

IMMIGRATION AND FAMILY LIFE: REUNIFICATION IN IRISH LAW -

Subject: Immigration. **Other related subjects:** European Union. Human rights

CLIODHNA MURPHY*

Introduction

Family reunification – which for the purposes of this article means the process whereby family members who are separated due to forced or voluntary migration regroup in a country other than the country of origin of one or more of the family members – is treated by scholars and immigrant advocates as a key element of the integration process and as essential for migrants' wellbeing. The socio-political consequences of failure to facilitate family reunification have been emphasised by the International Labour Organisation in the following terms:

Prolonged separation and isolation lead to hardships and stress situations affecting both the migrants and the families left behind and prevent them from leading a normal life. The large numbers of migrant workers cut off from social relations and living on the fringe of the receiving community create many well-known social and psychological problems that, in turn, largely determine community attitudes towards migrant workers.²

Despite the importance of family reunification as part of a humane and holistic immigration policy, official policy relating to immigration and integration often ignores or seeks to discourage family reunification,³ most likely due to the perception that more generous family sponsorship provisions tend to raise the overall costs of integration and dilute the economic benefits produced by the original labour entrants.⁴ The introduction of administrative delays before legal status is granted to spouses, and integration conditions whereby the family member must prove their integration potential before they have even entered the state are amongst the legal tools used by European states to restrict family reunification for certain types of migrants.⁵

In Ireland, family reunification has not to date formed an express part of immigration or integration policy. In legal terms, the lack of emphasis on family reunification in Ireland is reflected in the fact that outside of the field of refugee law, there is no legislative provision for family reunification. Similarly, despite the strong protection of the family in the Constitution, the jurisprudence of the Irish courts relating to family reunification has been influenced by the difficulties involved in reconciling the conflicting interests at the centre of family reunification disputes, as encapsulated in Fennelly J's words in the Supreme Court: "The legitimate interest of the State in the control of immigration frequently conflicts with

claims of migrants based on family reunification.”⁶

This article will examine the rules (including existing case law) governing family reunification for Irish citizens; EU citizens exercising their right to free movement in Ireland; refugees and beneficiaries of subsidiary protection; and non-EEA nationals. While the circumstances in which a deportation of a person already in the state can violate the family rights of both the deportee and their family members remaining in the host country has formed the basis of a considerable amount of case law and academic commentary,⁷ there have been very few cases considering the question of whether the State can be compelled to admit family members in certain circumstances. Having examined the rules in respect of each category, the article will assess the Irish family reunification regime in the light of international law on family reunification. It concludes that while elements of the Irish family reunification framework are influenced by international refugee law and the ECHR, international law places relatively limited obligations on states in the sphere of family reunification.

Differentiated rules for different categories of migrants

The legal position regarding family reunification depends on the legal classification of the person concerned. Different rules apply to Irish citizens, nationals of EU member states, refugees and other categories of non-EEA migrants who wish that their family members join them in Ireland. EU migrants are in the most favourable position as regards family reunification due to the right of residence of third country national family members of EU citizens exercising their right to free movement as protected by EU law, followed by refugees for whom family reunification is grounded in statute. In contrast, the family reunification of Irish citizens and non-EEA citizens is based on ministerial discretion and is consequently fraught with uncertainty for applicants. A cursory look at the rules relating to each of the categories thus reveals an anomaly: EU citizens exercising their right to free movement in Ireland, along with recognised refugees and beneficiaries of subsidiary protection, are better off in family reunification terms than Irish citizens.

The differentiated rules which will be explored in this article have a variety of rationales. In the case of EU migrants, the rationale for the right to family reunification in EU law relates to the objectives of the single market and the realisation of free movement of persons. In the case of refugees, the entitlement to family reunification is linked to the inability of the refugee to return to their country of origin. The rules in relation to these two categories are both indirectly related to integration concerns in the sense of constituting an acknowledgement that individuals find it difficult to settle and integrate in a country without their family unit. The position in relation to Irish citizens and non-EU citizens, on the other hand, is bound up with the concerns of immigration control and the desire to maintain a high degree of executive control over the immigration and asylum systems.

The constraints placed on national family reunification regimes by the EU and international frameworks are an important feature of the law in this area. Jastram and Newland note that while family reunification across borders is shaped by the State's sovereign power to control the entry of non-nationals, it is not entirely defined by this sovereign power. They

argue that there has been a progressive development in the international law of family reunification over the past fifty or so years such that it is now widely recognised that the State has an obligation to reunite close family members who are unable to enjoy the right to family unity elsewhere.⁸ This view is vindicated in this article which reveals that state discretion in the sphere of family reunification in Ireland is being eroded, in particular by domestic obligations under EU law, international refugee law and the European Convention of Human Rights. This poses a significant challenge to the state-centred paradigm of family reunification still perpetuated by the Irish government, and to a certain extent by the courts. However, as mentioned above, it will also be seen that states still enjoy a wide margin of appreciation as regards the domestic legal framework for family reunification, except in the case of EU citizens.

EU citizens

Family members of EU citizens exercising their free movement rights in Ireland enjoy derived rights under EU law regardless of their nationality. Third country national family members of EU citizens ("TCNs") who exercise their free movement rights are entitled to essentially the same treatment as their EU national principal, with Directive 2004/58 (the "Citizenship Directive") comprehensively outlining these rights.⁹ The concept of EU citizenship has also indirectly benefited non-EU national family members of EU citizens falling outside the scope of the legislation, through the emphasis in the case law on the fundamental rights of citizens and particularly the importance of the citizen's right to family life.¹⁰ The law relating to family members of EU citizens constitutes a significant constraint on national immigration law. For countries with integration conditions and tests for family reunification for example, such conditions may not be applied in the case of TCNs reuniting with their EU national family member who is exercising their free movement rights in that country. In the case of Ireland, nationals of other Member States who have chosen to exercise their right of free movement to come to Ireland and are seeking reunification with TCN family members in Ireland are in a more favourable legal position than TCNs seeking reunification with TCN family members, as well as Irish citizens resident in Ireland seeking reunification with TCN family members.

