MIGRANT ACCESS TO WELFARE PAYMENTS IN IRELAND AND THE IMPACT OF EUROPEANISATION: COMPARING EU CITIZENS AND THIRD-COUNTRY NATIONAL LABOUR MIGRANTS

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Plagiarism Declaration

I hereby certify that this material, which I now submit for assessment on the programme of study leading to the award of PhD in Law, is entirely my own work and has not been taken from the work of others save and to the extent that such work has been cited and acknowledged within the text of my work.

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Abstract

This thesis seeks to establish how welfare payments are provided in Ireland for two categories of migrants: mobile European Union citizens; and third-country national labour migrants; the barriers that restrict their access to the welfare system, and the extent to which the process of 'Europeanisation' has affected welfare provision in Ireland for both. In order to achieve this, the thesis utilises a socio-legal method of analysis, which includes theoretical, doctrinal and non-legal strands.

What it finds, is that both the relevant Irish and EU welfare rules are quite restrictive and market-based. However, they diverge in terms of their initial starting points. EU law has primarily universalist ambitions in terms of facilitating migrant access to the welfare state, but this is not reflected within the rules themselves. Ireland, by comparison, became more restrictive as an almost direct consequence of its first significant experience of inward migration.

It also establishes that, whilst EU law has developed quite significantly within this field, the impact of Union welfare rules on the everyday behaviour of the Irish State in providing welfare payments is limited, in large part due to the Irish State's lack of technical expertise in EU, and national, welfare law, and the way in which the administration continues to operate. In almost every other respect, Ireland would appear to be a strong example of the impact of Europeanisation.

Finally, the thesis argues that this lack of technical expertise, and the opaqueness of the Irish system, create the most significant barriers to accessing welfare payments for both categories of migrants - despite the different legal regimes that govern each of them. Specific barriers do arise for both categories, but these are of lesser significance than the highly opaque and often arbitrary way in which Irish administrative procedures operate at the micro level.

INTRODUCTION

1. Introduction

This thesis seeks to examine welfare provision for two different categories of migrants - mobile European Union (EU) citizens and third-country national (TCN) labour migrants - present in Ireland. It utilises a comprehensive socio-legal methodology, incorporating both theoretical and practical strands. This firstly necessitates exploring what 'mode' of welfare provision Ireland most closely aligns with in respect of each category of migrant, as well as the effect that EU law has had on this mode of welfare provision - often referred to as the process of 'Europeanisation.' Finally, it will examine the practical barriers that often hinder migrants in accessing welfare payments under the EU and Irish rules that apply to them. The analytical framework for this thesis has three aspects: theoretical; legal or doctrinal; and socio-legal.

The theoretical element relates to the mode of welfare provision utilised in Ireland as well as at the European Union level, using what are referred to as the 'universalist' and 'specific' modes as the most commonly utilised in developed States. These modes represent two points on a global spectrum, and the thesis seeks to establish with which mode of welfare provision the EU and Irish welfare systems most closely align. The doctrinal and socio-legal elements inform this analysis in two ways. First, by examining the constitutional and legislative provisions and acts governing welfare provision. Then, by providing evidence of how the Irish and EU welfare systems operate in practice based upon the mode with which they most closely align, and where practice may diverge from a strict reading of the relevant laws or rules in place.

This framework will be used to evaluate the three central questions of the thesis, which are:

(i) With which mode of welfare provision do the (a) Irish and (b) European Union welfare systems most closely align in respect of EU citizens and TCN labour migrants?

(ii) What impact has the expansion of EU law had on welfare provision in Ireland for both categories of migrants (the degree of 'Europeanisation')?

(iii) What are the legal and practical barriers which make accessing welfare payments more difficult for EU citizens and TCN labour migrants?

The following sections will address some of the core definitions and terminology which will be used throughout the thesis. They will then outline the structure of the remaining chapters of the thesis, as well as the methodology used as its basis. Broad concepts such as the modes of welfare provision and Europeanisation will be explored in Chapter Two.

1.1.1 Introducing and Defining Key Concepts Related to Welfare Provision

Following the end of World War II, European States engaged in a period of unprecedented economic redistribution and intervention within their national economies. Market failures of almost any kind were viewed as sufficient grounds for greater State control of the economy.[1] This fit within a wider conceptual framework, according to which *'*the political machinery of the nation could be used to improve the lot of mankind and helped given post-war national politicians the justificatory ideology they needed.'[2] The State's responsibility towards its citizens morphed into one based on 'the comprehensive responsibility for the subsistence and development of society in cultural, economic and social terms.'[3] These new ways of organising the State blended capitalism with social objectives,[4] and acted as a compromise between classical socialist and liberal economies.[5] These new hybrid economic models varied State by State, however, the overarching intent was that 'never again will doles and subsistence levels be tolerated' among the poor and working poor.[6]

The primary apparatus through which the State engages in redistribution is often referred to as the '*welfare state*.' Although it can be taken to mean different things in separate contexts,[7] the welfare state governs 'all publicly provided and subsidised services,

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[1] G. Malone, *Regulating Europe* (Routledge, 1996); A.S. Milward & V. Sorensen, 'Interdependence or Integration? A National Choice' in A.S. Milward, F.M.B. Lynch, F. Romero, R. Ranieri & V. Sorensen (eds.), *The Frontier of National Sovereignty: History and Theory 1945-1992* (Routledge, 2015).

[2] A.S. Milward, *The European Rescue of the Nation-State* (Routledge, 2000), 41-42.

[3] D. Grimm, 'Il Futuro Della Costituzione' in G. Zagrebelsky, P. Paolo Portinaro & J. Luther (eds), *Il Futuro Della Costituzione* (Einaudi, 1996), 143.

[4] T. Judt, *Postwar: A History of Europe Since 1945* (Penguin, 2005), 777 et seq.

[5] M. Kleinman, *A European Welfare State? European Union Social Policy in Context* (Palgrave, 2002). Additionally, some other States engaged directly with Marxist economic principles.

[6] W.H. Beveridge, *Full Employment in a Free Society* (2nd edn, Allen and Unwin, 1967), 249; N. Barr, *The Economics of the Welfare State* (3rd edn, OUP, 1998); and M. Panic, *Globalisation and National Economic Welfare* (Palgrave Macmillan, 2003).

[7] D. Garland, *The Welfare State. A Very Short Introduction* (Oxford University Press, 2006).

statutory, occupational and fiscal,'[8] and can broadly be considered 'a state which through its state structure, social policy, and institutions allows its inhabitants a *level of decommodification*; they can opt out of work for a period of time and there still exists a safety net in the form of public social support.'[9] Or, as Esping-Andersen opined, it reduces the importance of the labour market 'as the chief determinant of peoples' life chances.'[10] Consequently, an individual's class and personal financial resources are not their primary means of survival when certain insurable risks or life events occur,[11] and decommodification revolves around the idea of making engagement with the labour market and being employed less important at the individual and societal level. The welfare state may include services such as public healthcare, education, vocational training, or perhaps most importantly, welfare payments. The '*welfare system*' is the specific redistributional arm of the welfare state that administers welfare payments, although both 'welfare state' and 'welfare system' have been used somewhat interchangeably over time.

For the purposes of this analysis, '*welfare payment*' is used as the umbrella term for direct financial transfers from the State to its citizens - including social security and social assistance payments - which aim to redress different forms of imbalances within society at a personal level. Welfare payments are often referred to as a 'social right.' Rights are often divided into the more common civil and political - which are considered to be 'first generation' rights - and social rights.[12] The latter are often seen as the final stage in the evolution of a society,[13] as these are rights which inherently necessitate

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[8] P. Alcock & H. Glennerster (eds.), *Welfare and wellbeing: Richard Titmuss' Contribution to Social Policy* (Policy Press, 2001), 118. See also, H.K. Girvetz, 'Welfare State' in D.L. Sills (ed.) *International Encyclopedia of the Social Sciences* (Vol 16, Mac Milian 1968), 512.

[9] A. Ingvarsson, 'Migrants and the Welfare State: An Examination of Variation in Migrants' Access to Social Benefits' <https://www.ibei.org/migrants-and-the-welfare-state-an-examination-of-variation-in-migrants-access-to-social-benefits_37765.pdf> accessed 14/12/2017, 2.

[10] G. Esping-Andersen, *Politics against Markets: The Social Democratic Road to Power* (Princeton University Press, 1985), 245.

[11] T.H. Marshall, 'Citizenship and Social Class' in T.H. Marshall & T. Bottomore (eds.), *Citizenship and Social Class* (Pluto Press, 1992).

[12] These may also be referred to as socio-economic rights.

[13] T.H. Marshall, 'Citizenship and Social Class' in T.H. Marshall & T. Bottomore (eds.), *Citizenship and Social Class* (Pluto Press, 1992).

positive intervention and redistribution[14] - such as the right to access welfare programmes. Or, as Garland argues, '[t]he most important difference is that social rights often involve transfers and forms of provision that are more expensive and more redistributive than other rights.'[15]

With regards to how welfare payments are categorised or subdivided, the distinction between these two larger umbrella terms has become increasingly blurred over time in almost all jurisdictions that utilise these categorical distinctions. However, *social security* has historically been classified as a category of payments 'payable as of right, based on contributions paid by a worker and his or her employer and generally related to previous earnings,' with *social assistance* being '[often] a local or regional payment, payable in many cases on a somewhat discretionary basis, based on an assessment of need of the person (and his or her wider family or household), and set at a level to provide a minimum income in the particular country or region.'[16] Thus, both of these broad categories of payments segment those who are in need of state assistance into different strands, with the potential being that those who have worked previously and are therefore entitled to social security are provided with a more concrete set of rights. The degree to which any individual State makes this distinction at a practical and legal level is subject to other factors.

1.1.2 Who Is a Migrant?

The meaning of the term 'migrant' is quite malleable and subject to change.[17] It is one which is context dependent, and subject to the intentions of the individual that uses it. Migrants are predominantly considered to be those who cross some form of border and relocate to an area other than that from which they originated. These borders may be internal - within a State - or external - between States - making the movement international in character.

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[14] See C. O'Cinneide, 'Austerity and the Faded Dream of a 'Social Europe' in A. Nolan, (ed.) Economic and Social Rights after the Global Financial Crisis (Cambridge University Press, 2014), 169-201; T. Judt, *Postwar: A History of Europe Since 1945* (Penguin, 2005), 777 et seq.

[15] D. Garland, 'On the Concept of 'Social Rights' 24(4) *Social and Legal Studies* (2015) 622, 627.

[16] M. Cousins, 'Social security, social assistance, and "special noncontributory benefits": the never-ending story', 1 <http://works.bepress.com/mel_cousins/41/> accessed 01/03/2016. This definition of or distinction existing between the two categories is broadly supported by others such as C. Fombad, 'An Overview of the Constitutional Framework of the Right to Social Security with Special Reference to South Africa' (2013) 21 *African Journal of International & Comparative Law* 1.

[17] E. Luibheid, *Pregnant on Arrival: Making the Illegal Immigrant* (University of Minnesota Press, 2013).

Contemporary scholars have, for example, argued that we are now in 'the age of migration,'[18] wherein mobility is the 'norm of our species.'[19] There are multiple forms that migration may take, and many of these are often under-represented within scholarly literature and studies. These include short-term circular migration,[20] undocumented migration,[21] and those that migrated but subsequently took citizenship of their host State.[22]

This thesis accepts the definition currently utilised by the Department of Economic and Social Affairs within the United Nations, which defines a migrant as 'someone who changes his or her country of usual residence, irrespective of the reason for migration or legal status.'[23] In this respect, an international border between States is being crossed. The thesis does however qualify this, by limiting it to *lawful* migration, as lawful migrants are entitled to welfare payments in a way that undocumented migrants are not.[24] It further focuses on mobile EU citizens and lawfully present TCN labour migrants, as both are categories of migrants governed by explicit rules under Irish and European Union law, and for whom access to the welfare system is expressly regulated. Both have also crossed international borders, and have, as such, migrated from one State to another.

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[18] S. Castles & M.J. Miller, *The Age of Migration: International Population Movements in the Modern World* (Palgrave Macmillan, 2009).

[19] N. Glick Schiller & N.B. Salazar, 'Regimes of Mobility Across the Globe' (2013) 35(2) *Journal of Ethics and Migration Studies* 177, 185.

[20] S. Castles & M.J. Miller, *The Age of Migration: International Population Movements in the Modern World* (Palgrave Macmillan, 2009), 67-70; and D. Ralph, '"Always on the Move But Going Nowhere Fast": Motivations for "Euro-Commuting" Between the Republic of Ireland and other EU States' (2015) 41(2) *Journal of Ethnic and Migration Studies* 176 for a discussion on migrants from EU Member State commuting to another purely for the purposes of carrying out employment.

[21] M. Jandl, 'Methods, Approaches and Data Sources for Estimating Stocks of Irregular Migrants,' (2012) 49(5) *International Migration* 53.

[22] J. Lee, 'US Naturalisations: 2011' (2012) Department of Homeland Security, Office of Immigration Statistics <www.dhs.gov/xlibrary/assets/statistics/publications/natz_fr_2011.pdf> accessed 01/02/2017.

[23] UN Refugees and Migrants, 'Definitions' <https://refugeesmigrants.un.org/definitions> accessed 02/09/2018.

[24] See, for example, E. Quinn, E. Gusciute, A. Barrett and C. Joyce, 'Migrant Access to Social Security and Healthcare: Policies and Practice in Ireland' (ERSI, July 2014), which outlines the extremely limited recourse that undocumented migrants have to the welfare state and welfare system in Ireland.

1.2 Outline of the Thesis

1.2.1 Chapter Two - Outlining the Theoretical and Legal Scope of the Thesis

Following on from this brief chapter, Chapter Two will complete this introductory section by outlining what is meant by one of the most fundamental concepts which will be utilised throughout this thesis - the modes of welfare provision.

This will then be followed by a number of sections which detail some of the deeper contextual questions which underline the nature of the research questions posed within the thesis, and on which it is built. This includes: the relationship between migration and welfare; the justifications often provided to restrict migrant access to welfare payments; what is meant by 'Europeanisation;' how migrants provide a prism through which we can view a society's attitude towards welfare provision more generally; the decision to examine EU welfare rules; and why Ireland provides an interesting case study on each of these points, as well as its suitability for the overall research questions posed.

These points will then be returned to in Chapter Seven, which ties together the research conducted in the substantive chapters with these larger theoretical and legal strands.

1.2.2 Section 1 - Unravelling the Complex Doctrinal Rules Relating to Welfare Provision at an EU and Irish level

Section One will concern itself with outlining and critically evaluating the complex legal rules for welfare provision that exist at both the EU and Irish levels respectively. Welfare rules are notoriously complex, as confirmed by this examination of the two separate legal systems. As these rules are set out and explained, this section will evaluate which mode of welfare provision the Irish and EU welfare systems most closely align with along this broader spectrum. It will also elucidate some of the most common barriers to accessing welfare payments. Thus, it focuses primarily on the first and third research questions posed by this thesis.

Chapter Three deals with the EU welfare rules on welfare coordination, a system which facilities access to the national welfare system of an EU Member State for both EU citizens and TCN labour migrants. It examines the legal rules relating to both categories in tandem, exploring the constitutional competences of the Union to enact welfare legislation for each, before moving on to how social security and assistance are leg-

islated for in respect of each category. An integrated approach such as this is novel, and allows for an internal comparison of how EU law distinguishes *within* the broad categories of EU citizens and TCN labour migrants, as well as between citizens and those who come from outside the EU. A key theory underlining this chapter is the degree to which the Union has utilised its economic competences to justify the adoption of welfare rules, which has brought it in line with the specific mode of welfare provision, and limits access to the welfare system for those who fall outside of the labour market. This stands in stark contrast to the potentially universalist objectives of the EU rules in this area - i.e. the opening up of the welfare system and removal of barriers to access. The development of these rules has been gradual, which has led to some internal inconsistencies, and an often fractured approach in respect of who and what is covered by the relevant legislation. This is particularly true for TCN labour migrants, who exist under a comparatively new competence of the Union and have only recently begun to enjoy greater access to the welfare state. Finally, it examines some of the more recent developments in EU welfare law, and underlines how the Court of Justice of the European Union (CJEU) may be moving away from a more purposive method of interpretation, which could lead to even greater difficulties accessing welfare payments for mobile EU citizens in the future.

The fourth chapter examines the Irish welfare system and how it operates. This means that it first examines the constitutional basis, if any, for welfare payments as a social right in Ireland, before moving on to the legislative provisions currently in place. Part of this exploration is of a general character, and does not relate explicitly to migrants. This is due to the fact that, unlike EU law, the Irish welfare system does not apply solely to migrants, and the chapter must underline how the welfare system operates in an global sense before it examines how it applies to migrants specifically. The primary finding of this chapter is that the Irish system has been shaped by the State's response to inward migration. The Irish welfare system had, prior to an influx of EU and non-EU migrants, been characterised as one without an express purpose. Following on from this however, it became far more restrictive and opaque in nature, and even more so for migrants. Often, these changes to the welfare system were justified on the basis of EU rules, although always based on the particular agenda of the national government.

1.2.3 Section 2 - The Irish Welfare System as it Applies to Mobile EU Citizens and TCN Labour Migrants

This section builds upon the doctrinal and socio-legal elements within Section One, and analyses in detail how the relevant EU and Irish welfare rules apply to mobile EU citizens and TCN labour migrants present in Ireland respectively. In doing so, it will examine whether, and to what extent, the Irish welfare system differentiates between these two categories of migrants, and how EU rules have shaped the Irish welfare system for each. Both chapters follow a broadly similar structure - an examination of the applicable welfare rules for that category of migrants; the impact that the process of Europeanisation has had on that same category; followed by an exploration of the particular barriers that they face due to the nature of the particular rules that apply to them.

Chapter Five concerns itself with EU citizens present in Ireland, how Ireland has elected to implement the relevant rules within a national context, the extent to which the system can be said to be Europeanised, and the particular barriers which are created for this particular category of migrants. The primary findings of this chapter are that the EU welfare rules are highly complex and require a special technical expertise in order to ensure that they are correctly implemented and applied in a given national context. What complicates this picture, is the general lack of technical expertise within the Department of Employment Affairs and Social Protection, the Superior Courts, and the wider State administrative apparatus. This lack of expertise leads to additional barriers in accessing welfare payments for EU citizens, and that those engaged in marginal or ancillary employment, and those who fall outside of the labour market may be the most deeply affected. What this also means is that despite the potentially preferential status that EU citizenship bestows on mobile citizens, the Irish welfare system remains unclear and has failed to adopt a rights-based approach.

The sixth chapter explores the largely national welfare and immigration rules that apply to TCN labour migrants. This focus on national regulation is due to the Irish State's ability to 'opt-out' of any new Union-level legislation in this area, and it has determined that this is the best course of action for their own national interests in almost all instances. Consequently, TCN labour migrants must navigate an opaque immigration system *in addition to* an equally non-transparent welfare system. The welfare rules for TCN labour migrants are found to be even more opaque than those which apply to EU citizens. Rather than being disadvantaged by the unclear operation of EU rules, TCN

labour migrants suffer as a result of the uncertain and exclusionary nature of the national rules in place for them. The decision made by the Irish State to opt-out of almost every EU rule in this field also raises significant questions about the potential impact of EU law if it were to be applied. Whilst there is little to say that Ireland would change its ordinary practice to an appreciable degree in light of EU law, the adoption of the Long-Term Residence Directive in particular would provide a significant benefit for TCN labour migrants who have been resident in Ireland for over 5 years. In other instances, Ireland can be said to have indirectly Europeanised, as it has mimicked some of the new statuses created at the Union level within national law - albeit with far fewer procedural and substantive rights accruing under these purely national rules.

A seventh and final chapter will draw together the different strands analysed within the thesis, building upon the findings within each of the substantive chapters, as well as placing them within the context of the wider scholarly literature. This will in turn provide a deeper contextual framework for the research conducted throughout the thesis, relating to the historical tension between creating and maintaining a national welfare state on the one hand, and opening up and extending access to migrants on the other. Ireland provides a clear example of how this tension plays out at a national level, as the State responded to inward migration by restricting access rather than attempting to make it more universalist in outlook.

1.3 Outlining the Central Methodology

The purpose of this section is to outline the different methods of analysis which will be used within the overall methodology of the thesis. Some of these elements, such as the modes of welfare provision, are more theoretical in nature and will examined in full in Chapter Two. The following subsections will instead focus on: the doctrinal research used within the thesis; the more diverse sources, which are non-doctrinal in nature; and the basis on which the interview material, which is integrated throughout the thesis, how these interviews were conducted and how the material will be utilised.

1.3.1 Conducting a Comprehensive Doctrinal Analysis of the Relevant Rules

As with any substantive legal examination, it is necessary to conduct a doctrinal analysis of the constitutional provisions, as well as the ordinary and secondary legislation which give effect to them. Where relevant, principles of administrative law will

also be referenced to establish the parameters within which the welfare system in Ireland must operate. Finally, administrative guidelines - whilst not legally binding *stricto sensu* but still capable of binding administrative officers and displaying a form of legal effect[25] - provide an important insight into how administrative officials within each of the relevant Departments, agencies and bodies interpret legislative provisions within the confines of an individualised case.[26]

The thesis will, as mentioned above, firstly examine EU rules relating to both EU citizens and TCN labour migrants - in terms of both their movement and access to welfare - within their supranational context i.e. without examining how they are implemented at a national level. This analysis will be conducted throughout Chapter Three. The EU rules governing EU citizens referred to include: Directive 2004/38/EC on the free movement of EU citizens, their residency rights and access to social assistance;[27] Regulation 883/04 on the coordination of social security schemes;[28] and Regulation 987/2009.[29] EU rules governing TCN labour migration, their presence in the Union and

[25] See *State (Kershaw) v Eastern Health Board* [1985] ILRM 235. In addition, where the conditions within these rules have been complied with, there is a resulting right for the applicant based on having satisfied these terms, *Latchford v Minister for Industry* [1950] IR 33, 42.

[26] As will be explained throughout the thesis, administrative guidelines, much like Statutory Instruments, must not exceed the scope of the Acts which they seek to implement. If a set of administrative guidelines exceeded their purely interpretive scope, they are reviewable on the basis that they are ultra vires. Similarly, it is *possible* that a Court would examine the extent to which the guidelines have been adhered to by the relevant decision maker, but this a rare occurrence, as the courts will look first at whether or not the administrative decision appeared reasonable in nature - if it does not appear reasonable, the court *may* review the substance of the case. This is however an extremely rare occurrence.

[27] 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ L 158, 30.4.2004) OJ L 229.

[28] Corrigendum to Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ L 166, 30.4.2004) OJ L 200.

[29] REGULATION (EC) No 987/2009 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems OJ L 284/1.

their access to the national welfare system[30] will be examined in tandem with those of EU citizens. In order to facilitate this, Chapter Three is broadly structured in terms of the constitutional competences for enacting welfare legislation, the legislation on social security, followed by the legislation which relates to social assistance - first for Union citizens, and then for TCN labour migrants. Integrated analyses such as this - i.e. those that view EU citizens and TCN labour migrants and their relationship to one another in the welfare sphere jointly - had prior to this thesis never been conducted. As a result, this examination is potentially the first of its kind.[31]

In the Irish context, the primary laws examined will be: the Social Welfare (Consolidation) Act 2005 and its amending legislation;[32] the Immigration Acts of 1999, 2003, and 2004;[33] the Employment Permits Acts of 2004, 2006 and 2014,[34] and the Statutory

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[30] Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State *OJEU* 23 December 2011, L-343/1; Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification OJ L 251, 3.10.2003; Directive 2014/66EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer OJ L 157, 27.5.2014; Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers OJ L 94, 28.3.2014; Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents; Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly-qualified employment [2009] OJ L155/17; Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service OJ L 375, 23.12.2004; COUNCIL DIRECTIVE 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research OJ L 289/15; Directive 2011/98/EU on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State [2011] OJ L343/1 - Ireland and the United Kingdom do not participate; and Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents [2003] OJ L16/44 amended by Directive 2011/51/EU [2011] OJ L132/1.

[31] Ruhs notes that there is an artificial legal divide that has been made by EU legal scholar which attempts to view EU citizens as completely separate from TCN labour migrants, and that there is a specific need to interrogate and challenge this - [M. Ruhs,'Migrants', 'Mobile Citizens' and the Borders of Exclusion in the European Union' in R. Baubock (ed.), *Debating European Citizenship* (Springer, 2018), 163-168].

[32] See for example, Social Welfare Act 2006, Social Welfare Law Reform and Pensions Act 2006, Social Welfare Act 2007, Social Welfare and Pensions Act 2007, Social Welfare and Pensions Act 2008, Social Welfare (Miscellaneous Provisions) Act 2008.

[33] The Immigration Act 1999, 2003, and 2004.

[34] The Employment Permits Act 2004, 2006 and 2014.

Instruments that implement these acts.[35] This examination of the national welfare system will be conducted in Chapter Four. Studies of Irish welfare rules are infrequent, particularly those of a comprehensive nature which outline and critically evaluate the welfare system in a global sense.[36] It is even rarer still to find analyses of how the Irish welfare rules apply to migrants.[37] Therefore, whilst doctrinal analyses are far from new, it is uncommon to see them conducted in the areas of welfare and migration - particularly where they intersect.

The decision to include Irish immigration legislation which is of a more general character is due to the ways in which TCN labour migrants can have additional barriers created for them by virtue of this other area of national law. Unlike EU citizens, TCN labour migrants exist within a space where the Irish State maintains a far greater prerogative in terms of regulating their entry and residence. In certain instances, the loss of an immigration permission may even lead to an inability to access the welfare system or the immediate withdrawal of a payment.

Chapters Five and Six deal exclusively with the ability of EU citizens and TCN labour migrants respectively to access the Irish welfare system. They are both structured in a broadly similar fashion - an examination of the applicable rules for that category of migrants, the impact of EU rules, and the barriers that affect them as an individual category of migrants. Consequently, much of the law that these examine in a micro sense

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[35] There is a significant number of S.I.'s released on an annual basis. See: Social Welfare (Consolidated Supplementary Welfare Allowance) (Amendment) (No. 5) (Rent Supplement) Regulations 2014 (S.I. No. 604 of 2014); Social Welfare (Consolidated Claims, Payments and Control) (Amendment) (No. 8) (Assessment of Means) Regulations 2014 (S.I. No. 595 of 2014); Social Welfare (Consolidated Claims, Payments and Control) (Amendment) (No. 7) (Homemakers) Regulations (S.I. No. 569 of 2014); Social Welfare (Variation of Rate of Living Alone Allowance) Regulations 2014 (S.I. No. 568 of 2014); Social Welfare and Pensions Act 2014 (Section 6) (Commencement) Order 2014 (S.I. No. 530 of 2014); Social Welfare (Temporary Provisions) Regulations 2014 (S.I. No. 529 of 2014); Social Welfare (Consolidated Contributions and Insurability) (Amendment) (No. 6) (Return of Contributions) Regulations 2014 (S.I. No. 514 of 2014); Social Welfare (Consolidated Contributions and Insurability) (Amendment) (No. 4) (Return of Contributions) Regulations 2014 (S.I. No. 513 of 2014); Social Welfare (Consolidated Contributions and Insurability) (Amendment) (No. 5) (Modifications of Social Insurance) Regulations 2014 (S.I. No. 512 of 2014).

[36] Some organisations have conducted studies in this area, but it is often non-doctrinal [Crosscare, Doras Luimni, Nasc, 'Person or Number? Issues Faced By Immigrants Accessing Social Protection' (2012) <http://www.livinginireland.ie/images/uploads/Person%20or%20Number.pdf> accessed 02/05/2016; Crosscare, Doras Luimni, Nasc, Citizens Information, FLAC, 'Person or Number? 2: A Second Examination of Issues Faced by Immigrants Accessing Social Protection' (2014) <http://dorasluimni.org/wp-content/uploads/2015/01/PON-2.pdf> accessed 02/05/2016] or is informative/non-critical in tone [E. Quinn, E. Gusciute, A. Barrett and C. Joyce, 'Migrant Access to Social Security and Healthcare: Policies and Practice in Ireland' (ERSI, July 2014)].

[37] Shortall in his doctoral thesis conducted a comprehensive analysis of the Irish welfare system's compliance with EU rules, but from an almost purely doctrinal perspective and only in respect of EU citizens - [D. Shortall, 'Social Welfare Rights of EU Citizens in Ireland - Ireland's Non-Compliance with EU Law' (PhD Thesis, NUI Galway, 2015].

were examined in Chapters Three and Four at the macro level. Both chapters will however emphasise the national legislation which implements the applicable EU rules[38] to a far greater extent, as well as principles of administrative law and guidelines that apply in each context.

1.3.2 Utilising Diverse Research Sources to Provide a Deeper Contextual Understanding of the Topic

Additional sources will be utilised throughout the thesis in order to further develop the socio-legal analysis and add additional depth to it. From a governmental perspective, Freedom of Information (FOI) requests were used to obtain policy papers, internal review documents, communications, circulars, and statistic which establish, through often previously unavailable sources, the State's position.

Many of the internal reports and documentation utilised within the thesis were discovered based on reference being made to them in secondary material or - where they had been commissioned by the department or agency in question using an external organisation - within their annual budgets. These would subsequently been requested through the FOI process. Communications, memos and circulars were often sought in order to answer specific questions - such as to establish the Department of Justice's portion on a European Union Directive relating to third-country migration - and these often proved more complicated to obtain than documentation of which the name was known and there was no concern over the potential sensitivity of the same.

Where possible, statistical data was sought in order to provide a broader picture of, for example, the number of public service numbers issued to the migrants being examined so that they may access welfare services, the number of employment permits issued per year and per sector, and data representing the number of appeals made by migrants against negative decisions to the Social Welfare Appeals Office. The data collected by each of the relevant departments and agencies can often be quite rudimentary, and may not always be easily accessible.

On this first point, it was invariably not possible to obtain metadata capable of independent analysis. Individual datasets that were not publicly available were instead re-

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[38] See, for example, the Social Welfare (Consolidation) Act 2005, Section 246(1); S.I. No. 548/2015 - European Communities (Free Movement of Persons) Regulations 2015; and S.I. No. 656/2006 - European Communities (Free Movement of Persons) (No. 2) Regulations 2006.

quested from the Departments, and in other instances, sought through the use of Parliamentary Questions (PQs) asked via a willing TD. In some instances, data that had been claimed by a department or agency to not exist or to outside the scope of what was available was subsequently found to be within an internal report or similar - such as an analysis of the application of the Habitual Residence Condition based on either nationality or immigration status.

1.3.3 Interview Sampling and Data Collection

Qualitative data was collected via semi-structured interviews, each of which lasted between 30 minutes and 1 hour, and which were conducted face-to-face with the participants. These interviews received ethical approval in line with the requirements mandated by the research ethics committee at Maynooth University.

These interviews were conducted on the basis of Bogner and Menz's model of expertise, which encompasses technical, process and interpretative knowledge.[39] This particular model believes that interviewing experts is not only a more efficient method of data collection, but also of obtaining extremely succinct and reliable information.[40] Although the subjects were chosen based on their different kinds of expertise, '[i]t is not the experts themselves who are the objects of the investigation; their function is rather that of informants who provide information about the real objects being investigated.'[41]

Parties invited to participate in the study and to be interviewed were pre-selected in a broad sense, to reflect both their specialised knowledge, as well as their proximity to and interest in the subject matter of the thesis. In order to reflect the full range of stakeholders, each of the relevant government departments (Department of Employment Affairs and Social Protection, the Department of Business, Enterprise and Innovation, and the Department of Justice) as well as State bodies (the Irish Naturalisation and Integra-

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[39] A. Bogner & W. Menz, 'The Theory-Generating Expert Interview: Epistemological Interest, Forms of Knowledge, Interaction' in A. Bogner & ors (eds.), *Interviewing Experts* (Palgrave and MacMillan, 2009), 52.
See also, M. Meuser & U. Nagel, 'The Expert Interview and Changes in Knowledge Production' in A. Bogner & ors (eds.), *Interviewing Experts* (Palgrave and MacMillan, 2009), 24.

[40] A. Bogner & W. Menz, 'The Theory-Generating Expert Interview: Epistemological Interest, Forms of Knowledge, Interaction' in A. Bogner & ors (eds.), *Interviewing Experts* (Palgrave and MacMillan, 2009), 52. See also, M. Meuser & U. Nagel, 'The Expert Interview and Changes in Knowledge Production' in A. Bogner & ors (eds.), *Interviewing Experts* (Palgrave and MacMillan, 2009), 24.

[41] A. Bogner & W. Menz, 'The Theory-Generating Expert Interview: Epistemological Interest, Forms of Knowledge, Interaction' in A. Bogner & ors (eds.), *Interviewing Experts* (Palgrave and MacMillan, 2009), 47.

tion Service) were invited to either nominate members of staff or allow them to voluntarily take part in order to provide a governmental perspective. These requests for interview were sent to the relevant sections within each department or body rather than directly identifying individuals to ensure that their employers fully supported their participation. Where possible, existing contacts were consulted in order to ensure that these requests would reach the most suitable point of reference within the relevant department or agency, as well as to ensure that these request would be replied to in a timely manner. Each government department and organisation waived their right to directly take part, often citing concerns relating to time and resources.

This reticence may have in part been driven by the original decision to engage with formal channels, as communications with many departments of this were often far more congenial. For example, the Department of Employment Affairs and Social Protection eventually nominated a liaison to assist with any additional queries that arose throughout the course of the study, and proved to be an invaluable asset. Staff within the same department's Freedom of Information unit would also often collate data or information into a more access formats - such as manually creating a list of all of the Direct Provision centres in Ireland which had a Community Welfare Officer assigned to them. Other departments continued to be more combative in their approach to requests for information and data, even when obliged to do so through Freedom of Information requests.

A questionnaire was also circulated within INIS and which largely mirrored the questions which would have been asked in a face-to-face interview, but this received no responses. A survey was also distributed within the Citizens Information Bureau but received an insufficient number of responses to be utilised within the thesis, as well as a low quality of answers. Of the 4 returned by the Citizens Information Bureau, the directions given in completing the survey were largely not followed and the responses could not be relied upon as a result.

Invitations were sent to each of the relevant non-governmental and civil society organisations representing migrants directly in respect of welfare itself, as well as those operating more generally within the immigration field. From this, three persons volunteered to be interviewed and are included within the thesis. Several legal practitioners were chosen because of their speciality within the fields of immigration and welfare law, and from these two of the invited parties were interviewed. Finally, a small number of scholars were included, and of these two chose to take part. In total, seven interviews

were conducted, representing three civil society organisations, two scholars (one of whom also had practical experience working with an NGO on welfare research), and two practitioners (including one solicitor and one barrister).

Each interview was recorded on an audio recorder, before being transcribed in full. This, as well as the other parameters of the interviews and the research project as a whole, was made known to the participants in both the invitation and an information and consent form given to them before the interview commenced. The transcription was carried out in two phases, one of which included an application which would analyse the recordings and provide a relatively accurate voice-to-text translation. These transcripts would be examined manually along with the original recording, and any inaccuracies would be corrected. Interviewees were then provided with a transcript of the interview for their approval, and were allowed to make minor changes to clarify or remove any ambiguities they had identified. This ensured that they were fully cognisant of what would be included in the thesis and that they had given their informed consent to the material.

Quotations were from the interviews were grouped manually based on the specific themes they addressed as well as where the interview subjects agreed or disagreed on a given point. These were then interspersed into the doctrinal analysis that had previously been conducted in order to reflect the how each of the interviewees understood the law to operate in practice based on their specific expertise. Other socio-legal sources were then inserted alongside these quotations from the interviews where these either agreed or contradicted what had been said by the interview subjects to provide a strong foundation for this particular strand of analysis.

Anonymity was provided to all interviewees to ensure that they felt comfortable speaking openly about the issues under discussion, particularly given the often highly politicised nature of immigration and welfare matters. It was possible for interviewees to be identified as being a representative of a particular NGO, government department, or institution but none elected to do so. Instead, each is referred to more generally by their area of expertise and the sector they work within and this is reflected in the full transcripts (see appendix).

Qualitative data is sometimes criticised because of the presumed lack of objectivity or the relatively small sample size.[42] This thesis utilises a relatively small dataset in terms of the interviews conducted, as well as representing mainly non-governmental voices due to the refusal of state bodies to participate. The function of the data collected from the interviews is to complement and supplement the theoretical and doctrinal analysis. The answers given to interview questions are not used as the sole basis on which to base an argument, and instead confirm, add context to or disprove what can be established through a combination of other sources.

1.3.4 The Themes of the Interview Questions

The questions asked were broken down into specific themes, however where these were unsuitable to the interviewee or it did not directly relate to their work or experience, they were allowed to answer as they saw fit.[43] The key themes were:

(1) *The nature of the immigration and welfare systems*. Within this heading, the interviewee was asked to give their personal understanding of how these operate and how they would characterise them.
(2) *The way in which these systems create difficulties or barriers for migrants in Ireland*. Here, the questions focused on how the systems operate in a more specific sense. For example, are there particular barriers faced by one category of migrants that are unique to them?
(3) *The level of State control or discretion that exists*. These questions focused on perceptions of how consistent the State is in terms of applying the law, as well as the ways in which they can alter their decisions based on the facts of the case. In addition, they tried to establish how clear the decisions given are, and if they might be vague or unclear, or seem to lack an objective criteria being applied.

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[42] L. Webley, 'Qualitative Approaches to Empirical Legal Research' in P. Cane & H. Kritzer (eds.), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010), 930; and J.W. Crasswell, *Research Design: Qualitative, Quantitative, and Mixed Research Methods* (Sage, 2013).

[43] M. Meuser & U. Nagel, 'The Expert Interview and Changes in Knowledge Production' in A. Bogner & ors (eds.), *Interviewing Experts* (Palgrave and MacMillan, 2009), 31.

(4) *The experience of the interviewee*. Where interviewees had experience working directly with affected migrants, they were invariably asked about the kinds of work they carry out and/or with what kinds of migrants.

(5) *Further contextual questions*. Finally, it was necessary to adapt the questions based on the expertise of the interviewee and the points they raised. For example, an NGO worker operating in the immigration sphere may not have the same level of knowledge about the welfare system as someone within that field, and questions would be reframed or altered based on what experience they do have, and to obtain the greatest amount of detail possible.

1.4 Advancing the Current Scholarly Literature

This thesis has been written at a time of increasing political and social uncertainty, particularly surrounding immigration and its supposed dangers; continued austerity measures; and the shrinking of the welfare state.

In Ireland, the austerity[44] imposed as a direct consequence of the State's decision to take part in the 'bailout package'[45] offered to it by the 'Troika'[46] has led to significant cuts in public services, including welfare payments,[47] and an increased focus on fraud reduction measures.[48] At the supranational level, the EU has found itself repeatedly dismissing the assertion that welfare tourism exists,[49] as well as its experience of the

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[44] D. Ferri & C.E. O'Sullivan, 'The Impact of the Economic Crisis on the Irish Legal System: Between Austerity and Constitutional Rhetoric' (30 December 2016) 26 *Federalismi.*

[45] Council Implementing Decision 2011/77, On Granting Union Financial Assistance to Ireland, 2011 O.J L30/34, as well as 12 further 'Memoranda of Understanding.'

[46] The European Commission, European Central Bank and the International Monetary Fund (IMF).

[47] T. Callan, B. Nolan, C. Keane, M. Savage & J. Walsh, 'Crisis, Response and Distributional Impact: The Case of Ireland' (2013) 456/2013 ESRI Working Paper; R. Hick, 'From Celtic Tiger to Crisis: Progress, Problems and Prospects for Social Security in Ireland' (2014) 4 *Social Policy and Administration* 394; U. Barry & P. Conroy, 'Ireland in Crisis 2008-2012: Women, austerity and inequality' National Women's Council of Ireland (NWCI) and Think Tank on Social Change (TASC) (October 2012); and M.P. Murphy, 'Gendering the Narrative of the Irish Crisis' (2015) 30(2) *Irish Political Studies* 220.

[48] Department of Social Protection, 'Department of Social Protection Fraud Initiative 2011-2013' (September 2011) <http://www.welfare.ie/en/downloads/fraudinitiative2011.pdf> accessed 08/09/2016.

[49] Commissioner Cecilia Malmstrom has emphasised that the notion of welfare tourism is not backed up by available statistics at the Union level, and is instead the result of right-wing populism and certain forms of domestic policy [Svenska Dagbladet, 'Hot om bidragsturism får fart igen' *Svenska Dagbladet* (3/06/2013) < https://www.svd.se/hot-om-bidragsturism-far-fart-igen> accessed 07/06/2017] and this was supported by Viviane Reding, who reiterated these points as well as underlining that *"let language not betray us: European citizens exercising their right to free movement are not 'immigrants"* [V. Reding, 'Main Message: Trieste Citizens' Dialogue' Speech/13/706, European Commission (16/09/2013) <europa.eu/rapid/press-release_SPEECH-13-706_en.htm> accessed 02/05/2017].

ongoing 'migrant crisis'[50] and the practical as well as existential threats posed by the decision of the United Kingdom to leave the European Union following the 'Brexit' referendum in 2016.[51]

The thesis seeks to contribute to the current scholarly literature and social debate by conducting one of the first in-depth doctrinal studies of migrant access to welfare provision in Ireland. It differs from existing studies[52] due to:

(1) Its exploration of the interaction of migration and welfare as well as the Europeanisation of welfare systems;
(2) The juxtaposition of the treatment and experiences of mobile EU citizens and TCN labour migrants; and
(3) The use of socio-legal sources which allow for an in-depth analysis of how the Irish welfare system operates from a practical perspective (and what barriers it creates for EU citizens and TCN labour migrants who attempt to access welfare payments in Ireland).

Each of these points will be briefly discussed below.

1.4.1 Exploring the Interaction Between Migration and Welfare

The scholarly literature in this area has usually explored the broad impact of the European Union's well established economic policies on social regulation at the Member State level, rather than within particular material fields, such as welfare. This thesis moves away from this by examining the specific interaction between welfare law and policy and migration, as well as discussing the particular mode of welfare provision with which the EU and Irish welfare systems most closely align. The latter point, also facilitates a more in-depth an analysis of the impact of the process of Europeanisation on Irish welfare rules for the categories of migrants being examined and the national

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[50] M. Albahari, 'Europe's Refugee Crisis' (2015) 31(5) *Anthropology Today* 1.

[51] N. Tzouvala, 'Chronicle of a Death Foretold? Thinking About Sovereignty, Expertise and Neoliberalism in the Light of Brexit' (2016) 17(Brexit Supplement) *German Law Journal* 117.
For commentary on how Brexit might impact upon social security rights across Ireland, see G. McKeever, 'Brexit, the Irish border and social security rights' (2018) 24(1) *Journal of Social Security Law*.

[52] See for example, D. Shortall, 'Social Welfare Rights of EU Citizens in Ireland - Ireland's Non-Compliance with EU Law' (PhD Thesis, NUI Galway, 2015), as well as other studies outlined below.

welfare system in a broader sense as it provides evidence of how the Irish State has responded to this process in a holistic sense.

It is also timely, given the formal inclusion of the Charter of Fundamental Rights[53] within the Union's constitutional legal order post-Lisbon, and the adoption of the new 'European Social Pillar.'[54] The implications of this landscape are only now beginning to be explored,[55] and a comprehensive analysis has yet to be conducted of how these instruments will impact upon its Member States. Many authors have detailed the link between Union citizenship and economic freedoms,[56] arguing that what currently exists is a market-based form of citizenship with the potential for growth in the future,[57] but this has yet to be put within the context of particular modes of welfare provision, and from this socio-legal perspective.

Perhaps more importantly, due to the onset of the migrant crisis, the Brexit referendum, and the rise of far-right parties nationally throughout Europe, the ability of EU citizens to access the welfare systems of their host States is now being openly debated and questioned by both Member States and by ordinary citizens. For example, data collected by the European Social Survey suggests that attitudes towards those from less developed EU Member States, third-country States as well as ethnic minorities were found to be quite strongly negative,[58] and responses suggesting that there should be no

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[53] European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02 <http://www.refworld.org/docid/3ae6b3b70.html> accessed 2 October 2018.

[54] European Union, European Pillar of Social Rights <https://ec.europa.eu/commission/sites/beta-political/files/social-summit-european-pillar-social-rights-booklet_en.pdf> accessed 21/12/2017.

[55] See C. Semmelmann, 'The European Union's economic constitution under the Lisbon Treaty: soul-searching among lawyers shifts the focus to procedure' (2010) *European Law Review* 516; F.W. Scharpf, 'The asymmetry of European integration, or why the EU cannot be a 'social market economy'' (2010) 8(2) *Socio-Economic Review* 211; L. Azoulai, 'The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for Its Realization' (2008) *Common market Law Review* 493; V. Smejkal & S. Saroch, 'EU as a Highly Competitive Social Market Economy: Goals, Options, and Reality' (2014) 14 *Review of Economic Perspectives* 393.

