for family reunification should have regard to the applicants' refugee status on the one hand and the best interests of the children on the other, in order to safeguard interests as guaranteed by Article 8 of the Convention.

recommends that provision should be made to allow for an extension of time where good and sufficient reasons exist.

Sections 56(9) of the International Protection Act 2015 should be amended to ensure that spouses and civil partners are eligible for family reunification where the marriage or civil partnership was subsisting on the date of the application for family reunification.

Application of 2015 Act to individuals who were granted status under the Refugee Act 1996

In *Djamba & Ors v The Minister for Justice and Equality*[75] the applicant been granted subsidiary protection in February 2015, at which time there was no time limit within which to apply for family reunification. Following an application for family reunification for his four minor dependent children, the Minister refused the application in March 2017 on the basis that the applicant should have applied within 12 months of getting status, as per the International Protection Act 2015. The applicant applied to the High Court for relief by way of judicial review and Mr. Justice O'Regan affirmed the Minister's decision on 8 May 2017, stating that the right to apply for family reunification under the Refugee Act 1996 had not vested in the applicant, and so couldn't be relied upon. The Commission understands that the applicant has appealed the decision of the High Court.

Right of appeal

Refusals of applications for family reunification under section 56(8) of the International Protection Act 2015 may not be appealed. This was also the case under the Refugee Act 1996 which was criticised by international bodies. Following its 2011 examination of Ireland,

[75] *Djamba & Ors v The Minister for Justice and Equality* [2017] IEHC 280 http://www.courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/4cd930d58167b6b580258124004852e3?OpenDocument

the Committee on the Elimination of Racial Discrimination (CERD) recommended that the State develop an 'appellate procedure to challenge its decisions'.[76]

The requirement for an appellate procedure has also been identified by the Council of Europe's Committee on Social Rights, which has stated that:

> restrictions on the exercise of the right to family reunion should be subject to an effective mechanism of appeal or review, which provides an opportunity for consideration of the individual merits of the case consistent with the principles of proportionality and reasonableness.[77]

Currently, individuals who are refused family reunification may not challenge the outcome of the decision but may judicially review the decision-making process. Since it is only possible to review the 'reasonableness' of a decision by means of judicial review, this course of action may not be considered an effective remedy. The right to an effective remedy has been set out in international human rights treaties[78] as well as in the Constitution of Ireland.[79] For example, in *Smith and Grady v. the United Kingdom*,[80] the European Court of Human Rights concluded that judicial review was not an effective remedy on the ground that the domestic courts defined policy issues so broadly that it was not possible for the applicants to make their Convention points regarding their rights under Article 8 in the domestic courts. Judicial review may also be a costly and time consuming procedure, particularly since legal aid is not available and there have been concerns about delays in hearing immigration cases in the superior courts in the past.[81]

[76] CERD (2011) *Concluding observations of the Committee on the Elimination of Racial Discrimination: Ireland,* para. 25.
[77] https://rm.coe.int/1680593904
[78] For example, Article 13 of the ECHR, Article 47 of the EU Charter for Fundamental Rights and Article 2 of the International Covenant on Civil and Political Rights.
[79] [2011] IEHC 214, para 4. According to Hogan J in *Efe v. Minister for Justice, Equality and Law Reform* 'the combined effect of Articles 34.1, 34.3.1, 40.3.1 and 40.3.2 coupled with a wealth of case law, is to demonstrate that the Constitution provides litigants with such a right [to an effective remedy]'.
[80] Application nos. 33985/96 and 33986/96, §§ 135-39, ECHR 1999-VI.
[81] Becker (2014) 'The Law on Family Reunification', *Irish Journal of European Law,* Volume 17, Issue 1.

Recommendation

The Commission recommends that an independent appeals procedure be introduced or added to the existing appeals mechanisms of the State in order to protect the right to an effective remedy.