This position has been reinforced in the wake of the ECJ ruling in *Metock*.¹¹ In its decision in *Akrich* the ECJ had introduced the "prior lawful residence" requirement, holding that a TCN spouse "must be lawfully resident in a Member State when he moves to another Member State to which the citizen of the Union is migrating or has migrated."¹² On the basis of *Akrich* (and despite further rulings in *Jia*¹³ and *Eind*¹⁴ which rendered the application of *Akrich* questionable) Ireland had introduced a prior lawful residence requirement in its implementing legislation for the 2004 Directive,¹⁵ and this was the basis for the Article 134 reference in *Metock*. The reference queried the legality of the prior lawful residence requirement. The ECJ found (basing its decision on the Citizenship Directive rather than general fundamental rights principles) that the provisions of the Citizenship Directive applied to family members of Union citizens, irrespective of whether they have previously resided in a Member State, lawfully or otherwise.¹⁶

The combined effect of the Citizenship Directive and the *Metock* decision has been that, in

many EU Member States, EU citizens exercising free movement rights with TCN family members are not merely legally assimilated to the position of a national citizen but are actually placed in a better position in family reunification terms.¹⁷ In Ireland, the State has continued to resist this loss of discretion over the entry and residence of TCN family members of EU citizens. The courts have been obliged to apply EU law in decisions which effectively have compelled changes to government policy and practice in this regard. In *John Tagni v Minister for Justice, Equality and Law Reform*,¹⁸ Edwards J found that where the Minister for Justice, Equality and Law Reform (the "Minister") is uncertain about the nature of an application but the applicant has provided all the required documentation, the residence card must be granted within the six month period. This decision makes the six-month time frame allowed under EU law for the Minister to decide a residency application of a TCN family member of an EU citizen exercising their right to free movement mandatory in all cases. Edwards J stated that the risk of fraud could be appropriately dealt with by revoking the residence card after it is granted in cases of fraud. On a procedural note, while the judge also stated that there was no time limit in respect of reviews of decisions to refuse an application for a residence card, a period of consideration of more than three months would generally constitute an unreasonable delay.

A further illustration of the extent of the restrictions placed by EU law on governmental discretion in this sphere is the decision in *Decsi v Minister for Justice, Equality and Law Reform*.¹⁹ In June 2010, the government introduced a policy to not allow the non-EU citizen family members of EU citizens to work or set up a business while their application for a residence card was being processed (which routinely takes six months). This was successfully challenged in *Decsi*, in which Cooke J confirmed that the right of the family member to take up employment, under Regulation 18(1) of the European Communities (Freedom of Movement of Persons) (No 2) Regulations 2006 and 2008 (along with the right of residence itself under Regulation 6(1)) was exercisable as of the date of the acknowledgment notice issued by the Minister of receipt of a valid application for residence. This was because the Citizenship Directive as implemented by the Regulations directly confers the right to work or set up a business on family members of EU nationals who have the right to reside in Ireland, as opposed to these rights being conferred by the residence permit issued by the Irish Government. The practice of refusing the right to work pending receipt of a residence card was in breach of Article 23 of the Citizenship Directive which states:

irrespective of nationality, the family members of a Union citizen who have the right of residence in a Member State shall be entitled to take up employment or self-employment there.

This position, whereby neither the right of residence nor the entitlement to take up employment is dependent upon or postponed to the issue of the residence card by the national authority, effectively removes national control over this group of family migrants.²⁰

Much of the policy and practice discussed above has been justified as necessary to counteract the spectre of "sham marriages," whereby third country nationals enter into

marriages with EU citizens in Ireland for the purposes of obtaining a residence permit. These so-called sham marriages have been the focus of much media and public attention.²¹ The most recent of these initiatives which purported to deal with sham marriages was section 138 of the Immigration Residence and Protection Bill 2010, which provides:

The Minister, in making his or her determination of any immigration matter, may disregard a particular marriage as a factor bearing on that determination where the Minister under this section deems or determines that marriage to be a marriage of convenience.

Section 138(5) set out the factors which the Minister may take into account in reaching such a decision, including, for example, the nature of the relationship between the parties prior to the marriage and whether the parties are each familiar with the other's personal details. This Bill failed to pass through the Houses of the Oireachtas before the dissolution of the Dáil and thus will not become law. It therefore remains to be seen what approach to this issues is taken by the next government. Legislation in this area has been made very likely by the decision of Hogan J in the High Court in *Izmailovic & Anor v Commissioner of An Garda Siochana & Ors*²² in which he clarified that, as the law stands, Gardaí have no power to prevent non-EU citizens entering into a marriage of convenience for immigration purposes, as the Gardaí have no free-standing power to object to a marriage under [section 58 of the Civil Registration Act 2004](#). In fact, as the law stands, a marriage of convenience is not an invalid marriage. While the Minister has the power under the 2006 Regulations to refuse certain rights and entitlements to TCN spouses of EU citizens where it is shown that they entered into a marriage of convenience, the law does not allow for a review of the validity of the marriage before the marriage takes place.²³ For this reason, the arrest and detention of an Egyptian man in an effort to prevent his marriage to a Lithuanian woman (which Gardaí suspected was a marriage of convenience) was deemed unlawful and the release of the man was ordered. Hogan J stated:

I quite appreciate that the decision in this case may present the authorities with very considerable difficulties in this problematic area.... As this decision in its own way illustrates, the problems encountered here are difficult ones and present complex questions of public policy in relation to marriage and immigration. These, however, are ultimately policy questions which only the Oireachtas and, again if needs be, the Union legislature can resolve.²⁴

Refugees and beneficiaries of subsidiary protection

Despite the fact that family reunification is not specifically provided for in the 1951 Convention Relating to the Status of Refugees and Stateless Persons,²⁵ most states provide for family reunification for refugees in their domestic asylum systems and, in general, refugees are treated more generously in terms of family reunification than other categories of migrants.²⁶ In Ireland, family reunification for refugees is governed by section 18 of the Refugee Act 1996, which provides that the Minister "shall" grant permission to family members to enter and reside in the State if he is satisfied that they

are a family member of the recognised refugee.²⁷ “Family members” include spouses, children under eighteen years and parents in the case of refugees less than eighteen years.²⁸ In addition, a second class of family reunification is created for “dependent family members” (which may include a 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), who “may” be granted permission to enter and reside in the State, at the discretion of the Minister.²⁹ Individuals who are granted permission to enter and reside in the State under section 18 are granted the same rights as those extended to recognised refugees under section 3 of the 1996 Act.³⁰