[56] W. Maas, *Creating European Citizens* (Rowman & Littlefield, 2007); A. Durand, 'European Citizenship' (1979) 4 *European Law Review* 3; W. Maas, *Creating European Citizens* (Rowman & Littlefield, 2007); A. Evans, 'European Citizenship' (1982) 45 *Maastricht Journal of European and Comparative Law* 497; A. Tryfonidou, *The Impact of Union Citizenship on the EU's Market Freedoms* (Bloomsbury, 2016); and E. Szyszczk, 'Building a Socio-Economic Constitution: A Fantastic Object?' (2011) 35 *Fordham International Law Review* 1364.

[57] T. Kostakopoulou, *Citizenship, Identity and Immigration in the European Union* (Manchester University Press, 2001), 66.

[58] European Social Survey, 'Attitudes towards Immigration and their Antecedents: Topline Results from Round 7 of the European Social Survey' <http://www.europeansocialsurvey.org/docs/findings/ESS7_toplines_issue_7_immigration.pdf> accessed 11/07/2017, 6.

immigration allowed from less developed States increased from 2002-2014.[59] In this respect, the EU is at the forefront of this debate surrounding the relationship between migration and welfare, as its system of welfare coordination is based upon a form of migration, and it has sought to expand this by adopting legislative provisions which are increasingly allowing TCN labour migrants access to welfare payments in a similar, but not comparable manner - an issue which will be outlined in greater detail in Chapter Three. Ultimately, this means that whilst the EU has been expanding its welfare rules and sought to create broader social policies to soften its economic impulses, these are being questioned with renewed vigour at a national level.

1.4.2 Juxtaposing Mobile EU Citizens and TCN Labour Migrants

Another significant contribution to the current scholarly landscape is made by virtue of the decision to compare and contrast two distinct categories of migrants in Ireland: mobile EU citizens and TCN labour migrants, the ways in which they access welfare payments and the practical barriers to doing so.

From a scholarly perspective, some studies have highlighted that hierarchies among and within these categories of migrants have arisen over time.[60] However, as Ruhs recently argued, there is an overall tendency to view EU citizens and their right to free movement as something which is entirely unique, and unrelated to larger debates surrounding immigration and welfare policies at the national level. This distinction is unhelpful,[61] as both are intimately interlinked, and to separate them ignores the broader context.

1.4.3 Practical Perspectives: Using Socio-Legal Sources

Research of this kind is particularly suited to the use of socio-legal sources, as a purely doctrinal analysis of the relevant welfare rules would not adequately explain how, and to what extent, migrants will be disadvantaged by the *application* of these same rules in practice.

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[59] European Social Survey, 'Attitudes towards Immigration and their Antecedents: Topline Results from Round 7 of the European Social Survey' <http://www.europeansocialsurvey.org/docs/findings/ESS7_toplines_issue_7_immigration.pdf> accessed 11/07/2017, 7.

[60] J.H. Carens, *The Ethics of Immigration* (Oxford University Press, 2013); and R. Baubock, 'Citizenship and National Identities in the European Union' (1997) 4 Jean Monet Working Paper.

[61] M. Ruhs,'Migrants', 'Mobile Citizens' and the Borders of Exclusion in the European Union' in R. Baubock (ed.), *Debating European Citizenship* (Springer, 2018), 163-168.

Many NGOs, charitable organisations and civil society groups have published material on the rights of migrants as well as their qualitative experiences, outlining the difficulties migrants face in accessing welfare payments in their own words. In other instances, where it may be aimed at legal practitioners, the research is descriptive in nature, detailing how specific payments operate and how migrants must interact with the Irish welfare system in order successfully lodge a claim without critical commentary. A partial exception to this rule are the 'Person or Number?' Reports that were issued by a coalition of 5 NGOs working directly with migrants.[62] These reports utilised a large number of personal cases of migrants facing particular barriers in accessing a welfare payment, as well as quantitative data and policy documentation to paint a much more detailed picture of how law and its practice can vary substantially. This study will build upon these reports by utilising them in conjunction with other qualitative and quantitative datasets, as well as analysing other previously unreleased documentation within a comprehensive doctrinal investigation.

It is hoped that conducting a study of this kind will lay the groundwork for future projects which bring together these heretofore relatively distinct legal areas, and facilitate deeper debates about the Irish welfare system as it relates to migrants as well as its broader welfare architecture - and its interplay within the broader process of Europeanisation.

Conclusion

The purpose of this brief chapter was to introduce the core research questions that this thesis will answer, the structure of the thesis, and the variety of sources that it will utilise throughout. Whilst it also provided some basic information regarding terminology, such as what is meant by 'migrant' and the different concepts related to welfare, Chapter Two will examine this terminology and the broader theoretical framework for this study in greater detail - as well as the justifications for the questions outlined within this introduction.

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[62] Crosscare, Doras Luimni, Nasc, 'Person or Number? Issues Faced By Immigrants Accessing Social Protection' (2012) <http://www.livinginireland.ie/images/uploads/Person%20or%20Number.pdf> accessed 02/05/2016; Crosscare, Doras Luimni, Nasc, Citizens Information, FLAC, 'Person or Number? 2: A Second Examination of Issues Faced by Immigrants Accessing Social Protection' (2014) <http://dorasluimni.org/wp-content/uploads/2015/01/PON-2.pdf> accessed 02/05/2016.

2. Outlining the Theoretical and Legal Scope of the Thesis

2.1 Introduction

The purpose of this chapter is to clearly establish many of the key concepts that will be mentioned throughout this thesis, as well as the general theoretical framework which the substantive chapters of this study will expand upon later.

This will first and foremost involve an examination of what is meant by 'modes of welfare provision.' The thesis uses two particular modes: the universalist and the specific, as two points along an overall spectrum of welfare provision within which national welfare systems are placed. In most instances, national welfare systems will align more closely with one over another, and by outlining the particular characteristics of each mode, later chapters will be able to establish with which mode the European Union and Irish welfare systems share the most commonalities.

Secondly, the chapter will explore the current state of the art relating to the issues being evaluated within this thesis, placing an emphasis on the intersection of welfare provision and migration. The welfare state is generally conceived of along nationalistic lines, with migrants being viewed as a potential threat to the viability of welfare provision for citizens of their host State. In an increasingly globalised world, where individuals can cross national territorial boundaries more easily, this poses significant questions for how States will respond to increased inward migration. Namely, if the State will attempt to include migrants and offer them access to the welfare state on similar, if not identical, conditions to national citizens, or if they will seek to exclude migrants in order to 'defend' the welfare state against them.

Ultimately, in constructing this theoretical framework, this chapter will not only provide the contextual backdrop necessary for each of the substantive chapters, it will also underline the need for research in this area, and why this thesis has elected to do so.

2.2 Universalist and Specific Welfare Provision

The welfare state, as outlined briefly in Chapter One, is primarily concerned with the *decommodification* of daily life, allowing individuals to account for certain risks or life events that are likely to occur and are as such, capable of being insured against. This means that individuals can decrease their dependency upon labour market activity

(whether as a worker or employee, or as a self-employed service provider) in order to provide for themselves, as the State intercedes to ensure that they are in some way provided for if certain events occur - such as unemployment, maternity leave, or where they are suffering from an illness or some form of injury.

Within a capitalist society, it is broadly assumed that the provision made by the State is finite in nature. Once the event has ceased or it is appropriate to do so, the individual will be fully reintegrated into the labour market and their labour will be commodified once again. Consequently, regardless of whether or not an individual is a citizen or a migrant, *they are continually commodified* - as society is predicated upon the existence of some form of economy within which individuals sell their labour. An event such as unemployment would merely mean that an individual leaves the labour market until such time as they can reenter it. Similarly, a pension compensates them for the labour they have carried out in the past, and an income support would raise their income to a minimum level while they continue working within the labour market. Labour migrants are simply the most explicit example of this commodification, as their entry and residence is largely dependent upon continued labour market activity.

Each State will vary in the extent to and methods through which they decommodify labour, and for the purposes of this analysis the two most common modes referred to will be the 'universalist' and 'specific' modes of welfare provision. Undoubtedly, the most frequently utilised framework in analysing the different varieties of welfare states/ welfare systems is that of Esping-Andersen, who establishes the social democratic, corporatist, and liberal models of welfare provision.[1] However, this method of creating 'ideal' typographies has been increasingly challenged over time, with many scholars suggesting that there are more than these three models, and that few welfare states fit firmly within one of them[2] - particularly in light of the often active reshaping the wel-

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[1] G. Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Polity Press,1990). See also, F. Castles, *Comparative Public Policy: Patterns of Post-war Transformation* (Edward Elgar, 1998); and F. Castles, 'Reflections on the Methodology of Comparative Type Construction: Three Worlds or Real Worlds?' (2001) 36 (Summer) *Acta Politica* 141.

[2] W. Arts & J. Gelissen, 'Three Worlds of Welfare Capitalism or More?' (2002) 12(2) *Journal of European Social Policy* 137; F. Castles & D. Mitchell, 'Three Worlds of Welfare Capitalism or Four?' in F. Castles (ed.), *Families of Nations* (Dartmouth, 1993); G. Esping-Andersen, 'Hybrid or Unique? The Distinctiveness of the Japanese Welfare state' (1997) 7(3) *Journal of European Social Policy* 179; E. Huber & J. Stephens, *Development and Crisis of the Welfare State* (University of Chicago Press, 2002); and A. Hicks, & L Kenworthy, 'Varieties of Welfare Capitalism' (2003) 1 *Socioeconomic Review* 27.

fare state has undergone since the 1980s.[3] Other models or typographies have also been developed[4] to explain how the welfare state operates and the kinds of welfare states that exist, but these are also open to criticism. Whilst many scholars have used different models and ways of categorising welfare provision, the 'universalist' and 'specific' modes are common threads that run throughout the majority of the literature in this area.[5] They represent two clear and individualised points along a continuous spectrum, and which national welfare systems will tend to concentrate themselves around.

The following subsections will outline the working definition used for these two modes, the common characteristics they possess based on the existing scholarly literature, the ideologies or purposes which tend to underpin them, and how they will be utilised throughout this thesis.

2.2.1 'Universalist' Welfare Provision

Universalist welfare provision, or the concept of 'universalism,' is perhaps best ascribed to the Social Democratic systems utilised in Northern European States[6] and so-

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[3] This process is often referred to as 'neoliberal' in its outlook. Neoliberalism is seen as the way in which the State structures are seized and reframed in such a way as to construct new markets for competition and by extension, limit the States direct involvement in the economic sphere beyond regulating these new markets [D. MacKenzie, *Material Markets: How Economic Agents are Constructed* (Oxford University Press, 2009); M. Callon (ed.), *The Law of Markets* (Blackwell, 1998); A. Barry, *Political Machines: Governing a Technological Society* (Athlone, 2001); D. Harvey, *A Brief History of Neoliberalism* (Oxford University Press, 2005).
See also, P. Dardot & C. Laval, *The New Way of the World: On Neoliberal Society* (Verso, 2014). For criticisms of neoliberalism, see J. Peck, *Constructions of Neoliberal Reason* (Oxford University Press, 2010), 40; M. Fisher, *Capitalist Realism: Is There No Alternative?* (Zero, 2009); R. Cockett, *Thinking the Unthinkable: Think Tanks and the Economic Counter-Revolution, 1931-1983* (HarperCollins, 1994).

[4] M. Ferrera, 'The "Southern Model" of Welfare in Social Europe' (1996) 6(1) *Journal of European Social Policy* 17; R. Goodman & I. Peng, 'The East Asian Welfare States' in G. Esping-Andersen (ed.), *Welfare States in Transition* (Sage, 1996), 192; J. Bockman, *Markets in the Name of Socialism: The Left-Wing Origins of Neoliberalism* (Stanford University Press, 2011); P. Alcock & H. Glennerster (eds.), *Welfare and wellbeing: Richard Titmuss' Contribution to Social Policy* (Policy Press, 2001), 118. See also, H.K. Girvetz, 'Welfare State' in D.L. Sills (ed.) *International Encyclopedia of the Social Sciences* (Vol 16, Mac Milian 1968), 512.
See also, M. Simpson, G. McKeever & A.M. Gray, *Social security systems based on dignity and respect* (Equality and Human Rights Commission, 2017) on one of the most recent models being developed in Scotland.

[5] See for example, G. Esping-Andersen & W. Korpi, 'Social Policy as Class Politics in Postwar Capitalism' in J.H. Goldthorpe (ed.), *Order and Conflict in Contemporary Capitalism* (Oxford University Press, 1984); A. Wagner, 'Three Extracts on Public Finance' in R.A. Musgrave & A.T. Peacock (eds.), *Classics in the Theory of Public Finance* (Macmillan, 1967); P. Flora & A.J. Heidenheimer, *The Development of Welfare States in Europe and America* (Transaction Books, 1981); S. Whitman, *Personal Reminiscences of Prince Bismarck* (John Murray, 1902); and E. Eyck, *Bismarck and the German Empire* (2nd edn, Allen and Unwin, 1958).

[6] G. Esping-Andersen & W. Korpi, 'Social Policy as Class Politics in Postwar Capitalism' in J.H. Goldthorpe (ed.), *Order and Conflict in Contemporary Capitalism* (Oxford University Press, 1984); G. Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Polity Press,1990).

cialist economies. It seeks to decommodify labour to a high degree by making welfare payments and other income supports available to the general population, rather than providing discrete payments which deal with delineated circumstances and life events.[7] At an even more basic level, universalism deals with the expansion of the welfare state, and ensures the broadest degree of access to it. Despite this move to provide supports on a universalist basis, in almost all instances the decommodification remains partial or, with the assumption that the individual will reenter the labour market at a later date where they have left it for a period of time.

What universalism instead means is that a payment to facilitate access to the labour market (jobseekers payment), for example, would not be sharply split into a contributory social security payment, a non-contributory social assistance payment, and a minimum subsistence payment. Rather, the State will seek to provide a comparable standard of living for all individuals residing within their territory, albeit within a market-based model.[8] It is an '*equality of the highest standards, not of minimal needs,*'[9] so that pre-existing class and social distinctions are alleviated, if not removed.

This is not to suggest that this mode of welfare provision does not potentially suffer from certain shortcomings and has been free from criticism. For example, many universalist welfare systems tend to be culturally and racially homogenous, and are considered to be less responsive to change as a result of this.[10] Due to the fact that universalist pro-

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[7] O. Kangas & J. Palme (eds.), *Social Policy and Economic Development in the Nordic Countries* (Palgrave, 2005); W. Paxton, N. Pearce, & H. Reed, 'Foundations for a Progressive Century' in N. Pearce & W. Paxton (eds.) *Social Justice: Building a Fairer Britain* (Politico's, 2005); A. Ellingsæter & L. Gulbrandsen, 'Closing the Childcare Gap: The Interaction of Childcare Provision and Mother's Agency in Norway' (2007) 38(4) *Journal of Social Policy* 649; R. Lister, *Poverty* (Polity Press, 2004); and A. Morissens, & D. Sainsbury, 'Migrants' Social Rights, Ethnicity and Welfare Regimes' (2005) 34(4) *Journal of Social Policy* 637.

[8] As Polanyi put it, "Marx had admittedly created a theory of the capitalist economy, it however always deliberately avoided touching on the theory of socialist economy. The only theory of a market less economy, which we have at our disposal, stems from the marginal school and admittedly, as a theory of a closed economy. A communist managed economy could, so paradoxical it must sound in many ears, only turn to this school, to lay the foundation on its particular theoretical economic doctrine." [K. Polanyi, 'Sozialistiche Rechnungslegung' (1922) 49(2) *Archiv fur Sozialwissenschaft und Sozialpolitk* 377, 379-380].

[9] G. Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Polity Press, 1990), 27.

[10] B. Rothstein, 'The Universal Welfare State as a Social Dilemma' in M. van Vugt, M. Snyder, T.R. Tyler, & A. Biel (eds.), *Cooperation in Modern Society: Promoting the Welfare of Communities, States and Organisations* (Routledge, 2000), 210; B. Rothstein, 'Social capital in the Social Democratic Welfare State' (2001) 29(2) *Politics and Society* 206; W. Knocke, 'The Labour Market for Immigrant Women in Sweden: Marginalised Women in Low-Valued Jobs' in J. Wrench, A. Rea, & N. Ouali (eds.), *Migrants, Ethnic Minorities and the Labour Market: Integration and Exclusion in Europe* (Macmillan, 1999), 108; W. Knocke, 'Integration or Segregation: Immigrant Populations Facing the Labour Market in Sweden' (2000) 21 *Economic and Industrial Democracy* 361.

vision is often designed to ensure comparable standards of living and decrease reliance on the male 'breadwinner' as the vehicle through which their family gains access to the welfare state, it has also been suggested that this has led to welfare dependence, the breakdown of the traditional family unit, and an increase in one-parent families leading to higher levels of public debt.[11] In spite of these issues, the universalist mode of welfare provision is socially-orientated, and ensures that 'a worker, severed from the labor market, will earn merely by virtue of his or her [membership of the community].'[12]

In terms of the primary academic literature on universalist welfare systems, several pre-eminent scholars within the field have outlined the following key characteristics:[13] high levels of decommodification; equality in terms of the benefits granted, universal payments, and access to welfare payments as a right;[14] the State is the primary employer, right to work and to benefits, adheres to principle of universalism from an ideological perspective;[15] an emphasis on creating equality of outcome and facilitating minority groups through high levels of benefits;[16] an attempt on the part of the State to equalise social status and eradicate social exclusion, high social expenditure;[17] an entitlement to benefits as a form of 'social right,' and whilst in some instances there are lower levels of

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[11] A, Buckingham, 'Welfare Reform in Britain, Australia and the United States' in P. Saunders (ed.), *Reforming the Australian Welfare State* (Australian Institute of Families Studies, 2000); G. Gilder, *Wealth and Poverty* (ICS Press, 1993); N. Fraser, Justice *Interruptus: Critical Reflections on the "Postsocialist" Condition* (Routledge, 1997); S. Butler & A. Kondratas, *Out of the Poverty Trap* (Free Press, 1987); and A. Lindbeck, 'Interpreting Income Distributions in a Welfare State: The Case of Sweden' (1983) 21 *European Economic Review* 227.

[12] A. Hicks, Social Democracy and Welfare Capitalism (Cornell University Press, 1999), 196; and L. Kenworthy, 'Do Social-Welfare Policies Reduce Poverty? A Cross-National Assessment' (1999) 77(3) *Social Forces* 1119.

[13] For an executive summary of some of these welfare states, see B. Greve, 'What Characterise the Nordic Welfare State Model' (2007) 3(2) J*ournal of Social Sciences* 43.

[14] G. Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Polity Press, 1990), 27-28.

[15] S. Leibfried, 'Towards a European welfare state? On integrating Poverty Regimes into the European Community' in Z. Ferge & J.E. Kolberg (eds.), *Social Policy in a Changing Europe* (Campus Verlag, 1992).

[16] A. Siaroff, 'Work, Welfare and Gender Equality: a New Typology' in D. Sainsbury (ed.) *Gendering Welfare States* (Sage, 1994), 82-100.

[17] F. Castles & D. Mitchell, 'Worlds of Welfare and Families of Nations' in F. Castles (ed.), *Families of Nations: Patterns of Public Policy in Western Democracies* (Dartmouth Publishing Company, 1993).

social expenditure,[18] they tend to be more generous, with a strong emphasis on universalism and on the eradication of structure inequalities.[19]

For the purposes of this analysis, the most commonly recurring characteristics within the descriptions of universalist system are consolidated so that the working definition of universalist welfare provision is taken as including:

1. A strong emphasis on the principle of universalism;
2. Welfare payments granted as a right;
3. A welfare system which is not clearly stratified into social security and social assistance;
4. Clear and effective procedures and procedural rights; and
5. The conditions attached to welfare payments are not unduly limiting.

The final two criteria have been added in order to reflect that, firstly, in order for welfare payments to be granted *as a right,* that right must be *effective.* Secondly, based on the idea that the system administering these payments are universalist, the criteria an individual must satisfy in order to qualify for them must not be unduly restrictive, as that would undermine the unique character they possess. They also counter-balance some of the characteristics of 'specific' modes of welfare provision outlined below.

2.2.2 'Specific' Welfare Provision

The specific mode of welfare provision is one which decommodifies labour to a lesser extent than the universalist mode. This is due to the lower level of importance given to economic redistribution and to ensuring relative equality of outcome and living standards between those residing within that particular State.[20] The economy is seen as the primary engine of society, and the best means of providing for the welfare needs of in-

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[18] W. Korpi & J Palme, 'The paradox of redistribution and strategies of equality: welfare institutions, inequality and poverty in the western countries' (1998) 63 American Sociological Review 661.

[19] M. Ferrera, 'The ´Southern` Model of Welfare State in Social Europe' (1996) 6(1) *Journal of European Social Policy* 17.

[20] K.J. Arrow, 'Gifts and Exchanges' (1972) 1(4) *Philosophy & Public Affairs* 343, 349-350; F. Hirsch, *The Social Limits to Growth* (Cambridge, 1976), 87, 93, 92; and E.F Schumacher, *Small is Beautiful: A Study of Economics as if People Mattered* (Vintage, 2011), 31.

dividuals as well as society at large.[21] Consequently, an individual's entitlements to welfare payments is an extension of their activity within the labour market, and categories of payments will be more sharply delineated between social security payments, which they receive based on their contributions towards the main social fund, and social assistance, which they receive at the discretion of the State and to provide for a minimum level of subsistence.[22] Welfare systems which align with the specific mode are the most common internationally, and for this reason, are perhaps the most diverse.

Due to the lower level of decommidification that takes place in welfare systems which align closely with the specific mode, it is often considered to create a form of 'market citizenship.'[23] This means that where an individual falls outside of the scope of the labour market, they have a far more limited form of access to the welfare system, as the primary assumption is that their wellbeing will be best provided for through active participation in the labour market on a continual basis. Similarly, where entitlements are highly restricted, individuals from ethnic, racial, or socio-economic minority groups may be disadvantaged to a far higher degree. Such persons may fall outside of the welfare system more easily, or find themselves ejected from it after a period of time. Where an individual is from more than one minority group, such as a person of colour who identifies as disabled, they will be placed at an even greater disadvantaged when attempting to engage with a welfare system which aligns more closely with the specific mode.[24] Individuals that fall outside of it by engaging in unremunerated labour may also

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[21] D McNally, *Against the Market: Political Economy, Market Socialism, and the Marxist Critique* (Verso Books, 1993), 172. Although McNally in this instance refers to the unquestioning adoption of the Market by Social Democrats over time, it still demonstrates the view of the Market by its advocates. Advocates of the Market either knowingly or unknowingly would for the existence of the 'Market State' in that it is the natural consequence of Market principles.

[22] See for example, H. Skovgaard-Petersen, 'Market Citizenship and Union Citizenship: An 'Integrated' Approach? The Martens Judgment' (2015) 42(3) *Legal Issues of Economic Integration* 281; I. Bartle, 'Political Participation and Market Citizenship in a Global Economy: The European Union in Comparative Perspective' (2006) 4(6) *International Journal of Public Administration* 415; C. O'Brien, 'I Trade, Therefore I am: Legal Personhood in the European Union' (2013) 50(6) *Common Market Law Review* 1643.

[23] M. Everson, 'The Legacy of the Market Citizen' in J. Shaw & G. More (eds.), *New Legal Dynamics of European Union* (Clarendon, 1995), 73; N. Nic Shuibhne, 'The resilience of EU market citizenship' (2010) 47(6) *Common Market Law Review* 1597; K. Jayasuriya, 'Constituting market citizenship: regulatory state, market making and higher education' (2015) 70(6) *Higher Education* 973.

[24] C. O'Brien, '*Civis Capitalist Sum:* Class as the New Guiding Principle of EU Free Movement Rights' (2016) 53 *Common Market Law Review* 937; D Kochenov, 'On Tiles and Pillars: EU Citizenship as a Federal Denominator' in Kochenov (eds.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press, 2017) 1; P Caro de Sousa, 'Quest for the Holy Grail' (2014) 20 *ELJ* 499; D Kochenov, 'Neo-Mediaeval Permutations of Personhood in Europe' in L Azoulai et al (eds.), *Ideas of the Person and Personhood in European Union Law* (Hart Publishing, 2016).

have to rely on either social assistance or draw social security by virtue of their relationship with someone engaged in the labour market. This does not alter that the welfare state is based on the concept of decommodification, but rather makes an individual more dependent on labour market activity in order to have an appreciable level of decommodification take place. Consequently, it is a predominantly *market-driven* approach to welfare provision.

In examining some of the seminal scholarly literature, specific welfare provision can encompass: where benefits are tightly targeted at specific groups and issues, making entitlements narrow and harder to access;[25] those systems which, outside of statutory entitlements, target payments at those in 'genuine need' and will take account of their assets for the purposes of social assistance;[26] discretionary payments are targeted at the vulnerable or marginalised and will be restricted to those deemed 'deserving' and may require that the individual's 'character' is judged;[27] the use of targeted payments, clear divide between social security and assistance, emphasis on granting payments to those who cannot work, limited access and a preoccupation with those deemed 'unwilling to work;'[28] and where there is a sharp delineation between social security and assistance, entitlements are limited, the procedures may be limited/conservative in nature and there is a social stigma attached to welfare recipients.[29]

From this it is possible to extrapolate the common characteristics of a specific welfare system as being:

1. One which does not attach much value to universalism;

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[25] P. Townsend, *Sociology and Social Policy* (Penguin, 1975), Chapters 7 and 9 in particular.

[26] P. Saunders, 'Selectivity and Targeting Income Support: The Australian Experience' (1991) 20 *Journal of Social Policy* 299.

[27] D.S. King, *Actively Seeking Work? The Politics of Unemployment and Welfare Policy in the United States and Great Britain* (University of Chicago Press, 1995).
This also ties into the issue of 'welfare fraud' which has been explored by McKeever in detail. See, G. McKeever, 'Fighting Fraud: An Evaluation of the Government's Social Security Fraud Strategy' (1999) 21(4) *Journal of Social Welfare and Family Law* 357; G. McKeever, 'Detecting, Prosecuting and Punishing Benefit Fraud: The Social Security Administration (Fraud) Act 1997' (1999) 62(2) *Modern Law Review* 261; G. McKeever, 'Social Security as a Criminal Sanction' (2004) 26(1) Journal of Social Welfare and Family Law 1; G. McKeever, 'Tackling Benefit Fraud' (2003) 32 *Industrial Law Journal* 326; and G. McKeever, 'Balancing Rights and Responsibilities: The Case of Social Security Fraud' (2009) 16(3) *Journal of Social Security Law* 139 for example.

[28] C. Murray, *Losing Ground: American Social Policy, 1950-1980* (Basic Books, 1984); and L.M. Mead, *Beyond Entitlement: The Social Obligations of Citizenship* (Free Press, 1986).

[29] G. Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Polity Press, 1990), 26-27.

2. Welfare payments are not considered to be a right;
3. The welfare system is clearly delineated between social security and social assistance payments;
4. Entitlements are quite rigid; and
5. A cultural stigma may often be attached to welfare recipients and this means procedures may be distrusting of those attempting to access payments.

2.2.3 The Two Modes of Welfare Provision

Table 2.1 below illustrates the common characteristics of both the universalist and specific modes of welfare provision and how they relate to one another. These will be used throughout the thesis to represent two individualised points along a spectrum of welfare provision, and with which most welfare systems will tend to align.

Table 2.1 Working Definitions of Universalist and Specific Modes of Welfare Provision

Universalist	Specific
Normative emphasis on universalism	No emphasis on universalism
Welfare payments as a right	No right to welfare payments
No clear delineation between social security and assistance	Delineation between social security and assistance
Effective procedures and procedural rights	Procedures are be designed to establish that individual is 'worthy'
Less Rigid entitlements to provide broader access to payments	Rigid entitlements that limits access to payments

As will explained throughout this chapter, migrants are often excluded from or in some way limited or restricted in their access to the welfare system of their host State. This does not mean that classic conceptions of welfare provision cannot be applied to

them. It instead creates an impetus for establishing how the welfare system applies to them in particular, and if this differs from the rules that apply to national citizens. For example, national welfare systems may be reshaped by the State's response to inward migration, or, in the case of EU welfare rules, may be based upon the idea of opening up the welfare state to migrants on a more universal, albeit limited, basis. Consequently, it is a matter of ensuring that the welfare system and State's relationship with migration is taken into account to shed light on the State's relationship with welfare provision *in an overarching sense.*

From the perspective of this thesis, this kind of analysis will be conducted in a global manner, meaning that each chapter will attempt to discuss how the European Union and Irish welfare systems align with each mode in a holistic sense, rather than attempting to examine how it satisfies each particular criteria of the universalist and specific modes. The full complexity of where each welfare system lies along this overall continuum of welfare provision will, however, be returned to in Chapter Seven.

2.3 The Welfare State and Migration

An issue present, but not developed in the preceding chapter, is the idea of the welfare state being tied to the notion of statehood and of national borders. Borders act as part of a broader system designed to ensure that those who are considered to be part of a particular political, social and geographic community enjoy certain privileges and opportunities - particularly with regard to accessing resources and state systems, such as the welfare state - that non-citizens do not enjoy to the same degree.[30] This requires that the territory is known and quantifiable, and in turn governed.[31] Not only must the State be able to identify the geographical territory and its resources, it must also be able to establish the identities of its constituents and their resources.[32] For Walzer,

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[30] R. Bellamy, *Citizenship: A Very Short Introduction* (Oxford University Press, 2008); L. Benton, *A Search for Sovereignty: Law and Geography in European Empires 1400-1900* (Cambridge University Press, 2010); and M. Foucault, 'Governmentality' in P. Rainbow & N. Rose (eds.), *The Essential Foucault: Selections from Essential Works of Foucault, 1954-1984* (New Press, 2003), 229-45.

[31] M. Foucault, 'The Subject and Power' (1982) 8 *Critical Inquiry* 777-95, 777.

[32] J.C. Scott, *Seeing Like a State: How Certain Schemes to Improve Conditions Have Failed* (Yale University Press, 1998).

> 'the very idea of distributive justice presupposes a bounded world within which distributions take place: a group of people committed to dividing, exchanging, and sharing social goods, first among themselves.'[33]

Citizenship, as well as other forms of belonging to a national community, consequently act as both 'an object and instrument of closure'[34] through which the State deems individuals to be included in or excluded from it, and is able to limit their access to the welfare state on that basis.[35] Belonging extends clear rights as well as obligations to an individual based on their relationship to the State authority who create and maintain these.[36]

Residence, nationality, citizenship and the State's perception of an individual's belonging within a particular community can therefore have deep consequences in terms of a person's ability to access welfare payments. For example, as Table 2.2 below illustrates, different forms of legal rules and requirements can act as barriers to accessing welfare payments. In some instances, this may be a declaration that a right to a particular payment accrues exclusively to citizens,[37] through conditions attached to immigration permissions,[38] through particular residency requirements,[39] or through certain inte-

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[33] M. Walzer, *Spheres of Justice: A Defence of Pluralism and Equality* (Basic Books, 1983), 31. Walzer also argues that 'admission and exclusion are at the core of communal independence… without them, there could not be communities of character, historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of their common life.' (Ibid, 62.) See also, D. Miller, *National Responsibility and Global Justice* (Oxford University Press, 2007).

[34] W.R. Brubaker, *Citizenship and Nationhood in France and Germany* (Harvard University Press, 1992), 34.

[35] S. Wolin, 'Fugitive Democracy' in S. Benhabib, *Democracy and Difference* (Princeton University Press, 1996); M. Anderson & E. Bort (eds.), *The Frontiers of Europe* (Pinter, 1998); H. Donnan & T.M. Wilson, *Borders: Frontiers of Identity, Nation and State* (Berg, 1999); M. Albert, D. Jacobson & Y. Lapid (eds.), *Identities, Borders, Orders: Rethinking International Relations Theory* (University of Minneapolis Press, 2001); A. Buchanan & M. Moore (eds.), *States, Nations and Borders* (Cambridge University Press, 2003).

[36] C Joppke, *Citizenship and Immigration* (Cambridge, Polity, 2010), 96–110; Y Soysal, *Limits of Citizenship* (Chicago, University of Chicago Press, 1994); Y. Tamil, *Liberal Nationalism* (Princeton University Press, 1993); J. Isbister, 'A Liberal Argument for Border Controls: Reply to Carens' (2000) 34(2) *International Migration Review* 629; S. Scheffler, *Boundaries and Allegiances* (Oxford University Press, 2001); and S. Macedo, 'What Self-Governing Peoples Owe to One Another: Universalism, Diversity and the Law of Peoples' (2004) 72(5) *Fordham Law Review* 1721.

[37] Examples of this can be seen in the case law of the ECtHR, detailed in Chapter Four.

[38] As Chapter Six discusses in detail, immigration stamps or permissions often attach limitations in terms of access to welfare payments for the migrants holding them.

[39] See the Habitual Residence Condition and Right to Reside as discussed throughout this thesis.

gration requirements.[40] Where these conditions can either not be met or are an exact condition attached to a migrant's stay within a State, their access to the welfare system is limited in a legal and practical sense.

Table 2.2: Examples of Migrant Barriers to Accessing Welfare Payments

Citizenship	Directly discriminatory measures require that an individual is of a particular nationality
Immigration Permissions	Immigration Stamps in Ireland often limit access to the welfare state in some form based on the kind of permission and form of migration.
Residency Requirements	The Habitual Residence Condition and 'Right to Reside' under EU and Irish law both limit access to social assistance payments in particular.
Integration Requirements	States may limit access to the welfare system for migrants until they have met certain integration requirements - language competency exams, demonstration of integration into the community, or having met the threshold for 'long-term residence.'

The difficulty with applying conditions such as these, and in restricting access to the welfare system for migrants, is that they often fail to consider the realities of an increasingly globalised world. As Baubock has posited, individuals can now more easily move to and reside in States other than their country of origin than ever before, and these persons develop more complex personal identities which reflect an attachment to more than one State.[41] For example, a French citizen living in London is capable of viewing themselves as both French and English, as well as something entirely separate from both - an identity that reflects both of these lived experiences. Yet, States themselves continue to draw red lines in terms of who is and is not able to access welfare payments and other State services which are often incapable of dealing with this new reality. Conversely, from the perspective of the host State, measures such as residency requirements or inte-

[40] E. Guild et al, 'Understanding the Contest of Community: Illiberal Practices in the EU?' in E. Guild, K. Groenendijk & S. Carrera (eds.), *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU* (Ashgate, 2009), 5 discuss the extent to which integration requirements will place limitations on migrant access to the welfare system based on how long they have resided their and if they have met specific legal tests or requirements. This may also be seen in access to welfare payments for mobile EU citizens deemed to be long-term residents within their host State.

[41] R. Baubock, *Transnational Citizenship* (Edward Elgar, 1994); and R. Baubock, 'Political Boundaries in a Multi-Level Democracy' in S. Benhabib & I. Shapiro (eds.), *Identities, Affiliations and Allegiances* (Cambridge University Press, 2007).

gration criteria are a natural compromise between the interests of the migrant and the State in maintaining its welfare system, as they allow migrants to demonstrate their affinity with the host society and, once satisfied, access welfare payments.Unfortunately, as Section 2.3.1 will demonstrate, these are not ethically-neutral practices, and often draw upon problematic preconceived notions of the 'dangers' of inward migration, as well as the limits of a State's sense of social solidarity, which commonly fail to embrace these new migrants with more complex identities than citizens of their host States.

2.3.1 Internal and External Justifications for Limiting Access to the Welfare System for Migrants

Inward migration from other States is often viewed as constituting an existential threat to the welfare state and society at large.[42] Migrants must be restricted based on an objective set of criteria, citizenship must act as a red line in terms of access to the welfare state, or even both.[43] Kant argues that a State is merely required to acknowledge 'the right of an alien not to be treated as an enemy upon his arrival in another's country. If it can be done without destroying him, he can be turned away; but as long as he behaves peacefully he cannot be treated as an enemy.'[44] Social rights are, as outlined earlier, often the final step[45] in the overall process of defining citizenship of a national community.[46] In order to ensure that this link between the citizen and the State is main-

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[42] M. Bommes & A. Geddes, 'Introduction: Immigration and the Welfare State' in M. Bommes & A. Geddes (eds.), *Immigration and Welfare. Challenging the borders of the welfare state* (London, Routledge, 2000), 1-2.

[43] K.A. Appiah, *Cosmopolitanism: Ethics in a World of Strangers* (WW Norton, 2006), 71, 76-78, 85; S. Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge University Press, 2004), 17-19; M. Ruhs & C. Vargas-Silva, The Labour Market Effects of Immigration' Migration Observatory briefing, COMPAS, (University of Oxford, UK, May 2015); M. Ruhs, *The Price of Rights: Regulating International Labour Migration* (Princeton University Press, 2013); B. Anderson, *Us and Them? The Dangerous Politics of Immigration Controls* (Oxford University Press, 2013); and D. Sainsbury, *Welfare States and Immigrant Rights. The Politics of Inclusion and Exclusion* (Oxford University Press, 2012).

[44] I Kant, 'Perpetual Peace: A Philosophical Sketch' in H Reiss (eds) *Kant: Political Writings* (Cambridge University Press, 1994), para 358.
See also, A. Schacar, *The Birthright Lottery: Citizenship and Global Inequality* (Harvard University Press, 2009); J.H. Carens, 'Who Belongs? Theoretical and Legal Questions About Birthright Citizenship in the United States,' (1987) 37(4) *University of Toronto Law Journal* 413; J.H. Carens, *The Ethics of Immigration* (Oxford University Press, 2013); J.H. Carens, 'Realistic and Idealistic Approaches to the Ethics of Migration' (1996) 30(1) *International Migration Review* 156.

[45] Although it should be noted that EU citizens have political rights by virtue of their legal status.

[46] T.H. Marshall, 'Citizenship and Social Class' in T.H. Marshall & T. Bottomore (eds.), *Citizenship and Social Class* (Pluto Press, 1992).

tained, as well as to ensure the resources of the welfare system are protected, access must be limited.[47]

The justifications for these restrictions range from the external - the perceived dangers posed by the migrant - to the internal - the reaction of the society to the migrant. In respect of external dangers, Anderson highlights the existence of the 'lump labour fallacy,' or the belief that there is 'a fixed amount of work in an economy that is then divided between a given number of workers' and this is affected by the number of migrants within a particular society.[48] This in turn leads to more nationals of that State having to resort to the welfare system, placing an undue strain upon it. Similarly, some States argue that they do not want to become a magnet for 'welfare tourism,' the phenomenon in which migrants move to a State simply to take advantage of their more generous welfare system. Although some studies suggest migrants *may* in some instances be more likely to access welfare payments,[49] it is difficult to categorise this as an abuse,[50] due in large part to the legal barriers that often exist for them in accessing the welfare system. There is, however, no 'immigrant effect' that will lead migrants to threaten the financial security of the welfare system to a greater extent than national citizens.[51] Migrants are

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[47] See T. Hammar, *Democracy and the Nation State: Aliens, Denizens and Citizens in the World of International Migration* (Avebury, 1990); J.F. Hollifield, *Immigrants, Markets and States: The Political Economy of Postwar Europe* (Harvard University Press, 1992); Y. Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (University of Chicago Press, 1994); D. Jacobson, *Rights Across Borders: Immigration and the Decline of Citizenship* (John Hopkins University Press, 1996); S. Soroka, K. Banting & R. Johnston, 'Immigration and Redistribution in a Global Era' in P. Bardhan, S. Bowles & M. Wallerstein (eds.), *Globalisation and Egalitarian Redistribution* (Princeton University Press, 2006) 261; and M. Dougan & E. Spaventa, 'Wish You Weren't Here… New Models of Social Solidarity in the European Union' in E. Spaventa & M. Dougan (eds.), *Social Welfare and EU Law* (Oxford, Hart Publishing, 2005), 181-218.

[48] B. Anderson, 'British Jobs for British Workers?: Understanding Demand for Migrant Workers in a Recession' (2010) 11 *The Whitehead Journal of Diplomacy and International Relations* 103, 104.

[49] L. Jensen, 'Patterns of Immigration and Public Assistance Utilization,' (1988) 22(1) *International Migration Review* 51; G.J. Borjas & L. Hilton, 'Immigration and the Welfare State: Immigrant Participation in Means-tested Entitlement Programs' (1996) 111(2) *Quarterly Journal of Economics* 574; and G.J. Borjas & S.J. Trejo, 'Immigrant Participation in the Welfare System' (1991) 44(2) *Industrial and Labor Relations Review* 195.

[50] H. Brücker, G.S. Epstein, B. McCormick, G. Saint-Paul, A. Venturini & K. Zimmermann, 'Welfare State Provision' in T. Boeri, G. Hanson & B. McCormick (eds.), *Immigration Policy and the Welfare State* (Oxford University Press, 2002).

[51] Supported by E.J. Castronova, H. Kayser, J.R. Frick & G.G. Wagner, 'Immigrants, Natives and Social Assistance: Comparable Take-up under Comparable Circumstances' (2001) 35(3) *International Migration Review* 726; R.T. Riphahn, 'Immigration Participation in Social Assistance Programs' (2004) 50(4) *Applied Economics Quarterly* 329.

also no more likely to become long-term dependents upon the national welfare system.[52] These arguments are however, often put forward by the judiciary in defending State policies towards migrants, with Hogan J recently arguing in the High Court that

> 'Child benefit is paid for by the taxpayers of the State and the Oireachtas as general guardians of the Exchequer could quite reasonably require that this money is only paid to persons resident within the State, thus ensuring that transfer payments made by the State's taxpayers are paid only to inhabitants of the State, thereby contributing to the overall welfare of the State.'[53]

In this instance, the plaintiffs had been present in the State for several years, but one of them simply lacked the legal status necessary to be considered lawfully resident. The Court ultimately believed that differentiating between the citizen and non-citizen is potentially justifiable, illustrating how these preconceptions can seep into not just political discourse, but also judicial decision making.

With regard to internal factors, many arguments in favour of restricting access to welfare state for migrants (and immigration laws generally) deal with the way in which migrants affect their social environment upon arrival. Many scholars have indeed argued that multiculturalism, particularly when it is brought to previously quite homogenous societies through migration, can lead to the erosion of social solidarity which in turn undermines support for welfare programmes among national citizens.[54] In essence, the more diverse a State becomes, the less the majority begins to trust the State in redis-

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[52] J. Hansen & M. Lofstrom, 'Immigrant Assimilation and Welfare Participation: Do Immigrants Assimilate into or out of Welfare?' (2003) 38(1) *Journal of Human Resources* 74; J. Hansen & M. Lofstrom, 'Immigrant-Native Differences in Welfare Participation: The Role of Entry and Exit Rates' (2006) IZA Discussion Paper 2261; J. Hansen & M. Lofstrom, 'The Dynamics of Immigrant Welfare and Labor Market Behaviour,' (2009) 22(4) *Journal of Population Economics* 941.

[53] *Agha (a minor) & ors -v- Minister for Social Protection & ors, Osinuga (a minor) & anor -v- Minister for Social Protection & ors* [2018] IECA 155.

[54] Z. Hellgren & B. Hobson, 'Cultural Conflict and Cultural Dialogues in the Good Society: The Case of Honour Killings' (2008) 8(Special Issue) *Sweden, Ethnicities, Special Issue: The Rights of Women and the Crisis of Multiculturalism*, 385; B. Slim, 'Dilemmas of Citizenship - Tensions between Gender Equality and Respect for Diversity in the Danish Welfare State' in K. Melby C. Wetterberg & S Revn eds.), *Gender Equality and Welfare Politics in Scandinavia: The Limits of Political Ambition* (The Policy Press, 2008); A. Morissens & D. Sainsbury, 'Migrants' Social Rights, Ethnicity and Welfare Regimes' (2005) 34(4) *Journal of Social Policy* 637.

tributing wealth.[55] A similar issue arises from the perception that citizens of the host State must compete with migrants for access to State resources, including welfare payments.[56] It is also believed that 'competition theory' can exacerbate tensions between different ethnic groups nationally, as the dominant group in society will often reflect their anger onto native minorities.[57]

For Appadurai, 'majorities can always be mobilized to think that they are in danger of becoming minor… and to fear that minorities, conversely, can easily become major.'[58] This 'fear of small numbers' can facilitate right-wing parties using migrants as scapegoats 'for all that is newly unfamiliar, for every thing and every relation that is newly different, newly understood, or newly unappreciated.'[59] These fears can often be based on a the perceived 'dilution' of national cultural values[60] but are also commonly framed in terms of security,[61] and the literal threat that migrants poses to public safety. Exerting control over immigration and welfare laws and making them more restrictive can act as a kind of 'symbolic crusade,' whereby the State can fight the perceived dwindling of its sovereignty and border controls.[62] As Harvey and Barnidge argue,

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[55] A. Alesina, E. Glaeser & B. Sacerdote, 'Why Doesn't The US Have A European-Style Welfare System?' (2001) <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.200.2805&rep=rep1&type=pdf> accessed 9 March 2017; A. Alesina, R. Baqir & W. Easterly, 1997. 'Public goods and ethnic divisions' No. w6009 (National Bureau of Economic Research, 1997); J. Habyarimana, M. Humphreys, D. Posner & J. Weinstein, 'Why does ethnic diversity undermine public goods provision?' (2007) 101(04)) *American Political Science Review* 709; and R.D. Putnam, 'E pluribus unum: Diversity and community in the twenty− first century the 2006 Johan Skytte Prize Lecture' (2007) 30(2) *Scandinavian political studies* 137.