The right to family reunification in Irish law in the context of European Union law

Sections 56-57 of the International Protection Act 2015 have been described by the Irish Naturalisation and Immigration Service (INIS) as 'the biggest change to refugee law to come in under the new Act'.[82] The significance of these changes, particularly the narrowing of the definition of the family, is evident in the fact prior to signing the International Protection Bill 2015 into law, the President of Ireland, Michael D Higgins, convened the Council of State to consider the constitutionality of these provisions.[83] During parliamentary debates, particularly those related to the International Protection (Family Reunification) (Amendment) Bill 2017, the Government has stated that the changes were introduced in order to align Irish law with European Union law:

> The 2015 Act was written to closely align Ireland with mainstream European practice and its current provisions on family reunification are not only in line with other EU member states, but are in parts less rigid and more flexible than those which exist in other jurisdictions.[84]

In 2014, the European Commission published guidance on the application of the Directive due to 'issues of incorrect transposition or misapplication'.[85] This guidance provides useful information on the scope of the Directive, including the definition of 'family members'.[86] The guidance also clarifies that while Member States have a certain margin of appreciation in relation to the promotion of the right to family reunification beyond the nuclear family, it

[82] Samantha Arnold and Emma Quinn (2017) *Family Reunification of Non-EU Nationals in Ireland,* Research Series No. 62. (Dublin: European Migration Network. Economic and Social Research Institute), p. 31.

[83] https://www.irishtimes.com/news/politics/president-michael-d-higgins-signs-asylum-bill-into-law-1.2480567

[84] Minister for Justice and Equality, Charles Flanagan TD, Second Stage debate, *Parliamentary Debates: Seanad Éireann*, Vol. 253, No. 2, 19 July 2017, available: http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/seanad2017071900002?opendocument#QQ00300

[85] European Commission (2014) *Guidance for application of Directive 2003/86/EC on the right to family reunification,* p. 2.

[86] European Commission (2014) *Guidance for application of Directive 2003/86/EC on the right to family reunification,* p. 5–7.

'must not be used in a manner that would undermine the objective of the Directive, which is to promote family reunification'.[87]

In its observations on the General Scheme of the International Protection Bill 2015, the Commission noted that although Ireland has not opted into the Family Reunification Directive the State should always seek to 'transpose EU Directives in a manner that does not reduce the level of standards already applied by Ireland in that area of protection law'.[88] This approach is in line with the established principle of progressive realisation in international human rights law. The UN Committee on Economic, Social and Cultural Rights has stated that this principle prohibits States from taking 'any deliberately retrogressive measures'.[89] Commenting on the International Protection Act 2015 in the context of migration law and policy across the EU, the European Legal Network on Asylum has characterised sections 56-57 of the Act as 'restrictive provisions in a 'race to the bottom' of standards aiming to reduce access to family reunification for beneficiaries of international protection as a method of managing migration'.[90]

The UN Committee on Economic, Social and Cultural Rights has also stated that the principle of progressive realisation requires States to use their maximum available resources to advance individual rights.[91] In the context of family reunification the Supreme Court held that while there may be a cost associated with family reunification, 'significant weight must also be attached to the statutory policy which favours giving special admission status to such family members'.[92] The Commission notes that the Government has declined to support a legislative proposal which seeks to widen the definition of family member on the basis that the financial implications of the Bill had not been costed and in the Government's view, 'the admission of so many people would have significant and unquantifiable impacts on the provision of housing, health care, education, welfare payments and other State supports'.[93]

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[87] European Commission (2014) *Guidance for application of Directive 2003/86/EC on the right to family reunification,* p. 3.
[88] IHREC (2015) *Legislative observations on the General Scheme of the International Protection Bill 2015,* p 17.
[89] CESCR (1991) *General comment No. 3: The nature of States parties obligations (Art. 2, par. 1),* para. 9.
[90] ELENA (2016) *Information Note on Family reunification for Beneficiaries of International Protection in Europe,* p. 1.
[91] CESCR (1991) *General comment No. 3: The nature of States parties obligations (Art. 2, par. 1),* para. 9.
[92] *AMS v Minister for Justice and Equality* [2014] IESC 65.
[93] Minister of State at the Department of Justice and Equality, David Stanton TD, Seanad Éireann Debate Vol. 254 No. 1, available: http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/seanad2017110800002?opendocument#P00500

The Commission is of the view that the removal of the right of international protection beneficiaries to apply for family reunification with extended family members under the International Protection Act 2015 and the introduction of a statutory time limit for applications constitutes retrogressive measures.



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