The existence of this statutory framework means that decision-making regarding the family reunification of refugees, while resting with the Minister, is not completely discretionary, in contrast to the situation for all other types of non-EEA migrants. This was confirmed in the decision of Hedigan J in *T v Minister for Justice, Equality and Law Reform*,³¹ in which he confirmed that the principles set out in *Bode v Minister for Justice, Equality and Law Reform* (to the effect that in the case of special administrative schemes the Court would not interfere with the discretion of the Minister) did not apply to the section 18 procedure by which the Minister assesses an application for family reunification. In the instant case, the delay of four years in considering the applicant's request for family reunification was a breach of fair procedures. Unusually for an Irish judge, Hedigan J referred to the broader international and regional context of Irish refugee law, stating:

The administrative IBC/05 scheme that was at issue in *Bode* cannot be compared to the section 18 procedure by which the Minister assesses an application for family reunification; the IBC/05 scheme was not placed on a statutory basis whereas the right to family reunification is grounded not only in s.18 of the Refugee Act 1996 but also in regional and international law and practice.³²

Even more unusually in the context of refugee and immigration law adjudication, Hedigan J emphasised both the constitutional importance of the protection of the family and the centrality of family unity to integration, noting the linkage in Recital 4 of the Family Reunification Directive between family reunification and integration. He opined:

The matter of family reunification is a matter of great urgency and importance. The fundamental importance of the family unit and its right to be protected is enshrined at the heart of the Irish Constitution. It is further protected by Article 16 of the Universal Declaration of Human Rights and Article 8 of the European Court of Human Rights, among other domestic, regional and international instruments.... Thus, family reunification is not only a way of bringing families back together but it is also essential to facilitate the integration of third-country nationals into the State and into the EU.³³

This approach contrasts sharply with the state-centred approach of the Courts to family reunification for those without refugee status. In the case of refugees, the constitutional imperative of protecting the moral institution of the family is invoked to give a greater level of protection for family rights than in the case of other migrants (although the family

reunification regime for refugees can be criticised on the basis of the failure to lay down clear guidelines for the processing, investigation and determination of family reunification applications).³⁴ However it will be seen that this rationale is absent from the reasoning of the courts in the case of families not comprised of refugees. The use of this approach in the case of refugees seems to owe more therefore to the proliferation of international and EU law affecting refugee rights, in addition to the existence of a domestic statutory scheme, rather than the Irish constitutional position in respect of the family.³⁵

Irish citizens

Irish citizens do not have an automatic right to be united with their non-citizen spouse, children or parents in the State³⁶ and the family reunification regime for Irish citizens is based around the concept of ministerial discretion. A non-EEA national who wishes to reside in the State on the basis of their marriage to an Irish national must make an application for permission to remain in the State. The applicant will usually have to provide evidence of the existence of a valid and genuine marriage and of joint residence. It is not guaranteed that such an application will be successful and the Minister retains discretion over all applications. In the case of married couples, the Minister is entitled to take into account, for example, the length of time the applicants have resided together as a family unit, as the approach of the Irish Courts has been that “a state is not bound to respect the choice of residence made by married couples,”³⁷ even where one of the couple is a citizen of the State. In the case of Irish citizen children with non-citizen parents, the Supreme Court in its seminal decision in *AO and LO v Minister for Justice, Equality and Law Reform* found that the Minister was entitled to consider applications for residency of non-citizen parents of Irish-born children on a case-by-case basis, balancing the individual rights in question with the concerns of the State to protect the integrity of the immigration system.³⁸ While the facts of this case did not constitute a classic family reunification situation whereby it is sought to admit family members who are outside the jurisdiction, the decision illustrates the manner in which family rights may be outweighed by concerns relating to the running of the immigration system.

The net effect of the discretionary regime in place in relation to the family reunification of families containing Irish citizens is to place Irish citizens in a more disadvantageous position than nationals of other EU states exercising their freedom of movement rights in Ireland. While the rights of TCN members of EU workers are enforceable through the courts via EU law, the family rights of Irish citizens and non-EEA nationals resident in Ireland continue to be outweighed by a state discretion centred paradigm of immigration control. In Costello's words:

In the absence of political voice, or EC judicial protection for the static EU Citizen, ‘exit’ to the transnational realm becomes the only option. *Metock* should thus prompt deeper reflection on agency, belonging and identity in the EU. National governments’ reflex is to insist on discretionary control over TCN entry to the EU. In contrast, the ECJ’s rights-based approach supports a vision of residence rights in which origins and belonging in the EU are decoupled, and blended families benefit from secure rights and entry and residence along the model established for EU citizens themselves.³⁹

This model stands in stark contrast to the approach taken by the Irish Courts in both the family reunification and the deportation cases, whereby the rights of members of “blended families” comprised of both citizens and non-citizens gravitate towards the lowest common denominator of the restricted rights of the non-citizen members of the family.

The legality of the differential treatment of Irish citizens and EU workers exercising their free movement rights was confirmed by Edwards J in the High Court in *M v Minister for Justice, Equality and Law Reform*, which involved a naturalised Irish citizen seeking reunification in Ireland with her non-citizen mother.⁴⁰ Edwards J disposed swiftly of the applicant's argument that the legal position constituted reverse discrimination against Irish citizens, finding that Irish citizens were not in an equivalent position to a non-Irish EU worker exercising their free movement rights as Irish citizens do not have to exercise rights under the Treaty or any Directive in order to work in the state. In these circumstances, there could be no discrimination and the applicant had not established the substantial grounds necessary for leave to seek judicial review. Moreover, he reasoned that if the applicant were herself to exercise her free movement rights, she would be treated in exactly the same way as any other EU national exercising those rights. Accordingly, if she decided tomorrow morning to move to Spain or to France or to Sweden or to any other EU country, she too would be entitled to have her non-EU national mother accompany her and reside with her in that country. Furthermore, he found that in any case, EU law has always recognised the principle of reverse discrimination, such that “Ireland is entitled to treat the applicants less favourably than a national of another Member State who is in a position to rely upon a specific Treaty right that the applicants are not in a position to avail of.”⁴¹