[56] H. Blumer, 'Race prejudice as a sense of group position' (1958) *Pacific Sociological Review* 3; L. Bobo V. Hutchings, 'Perceptions of racial group competition: Extending Blumer's theory of group position to a multiracial social context' (1996) *American Sociological Review* 951; and L. Quillian, 'Prejudice as a response to perceived group threat: Population composition and anti-immigrant and racial prejudice in Europe' (1995) *American sociological review* 586.

[57] J. Oliver, & J. Wong, 'Intergroup prejudice in multiethnic settings' (2003) 47(4) *American Journal of Political Science* 567.

[58] A. Appadurai, *Fear of Small Numbers: An Essay on the Geography of Anger* (Duke University Press, 2002), 83.

[59] A. Pred, *Even in Sweden: Racisms, Racialized Spaces, and the Popular Geographical Imagination* (University of California Press, 2000), 31.

[60] J. Esposito & I. Kalin (eds.), *Islamophobia* (Oxford University Press, 2011); A. Lentin & G. Titley, *The Crises of Multiculturalism: Racism in a Neoliberal Age* (Zed Books, 2011).

[61] J. Esposito & I. Kalin (eds.), *Islamophobia* (Oxford University Press, 2011); A. Lentin & G. Titley, *The Crises of Multiculturalism: Racism in a Neoliberal Age* (Zed Books, 2011); as well as L. Chavez, *The Latino Threat: Constructing Immigrants, Citizens, and the Nation* (2nd edn., Stanford University Press, 2013).

[62] K. Calavita, *Immigrants at the Margins: Law, Race, and exclusion in Southern Europe* (Cambridge University Press, 2005), 166.

> '[i[f '[l]iberty of movement is an indispensable condition for the free development of a person', then what is an 'indispensable' human right is increasingly seen by developed states as an 'inconvenient' human right.'[63]

Access to the welfare system is therefore ultimately limited for migrants so that nationals may maintain a preferential position relative to them, whether it is based on internal or external factors, or some combination of the two.[64]

2.3.2 Migrants a Prism Through Which to View the Welfare State

As the scholarly literature in the preceding sections demonstrates, migration can cause deep seated fears to develop within the native population. By contrast, the freedom of movement within a single State has often be viewed as 'nation building' in a way that migration from one State to another is not.[65] Internal migration helps to construct a sense of ethnic or national identity, as well as the ability for States to have labour shortages in one region filled by citizens from another area of the State with relative ease. This is not only economically beneficial, as labour shortages or shortages in the supply of goods or services can be filled quickly, internal migration also provides a constitutive force within society, as citizens from different parts of the State share the common bond of citizenship.[66] Yet the moment a migrant from another national state

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[63] C. Harvey & R.P. Barnidge, 'Human Rights, Free Movement, and the Right to Leave in International Law' (2007) 19(1) *International Journal of Refugee Law* 1, 1.

[64] P. Scheepers, M. Gijsberts & M. Coenders, 'Ethnic exclusionism in European countries. Public opposition to civil rights for legal migrants as a response to perceived ethnic threat' (2002) 18(1) *European sociological review* 17.

[65] W. Maas, *Creating European Citizens* (Rowman & Littlefield, 2007); M. Blake, 'Universal and Qualified Rights to Immigration' (2006) 4(1) *Ethics and Economics* <https://papyrus.bib.umontreal.ca/xmlui/bitstream/handle/1866/3370/2006v4n1_BLAKE.pdf;jsessionid=23C37E97E45D18ACB277BDE9B2E04594?sequence=1> accessed 09/04/2017; K. Oberman, 'Immigration as a Human Right' (2013) JWI Working Paper No 2013/03 <http://www.sps.ed.ac.uk/__data/assets/pdf_file/0003/129207/Kieran_Oberman_JWI_Working_Paper_Immigration_as_a_Human_Right.pdf> accessed 03/04/2017; and D. Miller, 'Is There a Human Right to Immigrate?' in S. Fine & L. Ypi (eds.), *Migration in Political Theory: The Ethics of Movement and Membership* (Oxford University Press, 2013).

[66] This is not say that the adoption of this right was uniformly supported. See S. Jagerskiold, 'The Freedom of Movement' in L. Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press, 1981); J. Morsink, *The Universal Declaration of Human Rights* (University of Pennsylvania Press, 1999); M.A. Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House, 2001); J. McAdam, 'An Intellectual History of Freedom of Movement in International Law: The Right to Leave as a Personal Liberty' (2011) 12(1) *Melbourne Journal of International Law* 27; and S.S. Juss, 'Free Movement and the World Order' (2004) 16 *International Journal of Refugee* Law 289, 291.

attempts to cross an external border, their 'otherness' becomes a primary concern, regardless of the reason for which they migrated.

The relationship between the citizen and migrant can therefore be constructive, insofar as the citizen's response to a migrant relocating to their State will shape their personal definition of their own community. At a macro level, for the State to change the way in which it defines the 'outsider' will inform the community's view of those who 'belong' and those who are excluded.[67] In both respects, who belongs, and how those who are considered to fall outside of this cannot be considered a merely legal or political question, as the decision to withhold or limit rights for a given group, such as migrants, will inevitably have moral implications.[68] Or, as Koopmans puts it,

> '*the immigrant 'other' functions as a mirror in which we can observe and by which we can redefine ourselves*, as immigration tends to create pressures and opportunities for a redefinition and reinvention of the conception of citizenship and national identity within the receiving nation states.'[69] (emphasis added)

A State and its society which is easily divided by an influx of migrants may reflect this internally with its treatment of citizens who are similarly seen as different or 'other.' Or, if this is not the case, a reticence to embrace the migrant shows a society's potential willingness to act in a similar manner to other minority groups in the future, with the migrant acting as an early indicator of this gradual fragmentation of social solidarity. The migrant and their relationship to the citizen is constructive, insofar as any changes in what constitutes the first informs the latter.

To change the way in which we define the 'outsider' will always inform our view of those who 'belong.'[70] In the welfare context, this can clearly be seen within the ways in

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[67] C. Joppke, *Immigration and the Nation States: The United States, Germany, and Great Britain* (Oxford University Press, 1999), 4; R. Brubaker, *Citizenship and Nationhood in France and Germany* (Harvard University Press, 1992), 46.

[68] See for example S. Fine, *Immigration and the Right to Exclude* (Oxford University Press, 2014); and K. Hailbronner, 'Citizenship and Nationhood in Germany' in W. Rogers Brubaker (ed.), *Immigration and the Politics of Citizenship in Europe and North America* (University Press of America, 1989), 81.

[69] R. Koopmans (eds.), *Contested Citizenship: Immigration and Cultural Diversity in Europe* (University of Minnesota Press, 2005), 6.

[70] C. Joppke, *Immigration and the Nation States: The United States, Germany, and Great Britain* (Oxford University Press, 1999), 4; R. Brubaker, *Citizenship and Nationhood in France and Germany* (Harvard University Press, 1992), 46.

which a State may begin to reduce the overall generosity of a system once it has seen an influx of migrants, and as citizens begins to question their own sense of social solidarity. The moral or ethical implications of this reconsideration of the welfare state will subsequently have legal and administrative consequences, as the welfare system tightens or retrenches in response to the addition of the migrant.

2.3.3 EU Welfare Law and the Free Movement of Union Citizens

EU law is significant in this respect because it is part of an overall process of 'unbundling' or 'decoupling' rights, such as access to welfare, from citizenship and other measures which restrict access to the welfare state nationally.[71] Prior to this, the barriers outlined in Table 2.2 were capable of being utilised by its Member States with few, if any restrictions being placed upon them.

In relation to EU citizens, the impact of free movement rules enacted by the EU[72] has facilitated the development of a form of 'postnational' citizenship,[73] wherein 'belonging' within a host Member State's society is increasingly less tied to holding citizenship of that State.[74] Facilitating this free movement of persons has in turn opened up access to national welfare systems for mobile EU citizens - those who have migrated internally from one Member State to another. In 1971, for example, Regulation 1408/71 facilitat-

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[71] W. Kymlicka, 'Liberal Nationalism and Cosmopolitan Justice' in R. Post (ed.), *Another Cosmopolitanism* (Oxford University Press, 2006), 138.

[72] T. Kinggreen, 'Fundamental Freedoms' in A. von Bogdandy & J. Bast (eds.), *Principles of European Constitutional Law* (Hart, 2011), 519-520; J.H.H. Weiler, *The Constitution of Europe* (Cambridge University Press, 2005), 30-31.

[73] Y. Soysal, 'Changing Parameters of Citizenship and Claims-Making: Organised Islam in European Public Spheres' (1997) 26 *Theory and Society* 509; D. Kostakopoulou, 'Thick, Thin and Thinner Patriotism: Is This All There Is?' (2006) 26 *Oxford Journal of Legal Studies* 73, 83. This is to be contrasted with 'transnational citizenship as discussed in R. Baubock, *Transnational Citizenship* (Elgar, 1994).

[74] This is also aided by the increased control of non-State level governance within a given territory. See S. Tierney, 'Reframing Sovereignty: Sub-State National Societies and Contemporary Challenges to the Nation State,' (2005) 54 *International and Comparative Law Quarterly* 161.

ing the free movement of workers[75] was enacted based on the Article 51[76] of the Treaty Establishing the Economic Community.[77]

The Union has never sought to *harmonise* welfare provision for these persons, and has instead sought only to *coordinate* access to national welfare systems. For Cornelissen, this has become an unfeasible proposition due to the current size of the European Union and the sheer number of Member States within it,[78] and the Union's institutions have also argued that the 'considerable differences existing between national social security legislations'[79] mean that in practical terms, 'substantive and procedural differences between the social security systems of individual Member States are unaffected by Article[s 45 and 48 TFEU]…'[80] In spite of these differences and the need to reconcile them, the fact remains that European Union law is considered to have supremacy over national law,[81] with the effect that where there is a dispute between EU and national rules, Union rules will override any conflicting provision at the national level.[82] Whilst Member States may choose to organise their national welfare system as they see fit, they must comply with the welfare provisions contained within the Treaties and leg-

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[75] Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community OJ L 149 , 05/07/1971 P. 0002 – 0050.

[76] Article 51 outlined that - 'The Council, acting by means of a unanimous vote on a proposal of the Commission, shall, in the field of social security, adopt the measures necessary to effect the free movement of workers, in particular, by introducing a system which permits an assurance to be given to migrant workers and their beneficiaries: (a) that, for the purposes of qualifying for and retaining the right to benefits and of the calculation of these benefits, all periods taken into consideration by the respective municipal law of the countries concerned, shall be added together; and (b) that these benefits will be paid to persons resident in the territories of Member States." See also Articles 2 and 7 of the same Treaty.

[77] Now Treaty on the Functioning of the European Union, Article 48.

[78] R. Cornelissen, 'Achievements of 50 years of European Social Security Co-ordination' in Y. Jorens (ed.), *Fifty Years of Social Security Co-ordination* (European Commission, 2009) 55, 55.

[79] Regulation 1408/71, Preamble.

[80] Case C−3/08 *Ketty Leyman v Institut national d'assurance maladie-invalidité (INAMI)* [2009] ECLI:EU:C:2009:595, para 40 - 'As regards freedom of movement for workers, Article 42 EC leaves in being differences between the Member States' social security systems and, consequently, in the rights of persons working in the Member States. It follows that substantive and procedural differences between the social security systems of individual Member States are unaffected by Article 42 EC...'

[81] Case 6/64 *Flaminio Costa v ENEL* [1964] ECLI:EU:C:1964:66; and *Meagher v Minister for Agriculture* [1994] I IR 329.

[82] Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECLI:EU:C:1978:49, para 17 - 'Furthermore , in accordance with the principle of the precedence of community law, the relationship between provisions of the treaty and directly applicable measures of the institutions on the one hand and the national law of the member states on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but... and take precedence in, the legal order applicable in the territory of each of the member states - also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with community provisions.'

islation, and the organisation of these national systems cannot impede the effective use of the free movements. As the Court later opined,

> 'It should be observed that, in order to safeguard the effective exercise of the right to freedom of movement enshrined in Article 48 of the Treaty, the Council is required, under Article 51 thereof, to set up a system to enable workers to overcome obstacles with which they might be confronted in national social security rules. In principle, the Council carried out that duty by introducing Regulation No 1408/71.'[83]

Similarly, the Advocat General's opinion in *Vassilopoulos* made clear that '*the freedoms of movement must be understood to be one of the essential elements of the 'fundamental status of nationals of the Member States.'*[84]

The scholarly literature in this area has predominantly focused on the negative consequences of social integration, arguing that the Union has eroded the competences of its Member States to create their own social policies,[85] despite this emphasis within EU law that Member States may organise their welfare states and systems in a manner that they believe to be most fitting within the national context.[86] This, as well as the lack of a centralised EU welfare state and the Union's somewhat devolved competence in the area, has meant that in characterising the EU welfare system, scholars have often avoided using modes of welfare provision which may be attributed to States, despite the EU arguably conforming with the definition of Statehood[87] or, at the very least, qualifying as 'State-like.'

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[83] Case C-360/97 *Herman Nijhuis v Bestuur van het Landelijk instituut sociale verzekeringen* [1999] ECLI:EU:C:1999:180, para 28.

[84] Joined Cases C-158 & 159/04 *Vassilopoulos* [2006] ECLI:EU:C:2006:212, para 40.

[85] D. Schiek, 'Re-embedding economic and social constitutionalism: normative perspectives for the EU' in D. Schiek, U. Liebert & H. Schneider (eds.), *European Economic and Social Constitutionalism after the Treaty of Lisbon* (Cambridge University Press, 2011) 17; D. Ashiagbor, 'Unravelling the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration' (2013) 19(3) *European Law Journal* 303.

[86] For example, the EU does not conform with the common stages of constitutional development among States - G. Peces Barbra Martinez, *Teoria de los derechos fundamentales* (Madrid, 1991). Outlined in greater detail in P. Policastro, 'A New Garment for an Old Question: 'A Clash between Man's Rights and Citizen's Rights in the Enlarged Europe?' in J. Nergelius (ed.), *Nordic and Other European Constitutional Traditions* (Martinus Nijhoff, 2006) 61, 63.

[87] P. Schmitter, 'Imagining the Future of the Euro-Polity with the Help of New Concepts' in G. Marks, F. Scharpf, P. Schmitter and W. Streeck (eds.), *Governance in the European Union* (Sage, 1996), 133.

In terms of the particular mode of welfare provision that EU welfare rules most closely align with, significant questions remain in terms of the shared social solidarity between the Member States and their sense of a shared identity. Solidarity within the EU context has been defined by the CJEU as involving the '*inherently uncommercial act of involuntary subsidisation of one social group by another,*'[88] underlining that in some ways solidarity-based systems at the national, Member State level as well as within EU law itself are seen as a 'buttress' against the Internal Market.[89] However, it must also be borne in mind that when the EU has engaged with welfare provision under EU law, a solidarity-based concept, it has done so based primarily on the idea that such systems as inherently 'market building' - that the proper functioning of the Internal Market *necessitates* that EU law in some way attempts to temper the excess of the unrestricted market.[90]

In many ways, this would suggest that the EU rules on welfare coordination point to a system which at least began as highly specific, but have over time, due to the increased reformulation of Union citizenship and convergence of welfare rules for different categories of EU citizens, become less dependent on labour market activity. It is also indicative of a system of welfare coordination which seeks to gradually make access to the welfare payments easier based along, somewhat limited, universalist lines. This creates a further conflict between the notion of opening up the welfare state, and doing so in a manner which is built upon nationalistic conceptions of welfare provision at the Member State level.

2.3.4 EU Welfare Law and Third Country Nationals

In the external sphere, the EU has developed a Union-level third-country migration policy which is 'cosmopolitan' in outlook,[91] and seeks to provide channels for legally entering and residing within the territory of the Union. It has not however, attempted to

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[88] Case C-70/95 *Sodemare v Regione Lombardia* [1997] ECLI:EU:C:1997:301, para 29.

[89] T. Harvey, 'Social Solidarity: A Buttress Against Internal Market Law?' In J. Shaw (ed.), *Social Law and Policy in an Evolving European Union* (Hart Publishing, 2000).

[90] S. Leibfried & P. Pierson, 'Social Policy: Left to Courts and Markets?' In H. Wallace & W. Wallace (eds.), *Policy-Making in the European Union* (Oxford University Press, 2000); and J. Tooze, 'Social Security and Social Assistance' in T. Hervey & J. Kenner (eds.), *Economic and Social Rights under the EU Charter of Fundamental Rights: A Legal Perspective* (Hart Publishing, 2003).

[91] D. Thym, 'EU Migration Policy and its Constitutional Rationale: A Cosmopolitan Outlook' (2013) 50 *Common Market Law Review* 709.

create open international borders.[92] An extension of this is that EU law has sought to protect and promote the rights of TCN labour migrants, such as to access welfare payments, but through *legislative provisions* rather than by utilising constitutional provisions as a basis for facilitating their access to the welfare state.[93]

Territorial borders remain highly prized by nation states,[94] and this has not been significantly altered by the process of European integration.[95] This reticence on the part of the Member States to cede control of asylum and third-country immigration pre-Lisbon provides some evidence of this.[96] It has been argued that European integration simply helped move internal frontiers between Member States outward to the Union's natural border with third-countries, with the Member States increasingly focused on the control of third-country migrants in particular as they gradually lost the ability to restrict the internal movements of mobile Union citizens.[97]

Articles 77-79 TFEU deal with internal and external border checks in respect of third-country nationals, the creation of a common asylum system, and a common immigration system for the Union respectively. Whilst it is outside of the scope of this thesis to explore the former two Articles in great detail, it is evident that allowing for legal channels of migration into the EU has been cast as requiring the control of other forms or categories of migration, often using what may be considered nationalistic language

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[92] See Article 77 TFEU.

[93] Joined cases C-22/08 and C-23/08 *Vatsouras & Koupatantze* [2009] ECLI:EU:C:2009:344, para 52.

[94] See T. Hammar, *Democracy and the Nation State: Aliens, Denizens and Citizens in the World of International Migration* (Avebury, 1990); J.F. Hollifield, *Immigrants, Markets and States: The Political Economy of Postwar Europe* (Harvard University Press, 1992); Y. Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (University of Chicago Press, 1994); D. Jacobson, *Rights Across Borders: Immigration and the Decline of Citizenship* (John Hopkins University Press, 1996).

[95] E. Balibar, 'Europe as borderland' (2009) 27 *Environment and Planning D: Society and Space* 190; U. Beck, and E. Grande, *Cosmopolitan Europe* (Polity Press, Cambridge, 2007).

[96] H. Lindahl, 'Introduction' in H. Lindahl (eds.), *A Right to Inclusion and Exclusion? Normative Faultlines of the EU's Area of Freedom, Security and Justice* (Hart Publishing, 2009), 2.

[97] W. Brown, *Walled States, Waning Sovereignty* (Zone Books, 2010); S. Sassen, 'Bordering capabilities versus borders: Implications for national borders' (2009) 30(3) *Michigan Journal of International Law* 567; S. Sassen, *Losing control? Sovereignty in an age of globalization. (The 1995 Storr Lectures)* (Columbia University Press, 1996), 29-30.

and emphasising the control of 'illegal' migration.[98] More importantly, for the purposes of Article 79 TFEU and channels of legal migration into the EU, the Union has often argued that the control of TCNs and the selective admission of certain categories of them can ensure the proper functioning of the Internal Market, and protect the rights of Union citizens.

The Union has adopted a sectoral approach to this legislation, meaning that a different Directive governs highly-skilled workers, and another governs low-skilled, seasonal workers, and their rights may vary.[99] This suggests that the approach of the EU in terms of formulating welfare rules for TCNs has been quite specific and dependent upon labour market activity. The development of welfare coordination for TCN labour migrants has primarily been justified on securing the internal market, and supporting the EU in the future. In *Wijsenbeek*, the Court of Justice went as far as to suggest that the free movement of citizens 'presupposes harmonisation of the laws of the Member States governing the crossing of borders of the Community, immigration, the grant of visas, asylum and the exchange of information on those questions.'[100]

2.3.5 The 'Europeanisation' of Welfare Provision

The increasing scope of EU law and policy, even in a relatively small field of competence such as welfare payments, can have a significant impact on the law and policies of the Member States due to the supremacy of EU rules where they exist and apply.[101] This allows for the *'Europeanisation'* of national laws and policies to take place, which due

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[98] See European Convention, *Final Report of Working Group X 'Freedom, Security and Justice'* CONV 426/02, 2; European Commission, *An Area of Freedom, Security and Justice Serving the Citizen*, COM (2009) 262, 2; and Case C-378/97 *Criminal proceedings against Florus Ariël Wijsenbeek* [1999] ECLI:EU:C:1999:439, Para 40.
See also, S. Carrera & M. Merlino, 'Undocumented Immigrants and Rights in the EU: Addressing the Gap between Social Science Research and Policy-Making in the Stockholm Programme?', Centre for European Policy Studies (CEPS), 2009; and M. Paspalanova, 'Undocumented v Illegal Migrant: Towards Terminological Coherence' (2008) 4 *Migraciones Internacionales* 82.

[99] See for example L Halleskov, 'The Long-term Residents Directive: A Fulfilment of the Tampere Objective of Near-Equality?' (2005) 7 *European Journal of Migration and Law* 181; A Beduschi, 'An Empty Shell? The Protection of Social Rights of Third-Country Workers in the EU after the Single Permit Directive' (2015) 17 *European Journal of Migration and Law* 210; B. Fridriksdóttir, What Happened to Equality? The Construction of the Right to Equal Treatment of Third-Country Nationals in European Union Law on Labour Migration' (PhD Thesis, Radboud Universiteit Nijmegen, 2016).

[100] Case C-378/97 *Criminal proceedings against Florus Ariël Wijsenbeek* [1999] ECLI:EU:C:1999:439, Para 40.

[101] Case 6/64 *Flaminio Costa v ENEL* [1964] ECLI:EU:C:1964:66; and Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECLI:EU:C:1978:49.

to the supremacy of EU laws is potentially more noticeable than other European or international Treaties such as the European Convention on Human Rights.[102]

The concept of Europeanisation has developed rapidly over time,[103] and this has led to various meanings being attributed to it. This thesis adopts Zahn's definition of Europeanisation, who believes it to be 'a process of domestic change that can be attributed to European integration.'[104] A broad definition, such as Zahn's, acknowledges this may include hard law adopted through exclusive or more established Union competences,[105] or be policy-based or largely political in nature. As many scholars have noted, it is often in the more policy-based or developing areas of Union competences that Europeanisa-

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[102] The European Convention on Human Rights will be discussed in a condensed manner in Section 4.2.4.

[103] K. Featherstone, 'Introduction: In the Name of Europe'. In K. Featherstone & C. Radaelli (eds), *The Politics of Europeanization* (Oxford University Press, 2003), 3; M. Vink, 'What is Europeanisation and other Questions on a New Research Agenda' (2003) 3(1) *European Consortium for Political Research*; and J. Olsen, 'The Many Faces of Europeanization' (2002) 40(5) *Journal of Common Market Studies* 921.

[104] R. Zahn, *New Labour Laws in Old Member States: Trade Union Responses to European Enlargement* (Cambridge University Press, 2017), 67.
Other examples include R Ladrech, 'Europeanisation of Domestic Politics and Institutions: The Case of France' (1994) 32(1) *Journal of Common Market Studies* 69, 69; C. Knill, *The Europeanisation of National Administrations: Patterns of Institutional Change and Persistence* (Cambridge University Press, 2001); H. Wallace, 'Europeanisation and Globalisation' (2000) 5(3) *New Political Economy* 69; H. Grabbe, 'How Does Europeanisation Affect CEE Governance? Conditionality, Diffusion and Diversity' (2001) 8 *Journal of European Public Policy* 1013; B. Kohler Koch (ed.), *Linking EU and National Governance* (Oxford University Press, 2003); J.P. Olsen, *Europe in Search of Political Order* (Oxford University Press, 2007); K.H. Goetz & S. Hix (eds.), *Europeanised Politics? European Integration and National Political Systems* (Frank Cass, 2001).

[105] S. Jenni, 'Direkte und indirekte Europäisierung der schweizerischen Bundesgesetzgebung' (2013) 2 *Leges* 489.

tion can display the greatest effects,[106] as well as the greatest sources of conflict.[107] For instance, Marginson and Sisson have argued that in social fields, which would include welfare payments, Europeanisation has been highly uneven,[108] and its effects are rarely systematic, tending instead to be trends that have developed over time or a specific theme that becomes of greater or lesser importance.[109]

Other scholars have argued that Member States are capable of exerting a high degree of influence of EU social policy and the regulation of social fields,[110] and that national laws and policies can be transferred to the European Union level before being promulgated across the Union to all of its Member States[111] - a potential form of 'bottom up' Europeanisation. This raises questions about the adequacy of current definitions of Europeanisation, and whether something more complex and multi-directional must replace

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[106] E. Guild, 'The Europeanisation of Europe's Asylum Policy' (2006) 18 *International Journal of Refugee Law* 630, 636-637; T. Schulten 'A European Solidaristic Wage Policy? Conceptual Reflections on a Europeanisation of Trade Union Wage Policy' (ETUI, 2001); V. Glassner & P. Pochet, 'Why Trade Unions Seek to Coordinate Wages and Collective Bargaining in the Eurozone: Past Developments and Future Prospects' (ETUI, 2011); P. Marginson, 'Between Europeanisation and Regime Competition: Labour Market Regulation Following EU Enlargement' (2006) (79) Warwick Papers in Industrial Relations; A. Kicinger, 'Beyond the focus on Europeanisation: Polish migration policy 1989-2004' (2009) 35(1) *Journal of Ethnic and Migration Studies* 79; M. Borkert & W. Bosswick, 'The Case of Germany' in G. Zincone, R. Penninx & M. Borkert (eds.), *Migration Policymaking in Europe: The Dynamics of Actors and Contexts in Past and Present* (Amsterdam University Press, 2011), 95; S. Carrera & A. Wiesbrock, 'Civic Integration of Third-Country Nationals: Nationalism versus Europeanisation in the Common EU Immigration Policy' (ENACT Report, 2009); and A. Faure Atger, 'Competing Interests in the Europeanisation of Labour Migration Rules', in E. Guild & S. Mantu (eds.), *Constructing and Imagining Labour Migration: Perspectives of Control From Five Continents* (Ashgate, 2010), 157.

[107] V. Mitsilegas, 'The Place of the Victim in Europe's Area of Criminal Justice' in F. Ippolito & S. Iglesias Sanchez (eds.),*Protecting Vulnerable Groups: The European Human Rights Framework* (Hart, 2015), 313; J. Toth, & E. Sik, 'Joining an EU identity. Integration of Hungary or the Hungarians?' in W. Spohn & A. Triandafyllidou (eds.), *Europeanisation, National Identities and Migration: Changes in Boundary Constructions between Western and Eastern Europe* (Routledge, 2003); N. Trimikliniotis, 'Nationality and Citizenship in Cyprus since 1945: Communal Citizenship, Gendered Nationality and the Adventures of a Post-Colonial Subject in a Divided Country' in R. Baubock, B, Perchinig & W. Sievers (eds.), *Citizenship Policies in the New Europe* (Amsterdam University Press, 2009), Section 13.3.1; and Elspeth Guild et al, 'Understanding the Contest of Community: Illiberal Practices in the EU?' in Elspeth Guild, Kees Groenendijk & Sergio Carrera (eds), *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU* (Ashgate, 2009), 5.

[108] P. Marginson & K. Sisson, *European Integration and Industrial Relations: multi-level governance in the making* (Palgrave Macmillan, 2006).

[109] See K.H. Goetz, 'European Integration and National Executives: A Cause in the Search of an Effect' in K.H. Goetz & S. Hix (eds.), *Europeanised Politics: European Integration and National Political Systems* (Frank Cass, 2001) 211; and J. Kvist & J. Saari (eds.), *The Europeanisation of Social Protection* (Oxford University Press, 2007).

[110] This can even be the case for Member States viewed as somewhat 'Eurosceptic.' See J. Kvist, 'Denmark: from foot dragging to pace setting in European Union social policy' in J. Kvist & J. Saari (eds.), *The Europeanisation of Social Protection* (Oxford University Press, 2007), 165.

[111] 'The 'European' is in this way instrumentalised to legitimise contested national politics in these sensitive areas, and even universalises them to the entire EU by becoming part of the European immigration and asylum policy' - S. Carrera & E. Guild, 'The French Presidency's European Pact on Immigration and Asylum: Intergovernmentalism vs. Europeanisation? Security vs. Rights?' (2008) 170 CEPS Policy Brief, 5.

them. This is accommodated by Zahn's definition, but is developed to a lesser degree than the more direct 'top down' form of Europeanisation.

The thesis will also briefly touch upon the European Convention on Human Rights (ECHR), which represents another potential, but very limited source of Europeanisation. Within the Irish context, the Convention is integrated sub-constitutionally[112] through the European Convention on Human Rights Act 2003 (ECHR Act). Any provision of a national law which is found by the Irish Courts to be repugnant to a provision of the Convention will trigger a 'Declaration of Incompatibility,'[113] after which time the State must take further action to bring the offending legislation or policy into compliance with the Convention. Due to the extra-judicial nature of these Declarations of Incompatibility,[114] they do not have the immediate effect of a 'Declaration of Unconstitutionality' which are viewed as a 'judicial death certificate.'[115] Awards of damages granted on the basis of the ECHR Act are however more immediate in terms of their effect.[116] This may reflect a different form of Europeanisation that takes place outside of the EU legal structures, albeit with a less binding nature due to the sub-constitutional status of the Convention, and with a far smaller remit from a welfare perspective.

One of the key aims of this thesis is therefore to establish the degree of Europeanisation that has taken place within the Irish welfare system in relation to EU citizens and third-country national labour migrants - which values has it accepted, which does it resist, what affects have EU rules and policies had on the welfare system generally - and how and where Ireland has in turn influenced EU welfare law and policy, if that is the case.

2.3.6 Concepts of Administrative Justice

Due to the consistent emphasis on administrative law and procedures throughout the thesis, it will also engage with certain theories relating to administrative justice. In es-

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[112] *S (a minor) & Ors v MJELR & Ors* [2010] IEHC 31 (Hogan J), para 6.

[113] European Convention on Human Rights (ECHR) Act 2003, Section 5.

[114] *McD v L & Another* [2009] IESC 81.

[115] *Murphy v Attorney General* [1982] IR 241, 307.
This should however be considered in the recent context of *N.H.V v Minister for Justice & Equality and ors* [2017] IESC 35 where a declaration of unconstitutionality was stayed, in order to facilitate a change in government policy.

[116] *O'Donnell (a minor) & Ors v South Dublin County Council* [2007] IEHC 204.

sence, Adler argues that these are 'the principles that can be used to evaluate the justice inherent in administrative decision-making.'[117] In administrative procedures, such as those utilised within welfare systems which distribute welfare payments and benefits to the public, it has been argued that efficiency and cost should not be the primary motivators of the system itself. Rather, the way in which these payments are administered and claimants are engaged with should strive for fairness and equity.[118] Where the notion of efficiency is put ahead of these outcomes, it is possible for inconsistent or unpredictable decisions to be made.[119] Conversely, other scholars have argued that administrative systems which are too discretionary will also disadvantaged individuals who must engage with them,[120] and this highlights the need for a certain equilibrium between effectiveness on the one hand, and individual assessments based on the personal circumstances of the individual and skills and expertise of the administrative officer on the other, to be reached. Where this balance has not been achieved, individuals may disengage from otherwise necessary bureaucratic processes created by the State.[121] This is particularly important for migrants in an Irish welfare context, who may already demonstrate a lesser propensity to engage at all.[122]

Mashaw goes further, and posits that there are three competing, but not entirely mutually-exclusive, ways in which administrative justice can be conducted: bureaucratic

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[117] M. Adler, 'A Socio-Legal Approach to Administrative Justice' (October 2003) *Law and Policy* 323.

[118] V. Lens, 'Administrative Justice in Public Welfare Bureaucracies When Citizens (Don't) Complain' (May 2007) 39(3) *Administration and Society* 382; H.G. Frederickson, 'Public administration and social equity' (1990) 50(2) *Public Administration Review* 228; H.G. Frederickson, 'The state of social equity in American public administration' (2005) 95(4) *National Civic Review* 31.

[119] J.L. Mashaw, 'Conflict and Compromise Among Ideals of Administrative Justice' (1981) 2 *Duke Law Journal* 181, 182.

[120] R.M. Cooper, 'Administrative Justice and the Role of Discretion' (1938) 47(4) *Yale Law Journal* 577.

[121] V. Lens & S. Vorsanger, 'Complaining after claiming: Fair hearings after welfare reform' (2005) 79 *Social Service Review* 430; D. Cowan & S. Halliday, *The appeal of internal review: Law, administrative justice and the (non-)emergence of disputes* (Hart Publishing, 2003);S. Lloyd-Bostock & L. Mulcahy (eds.), *The social psychology of making and responding to hospital complaints: An account model of complaint behavior* (Oxford University Press, 1996);G. Miller & J.A. Holstein, *Dispute domains and welfare claims: Conflict and law in public bureaucracies* (JAI, 1996).

[122] A. Barrett & Y. McCarthy, 'Immigrants in a booming economy: analysing their earnings and welfare dependence' (2007) 21(4/5) *Labour* 789; A. Barrett & Y. McCarthy, 'Immigrants and welfare programmes: exploring the interactions between immigrant characteristics, immigrant welfare dependence and welfare policy' (2008) 24(3) *Oxford Review of Economic Policy* 542; and V. Timonen & M. Doyle, 'In search of security: migrant workers' understandings, experiences and expectations regarding 'social protection' in Ireland' (2008) 38(1) *Journal of Social Policy* 157.

rationality; professional treatment, and moral judgment.[123] Whilst the first recognises efficiency and accuracy as the primary objectives of the administrative process; the second focuses on service and 'client' satisfaction, while the latter, that of moral judgment, underlines the importance of fairness and ensuring that the particular individual circumstances of each case are dealt with.[124] As an administrative system moves away from the rational approach and realigns itself more closely with that of moral judgment, the emphasis on outcome and equality becomes more significant. Consequently, it is possible to partially reconcile these approaches with that of the specific and universalist modes in the following manner: universalist modes are more likely to attempt to strike a balance between efficiency and ensuring fair procedures and outcomes which would suggest moral judgement with elements of bureaucratic rationality or professional treatment; whilst the specific mode will most closely resemble either rationality or professional treatment due to their emphasis on efficiency, accuracy and their stricter application of the relevant rules, but may also engage with the model of moral judgement at certain points.

These concepts of administrative justice will be incorporated, where relevant, throughout the substantive discussions of the administration of the Irish welfare and immigration systems to add a further nuance to the ways in which the procedures underpinning them are designed and carried out by administrative officers. This will allow the analysis to tease out further issues related to access to justice in administrative settings, as well as ensuring that these issues are placed in a structural context, rather than placing an undue emphasis on the decisions of ordinary administrative officers.

2.3.7 Ireland as a Case Study Country

Ireland occupies an interesting position in the study of migration and welfare as the State has traditionally taken an idiosyncratic approach to both issues. It is considered to have a functional welfare state, but one which thus far has largely resisted categorisation. Due to the historical lack of a clear political divide and low levels of industrialisa-

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[123] J.L. Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (Yale University Press, 1983), 31.

[124] See M. Adler, 'A Socio-Legal Approach to Administrative Justice' (October 2003) *Law and Policy* 323, 330 for a breakdown of this, and other models.

tion,[125] the national welfare state was said to have been undeveloped for much of its existence.[126]

For a significant portion of Irish history post-independence, the Irish welfare system was typified by its reliance on the governmental structures that existed prior to Ireland decoupling from the United Kingdom, as well as mimicking systems which had been adopted there after that time. As Coakley notes, as much as 50% of the entire civil service by 1934 was comprised of those hired prior to 1922,[127] and elsewhere, Daly[128] and Fanning[129] conducted comprehensive studies of the Department of the Environment and Department of Finance respectively to illustrate that this move to retain or rationalise the existing structures in place remained constant. Welfare state programmes in Ireland ultimately tended to draw inspiration from those in the UK, often in spite of the fact that the measures in the UK being based upon it as a largely industrialised society, versus the realities of Irish society which was primarily agrarian and pre or non-industrial.[130]

Even where the then politically-dominant Fianna Fáil (FF) party attempted to adopt new welfare state measures, it did so primarily by mimicking those used in the UK. The adoption of the earliest Pension and Unemployment Acts, as well as the introduction of the Child Benefit, demonstrate a degree of parallelism between the Irish and UK systems from the 1930s onwards, but primarily in terms of the measures and not the content or suitability.[131] McCashin even argues that first significant consolidation of the Irish welfare system through the Social Welfare Act 1952 continued this mimicry of the UK system as well as partially-excluding a large number of individuals: the self-em-

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[125] R. Sinnott, *Irish Voters Decide: Voting Behaviour in Elections and Referendums Since 1918* (Manchester University Press, Manchester, 1985), Figure 1.4; J. Coakley & M. Gallagher, "*Politics in the Republic of Ireland"* (4th edn., PSAI Oxon, 2005) at Figure 2.1 and Table 2.1; and more generally, S.M. Lipset & S. Rokkan, *Party Systems and Voter Alignments* (The Free Press, 1967), 1-64.

[126] A. McCashin, *Social Security in Ireland* (Gill & MacMillian, 2004), 25; and G. Cook, 'Britain's Legacy to the Irish Social Security System' in P.J. Drudy (ed.), *Ireland and Britain since 1922* (Cambridge University Press, 1996).

[127] J. Coakley, 'The Foundations of Statehood', in J. Coakley and M. Gallagher (eds), *Politics in the Republic of Ireland* (5th edn., Routledge, 2010), 29.

[128] M.E. Daly, *The Buffer State: The Historical Roots of the Department of the Environment* (Institute of Public Administration, 1997).

[129] R. Fanning, *The Irish Department of Finance, 1922-1958* (Institute of Public Administration, 1973).

[130] M. Cousins, *The Irish Social Welfare System: Law and Social Policy* (Round Hall Press, 1995), 14-15.

[131] Old Age Pension Act 1932 (No. 18 of 1932); Unemployment Assistance (Amendment) Act, 1935 (No. 38 o f 1935); Unemployment Assistance (Amendment) Act, 1938 (No. 2 o f 1938); G. Cook, 'Britain's Legacy to the Irish Social Security System' in P.J. Drudy (eds), *Ireland and Britain since 1922* (Cambridge University Press, 1996); A. McCashin, *Social Security in Ireland* (Gill & MacMillian, 2004), 25.

ployed, public servants, and farmers,[132] from comparable protections with workers in a society which remained reliant on these categories rather than actual employees.

Similarly, in spite of Fianna Fáil's retention of 'mak[ing] the resources and wealth of Ireland subservient to the needs and welfare of all the people of Ireland'[133] within their political constitution and arguing that 'the social system at present...is not anything like what it ought to be... It ought to be our constant endeavour to try to remedy it,'[134] the almost exclusively FF-led governments of the early Republic would often ensure that core welfare state programmes were delivered by the Catholic Church on behalf of the state, by charities or by 'friendly societies.'[135]

Consequently, despite often proclaiming the State's commitment to the welfare of the Irish people,[136] until the 1980s the Irish welfare state largely mimicked that of the United Kingdom[137] - even where the measures adopted were inappropriate for Irish society[138] - and often with lower levels of protection or at the direction of non-governmental organisations. Ireland primarily diverged from the system and rules in place in the United Kingdom due to the conservative programme instigated by the Thatcher government, which sought to retrench if not wholly dismantle the welfare state,[139] and this continued

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[132] A. McCashin, *Social Security in Ireland* (Gill & MacMillian, 2004), 38.

[133] Memorandum regarding constitution of Fianna Fâil, 9 Nov. 1926 (U.C.D. Archives, MacEntee Papers, P 67/443); Fianna Fâil, Côni 1934-35 is one such example.

[134] M. Moynihan (ed.), *Speeches and statements by Eamon de Valera 1917-73* (Dublin and New York, 1980), 326.

[135] M. Cousins, *Social Welfare Law* (Round Hall, 2002), 15.

[136] Eamon De Valera proclaimed that 'the social system at present...is not anything like what it ought to be... It ought to be our constant endeavour to try to remedy it,' that 'we are at one with the Labour Party,' and 'taking from a section of the community who have wealth and handing it over to people who have not got it, because we regard it as a social obligation on us to maintain those people.' [M. Moynihan (ed.), *Speeches and statements by Eamon de Valera 1917-73* (Dublin and New York, 1980), 326, 394 and 407.]

[137] M. Daly & N. Yeates, 'Common origins, different paths: adaptation and change in social security in Britain and Ireland' (2003) 31(1) *Policy & Politics* 85.

[138] M. Cousins, *Social Welfare Law* (Round Hall, 2002), 14-15. See also, the Unemployment Assistance Acts of 1933, 1935 and 1938 which recognised that for those who fell outside of the contributory system, '*rates of unemployment assistance are not intended to provide for unemployed persons a substitute for wages or maintenance over a lengthy period.'* [DD vol. 82, 2 Apr. 1941, col. 1168.]

[139] Scholarship attempting to identify the cause of this unravelling include W. Benn Michaels, T*he Trouble with Diversity: How We Learned to Love Identity and Ignore Inequality* (Holt & Company, 2006); R. Rosen, *The World Split Open: How the Modern Women's Movement Changed America* (Penguin, 2006); C Robin, *The Reactionary Mind: Conservatism From Edmund Burke to Sarah Palin* (Oxford University Press, 2013); and J. Bockman, *Markets in the Name of Socialism: The Left-Wing Origins of Neoliberalism* (Stanford University Press, 2011).
Mair has also called this *'the tendency towards the decline of collective identities within western electorates, resulting from more or less common socio-economic or socio-cultural processes.'* [P Mair, *Ruling the Void: The Hollowing of Western Democracy* (Verso Books, 2013), 57.]

after New Labour assumed power,[140] as well as under the more recent Conservative-led governments.[141]

It was only in the late 1990s, when the State began to restrict access to the welfare system for certain categories of migrants,[142] that the State began to adopt its first series of reforms which did not mimic those in the United Kingdom and began developing its own recognisable identity in this area. Until this time, the welfare system had continued to mimic the pre-Thatcher UK system, with minor amendments. As Nolan underlines

> '[l]ow taxes, the reliance on non-state actors to deliver ESR-related goods and services, and the adoption of a market-based model to healthcare, including heavy reliance on private health insurance were key features of Celtic Tiger Ireland (and beyond).'[143]

This meant that even with the period of unprecedented economic growth that began in the early to mid-1990s, more commonly referred to as the 'Celtic Tiger,' the Irish welfare system remained relatively constant, and it was only when issues concerning the intersection of migration and welfare provision that the Irish welfare system began to adopt a more conscious ideology through a sustained programme of reforms - before it had always engaged in incremental reforms that did not substantively alter the system

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[140] S. Todd, *The People: The Rise and Fall of the Working Class* (John Murray, 2015), 62; Interview with *Catholic Herald*, 22 December 1978 <http://margaretthatcher.org> accessed 19/09/2016; D. Hannan, 'If you pay people to be poor, you'll never run out of poor people' *The Daily Telegraph* (18 April 2009), A. Cowburn, 'More than 85% of public tips on benefit 'frauds' are false' The Guardian (27/02/2016) <https://www.theguardian.com/society/2016/feb/27/false-benefit-fraud-allegations> accessed 02/01/2017.

[141] See G. McKeever, 'News: Charting the impact of tax and benefit changes; welfare reform and devolution; Universal Credit; Work Programme; Personal Independence Payment; Farewell to the AJTC and the Office of the Social Fund Commissioner; Employment and Support Allowance; Fitness for work; Housing benefit' (2013) 20 *Journal of Social Security Law* 100; G. McKeever, 'News: Universal Credit; Employment and Support Allowance; Redefining Child Poverty; Personal Independence Payment; Abolishing the oversight of administrative justice; Fraud, overpayments and underpayments' (2013) 20 Journal of Social Security Law 4; McKeever, 'News: Universal Credit; Personal Independence Payment; Direct lodgement of appeals; Housing Benefit; HMRC performance; Employment and Support Allowance; Child poverty; Back to work; Welfare reform and devolution' (2013) 20 Journal of Social Security Law 44; and G. McKeever, 'News: Universal Credit; Employment and Support Allowance; Benefit Cap; Jobseeker's Allowance Sanctions; Housing Benefit; Jobseeker's Allowance, Residence and Migrants; Personal Independence Payment' (2014) 21 *Journal of Social Security Law* 3.

[142] This will be discussed in full in Chapter 4.