Other non-EEA migrants

Ireland exercised its right to opt out of Directive 2003/86/EC on family reunification⁴² and consequently the State is not bound by EU law in this regard. The overarching theme of family reunification in the case of non-EEA migrants is ministerial discretion: there is no legislation governing entry and rights of residence specifically for family members of non-EEA migrants and the arrangements are of an administrative nature. It is open to a non-EEA migrant to apply to the Irish Naturalisation and Immigration Service for anyone (including a partner) to be allowed join them in Ireland, however there is no legal certainty about whether such an application will be granted. Family members who are given permission to enter and reside in the State are generally spouses and children under the age of 18.⁴³ Once family reunification is granted, the family members' right to remain in Ireland depends on the sponsor's right to remain, although they may become entitled to a right of residence in their own right, by obtaining a work permit or Green Card. This dependence on the sponsor for legal status may put women in particular in a precarious position and leave individuals vulnerable to domestic violence or abuse.⁴⁴

While extensive discretion forms the basis of family reunification for non-EEA nationals, specific policy approaches are taken in the relevant administrative arrangements for different types of non-EEA migrants.⁴⁵ Holders of work permits are generally permitted to bring their family to live in Ireland after they have been legally working in the country for a year, if they can show that they can support the relevant family members. Spouses and

dependants aged less than 18 may apply for a spousal/dependant work permit once they are legally resident in Ireland on the basis of being a spouse or dependant. Holders of Green Card permits and Scientific Researchers are in a privileged position in that they may bring their family to live with them in Ireland immediately, who may then obtain spousal/dependant work permits. In the converse position are international students, the general policy in relation to which is to refuse to allow family members to join them in Ireland.

The potential for ministerial decisions regarding family reunification to be challenged by way of judicial review is particularly limited in light of the approach of the Supreme Court in *Bode v Minister for Justice, Equality and Law Reform*, where it was held that the Minister did not have to consider the constitutional and human rights of an Irish citizen child when processing an application by his or her parent under a specific administrative scheme. Nevertheless, it is important to note that decisions of the Minister on family reunification *are* in principle open to review. This was clarified in *Khalimov v Minister for Justice, Equality and Law Reform*,⁴⁶ in which the court rejected the Minister's argument that his power to grant or refuse entry visas for the purposes of family reunification was purely discretionary and not reviewable. However, while the courts may review a ministerial decision in this regard, it seems that in practice such a decision will very rarely be overturned. The courts' perception of their role in the family reunification regime is clearly illustrated in *R&H v Minister for Justice, Equality and Law Reform*.⁴⁷ Here, a man who had been granted leave to remain in Ireland for twelve months subsequently entered into an arranged marriage in Sri Lanka and applied for his spouse to join him in Ireland, which application was refused. Clark J in the High Court appeared to have little patience for the application for judicial review of this decision, commenting:

There are some issues in this case which cause surprise. There was a presumption that a person in the husband's position has a right to bring his spouse into the State. As the application is based on a false premise the application is misconceived. It is for the Minister to determine the conditions under which foreign nationals enter, remain and leave the State

–this has been stated on many occasions by the Courts....It is clear that the Minister is under no legal obligation to grant a visa

–the grant or refusal of visas is entirely within his discretion and it is for the visa applicant to convince the Minister that he or she should be granted a visa. Government policy determines which foreign nationals require visas to visit or transit the State and whether they can work in the State.⁴⁸

This passage reveals an extraordinarily state-centred conception of family reunification, and one which appears to clash with the approach of the High Court in *T v Minister for Justice, Equality and Law Reform* as discussed above. However, the judgment in *R&H v Minister for Justice, Equality and Law Reform* is consistent with the reasoning of the Courts generally in dealing with migrant or blended families whose legal position is subject to ministerial discretion, whereby family rights may be treated as outweighed by administrative concerns and the protection of the “common good” by way of the preservation of the integrity of the asylum and immigration system. The approach of the

Courts in these cases is encapsulated in the view of Hardiman J in delivering the judgment of the Supreme Court in *P, B & L -v- Minister for Justice, Equality and Law Reform*, where he stated:

The state's obligation to protect with special care the institution of marriage and protect it against attack cannot, in my view, be invoked to limit the Minister's discretion in relation to an individual applicant whose application for asylum has been refused.⁴⁹

The important position of the family in the Irish constitutional order is therefore displaced in the context of immigration issues by the concerns of migration control. The net effect of these decisions is to render the scope for family reunification decisions to be successfully challenged, on the basis of constitutional rights or otherwise, relatively limited. The decision of the Supreme Court in *Meadows v Minister for Justice, Equality and Law Reform* in which the majority held that the courts, when assessing the reasonableness of administrative decisions in cases affecting fundamental rights, are entitled to consider the proportionality of the decision may lead to a recalibration of the standard of judicial review in these cases with a corresponding reduction in the scope of the discretion of the Minister.⁵⁰ It remains to be seen however whether this recalibration occurs and how significant the impact of this is.⁵¹

Compatibility of the Irish family reunification framework with international law

The Irish courts have proceeded on the basis that family rights may not operate to limit ministerial discretion and that there is no entitlement to family reunification for Irish citizens or non-EU migrants other than recognised refugees. Is this consistent with international law? The difficulties in relation to discerning a right to family reunification in international law are summarised by Cynthia S Anderfuhren-Wayne as follows in assessing the links between family reunification and the right to family unity as enshrined in numerous international instruments:

On the one hand, family reunification calls for the movement of persons from one State to another. On the other hand, outside of specific bilateral or multilateral treaties, there is no right to immigrate and no general duty on the part of States to allow persons to enter their territories. Although, practically speaking, family reunification 'should be considered as a means of implementing the principle of family unity...', under general international law it is merely a policy the force of which is vague and undefined — in effect, a right of unity without a clear means of executing it.⁵²

Article 8 ECHR and family reunification

The ECHR forms part of Irish domestic law via its indirect incorporation at a sub-constitutional level by the European Convention of Human Rights Act 2003. Unlike the majority of national constitutions, the ECHR expressly applies to all persons on the territory of State Parties and the rights contained therein therefore unquestionably extend to immigrants.⁵³ The ECHR has had a significant impact in the sphere of immigration law, to the extent that DeBlacam has observed that "In the Irish experience to date, the ECHR has had its most profound impact in claims initiated by immigrants."⁵⁴

The typical family reunification case before the European Court of Human Rights (“ECtHR”) has concerned the situation where an applicant in a Contracting State maintains that the refusal of that State to allow the entry of a member of his family (most often a child) fails to respect his right to family life. In conceptual terms, the distinguishing feature of these cases is that they concern a positive obligation of the State rather than the negative obligation at play in cases in which it is sought to resist deportation on the basis of family ties in the host state. As the ECtHR has reiterated:

the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in effective ‘respect’ for family life. However, the boundaries between the State’s positive and negative obligations under this provision (art. 8) do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation.⁵⁵

This passage suggests that the principles to be applied in relation to the negative and positive obligations contained in Article 8 are broadly similar. In the early family reunification cases in particular, however, the ECtHR took a very restrictive approach towards applicants making this type of claim, affording states a wide margin of appreciation in determining whether a positive obligation existed at all. It stated in *Abdulaziz, Cabales and Balkandali*, the first of these cases:

as far as positive obligations are concerned, the notion of ‘respect’ is not clear-cut: having regard to the diversity of the practice followed and the situations obtaining in the Contracting States, the notion’s requirements will vary considerably from case to case.⁵⁶

The jurisprudence of the ECtHR shows that the State’s right to control the entry of non-nationals into its territory will rarely be out-weighed by the circumstances of the individual applicants. First, the Court has been clear in its position that Article 8 does not impose on a State “a general obligation to respect the choice by married couples of the country of their matrimonial residence and to authorise family reunion in its territory.”⁵⁷ In assessing the circumstances of the applicants, the Court will consider whether admission is the only way to develop true family life: are there insurmountable obstacles to setting up family life in the country of origin? This is a high hurdle for applicants to overcome, as illustrated by *Gul v Switzerland*⁵⁸ and the subsequent case of *Ahmut v The Netherlands*.⁵⁹ In the controversially harsh decision in *Gul*, the Court found that while the circumstances of the family in question were compelling “very difficult from the human point of view,”⁶⁰ there was no such obligation in this case as there were “strictly speaking, no obstacles preventing them from developing family life in Turkey.”⁶¹ A similar approach was taken in *Ahmut v The Netherlands*,⁶² in which the father had actually obtained Dutch nationality⁶³

It seems that one circumstance in which the Court will find that insurmountable obstacles exist to settling in the country of origin is where the applicant(s) have started a family in

the host country and other children have been born or substantially brought up in that country. Here the Court acknowledges that the State's decision effectively requires the applicants to choose between their children in the host country and those in the country of origin, compelling an impossible choice which does not respect the applicants' right to family life.⁶⁴ This formed the basis of the reasoning of the Court in *Sen v The Netherlands*⁶⁵ and *Tuquabo-Tekle v The Netherlands*,⁶⁶ which seemed to signal a shift towards a less restrictive attitude of the Court towards these cases.⁶⁷ However, the limited number of cases which make it past the admissibility stage illustrates how difficult it remains to succeed in these cases.⁶⁸

As noted above, the influence of the ECHR in Irish immigration judicial review cases is pervasive. The Irish courts have been expressly considering the deportation cases in the light of the ECtHR's jurisprudence under Article 8 since the *AO and LO* judgment,⁶⁹ and are required to do so since the indirect incorporation of the ECHR into Irish law by the European Convention of Human Rights Act 2003. It is well-established that the Minister is required to consider the Convention rights of the applicants in the context of his decision to deport a parent of an Irish-born child under section 3 of the Immigration Act 1999.⁷⁰ The Article 8 jurisprudence of the ECtHR is consistently referred to in the case law, and has in this way infused constitutional decision-making in the sphere of immigration law. However, there have been very few instances where the courts have been required to apply the Article 8 case law in a family reunification as opposed to a deportation situation.

Despite the dearth of case law in this area, the approach of the High Court in *Khalimov v Minister for Justice, Equality and Law Reform*⁷¹ may give some indication of how the Irish courts will approach these cases. The applicant was a national of Uzbekistan whose mother, half sister and step father lived in Ireland pursuant to the Irish-Born Child 05 scheme. His sister was permitted to join them in 2009. The Minister had refused to grant the applicant a visa to enter and live in the State and the applicant sought to judicially review that decision. He challenged the legality of the decision on the basis of, amongst other things, the failure of the Minister to consider his individual circumstances and his right to respect for private and family life pursuant to Article 8 ECHR. Clark J found that the applicant did not in fact enjoy any Article 8 rights in the circumstances as the requisite family ties did not exist (the applicant was not a minor and was not dependent on his parents) and in addition, Uzbekistan was not a Contracting Party to the ECHR - raising the issue of the extra-territorial application of the ECHR. Although this effectively disposed of the Article 8 point, Clark J went on to note that even if the ECHR did apply, Article 8 does not guarantee the right to choose the most suitable place to family life, and that the *Sen* decision meant that it was only where the family cannot be reunited elsewhere that states are compelled to allow family reunification within their borders. It thus seems that the Irish courts will take a narrow view of the State's family reunification obligations under Article 8 ECHR. Nonetheless, the implications of this judgment are that in the right circumstances, Article 8 could apply, leaving the door open for its application in future family reunification cases.