[143] A. Nolan, "Welfare Rights in Crisis in the Eurozone: Ireland", in C. Kilpatrick and B. De Witte, *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges* (2014) EUI Working papers.

itself.[144] Welfare payments did, in some instances, become more generous,[145] but the overall *shape* of the welfare system remained unchanged[146] due to a perceived governmental attitude during the Celtic Tiger period that other policy agendas should be emphasised,[147] such as a reduction in the rate of marginal taxation in order to drive economic growth.[148]

Ireland's relationship with migration has always been complicated.[149] Gilmartin, for example, highlights many of the different - and often conflicting - images that Ireland projects into the public consciousness.[150] On the one hand, emigration from Ireland was a prominent theme within Irish society from the 1840s onwards, with these emigrants often being subject to racism and xenophobia,[151] both of which have been predominant features of how Ireland is presented in popular culture. On the other, recent Census data reflects an increasingly multi-cultural and diverse population, with 700,000 people or 15.5% of the population in 2011 no longer identifying as 'white Irish.'[152] In the 2016 Census, this increased to 18% of the population.[153] Roughly 12% of those resident with-

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144 M. Daly & N. Yeates, 'Common origins, different paths: adaptation and change in social security in Britain and Ireland' (2003) 31(1) *Policy & Politics* 85; M, Murphy, 'Interests, institutions and ideas: explaining Irish social security policy' (2012) 40(3) *Policy & Politics* 347.

145 R. Hicks, 'From Celtic Tiger to Crisis: Progress, Problems and Prospects for Social Security in Ireland' (August 2014) 48(4) *Social Policy and Administration* 394.

146 F. Dukelow, 'Economic crisis and welfare retrenchment: Comparing Irish policy responses in the 1970s and 1980s with the present' (2011) 45(4) *Social Policy & Administration* 408.

147 K. Allen, 'The model pupil who faked the test: Social policy in the Irish crisis' (2012) 32 *Critical Social Policy* 422.

148 International Monetary Fund, *Ireland: Selected Issues* (IMF, 2012); D. Donovan & A.E. Murphy, *The Fall of the Celtic Tiger: Ireland and the Euro Debt Crisis* (Oxford University Press, 2013).

149 Discussed in more depth in M. Gilmartin, *Ireland and Migration in the 21st Century* (Manchester University Press, 2015).

150 M. Gilmartin, *Ireland and Migration in the 21st Century* (Manchester University Press, 2015), Chapter One.

151 K. Miller, *Emigrants and Exiles: Ireland and the Irish Exodus to North America* (Oxford University Press, 1985); M. Gilmartin, 'Ireland, Modern Era Migrations,' in I. Ness (eds.), *Encyclopaedia of Global Human Migrations* (Wiley-Blackwell, 2013).

152 Central Statistics Office, 'This is Ireland - Highlights from Census 2011, Part 1' <http://www.cso.ie/en/census/census2011reports/documents/census2011thisisirelandpart1/> accessed 12/11/2016.

153 Central Statistics Office, 'Part 6 - Ethnicity and Irish Travellers' <http://www.cso.ie/en/media/csoie/releasespublications/documents/population/2017/Chapter_6_Ethnicity_and_irish_travellers.pdf> accessed 13/04/2017.

in the State in 2011 declared themselves as having a nationality other than Irish,[154] and this decreased only slightly to be closer to 11% by the 2016 Census.[155] This increased diversity is believed to represent a more modern and metropolitan Ireland. Neither of these images however, paint a complete picture of Ireland's relationship with migration. In particular, despite this historical context and the supposedly welcoming atmosphere of Irish society, the State responded to this new wave of migration into Ireland in recent decades by trying to limit their access to the welfare system, as well as with its own forms of racism and xenophobia.[156]

It has been argued that this increasingly severe and targeted immigration reform[157] simply brings Ireland in line with other States who have instigated similar laws and policies.[158] What remains unique to the Irish example however, is the degree of dissonance it appears to demonstrate on this issue. For example, despite the increasingly harsh policies being enacted in Ireland against migrants, the State has continually stressed the need for undocumented Irish migrants in the United States to be granted amnesty, allowing them to integrate fully and openly into their host society despite their legal status.[159] Consequently, the State continues to argue that its own migrants are deserving of the full benefits of membership of communities elsewhere, while restricting access to the Irish welfare state for migrants resident there.

From a European Union perspective, Ireland has been a Member State since 1973. However, much of its support for EU integration has appeared contingent upon the

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[154] M. Gilmartin, 'The Changing Landscape of Irish Migration, 2000-2012,' NIRSA Working Paper No 69 <http://www.nuim.ie/nirsa/research/documents/WP69_The_changing_face_of_Irish_migration_2000_2012.pdf> accessed 02/02/2015.

[155] CSO, 'Part 5 - Diversity' <http://www.cso.ie/en/media/csoie/releasespublications/documents/population/2017/Chapter_5_Diversity.pdf> accessed 13/04/2017.

[156] RTE, 'Figures Show Rise in Racist Incidents,' (10 Nov 2004) <http://www.rte.ie/amp/56575/> accessed 01/04/2017; The Irish Times, 'Figures Show Racist Incidents on Rise,' (20 March 2008) <http://www.irishtimes.com/news/figures-show-racist-incidents-on-rise-1.820177> accessed 01/04/2017; S. Pollak, 'Reports of racist incidents in Ireland are on the rise,' (09 Aug 2016) *The Irish Times* <http://www.irishtimes.com/news/social-affairs/reports-of-racist-incidents-in-ireland-are-on-the-rise-1.2750542> (accessed 01/04/2017.

[157] J. Mancini and G. Finlay, ''Citizenship Matters': Lessons from the Irish Citizenship Referendum,' (2008) 60(3) *American Quarterly* 575-99.

[158] I. Honohan, 'Citizenship Attribution in a New Country of Immigration: Ireland,' (2010) 36(5) *Journal of Ethnic and Racial Studies* 811-27.

[159] N. Bernstein, 'An Irish Face on the Cause of Citizenship,' *New York Times* (16 March 2006); C. Sadowski-Smith, 'Unskilled Labor Migration and the Illegality Spiral: Chinese, European and Mexican Indocumentados in the United States, 1882-2007,' (2008) 60(3) *American Quarterly* 779-804.]

opening up of structural and other funds in return for further political integration. In exchange for political and policy based decisions, Ireland would effectively be compensated economically. Scott suggests that Ireland has been 'conditionally integrationist,'[160] and Ireland's relationship with the EU institutions has often been considered neglectful and ignorant.[161] In terms of Ireland's attitude to the expansion of the Union's competences to third-country migration, it has used the existence of the Common Travel Area (CTA) with Northern Ireland and Great Britain as a rationale for negotiating an 'opt-out' on legislation falling under this heading, and this includes access to welfare payments for TCNs. The CTA creates a relatively borderless travel area between the Republic of Ireland and the devolved States and islands that constitute the United Kingdom.[162] The primary basis for its continued existence is the current status of Northern Ireland, and due to its politically sensitive nature, both Ireland and the UK have continually sought, and been granted, exceptions or exemptions to EU rules that they believe may conflict with the functioning of the CTA.[163] Ireland has on several occasions opted in to EU legislation in this area, but has primarily done so where this formalises the State's control of immigration and asylum procedures, and migration flows, as opposed to being focused on the rights of the migrants that fall within the material scope of the

[160] D. Scott, *Ireland's Contribution to the European Union* (Institute of European Affairs), 3.

[161] E. O'Halpin, 'Irish Parliamentary Culture and the EU: Formalities to be Observed' in P. Norton (eds.), *National Parliaments and the European Union* (Frank Cass, 1996), 124.

[162] B. Ryan, 'The Common Travel Area between Britain and Ireland' (2001) 64 *Modern Law Review* 855.

[163] Declaration by Ireland on Article 3 of the Protocol on the position of the United Kingdom and Ireland, Treaty of Amsterdam Amending the Treaty soon European Union, The Treaties Establishing the European Communities and Certain Related Acts. See also Protocol on the Application of Certain Aspects of Article 26 TFEU, Article 3.

legislation.[164] Michael McDowell, a previous Minister for Justice, believed that any decision to opt-in to new legislative instruments at the supranational level is driven by the State's own 'enlightened self-interest.'[165] This is not entirely unique to Ireland, as States will usually seek to extract as much as possible from European integration whilst minimising the degree to which they surrender sovereignty,[166] however the willingness to so openly state this is somewhat novel.

Ultimately, this places Ireland, as well as the United Kingdom (and Denmark), in a unique position, as they are bound by EU law relating to the coordination of welfare payments in respect of Union citizens, but can opt to be bound by the rules in respect of TCNs. It also raises questions about the shape of Europeanisation within this particular area of migration law and policy at both the EU and Irish level.

Conclusion

The purpose of this short chapter was to construct a theoretical framework on which the substantive chapters of this thesis can build upon and develop, drawing upon the existing scholarly literature in respect of migration and the welfare state. This framework encompasses not only the modes of welfare provision against which the European Union and Irish welfare systems will be measured and the concept of 'Europeanisation,' but also a consideration of the broader question of *why* research of this nature is of such

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[164] See, for example, Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status OJ L 326, 13.12.2005, p. 13–34; Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities - Dublin Convention OJ C 254, 19.8.1997, p. 1–12; Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice OJ L 180, 29.6.2013, p. 1–30; Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person OJ L 180, 29.6.2013, p. 31–59.
Exceptions to this rule would be Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service OJ L 375, 23.12.2004; and Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection OJ L 180, 29.6.2013, p. 96–116.

[165] Michael McDowell, 18th June 2001, quoted in the *Irish Times,* 19th June 2001.

[166] A.S. Milward, F.M.B. Lynch, F. Romero, R. Ranieri, V. Sørensen (eds.), *The Frontier of National Sovereignty: History and Theory 1945-1992* (Routledge Revivals, 2016); and in particular, A.S. Milward & V. Sørensen, 'Interdependence or Integration? A National Choice' in the same volume.

SECTION ONE - Unravelling the Complex Doctrinal Rules Relating to Welfare Provision at an EU and Irish level

3. EU Welfare Coordination: A Universalist Outlook with Specific Outcomes

3.1 Introduction

EU law has had a significant impact on the 'deterritorialisation'[1] of welfare payments, which is primarily viewed as the decoupling of welfare rights from previous nationalistic methods of access the welfare system. This is due to the fact that the European Union has created a legal framework and set of rules for both EU citizens and TCN labour migrants to access the welfare system of their host State, albeit based upon separate legislative competences and with differing levels of access for each category. This is also limited by the nature of the rules the EU has created: it *coordinates*, rather than harmonises, and never seeks to create a supranational welfare state providing social services like welfare payments on behalf of the EU27. Nevertheless, the extent to which these rules have been interpreted and applied in practice, particularly for EU citizens, lends it a significant material scope and legal gravitas.

This chapter will argue that the mode of welfare provision promoted at the Union level presents somewhat of a paradox. In practice, it can be said to be highly specific and market-based, leaving persons who exist at the margins, or entirely outside, of the labour market with little to no protection. By comparison, in principle, EU welfare rules are fundamentally concerned with opening up and facilitating access to the welfare system of a host Member State, which is suggestive of universalism. The universalism inherent in the Union's approach is perhaps most clearly exemplified in the gradual extension of new categories of welfare payments to EU citizens over time, despite the highly specific nature of the way in which these rules are constructed and the reality that many minorities may fall outside of the EU rules in certain circumstances. TCN labour migrants, by comparison, exist within a developing competence of the Union, which still treats the coordination of social security as a largely ancillary issue. The approach adopted thus far, has been highly sectoral, and grants TCN labour migrants working in different sectors of the Internal Market varying levels of protection, and only in respect of social security. This is also representative of a more general opening up of the welfare state and of universalism, but in a manner which is far more contingent on continu-

[1] W. Kymlicka, 'Liberal Nationalism and Cosmopolitan Justice' in R. Post (ed.), *Another Cosmopolitanism* (Oxford University Press, 2006), 138.

ous labour market activity. Thus, there has been a relative lack of *convergence* between the welfare rules for EU citizens and for TCN labour migrants - meaning that the rules for each category have yet to develop similar characteristics under similar conditions.

With this in mind, this chapter will explore the supranational rules on welfare coordination for EU citizens and TCN labour migrants resident in a Member State other than their country of origin in light of the universalist and specific modes of welfare provision. In this way, it will act as the first comprehensive scholarly analysis of both categories of migrants in an integrated manner. It will also examine what 'values' these rules represent, and can therefore be considered Europeanised values. Lastly, it will underline what this ultimately means for migrant access to welfare payments from a legal perspective. This will allow subsequent chapters to examine the extent to which the Irish welfare system has been impacted by these rules and can be considered Europeanised. To enable this, the chapter shall be structured as follows. Section Two will outline the constitutional competences of the Union in respect of welfare payments and the right to welfare payments that may be said to exist within the Charter of Fundamental Rights of the EU (herein after, the Charter), underlining the often uneven development that has taken place in this field. Section Three will then detail the way in which access to social security and social assistance is regulated for both EU citizens and TCNs, arguing that the system that currently exists appears to be highly effective, but so specific in nature that minorities may fall completely outside of the scope of EU law. A further section will provide some analysis of recent trends in the development of this area of law, before providing some brief concluding remarks which will tie these different strands together and addressing some of the potential issues relating to administrative justice.

3.2 Welfare Payments as a Constitutional Competence

As a constitutional legal order, the European Union has historically developed along functionalist lines.[2] This has meant, for example, that the original European Coal and Steel Community (ECSC) which coordinated the production of these goods between its signatory States through the creation of a common market, expanded and became the European Economic Community and utilised a common market for the factors of pro-

[2] J.E. Fossum & A.J. Menendez, *The Constitution's Gift: A Constitutional Theory for a Democratic European Union* (Rowman and Littlefield, 2011).

duction generally,[3] before developing into the economic, political and (limited) social Union that the EU is today. In spite of this shift away from a purely economic union, it has consistently been argued that the 'market building' imperative of the EU remains embedded within constitutional DNA of the Union,[4] and that its social competences - the ability of the Union to legislate or take action within a material social field - remain weak unless they can be linked to a more firmly established economic competence and overall economic objective.[5] This creates a kind of tension, insofar as the Union has created rights, such as to access certain categories of welfare payments, at the legislative level based on its more established economic competences to enact such rules, and inevitably placing an emphasis on the rights of the economically-active citizen.

The competence to legislate in respect of internally mobile workers, the self-employed and the broader category of EU citizens have slowly amalgamated over time, but have not as yet become powerful enough to enact a comprehensive, universalist system of welfare provision, or even at the more basic level, to provide an express competence to legislate in respect of social assistance. This is somewhat interesting, given that the very nature of these rules is universalist in character, i.e. to open up access to the welfare system and make that access less conditional or qualified.

TCN labour migrants fall within an even more fractured field of welfare law, due in large part to the ongoing development of the immigration code and the relative youth of the Union's competence to legislate in respect of the entry, residence and labour market access for such persons. This appears to have made it less uniform, but no less market-based in terms of its design.

3.2.1 Citizen Workers and the Self-Employed: A Competence Predicated on Labour Market Activity

The free movement of persons is one of the cornerstones of EU constitutional law, and incorporates both economically-active workers (Articles 45-48 TFEU), self-em-

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[3] Articles 2 and 3, EEC Treaty.

[4] P. J. Oliver, *Oliver on Free Movement of Goods in the European Union* (5th edn, Bloomsbury, 2010), 6.1115.

[5] A. Tryfonidou, *The Impact of Union Citizenship on the EU's Market Freedoms* (Hart-Bloomsbury, 2016), 168; C. O'Brien, 'Social Blind Spots and Monocular Policy Making: The ECJ Migrant Worker Model' (2009) 46 *Common Market Law Review* 1107, 1112; and H. Wallace, 'Europeanisation and Globalisation: Complimentary or Contradictory Trends?' (2000) 5(3) *New Political Economy* 369, 370.

ployed service providers (Articles 48-49 TFEU) and the economically-inactive citizen (Articles 18-21 TFEU), the latter of which will be dealt with in Section 3.2.2.

In relation to the legislative competence of the Union to enact rules relating to welfare payments, Articles 45 and 48 TFEU are perhaps the most fundamental, and the most often referred to. Article 46 TFEU also grants the Union the competence to enact legislation which is related to employment services, and this has been interpreted broadly as being capable of governing work-related benefits, but it has been utilised with far less frequency and only in the context of workers in a direct employment relationship.[6] Article 49 TFEU was also used to adopt finite rules for the self-employed, but this is now concentrated within Article 48 TFEU.

Article 45 in particular states that its intention is to provide for:

> 'the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.'

Consequently, it is designed to ensure that nationals from one Member State but resident in another cannot be discriminated against in comparison to citizens of that host State, albeit primarily in terms of their employment. The idea of social security in particular was originally brought under the Article due to its overall purpose and its inclusion of 'other conditions'. In *Vougioukas*,[7] the Court argued that 'a system to enable workers to overcome obstacles with which they might be confronted in national social security rules' was a direct implication and necessary component of the free movement of workers.

What constitutes a worker for the purposes of Article 45 TFEU has been quite broadly defined by the Court of Justice, and it retains the sole monopoly in doing so.[8] This monopoly on defining the term 'worker' for the purposes of EU law ensures that there are no divergent definitions adopted at the Member State level which might undermine their free movement. The term 'worker' subsequently holds a 'community wide mean-

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[6] See, for example, Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L141/1.

[7] Case C-443/93 *Ioannis Vougioukas v Idryma Koinonikon Asfalisseon (IKA)* [1995] ECLI:EU:C:1995:394, para 30.

[8] Case C-53/81 *Levin Straatssecretaris van Justitie* [1982] ECLI:EU:C:1982:105, para 13.

ing,'[9] and provides a broad litmus test which Member States and the CJEU must abide by.[10] The primary criteria are whether or not: the individual performs a task; under the direction of another; in exchange for some form of remuneration; and for a period of time.[11] Each of these factors must be interpreted in the most purposive manner possible to ensure that individuals do not unnecessarily fall outside of the scope of Article 45 TFEU and be subject to discrimination on the basis of nationality, or in this instance, be limited in their access to welfare payments. The employment must merely be *effective* and *genuine* and not fall below a threshold which would render it marginal or ancillary.[12]

This has meant that the temporal element, for example, can generally be satisfied by employment of between 10 and 18 hours per week but as low as an average of 2 where the employee is subject to an 'on-call' contract with poorly defined hours.[13] This has allowed for the enfranchisement of categories of persons who may otherwise not be considered workers under national Member State rules.[14] Remuneration is also interpreted purposively, with benefits in kind and other stipends or measures having the effect of direct remuneration capable of satisfying this condition.[15] This need not be capable of satisfying an individual's subsistence costs, and they may supplement these

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[9] Case C-75/63 *Mrs M.K.H. Hoekstra (née Unger) v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten (Administration of the Industrial Board for Retail Trades and Businesses)* [1964] ECLI:EU:C:1964:19, para 1: "the term 'workers' in Articles 48 to 51 of the EEC Treaty, [has] a Community meaning."

[10] Case C-53/81 *Levin v Staatssecretaris van Justitie* [1982] ECLI:EU:C:1982:105.

[11] Case 66/85 *Lawrie-Blum* [1986] ECLI:EU:C:1986:284, para 17.

[12] Case 58/81 *Levin v Straatssecretaris van Justitie* [1982] ECLI:EU:C:1982:105, para 17. See also, Case C-2/89 *Bestuur van de Sociale Verzekeringsbank v M. G. J. Kits van Heijningen* [1990] ECLI:EU:C:1990:183; Case C-543/03 *Christine Dodl and Petra Oberhollenzer v Tiroler Gebietskrankenkasse* [2005] ECLI:EU:C:2005:364, para 30; and Case C-516/09 *Tanja Borger v Tiroler Gebietskrankenkasse* [2011] ECLI:EU:C:2011:136, para 28.

[13] Case C 171/88 *Ingrid Rinner-Kuehn v FWW Spezial-Gebaeudereinigung GmbH & Co. KG* [1989] ECLI:EU:C:1989:328, para 16; Case C-102/88 *M. L. Ruzius-Wilbrink v Bestuur van de Bedrijfsvereniging voor Overheidsdiensten* [1989] ECLI:EU:C:1989:639; Case 139/85 *Kempf v Staatssecretaris van Justitie* [1986] ECLI:EU:C:1986:223, paras 11-12; Case C-357/89 *Raulin v Minister van Onderwijs en Wetenschappen* [1992] ECLI:EU:C:1992:87, para 14; and Case C-14/04 *Dellas and Others v Premier ministre and Ministre des Affaires sociales, du Travail et de la Solidarité* [2005] ECLI:EU:C:2005:728, para 46.

[14] Case C-94/07 *Andrea Raccanelli v Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV* [2008] ECLI:EU:C:2008:425 - doctoral students awarded a maintenance grant to facilitate the completion of their PhD theses may be considered workers for the purposes of Article 45 TFEU where they meet the core criteria. This is even where the institution itself does not define them as an employee.

[15] Case C-196/87 *Steymann v Staatsecretaris van Justitie* [1988] ECLI:EU:C:1988:475, paras 11-12; and Case C-14/09 *Hava Genc v Land Berlin* [2010] ECLI:EU:C:2010:57.

through welfare payments where necessary and appropriate.[16] In *Kempf*,[17] the Court opined that:

> 'The fact that he claims financial assistance payable out of the public funds of the latter member state in order to supplement the income he receives from those activities does not exclude him from the provisions of community law relating to freedom of movement for workers .'[18]

A natural consequence of this is that the economically-active worker is not required to be entirely self-sufficient so long as they can establish a genuine link to the labour market. It does however mean that the scope of the Article does not encompass those who are incapable of doing so. The jurisprudence of the CJEU has also expanded upon this over time, allowing for Article 45 TFEU to now cover those who are not in employment at present but are actively seeking it (jobseekers),[19] those who have left their employment (but retain their previous status as a worker),[20] and those who are currently in active employment.[21] With these discrete categories now being constitutionally embedded within the Treaties, it would be difficult to undermine this deepening of the concept of worker without additional Treaty amendments or a significant rewriting of the criteria by which worker status is determined by the CJEU itself. What this ultimately means is that Article 45 has consistently attempted to expand access to social security in particular along universalist lines whilst remaining within the specific constraints of its construction.

Article 45 is further supported by Article 48 TFEU, which outlines that:

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[16] Case 58/81 *Levin v Straatssecretaris van Justitie* [1982] ECLI:EU:C:1982:105, paras 16 and 17.

[17] Case 139/85 *Kempf v Staatssecretaris van Justitie* [1986] ECLI:EU:C:1986:223.

[18] Case 139/85 *Kempf v Staatssecretaris van Justitie* [1986] ECLI:EU:C:1986:223, para 16.

[19] Article 45 TFEU, paras (3)(a) and (b) - 'to accept offers of employment actually made…to move freely within the territory of Member States for this purpose'

[20] Article 45 TFEU, para (3)(d) - 'to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.'

[21] Article 45 TFEU, para (3)(c) - 'to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action.'

> ‘The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, they shall make arrangements to secure for employed and self-employed migrant workers and their dependents.’ (emphasis added)

Article 48 TFEU focuses on particular issues, such as the payments of benefits,[22] and the aggregation of the same.[23] It also now specifically acknowledges the self-employed and their access to social security in a constitutionally embedded fashion and on the same basis as the citizen worker.[24] Prior to this amalgamation, the self-employed were governed primarily by Article 49 TFEU on the right of establishment. This created a somewhat anachronistic divide between these two categories of economically-active citizens.[25] In spite of this amalgamation of these separate competences within Article 48 TFEU, the emphasis within it remains on access to social security.

In a similar manner to that of mobile citizen workers, the Court of Justice ensured that the definition of self-employment was as functional as possible, in order to avoid the potential undermining of Article 49 TFEU. Self-employed persons are, as established by the CJEU in *van Roosmalen*, individuals

> ‘who are pursuing or have pursued, otherwise than under a contract of employment or by way of self-employment in a trade or profession, an occupation in respect of which they receive income permitting them to meet all or some of their needs, even if that income is supplied by third-parties.’[26]

The direct reference to both present and past activity facilities the retention of self-employed status - mirroring Article 45 TFEU in relation to workers on this point. Similarly,

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[22] Article 48(b) TFEU.

[23] Article 48(a) TFEU.

[24] referenced in the opening line of Article 48 TFEU.

[25] D. Chalmers, G. Davies & G. Monti, *European Union Law* (3rd edn., Cambridge University, 2014), Chapter 19.

[26] Case C-300/84 *van Roosmalen v Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen* [1986] ECLI:EU:C:1986:402, para 1.

the idea that self-employed persons need not be entirely self-sufficient harks back to that of workers, as they may supplement their income by accessing welfare payments or other social benefits. Income, like remuneration for the citizen worker, may include other transfers and is not defined wholly by direct financial payments.[27] Overall, it provides a sufficient number of delineating characteristics for self-employment and direct employment, whilst ensuring that a large number of circumstances cannot fall outside of the scope of either Article 45 or Article 49 TFEU. The only substantive caveat to this approach is where reference may be made to national law in order to establish an individual qualifies as self-employed,[28] but only occurs in marginal cases and has similarly been applied in a small number of cases relating to workers with equally difficult to establish factual circumstances.[29]

Thus, the power to legislate in respect of internally mobile workers and self-employed citizens have amalgamated over time, albeit on the basis of helping to more firmly establish and develop the the EU and its economy. The following subsection on the competence to enact legislation in respect of welfare payments for EU citizens, particularly economically-inactive citizens, will develop how this has led to a very specific, market-based form of welfare provision from a constitutional standpoint, in spite of its more universalist objectives.

3.2.2 EU Citizenship: A Move Towards Universalism

The free movement of EU citizens, irrespective of their economic activity and engagement with the labour market, is governed primarily by Articles 18 and 20 TFEU in the post-Lisbon landscape. The concept of a European citizenship was first introduced in the Treaty of Maastricht, wherein Article 8 EC stated that:

> '1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union.
> 2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.'

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[27] Case C-300/84 *van Roosmalen v Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen* [1986] ECLI:EU:C:1986:402, para 22.

[28] Case C-296/09 *Vlaamse Gemeenschap v Baesen* [2010] ECLI:EU:C:2010:755, para 24.

[29] Case C-14/09 *Hava Genc v Land Berlin* [2010] ECLI:EU:C:2010:57.

Citizenship of the Union is considered to be a *ius tractum,* or derivative form of citizenship.[30] This means that 'one can be European citizen only if one is previously a French, a Belgian, or a German citizen.'[31] Union citizenship does not distinguish between the different methods of obtaining citizenship nationally, such as *ius sanguinis* ('blood right')[32] or *ius soli* ('birthright')[33] - so long as an individual is a citizen of one of the Member States, they are also a citizen of the European Union and they will gain any rights that accrue under it. Union citizenship was never designed to replace national citizenship in any way,[34] and remains a set of rights that is 'activated' upon a citizen's internal movement and which can then be enforced against their host or home Member

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[30] D. Kochenov, 'Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights' (2009) 15 *Columbia Journal of European Law* 169; and D. Kochenov, 'The Impact of European Citizenship on the Association of the Overseas Countries and Territories with the European Community' (2009) 36 *Legal Issues of Economic Integration* 181.

[31] M Martiniello, 'The Development of European Union Citizenship' in M. Roche & R. Van Berkel (eds.), *European Citizenship and Social Exclusion* (Ashgate, 1998), 35.

[32] The French Civil Code of 1804 granted that parents (at this time taken to mean fathers) could pass on citizenship to their children even where these children were not born in France - P. Weil, 'Access to Citizenship: A Comparison of Twenty-Five Nationality Laws' in T.A. Aleinikoff & D. Klusmeyer (eds.), *Citizenship Today: Global Perspectives and Practices* (Brookings Institution Press, 2001), 17-35, 19.

[33] M.R.W. Houston, 'Birthright Citizenship in the United Kingdom and the United States: A Comparative Analysis of the Common Law Basis for Granting Citizenship to Children born of Illegal Immigrants' (2000) 33 *Vanderbilt Journal of Transnational Law* 693, 698-701.

[34] Article 20 TFEU - 'Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.'
See also, R. Rogers, *Guests Come to Stay: The Effect of European Labour Migration on Sending and Receiving Countries* (Westview Press, 1985); S. Sassen, *Guests and Aliens* (New Press, 1999); C. Joppke, *Immigration and the Nation State: The United States, Germany and Great Britain* (Oxford University Press, 1999); and P. Weil, 'Access to Citizenship: A Comparison of Twenty-Five Nationality Laws,' in T.A. Aleinikoff (eds.), *Citizenship Today: Global Perspectives and Practices* (Carnegie Endowment, 2001); and T. Triadafilopoulos, *Becoming Multicultural: Immigration and the Politics of Membership in Canada and Germany* (University of British Columbia Press, 2012).

State.[35] It is subsequently capable of being considered a new model[36] based on transnational or inter-state citizenship.[37] For some scholars, this renders EU citizenship contingent upon certain kinds of prescribed behaviour or economic activity,[38] whilst also simultaneously making citizenship of a given State less important in terms of receiving and enforcing rights.[39]

Citizenship is generally considered constitutive of a *social polity*, and is not in and of itself market building. From a Union perspective, it cannot easily be linked to the maintenance of the Internal Market, and should not be developed on the same basis as the competences to legislate for citizen workers and the self-employed. However, even prior to the incorporation of Union citizenship in the Maastricht Treaty, there was an attempt by scholars[40] and the Court of Justice to recast the economic freedoms, such as

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[35] Case C-85/96 *María Martínez Sala v Freistaat Bayern* [1998] ECLI:EU:C:1998:217; Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECLI:EU:C:2001:458; Case C-224/98 *D'Hoop* [2002] ECLI:EU:C:2001:458; Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECLI:EU:C:2002:493; Case C-456/02 *Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS)* [2004] ECLI:EU:C:2004:488; C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [2004] ECLI:EU:C:2004:639; Case C-209/03, *The Queen, on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills* [2005] ECLI:EU:C:2005:169; Case C-192/05 *K. Tas-Hagen and R. A. Tas v Raadskamer WUBO van de Pensioen- en Uitkeringsraad* [2006] ECLI:EU:C:2006:676; Case C-370/90 *The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department* [1992] ECLI:EU:C:1992:296; Case C-291/05 *Minister voor Vreemdelingenzaken en Integratie v RNG Eind* [2007] ECLI:EU:C:2007:771; Joined Cases C-64/96 and C-65/96 *Land Nordrhein-Westfalen v Kari Uecker and Vera Jacquet v Land Nordrhein-Westfalen* [1997] ECLI:EU:C:1997:285; Joined Cases 35/82 and 36/82 *Elestina Esselina Christina Morson v State of the Netherlands and Head of the Plaatselijke Politie within the meaning of the Vreemdelingenwet; Sweradjie Jhanjan v State of the Netherland* [1982] ECLI:EU:C:1982:368; Case C-34/09 *Gerardo Ruiz Zambrano v ONEm* [2011] ECLI:EU:C:2011:124; Case C-456/12 *O. v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B* [2014] ECLI:EU:C:2014:135; Case C-457/12 *S. v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v G* [2014] ECLI:EU:C:2014:136.
See also R.C.A. White, 'Free movement, equal treatment and citizenship of the Union' (2005) 54 *International and Comparative Law Quarterly* 885; and R.C.A. White, 'Citizenship of the Union, Governance and Equality' (2006) 29 *Fordham International Law Journa*l 790.

[36] D Ashiagbor, 'Promoting Precariousness? The Response of EU Employment Policies to Precarious Work' in J. Fudge & R. Owens (eds.), *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms* (Hart Publishing, 2005).

[37] C. Schönberger, 'European citizenship as federal citizenship: Some citizenship lessons of comparative federalism' (2009) 19 *European Review of Public Law* 61; Y. Soysal, 'Changing Parameters of Citizenship and Claims-Making: Organised Islam in European Public Spheres' (1997) 26 *Theory and Society* 509; D. Kostakopoulou, 'Thick, Thin and Thinner Patriotism: Is This All There Is?' (2006) 26 *Oxford Journal of Legal Studies* 73, 83; and R. Baubock, *Transnational Citizenship* (Elgar, 1994).

[38] S. Coutts, 'Union citizenship as probationary citizenship: Onuekwere' (2015) 52 *Common Market Law Review* 531, 531.

[39] See S. Tierney, 'Reframing Sovereignty: Sub-State National Societies and Contemporary Challenges to the Nation State,' (2005) 54 *International and Comparative Law Quarterly* 161.

[40] A. Durand, 'European Citizenship' (1979) 4 *European Law Review* 3; W. Maas, *Creating European Citizens* (Rowman & Littlefield, 2007); and A. Evans, 'European Citizenship' (1982) 45 *Maastricht Journal of European and Comparative Law* 497.

the right of establishment and the free movement of workers, as fundamental rights of a more general character, and this gave rise to a discourse involving EU citizenship prior to its formal constitutionalisation. This meant that the power to invoke EU law was re-centred with the citizen as a bearer of rights rather than the Member States as being the primary addressee and focal point of EU law.[41] Thus, an effort was made to ensure that the rights of workers and the self-employed migrated away from their existence as economic beings and placed an emphasis on their capacity as social constituents of the European Union. This represents the most conscious shift at the Union level to engage with more universalist language, as it attempts to expand the definition of citizenship beyond national borders. In this way, it is a somewhat natural evolution of the development of Articles 45, 48 and 49 TFEU and the jurisprudence underpinning them.

Despite the period immediately following the incorporation of Article 8 EC being characterised as one of 'judicial minimalism,'[42] the Court of Justice slowly began to expand the scope of the concept - particularly in relation to what might otherwise be considered wholly internal situations with no cross-border element.[43] With the onset of cases such as *Garcia Avello*,[44] *Schempp*,[45] *Martinez Sala*[46] and *Bickel and Franz*,[47] the CJEU increasingly invoked the right to non-discrimination outside of the economic freedoms.[48] This in turn meant that by utilising the right to free movement as set out in the citizenship provisions of the Treaty, as opposed to the rights of the citizen worker

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[41] J. Baquero Cruz, *Between Competition and Free Movement: The Economic Constitutional Law of the European Community* (Hart, 2002), 44-46.

[42] D. Kostakopoulou, 'Ideas, Norms and European Citizenship: Explaining Institutional Change' (2005) 68 *Modern Law Review* 233.

[43] Joined Cases 64 & 65/96 *Land Nordrhein-Westfalen v Kari Uecker and Vera Jacquet v Land Nordrhein-Westfalen* [1997] ECLI:EU:C:1997:285, para 23 - 'citizenship of the Union… is not intended to extend the scope ratione materiae of the Treaty also to internal situations which have no link with Community law… Any discrimination which nationals of a Member State may suffer under the law of that State falls within the scope of that law and must therefore be dealt with within the framework of the internal legal system of that State.'

[44] Case C-148/02 *Carlos Garcia Avello v Belgian State* [2003] ECLI:EU:C:2003:539.

[45] Case C-403/03 *Egon Schempp v Finanzamt München V* [2005] ECLI:EU:C:2005:446.

[46] Case C-85/96 *María Martínez Sala v Freistaat Bayern* [1998] ECLI:EU:C:1998:217 - '[EU citizenship] is the fundamental legal status guaranteed to the citizen of every Member State by the legal order of the Community.'

[47] Case C-274/96 *Criminal proceedings against Horst Otto Bickel and Ulrich Franz* [1998] ECLI:EU:C:1998:563.

[48] A. Tryfonidou, 'The Notions of 'Restriction' and 'Discrimination' in the Context of the Free Movement of Persons Provisions: From a Relationship of Interdependence to One of (Almost Complete) Independence' (2014) 33 *Yearbook of European Law* 385.

and the self-employed citizen, the national exclusionary zone from the application of EU law was narrowed once again.[49] *Garcia Avello, Rottmann*,[50] and most importantly *Zambrano*[51] would also demonstrate the potential for, and eventually the circumstances within which the rule against wholly internal situations could be superseded by the fundamental status of EU law and Union citizenship, allowing for a self-executing right to Union citizenship where the loss or deprivation of this status is likely to occur.

The application of Articles 18 and 20 TFEU within the field of welfare payments however, began with *Martinez Sala*,[52] where a German law requiring EU citizens living in Germany to produce a residence permit before accessing a childcare payment when the same was not required of its own nationals was found to violate the principle of non-discrimination on the basis of nationality. This was further cemented in *Grzelczyk,*[53] where it was made clear that national laws could not bar students resident in a secondary Member State from accessing welfare payments as

> 'Union citizenship is destined to be a fundamental status of nationals of all the member states, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.'[54]

Both of these cases would, on the surface, suggest that the EU was creating a broader set of rights for the economically-inactive citizen to access welfare payments, as well as moving away from the rights contained within Articles 45, 48 and 49 TFEU as the basis

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[49] Case C-148/02 *Carlos Garcia Avello v Belgian State* [2003] ECLI:EU:C:2003:539 - 'the situations falling within the scope ratione materiae of Community law include those involving the exercise of of the fundamental freedoms guaranteed by the Treaty, in particular those involving the freedom to move and reside within the territory of the Member States, as conferred by Article 18 EC.'
See also H.D. Jarass, 'A Unified Approach to the Fundamental Freedoms,' in M. Andreas & W.H. Roth (eds.), *Service and Free Movement in EU Law* (Oxford University Press, 2002), 143; A. Tryfonidou, 'The Federal Implications of the Transformation of the Market Freedoms into Sources of Fundamental Rights for the Union Citizen' in D. Kochenov (eds.), *Citizenship and Federalism in Europe* (Cambridge University Press, 2016).

[50] Case C-135/08 *Janko Rottman v Freistaat Bayern* [2010] ECLI:EU:C:2010:104.

[51] Case C-34/09 *Gerardo Ruiz Zambrano v ONEm* [2011] ECLI:EU:C:2011:124.

[52] Case C-85/96 *María Martínez Sala v Freistaat Bayern* [1998] ECLI:EU:C:1998:217.

[53] Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECLI:EU:C:2001:458.

[54] Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECLI:EU:C:2001:458, para 31.

for non-discrimination judgments in the welfare field. The reality however, was that this was a highly qualified move towards a general right to non-discrimination, as they emphasised procedural hurdles which disproportionately affected EU citizens from other Member States and did not expand the right to access welfare payments itself. *Grzelczyk* even clarified its scope by pointing out that access would still be determined by an EU citizen meeting all of the necessary legal requirements laid down in secondary EU law and national law, as well as the individual not becoming an 'undue burden' on the welfare system of their host State.[55] This was supported by *Bidar*;[56] where the Court believed that students who have 'demonstrated a degree of integration into the society of the host state'[57] can access *social advantages* such as maintenance grants tied to their education - so long as they again do not become an unreasonable burden on the welfare system.

Trojani remains one of the most paradoxical judgments of the CJEU in relation to welfare payments and Union citizenship. In this instance, it is was held that the right to non-discrimination contained within Article 18 TFEU could apply to persons in ancillary work seeking to access social assistance payments, despite this already being included within the scope of Article 45 and 48 TFEU. It is possible that the Court sought to consider those who are economically-inactive by proxy, but its decision to highlight the applicant's ability to satisfy the core criteria necessary to be considered a worker for the purposes of EU law limits it greatly. This was expanded upon in greater detail in *Collins*,[58] with the Court opining that

> 'in view of the establishment of EU citizenship and the interpretation of the right to equal treatment enjoyed by Union citizens, it is no longer possible to

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[55] Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECLI:EU:C:2001:458, para 46.

[56] Case C-209/03 *The Queen, on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills* [2005] ECLI:EU:C:2005:169.

[57] Integration in this respect would appear to be fulfilled by having maintained a reasonable period of lawful residence, and an adequate level of interactions with the host State's administrative apparatus, although this is itself quite vague - See Case C-209/03 *The Queen, on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills* [2005] ECLI:EU:C:2005:169 and Case C-456/02 *Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS)* [2004] ECLI:EU:C:2004:488, para 43.

[58] Case C-138/02 *Brian Francis Collins* [2004] ECLI:EU:C:2004:172.

exclude…. a benefit of a financial nature intended to facilitate access to employment in the labour market of a member state.'[59]

Thym has subsequently argued that, even at its most potent, this evolving strain of constitutional jurisprudence stemming from the concept of Union citizenship creates different rules for different categories of citizens,[60] and Nic Shuibhne has suggested that economic activity remains a primary dividing line in this respect.[61] Thus, 'the significance of this institution does not lie in what it is at present, but in what it might and should be.'[62] Many of the rights that citizenship seeks to provide in terms of access to welfare payments are already governed by Articles 45, 48 and 49 TFEU, as well as other principles of EU law that ensure that these are effective.[63] When the Union eventually created legislation in order to facilitate access to social assistance, it did so by using Articles 18 and 20 *as well as* Articles 45 and 49 TFEU as its legal bases.[64] Even in trying to create a dualist system in line with the specific mode of welfare provision - which may still serve a universalist objective - it retains this emphasis on labour market activity rather than individual need, underlining how central economic activity is to welfare provision at the Union level.

Consequently, EU citizenship represents the most significant normative shift in terms of moving towards a system of welfare coordination that utilises a universalist mode.

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[59] Case C-138/02 *Brian Francis Collins* [2004] ECLI:EU:C:2004:172, para 63.

[60] D. Thym, 'The elusive limits of solidarity: Residence rights of and social benefits for economically inactive Union citizens' (2015) 52(1) *Common Market Law Review* 17, 18.

[61] N. Nic Shuibhne, 'Limits rising, duties ascending: The changing legal shape of Union citizenship' (2015) 52(4) *Common Market Law Review* 880, 890.

[62] T. Kostakopoulou, *Citizenship, Identity and Immigration in the European Union* (Manchester University Press, 2001), 66.

[63] E. Meehan, *Citizenship and European Community* (Sage Publications); Y. Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (University of Chicago Press, 1994); T. Kostakopoulou, *Citizenship, Identity and Immigration in the European Union* (Manchester University Press, 2001); S. Carrera, 'What Does Free Movement Man in Theory and Practice in an Enlarged EU?' (2005) 11(6) *European Law Journal* 699-721, 703; M. Reddig, *Burger Jenseits des Staates? Unionsburgerschaft als mittel Europaisher Integration* (Baden-Baden, 2005). S. Kadelbach, 'Union Citizenship' Jean Monet Working Paper No 09/03 (Max Planck Institute for Comparative Public Law and International Law, 2003) however disagrees with this approach and believes that citizenship has managed to become its own concept free of the economic basis on which it springs from.

[64] 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ L 158, 30.4.2004) OJ L 229, 29.6.2004, p. 35–48.

This is due to the way in which it seeks to reconstitute the Union as being a social polity, which grants its constituents rights *where they cross an internal territorial border*. With this comes many contradictions, as it is limited by the continually developing nature of the concept, as well as the limited ability for the EU to actively legislative in respect of welfare payments on a universal basis. It is also limited by the fact that the tools the EU is capable of using remain primarily market-based and specific in nature.

2.2.3 Third-Country National Labour Migrants: Extending Universalism Even Further

Prior to the ratification and entry into force of the Lisbon Treaty, immigration and asylum rules and policies had been dealt with on a primarily intergovernmental basis, with limited scope for further judicial review, and the requirement of unanimity in all decision making.[65] This has also meant that the Treaties have dealt with these issues to a far lesser extent than for EU citizens, and consequently the attention that can be given to them as constitutional competences is not directly comparable. Chalmers has further argued that the development of the Union's competences in relation these other forms of migration has been quite convoluted.[66]

As highlighted in Chapter Two, the competence to enact legislation regulating the entry and residence of TCNs under Article 79 TFEU has often been linked to market building activities, in a manner which is similar to that of EU citizen workers. What this has meant from a practical perspective is that legislation adopted under Article 79 TFEU is primarily concerned with TCN labour migration. For example, the EU institutions have underlined that Member States can suffer from a short supply of highly-skilled and qualified workers,[67] that these workers can be a highly desirable commodity globally

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[65] P. Hobbing, 'The Management of the EU's External Borders from the Customs Union to Frontex and e-Borders' in E. Guild, S. Carrera & A. Eggenschwiler (eds), *The Area of Freedom, Security and Justice Ten Years On: Successes and Future Challenges Under the Stockholm Programme* (European Union and Centre for European Policy Studies, 2010), 63 - "for an astonishingly long time, matters concerning the external borders of the Union remained in the close neighbourhood of criminal justice and policing within the now-obsolete intergovernmental pillar of the Union… But, be it for security or sovereignty concerns as symbolised by traditionally uniformed border guards, no one dared touch this sacred security-oriented concept."

[66] D. Chalmers, G. Davies & G. Monti, *European Union Law* (3rd edn,, Cambridge University Press, 2014), 519.

[67] European Commission Communication, On a Policy Plan on Legal Migration, COM(2005) 669, 21.12.2005.

and the EU must be competitive in attracting them.[68] The Commission has also long emphasised the need for such skilled workers from a demographic perspective, in ensuring the functioning of national Member State economies and the Internal Market itself.[69] It has further been suggested elsewhere that providing some basic social rights for TCN labour migrants would limit the potential for them to be exploited by their employers, as well as to limit the potential for this exploitation to undercut the conditions extended to EU citizens.[70] This is another example of how the Union's institutions have sought to adopt a system more closely aligned with the universalist mode by ensuring greater levels of access for individuals and to erode, in this instance, wholly national rules which would limit access for TCN labour migrants, but on the basis of the Internal Market.

Carrera finds it significant that Article 79(1) developed at all, as 'this provision put an end (at least formally) to previous open debates as to whether the EU actually had an attributed legal competence to legislate in the labour immigration field.'[71] However, the Article does not explicitly refer to access to the welfare state, and does not confer an explicit competence to legislate on this issue. It instead emphasises the 'fair treatment of third country nationals residing legally in Member States,' and the Commission has predominantly elected to incorporate *legislative provisions* creating some form of access to national welfare systems in the applicable host State on this basis. This is arguably similar to the approach taken under Articles 45 and 49 TFEU for EU citizen workers.

Due to resistance on the issue of welfare state and labour market access, the rights granted to TCN labour migrants have usually not been comparable to those of Union

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[68] M. Samers, *Migration* (Routledge, 2010), 164-7; K. Tan, *Justice Without Borders: Cosmopolitanism, Nationalism, and Patriotism* (Cambridge University Press, 2004); D. Kapur & J. McHale, *Give Us Your Best and Brightest: The Global Hunt for Talent and its Impact on the Developing World* (Centre for Global Development, 2005); S. Caney, *Justice Beyond Borders* (Oxford University Press, 2005); L. Ypi, 'Justice in Migration: A Closed Borders Utopia?' (2008) 16(4) *Journal of Political Philosophy* 391; G. Brock, *Global Justice: A Cosmopolitan Account* (Oxford University Press, 2009); and T. Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Polity Press, 2008).

[69] European Commission Communication, On a Policy Plan on Legal Migration, COM(2005) 669, 21.12.2005.

[70] International Labour Organisation, Fair migration: Setting an ILO agenda (ILO, 2014), 7 - an approach 'grounded in universal values of equal treatment and non-discrimination . . . as the best way of ensuring that migration is not misused for the purpose of undercutting existing terms and conditions of work.'
See also, P. Taran, 'The need for a Rights-Based Approach to Migrant Labor' in R. Cholewinski, P. de Guchteneire & A. P.coud (eds.), *Migration and Human rights: The United Nations Convention on Migrant Workers' Rights* (Cambridge University Press, 2009), 151 - 'A minimal or non-existent application of rights would contribute to ensuring that migrant labour remains cheap, docile, temporary, and easily removable when not needed.'

[71] S. Carrera, E. Guild & K. Eisele, 'The Attractiveness of EU Labour Immigration Policy' in S. Carrera, E. Guild & K. Eisele, (eds.) *Rethinking the Attractiveness of EU Labour Immigration Policy: Comparative Perspectives on the EU, the US, Canada and Beyond* (Centre for European Policy Studies, 2014), 4.

citizens,[72] and this is reflected in the emphasis on their 'fair treatment,' as distinct from the 'equal treatment' of EU citizens. The legislative approach for TCN labour migrants has thus far been quite uneven and highly sectoral.[73] An original proposal to create comprehensive legislation on the admission of TCN labour migrants proved fruitless,[74] and the Commission moved forward with plans to initiate legislation for each sector of the Internal Market as a result. From a policy-based perspective, it has also meant that

> 'Member States will consider requests for admission to their territories for the purpose of employment only where vacancies in a Member State cannot be filled by national and Community manpower or by non-Community manpower lawfully resident on a permanent basis in that Member State and already forming part of the Member State's regular labour market.'[75]

Thus, the competence to take action in respect of the entry and residence of TCN labour migrants is unlikely to converge - i.e. to reach a similar end point in terms of their treatment - with that of EU citizens in the near future, and the value attached to each sector of the economy varies based on their perceived desirability, as well as the bargaining position of each Member State during its drafting and the subsequent negotiations. This piecemeal approach allows for an even more market-driven form of specific welfare provision, as the Union must continually point to the usefulness of each sector of the Internal Market, the need to adopt supranational legislation for that sector of the economy, and attempt to grant rights and protections to TCN labour migrants engaged

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[72] Joined cases C-22/08 and C-23/08 *Vatsouras & Koupatantze* [2009] ECLI:EU:C:2009:344, para 52.

[73] L Halleskov, 'The Long-term Residents Directive: A Fulfilment of the Tampere Objective of Near-Equality?' (2005) 7 *European Journal of Migration and Law* 181; A Beduschi, 'An Empty Shell? The Protection of Social Rights of Third-Country Workers in the EU after the Single Permit Directive' (2015) 17 *European Journal of Migration and Law* 210; B. Fridriksdóttir, What Happened to Equality? The Construction of the Right to Equal Treatment of Third-Country Nationals in European Union Law on Labour Migration' (PhD Thesis, Radboud Universiteit Nijmegen, 2016).
E. Guild, 'EU Policy on Labour Migration: A First Look at the Commission's Blue Card Initiative' CEPS Policy Brief 145 (2007), 2 - 'there has been some discussion about the wisdom and desirability of dividing up the area into sectors on the basis of type of work. The main concern is that highly qualified workers will receive more generous treatment than other workers which will institutionalise discrimination on the basis of skill level in the acquisition and enjoyment of labour rights.'

[74] E. Guild, 'EU Policy on Labour Migration: A First Look at the Commission's Blue Card Initiative' CEPS Policy Brief 145 (2007), 2 - 'as the Commission got nowhere with its earlier proposal which covered all third country national workers, perhaps it considers the only way forward in the field is sectorally.'

[75] Council Resolution on limitation of admission of third-country nationals to the territory of Member States for employment [1996] OJ 274/3.

in that sector on that basis. It is a somewhat universalist ideal underpinned by market-driven arguments and rules.

3.2.4 The Right to Welfare Within the Charter of Fundamental Rights

Although not strictly providing a legislative basis on which to enact welfare rules or upon which the Court of Justice can adjudicate, the Charter of Fundamental Rights, does recognise the right to both social security and assistance within its text. In essence, the Charter acts as the Bill of Rights for the EU. Unlike in many national constitutions, it has not been seamlessly incorporated within the primary text, and has instead been given equal legal value to the Treaties indirectly through Article 6(1) TEU.[76] While clearly constitutional in nature, its material scope applies only where Member States implement Union law in some fashion, and cannot apply to wholly national legal situations.[77] In relation to social security and assistance, there are express rights to both of these social rights in Articles 34(1)[78] and 34(3)[79] of the Charter respectively. These will again only apply in so far as EU law deals with social security or assistance i.e. where a Union citizen moves from one Member State to another and that secondary host State is implementing EU law.

One of the fundamental issues in respect of these provisions is whether or not these are binding rights, or are to be considered principles which direct but do not bind the EU institutions and the Member States. Article 51(1) of the Charter establishes that the EU institutions shall: 'respect the rights, observe the principles and promote the application thereof in accordance with their respective powers,' recognising that there are dis-

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[76] The rights contained within the Charter should also comply with the minimum standards established by the corresponding rights and their associated jurisprudence under the European Convention on Human Rights by virtue of Article 52(3) of the Charter - 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'

[77] Case C-45/12 *Office national d'allocations familiales pour travailleurs salariés (ONAFTS) v Radia Hadj Ahmed* [2013] ECLI:EU:C:2013:390 - 'It must be recalled that the fundamental rights guaranteed in the legal order of the European Union, including the Charter, are applicable in all situations governed by European Union law, but not outside such situations.'

[78] Article 34(1) of the Charter - "The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Community law and national laws and practices."

[79] Article 34(3) of the Charter - "In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices."

tinctions to be made between the two and that they may also have hierarchical values.[80] The definition for principles has proven to be quite elusive, but may be influenced by the remainder of Article 51 which emphasises that no new competences can be conferred upon the Union by virtue of the rights contained within the Charter, and that the application of the Charter must at all times respect the principle of subsidiarity. Thus, for O'Leary, the rights to social security and assistance must be considered principles and not rights,[81] which impose a lower burden on the EU and Member States by virtue of this distinction, as the Union has no concrete competence in these fields - they are almost exclusively approached through an economic or related competence. This has been supported by the Union's own explanatory set of guidelines on the Charter, which refers to 34(1) as a principle.[82]

Contrastingly, Shortall argues that these are potentially binding rights,[83] and that it is merely a matter of ensuring that the individual in question has an entitlement under both EU and national law, and is residing in a Member State other than their own.[84] He qualifies this by stating that even where these conditions are satisfied, Article 34(1) or 34(3) will only be used in order to supplement a more established right, and these do not therefore exist as free standing rights, as they must be tied to another and a violation of each must be demonstrated and shown as disproportionate.

The Court of Justice has thus far, only expressly considered Article 34 of the Charter and a right to welfare payments within the *Kamberaj*[85] judgment. Here, the Court emphasised that this category of social rights and how they are implemented is a matter for

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[80] Charter of Fundamental Rights, Article 51(1).

[81] S. O'Leary, 'Solidarity and Citizenship Rights in EU Law and the Welfare State' in G. de Burca (ed.), *In Search of Solidarity* (Oxford, 2005) at 50.

[82] Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02) - 'The principle set out in Article 34(1) is based on Articles 153 and 156 of the Treaty on the Functioning of the European Union, Article 12 of the European Social Charter and point 10 of the Community Charter on the rights of workers. The Union must respect it when exercising the powers conferred on it by Articles 153 and 156 of the Treaty on the Functioning of the European Union. The reference to social services relates to cases in which such services have been introduced to provide certain advantages but does not imply that such services must be created where they do not exist.'

[83] D. Shortall, 'Social Welfare Rights of EU Citizens in Ireland' (2017) 20(1) *Irish Journal of European Law* 80, 81.

[84] Case C-443/11 *Jeltes v Raad van bestuur van het Uitvoeringsinstituut werknem ersverzekerin -gen* [2013] ECLI:EU:C:2013:224, para 46; and Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government* [2008] ECLI:EU:C:2008:178.

[85] Case C-571/10 *Servet Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others* [2012] ECLI:EU:C:2012:233.

national, and not EU law.[86] It highlights that whilst the EU must be cognisant of the rights to social security, social assistance and housing, they are not within the Union's areas of competence. The use of Article 34, outside of the *Kamberaj* judgment, has been quite limited. It is more common to see the Court engage with other Articles, such as the rights of the elderly,[87] the right to non-discrimination,[88] the right to property,[89] dignity and equality.[90] It has also become increasingly routine for the CJEU to avoid engaging with the Charter entirely when dealing with the right to social assistance, instead referring almost exclusively to the Directives and Regulations in this area in its place.[91]

All of these factors inevitably suggest that the Charter *could* constitute a significant step forward on the Union's part towards a system more closely aligned with the universalist mode, insofar as it views welfare as a right.[92] However, the lack of enforceability and the clear delineation between social security and assistance would suggest a lack of practical effect. Consequently, the rights contained within the Charter relating to welfare payments are, at present, largely symbolic in nature. It also signals that without significant reforms, the Union is likely to lean more heavily on its established economic competences in order to recognise any right to welfare payments. Until such time as these Treaty reforms take place, the Charter will not have a significant impact on the market-driven, highly specific mode of welfare provision utilised by the EU at the constitutional level in practice.

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[86] 'Since both Article 11(1)(d) of Directive 2003/109 and Article 34(3) of the Charter refer to national law, it is for the referring court, taking into account the integration objective pursued by that directive, to assess whether housing benefit such as that provided for under the provincial law falls within one of the categories referred to in Article 11(1)(d), the Autonomous Province of Bolzano arguing that that is not the case.' (Case C-571/10 *Servet Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others* [2012] ECLI:EU:C:2012:233, para 84.)

[87] Case C-388/09 *Joao Filipe da Silva Martins v Bank Betriebskrankenkasse - Pflegekasse* [2011] ECLI:EU:C:2011:439, Para 77.

[88] Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government* [2008] ECLI:EU:C:2008:178, Para 147.

[89] Case C-443/11 *Jeltes and Others* [2013] ECLI:EU:C:2013:22, Para 46.

[90] Case C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* [2014] ECLI:EU:C:2014:2358.

[91] This can be seen in Case C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* [2014] ECLI:EU:C:2014:2358; Case C-67/14 *Jobcenter Berlin Neukölln v Alimanovic* [2015] ECLI:EU:C:2015:597; and Case C-308/14 *Commission v United Kingdom* [2016] ECLI:EU:C:2016:436.

[92] G. Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Polity Press, 1990), 27-28.

3.2.5 The Principle of Good Administration and Procedural Rights Within the Charter

One aspect of the EU constitutional legal order which may cause it to align more closely with the universalist mode of welfare provision is the emphasis that is often placed on making rights effective,[93] and ensuring that any procedures administered by the EU or utilising EU law must be similarly effective. In particular, the right to 'good administration' is enshrined as both a general principle of constitutional law as well as within the Charter (Article 41) itself.

Rights within the EU legal order have often been viewed as a byproduct of making these supranational rules more effective[94] - for example, cases such as *Van Gend en Loos,*[95] *Comet*[96] and *Rewe*[97] directly linked the rights of Union citizens to being able to directly enforce certain obligations against Member States where they engage with EU law. The effectiveness of EU rules, and the rights that stem from this - such as to good administration - are consequently capable of displaying a significant effect on the ordinary lives of citizens who must engage with the administrative arms of their host Member State.

Beginning with the general principle of good administration, as early as 1963, the Court held that 'the requirements of sound justice and good administration, must be followed by Community Institutions.'[98] Over time this principle was extended beyond the EU and its dealings with its own employees to the Member States themselves where

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[93] G. Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Polity Press, 1990), 27-28.

[94] T. Eilmansberger, 'The Relationship Between Rights and Remedies in EC Law: In Search of the Missing Link' (2004) 41 *Common Market Law Review* 1199, 1204; C. Harlow, 'Voices of Difference in Plural Community' Harvard Working Paper 03/00, 19; S. Prechal, *Directives in EU Law* (Oxford University Press, 2006), 99.

[95] Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECLI:EU:C:1963:1.

[96] Case 45/76 *Comet BV v Produktschap voor Siergewassen* [1976] ECLI:EU:C:1976:191.

[97] Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECLI:EU:C:1976:188.

[98] Case 32/62 *Maurice Alvis v Council of the European Economic Community* [1963] ECLI:EU:C:1963:15, Para 1.

they implement EU law in cases such as *Algera,*[99] *Consten and Grundig*,[100] *Tradax*[101] and *Assider.*[102] These principles of administrative law were expanded in additional cases to infer that there are a plethora of rights which can be invoked by EU citizens in dealing with EU institutions or emanations of their Member State where they apply EU law and make administrative determinations of one kind or another.[103] Hofman and Mihaescu believe this general principle of good administration to be

> 'aimed at ensuring satisfactory outcomes of decision-making reach back into the public law of the member states, particularly concerned with ensuring procedural fairness through rules and principles for administrative procedures.'[104]

This includes rights such as to access an individual's own files, to receive a justification for any decision made, to access previous judgments and information which would allow for an effective appeal to be made.

In the Post-Lisbon landscape, the Charter has integrated a specific right to good administration, albeit one which is likely more limited that the general principle from it derives its name. This is in large part due to the fact that Article 41 decouples the right to good administration from the further procedural rights which stem from the general principle but are capable of applying in other contexts, such as access to documents (Article 42), the European Ombudsman (Article 43), the right to an effective remedy and a fair trial (Articles 27 and 48), and that procedures must be fair and not discriminate (Article 21) against a citizen from a secondary Member State residing in that territory.

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[99] Joined Cases 7/56, 3/57 to 7/57 *Algera and others/Common Assembly* [1957] ECLI:EU:C:1957:7.

[100] Joined cases 56 and 58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community* [1966] ECLI:EU:C:1966:41.

[101] Case 64/82 *Tradax Graanhandel BV v Commission of the European Communities* [1984] ECLI:EU:C:1984:106.

[102] Case 3/54 *Associazione Industrie Siderurgiche Italiane (ASSIDER) v High Authority of the European Coal and Steel Community* [1955] ECLI:EU:C:1955:2.

[103] Joined Cases 1-57 and 14-57 *Soci.t. des usines . tubes de la Sarre* [1957] ECLI:EU:C:1957:13; Case C-255/90 *Jean-Louis Burban v European Parliament* [1992] ECLI:EU:C:1992:153; and Case T-167/94 *Detlef Nölle v Council of the European Union and Commission of the European Communities* [1995] ECLI:EU:T:1995:169.

[104] H.C.H. Hofmann & B.C. Mihaescu, 'The Relation between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case' (2013) 9 *European Constitutional Law Review* 73, 84.

Whilst its specific inclusion within the Charter is certainly novel,[105] it does to a certain extent remove from its scope these ancillary rights, as well as limiting the scope of each. Separating them in turn leads to a situation within which applicants must either attempt to invoke the broader general principle, the principle and Article 41 of the Charter, or utilise the Charter drawing up the existing case law and coupling it with other Articles, as 'the material scope of protection of good administration is intended to cover 'single case decision-making,' and not the process in totality.[106]

From the perspective of the particular mode of welfare provision with which the Union's welfare rules most closely align, this principle and the corresponding rights within the Charter demonstrate that EU welfare law does attach a certain value to administrative and procedural rights in an attempt to ensure that access is as effective as possible. It may still be highly specific in practice, but one which functions in a fair and effective manner. An extension of this is that the principle and its corresponding rights would indicate that the EU promotes a model of administrative justice that is, at minimum, one of bureaucratic rationality. However, these rights have not been commonly utilised within the welfare sphere, in a similar manner to the more substantive rights contained in Article 34. With the increased reluctance of the CJEU to engage with the Charter at all in welfare cases,[107] this is unlikely to change. If the CJEU is unwilling to draw upon more concrete principles, such as those contained within Article 34, then these very individualised protections will also likely be avoided in practice.

3.3 Social Security and Social Assistance Within EU Welfare Legislation: A Complex Patchwork

Welfare payments under EU law can be organised into several different categories: social security; social assistance; special non-contributory cash benefits;[108] as well as

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[105] K. Kanska, 'Towards Administrative Human Rights in the EU: Impact of the Charter of Fundamental Rights' (2004) 10 *European Law Journal* 296.

[106] H.C.H. Hofmann & B.C. Mihaescu, 'The Relation between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case' (2013) 9 *European Constitutional Law Review* 73, 86.

[107] This can be seen in Case C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* [2014] ECLI:EU:C:2014:2358; Case C-67/14 *Jobcenter Berlin Neukölln v Alimanovic* [2015] ECLI:EU:C:2015:597; and Case C-308/14 *Commission v United Kingdom* [2016] ECLI:EU:C:2016:436.

[108] Article 70 of Regulation 883/2004 on the Co-ordination of Social Security Systems OJ L 166/1 of 2004.

'social advantages' more broadly[109] - the latter of which can also be taken to apply to specific categories of payments, and may overlap with some social security and assistance payments. This has ultimately led to some confusion[110] over what differentiates each category of payment in practice and, which legislation each category is subject to. Like the definition of 'worker' or 'self-employed,' the definitions adopted for these categories of payments at the Union level can be intentionally broad and tend to fall outside of the common national definitions and categories used.

The following subsections will therefore explore the different categories in respect of EU citizens, both active and inactive, as well as TCN labour migrants.

3.3.1 Social Security for EU Citizens

At present, no clear statutory or constitutional definition for what constitutes social security exists within EU law. One of the commonly accepted definitions is that social security can generally be classified as 'a payment, payable as of right, based on contributions paid by a worker and his or her employer and generally related to previous earnings.'[111] Distilling this down even further, a social security payment will, based on standard conceptions of it, be an entitlement based on previous contributions of one kind or another to a general welfare or taxation fund.[112]

Regulation 883/2004, which is responsible for laying down rules governing the

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[109] Case C-310/91 *Hugo Schmid v Belgiand State, represented by the Minister van Sociale Voorzorg* [1993] ECLI:EU:C:1993:221 found Disability Allowances were social benefits and Case C-249/83 *Vera Hoeckx v Openbaar Centrum voor Maatschappelijk Welzijn, Kalmthout* [1985] ECLI:EU:C:1985:139 held that a subsistence benefit was a social advantage as well as social assistance.
Social advantage is mentioned specifically in Article 7(2) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community OJ L 257, 19.10.1968, p. 2– 12.

[110] F. Pennings, *European Social Security Law* (5th edn, Intersentia, 2010), 58.

[111] M. Cousins, 'Social security, social assistance, and "special noncontributory benefits": the never-ending story', 1 <http://works.bepress.com/mel_cousins/41/> accessed 01/03/2016. This definition of or distinction existing between the two categories is broadly supported by others such as C. Fombad, 'An Overview of the Constitutional Framework of the Right to Social Security with Special Reference to South Africa', (2013) 21 *African Journal of International & Comparative Law* 1.

[112] D. Sindberg Martinsen, *The De-Terriorialization of Welfare, in EU Law and the Welfare State, In Search of Solidarity* (Oxford University Press, 2005), 91-92.

> ‘coordination of national social security systems… within the framework of free movement of persons and should contribute towards improving their standard of living and conditions of employment,’[113]

provides only cursory guidance on this matter. Although Regulation 987/2009 provides further details on how Regulation 883/04 is to interpreted and implemented,[114] it is Article 3(2) of the 2004 Regulation which establishes that:

> ‘Unless otherwise provided for in Annex XI, this Regulation shall apply to general and special social security schemes, whether contributory or non-contributory, and to schemes relating to the obligations of an employer or shipowner.’

This means that under EU law social security is not strictly limited to payments which are contributory in nature. Instead, the Regulation provides a broad category of payments to which it will apply, including:

A. sickness benefits;
B. maternity and equivalent paternity benefits;
C. invalidity benefits;
D. old-age benefits;
E. survivors' benefits;
F. benefits in respect of accidents at work and occupational diseases;
G. death grants;
H. unemployment benefits;
I. pre-retirement benefits; and
J. family benefits.[115]

The use of the term ‘benefits’ has been interpreted as applying primarily to contributory payments. This has however expanded, in certain instances, the entitlement of EU

[113] Regulation 883/2004, Recital 1.

[114] Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems [2009] OJ L284/1.

[115] Regulation 987/2009, Article 3(1).

citizens to payments that would otherwise fall outside of the Regulation's material scope.[116] Thus, while the Regulation states that the welfare legislation of each Member State is to be respected, the way in which a payment has been classified under national welfare legislation is largely immaterial,[117] and the Court of Justice has often widened the material scope of the Regulation to encompass new payments which have not been expressly excluded.

For example, where a *non-contributory* payment meets the following two specific criteria: firstly, that persons claiming such a payment within a legally defined position that gives rise to a right to the same; and that the social assistance payment is in line with one of the stated objectives of social security,[118] it can be brought within the scope of Regulation 883/04 and migrant workers[119] and their family will be entitled to that payment as if it were a pure social security payment.[120] A further criteria which has developed over time, is the requirement that the primary purpose of the payment must not be that of subsistence, as this would once again make it fall outside of the scope of Regulation 883/04 due to this being a key characteristic of social assistance under EU law.[121] Payments like this which fall within the margins are often referred to as 'mixed payments.'

Unemployment benefits, as contained within Article 3(1)(h) of the Regulation, have caused significant issues in this respect, as an unemployment benefit intended to facilitate access to the labour market - often referred to as a jobseekers payment - can easily be pulled within the scope of the Regulation even where Member States intended this to be a social assistance payment. It must also be noted however, that Articles 2 and 5 of

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[116] Case 1/72 *Frilli* [1972] ECLI:EU:C:1972:56; Case C-356/89 *Stanton Newton* [1991] ECLI:EU:C:1991:265; Case 24/74 *Biason* [1974] ECLI:EU:C:1974:99; Joined Cases 379,380,381/85, and 93/86 *Giletti* [1987] ECLI:EU:C:1987:98; Case 139/82 *Piscitello* [1983] ECLI:EU:C:1983:126.

[117] Case 187/73 *Odette Callemeyn v Belgian State* [1974] ECLI:EU:C:1974:57, para 14 - 'The Court has repeatedly held that the distinction between benefits excluded from the scope of Regulation No 1408/71 and those which fall within its scope is based essentially on the constituent elements of the particular benefit, in particular its purposes and the conditions on which it is granted, and not on whether a benefit is classified as a social security benefit by national legislation.'

[118] P. Watson, 'Free movement of workers and social security' 6 (1981) *European Law Review* 290.

[119] Case 261/83 *Castelli* [1984] ECLI:EU:C:1984:280; Case C-356/89 *Stanton Newton* [1991] ECLI:EU:C:1991:265, paras. 15-18.

[120] Case 1/72 *Frilli* [1972] ECLI:EU:C:1972:56; Case C-356/89 *Stanton Newton* [1991] ECLI:EU:C:1991:265; Case 24/74 *Biason* [1974] ECLI:EU:C:1974:99; Joined Cases 379,380,381/85, and 93/86 *Giletti* [1987] ECLI:EU:C:1987:98; Case 139/82 *Piscitello* [1983] ECLI:EU:C:1983:126.

[121] Case C-67/14 *Jobcenter Berlin Neukölln v Alimanovic* [2015] ECLI:EU:C:2015:597; and Case C-333/13 *Dano v Jobcenter Leipzig* [2014] ECLI:EU:C:2014:2358.

Regulation 492/2011 also grant equal treatment in respect of employment[122] and this includes the 'same assistance there as that afforded… to their own nationals seeking employment.'[123] This has historically created a degree of difficulty in definitively categorising jobseekers payments,[124] but they can be considered to fall within social security.

In terms of the protections granted by the Regulation, Article 4 states that the principle of non-discrimination for 'pure' social security payments is unqualified. Those that fall within its personal scope cannot have any additional restrictions placed upon them or be discriminated against based upon their nationality. These payments can also be exported, meaning that an Irish citizen resident in another Member State can potentially access it without having to be formally resident in Ireland.[125] To access a social security payment under EU law in a secondary host State, a Union citizen must merely establish *ordinary* habitual residence in their host Member State, for which economic activity is seen as an immediate form of integration,[126] and meet the qualifying criteria for the payment within the national welfare law of that Member State in order to receive it.[127] EU law in this way supplements and extends access to the national welfare state rather than replacing it.[128]

Those who are capable of invoking a right to pure social security payments under the Regulation are migrant workers, which originally would have merely encompassed those who fall within the broad umbrella term of 'worker,' but, in light of the amalgamation of workers and the self-employed in Article 48 TFEU, is now considered to in-

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[122] Case C-316/85 *Centre public d'aide sociale de Courcelles v Lebon* [1987] ECLI:EU:C:1987:302, para 25; and Case C-138/02 *Collins v Secretary of State for Work and Pensions* [2004] ECLI:EU:C:2004:172, para 63.

[123] Regulation 492/2011, Article 5.

[124] Case C-187-73 *Callemeyn v Belgian State* [1974] ECLI:EU:C:1974:57, para 6.

[125] Regulation 883/04, Article 70. As this thesis explores access *within* the Irish State to the national welfare system, this issue will not be examined in full.

[126] Case 76/76 *Silvana di Paolo v Office national de l'emploi* [1977] ECLI:EU:C:1977:32, para 19 - 'In fact, whenever a worker has a stable employment in a Member State there is a presumption that he resides there, even if he has left his family in another State.'

[127] Case 152/84 *Antonio Ferraioli v Deutsche Bundespost* [1986] ECLI:EU:C:1986:168, para 14; Case C-117/89 *Kracht v Bundesanstalt für Arbeit* [1990] ECLI:EU:C:1990:279, para 11; Case C-119/91 *McMenamin v Adjudication Officer* [1992] ECLI:EU:C:1992:503, para 26; and Case C-225/10 *Garcia v Familienkasse Nürnberg* [2011] ECLI:EU:C:2011:678, para 44.

[128] Case C-140/12 *Pensionsversicherungsanstalt v Brey* [2013] ECLI:EU:C:2013:565.

clude the self-employed.[129] Due to the fact that the non-discrimination principle embedded in the Regulation is unqualified, the degree to which an economically-active person engages with the labour market is largely immaterial - so long as they can invoke the status of worker, or that of a self-employed person, they should be protected.

The only circumstances in which a wholly economically-inactive person may potentially benefit from Regulation 883/04 for such payments is where they are a family member of the worker or self-employed person, and gain access to the welfare system in this way. The Regulation restates in several instances the notion that such persons are included in this manner.[130] This would raise the question of whether or not the EU welfare system is based on standard family based structures, wherein work which falls outside of the labour market, primarily social labour carried out almost exclusively by women in the home is not valued from an economic perspective.[131] Although the division between social and economic labour can happen within both universalist and specific modes of welfare provision, it is more often attributed to the latter, due to the division it makes between social security and assistance as well as other categories. Consequently, women in this situation must resort to discretionary payments such as social assistance rather than being able to engage with the welfare system on a truly egalitarian basis.[132] Family within the meaning of Regulation 883/04 draws primarily on national law,[133] but for the purposes of EU law must include spouses and dependent children.[134] Member States may operate a wider definition of the family, but it is not necessary to do so. As a result, EU law does not challenge this notion that spouses engaged in social labour will have access to social security only by virtue of their spouse.

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[129] Case C−282/11 *Salgado González v Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social (TGSS)* [2013] ECLI:EU:C:2013:86, para 31.

[130] Regulation 883/04, Articles 1, 7, 15, 17, 18 and 19 to name but a few.

[131] M. Benston, 'The Political Economy of Women's Liberation' (1969) 21(4) *Monthly Review* 13, 15; M. Daly & K. Rake, *Gender and the Welfare State* (Polity, 2003); H.A. Brown, *Marx on Gender and the Family: A Critical Study* (Haymarket Books, 2012), 41; and J. Lewis, 'Gender and the Development of Welfare Regimes' 2(3) (1992) *Journal of European Social Policy* 159 for a comparative study of how strongly European states rely on the 'breadwinner model' of welfare provision.

[132] Showstack Sassoon, 'Women's New Social Role: Contradictions of the Welfare State' in A. Showstack Sassoon (ed.), *Women and the State: The Shifting Boundaries of the Public and Private* (Hutchinson, 1987), 158-88.

[133] Regulation 883/2004, art 1(i)(1)(i).

[134] Regulation 883/2004, art 1(i)(3); and Case C-363/08 *Slanina v Unabhängiger Finanzsenat, Außenstelle Wien* [2009] ECLI:EU:C:2009:732, para 30.

The Court has subsequently had to grapple with preliminary references where these payments were recast within national legislation so that their primary purpose was now that of subsistence, and to determine what rights accrue as result of these changes.[135] Ultimately, however, so long as one of the objectives set out in Article 3 of Regulation 883/04 is satisfied,[136] the conditions for receiving it are sufficiently precise so as to create an entitlement or de facto right, and the primary purpose is not subsistence, the payment will be pulled within the category of social security.[137]

The significance of reclassifying payments such as these is that they extended access to welfare payments for the economically-active by bringing payments which are granted without the need for prior contributions under the banner of social security, and granted them a more immediate form of access - so long as they can satisfy the procedural requirements. It did not seek to directly enfranchise the economically-inactive. Rather, this line of precedent acknowledged, indirectly, that some payments may not strictly be considered social security under national law, but will create a vested right or entitlement which, if allowed to remain as social assistance, would bar nationals from other Member States from accessing them solely on the basis of their nationality - a concept which runs counter to the general principle of non-discrimination as well as the freedom of movement and later, Union citizenship.

By bringing a small number of new payments within the definition of social security, the Union extended access to payments which would have otherwise been subject to the conditions laid down in Directive 2004/38/EC - which governs access to social assistance and its associated residency requirements. The EU may still be highly specific and market-driven in terms of the mode which it most closely aligns with, but it has over time became increasingly more generous for those who are economically-active, and may provide an additional support to those who are not engaged with the labour market on a full-time basis but can still satisfy the definition of worker or self-employed. It may, in some circumstances, even facilitate labour market participation for those who having caring and other familial duties. It is one of the clearest examples at the legislative level of how the CJEU has attempted to ensure that the rights granted un-

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[135] Case C-187-73 *Callemeyn v Belgian State* [1974] ECLI:EU:C:1974:57.

[136] Case 249/83 *Hoeckx* [1985] ECLI:EU:C:1985:139.

[137] Case 187/73 *Callemeyn* [1974] ECLI:EU:C:1974:57, para 17.

der EU law are more universalist in nature, by allowing access to a greater number of people and with fewer restrictions.

Aside from jobseekers payments, a particular issue that has arisen in recent years in relation to these particular kinds of social security payments, is whether or not the unqualified right to equal treatment that applies by virtue of Article 4 of Regulation 883/04 to pure contributory social security is equally applicable the former. In *Commission v UK*,[138] the European Commission was informed of the difficulties faced by EU citizens resident in the UK in accessing family payments.[139] This was due to the competent welfare officers in the UK deeming such persons to fail their residency requirement after having conducted a formal test not strictly provided for within the Regulation but which had been incorporated into national legislation.[140] If labour market activity is seen as an immediate form of integration,[141] proof of this should suffice without the State having to apply a further examination which might unduly restrict their freedom of movement and impinge upon the right to non-discrimination contained in Article 4 of the Regulation. This is particularly true in light of *Martinez Sala*, which held that the requirement to provide certification of one's permission to reside in the State violated Articles 18 and 20 TFEU.[142]

On foot of this, the Commission began infringement proceedings against the UK for violating established legal precedence in this area. The United Kingdom countered that Article 11(3)(e) of Regulation 883/04 allowed for more restrictions to be placed on ben-

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[138] Case C-308/14 [2016] ECLI:EU:C:2016:436.

[139] For an in-depth analysis of both hearings, see C. O'Brien, 'A. Court of Justice The ECJ sacrifices EU citizenship in vain: *Commission* v. *United Kingdom'* (2017) 54(1) *Common Market Law Review* 209.

[140] The Social Security (Persons from Abroad) Amendment Regulations 2006 (S.I. No. 1026 of 2006), Reg 9(4) - 'A claimant is not a person from abroad if he is— (a) a worker for the purposes of Council Directive No. 2004/38/EC; (b) a self-employed person for the purposes of that Directive; (c) a person who retains a status referred to in sub-paragraph (a) or (b) pursuant to Article 7(3) of that Directive; (d) a person who is a family member of a person referred to in sub- paragraph (a), (b) or (c) within the meaning of Article 2 of that Directive; (e) a person who has a right to reside permanently in the United Kingdom by virtue of Article 17 of that Directive...'
See also *Patmalniece v Secretary of State for Work and Pensions* [2009] EWCA Civ 621, para 10 - 'The purpose of the introduction of that requirement was made plain by the Secretary of State in the statement he was required to make (pursuant to s.172(1) of the 2002 Act) because the 2004 Regulations had been referred to the Social Security Advisory Committee. The underlying purpose of the introduction of a "right to reside" test into the UK's social security system was to protect that system from exploitation by those who do not wish to come to work but to live off benefits (§4). The Committee had taken the view that the existing habitual residence test was sufficient to prevent "benefit tourism."'

[141] Case 76/76 *Silvana di Paolo v Office national de l'emploi* [1977] ECLI:EU:C:1977:32, para 19 - 'In fact, whenever a worker has a stable employment in a Member State there is a presumption that he resides there, even if he has left his family in another State.'

[142] Case C-85/96 *Martinez Sala v Freistaat Bayern* [1998] ECLI:EU:C:1998:217

efits such as these and was therefore permissible. The questions referred to the CJEU were:

> i) whether the conditions set out in the Regulation would be breached by imposing a right to reside upon a citizen seeking to access a 'family benefit,' or;
> ii) alternatively, if this could amount to direct discrimination under Article 4 of the Regulation by requiring that EU citizens of another Member State must satisfy a condition that is not imposed on nationals of the UK.

The First Chamber of the CJEU held that this additional right to reside test is capable of being applied to the Child Benefit and Child Tax Benefit at issue in this case without violating Article 4 of Regulation 883/04. The Commission had argued before the First Chamber that the 'right to reside test is an automatic mechanism that systematically and ineluctably bars claimants who do not satisfy it from being paid benefits, regardless of their personal situation.' Even if the UK government were to suggest that it is an individualised assessment, 'that mechanism therefore does not permit the complex individual assessment which the Court requires of host Member States.'[143] Again, the precedent set in *Martinez Sala,*[144] would arguably apply in this instance, but this was effectively overruled without a truly compelling reason for doing so.

Although the full impact of the judgment in *Commission v UK* has yet to be felt, the likelihood is that persons who are more marginally engaged in employment, who move from one precarious source of employment to another or who engage infrequently in self-employed activities may now be excluded from accessing such payments based on an initial assessment which may not take a full account of their economic status.[145] It is equally plausible that this has chipped away at the status of these kinds of social security payments and may be applied to other such payments.

Thus, whilst such payments do align with the specific mode, albeit in a more generous form and with more universalist aspirations, the decision in *Commission v UK* sig-

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[143] First Chamber, para 47.

[144] Case C-85/96 *María Martínez Sala v Freistaat Bayern* [1998] ECLI:EU:C:1998:217

[145] C. O'Brien, 'An insubstantial pageant fading: a vision of EU citizenship under the AG's Opinion in C-308/14 Commission v UK' <http://eulawanalysis.blogspot.ie/2015/10/an-insubstantial-pageant-fading-vision.html> accessed 02/01/2017. See also, C. O'Brien, 'Case C-308/14, Commission v. United Kingdom: The ECJ sacrifices EU citizenship in vain' (2017) 54 *Common Market Law Review* 209–244.

nals that for this particular category of payments the EU welfare rules are potentially becoming more dependent upon economic activity. This is also clear in terms of social benefits within the meaning of Regulation 492/2011 more generally which, despite providing some protection for family members through a broader range of welfare measures, is attributable solely to workers and not the self-employed.

3.3.2 Social Benefits for EU Citizens

Social benefits are often difficult to characterise due to the way in which the term has been used interchangeably by the Court of Justice over time. However, Regulation 492/2011[146] does include several clear examples. In terms of welfare payments, it includes: payments given by right to the elderly;[147] a minimum subsistence payment granted by right;[148] and a benefit which helps parents in the financial maintenance of a dependent child.[149] These are payments which may have been pulled within the scope of Regulation 883/04 but are now exclusively provided for under Regulation 492/2011. More generally, it also ensures that workers and their family cannot be discriminated against on the basis of nationality in relation to social and tax advantages, even where these fall outside of the strict employment context,[150] such as: educational grants and sources of finance for both the worker and their dependent children,[151] and loans or grants given to pregnant persons to deal with the expenses of childbirth.[152]

Due to the fact that Regulation 492/2011 was adopted on the sole legislative basis of Article 46 TFEU, which applies exclusively to workers,[153] its material scope is limited and is incapable of being used by the self-employed. However, where Regulations

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[146] Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L141/1.

[147] Case C-310/91 *Schmid v Belgian State* [1993] ECLI:EU:C:1993:221, para 17.

[148] Case C-249/83 *Hoeckx v Openbaar Centrum voor Maatschappelijk Welzijn, Kalmthout* [1985] ECLI:EU:C:1985:139, para 22. The habitual residence cannot therefore apply to this payment for EU citizen workers.

[149] Case C-85/96 *Martinez Sala v Freistaat Bayern* [1998] ECLI:EU:C:1998:217, para 28.

[150] Regulation 492/2011, Article 7(2).

[151] Case C-3/90 *Bernini v Minister van Onderwijs en Wetenschappen* [1992] ECLI:EU:C:1992:89, paras 25 and 29; and Case C-337/97 *Meeusen v Hoofddirectie van de Informatie Beheer Groep* [1999] ECLI:EU:C:1999:284.

[152] Case C-65/81 *Reina v Landeskreditbank Baden-Württemberg* [1982] ECLI:EU:C:1982:6, para 13.

[153] Regulation 492/2011, Articles 2, 5 and 7.

883/04 and 492/2011 overlap, family members who cannot benefit from Regulation 883/04 are capable of using 492/2011 in their favour.[154] For example, a right to reside within the State may arise for an individual no longer considered to be a worker where their child is in continuous education and so long as the child was born prior to the loss of worker status.[155] This right continues until such time as the child is no longer dependent upon the care of their parents in order to finish their formal education, and this remains the case even where the child has reached the age of majority and the parents do not have sufficient financial resources to live independently and without recourse to the State.[156]

This category of welfare payments underlines many of the core themes prevalent within the construction of EU welfare rules. On the one hand, it highlights how the Union has continued to build a body of law which, in line with its more universalist ideals, seeks to extend greater levels of access to national welfare systems to EU citizens. On the other, the fact that this legislation was adopted on a legislative basis which fails to protect the self-employed as a specific category of migrant workers even after workers and the self-employed were amalgamated under Article 48 TFEU points to the difficulties that arise with an evolving area of law - as well as the ways in which these kinds of distinctions continually limit the universalist impulse of EU law in this area.

3.3.2.1 Special Non-Contributory Cash Benefits for EU Citizens

Special non-contributory cash benefits are payments which have been brought within the scope of Regulation 883/04 and thus become another form of social security benefit, albeit one which may share the more common characteristic of social assistance - being discretionary and non-contributory in nature. They are not however portable - capable of being brought from the original Member State to the new host State[157] - providing

[154] Case 40-76 *Slavica Kermaschek v Bundesanstalt für Arbeit* [1976] ECLI:EU:C:1976:157; Case C-310/91 *Hugo Schmid v Belgiand State, represented by the Minister van Sociale Voorzorg* [1993] ECLI:EU:C:1993:221, paras 12, 13 and 17.

[155] Case C-480/08 *Teixeira v London Borough of Lambeth and Secretary of State for the Home Department* [2010] ECLI:EU:C:2010:83, para 60; Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECLI:EU:C:2002:493, paras 52 and 76; Case C-197/86 *Browne v The Secretary of State for Scotland* [1998] ECLI:EU:C:1988:323, para 5.

[156] Case C-480/08 *Teixeira v London Borough of Lambeth and Secretary of State for the Home Department* [2010] ECLI:EU:C:2010:83, paras 54-57, 70 and 86.

[157] Case C-537/09 *Bartlett v Secretary of State for Work and Pensions* [2011] ECLI:EU:C:2011:278, para 38.

another clear distinction between these and 'pure' social security payments. Payments of this nature are always potentially subject to a residency requirement.[158]

Despite being 'mixed' and sharing characteristics of both social security and assistance, and being listed within Annex X of Regulation 883/04, these mixed payments are considered to be subject to the material scope of Directive 2004/38/EC,[159] explored in detail later within this chapter. This was made clear in *Brey*, where the Court of Justice articulated that, in a similar manner to the broad interpretation afforded to social security under the relevant EU rules, social assistance must also be provided with the same latitude[160] - effectively giving the Member States a larger margin of appreciation in terms of regulating these payments. Payments intended to facilitate access to the labour market, where this remains their primary purpose, are however excluded.[161]

This is likely due to the characteristics of a special non-contributory cash benefit - they are ancillary subsistence payments, or payments designed to protect persons with disabilities[162] and are entirely non-contributory in nature as they are paid for either through a general taxation fund or at the discretion of the relevant State authorities.[163] Consequently, whilst they may again overlap with some of the stated purposes of social security within the meaning of the Regulation, they are a matter of national and not Union law.

3.3.3 Third-Country National Labour Migrants and Access to Social Security

EU rules relating to TCN labour migrants and access to the welfare system of their host Member State have undergone a rapid, and highly uneven process of development. Due to the limited competence of the Union in relation to TCNs and the control of its

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[158] Regulation 883/2004, art 70(4).

[159] Case C-140/12 *Pensionsversicherungsanstalt v Brey* [2013] ECLI:EU:C:2013:565, para 58.

[160] Case C-140/12 *Pensionsversicherungsanstalt v Brey* [2013] ECLI:EU:C:2013:565, para 60.

[161] Case C-299/14 *Vestische Arbeit Jobcenter Kreis Recklinghausen v Garcia-Nieto and Others* [2016] ECLI:EU:C:2016:114, Opinion of AG Wathelet [2015] ECLI:EU:C:2015:366, paras 79-90.

[162] Regulation 883/2004, art 70(2)(a)(i), which provides that special non-contributory cash benefits mean: '…supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in Article 3(1), and which guarantee the persons concerned a minimum subsistence income having regard to the economic and social situation in the Member State concerned…'
See also, Regulation 883/2004, art 70(2)(a)(ii): 'solely specific protection for the disabled, closely linked to the said person's social environment in the Member State concerned…'

[163] Regulation 883/2004, art 70(2)(b): 'where the financing exclusively derives from compulsory taxation intended to cover general public expenditure and the conditions for providing and for calculating the benefits are not dependent on any contribution in respect of the beneficiary…

external borders for much of its history, one of the initial steps taken by the Union in the welfare field was to extend the existing rules for citizens under Regulation 1408/71[164] - the predecessor to Regulation 883/04 - to TCNs in very limited circumstances i.e. where the TCN has engaged in intra-EU movement and fully in line with the immigration rules of both Member States.[165] This was a significant step in many respects, as it did see EU welfare rules open and embrace TCN labour migrants in a more universalist manner than ever before, but from a practical standpoint, the number of persons covered by this were comparably low, as TCNs do not enjoy an identical right to free movement with Union citizens. To fall within the material scope, a TCN would have to move within the EU, complying with the immigration rules of each Member State, and then have to try to claim a right on this basis. This was subsequently extended to Regulation 883/04.[166]

It was later decided that the EU institutions would attempt to regulate the entry and residence of TCN labour migrants where there was no intra-EU movement, with the crossing of the Union's external border likely invoking the necessary cross-border element for EU law to be engaged. However, following resistance from the Member States to a comprehensive set of rules governing TCNs generally, the Commission initiated a sectoral programme,[167] with different forms of employment as well as discrete sectors of the Internal Market being subject to individual Directives. This resistance, as Peers argues, is due to the perception that Member State labour markets remain within the exclusive purview of the States themselves, and that this is an area of national competence which they seek to retain as much control of as possible.[168] This is supported elsewhere within the Treaties, with Article 153(1)(g) TFEU outlining that the Union has a support-

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[164] Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality.