UN Human Rights Treaties

The European Court of Human Rights has been slow to develop an extensive right to family reunification in the positive sense of requiring states to admit family members of migrants living in the state (although it has required states to do this on a number of occasions). Similarly, while the right to freedom from interference with family life and the right to the family are protected under the International Covenant on Civil and Political Rights (“ICCPR”), there is no clear and unambiguous right to family reunification under that instrument even though the right to family unity contained in Article 23 is a positive rather than a negative right.⁷² In its General Comment on the position of aliens under the ICCPR the Human Rights Committee (“HRC”) noted that the Covenant does not recognise the right of aliens to enter or reside in the territory of a state party - it is, in principle, a matter for the state to decide who it admits to its territory. This key principle constitutes the critical difficulty with any attempt to establish the existence of a right to family reunification in international law. However, the General Comment stresses that, “in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.” The Human Rights Committee has also determined that states are under a duty to take measures to “ensure the unity or reunification of [refugee] families.”⁷³ In Hathaway's view, the question of when such affirmative efforts are sufficient will likely be measured in relation to the usual “reasonableness” standard meaning that conditioning family reunification on sponsor's ability to support them, or public policy or security would be acceptable once it didn't stray into the realm of the arbitrary.⁷⁴ The provisions of the ICCPR relating to the family thus represent a rather limited constraint on the general power of states to determine who may enter and reside in their territory. In addition, as the ICCPR does not form part of domestic law, it would be very difficult for an individual applicant to seek to rely on the ICCPR in front of an Irish court. Nevertheless a refusal to permit family reunification could (in circumstances where the decision is arbitrary and unreasonable) result in the state being in breach of its international legal obligations under the ICCPR.

Family reunification is expressly referred to in the Convention on the Rights of the Child (“CRC”) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (“CMW”), although neither instrument provides an unqualified “right” to family reunification.⁷⁵ In its concluding comments on Ireland's state report, the Committee for the Rights of the Child commented on the narrow scope of family reunification entitlements in Irish immigration law:

The Committee notes that the Refugee Act of 1996 provides for an adequate legal framework for family reunification. However, family reunification in accordance with article 10 of the Convention also applies to other situations, including migration. The Committee is concerned that family members seeking reunification do not have access to procedural information, and that the principle of the best interests of the child is not taken into account in the decision-making process.⁷⁶

The Committee recommended *inter alia* that Ireland consider establishing a legal framework for family reunification outside situations under the Refugee Act.⁷⁷ It is a

matter of some debate as to whether - under the CRC in particular - a right to family reunification has begun to develop in international law.⁷⁸ On this basis, the Irish system relating to the family reunification of non-EEA family members could be incompatible with the international framework. The intricacies of this debate are beyond the scope of this article. From an Irish perspective however, it is sufficient to note that the practical impact of the development of a "right" to family reunification under the CRC and the CMW is limited. Ireland is not a party to the CMW, and the provisions of the Convention on the Rights of the Child have not been incorporated into domestic law. Overall, in practical terms the nebulous right to family reunification in international human rights law is likely to make little impact on the Irish administrative regime on family reunification.

Conclusion

Significant change in the area of family reunification for non-EU migrants seems unlikely, in the near future at least. The Immigration, Residence and Protection Bill 2010 failed to address family reunification and if and when legislation is passed to overhaul the immigration system, Ireland may still be the only country in Europe without a legislative regime for family reunification.⁷⁹ In the meantime, the legal regime for family reunification in Ireland remains characterised by a patchwork of differentiated rules and policies - shaped partly by EU law, partly by international refugee law, and mainly by the principle of executive discretion in the field of immigration law. While this discretion-centred paradigm is undoubtedly placed under pressure by developments in the field of EU and international law, meaningful development at the level of international law continues to be inhibited by the principle on which this paradigm is based: the sovereign power of states to decide who may be admitted to their territory.

This journal may be cited as e.g. (2009) 31 D.U.L.J. (ns) 1 [(year) (Volume number) D.U.L.J. (ns) (page number)]

[1.](#)

This journal may be cited as e.g. (2009) 31 D.U.L.J. (ns) 1 [(year) (Volume number) D.U.L.J. (ns) (page number)]

Dublin University Law Journal 2011, 2, 221-241



-
- *. Solicitor, McCann Fitzgerald. This note is based on part of a PhD thesis submitted to Trinity College, Dublin; I am grateful to my supervisor, Dr Rosemary Byrne, for her comments in that regard.
 2. International Labour Conference, 59th session, 1974, Report VII (I), *Migrant Workers*, 1973, at 27.
 3. For example, the Irish Ministerial strategic statement on integration does not mention family reunification. *Migration Nation: Statement on Integration Strategy and Diversity Management* (Office of the Minister for Integration, April 2008). Irish official discourse on integration has to date avoided reference to family reunification as a potential tool for integration. This reflects policy and practice in other European states. UNHCR noted in a recent report on integration that none of the European countries researched for the report emphasised facilitation of family reunification as part of their integration efforts. UNHCR, "Mapping Integration: UNHCR's Age, Gender and Diversity Mainstreaming Project on Refugee Integration in Ireland – 2008/2009" (UNHCR, 2009), at 10.
 4. National Economic and Social Council in conjunction with the International Organisation for Migration, *Managing Migration in Ireland: An Economic and Social Analysis* (IOM, 2006), at 158.
 5. Rainer Bauböck, Eva Ersbøll, Kees Groenendijk and Harald Waldrauch eds, *Acquisition and Loss of*

Nationality: Policies and Trends in 15 European States (Institute for European Integration Research, 2006), at chapter 8.