[165] Article 1, Regulation 859/2003 and Article 1, Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality OJ L 344, 29.12.2010, 1–3.

[166] Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality OJ L 344, 29.12.2010, 1–3.

[167] E. Guild, 'EU Policy on Labour Migration: A First Look at the Commission's Blue Card Initiative' CEPS Policy Brief 145 (2007), 2 - 'as the Commission got nowhere with its earlier proposal which covered all third country national workers, perhaps it considers the only way forward in the field is sectorally.'

[168] S. Peers, 'The UK opt-out from the EU Immigration and Asylum Law in Practice' in JY. Carlier & P. de Bruycker (eds.), *Actualité du droit européen de l'immigration et de l'asile* (Bruylant, 2005), 89.

ing competence in respect of the 'conditions of employment for third-country nationals legally residing in Union territory.' Therefore, whilst the Union might have a greater role in admitting third-country nationals by virtue of the insertion of Article 79(1) TFEU, its role is secondary in actively assigning the right to access individual labour markets once this has occurred, or in granting rights such as to access social security which is tied to the labour market by virtue of their primarily contributory nature.

This does, in some respects, mirror the original approach taken towards EU citizens, where the first measures protected the free movement rights of workers by allowing them access to social security payments on the same basis as nationals of their host Member State before separate rules were adopted in respect of the self-employed and citizens generally. Each have gradually amalgamated and been centralised in Article 48 TFEU to a large extent, although the historical and often legislative distinctions continue to cause issues from time to time.

However, the Directives in relation to TCN labour migrants divide up *workers* as a singular category. Rather than categorising individuals as workers, the self-employed, their family members and dependents, and the wholly economically-inactive individual, the legislation regulating TCN labour migrants creates categories such as 'highly skilled workers,' 'seasonal workers,' 'researchers' and 'intra-corporate transferees.' They are divided into categories based on the *nature* of the work they are carrying out, and not on the employment relationship - or lack thereof. As Carrera and others have eloquently articulated, this potentially creates 'a hierarchical, differentiated and obscure European legal regime on labour [im]migration which accords different rights, standards and conditions for entry and stay to different groups and countries of origin of third-country nationals.'[169]

The Student Directive[170] was the first such legislative measure regulating the entry and residence of TCNs. As Verschueren notes, is not strictly a labour market Directive, nor does it relate directly to social security.[171] It has a rather broad scope, and applies to

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[169] S. Carrera, A Faure Atger, E. Guild & D. Kostakopoulou, 'Labour Immigration Policy in the EU: A Renewed Agenda for Europe 2020' CEPS Policy Brief No. 240 (April 2011), 4.

[170] Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service OJ L 375, 23.12.2004.

[171] H. Verschueren, 'Employment and Social Security Rights of Third-Country Labour Migrants under EU Law: An Incomplete Patchwork of Legal Protection' (2016) 18 *European Journal of Migration and Law* 373, 380.

TCN students,[172] school pupils,[173] unremunerated trainees, and volunteers residing within the EU. Such persons are not explicitly admitted for the purposes of employment but may engage in it during their residency. Article 16 provides a limited right to take part in paid employment or engage in self-employed activities, and this cannot fall below 10 hours per week. The overall tenor of the article is deferential to the Member States, as they are allowed to determine how many hours above this minimum threshold may be granted to TCN students, they may restrict access within the first year of residence, and may impose a reporting burden upon the student and their employer. The CJEU has established that the rights within the Directive,[174] including access to the labour market must be interpreted as broadly and as effectively as possible,[175] but there is no express right to social security contained within it. This could potentially be inferred from the right to access the labour market, but without any obligation being placed upon Member States and the poor implementation of the express duties within the Directive,[176] Member States are unlikely to impose this upon themselves.

Within a relatively short period of time, the Scientific Research Directive[177] was adopted. The Preamble quickly and succinctly establishes that it is in the EU's economic interests and in its own policy objectives[178] that scientific researchers be admitted under an efficient and unified procedure, with commensurate rights being granted to them. Article 12 on equal treatment grants clear and unqualified rights to tax benefits,[179] ac-

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[172] Directive 2004/114/EC, Article 7.

[173] Directive 2004/114/EC, Article 9.

[174] See Case C-491/13 *Mohamed Ali Ben Alaya v Bundesrepublik Deutschland* [2014] ECLI:EU:C:2014:2187 for example.

[175] Case C-15/11 *Leopold Sommer v Landesgeschäftsstelle des Arbeitsmarktservice Wien* [2012] ECLI:EU:C:2012:116.

[176] European Commission, REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the application of Directive 2004/114/EC on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service COM(2011) 587 Final.

[177] Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research OJ L 289, 3.11.2005.

[178] Directive 2005/71/EC, Recitals 1-4.

[179] Directive 2005/71/EC, Article 12(d).

cess to goods and services,[180] and most importantly, access to social security in line with EU citizens within the meaning of Regulation 883/04.[181]

Both of these instruments were recently recast within a single Directive,[182] which has made the position of both groups potentially less clear in terms of access to social security. Rather than providing for an express right to non-discrimination based on Regulation 883/04 as the original Scientific Research Directive did, the new measure includes provisions which allow for the refusal of applications as well as the revocation or non-renewal of successful applications where the hosting body, party or family does not carry out their legal obligations in relation to social security.[183] Recital 55 includes that the Directive as a whole should be interpreted as granting equal treatment with EU citizens in respect of access to social security based on Regulation 883/04 for both students and researchers,[184] but the decision to omit this from the main body of the legislation is somewhat puzzling. It represents an improvement on the 2004 Students Directive through the inclusion of an interpretive note.[185]

This was then followed by Blue Card Directive,[186] which deals exclusively with 'highly-qualified employment,' and which was more ambitious in terms of the rights it attempted to establish for those who fall within its scope. The Directive indicates that the salary of the individual in question must be 1.2-1.5 times the national average,[187] in support of this idea. Blue Card holders are firstly granted the right to social security in line with the rights of EU citizens,[188] with the caveat that they cannot be unemployed

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[180] Directive 2005/71/EC, Article 12(e).

[181] Directive 2005/71/EC, Article 12(c).

[182] Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing OJ L 132, 21.5.20167.

[183] Directive 2016/801, Articles 20(2)(a) and 21(2)(a).

[184] Directive 2016/801, Recital 55. Recital 56 of the Directive also excludes family benefits from the scope of the protections included in Regulation 883/04.

[185] Directive 2016/801, Recital 55.

[186] Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly-qualified employment [2009] OJ L155/17 - Ireland and the United Kingdom do not participate.

[187] Directive 2009/50/EC, Article 5.

[188] Directive 2009/50/EC, Article 14(e).

for a period exceeding 3 months and may not be unemployed more than once within their host Member State[189] - a requirement that falls below best practice.[190]

Cholewinski[191] highlights the preferential treatment of Blue Card workers in comparison to some other sectors,[192] particularly in respect of access to goods and services,[193] as their social rights are usually granted without significant qualifications being attached to them. The rights given to family members of Blue Card holders are also quite generous. Although they must not constitute an 'undue burden' on the receiving/host Member State,[194] their family members receive unreserved access to the labour market,[195] and this exceeds the standard protections included within the Family Reunification Directive.[196] Thus, the Blue Card Directive on the one hand demonstrates how the sectoral approach can be beneficial, insofar as it may offer higher protections than pre-existing instruments, and on the other, underlines the potential confusion arising from this difference in treatment, particularly as part of an overall framework on lawful third-country labour migration.

The Single Permit Directive (SPD)[197] is, in many respects, the most symbolic of this sectoral approach towards legislating for TCN labor migrants. Its intention was to simplify existing procedures and allow for the control of a TCN worker's status, and by

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[189] Directive 2009/50/EC, Article 13.

[190] European Convention on the Legal Status of Migrant Workers, Strasbourg, 24.XI.1977, Article 9(4) - a minimum of 5 months in which the individual can be unemployed should be granted.

[191] R. Cholewinski, 'Labour Migration, Temporariness and Rights' in S. Carrera, E. Guild & K. Eisele, (eds.) *Rethinking the Attractiveness of EU Labour Immigration Policy: Comparative Perspectives on the EU, the US, Canada and Beyond* (Centre for European Policy Studies, 2014), 26 (footnote 10).

[192] Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a member state and on a common set of rights for third-country workers legally residing in a member state OJ L 343, 23.12.2011, p. 1–9.

[193] Directive 2009/50/EC, Article 14(g).

[194] Directive 2004/58/EC.

[195] Directive 2004/58/EC, Article 15(6).

[196] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification OJ L 251, 3.10.2003.

[197] Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State *OJEU* 23 December 2011, L-343/1.

proxy, encourage efficient processes that allow for labour migration into the Union.[198] Both of these objective reflect those of Article 79 TFEU itself. The difficulty is that the Directive dedicates as much, if not more time to who is *not* governed by it than those who are. In total, 6 categories of TCNs are covered[199] while 9 are not,[200] some of whom would require further Directives in the future.[201] If the Single Permit Directive intended to live up to and satisfy the ambitions of Article 79(1)-(2) TFEU,[202] it ultimately failed to do so. Article 12 of the Directive establishes the right to equal treatment for all migrant workers under the SPD. Article 12(2) does however, create further derogations in many social fields such as education and vocational training,[203] tax benefits,[204] and in accessing social goods and services.[205] Social security payments under the Directive cannot be refused for 'third-country workers who are in employment or who have been in employment for a minimum period of six months and who are registered as unemployed,'[206] which is in many ways the inverse of the requirement included in the Blue

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[198] Directive 2011/98/EU, Recital 3 and 14.

[199] TCN Students with employment; Researchers; Blue Cards; migrants coming in through national schemes; family members of nationals coming under national schemes, and family members coming under the Family Reunification Directive [Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification OJ L 251, 3.10.2003].

[200] TCNs who are family members of EU citizens [governed by Directive 2004/38/EC]; persons who enjoy a right to free movement due to a trade/association agreement with a third country; posted workers working/residing under the Posted Workers Directive [Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services OJ L 18, 21.1.1997]; Intra-corporate transferees; seasonal workers and au pairs; migrants receiving temporary protection; long-term residents; the self-employed; and seafarers.

[201] Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers OJ L 94, 28.3.2014 makes no mention of the SPD applying in this instance to seasonal workers; DIRECTIVE 2014/66/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer L 157/1 27.5.2014.

[202] Y. Pascouau & S. McLoughlin, 'EU Single Permit Directive: a small step forward in EU migration policy' *European Policy Centre* (2012).

[203] [Article 12(2)(i) to (iv) of SPD] can also be derogated from but only in the case of students, unpaid workers/trainees and volunteers [Article 12(2)(a)(ii) of SPD], as well as study/maintenance grants, or similar loans [Article 12(2)(a)(iii) of SPD]. They cannot exclude 'those third-country workers who are in employment or who have been employed and who are registered as unemployed' [Article 12(2)(a)(i) of SPD].

[204] Tax benefits may of course only be limited where 'the registered or usual place of residence of the family members of the third-country workers for whom he/she is claims benefits, lies in the territory of the Member State concerned' [Article 12(2)(c) of SPD]. Any such derogations must strike the balance between a Member State's sovereignty on issues of tax with their obligations under EU law.

[205] Goods and services can also concern items such as housing [Article 12(2)(d)(i) and (ii)], although this does not explicitly state whether the derogation can be complete or merely partial when it comes to some form of housing benefit].

[206] Directive 2011/98/EU, Article 12(2)(b).

Card Directive. Social security is also to be interpreted in line with the definition established in Article 3 of Regulation 883/04,[207] meaning that additionally recognised categories of social security will be included but anything falling outside of the Regulation is not.[208]

The remaining two Directives cover sectors of the economy which were excluded from the scope of the SPD, as well as involving migration flows which are by their very nature considered to be temporary. The Seasonal Workers Directive (SWD)[209] governs activities which are in some way dependent upon the passage of seasons, and for which EU undertakings may bring over third-country nationals in order to assist them with these activities for a short period of time.[210] By regulating this sector of the Internal Market, the Union hopes to 'contribute to the effective management of migration flows for the specific category of seasonal temporary migration and to ensuring decent working and living conditions for seasonal workers.'[211] This is supported by other objectives, such as covering both direct-employment relationships, any agency that might hire seasonal workers as a third-party,[212] and the incorporation of civil society organisations who work directly with such migrant workers within the overall implementation process and operation of the Directive.[213]

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[207] Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality [2003] OJ L 124/1 makes this possible.

[208] For a critical analysis of the protections granted under the Directive, see A. Beduschi, 'An empty shell? The protection of social rights of third-country workers in the EU after the single permit directive' (2015) 17 *European Journal of Migration Law* 210. Some such as K. Groenendijk, 'Equal treatment of workers from third countries: the added value of the Single Permit Directive' ERA Forum (2015) 1-15, argue that the Directive at least attempts to create comparable rights for TCNs, even if they are not equal to those of EU citizens.

[209] DIRECTIVE 2014/36/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers L 94/375 28.3.2014.

[210] Directive 2014/36/EU, Article 3(b).

[211] Directive 2014/36/EU, Point (7).
See also, J. Fudge & P Herzfeld Olsson, 'The EU seasonal workers directive: When immigration controls meet labour rights' (2014) 16(4) *European Journal of Migration and Law* 439, on the tensions that arose during the negotiations for and drafting of the Directive in respect of granting labour and social rights to those covered by the Directive's personal scope.

[212] Directive 2014/36/EU, Point (12).

[213] Directive 2014/36/EU, Point (13).

Such persons are granted access to social security in line with Regulation 883/04,[214] but Member States may immediately exclude family and unemployment benefits from this equal treatment.[215] The Directive is instead more focused on other substantive socially-based interventions which can be made to protect the interests of seasonal workers. Article 8 allows for an employer to be barred from procuring seasonal workers where they have violated national law, including labour rights,[216] and where the employer has purposefully attempted within the last 12 months to replace a permanent job with an unsecured seasonal position.[217] The duration of a seasonal worker's contractual term should not exceed 5 to 9 months, and this will also be dependent upon on national labour policy.[218] Similarly, applications can only be made by workers from outside of the EU.[219] Accommodation must also be provided, and rents on these premises cannot be unduly harsh, or exploitative,[220] a rental agreement must be provided, so that the terms are known and enforceable.[221] This accommodation must be compliant with national law, must be provided in advance and any changes in accommodation must be communicated to the relevant authorities.[222] These conditions are deemed to be mandatory in nature.[223]

The SWD is therefore a significant step forward in ensuring access to the national welfare system and in regulating the material conditions in which seasonal workers are

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[214] Directive 2014/36/EU, Article 23(1)(d).

[215] Directive 2014/36/EU, Article 23(2)(a).

[216] Directive 2014/36/EU, Article 8(4)(a).

[217] Directive 2014/36/EU, Article 8(4)(b).

[218] Directive 2014/36/EU, Article 14(1).

[219] J. Hunt, 'Making the CAP Fit: Responding to the Exploitation of Migrant Agricultural Workers in the EU' (2014) 30(2) *The International Journal of Comparative Labour Law and Industrial Relations* 131, 142 discussing Article 2(1) of the Directive.

[220] Directive 2014/36/EU, Article 20(2)(a).

[221] Directive 2014/36/EU, Article 20(2)(b).

[222] Directive 2014/36/EU, Article 20(1).
See also, PICUM, 'SEASONAL WORKERS DIRECTIVE: Improvements for Treatment of non-EU Workers, But Not Enough to Prevent Exploitation' (14/10/2013) <http://picum.org/en/news/picum-news/42304/> accessed 13/04/2015.

[223] S. Peers, 'Ending the exploitation of seasonal workers: EU law picks the low-hanging fruit' <http://eulawanalysis.blogspot.ie/2015/02/ending-exploitation-of-seasonal-workers.html#uds-search-results> accessed 12/04/2015. See also, PICUM, 'SEASONAL WORKERS DIRECTIVE: Improvements for Treatment of non-EU Workers, But Not Enough to Prevent Exploitation' 14/10/2013 <http://picum.org/en/news/picum-news/42304/> accessed 13/04/2015.

housed. The protections granted by it are limited, but represent a positive step for this specific category of TCN labour migrants overall.

The Intra-Corporate Transferees Directive[224] demonstrates that even highly-skilled workers where they are present for a short duration are subject to potential derogations in terms of the social rights that may be granted to them. Its intention is to facilitate international companies operating in a given Member State in relocating a highly-skilled TCN resident outside of the Union to one of their offices or undertakings within the EU.[225] Article 5 outlines the process itself, which merely requires that the third-country transferee is sent from an undertaking established in a third-country,[226] that they have been employed by the company/undertaking for between three and twelve continuous months prior to the transfer taking place,[227] that they provide evidence of their employment contract containing the specific duration of the transfer,[228] that they fulfil a role within the overall undertaking as a specialist, manager or trainee,[229] that the rate of remuneration and conditions during their secondment are clearly established,[230] and that they will be able to transfer back to the third-country undertaking once the posting has finished.[231]

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[224] DIRECTIVE 2014/66/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer L 157/1 27.5.2014.

[225] Directive 2014/66/EU, Preamble, 6 - 'such intra-corporate transfers of key personnel result in new skills and knowledge, innovation and enhanced economic opportunities for the host entities, thus advancing the knowledge-based economy in the Union while fostering investment flows across the Union.'
Unfortunately this does not seem entirely consistent with the same point, which subsequently argues that the Directive helps globalised companies make better use of their internal human resources. However it might in fact seek to balance these competing interests despite no direct link being made, or it may in fact simply treat the global formation of the undertaking and each of its different national emanations as being part of one indivisible whole.
Article 2(a) of the Directive expands upon the nature of the transfer by excluding research projects as a ground for entry. Research projects would specifically seek to create some form of innovation, and yet the Directive's intent to support the 'knowledge-based economy', sees this category of work excluded entirely. It may simply be an aspiration statement of intent, but one without a solid basis in the operation of the Directive itself.

[226] Directive 2014/66/EU, Article 5(1)(a).

[227] Directive 2014/66/EU, Article 5(1)(b).

[228] Directive 2014/66/EU, Article 5(1)(c)(i).

[229] Directive 2014/66/EU, Article 5(1)(c)(ii).

[230] Directive 2014/66/EU, Article 5(1)(c)(iii).

[231] Directive 2014/66/EU, Article 5(1)(c)(iv).

Chapter IV of the Directive outlines many of the standard rights accruing to the all categories of legal migrants under EU law, including the right to access social security as defined within Article 3 of Regulation 883/04, and this would include additionally recognised categories of social security.[232] An application may even be refused where access to social security has not been adequately considered.[233] Member States may derogate from this right somewhat where a bilateral agreement exists between the third-country and the Member State.[234] Further, the non-discrimination principle for remuneration and conditions of employment must not fall below those of the Posted Workers (PW) Directive (Directive 96/71/EC),[235] a Directive which has been heavily criticised for its impact on both union rights and on depressing national wages.[236] Although the scope of the ICT Directive is far smaller than the PW Directive, it does allow undertakings to engage in an even greater degree of selectivity. Employees can not only be chosen based on their skill level, but also on their home state's respective cost structures and legal regimes to ensure the best conditions for the undertaking/company and not necessarily for the individual worker. Temporariness 'can be problematic from the perspective of ensuring the protection of the human rights of migrant workers, and their right to non-discrimination and equality of treatment in particular,'[237] and by never enforcing a higher standard against international undertakings, the EU does not to assuage this issue overall.

As Guild has noted, and as summarised in Table 3.1, 'there has been some discussion about the wisdom and desirability of dividing up the area into sectors on the basis of

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[232] Directive 2014/66/EU, Article 18.

[233] Directive 2014/66/EU, Article 7(3)(a) and Article 8(5)(b).

[234] Directive 2014/66/EU, Article 18(2)(c). Article 5 requires that other procedural requirements such as presenting proof of education and possession of valid travel documents, etc are also fulfilled.

[235] Directive 2014/66/EU, Article 18(1).

[236] Case C−341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet* [2007] ECLI:EU:C:2007:809 in relation to the Posted-Workers Directive and it's impact on union activity.
See also, R. Cholewinski, 'Labour Migration, Temporariness and Rights' in S. Carrera, E. Guild & K. Eisele, (eds.) *Rethinking the Attractiveness of EU Labour Immigration Policy: Comparative Perspectives on the EU, the US, Canada and Beyond* (Centre for European Policy Studies, 2014), 23.

[237] R. Cholewinski, 'Labour Migration, Temporariness and Rights' in S. Carrera, E. Guild & K. Eisele, (eds.) *Rethinking the Attractiveness of EU Labour Immigration Policy: Comparative Perspectives on the EU, the US, Canada and Beyond* (Centre for European Policy Studies, 2014), 22.

type of work.'[238] Many scholars have argued that this will segment TCN labour migrants into different classes, and will grant different sets of rights to each commensurate with their level of economic value and the sector of the Internal Market which they are engaged with - with labour rights and the right to social security serving as primary examples.[239]

Table 3.1 Summary of TCN Labour Migrant Directs and Rights

Title	Social Security
'Student Directive' ***Directive 2004/114/EC***	No explicit access - access instead to labour market.
Scientific Research Directive' ***Directive 2005/71/EC***	Yes, in line with Regulation 883/04.
Recast Student and Scientific Research Directive ***Directive 2016/801***	Yes, in line with Regulation 883/04 but now incorporated through Recital 55.
Blue Card' Directive ***Directive 2009/50/EC***	Yes, in line with Regulation 883/04. Better access to other goods and services and family members have access to labour market.
Single Permit' Directive ***Directive 2011/98/EU***	Yes, in line with Regulation 883/04 but only were they have been employed for 6+ months. Derogations in terms of tax advantages and other benefits.
Seasonal Workers' Directive ***Directive 2014/36/EU***	Yes, in line with Regulation 883/04 but excluding family and unemployment benefits. Other category-specific protections incorporated.
Intra-Corporate Transferees' Directive ***Directive 2014/66/EU***	Yes, in line with Regulation 883/04. Non-discrimination in remuneration must not fall below that of Directive 96/71/EC.

However in spite of the evidence that there are some differences in how the right to social security is assigned to Blue Card workers and to scientific researchers when compared with seasonal workers for example, these are discrepancies that may have arisen due to the particular agendas of the Member States at a given point in time and as

[238] E. Guild, 'EU Policy on Labour Migration: A First Look at the Commission's Blue Card Initiative' CEPS Policy Brief 145 (2007), 2.

[239] E. Guild, 'EU Policy on Labour Migration: A First Look at the Commission's Blue Card Initiative' CEPS Policy Brief 145 (2007); A. Portes, 'Immigration theory for a new century: some problems and opportunities', 31(4) *International Migration Review* (1997), 799; and A. Portes & M. Zhou, 'The new second generation: segmented assimilation and its variants among post-1965 immigrant youth' 530 *The Annals of the American Academy of Political and Social Sciences* (1993) 74.

a result of the highly sectoral approach that has been utilised since 2004. Any differences in how rights are ascribed could therefore be due to the process through which new EU laws are adopted in the field of immigration, and the particular severity of the responses from the Council/Member States rather than to that particular sector of the Internal Market. Thus, unlike with EU citizens where the right to social security has amalgamated and centralised within Article 48 TFEU over time, the same right for TCN migrant workers remains highly fractured due to the current policy approach and the relative infancy of much of the legislation in this area. It is still indicative of a universalist outlook, insofar as the EU is continually attempting to broaden access to national welfare systems for different categories of migrants, but in an incomplete and uneven manner, and which is reinforced through specific and highly market-based mechanisms.

3.3.4 Social Assistance for EU Citizens

'Pure' social assistance payments lie outside of the material scope of Regulation 883/04,[240] and are instead regulated by Directive 2004/38[241] in conjunction with Regulation 987/2009[242] - the latter of which outlines the conditions for establishing habitual residence within the meaning of Directive 2004/30/EC.[243] Social assistance has been legislated for under a combination of Articles 45, 48, 18 and 20 TFEU, to reflect both the economically-active citizen worker and inactive citizen.

As with social security, there is no legislative or Treaty-based definition for what constitutes social assistance for the purposes of EU law. A social assistance payment is generally considered to be one which does not pursue one of the objectives outlined in Article 3(1) of Regulation 883/04, and which has as its primary purpose the subsistence

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[240] Article 3(5) of the Regulation outlines that it 'shall not apply to social and medical assistance or to benefit schemes for victims of war or its consequences.'

[241] 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ L 158, 30.4.2004) OJ L 229, 29.6.2004, p. 35–48.

[242] REGULATION (EC) No 987/2009 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems OJ L.284/1.

[243] Although the Directive does not directly reference the term 'habitual residence' it is arguably a primary concern, as the legislation links residence with access to social assistance payments.

of the individual in question i.e. that greater than 50% of the objective is subsistence.[244] This will also invariably lead to social assistance schemes being non-contributory in nature,[245] and imply that a means test is conducted.[246]

Prior to the adoption of the 2004 Directive, there were no rules at the Union level regulating access to social assistance, and in that respect, those who did not engage with the labour market, or did not retain their status as a worker or self-employed person largely fell outside of the scope of EU law, but may have been granted social assistance payments at the discretion of their host State. This created a quite severe and specific mode of welfare provision that was not even stratified into social security and social assistance. It was therefore incumbent upon EU citizens to continually engage with the labour market in some respect to potentially draw from the welfare system of their host State under EU rather than national law.

Directive 2004/38/EC has not wholly replaced this emphasis on economic activity. Rather, it has created another stream within national welfare systems which EU citizens may access by virtue of EU rules but based once again on having engaged in some way with the labour market. It eliminates the potential that by falling outside of the scope of Regulation 883/04 that citizens fall off of this precipice and outside of the relevant EU rules entirely. The wholly economically-inactive citizen is included, but primarily on the basis that they are economically self-sufficient and will not become an undue burden on the welfare system of their host State.[247] Directive 2004/38/EC does signal a move towards more universalist provision by extending access to social assistance, but by mimicking the division between social security and assistance inherent in the specific mode and emphasising economic activity rather than individual need.

This emphasis on labour market activity is further evident in the way in which the right to social assistance is constructed within the Directive. The economically-active migrant worker, which by virtue of Article 48 TFEU now includes workers and the self-employed, have a legislative right under Article 7(3) of Directive 2004/38 to social as-

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[244] Case C-67/14 *Jobcenter Berlin Neukölln v Alimanovic* [2015] ECLI:EU:C:2015:597; and Case C-333/13 *Dano v Jobcenter Leipzig* [2014] ECLI:EU:C:2014:2358.

[245] Case 187/73 *Odette Callemeyn v Belgian State* [1974] ECLI:EU:C:1974:57, paras 7-8.

[246] Case C-78/91 *Hughes* [1992] ECLI:EU:C:1992:331, para 17 - '…an individual assessment of the claimant's personal needs… is a characteristic feature of social assistance…'

[247] Case C-140/12 *Pensionsversicherungsanstalt v Brey* [2013] ECLI:EU:C:2013:565, para 75; and Directive 2004/38/EC, Article 7(1)(b) and (c).

sistance for a potentially indefinite period of time[248] (subject to the undue burden criteria) where they have been employed/self-employed for a period of more than twelve months,[249] and for six months where they have been employed/self-employed for less than one year.[250] In the latter case, after their six month period has elapsed, they may have that payment revoked by the State but will not automatically lose their right to reside.[251] This twelve month window has been interpreted very narrowly in recent years by the Court of Justice, meaning that if an individual has worked for a period of eleven months or one day less than a full calendar year, they will lose their residual worker status after six months.[252] There has also been some doubt as to whether or not Article 7 and the loss of worker or self-employed status *may* lead to an immediate loss of the right to reside with this period. The right to reside and the right to access social assistance are jointly included in Article 7, but remain separate, and reading the Directive as: involving an automatic loss of the right to reside the moment worker or self-employed status is lost; *as well as* that the Member States have the discretion to continue to grant the right to residency without such status existing are both arguably correct.[253]

In all instances, the unemployment or cessation of self-employed activities in order to qualify for social assistance must be involuntary in nature,[254] be due to the participation in vocational training or further education linked to the previous employment,[255] or due to illness.[256] Illness as a ground has in some instances proven to be contentious. *Saint Prix*,[257] which dealt with a pregnant French woman resident in the UK who found herself unemployed 11 weeks prior to her due date and sought to access an Income

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[248] *Tarola v Minister for Social Protection* [2017] IECA 208 (Hogan J), para 30 - 'In the case of Article 7(3)(b) the Union citizen in questions would seem to retain the status of "worker" indefinitely'.

[249] Directive 2004/38, Article 7(3)(b).

[250] Directive 2004/38, Article 7(3)(c).

[251] Directive 2004/38, Article 24(1).

[252] Case C-67/14 *Jobcenter Berlin Neukölln v Alimanovic* [2015] ECLI:EU:C:2015:597.

[253] Case C-333/13 *Dano v Jobcenter Leipzig* [2014] ECLI:EU:C:2014:2358.

[254] Directive 2004/38, Article 7(3)(b) and (c). Case C-507/12 *Saint Prix v Secretary of State for Work and Pensions* [2014] ECLI:EU:C:2014:2007, para 27.

[255] Directive 2004/38, Article 7(3)(d).

[256] Directive 2004/38, Article 7(3)(a).

[257] Case C-507/12 *Saint Prix v Secretary of State for Work and Pensions* [2014] ECLI:EU:C:2014:2007.

Support payment[258] is one of the clearest examples of this. After questioning whether or not the payment was social assistance and whether or not she could be considered involuntarily unemployed on the basis of incapacity,[259] the CJEU found that she was granted the status of worker directly from Article 45 TFEU as she would eventually return to the labour market.[260] From the perspective of social labour, the applicant's work in caring for her child was only deemed valuable to the Court when it was viewed as a short diversion from the labour market, and for Busby, threw 'a spotlight on a particularly inimical corner of EU law which somehow appears to have developed without regard to the fact that a large proportion of the European labour market consists of women of childbearing age.'[261] The Advocate General had attempted to move away from this highly market-based and specific mode by arguing that the right to access the social assistance payment came directly from the fundamental status of citizenship,[262] but this was not acknowledged by the Court of Justice in its judgment.

Worker status, as with self-employed status, is considered to be a 'sticky' - it remains affixed to the individual for a period of time, and is not automatically lost. The longer one acts as a worker, the harder it is for them to lose this status. Article 7(3) is a reflection of that fact, as it controls at what point that residual status dissipates. For those engaged in unremunerated social labour of one kind or another - for example, childcare or working within the family home - such persons will also fall outside of this provision of the Directive as they would fall outside of the labour market. The only potential benefit for family members such as these, is that the definition of 'family' within the meaning of the Directive is wider than that of Regulation 883/04.[263] Whilst a relationship of dependence must have existed in the original Member State prior to exercising one's free

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[258] S. Currie, 'Pregnancy-related employment breaks, the gender dynamics of free movement law and curtailed citizenship: *Jessy Saint Prix'* (2016) 53(2) *Common Market Law Review* 543; and N. Busby, 'Crumbs of comfort: Pregnancy and the status of 'worker' under EU law's free movement provisions' (2015) 44 *Industrial Law Journal* 134.

[259] The payment was granted as a right to all UK citizens but was considered to be one of subsistence and therefore subject to the right to reside test and habitual residence condition for which she could satisfy to the State's satisfaction. See also, Case C-507/12 *Saint Prix v Secretary of State for Work and Pensions* [2014] ECLI:EU:C:2014:2007, para 30.

[260] Case C-507/12 *Saint Prix v Secretary of State for Work and Pensions* [2014] ECLI:EU:C:2014:2007, para 47.

[261] N. Busby, 'Crumbs of comfort: Pregnancy and the status of 'worker' under EU law's free movement provisions' (2015) 44 *Industrial Law Journal* 134, 138.

[262] Opinion of A.G. Wahl, [2013] EU:C:2013:841, para 49.

[263] See Directive 2004/38, Article 2(2).

movement rights,[264] family is considered, for the purposes of the Directive, to include legal spouses,[265] non-marital partners or those in a legally recognised relationship other than marriage,[266] dependents up to the age of 21 - whether or direct or indirect[267] - as well as in an ascending line.[268] This potentially grants them access to social assistance, but reinforces - in line with the specific mode - that citizens must engage with the welfare system primarily on the basis of their own personal economic activity or by virtue of another for whom they can be considered a member of family.

3.3.5 Habitual Residence Under Directive 2004/38/EC

Another prominent issue in relation to access to social assistance for EU citizens is that of residence. Under Regulation 883/04, workers and the self-employed must establish *ordinary* habitual residence, for which economic activity within the labour market is seen as an immediate form of integration.[269] Under Directive 2004/38, habitual residence is treated in a different manner due to its more complex formulation where social assistance is concerned.

Barnard has argued that, taken literally, the now iconic declaration in *Grzelczyk* that

> 'Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exception as are expressly provided for'[270]

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[264] Case C-423/12 *Reyes v Migrationsverket* [2014] ECLI:EU:C:2014:16, para 22.

[265] Directive 2004/38, Article 2(2)(a).

[266] Directive 2004/38, Article 2(2)(b).

[267] Directive 2004/38, Article 2(2)(c).

[268] Directive 2004/38, Article 2(2)(d).

[269] Case 76/76 *Silvana di Paolo v Office national de l'emploi* [1977] ECLI:EU:C:1977:32, para 19 - 'In fact, whenever a worker has a stable employment in a Member State there is a presumption that he resides there, even if he has left his family in another State.'

[270] Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECLI:EU:C:2001:458, para 31.

is indicative of an approach which would make all social benefits available to the economically-inactive citizen from their first day of arrival in a Member State.[271] The author is however clear in outlining that overall, the EU has adopted a more cautious approach in practice, which allows for a gradual equality between EU citizens and citizens of the host Member State based on their continual satisfaction of the terms laid out in the relevant Directives and Regulations.[272] Thus, the Union has adopted a policy in respect of EU citizens which could be characterised as 'gradually integrationist.'

The perceived dangers of welfare tourism and welfare dependence amongst migrants have played a central role in the adoption of this incremental approach, as there is a belief that allowing more generous access to social assistance in particular would encourage EU citizens to move to a secondary Member State for the sole purpose of taking advantage of this - without any intention of engaging with the labour market. Both of these issues have been widely discredited based on the lack of corroborating evidence.[273] This includes a study conducted on behalf of the Commission which utilised a far larger dataset than similar studies in the past.[274] However, this perception that the welfare state must be protected,[275] and that this necessitates limiting access to it for migrants - including mobile EU citizens - has become deeply embedded within the Union's welfare rules and its approach to welfare payments generally. Thus, the notion of possessing sufficient financial resources, as well integrating through activity within the labour market to ensure that citizens never become an undue or unreasonable burden

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[271] C. Barnard, 'EU Citizenship and the Principle of Solidarity' in M. Dougan & E. Spaventa (eds.), *Social Welfare and EU Law: Essays in European Law* (Hart Publishing, 2005), 165-166.

[272] C. Barnard, 'EU Citizenship and the Principle of Solidarity' in M. Dougan & E. Spaventa (eds.), *Social Welfare and EU Law: Essays in European Law* (Hart Publishing, 2005),166 citing A.G. La Pergola in Joined Cases C-4 and 5/95 *Stober and Pereira* [1997] ECLI:EU:C:1996:225, para 50.

[273] E.J. Castronova, H. Kayser, J.R. Frick & G.G. Wagner, 'Immigrants, Natives and Social Assistance: Comparable Take-up under Comparable Circumstances' (2001) 35(3) *International Migration Review* 726; R.T. Riphahn, 'Immigration Participation in Social Assistance Programs' (2004) 50(4) *Applied Economics Quarterly* 329; J. Hansen & M. Lofstrom, 'Immigrant Assimilation and Welfare Participation: Do Immigrants Assimilate into or out of Welfare?' (2003) 38(1) *Journal of Human Resources* 74; J. Hansen & M. Lofstrom, 'Immigrant-Native Differences in Welfare Participation: The Role of Entry and Exit Rates' (2006) IZA Discussion Paper 2261; J. Hansen & M. Lofstrom, 'The Dynamics of Immigrant Welfare and Labor Market Behaviour' (2009) 22(4) *Journal of Population Economics* 941.

[274] European Commission, 'Study on Mobility, Migration and Destitution in the European Union' (Regioplan, 2014), 31.

[275] M. Bommes & A. Geddes, 'Introduction: Immigration and the Welfare State' in M. Bommes & A. Geddes (eds.), *Immigration and Welfare. Challenging the borders of the welfare state* (London, Routledge, 2000), 1-2.

on the financial resources of the host Member State, is inbuilt within this specific approach and the Directive as a whole.

Within the Directive, this policy has been given effect by creating three stages of integration. Where a citizen is resident in a Member State other than their own for up to three months, they have no right to access social assistance,[276] although this may not impact on the right of first-time jobseekers to access unemployment benefits where these are designed, as their primary purpose, to facilitate access to the labour market and to help them find employment.[277] No other restrictions may be placed upon them in order to ensure that their right to move and reside freely is effective.[278] In order to maintain lawful residence exceeding three months but of less than 5 years in duration, the citizen must have sufficient resources and personal health insurance,[279] to ensure that they do not become an undue burden on the national social assistance system.[280] After 5 years of these conditions being met, permanent residence will be granted with a full right to equal treatment with national citizens of that host Member State.[281]

Thus, where an EU citizen, whether economically-active or inactive, has successfully resided in a Member State for a period exceeding five years, they cannot be discriminated against and it is arguable that the distinction between active and inactive, and even between national and Union citizen, becomes largely immaterial from a welfare perspective. The difficulty is that up until this point, they must have either possessed sufficient independent financial resources, or have benefitted from the economic activity of a family member or their own in order to qualify for long-term residence. This cannot erase the highly specific and market-based means of providing welfare payments under the relevant EU rules or in recognising their integration within the host society. The social solidarity between Member States, as evidenced by this gradually integrationist approach, is limited.

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[276] Directive 2004/38, art 24(2). See also, Case C-140/12 *Pensionsversicherungsanstalt v Brey* [2013] ECLI:EU:C:2013:565, para 44; and Case C-299/14 *Vestische Arbeit Jobcenter Kreis Recklinghausen v Garcia-Nieto* [2016] ECLI:EU:C:2016:114, para 52.

[277] Case C-140/12 *Pensionsversicherungsanstalt v Brey* [2013] ECLI:EU:C:2013:565.

[278] Directive 2004/38, Article 24(2).

[279] Directive 2004/38, Article 7(1)(b).

[280] Directive 2004/38. Article 7(1)(b).

[281] Directive 2004/38, Article 16.

Member States may also adopt further measures which allow them to verify whether or not an individual has a right to reside - so long as these measures do not substantively violate EU law.[282] This kind of assessment is usually conducted prior to habitual residence being determined,[283] and seeks to establish primarily if the citizen in question has either a current or residual worker or self-employed status,[284] although they may also inquire if the individual has adequate health insurance and personal resources.[285] Such an assessment is not necessary if the individual has been resident for less than three months as they automatically have no right to claim social assistance.[286] This additional assessment *should* also be reserved solely for social assistance payments, but as per *Commission v UK*,[287] it is now possible to apply a 'right to reside' test to social security payments like family benefits, even though they are not within the scope of Directive 2004/38.

In 2011, the CJEU issued a deeply troubling judgment in which it held that periods during which a Union citizen is not self-sufficient may also be subtracted from the five years necessary to establish long-term residence.[288] This means that those engaged in sporadic or highly precarious employment will have to overcome an additional obstacle in comparison to those who enjoy stable employment and/or have sufficient resources. Not only does this potentially undermine the right to free movement, it also demonstrates that the CJEU is capable of revisiting and rolling back the earlier protections it had development in previous judgments.

Returning to habitual residence within the meaning of Directive 2004/38/EC, this was enunciated within the *Swaddling* judgment,[289] where the Court opined that:

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[282] Case C-299/14 *Vestische Arbeit Jobcenter Kreis Recklinghausen v Garcia-Nieto and Others* [2016] ECLI:EU:C:2016:114; and Opinion of AG Wathelet [2015] ECLI:EU:C:2015:366, paras 79-90.

[283] Case C-308/14 *Commission v the United Kingdom* [2016] ECLI:EU:C:2016:436.

[284] Directive 2004/38, Article 7(1)(a) and 7(3).

[285] Directive 2004/38, Article 7(1)(b).

[286] Case C-299/14 *Vestische Arbeit Jobcenter Kreis Recklinghausen v Garcia-Nieto and Others* [2016] ECLI:EU:C:2016:114, para 52.

[287] Case C-308/14 *European Commission v United Kingdom of Great Britain and Northern Ireland* [2016] ECLI:EU:C:2016:436.

[288] Joined Cases C−424/10 and C−425/10 *Tomasz Ziolkowski, Barbara Szeja, Maria-Magdalena Szeja, Marlon Szeja v Land Berlin* [2011] ECLI:EU:C:2011:866.

[289] Case C-90/97 *Robin Swaddling v Adjudication Officer* [1999] ECLI:EU:C:1999:96.

> ‘account should be taken in particular of the employed person's family situation; the reasons which have led him to move; the length and continuity of his residence; the fact (where this is the case) that he is in stable employment; and his intention as it appears from all the circumstances…’

These conditions are considered to have a ‘community wide’ value, and are to be followed by each of the relevant authorities in every Member State. They have also been codified within legislation via Article 11 of Regulation 987/2009.[290] They are applicable to all EU citizens who are required to establish their residence in order access welfare payments, but as outlined above, are of greatest importance when discussing social assistance and Directive 2004/38, as the economically-inactive citizen who attempts to access social assistance will fall within its scope. It has been established that, like ordinary habitual residence, employment or direct engagement with the labour market should create a rebuttable presumption of habitual residence existing, even where the family of the citizen are not resident in the host Member State.[291] The addition of these further criteria by virtue of *Swaddling* makes establishing habitual residence for the purposes of accessing social assistance a more complex proposition, particularly where stable employment is not easily confirmed. The judgment did however overrule the imposition of specific temporal requirements, such as requiring that an EU citizen is resident within the State for 8 weeks before being considered habitually resident, as this would undermine the need for an assessment and may not take a full account of the individual circumstances within a case.[292]

This requirement to establish habitual residence within the meaning of Directive 2004/38/EC - much like the need to be ordinarily habitually resident under the Regulations - is, from a Union perspective, designed to aid in the coordination of welfare at the EU level. It is considered to help establish which Member State is competent to conduct an assessment of a welfare claim. The difficulty with this, is that habitual residence, particularly as it is constructed in the Directive, only provides conditions by which an individual Member State can determine if it is competent to do so - if the answer is no, then

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[290] REGULATION (EC) No 987/2009 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems OJ L.284/1.

[291] Case C-76/76 *Di Paolo v Office national de l'emploi* [1977] ECLI:EU:C:1977:32, para 19.

[292] Case C-90/97 *Swaddling v Adjudication Officer* [1999] ECLI:EU:C:1999:96, para 33.

no further assessment is made to see which of the remaining Member States is. This means that if a French citizen resident in Germany is considered by the relevant German authorities to not be habitually resident, the claim is rejected, and no attempt is made to see if France, or a secondary Member State in which they may have been resident prior to Germany must grant access to the equivalent payment there. The French national is simply without any access to the German social assistance that they lodged an application for. Thus, in practice, habitual residence is more a product of the fears of the Member States than it is of the Union to help the system function more efficiently in the interests of citizens.

The Directive also includes a specific limitation on the removal of citizens where they simply attempt to draw a social assistance payment within their host State.[293] In this respect, Article 14(3) must be interpreted as meaning:

> '. . . an expulsion measure should not be the automatic consequence of the recourse to the social assistance system. The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his expulsion.'[294]

It also finds that drawing from social assistance funds on a short-term basis cannot necessarily be considered grounds for expulsion. Like Article 7(1)(b) of the Directive, It also fails to define the concept of 'unreasonable burden' in substantive terms, meaning that the Court of Justice has had to grapple with this on more than one occasion, as those who can be considered a burden may, in certain limited circumstances, be subject to expulsion orders. However, it is important to note that losing the right to reside does not automatically allow a removal to be carried out. If a Union citizen was to lose the right to reside, they are considered to no longer have a right to be present in the State, and should essentially leave of their own volition or attempt to regain the right to reside in the host Member State if this is possible.

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[293] Directive 2004/38, Article 14.

[294] Directive 2004/38, Recital 16.

The closest the Court of Justice has ever come to acknowledging any right to social assistance for economically-inactive citizens, and to defining at what point citizens become an unreasonable burden on the social assistance system of their host Member State, was in *Brey*.[295] The applicant was a German pensioner residing in Austria who had applied for and was refused a mixed payment for which the primary purpose was considered to be subsistence - and fell within the meaning of Directive 2004/38/EC as it was a special non-contributory cash benefit. He was also refused residence in Austria by virtue of having applied for the payment.[296] Confirming that this was a clear violation of Article 14(3) the Directive, the Court went even further, and held that before an individual is labelled an unreasonable burden, any relevant national welfare authority must bear in mind: (i) the duration of the applicant's residence; (ii) the amount of the benefit she/he would receive; and (iii) the period for which the benefit would be available.[297] It also found that a proportionality test must be carried out before refusing the grant of social assistance, and that these criteria must be in-built within that assessment.[298] The result was that *Brey* arguably created a presumptive right to social assistance once these conditions were met, albeit a right that is heavily limited by the right to reside criteria if it can be considered a test to be applied prior to this proportionality test. Equally, persons engaged in unremunerated social labour who are not otherwise economically-active would have to ensure that they have satisfied each of these conditions, and *Brey* would suggest that it cannot apply to them where they have not been resident in the host Member State for an appreciable period of time living off of their independent means - i.e. a spouse or personal financial resources - and by virtue of the fact that their use of welfare funds would likely exceed a short period of time in between employments where their social security payments have run out. Consequently, *Brey* would have realistically only protected individuals who at least sporadically sought employment outside of their ordinary care duties and had resided within the host State for an appreciable period of time, and is not conducive to supporting wholly economically-inactive citizens on an ongoing basis. This was subsequently confirmed in *Dano*.[299]

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[295] Case C-140/12 [2013] ECLI:EU:C:2013:565.

[296] Directive 2004/38/EC, Article 14(3).

[297] *Brey*, paras 75-78.

[298] *Brey,* paras 75-78.

[299] Case C-333/13 [2014] EU:C:2014:2358.

Despite its best efforts, *Brey* underlines that whenever the EU, and in particular, the Court of Justice, attempts to extend access to welfare payments using the concept of citizenship or without engaging with the well-established fundamental economic freedoms, it does so by attempting to enfranchise those who are either sporadic or potential economic actors (such as students and jobseekers).[300] This is because, even at its most potent, there exists an unwritten hierarchy among EU citizens,[301] and those who are clearly engaged in economic activity without the need to draw on welfare payments reside at its apex.[302] For those who have more complex personal circumstances - for example, someone who is continually attempting to engage with the minimum number of hours necessary to qualify as a worker, to establish their residence and provide all of the necessary paperwork in a language which may not be their mother tongue - and those who are most in need but are not engaged with the labour market, EU welfare law is unable to help.[303]

This cannot undermine the ways in which any attempts made by the EU to legislate in respect of social assistance is inherently novel and potentially groundbreaking. Unlike with social security, which can be quite clearly linked to labour market activity and is often given as a right to the working population, social assistance is considered to be a discretionary system run by nation states which they have continually sought to restrict for all migrants in a number of ways - habitual residence conditions, barring access to social assistance based on the individual's immigration permission, or requiring that certain integration requirements have been met. EU law arguably streamlines this

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[300] See Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECLI:EU:C:2001:458; Case C-292/89 *The Queen v Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen* [1991] ECLI:EU:C:1991:80; Case C-138/02 *Brian Francis Collins v Secretary of State for Work and Pensions* [2004] ECLI:EU:C:2004:172; Case C-258/04 *Office national de l'emploi v Ioannis Ioannidis* [2005] ECLI:EU:C:2005:559; Joined cases C-22/08 and C-23/08 *Athanasios Vatsouras and Josif Koupatantze v Arbeitsgemeinschaft (ARGE) Nürnberg 900* [2009] ECLI:EU:C:2009:344; A. Iliopoulou-Penot, 'Deconstructing the former edifice of Union citizenship? The Alimanovic judgment' 53(4) (2016) *Common Market Law Review* 1007, 1009; and Michael Dougan, 'Free movement: the Workseeker as citizen' 4 (2001) *Cambridge Yearbook of European Legal Studies* 93.

[301] D. Thym, 'The elusive limits of solidarity: residence rights of and social benefits for economically inactive Union citizens' (2015) 52(1) *Common Market Law Review* 17, 18.

[302] N. Nic Shuibhne, 'Limits rising, duties ascending: the changing legal shape of Union citizenship' (2015) 52(4) *Common Market Law Review* 880, 890.

[303] C. O'Brien, '*Civis Capitalist Sum:* Class as the New Guiding Principle of EU Free Movement Rights' (2016) 53 *Common Market Law Review* 937; D. Kochenov, 'On Tiles and Pillars: EU Citizenship as a Federal Denominator' in D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press, 2017) 1; P Caro de Sousa, 'Quest for the Holy Grail' (2014) 20 *European Law Journal* 499; D. Kochenov, 'Neo-Mediaeval Permutations of Personhood in Europe' in L Azoulai et. al. (eds.), *Ideas of the Person and Personhood in European Union Law* (Hart Publishing, 2016).

process by ensuring that habitual residence is the primary means regulating access, and that a potential right to access social assistance payments is not automatically lost once an individual leaves their employment. This is not only universalist due to the ways in which it opens up access for EU citizens in a greater way from as early as 3 months of residence, but also because long-term residence of over 5 years creates a right to non-discrimination in line with those of citizens of that Member State. Thus, habitual residence remains a limitation, and one which makes past or present labour market activity the primary means of accessing social assistance, but with a more enlightened objective overall. The difficulty, is that this objective means little to those who are adversely affected by the way in which Directive 2004/38/EC operates in reality.

3.3.6 Social Assistance and Third-Country National Migrant Workers

The extension of social assistance rights to EU citizens is relatively new in terms of the overall development of welfare rules at the Union level. It was not until Directive 2004/38/EC entered into force that there was a clear right to access social assistance for Union citizens. As previous sections have illustrated, *any* substantive attempts related to the coordination of access to the welfare system of a host State for TCN labour migrants can be said to have been adopted within the last 20 years or so, and with low levels of convergence - i.e. to reach similar end points in terms of treatment - taking place between the rights of EU citizens and TCNs to access social security.

From this perspective, it is not unusual that few, if any, of these Directives place an emphasis on social assistance in any capacity. The original Students Directive[304] for example, fails to mention it entirely, whilst the Scientific Research Directive,[305] underlines that it must be part of the overall hosting agreement that the bearer will have sufficient resources as well as the ability to return to their country of origin without attempting to access the social assistance system of their host State.[306] The joint Directive which re-

[304] Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service OJ L 375, 23.12.2004.

[305] Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research OJ L 289, 3.11.2005.

[306] Directive 2005/71/EC, Article 6(2)(b).

cently replaced both of these measures[307] maintains this need for sufficient independent resources, and this is a precondition for continued residence within the territory of the State[308] - a practice reflected in the Intra-Corporate Transfer[309] and Seasonal Workers Directives.[310] Others, such as the Single Permit Directive, simply state that payments and other benefits which would fall outside of the scope of Regulation 883/04 are not covered,[311] whilst the Blue Card Directive underlines that the lack of sufficient resources or attempts to draw upon the social assistance system of the host State can lead to a permit being refused or revoked.[312] Consequently, there has been no convergence with EU citizens in terms of social assistance, and the system of welfare provision for TCN labour migrants more closely aligns with the specific mode, as they must continually commodify their labour in order to allow for some degree of decommodifcation to take place - or put more simply, access to the welfare system is wholly contingent upon engaging with the labour market.

The only point at which this changes, is when a TCN migrant worker qualifies for long-term residence, where the Long Term Residence Directive (LTR Directive)[313] takes effect. As the titles would suggest, the Directive seeks to provide TCNs with a right to reside on a more permanent basis within a host Member State. Interestingly, despite the Single Permit Directive excluding long-term residents from its personal scope,[314] it

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[307] Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing OJ L 132, 21.5.2016, p. 21–57.

[308] Directive 2016/801, Articles 7(1)(e), 28(6)(d), 29(2)(a)(iii) and 31(6)(d).

[309] DIRECTIVE 2014/66/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer L 157/1 27.5.2014, Article 5(5).

[310] DIRECTIVE 2014/36/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers L 94/375 28.3.2014, Articles 5(3), 6(3), and Recital 46.

[311] Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State *OJEU* 23 December 2011, L-343/1, Recital 27.

[312] Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly-qualified employment [2009] OJ L155/17, Articles 9(3)(b) and (d), and also 19(4)(b).

[313] Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents [2003] OJ L16/44 amended by Directive 2011/51/EU [2011] OJ L132/1 - Ireland, UK do not participate.

[314] Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State *OJEU* 23 December 2011, L-343/1, Recital 8.

views itself as being an initial phase of integration prior to gaining long-term residence,[315] and like the other Directives in this field can be viewed as a complementary measure - each feeds into the LTR Directive so long as the conditions have been met.[316]

Article 4(1) of the LTR Directive states that in order to qualify, residence within a state must be habitual, but not necessarily continuous, for a period of 5 years. It further allows for statuses to create a cumulative right to long-term residence, although certain statuses are excluded and this includes pursuing studies and vocational training.[317] This is qualified elsewhere within the Directive to mean that, rather than wholly excluding studies, 50% of one's residence as a student will be counted towards the 5 year total.[318] Third-country nationals can leave the territory of the State for short periods without this affecting their overall residence, so long as individual trips outside of the territory do not exceed 6 months, or 10 months in total for all journeys outside of the territory throughout the entire 5 years.[319]

In many ways, this is quite similar to the gradually integrationist approach taken by EU law in respect of EU citizens - both require 5 years before a preferential status is granted, and there is the in-built presumption that they will either be self-sufficient or act as a migrant worker in order to meet that threshold. Article 5 of the LTR Directive even outlines, in a similar fashion to Article 7 of Directive 2004/38/EC, that TCN labour migrants must possess sufficient financial resources to support themselves and any dependents or family members resident with them,[320] as well as adequate health insurance.[321] There is subsequently a degree of convergence in respect of the overall integration strategy utilised by the EU for both Union citizens and TCN labour migrants.

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[315] Directive 2011/98/EU, Recital 19.

[316] Refining a point originally made in C.E. O'Sullivan, 'Conceptualising the Irish Immigration System for Third-Country Migrants' in S. Baldwin & M. Zago (eds.), *Europe of Migrations* (Edizioni Università di Trieste, 2017).

[317] Directive 2003/109, Article 3(2)(a).

[318] Directive 2003/109, Article 4(2).

[319] Directive 2003/109, Article 4(3) - Although Member States may allow for longer periods outside of the State without it affecting the 5 year habitual residency where they elect to do so.

[320] Directive 2003/109, Article 5(1)(a).

[321] Directive 2003/109, Article 5(1)(b).

Functionally however, the conditions for the acquisition of long-term residence in Directive 2004/38/EC are far more generous, granting EU citizens preferential treatment in practice. EU citizens may, for example, be absent for far longer periods of time (up to 6 months a year) without it impacting upon their overall cumulative residence.[322] Similarly, citizens may also be absent from the State for up to 2 years before their right to permanent residence is revoked,[323] whereas long-term resident TCN labour migrants may only be outside of the territory for 1 year.[324] When one factors in that TCN labour migrants must also have successfully met the 5 year threshold without ever having made recourse to the social assistance system of the host State whilst EU citizens at least have some degree of access to it, this makes integration much more difficult for TCN labour migrants due to the even more specific mode applied to them as a separate category of migrants. This is qualified somewhat by the previously mentioned 2011 judgment from the CJEU which removes periods where citizens were not entirely self-sufficient from the 5 year timeframe,[325] signalling another form of convergence by potentially reducing an EU citizen's recourse to the social assistance system in a practical sense, as they may be unwilling to do so or to declare themselves as being in possession of insufficient resources in the event that this reflects negatively upon them.

Perhaps the most important distinction from the perspective of this analysis however, is the extent to which TCN migrant workers are granted a right to non-discrimination after becoming long-term residents. EU citizens in a similar position are no long subject to the qualified right to reside contained within Chapter III of Directive 2004/38/EC,[326] and by virtue of this, are not required to be self-sufficient or limited in their access to the social assistance system or to the welfare state more generally. They must be treated on an equal basis with nationals of the host Member State, and cannot reasonably have a right to reside test imposed upon them. In principle, the exact same should apply to TCN labour migrants under the LTR Directive, and this is expressly contained within Article 11 of Directive 2003/109. TCN labour migrants *should* have equal access to so-

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[322] Directive 2004/38/EC, Article 16(3) - this can in certain circumstances be increased to 12 months.

[323] Directive 2004/38/EC, Article 16(4).

[324] Directive 1003/109, Article 9(1)(c), although under Article 9(2) Member States may allow for longer absences.

[325] Joined Cases C−424/10 and C−425/10 *Tomasz Ziolkowski, Barbara Szeja, Maria-Magdalena Szeja, Marlon Szeja v Land Berlin* [2011] ECLI:EU:C:2011:866.

[326] Directive 2004/38/EC, Article 16(1).

cial security, social assistance, social protection[327] as well as vocational training, education and grants, and tax advantages[328] which would for EU migrant workers fall under Regulation 492/2011. The Court of Justice in *Kamberaj*[329] however, held that Member States have the right to interpret this as meaning access to 'core benefits,' which the CJEU argued 'covers at least minimum income support, assistance in case of illness, pregnancy, parental assistance and long-term care.' This was then immediately limited insofar as 'the modalities for granting such benefits are to be determined in accordance with that recital, by national law,'[330] allowing for a discrepancies to develop between Member States in terms of what this will mean in practice. Whilst *Kamberaj* necessitates some degree of positive state intervention, it interprets these 'core benefits' in the narrowest sense possible, whilst paradoxically maintaining that this is not an issue of EU law - as social assistance is viewed here as being primarily a national competence. Similar to the early development of social security law for citizens, it is of course possible that what constitutes a core benefit may be interpreted more broadly with the passage of time, but the emphasis in this instance remains on this discretion being left to the Member States themselves, not the Court of Justice, and recent jurisprudence of the CJEU in respect of EU citizens and access to welfare payments does not suggest that this definition of core benefits will be expanded upon in the near future. This lack of any comparable right to social assistance, even for limited periods of time, does place a particular emphasis on the need for TCNs to remain constantly engaged in economic activity in order to gain a more permanent right to residency, and is potentially far more specific than the same right for EU citizens.

Overall, the LTR Directive does establish a clear road to residency for third-country nationals, and by extension, citizenship. Yet it does so in terms which are more likely to be satisfied by persons who continually engage in economic activity, and/or who have private resources upon which they can draw if they fall outside of the labour market. As a result, even in granting a right to social assistance to TCN labour migrants who have successfully completed the 5 years necessary for establishing long-term residence, the

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[327] Directive 2003/109, Article 11(1)(d).

[328] Directive 2003/109, Article 11(1)(b), (e) and (f).

[329] Case C-571/10 *Servet Kamberaj v Istituto per l'Edilizia Sociale della Provincia autonoma di Bolzano (IPES) and Others* [2012] ECLI:EU:C:2012:233.

[330] Case C-571/10 *Servet Kamberaj v Istituto per l'Edilizia Sociale della Provincia autonoma di Bolzano (IPES) and Others* [2012], Para 84.

EU has crafted a far more specific and market-based system for TCNs than currently applies to Union citizens. It may be somewhat universalist in outlook, but in practice this does not seem to hold true.

3.3.7 Recent Jurisprudence of the CJEU: Restatement or Retrenchment?

As previous sections have made clear, EU welfare law exists in a somewhat paradoxical state - it has, for example, continually sought to open up access to national welfare systems for different categories of migrants, which is inherently universalist in outlook. However, in practice, the system of welfare coordination promoted at the Union level is closely aligned with the specific mode, and can even said to be highly specific and market-based. This is due to the fact that it relies primarily on social security which accrues as a right solely for those who can be considered a migrant worker or a member of their family, either as a citizen worker or self-employed person, and social assistance is predicated along similar lines. This is due to the apparent fear of the welfare tourist, and of the threat that even EU citizens can pose to the welfare system of their host State. Citizens must continually engage with the labour market in one form or another in order to access the national welfare system based upon EU law - unless they have obtained a right to long-term residence and even then they are not fully decommodified.

Since the onset of the Global Financial Crisis in 2008, the judgments issued by the Court of Justice on these welfare rules appear to have taken a more literal turn, with some representing an adherence to the strict letter of the law, whilst others appear to contravene the spirit of the right to free movement itself. In both respects, they signal a shift towards an even more specific welfare system for EU citizens than is currently in place. This has perhaps been spurred on by the results of the 2016 'Brexit' Referendum in which the United Kingdom voted to leave the European Union[331] - although the degree to which it intends to leave its structures remains to be seen - and the ongoing 'migrant' or refugee crisis taking place in the Mediterranean.[332] These ongoing issues, as well as the rise of far-right fascist parties in many EU Member States, have led to an existential crisis for the EU institutions, particularly in the area of welfare coordination in which Union citizens seem to demonstrate an increasingly lack of social solidarity

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[331] N. Tzouvala, 'Chronicle of a Death Foretold? Thinking About Sovereignty, Expertise and Neoliberalism in the Light of Brexit' (2016) 17(Brexit Supplement) *German Law Journal* 117.

[332] M. Albahari, 'Europe's Refugee Crisis' (2015) 31(5) *Anthropology Today* 1.

towards citizens from other Member States, and from poorer Central and Eastern European States in particular.[333] In spite of the Union's clear commitment to the foundational principle of the free movement of persons, the Court of Justice appears to have incorporated some of these existential crises into their judgments in recent years.[334] This is not to say that the CJEU has become overtly political in determining the outcome of cases brought before it,[335] but that as Thym notes, within an increasingly polarised climate values such as the freedom of movement inherent in EU law and the benefits that accrue by virtue of it 'serve[s] as a projection sphere for economic, social and political unease about wider globalization processes.[336]

These judgments are often a literal reading of the legislation in place. This does not mean that they do not have a severe impact, particularly on those who are engaged in sporadic or precarious labour market activity. Instead, these should be viewed as being within the meaning of the legislation but potentially contrary to the spirit of the earlier jurisprudence of the CJEU which sought to continually ensure greater access to welfare payments. *Garcia-Nieto*[337] for example, merely establishes that within the first 3 months of residence that access to the welfare system is not possible, and that this is on the basis of limiting welfare tourism. It is however simultaneously viewed as 'add[ing] another dimension to the realisation that the heyday of a justice-driven EU social citizenship is behind us.'[338]

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[333] European Social Survey, 'Attitudes towards Immigration and their Antecedents: Topline Results from Round 7 of the European Social Survey' <http://www.europeansocialsurvey.org/docs/findings/ESS7_toplines_issue_7_immigration.pdf> accessed 11/07/2017.

[334] See D. Kostakopoulou & D. Thym, 'Conclusion: The Non-Simultaneous Evolution of Citizens' Rights' in D. Them (ed.), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart Publishing, 2017), 309-322.

[335] D. Kelemen, 'The Political Foundations of Judicial Independence in the European Union' (2012) 19 *Journal of European Public Policy* 43; and B. de Witte and E. Muir (eds.), *Judicial Activism at the European Court of Justice: Causes, Responses and Solutions* (Edward Elgar, 2013).

[336] D. Thym, 'The elusive limits of solidarity: Residence rights of and social benefits for economically inactive Union citizens' (2015) 52 *Common Market Law Review* 17, 20; N. Nic Shuibhne, 'Limits Rising, Duties Ascending. The Changing Legal Shape of Union Citizenship' (2015) 52 *Common Market Law Review* 889.

[337] Case C-299/14 *Garcia Nieto and others* [2016] EU:C:2016:114.

[338] D. Kramer, 'Short-term Residence, Social Benefits and the Family: An Anlaysis of Case C0299/14 (Garcia-Nieto and Others)' (09/03/2016) < https://europeanlawblog.eu/2016/03/09/short-term-residence-social-benefits-and-the-family-an-analysis-of-case-c-29914-garcia-nieto-and-others/> accessed 03/05/2017.

This issue of welfare tourism was again raised in *Dano*.[339] Here, the applicants were a Romanian woman and her son who had moved to Germany in order to live with Ms. Dano's sister, who acted as their primary financial support. After having successfully claimed a number of welfare payments, and being granted an unrestricted right to reside by the German State, the first-named applicant sought to access a mixed payment for which the primary purpose was considered to be subsistence but also facilitated access to the labour market. After having been twice denied the payment, a preliminary reference was made by the Social Court of Leipzig to the CJEU questioning if this constituted a discrimination based on Articles 18 and 20 TFEU, as well as under Directive 2004/38 - particularly given that she was not actively seeking employment and had no intention to do so in the near future. In finding against her, the Court held that the principle of non-discrimination based on nationality will only apply where a citizen has already complied with the undue burden requirement for 5 years, and has as such become a long-term resident who must be treated in the same manner as German citizens. This is due to the rights contained within Articles 18-21 TFEU on citizenship being subject to ordinary legislation, namely Directive 2004/38 and Article 7 of the same. One of the most important points to consider in this instance is that the *Brey* proportionality test was neither applied nor considered. This is due to the fact that *Dano* was seen as a potential precedent on the dangers of welfare tourism. Rutledge goes so far as to say that 'in Dano the evidence of 'social tourism' is fairly blatant" and that 'EU law continues to provide protection for genuine work seekers who have established a genuine link with [a Member State].'[340]

Central and Eastern European Member States of the EU are often the subject of some of the most harmful ethnic stereotypes, such as their perceived willingness to engage in welfare tourism.[341] As a Romanian national, Ms. Dano is capable of being the victim of such stereotyping, as would appear to be the case here.[342] Not only did the CJEU largely ignore Ms. Dano's unequivocal right to reside and the two other social assistance pay-

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[339] Case C-333/13 *Dano v Jobcenter Leipzig* [2014] ECLI:EU:C:2014:2358.

[340] D. Rutledge, 'Dano and the exclusion of inactive EU citizens from certain non-contributory social benefits' (Free Movement, 19 November 2014) <https://www.freemovement.org.uk/dano-and-the-exclusion-of-inactive-eu-citizens-from-certain-non-contributory-social-benefits/> accessed 02/02/2016.

[341] An issue which will be dealt with throughout Chapter 5.

[342] Case C-333/13 *Dano v Jobcenter Leipzig* [2014] ECLI:EU:C:2014:2358, para 78 specifically mentions and underscores the role played by welfare tourism and the need to curtail it.

ments she had previously been granted,[343] the Court failed to consider that she had almost no German written or spoken comprehension, was of a very low skill level and was the primary caregiver for her son. Ms. Dano and her son ultimately had their right to reside revoked, as well as the existing payments they were in receipt of taken being from them.

The *Alimanovic*[344] judgment engages with many of these points from a slightly different vantage point. Here, the plaintiff was a Swedish woman and her three German-born children, although the children were considered to be Swedish citizens. She and her eldest daughter had been employed for a period of 11 or so months, but fell below the 12 month period of employment necessary for sustained access to the social assistance system in Germany based on Article 7(3) of Directive 2004/38. After their 6 months of entitlement to social assistance had elapsed, the German welfare authorities cut off their payments. The central question referred to the CJEU dealt with whether or not the right to non-discrimination applied in this instance and therefore barred Germany from cutting off access. In answering this question, the Court found that equal treatment will only apply where the undue burden requirement has been complied with, i.e. that citizens have lived in their host State for more than 5 years and have an unqualified right to reside.[345] Similarly, because the payment fell primarily within the category of social assistance, as subsistence was its primary purpose - and both Alimanovic and her daughter had not broken the 12 month threshold - their legal entitlement was only 6 months. After that time, it was well within the German authorities' power to cancel the payment based on Articles 7(3)(c) and 24(1) of the Directive.[346] The proportionality case designed in *Brey* did not apply,[347] despite the plaintiffs being strong candidates if the German authorities were to do so. Both Alimanovic and her daughter could have arguably found other positions given enough time to do so, and the continuation of the payment for a short period of time would likely have facilitated this. The reason given by the Court for this qualification of the *Brey* proportionality test was not that the plain-

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[343] These were merely alluded to in passing, see Case C-333/13 *Dano v Jobcenter Leipzig* [2014] ECLI:EU:C:2014:2358, paras 35-39.

[344] Case C-67/14 *Jobcenter Berlin Neukölln v Alimanovic* [2015] ECLI:EU:C:2015:597.

[345] Case C-67/14 *Jobcenter Berlin Neukölln v Alimanovic* [2015] ECLI:EU:C:2015:597, paras 49-50.

[346] Case C-67/14 *Jobcenter Berlin Neukölln v Alimanovic* [2015] ECLI:EU:C:2015:597, paras 53, 54, 59.

[347] Case C-67/14 *Jobcenter Berlin Neukölln v Alimanovic* [2015] ECLI:EU:C:2015:597, para 59.

tiffs themselves might pose a potential threat to the sanctity of the welfare system, but that there were others who might, particularly if such persons were of a significant number.[348]

Other judgments represent a retrenchment, or clean move away from the spirit of the case law of the CJEU in relation to welfare coordination. These judgments in some way dilute previous protections granted, as well as potentially undermining the free movement of persons more generally.

For example, in *Commission v UK*, the Court was clearly influenced by the idea of welfare tourism in holding that a measure, which is likely discriminatory[349] and a quite clear diminution of the unqualified right to equal treatment based on Article 4 of Regulation 883/04, allows for family benefits and other additional categories of social security to be treated differently from pure social security payments. The CJEU rationalised this on the basis that there was a clear need to defend the financial resources of the host Member State against the economically-inactive,[350] in spite of the fact that this has been disputed by the Commission and that the economically-inactive have no right to access social security under EU law - unless they do so by virtue of their relationship to another. The people most likely to be punished by a judgment such as this, are those who exist at the margins of the labour market and may benefit under Article 4 of the Regulation and ordinary habitual residence within the meaning of the Regulation as a whole, in comparison to habitual residence within the meaning of Directive 2004/38/EC and the qualified right to non-discrimination included within the same.

The *Ziolkowski*[351] judgment is particularly troubling, as it grants Member States the permission to remove from consideration periods where an EU citizen was not entirely self-sufficient when calculating if that same person has reached the threshold for acquiring long-term residence. Those who are engaged in sporadic, precarious or even casual employment and may need to draw up social assistance for short periods of time may find that their ability to accrue long-term residence status is significantly curtailed.

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348 Case C-67/14 *Jobcenter Berlin Neukölln v Alimanovic* [2015] ECLI:EU:C:2015:597, para 62.

349 Case C-308/14 [2016] ECLI:EU:C:2016:436, paras 76-84.

350 Case C-308/14 [2016] ECLI:EU:C:2016:436, para 80.

351 Joined Cases C−424/10 and C−425/10 *Tomasz Ziolkowski, Barbara Szeja, Maria-Magdalena Szeja, Marlon Szeja v Land Berlin* [2011] ECLI:EU:C:2011:866.

One of the suggested solutions put forward by the Commission in light of these judgments, some of which, like *Commission v UK* they argued against, is to increase the portability of welfare payments[352] - that is, to allow EU citizens from one Member State to bring payments with them from their county of origin to the host State. Although a thorough examination of this mechanism falls outside of the scope of this thesis, this applies almost exclusively to social security payments, and will benefit the economically-active. Secondly, a fundamental shift such as this may lead to circumstances in which citizens from certain Member States do not enjoy an effective right to free movement, benefiting those from wealthier States and regions and disadvantaging those from Central and Eastern Europe.[353] Even if this were to decrease pressure on the national welfare system of the host State, a pressure that has yet to be shown as threatening the very viability of the same, an EU citizen from Poland resident in Berlin will face far greater difficulties surviving on the amount provided by the Polish welfare system than if they could simply receive the German payment until such time as they find steady and gainful employment.

The European Commission has also worked tirelessly to develop a new 'European Social Pillar,' which 'consists of a set of social rights and principles and is accompanied by a package of proposals, comprising pre-existing initiatives, new legislation and soft law measures.'[354] Although a Union document, it casts the Member States as the primary drivers of necessary social reforms. These reforms, and the emphasis on the Member States themselves, are justified on the basis that the Union has limited social competences, and that certain imbalances have been created through the use of its market building competences, and how these economic competences have often curtailed the

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[352] European Commission, 'Fairness at the heart of Commission's proposal to update EU rules on social security coordination' (13/12/2016) <http://europa.eu/rapid/press-release_IP-16-4301_en.htm> accessed 01/07/2016.

[353] C. Bruzellius & M. Seeleib-Kaiser, 'The case for a European minimum income scheme for jobseekers' <http://blogs.lse.ac.uk/politicsandpolicy/the-case-for-a-european-minimum-income-scheme-for-jobseekers/> accessed 27/02/2017.

[354] S. Garben, 'The European Pillar of Social Rights: Effectively Addressing Displacement?' (2018) Special Issue *European Constitutional Law Review* 210, 210.

ability of the Member States to take action in social fields.[355] These reforms include clear Union competences, as well as areas in which it has little to no power to legislate[356] - such as fair working conditions, social protection and inclusion. The difficulty with this document, is that it is, as yet, not legally binding and, like the Charter, is incapable of conferring new competences upon the Union. However, like the Charter, it may be incorporated into the EU legal system at a later point in time, and become capable of binding EU Member States to some of the obligations contained within it.[357] At present, it is too early to tell what the effects of the Pillar will be in redressing many of the ongoing social issues being dealt with at both the EU and Member State level.[358]

From a welfare perspective, in 2017, the Commission released a consultation document seeking information on what can be done to address existing barriers to accessing social benefits generally, but including social security and assistance payments.[359] In particular, the Commission is seeking information on how to ensure that those in 'non-standard forms of employment' and the self-employed are not unduly limited in accessing welfare payments.[360] Non-standard in this instance, would appear to address those who are engaged in sporadic or precarious employment, which has been a persistent issue within the current legislation as well as the case law of the CJEU. Similarly, the historical divide between self-employment and worker status has, as Chapter Five will demonstrate, often created additional barriers for them in accessing jobseekers payments in particular.

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[355] See, for example, D. Schiek, 'Re-embedding economic and social constitutionalism: normative perspectives for the EU' in D. Schiek, U. Liebert & H. Schneider (eds.), *European Economic and Social Constitutionalism after the Treaty of Lisbon* (Cambridge University Press, 2011) 17; D. Ashiagbor, 'Unravelling the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration' (2013) 19(3) *European Law Journal* 303.

[356] European Commission, 'Commission presents the European Pillar of Social Rights' (Brussels, 26 April 2017) <http://europa.eu/rapid/press-release_IP-17-1007_en.htm> accessed 01/02/2018.

[357] Z. Rasnaca, 'Social summit preview: Can the European Pillar of Social Rights deliver on its promises?' *LSE EUROPP* (16/11/2017) <http://blogs.lse.ac.uk/europpblog/2017/11/16/social-summit-gothenburg-european-pillar-of-social-rights/> accessed 02/02/2018.

[358] ETUI, 'Bridging the gaps or falling short? The European Pillar of Social Rights and what it can bring to EU-level policymaking' ETUI Working Paper 2017.05, 38.

[359] European Commission, First phase consultation of Social Partners under Article 154 TFEU on a possible action addressing the challenges of access to social protection for people in all forms of employment in the framework of the European Pillar of Social Rights Brussels, 26.4.2017 C(2017) 2610 final.

[360] European Commission, First phase consultation of Social Partners under Article 154 TFEU on a possible action addressing the challenges of access to social protection for people in all forms of employment in the framework of the European Pillar of Social Rights Brussels, 26.4.2017 C(2017) 2610 final, 12-13.

Consequently, whilst this new Pillar currently acts primarily as a policy document, it highlights that the EU is still committed to moving forward and developing a system more closely aligned with the universalist mode by ensuring that access is as effective as possible. The increased deference of the CJEU towards Member State on matters relating to welfare may also show that whilst the Commission continues to move forward, the Court itself is somewhat more resistant to progressive legal developments in this sphere.

Conclusion

In practice, the EU system of welfare coordination aligns with a highly specific and market-based mode of welfare provision. At the normative level however, the EU has made significant legal changes which ensure greater levels of access to the national welfare system of a host Member State for both EU citizens and TCN labour migrants. This creates a sort of paradox, insofar as the ideology underpinning the law in this area seems to conflict with the outcomes of the legislation giving effect to it, due in large to the limited nature of the Union's competence to legislate for social security and social assistance.

This tension is evident at the constitutional level, where for EU citizens, the competence to enact welfare legislation remains grounded in Articles 45 and 48 TFEU on the free movement of workers as well as the power to create rules for the self-employed - who are governed separately by Article 49 TFEU but who have been partially subsumed into Article 48 TFEU. This is itself quite universalist, as it has again sought to enfranchise new categories of persons and reduce the number of barriers which can be placed before them at the national level in order to limit their access to the welfare system. However, by continuing to place an emphasis on market building and the economically-active citizen, these constitutional competences remain limited, and highly specific in nature. The insertion of Union citizenship within the Treaties has allowed the EU to expand into social assistance, as well as signalling a shift in the Union's way of framing any new legislation in this area. Rather than being a primarily economic being, the citizen is now both a social *and* economic actor. It also led to the creation of legislation regulating access to social assistance for the first time in Directive 2004/38/EC, which draws upon Articles 45, 48 and 49, as well as Articles 18 and 20 TFEU. Yet, the inability to draw on a competence which is not linked to economic activity to adopt legislation

on access to social assistance highlights once again how embedded this market-driven emphasis in EU welfare law remains.

TCN migrant workers are - constitutionally speaking - governed by a relatively new competence. Article 79 TFEU allows for legislation to be enacted which regulates the entry and residence of such persons, and any right to access the national welfare system is a legislative byproduct of this. As yet, there has only been a limited degree of convergence between EU citizens and TCN labour migrants with the rules relating to social security, and the approach at the legislative level has been uneven, and highly sectoral.

Constitutional elements which could be considered more explicitly 'social' in their construction include the Charter of Fundamental Rights and the social rights contained within it, as well as procedural safeguards such as 'the right to good administration' which is considered to be both general constitutional principles of EU law as well as being embedded within the Charter. Unfortunately, both of these elements, the substantive and the administrative, are of little practical assistance. Social rights within the Charter appear to act as guiding principles which must be taken into account but are not directly enforceable, and the administrative rights have yet to be significantly utilised in the welfare context to benefit applicants.

The tension between universalist ideals and market-based realities are even more evident at the legislative level. Despite the gradual expansion of social security through the inclusion of additional categories of social security, labour market activity is a prerequisite for EU citizens in accessing these on the same basis as nationals of the host Member State, and even this has been undermined by judgments such as *Commission v UK*. Similarly, the highly qualified right to social assistance within the meaning of Directive 2004/38/EC is one which is granted almost exclusively to those who have or retain their status as a worker, as a self-employed person, or as a member of their family. Those who are wholly economically-inactive are not provided for, and in this way it potentially moves beyond the specific mode as it is not even targeted at those most in need. Case law such as *Commission v UK, Dano*, *Alimanovic*, and others underline that the Court of Justice and the legislation is often quite quick to restrict access, and that welfare tourism - despite a lack of evidence - remains an overarching concern for them. It is also the case that at a basic level, EU welfare law is not capable of addressing the needs of its vulnerable populations, particularly where they have more complex personal circumstances, are engaged in precarious work or fall outside of the labour market.

TCN labour migrants are placed in an even more precarious position than EU citizens, as their only potential right is to access social security. Due to the highly sectoral nature of the legislation, different groups of TCNs also enjoy different levels of access to social security payments, with TCNs engaged in different sectors of the Internal Market attracting varying levels of protection. TCN labour migrants only gain a right to social assistance upon obtaining long-term residence, and until that point must ensure that they are almost entirely self-sufficient and make no demands on the social assistance system of their host State. Even after having obtained long-term residence, TCN labour migrants can have their access to the welfare system restricted to 'core benefits,' leaving them in a less than comparable situation to EU citizens who are no longer be subject to a right to reside test and have unrestricted access. Thus, the mode used for them is not only specific and highly market-based, social assistance is entirely absent from it until they have 5 years of documented and lawful residence within the host society.

The recent jurisprudence of the CJEU finally points towards the potential for EU welfare rules to become even more restrictive in the future. Although it is not possible to say with any degree of certainty that the Court has been swayed by the austerity imposed following the Global Financial Crisis of 2008, the Brexit referendum and the rise of far-right and fascist parties throughout Europe, these decisions follow on from these trends and exist within this context. Some judgments appear to be restatements of the literal intent of the legislation, whilst others potentially undermine the free movement of persons and access to the national welfare system of a host Member State in a general, and quite troubling fashion. That the Commission may accept and build upon these judgments in recasting their welfare programmes signals a less than bright future, in particular for EU citizens from Central and Europe, as well as those with complex personal circumstances and/or who are a member of a minority and in need of support. The EU rules have always been unable to help such persons by virtue of the way in which the rules are designed, but this may become even more pronounced over time.

A central underlying feature of the development of EU welfare rules that was not explicitly discussed within the chapter but is evident throughout, is the complexity of the rules in place. This is due in large part to the continual development of these same rules by the legislative and executive branches as well as by the Court of Justice. It is also a natural consequence of attempts to bring together categories which were once separate but are now to be viewed as part of an overall group. For example, the historical distinc-

tion between the self-employed and workers has been somewhat resolved by moves to integrate both within the meaning of 'migrant worker' under Article 48 TFEU, but self-employed persons remain unable to utilise rights to certain social benefits under Regulation 492/2011 as a result of it being adopted on the sole legal basis of Article 46 TFEU, which does not govern the self-employed in any capacity. Similarly, the decision to make concepts as broad as possible may also lead to confusion, and it is for this reason that the CJEU has continually had to grapple with who can be considered a worker or self-employed person for the purposes of EU law, or what habitual residence or the right to reside mean when they are applied to a specific set of complex circumstances. This will inevitably have consequences for Member States where they attempt to implement these rules on a case by case basis.

Similarly, another latent theme is the particular value of administrative justice displayed within EU welfare rules. Due to the fact that these EU rules require national implementation to give them effect, this value is perhaps best attributed to the particular Member State in question, which for the purposes of this thesis is the Republic of Ireland. However, all Member States must ensure that these rights are effective, and should not, as a result, impede the free movement of persons or lawful TCN labour migrants who fall within the scope of one of the applicable directives or regulations. Based on an assessment of the relevant Union rules, it would appear that they endorse the values of efficiency and accuracy above all else particularly through the general principle of good administration and the rights that flow from it. This would seem to be a *de minimis* set of values, with each State able to depart upwards from them. However, this is limited by the degree to which these EU rules appear to be somewhat incapable of dealing with complex personal circumstances - an issue which has only been compounded by the recent jurisprudence of the CJEU.

Thus, EU law has attempted to be universalist in outlook, by ensuring that different categories of migrants have greater levels of access to the welfare system of their host State and with fewer procedural barriers being erected before them. However, the way in which this objective has been given effect has created a system of welfare coordination which is highly specific and market-based in its delivery.

4. The Irish Welfare System: A Specific and Highly Opaque Mode of Provision for Migrants

4.1 Introduction

Establishing the particular mode with which welfare provision in Ireland most closely aligns has often proved difficult. For much of its history, the Irish welfare system has operated as a close facsimile of that which was used in the United Kingdom prior to the late 1970s.[1] This often meant that payments were transposed from the UK system into Irish law even where they were unsuitable for Irish society. For example, the Irish system adopted a worker-based model of welfare provision almost identical to that of the UK despite a large percentage of the population being self-employed.[2] The first significant shift in this position came with the breakdown of social solidarity in the United Kingdom in the late 1970s as well as the beginning of the rapid retrenchment of the UK welfare state in the 1980s. Ireland broke away from the UK model at this time, choosing to maintain the measures already in place rather than adopting reforms similar to those instigated by the Thatcher government in the United Kingdom.

In the mid-1980s, whilst the UK welfare state was undergoing a radical transformation, the Irish Commission on Social Welfare (1983-1986) suggested that 'adequacy' should be the core value regulating welfare payments in Ireland.[3] From an administrative justice perspective, this would suggest a system which prizes efficiency above other values,[4] albeit whilst capable of falling short of this in practice. A 2014 report commissioned by the Department of Employment Affairs and Social Protection (DEASP) found that the welfare system had, almost 30 years later, yet to adopt a unified principle for its administration. Staff within the DEASP had attempted to fill this lacuna with their own

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[1] J. Coakley, 'The Foundations of Statehood' in J. Coakley & M. Gallagher (eds.), *Politics in the Republic of Ireland* (5th edn., Routledge, 2010), 29; M.E. Daly, *The Buffer State: The Historical Roots of the Department of the Environment* (Institute of Public Administration, 1997); and R. Fanning, *The Irish Department of Finance, 1922-1958* (Institute of Public Administration, 1973).

[2] M. Cousins, *The Irish Social Welfare System: Law and Social Policy* (Round Hall Press, 1995), 13 and 38 in particular.

[3] M. Cousins, *Social Welfare Law* (Round Hall, 2002), 16.

[4] J.L. Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (Yale University Press, 1983), 31.

value-based culture,[5] but this led to inconsistencies, particularly in light of the often shifting priorities of the Department at a given point in time.[6] Rather than delineate clear guiding principles for the administration of the welfare system, the State has, at specific points, and primarily in response to external factors, instigated minor programmes of reform which have altered the boundaries of the welfare system. This has made the way in which it operates more opaque and lacking in clarity in terms of its structures and processes.

The purpose of this chapter is threefold. Firstly, it will explain the structure of the Irish welfare system and set out the key rules and administrative practices which underpin its operation. Comprehensive studies of this kind are infrequent, and rarely integrate a critical analysis of the relationship between the Irish welfare system and migrant access to it. Then, mirroring the analysis conducted in the preceding chapter, it will detail how the Irish welfare system can be said to comply with the specific and universalist modes of welfare provision. Unlike Chapter Three which, due to the nature of the EU system of coordination necessitates an almost exclusively doctrinal analysis, this chapter carries out a socio-legal analysis of how the Irish system operates in a general sense, albeit whilst continually attempting to highlight how the system applies to migrants generally. This will allow for subsequent chapters in Section Two to examine how it affects EU citizens firstly, followed by TCN labour migrants.

Ultimately, this chapter will demonstrate that *the Irish system has been reshaped by its response to inward migration in a fundamental sense*, and this has led what was already a system which aligned quite strongly with the specific mode in practice to become even more specific where migrants are concerned. Part of this reshaping of the Irish welfare system can be attributed to the process of Europeanisation, and the selective adoption and interpretation of EU rules to suit the State's own specific national policy objectives. However, the Irish system can also be described as extremely opaque, making it less clear and more difficult to navigate, and compound its specificity. Many

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[5] Axiom Consulting, 'One DSP Organisational Development Initiative: Driving Strategy and Transformation Through Strategy' (21/08/2014), 7 - 'The values at the heart of DSP culture may not currently be written down anywhere, but they do exist through commonly held beliefs and norms, through peoples' behaviour, through the dominant leadership style, and through the organisation's structure, processes, buildings, sights and sounds.'

[6] Axiom Consulting, 'One DSP Organisational Development Initiative: Driving Strategy and Transformation Through Strategy' (21/08/2014), 7 - 'there appears to be a lack of consistency in terms of how values are experienced by staff, depending on what part of the organisation they work, which is not unusual in large organisations or organisations undergoing significant change.'

of the underlying causes of this opaqueness - such as the often inadequate level of training for DEASP staff and the limited nature of services designed to aid individuals in drafting and lodging their application - will consequently have a disproportionate burden on migrants, as they must engage with a system that operates in a quite atypical manner, and will potentially possess lower levels of personal and social capital than Irish citizens.

In order to demonstrate this point, the chapter shall be structured as follows. Section two will briefly conduct an examination of the constitutional dimension of welfare provision in Ireland, including Article 45 of the Constitution and the fundamental rights provisions in Articles 40-44 respectively, before concluding that the right to welfare payments in the Irish context is purely legislative in nature. This section will explore the constitutional context for welfare payments in a global manner. The following three sections by comparison will each outline the legislative and administrative frameworks for welfare payments first, before looking specifically at issued raised for migrants. This will include an analysis of how first-instance decision making is conducted by designated Deciding Officers (DOs), and the reforms that have taken place within the relevant legislation as well as within the State's focus and priorities. Following on from this, the chapter will explore the Habitual Residence Condition (HRC) and how it has disproportionately impacted upon migrants. A seventh section will explore how the appeals process operates in law and in fact, and argue that whilst it tends to catch many of the payments wrongfully refused at first instance, it cannot address the systemic problems with the welfare system in Ireland. A brief concluding section will draw these different threads together.

4.2 The Right to Welfare Payments at a Constitutional Level

From a constitutional perspective, the Irish welfare system can largely be characterised as under-developed. With regard to a right to welfare payments in particular, Article 45 of the Constitution refers to the obligation placed upon the State to ensure the welfare of 'the whole people' - but fails to express how this is to be realised. In addition, Article 45 is prefaced by a clause confirming that it is not justiciable by the Courts and should only be used as a set of *directive principles* by the legislature in implementing social policy, such as the within the context of the welfare system. On the one hand, the Constitution does contain some explicit social rights within Articles 40-44 of the text,

and interpreted in light of Article 45 an unenumerated right to welfare *could* potentially be created or recognised. On the other, the judiciary has shown a marked reticence towards granting orders of mandamus recognising violations of social rights. The consequence of these two strands is that whilst universalism, or at the very least some form of communitarianism, is present at a constitutional level in Ireland, the interpretation of the relevant provisions by the Irish Superior Courts means that this obligation lacks sufficient force to display a practical effect.

The following subsections will attempt to underline this point by first examining Article 45 and the potential to recognise a right to welfare payments in the constitutional text, before then exploring why no such right is said to exist due to the reticence of the Superior Courts to acknowledge and enforce social rights in a general sense. A third subsection will establish why the right to welfare payments is considered to be legislative in nature, before briefly expanding upon the right to welfare payments contained within the European Convention on Human Rights (ECHR), with which all Irish legislation must comply.