6. TC v Minister for Justice, Equality and Law Reform[2005] 4 IR 109, at 111 *per* Fennelly J (SC).
7. See by way of example Claire Breen, "Refugee Law in Ireland: Disregarding the Rights of the Child Citizens, Discriminating Against the Rights of the Child" (2003) 15(4) *IJRL* 503; Siobhán Mullally, "Citizenship and Family Life in Ireland: Asking the Question 'Who Belongs?'" (2005) 25 *Legal Studies* 578; Siobhán Mullally and Liam Thornton, "The Rights of the Child, Immigration and Article 8 in the Irish Courts" in Ursula Kilkelly ed, *The ECHR and Irish Law* (2nd ed, Jordan Publishing, 2009), at 146.
8. Jastram and Newland, note 1, at 576.
9. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States OJ L/158, 30 April 2004. See for example Articles 3 (beneficiaries of the Directive), 5 (right of entry), 6 (right of residence for up to three months), 7 (right of residence for more than three months), 9 (administrative formalities).
10. See Case C-413/99 Baumbast [2002] ECR I-07091; Case C-200/02 Zhu and Chen [2004] ECR I-09925.
11. Case C-127/08, Blaise Baheten Metock, Hanette Eugenie Ngo Ikeng, Christian Joel Baheten, Samuel Zion Ikeng Baheten, Hencheal Ikogho, Donna Ikogho, Roland Chinedu, Marlene Babucke Chinedu, Henry Igboanusi, Roksana Batkowska v Minister for Justice, Equality and Law Reform, judgment of 25 July 2008.
12. Case C-109/01, Secretary of State for the Home Department v Hacene Akrich, [2003] ECR I-9607, at [50].
13. Case C-1/05, Jia v Migrationsverket, [2007] ECR I-1.
14. Case C-291/05, Minister voor Vreemdelingenzaken en Integratie v Eind, [2007] ECR I-10719.
15. SI 656/2006 European Communities (Free Movement of Persons) (No 2) Regulations 2006. Regulation 3(1) and (2) introduced the limitation that the Regulations would not apply to a family member unless that family member had been lawfully resident in another Member State.
16. The scope of regulations 3(1) and (2) was amended by SI 310/2008 in order to accommodate the ruling in *Metock*, which deleted the requirement that the Regulations would not apply to a family member unless that family member had been lawfully resident in another Member State.
17. On the implications of the *Metock* decision and the emergence of reverse discrimination, see Alina Tryfonidou, "Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach" (2009) 15(5) *ELJ* 634.
18. [2010] IEHC 85.
19. [2010] IEHC 342. See "New working restrictions repealed after legal defeat," *Irish Times*, 5 August 2010.
20. On the courts' approach to other elements of the application and review process under the European Communities (Freedom of Movement of Persons) (No 2) Regulations 2006 and 2008, see for example *EI Menkari v Minister for Justice, Equality and Law Reform* [2011] IEHC 29; *Mohamud v Minister for Justice, Equality and Law Reform* [2011] IEHC 54; *Lamasz v Minister for Justice, Equality* [2011] IEHC 50; and *Chikhi v Minister for Justice, Equality and Law Reform* [2011] IEHC 53.
21. By way of example, see "Registrar warns of rapid rise in 'sham marriages'," *Irish Times*, 17 August 2010; and "Gardaí object to 57 suspected 'sham' marriages," *Irish Times*, 18 August 2010.
22. [2011] IEHC 32.
23. See regulation 2(1) of the 2006 Regulations which provides that the word "spouse" does not include a party to a marriage of convenience and regulation 24 on "Cessation of Entitlements."
24. [2011] IEHC 32, at 72.
25. Although the 1951 Convention provides protection for the refugee family in a number of articles, including Article 22 on access to education for refugee children and Article 12(2) which provides that rights attaching to marriage shall be respected.
26. For example, family members of refugees are not generally required to pass integration tests in countries in which integration conditions are placed on family reunification. See also Patricia Brazil, "Recent Issues in Refugee Family Reunification under Irish Law" (2009) 16(1) *DULJ* 412.
27. Section 18(3)(a) Refugee Act 1996.
28. Refugee Act 1996, section 18(3)(b).
29. Refugee Act 1996, section 18(4)(a) and (b).
30. See section 18(3)(a) and section 3 of the Refugee Act 1996.
31. [2008] IEHC 361.
32. *Ibid*, at [17].
33. *Ibid*, at [14] and [15].
34. See Patricia Brazil, "Recent Issues in Refugee Family Reunification under Irish Law" (2009) 16(1) *DULJ* 412. Brazil notes, at 412, that: Section 18 is remarkably lacking in detail in respect of crucial aspects of the family reunification process: what is the extent and nature of the "investigation" to be conducted by the Refugee Applications Commissioner? Is the Minister required, or even permitted, to conduct his own investigations upon receipt of the Commissioner's report? Does the family reunification procedure permit or

require oral interview, or must it be an application on the papers only? What is the definition of “dependency”? The main criticism of the refugee family reunification regime in Ireland, according to UNCHR, is the processing time, “which can take up to 18 or 24 months” (UNHCR, “Mapping Integration: UNHCR’s Age, Gender and Diversity Mainstreaming Project on Refugee Integration in Ireland – 2008/2009,” at 86).

35. The protection afforded by the statutory scheme to refugee families is further illustrated by the decisions in *Hamza v Minister for Justice, Equality and Law Reform*[2010] IEHC 426 and *Hassan v Minister for Justice, Equality and Law Reform*[2010] IEHC 427. In these cases, Cooke J found that a purposive interpretation of section 18(3)(b) of the Refugee Act 1996, consistent with the approach taken in EU and international guidance, lead to the conclusion that the recognition of the marital relationship of spouse and refugee ought not to be confined to cases in which proof is forthcoming of a marriage validly solemnised in foreign law and recognisable in Irish law. Thus, “a refugee who is able to demonstrate the existence of a subsisting and real marital relationship with the person the subject of the application is entitled to have that marital relationship recognised for the purposes of section 18 unless some reason of public policy intervenes to prevent its recognition” *per* the judgment in *Hamza*, at para 39.
36. *TC v Minister for Justice, Equality and Law Reform*[2005] 4 IR 109 (in relation to spouses), approved in *Oguekwe v Minister for Justice, Equality and Law Reform*[2008] 3 IR 795; *AO and LO v Minister for Justice, Equality and Law Reform*[2003] 1 IR 1 (in relation to parents of Irish citizen children).
37. *TC v Minister for Justice, Equality and Law Reform*[2005] 4 IR 109.
38. *AO and LO v Minister for Justice, Equality and Law Reform*[2003] 1 IR 1.
39. Cathryn Costello, “Free Movement and ‘Normal Family Life’ in the Union” (2009) 46(2) *CMLR* 587, at 593.
40. [2009] IEHC 500.
41. *Ibid*, at [81] and [82].
42. Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification OJ L 251/13.
43. It is not the general policy to allow dependants over the age of 18 to join family members in Ireland.
44. See Immigrant Council of Ireland, *The Feminisation of Migration: Experiences and Opportunities in Ireland* (ICI, 2008), at 4.
45. These policy approaches are outlined and updated on the website of the Irish Naturalisation and Immigration Service.
46. [2010] IEHC 191.
47. [2009] IEHC 279.
48. *Ibid*, at [25]. These comments are echoed in *HU v Minister for Justice, Equality and Law Reform*[2010] IEHC 371, in which Clark J stated at para 54: The choice the wife now faces is whether to remain in Ireland and raise her son here without her husband, or to relocate to Nigeria with him and raise their son together there. This is a choice faced by many couples who come from different countries or even different parts of large countries. Married inter-racial or inter-religious couples often face choices which involve compromise and sacrifices in relation to their choice of residence, standards or beliefs. Adults who marry must make these decisions themselves without seeking the answers in constitutional rights which are neither guarantees nor immunities but must be seen in the context of social order and the common good.
49. [2002] 1ILRM 16.
50. [2010] IESC 3.
51. For a critique of *Meadows* and its implications, see Alan Brady, “Proportionality, Deference and Fundamental Rights in Irish Administrative Law: The Aftermath of *Meadows*” (2010) 17(1) *DULJ* 136.
52. Cynthia S Anderfuhren-Wayne, “Family Unity in Refugee and Immigration Matters: United States and European Approaches” (1996) 8(3) *IJRL* 347, at 351.
53. Article 1 of the ECHR states that “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”
54. Mark De Blacam, *Judicial Review* (2nd ed, Tottel, 2009), at [18.19].
55. *Abdulaziz, Cabales and Balkandali v United Kingdom*(1985) [EHRR 471](#), at [67].
56. *Ibid*.
57. *Abdulaziz, Cabales and Balkandali v United Kingdom*(1985) [EHRR 471](#); *Gul v The Netherlands*(1996) [22 EHRR 93](#); *Ahmut v Netherlands*(1996) 24 EHRR 62; *Sen v The Netherlands* Application No. 31465/96, judgment of 21 December 2001.
58. [\(1996\) 22 EHRR 93](#). It is particularly difficult for applicants to succeed where the separation was caused by a deliberate and voluntary decision on the behalf of the parent or parents, as was the case in *Ahmut*.
59. (1996) 24 EHRR 62.
60. [\(1996\) 22 EHRR 93](#), at [42].
61. *Ibid*. In a strong dissenting opinion, Judge Martens criticised what he viewed as the artificial distinction drawn by the majority between positive and negative obligations, and concluded that the interference with family life was in this case disproportionate and violated Article 8, particularly as it effectively required the parents to choose between renouncing their son and renouncing their daughter who was settled in Switzerland. In his view, there had to be a limit to the Court’s deference to domestic immigration law and

- policy. See [9].
- [62.](#) (1996) 24 EHRR 62.
- [63.](#) There were four dissenting judges in this case, including Judge Valticos who stopped just short of accusing the Dutch government of racism, given that the father in this case was a Dutch national.
- [64.](#) *Sen v The Netherlands*, at [41].
- [65.](#) Application No 31465/96, judgment of 21 December 2001.
- [66.](#) Application No 60665/00, judgment of 1 December 2005.
- [67.](#) See Nicola Rogers, "Immigration and the European Convention on Human Rights: Are New Principles Emerging?" (2003) *European Human Rights Law Review* 53, at 64, where the author expresses the opinion that the *Sen* case signalled a "move away from state interests engendered by a greater emphasis on the need to fulfil positive as well as negative obligations under Article 8."
- [68.](#) See for example *Benamar v the Netherlands* (dec), Application No 43786/04, 5 April 2005; *IM v the Netherlands* (dec), Application No 41266/98, 25 March 2003; and *Chandra and Others v the Netherlands* (dec), Application No 53102/99, 13 May 2003.
- [69.](#) See generally Siobhán Mullally and Liam Thornton, "The Rights of the Child, Immigration and Article 8 in the Irish Courts," in Ursula Kilkelly (ed) *The ECHR and Irish Law* (2nd ed, Jordans Publishing 2009), at 146.
- [70.](#) *Oguekwe v Minister for Justice, Equality and Law Reform*[2008] 3 IR 795, at 823.
- [71.](#) [2010] IEHC 191.
- [72.](#) See the General Comment.
- [73.](#) See HRC General Comment 19: The Family *General Comment No. 19: Protection of the family, the right to marriage and equality of the spouses (Art. 23)*, 27 July 1990. *CCPR General Comment No 19. (General Comments)*.
- [74.](#) James Hathaway, *The Refugee in International Law* (Oxford University Press, 2007), at 516.
- [75.](#) Article 10 of the CRC states: "In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family." Article 44(2) provides: "States Parties shall take measures that they deem appropriate and that fall within their competence to facilitate the reunification of migrant workers with their spouses or persons who have with the migrant worker a relationship that, according to applicable law, produces effects equivalent to marriage, as well as with their minor dependent unmarried children."
- [76.](#) Hathaway argues in the context of discussing refugee rights that "Article 23(3) is a standard against which the sufficiency of an asylum state's *affirmative* efforts to preserve family unity, including by way of reunification efforts, can legitimately be measured." Hathaway, *The Refugee in International Law* (Oxford University Press, 2007), at 540.
- [77.](#) Recommendation, at para (b).
- [78.](#) Jastan and Newland argue that such a right is under construction: see note 1. For a different viewpoint, see Cynthia S Anderfuhren-Wayne, "Family Unity in Refugee and Immigration Matters: United States and European Approaches" (1996) 8(3) *IJRL* 347. Although Professor Hathaway attempts to make a case for the recognition of a customary legal norm to protect the family unity of refugees, even he acknowledges in the context of refugee law that on close examination "it is clear that while there is a continuing insistence that the family members of a primary applicant refugee should be admitted to protection, most refugee-specific formulations fail to define with any precision the content of an affirmative dimension of the principle of family unity." Hathaway, note 76, at 545.
- [79.](#) See Immigrant Council of Ireland, *Information Update on Immigration Matters* (May 2009), at 9.
- [1.](#) See Kate Jastram and Kathleen Newland, "Family Unity and Refugee Protection," at Chapter 9.1, at 555 in Erica Feller, Voller Turk and Frances Nicholson eds, *Refugee Protection in International Law* (Cambridge University Press, 2003), in which the writers emphasise the importance of family reunification to integration in the following terms. In the refugee context, see UN High Commissioner for Refugees, Executive Committee of the High Commissioner's Programme (ExCom), *Conclusion on Family Reunification*, (No. 24 XXXII – 1981), at [2]. In the Irish context, see Immigrant Council of Ireland, *Getting On: From Migration to Integration* (Immigrant Council of Ireland, 2008), at 148.