4.2.1 The Meaning of 'Welfare' in Article 45

Prior to beginning a specific analysis of the right to welfare payments in Ireland, it is necessary to establish where this right may be situated at a constitutional level, as well as the enforceability of social rights generally. Article 45.1 of the Irish Constitution enshrines the State's obligation to ensure the 'welfare of the whole people' through the provision of an 'adequate means of livelihood,'[7] and similarly requires that the State 'safeguard with especial care the economic interests of the weaker sections of the community.'[8] This would suggest a form of universalism in line with the universalist mode, as it is at least communitarian in outlook in spite of the specific bounds of that same community never being clearly defined. The additional emphasis on providing for weaker sections of society also suggests that the State has an obligation, albeit limited, to address structural inequalities which persist or affect certain groups to a disproportionate degree. Several of the subsequent subclauses, such as Article 45.2, emphasise that the State should also promote private enterprise but that the rights of legal persons

[7] Bunreacht na hÉireann, Article 45.2.1. Although this does place an emphasis on this objective being achieved through employment.

[8] Bunreacht na hÉireann, Article 45.4.1.

are continually qualified by public policy.[9] This could be interpreted as imposing some form of obligation on the Irish executive to implement a welfare system that balances the interests of society and the market, in line with the classic, post-war welfare state which sought to achieve similar aims through direct market intervention.

The Article is prefaced with a clause underlining that any of the obligations and objectives established within are directive ‘principles of social policy’ and are as a result, considered non-justiciable before any Irish Court or against the executive itself. This is not to say that these directive 'principles of social policy’ will not have a normative impact in other ways. The State could make a political commitment to uphold the values enshrined in Article 45 and adopt a system based on the principles contained within it without the need for these to be judicially enforced. Including such principles, even if they are considered to be the exclusive purview of the executive, was justified based on the principle that citizens and civil society as a whole could use them as a

> ‘constant headline, something by which the people as a whole can judge of their progress in a certain direction; something by which the representatives of the people can be judged as well as the people judge themselves as a whole.’[10]

Tushnet however opines that from the perspective of civil society,

> ‘this response might be adequate in nations with entrenched democratic cultures where civil society stands ready to inflict political damage to legislators who depart from the constitution's requirements and advanced welfare states.’[11]

This does not mean that Article 45 ceases to be universalist in principle. Rather, it creates circumstances within which it simply displays a lesser or indirect legal effect. Similarly, whilst it may not impose a legal obligation, it certainly posits that there is a moral obligation placed upon the State to create some form of welfare state in the interest of protecting society. However, as the next section demonstrates, this issue of ac-

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[9] Bunreacht na hÉireann, Article 45.3.

[10] G. Jacobsohn, ‘The Permeability of Constitutional Borders’ (2004) 82 *Texas Law Review* 1763, 1770 (quoting Irish parliamentary debates).

[11] M. Tushnet, ‘Social Welfare Rights and the Forms of Judicial Review’ (2004) 82 *Texas Law Review* 1895, 1902.

knowledging and facilitating the enforcement of social rights is a constant issue within Irish constitutional law.

4.2.2 Enforcing Social Rights in 'Rare and Exceptional Circumstances'

In addition to containing a formal prescriptive social provision (Article 45), the Irish Constitution also has within the fundamental rights provisions (Articles 40-44) certain potentially enforceable social rights.[12] As briefly outlined in the introductory section of this thesis, social rights are those which necessitate some form of positive intervention and are not cost-neutral - they require that the State engage in redistributive policies.

The clearest example of a constitutionally embedded social right is included in Article 42 of the Constitution. Articles 42.4 and 42.5 see the specific inclusion of a social right, namely that: 'the State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative;' and '[i]n exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents.' However, it remains the case that the Courts are reticent to grant orders of mandamus recognising a breach of a fundamental social right unless there are sufficiently grave reasons for doing so.[13] This has led to a situation within which social rights cannot be said to be readily enforced by the Irish Courts, and points to a further limitation on the Irish welfare system being characterised as universalist in nature.

Many of the social rights contained within Articles 40-44 stem from or are linked to more common civil and political rights. These civil and political rights will often contain a particular element which necessitates State intervention, as well as the State's duty to 'by its laws to defend and vindicate the personal rights of the citizen',[14] and with 'due regard to difference in capacity, physical and moral, and of social function'[15] of

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[12] On the question of enforcing social rights before the Irish Courts, see, for example, G. Whyte, 'Judicial Capacity to enforce Socio-Economic Rights' (2014) 37 *Dublin University Law Journal* 203.

[13] *Sinnott v. Minister for Education* [2001] 2 I.R. 545; *Minister for Social, Community and Family Affairs v Scanlon* [2001] 1 IR 64; and S. Quinlivan and M. Keyes, 'Official Indifference And Persistent Procrastination: An Analysis Of *Sinnott'* (2002) *Judicial Studies Institute Journal* 163 <http://www.jsijournal.ie/html/Volume%202%20No.%202/2%5B2%5D_Quinlivan&Keys_An%20Analysis%20of%20Sinnott.pdf> accessed 10/10/2016.

[14] Bunreacht na hÉireann, Article 40.3.1.

[15] Bunreacht na hÉireann, Article 40.1.

individual citizens. Article 43.2.1 of the Constitution for example, whilst acknowledging the right of the individual to own person property allows for this right to be 'regulated by the principles of social justice.'

The idea that social rights should be considered in some way enforceable is also supported by the way in which the Constitution is drafted. Murray has argued that the drafters of the Constitution specifically included social rights 'in an attempt to make the class system less vulnerable to attack by alleviating its less defensible consequences.'[16] An initial draft of the Constitution had separated fundamental rights into 'Constitutional Guarantees' (Articles 32-38) and 'Economic Life' (Articles 39-43), but even in this form both sets of rights were fully enforceable by the Courts.[17] Articles 40-44 of the Constitution as they now stand, treat these rights as indivisible, or at the very least intertwined. That the Irish constitutional text differed so markedly from the English liberal tradition which emphasises rights to non-non-interference from the State cannot be considered a mere accident of history.[18]

Certain Superior Court Justices and court formations have also argued in favour of enforceable social rights in a general fashion, believing that 'it was not the intention of the Constitution in guaranteeing the fundamental rights of the citizen that these rights should be set at naught or circumvented,'[19] and that 'where the People by the Constitution create rights against the State or impose duties on the State, a remedy to enforce those must be deemed to be also available.'[20] The so-called 'Walsh Court,' active during the 1960s and 1970s, was known for its engagement with unenumerated rights, as well as its more progressive stance on the protection and promotion of constitutional rights.[21]

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[16] T. Murray, 'Socio-Economic Rights and the Making of the 1937 Irish Constitution' (2015) *Irish Political Studies* 1, 3.

[17] D. Keogh & A. McCarthy, *The Making of the Irish Constitution 1937* (Mercier, 2009), 81.

[18] T. Murray, *Contesting Economic and Social Rights in Ireland: Constitution, State and Society, 1848-2016* (Cambridge University Press, 2016), 38.
See also B. Kissane, *New Beginnings: Constitutionalism and Democracy in Modern Ireland* (UCD Press, 2011). This led to widespread criticisms that, for example, '*This constitution does not satisfy the aspirations of the Irish people. If the Proclamation of Easter Week meant anything, it meant the end of capitalism and the introduction of equal rights and opportunities for all.'* [M. Luddy, 'A 'Sinister and Retrogressive' Proposal: Irish Women's Opposition to the 1937 Draft Constitution' (2005) 15 *Transactions of the Royal Historical Society* 175 at 190 quoting The Irish Independent (26th June 1936).]

[19] *The State (Quinn) v Ryan* [1965] IR 70, 122 per O'Dálaigh J.

[20] *Byrne v Ireland* [1972] IR 241, 281 per Walsh J.

[21] See *Ryan v Attorney General* [1965] IR 294; *McGee v AG* [1974] IR 284; *AG v Ryan's Car Hire* [1965] IR 642; and G. Hogan & G. Whyte (eds.), *JM Kelly: The Irish Constitution* (Totel Publishing, Dublin, 2006),1251 for examples of this causal chain of precedent.

Its judgments, which acknowledged fundamental rights not explicitly included within the constitutional text, often drew upon Article 45 as well as the preamble to the Constitution with its emphasis on 'prudence, justice and charity.'[22] This particular time period can be viewed as a more interventionist phase on the part of the Courts and could potentially have led to more social rights being affirmed and made judicially enforceable, but this did not come to pass.

Subsequent to the Walsh Court, the case law of the Superior Courts relating to social rights, and in particular the right to education as contained within Article 42,[23] has demonstrated that they are slow to intervene where constitutional social rights are alleged to have been violated. This is due to the belief that without legislation expressly imposing specific duties on the State, the Courts would have to engage in unnecessary abstractions,[24] or have to impose a financial burden on the State where the right is upheld.[25] This has been departed from in a small number of judgments, such as *O'Reilly v Limerick Corporation*,[26] where it was held that despite the need for distributive justice to be 'advanced in Leinster House [rather] than in the Four Courts,' a housing authority can be directed to review its proposals and make adequate plans for the inclusion of traveller accommodation in the future despite there being no express right to a minimum standard of living within the Constitution. In the recent case of *C.A. & anor v Minister for Justice and Equality & ors*,[27] the High Court believed that

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[22] *The State (Healy) v Donoghue* [1976] IR 325: 'The rights given by the Constitution must be considered in accordance with concepts of **prudence, justice and charity** which may gradually change or develop as society changes or develops, and which fall to be interpreted from time to time in accordance with prevailing ideas.... The Constitution did not seek to impose for all time the ideas prevalent or accepted with regard to these virtues at the time of its enactment.'
See also, *McGee v AG* [1974] IR 284: 'According to the preamble the people gave themselves the Constitution to promote the common good with due observance of **prudence, justice and charity** so that the dignity and freedom of the individual might be assured. …….The judges must therefore as best they can from their training and their experience interpret these rights in accordance with their ideas of **prudence, justice and charity**. It is but natural that from time to time the prevailing ideas of these virtues must be conditioned by the passage of time.'

[23] *F.N. v. Minister of Education* [1995] 1 I.R. 409; *D.G. v. Eastern Health Board* [1997] 3 I.R. 511, 517; *D.B. v. Minister for Justice* [1999] 1 I.L.R.M. 93; and *Sinnott v Minister for Education.* [2001] 2 IR 545.

[24] *Sinnott v Minister for Education.* [2001] 2 IR 545 - 'It is hardly necessary to point out that a case based on a duty to provide services imposed by statute would avoid the difficulties of principle described in *O'Reilly v. Limerick Corporation* and elsewhere. It is clearly not possible to say, in the abstract, whether other difficulties might await a specific case, but the enforcement of duties imposed by the legislature is obviously an exercise of a different kind to the devising or inferring of such duties without legislative intervention.'

[25] I. Maher, 'Grafting the Homeless on to the Housing Code' (1989) 24(2) *Irish Jurist* 182, 182.

[26] *O'Reilly v. Limerick Corporation* [1989] I.L.R.M. 181, 195.

[27] [2014] IEHC 532.

> '…State action results in a breach of human rights and where the only remedy is the expenditure of additional money, the Court, in my opinion, must be entitled to make an appropriate order, even if the consequence is that the State must spend money to meet the terms of that order.'[28]

This assertion, as well as a supporting statement in the conclusion of the judgment that the Court is capable of directing the State to pay damages where a social right has been breached,[29] was however made in the context of the applicant being unsuccessful in respect of the specific claim to which this referred, and ultimately did not have a significant impact on the State's social policy.

The content of constitutional rights and the way in which they are implemented is, however, deemed to be the almost exclusive purview of the legislature and not that of the courts.[30] Consequently, it is only in the most 'rare and exceptional' circumstances that a Court may issue an order against the State in order to protect a constitutional right, and in particular a social right.[31] This is perhaps best summarised in *Mhic-Mhathuna v Attorney General,*[32] which dealt with welfare payments targeted at the needs of 'lone mothers,' found that the Superior Courts do not have a significant jurisdiction in which to entertain claims dealing with distributive justice and social rights.

In essence, for an order of mandamus to be granted in cases engaged with social rights, the Court must establish that a clear violation has occurred, and that the order upholding the violation will not stray into the political arena in any way, thereby forcing

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[28] [2014] IEHC 532, para 12.6.

[29] [2014] IEHC 532, para 12.6 - '…[W]here an applicant claims that 'direct provision' is having such adverse affects on her life as to cause serious harm and where such circumstances are backed up by appropriate medical and other independent evidence, a Court would be entitled to grant appropriate relief, even if the only remedy for the wrong involved the expenditure of additional resources by the State.'

[30] See *T.D. v. Minister for Education* [2001] 4 I.R. 259, 286-287 - binding the State to take action on a constitutional right would be '*effectively determining the policy which the Executive [is] to follow in dealing with a particular social problem.'* The Court also held that "it is not the function of the courts to make an assessment of the validity of the many competing claims on national resources, (288) and that nowhere in the Constitution is there an express provision which can '*impose an express obligation on the State to provide accommodation, medical treatment, welfare, or any other form of socio-economic benefit for any of its citizens, however needy or deserving.'* (316)

[31] *T.D. v. Minister for Education* [2001] 4 I.R. 259, 286-287; and on *Sinnott* see S. Quinlivan and M. Keyes, 'Official Indifference And Persistent Procrastination: An Analysis Of *Sinnott'* (2002) *Judicial Studies Institute Journal* 163 <http://www.jsijournal.ie/html/Volume%202%20No.%202/2%5B2%5D_Quinlivan&Keys_An%20Analysis%20of%20Sinnott.pdf> accessed 14/06/2017.

[32] [1995] 1 IR 484, [1995] 1 ILRM 69.

the Court to establish how the right should be read or the measure needed to give it effect. Such an order is merely an affirmation that a violation has occurred, and the State must then determine what action will be taken to rectify that same violation.

Yet this lack of easily enforceable social rights means that there cannot be said to be a culture of social rights in Ireland, unless these rights are self-enforced by the Irish State at a legislative and administrative level. It also goes some way towards explaining why Article 45 has been interpreted so narrowly, and is taken to impose no positive obligation on the State in terms of welfare provision.

4.2.3 Welfare Payments as a Purely Legislative Right?

This lack of clearly enforceable social rights has also meant that there is an unwillingness to recognise even an unenumerated right to welfare payments within the Constitution based on Article 45 or the existing rights contained within Articles 40-44 from the Courts' perspective. This is compounded even further by the State's reticence to bind its hands and hold itself to the moral obligation created by virtue of Article 45. On the first point, a report of the Constitutional Review Group (1996) had suggested that other constitutional provisions *could* give rise to a right to welfare payments as:

> '…it is obviously important that no one should be allowed to fall below a minimum level of subsistence so as to suffer from a lack of food, shelter or clothing. If this should ever happen, despite the social welfare system, the Constitution appears to offer ultimate protection through judicial vindication of fundamental personal rights such as the right to life and the right to bodily integrity.'[33]

This is primarily referring to the unenumerated rights contained within Article 40.3.1 and the jurisprudence of the Walsh Court mentioned above, and is in some way supported by Kenny J in *Murtagh Properties Ltd. v. Cleary*[34] who equally believed that the non-justiciability of Article 45 '*does not involve the conclusion that the courts may not take it into consideration when deciding whether a claimed constitutional right exists.*'[35] The

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[33] Constitutional Review Group (Report, 1996), 12(6) <http://archive.constitution.ie/reports/crg.pdf> accessed 12/07/2016.

[34] [1972] IR 330.

[35] [1972] IR 330.

recent decision in *Agha (a minor) & ors v Minister for Social Protection & ors and Osinuga (a minor) & anor v Minister for Social Protection & ors*,[36] where Hogan J found that the immigration status of a parent could not deprive an Irish citizen to a child benefit payment where the parent claiming it on their behalf lacked the required immigration permission to do so, is an example of how the more general constitutional right to non-discrimination may be utilised to enforce social rights and a right to welfare payments indirectly.

However, the Court has affirmed that there is no constitutional or higher legal principle within Irish law which are considered capable of giving rise to a right to welfare payments, in a similar manner to the way in which they have demonstrated a reticence to grant orders of mandamus where a social right may have been violated. In *Minister for Social, Community and Family Affairs v Scanlon,*[37] the Court held that any right to welfare payments is created solely through ordinary legislation.[38] The more recent case of *Meagher v Minister for Social Protection*,[39] argued that not only is the right limited to what is included within the relevant primary legislation, but the provisions of all Acts of the Oireachtas concerning welfare payments should be interpreted strictly, in a similar manner to criminal statutes.[40] Therefore, whilst welfare payments are granted as a legislative right, and may fall within the universalist mode of welfare provision in the broadest sense, the right is extremely limited in nature, easily susceptible to change and based upon meeting procedural preconditions instead of a broader normative principle. The only qualification of this appears to be firstly, where a minimum subsistence payment may create a vested right,[41] and that contributory pensions *may* create a right

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[36] *Agha (a minor) & ors -v- Minister for Social Protection & ors, Osinuga (a minor) & anor -v- Minister for Social Protection & ors* [2018] IECA 155.

[37] [2001] 1 IR 64.

[38] [2001] 1 IR 64 - 'It is an entitlement created by statute… I cannot identify any constitutional right to retain the benefit... The right to receive benefits in the first place… derive from the statute and do not partake of the nature of a property right.'

[39] *Meagher v Minister for Social Protection* [2015] IESC 4 (2015).

[40] *Meagher v Minister for Social Protection* [2015] IESC 4 (2015), para 35.

[41] *The State (James McLoughlin) v The Eastern Health Board, The Minister for Social Welfare and the Attorney General* [1952] IR 1.

stemming from the constitutional protections given to property[42] - although the Superior Courts have generally favoured the view that the latter is still contractual in nature.[43]

In relation to migrants, the High Court recently confirmed that not only is the right to welfare payments purely legislative, but it can be further limited by additional procedural requirements including the addition of immigration rules or requirements.[44] This issue will be explored more thoroughly within Chapter Six in respect of TCN labour migrants in particular, but does effect migrants in a general sense.

The ability of applicants to rely on the administrative law principle of legitimate expectation in a welfare context remains somewhat unclear. In *Galvin v Minister for Social Welfare*,[45] an assurance given to an individual that he would be entitled to a pension did not give rise to any right or remedy, even though they had acted on the incorrect assurance. The Court has also established that estoppel cannot create a right where it is not laid down in statute, and legitimate expectation cannot overrule the State's claim that no such right existed within the relevant legislation. This is supported by *Wiley v Revenue Commissioner,*[46] where an individual was not informed of changes made to the Disabled Drivers scheme and made a large purchase based on his expectation that the scheme would continue to operate in the same manner or that he would be notified were changes to be made. The Supreme Court rejected the plaintiff's argument, as it believed that the plaintiff ought to have known that he was not entitled to the scheme at first-instance, that the refunds had essentially been granted to him in error, and that it was not within the powers of the Revenue Commissioner to alter the scheme to his continued benefit. More recently however, *Lett & Company Limited v Wexford Borough Corporation, the Minister for Communications, etc. & Anor*[47] found that there *may* be a legitimate expectation in respect of substantial benefits where these are non-statutory in na-

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[42] *Cox v Ireland* [1992] 2 IR 503, 522: and *Lovett v Minister for Education, Ireland & The Attorney General* [1997] 1 ILRM 89.

[43] *Minister for Social, Community and Family Affairs v Scanlon* [2001] 1 IR 64 appears to have been endorsed once more in *P.C. v Minister for Social Protection* [2016] IEHC 315 and *P.C. v Minister for Social Protection* [2017] IESC 63.

[44] *Agha (a minor) & ors -v- Minister for Social Protection & ors, Osinuga (a minor) & anor -v- Minister for Social Protection & ors* [2018] IECA 155, para 71.

[45] [1997] 3 IR 240.

[46] [1993] ILRM 482.

[47] [2007] IEHC 195.

ture. This was subsequently upheld in a welfare context in *Power v The Minister for Social, Community and Family Affairs*,[48] where changes were made to a non-statutory 'back to education' payment so that the summer months from the eligible period. The High Court believed that these changes could not affect those who had returned to full-time education on the basis that it would be available for twelve months of the year.[49]

Further, the Constitutional Convention, which was established in order to discuss potential areas for constitutional reform and subsequent amendment - through a deliberative process which included ordinary citizens, parliamentarians and presentations made by impartial experts on each issue - voted by majority to insert 'a provision that the State shall progressively realise ESC rights, subject to maximum available resources and that this duty is cognisable by the Courts.'[50] A private members Bill was brought forward following the release of the Constitutional Convention's recommendations,[51] but this was defeated due to lack of government support.[52] The executive's response to the Bill was that

> 'In keeping with most Western democracies economic, cultural and social rights are not explicitly present in our Constitution; it focuses on civil rights and political freedoms. The courts have determined that the distribution of the State's financial resources lies within the exclusive remit of those of us privileged to be in our legislature and not with the courts. The power to determine how State revenue will be collected and spent is reserved to the Oireachtas and more specifically to the Dáil. While it is possible for the courts to restore the legal entitlements of par-

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[48] [2006] IEHC, 170; [2007] 1 ILRM, 109.

[49] This was found following a balancing test being applied which weighed the interests of the recipient against the public interest of allowing the Minister to have a relatively unfettered discretion on such matters.

[50] The Convention of the Constitution, 'Eighth Report of the Convention of the Constitution: Economic, Social and Cultural (ESC) Rights' (Convention on the Constitution, 2014).

[51] Thirty-fourth Amendment of the Constitution (Economic, Social and Cultural Rights) Bill 2014.

[52] Houses of the Oireachtas, 'Thirty-fourth Amendment of the Constitution (Economic, Social and Cultural Rights) Bill 2014: Second Stage [Private Members]' (19/05/2015) <https://www.oireachtas.ie/en/debates/vote/dail/31/2015-05-19/1/> accessed 30/05/2018.

ties, decisions involving the redistribution of existing wealth patterns are left to us in this Chamber.'[53]

The apparent weakness of Article 45 of the Constitution, and the position of the Superior Court on social rights more generally, means that the Irish State is not bound by strong universalist principles stemming from this level. This is somewhat alleviated by judgments such as *C.A. & anor v Minister for Justice and Equality & ors* and *O'Reilly v Limerick Corporation* which have found other means through which social rights may be enforced or vindicated, but these remain exceptional in nature. The State's reluctance to adopt the recommendations of the Constitutional Convention may also point towards its unwillingness to follow through the moral obligation placed upon it by Article 45, which does necessarily not bode well for the administration of the welfare system - a point which will be returned to in Section 4.5.

4.2.4 Welfare Payments and the European Convention on Human Rights

The Convention is applicable to all emanations of the State, and this would include the Department of Employment Affairs and Social Protection, the Social Welfare Appeals Office, the relevant Minister, and any legislation, policies or decisions they make. They should also be cognisant of the obligations set forward within the Convention and the ECHR Act,[54] and of the jurisprudence of the European Court of Human Rights[55] - an obligation which equally applies to the Courts in rendering judgments. Where all national remedies have been exhausted, a case may be brought directly to the European Court itself.

With regard to social security and assistance payments, Article 14 of the Convention, and Article 1 of the First Protocol are the most significant. Article 14 outlines that

'the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language,

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[53] Houses of the Oireachtas, 'Thirty-fourth Amendment of the Constitution (Economic, Social and Cultural Rights) Bill 2014: Second Stage [Private Members]' (19/05/2015) <https://www.oireachtas.ie/en/debates/debate/dail/2015-05-19/26/> accessed 30/05/2018, quoting Jerry Buttimer speaking on behalf of the government.

[54] ECHR Act 2003, Section 2(1).

[55] ECHR Act 2003, Section 4.

religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

Discrimination within this context cannot reasonably cover all forms of the same, as this would, in the Strasbourg Court's estimation, lead to potentially unfair results.[56] If this were the case, measures which positively discriminate and actively seek to redress current structural imbalances may also be unlawful and would allow for a very limited universalist system to be utilised by each of the signatory States. In order to bridge this gap, the Court has established a clear set of criteria which will allow for something to be classified as discriminatory under the Convention: individuals in comparable circumstances must be treated differently based on other characteristics they hold that would distinguish them; and there is no reasonable basis for this difference in treatment as it does not pursue a legitimate objective and is disproportionate in its impact.[57] In determining if the discrimination is justified, and would therefore fall within the State's margin of appreciation, the Court will examine the particular social and economic context in that State at that point in time[58] - however, the requirement that are objective reasons underlying the difference in treatment remains regardless of the social circumstances within that State.[59] Finally, Article 14 is only applicable in respect of Convention rights, and to apply Article 14, another right must also have been violated.

As Slingenberg notes, there is no explicit right to social security contained within the Convention itself, although it has been considered to overlap with Articles 2, 3, 8 of the same.[60] Article 1 of the First Protocol refers to conditions where a welfare payment under national legislation is granted *as a right.* In such circumstances, those who satisfy the relevant preconditions should not be barred from doing so.[61] In *Stec*, it was also held that distinctions between contributory social security payments and non-contributory

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[56] *Belgian Linguistic* app no 1474/62 et al (ECtHR, 23 July 1968), para 10.

[57] *Andrejeva v* Latvia app no 55707/00 (ECtHR, 18 February 2009), para 81; *Stec and others v United* Kingdom (ECtHR, 12 April 2006), para 51; and Burden *v United Kingdom* app no 13378/05 (ECtHR, 29 April 2008), para 60.

[58] *Rasmussen v. Denmark* app no 8777/79 (ECtHR, 28 November 1984).

[59] *Krajnc v Slovenia* app no 38775/14 (ECtHR, 31 October 2017).

[60] L. Slingenberg, *The Reception of Asylum Seekers under International Law: Between Sovereignty and Equality* (Bloomsbury, 2016), 192.

[61] *Andrejeva v Latvia* app no 55707/00 (ECtHR, 18 February 2009), para 77; *Stec and others v United Kingdom* app no 65731/01 and 65900/01 (ECtHR, 12 April 2006), para 54.

social assistance schemes are unimportant, as States will use a variety of different funding mechanisms and to classify only one category as engaging Article 1 of Protocol 1 would be too limiting.[62]

From the perspective of direct discrimination, the Convention has proved to be a relatively useful tool in fighting measures which use nationality as the primary rationale for discriminatory welfare measures. In *Gaygusuz v Austria,*[63] the first such case to deal with welfare payments, it was held that Article 14 and Article 1 of the First Protocol can be engaged where there is discrimination based on nationality - particularly where non-nationals resident in a State are barred from accessing welfare payments based solely on their lack of national citizenship. In cases of direct discrimination, the State must provide 'very weighty reasons' to justify the discrimination as a matter of public policy.[64] *Gaygusuz* found that the applicant's lawful residence status, his previous contributions into the welfare system as a worker as well as his satisfying the necessary preconditions for the subsistence payment cumulatively undermined the Austrian State's argument that it had a 'special responsibility for its own nationals and must take care of them and provide for their essential needs.'[65]

This was reaffirmed in *Koua Poirrez v France*,[66] where an Ivory Coast national was refused a social assistance payment for persons with a disability based on his lack of French nationality and the absence of a reciprocal international agreement on welfare payments existing between both States. Aside from his particular nationality, the applicant could satisfy the conditions for receiving the payment, and was in receipt of other social assistance payments which did not require citizenship or reciprocal agreements. As such, the Court held this to be clearly discriminatory based on his nationality.[67] Following these judgments, the ECtHR dealt with a small number of cases in which they struck down other directly discriminatory measures. These included social security

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[62] *Stec and others v United Kingdom* app no 65731/01 and 65900/01 (ECtHR, 12 April 2006), paras 50 and 53.

[63] App no 17371/90 (ECtHR, 16 September 1996).

[64] For critical commentary, see I. Ataç, 'Gaygusuz v. Austria: Advancing the rights of non-citizens through litigation' (2017) 1 *Österreichische Zeitschrift Für Politikwissenschaft,* 21.

[65] App no 17371/90 (ECtHR, 16 September 1996), para 45, 46, and 48.

[66] App no 40892/88 (ECtHR, 30 September 2003).

[67] App no 40892/88 (ECtHR, 30 September 2003), paras 46-49.

schemes,[68] as well as universal payments such as the child and family benefits,[69] maternity benefits,[70] and pensions.[71]

However Dembour has noted that, in spite of the pronouncements made in the *Gaygusuz* case in particular, the body of case law on the issue of access to welfare payments remains underdeveloped and is not suited to dealing with more complex issues of discrimination.[72] *Gaygusuz* and the cases that followed it have established that the belief that social rights are rooted in nationality,[73] as well as that the existence of a robust welfare system requires it being 'closed off' to some extent, are always difficult to justify. Where the ECtHR has proven less effective, is in dealing with *indirect discrimination* - where the effect of a welfare policy will disproportionately burden a migrant but is not automatically discriminatory on the grounds of nationality. As von Maydell argues,

> "discrimination against non-nationals nevertheless occurs in practice because these persons more often than nationals do not, or to a lesser extent, fulfil [sic] the benefit preconditions applicable to all persons. If, for example, the award of benefits is geared to employment or residence periods completed in the national territory, both non-nationals and nationals are able to furnish proof of these periods, but the periods completed by non-nationals will inevitably be shorter. Similar [indirect] discrimination may result if family benefits are paid only to dependents residing in the domestic territory."[74]

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[68] *Luczak v Poland* app no 77782/01 (ECtHR, 27 November 2007).

[69] *Okpisz v Germany* app no 59140/00 (ECtHR, 25 October 2005); *Niedzwiecki v Germany* app no 58453/00 (ECtHR, 15 February 2006); and *Saidoun and Fawsie v. Greece* app nos 40083/07 and 40080/07 (ECtHR, 28 January 2011).

[70] *Weller v Hungary* app no 44399/05 (ECtHR, 31 March 2009).

[71] See *Andrejeva v. Latvia* app no 55707/00 (ECtHR, 18 February 2009); *Zeibek v Greece* app no 46368/06 (ECtHR, 9 July 2009); and *Si Amer v France* app no 29137/06 (ECtHR, 29 October 2009).

[72] M.B. Dembour, '*Gaygusuz* Revisited: The Limits of the European Court of Human Rights' Equality Agenda' (2012) 12(4) *Human Rights Law Review* 689.

[73] See, for example, App no 17371/90 (ECtHR, 16 September 1996), para 45 - 'the difference in treatment [between the applicant and Austrian nationals] was based on the idea that the State had special responsibility for its own nationals and must take care of them and provide for their essential needs'.

[74] M.B. Dembour, '*Gaygusuz* Revisited: The Limits of the European Court of Human Rights' Equality Agenda' (2012) 12(4) *Human Rights Law Review* 689, 716 citing B. von Maydell, 'Discrimination in domestic social security law of the Member States of the European Union' in S. Van den Bogaert (ed.), *Social Security, Non-Discrimination and Property. The Consequences of the Gaygusuz Judgement of the European Court of Human Rights* (Maklu, 1997), 96.

The European Court of Human Rights has yet to deal with these other, more nuanced forms of discrimination within its case law. In a limited number of instances, the Court has dealt with instances where an immigration status may itself constitute a barrier to accessing welfare payments, and may be in some way discriminatory. Thus far, the Court has viewed immigration status as always constituting a sufficient justification.[75] More common requirements however, such as the Habitual Residence Condition, have yet to be considered by the Strasbourg Court, and this means that at present, the scope of protections granted by the Convention apply to a relatively discrete set of measures. If the Court's statement in *Ponomaryovi* that 'a State may have legitimate reasons for curtailing the use of resource-hungry public services, such as welfare programmes… by short-term and illegal immigrants, who, as a rule, do not contribute to their funding'[76] is to be believed, then it is possible that indirect measures such as the HRC would be upheld as reasonable - even where these may have a disproportionate impact on migrants.

Thus far, these has been no case law brought before the Irish Superior Courts that have substantively engaged with the right to welfare payments within the meaning of the Convention. The Courts have, however, in two judgments examined another associated social right, that of the right to housing. In both instances, the Courts have been very narrow in their interpretation of what the Convention requires in terms of State action. In *Donegan v Dublin County Council and Gallagher v Dublin City Council*,[77] a tenant of social housing was evicted after approximately 25 years of lawful residence when he would not obtain an exclusionary order against his son, who was found to be in possession of drug paraphernalia. Both the High Court and Supreme Court ultimately held that there were insufficient procedural safeguards in place to protect Mr. Donegan and that his right to his private and family life (Article 8) had been unduly interfered with. The more limited nature of the right to housing was confirmed in *Doherty and others v South Dublin County Council and others*,[78] where the High Court underlined that there is no positive right to be provided within housing, or even with a particular form of housing which would satisfy the needs of a specific ethnic group (in this case,

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[75] See *Ponomaryovi v Bulgaria* app no 5335/05, (ECtHR, 21 June 2011); and *Bah v United Kingdom* app no 56328/07 (ECtHR, 27 September 2011).

[76] *Ponomaryovi v Bulgaria* app no 5335/05, (ECtHR, 21 June 2011), para 54.

[77] [2012] IESC 18.

[78] [2007] IEHC 4.

members of the Travelling Community). This emphasis on the limitations of the Convention by the Irish Superior Courts suggests that they would be unlikely to adopt a more nuanced understanding of Article 14 and apply it to indirectly discriminatory measures without this being mandated by the jurisprudence of the ECtHR.

Thus, the right to welfare payments contained within the Convention is quite narrow, and has only applied where there is a direct discrimination on the grounds of nationality taking place. Anything that falls outside of this, such as potentially indirectly discriminatory measures like the HRC that States may be more likely to engage with, are not reflected in the jurisprudence of the Strasbourg court. Similarly, the interpretation of the right to housing in the Convention adopted by the Irish Superior Courts signals that they are unlikely to go beyond what is established within case law such as *Gaygusuz* if a welfare challenge were to be based on the Convention - with the likely outcome that indirect measures would be found to be justifiable.

4.3 The Legislative Welfare System in Context

Before exploring how the preliminary decision making process operates in relation to welfare claims in the Irish context, it is first necessary to explore the broader legislative framework that underpins the Irish welfare system.

As outlined above, any right to welfare payments is considered to be almost exclusively governed by legislation. This right is contained the Social Welfare (Consolidation) Act 2005 (the 'Primary Act'). The Act is concerned with outlining the mechanics of the system as a whole, as well as the different strands of payments available. The following subsections will establish: the general scope of the Primary Act; the mechanics of the payments themselves; and the issues with allowing any right to welfare payments being purely legislative in nature. These subsections will be general in nature, and will not look specifically at migrant access to the welfare system, as these will be dealt in Section 4.5 et seq.

4.3.1 The Social Welfare (Consolidation) Act 2005

The Primary Act has been subject to constant amendments since its adoption. It has been altered so frequently that the DEASP made available a Social Welfare (Consolidation) Act 2005 following its original entry into force, and even this fails to reflect every alteration that has been made subsequent to 2005. Additional Acts of the Oireachtas,

which modify the Primary Act to one degree or another, have also been passed on an almost annual basis since that time, often with more than one Act passing through parliament per year.[79] Secondary legislation, primarily Statutory Instruments (S.I.), have entered into force at an even higher frequency. These secondary measures aim to give further clarity to the provisions within the primary and ancillary acts and to allow for their full enactment. In 2014, for example, 26 S.I. were adopted,[80] with an additional 23 in 2015.[81] Currently, there is in excess of one thousand legal instruments available online which relate directly to welfare payments and the social welfare system at large, [82]illustrating the level of complexity within this area of law. From a comparative standpoint, despite the complexity of the Union system governing welfare coordination, it is far more codified with a smaller number of legislative acts in place. One interviewee noted that the 'Social Welfare Code in Ireland was described by a former High Court Justice who now sits in the Supreme Court as labyrinthine,' and that this 'a very good description of it.'[83] This was supported by another, who described it as 'complex' and a 'bit of a web,'[84] and stressed that

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[79] For example, Social Welfare Act 2006, Social Welfare Law Reform and Pensions Act 2006, Social Welfare Act 2007, Social Welfare and Pensions Act 2007, Social Welfare and Pensions Act 2008, Social Welfare (Miscellaneous Provisions) Act 2008.

[80] See: Social Welfare (Consolidated Supplementary Welfare Allowance) (Amendment) (No. 5) (Rent Supplement) Regulations 2014 (S.I. No. 604 of 2014); Social Welfare (Consolidated Claims, Payments and Control) (Amendment) (No. 8) (Assessment of Means) Regulations 2014 (S.I. No. 595 of 2014); Social Welfare (Consolidated Claims, Payments and Control) (Amendment) (No. 7) (Homemakers) Regulations (S.I. No. 569 of 2014); Social Welfare (Variation of Rate of Living Alone Allowance) Regulations 2014 (S.I. No. 568 of 2014); Social Welfare and Pensions Act 2014 (Section 6) (Commencement) Order 2014 (S.I. No. 530 of 2014); Social Welfare (Temporary Provisions) Regulations 2014 (S.I. No. 529 of 2014); Social Welfare (Consolidated Contributions and Insurability) (Amendment) (No. 6) (Return of Contributions) Regulations 2014 (S.I. No. 514 of 2014); Social Welfare (Consolidated Contributions and Insurability) (Amendment) (No. 4) (Return of Contributions) Regulations 2014 (S.I. No. 513 of 2014); Social Welfare (Consolidated Contributions and Insurability) (Amendment) (No. 5) (Modifications of Social Insurance) Regulations 2014 (S.I. No. 512 of 2014).

[81] Examples include: Social Welfare (Section 290A (Agreement) Order 2015 (S.I. No. 601 of 2015); Social Welfare (Consolidated Contributions and Insurability) (Amendment) (No. 2) (Modifications of Insurance) Regulations 2015 (S.I. No. 600 of 2015); Social Welfare (Consolidated Claims, Payments and Control) (Amendment) (No. 9) (Change in Rates) Regulations 2015 (S.I. No. 598 of 2015); Social Welfare (Consolidated Claims, Payments and Control) (Amendment) (No. 8) (Jobseeker's Allowance Transition) Regulations 2015 (S.I. No. 597 of 2015); Social Welfare (Consolidated Claims, Payments and Control) (Amendment) (No. 7) (Homemakers) Regulations 2015 (S.I. No. 596 of 2015); Social Welfare (temporary provisions) regulations 2015 (S.I. No. 529 of 2015).

[82] D. Shortall, 'Social Welfare Rights of EU Citizens in Ireland - Ireland's Non-Compliance with EU Law' (PhD Thesis, NUI Galway, 2015), 155.

[83] Interviewee 7.

[84] Interviewee 5.

> 'Unless you're lucky to get an annotated version [the Primary Act] with every subsequent instrument included in it, you have to read 3 or 4 different statutes together, understand what they mean, what they then mean together, and make it accessible for yourself. So it's not accessible for the people who need it most.'[85]

This is without considering the additional guidelines, internal communications, white papers and other departmental documentation that may direct decision makers in how to apply the conditions created under each of these instruments. Such guidelines, circulars, and other internal communications are considered to be valid administrative acts.[86] They cannot be considered to constitute law, and cannot bind the Deciding Officer dealing with a welfare payments claim, nor limit or replace the right(s) of a recipient as laid down in statute. Any internal guidelines or other administrative instruments which attempt to achieve either of these tasks would be ultra vires on the part of the Minister.[87] These administrative communications may however create enforceable rights where the applicant has met all of the conditions necessary for receiving the payment (or payments) in question,[88] as well as giving rise to a *legitimate expectation* where a representation or promise has been made based on their content.[89]

The complex nature of the welfare legislative framework may create difficulties for Deciding Officers and applicants in this respect, but where the information given to applicants is clear and precise and DOs are sufficiently trained, this should not present an insurmountable difficulty. This means that in practice, it would still be possible for Ireland to be more universalist in outlook, and from an administrative justice perspective, to possess a model of efficiency so long as the system facilitates this in practice.

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[85] Interviewee 5.

[86] *State (Kershaw) v Eastern Health Board* [1985] ILRM 235 - 'Insofar therefore as the Circular issued on his behalf on the 22nd June 1983 forms advice and guidance to Health Boards carrying out the National Fuel Scheme it is clearly a proper and valid administrative Act.'

[87] *State (Kershaw) v Eastern Health Board* [1985] ILRM 235, 239.

[88] *Latchford v Minister for Industry* [1950] IR 33, 42 - 'After having made and published the conditions on which payment of subsidy would be made, the Minister can alter these conditions from time to time or withdraw them: but, until altered or withdrawn, the conditions apply, and persons who have complied with the published conditions are entitled to claim that they have qualified for payment of subsidy.'

[89] *Power v Minister for Social and Family Affairs* [2007] 1 IR 278 - 'It was reasonable for the first applicant to conclude that the respondent would abide by the representation to the extent that it would be unjust to permit the respondent to resile therefrom.'

4.3.2 Social Security and Assistance Within the Act

Welfare payments in Ireland are delineated into separate strands, in line with the specific mode of welfare provision, suggesting that the more universalist or communitarian undertones contained within Article 45 have been interpreted more narrowly by the State. Social security payments, referred to in the 2005 Act as 'social insurance,'[90] are withdrawn from the Social Insurance Fund,[91] a set of current and investment accounts managed by the Minister for Social Protection and the Minister for Finance respectively.[92] Contributions are made by insured persons[93] through employment contributions paid by employees and their employers, self-employment contributions, optional contributions, and voluntary contributions.[94] The definitions for each category of insured person and their contribution is also expanded upon in subsequent sections.[95] Social assistance payments are, by comparison, paid out of monies provided for by the Oireachtas,[96] and is subject to a greater degree of political control as a result.

The payments themselves are primarily divided into three categories that are broadly equivalent to those within the UK system on which this division was originally based: a set of social security or insurance benefits (contributory); a further set of social assistance payments (means-tested and discretionary); and universal Children's Benefit (albeit based upon establishing habitual residence). The analogy remains valid only insofar as the payments themselves broadly correspond within both jurisdictions, not in the amount of State intervention engaged in by both Ireland and the UK from a historical perspective.

As one interviewee noted, 'even the payments themselves can be ridiculously complex, and unnecessarily so.' This is to be somewhat expected, as the Act must not only outline the mechanics of the system, but also give sufficient details on the procedures, responsibilities and powers of each delegated officer involved, as well as the individual

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[90] For consistency with the overall examination of the thesis, this chapter will hereinafter refer to this as social security.

[91] Social Welfare (Consolidation) Act, Chapter 1.

[92] Social Welfare (Consolidation) Act, Section 8-9.

[93] Social Welfare (Consolidation) Act, Sections 6-11.

[94] Social Welfare (Consolidation) Act, Sections 6-7.

[95] Social Welfare (Consolidation) Act, Sections 12-19, 20-23, 21-27, 28-30 for the employed, self-employed, voluntary and optional contributors and contributions respectively.

[96] Social Welfare (Consolidation) Act, Section 139.

payments. With regards to the specific payments and their categories, those that fall within social security and social assistance are listed later in the Act,[97] before being explored individually in order of their appearance within each list. Due to the large number of payments under both headings, it is not possible within the scope of this chapter to explore each of these in detail. It is instead sufficient to note that, for example, unemployment benefit is explored in Sections 62-68, and the unemployment assistance payment is covered in Sections 140-148. Both payments are firstly defined,[98] before outlining their respective eligibility criteria,[99] the rate of remuneration,[100] and the conditions under which a person may be disqualified from receiving them.[101] The unemployment benefit has an additional section,[102] outlining the duration of the payment. This is due to it being based on past contributions to the Social Insurance Fund, and where those contributions have been fully depleted, an individual may transfer to the unemployment assistance payment or a transitional payment.

Almost all payments can be considered to constitute a legislative right. Some of the only payments which are not capable of being considered available as a right are those based on exceptional need,[103] those which are required as a matter of urgency,[104] or those which are non-statutory in nature - although legitimate exception *may* arise in certain circumstances for non-statutory payments as outlined above. Exceptional needs or urgent needs payments *may* also create 'vested rights,' which do not require anything of the applicant other than to establish that they have sufficient need. Supplementary Welfare Allowance (SWA) for example, which is contained within Section 189 of the Primary Act, is considered to be a vested right. This payment was previously administered by the Department of Health and the Health Service Executive, but has since been incorporated into the primary DEASP's structures.[105] It acts as a completely discretionary

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[97] Social Welfare (Consolidation) Act, Sections 39, and 139.

[98] Social Welfare (Consolidation) Act, Sections 62 and 140.

[99] Social Welfare (Consolidation) Act, Sections 63-64 and 141-142.

[100] Social Welfare (Consolidation) Act, Sections 65-66 and 144 and 146.

[101] Social Welfare (Consolidation) Act, Sections 68 and 147-148.

[102] Social Welfare (Consolidation) Act, Section 67.

[103] Social Welfare (Consolidation) Act, Section 201(2).

[104] Social Welfare (Consolidation) Act, Sections 201-202.

[105] This is set out in the Social Welfare and Pensions Act 2010 (commenced by S.I. 471 of 2011), Part 4.

subsistence payment, and operates below social assistance. If an individual who is resident in the State is incapable of meeting their own needs, they will gain this vested right subject to the Act itself.[106] This specific right to a minimum safety net does arguably comply with the universalist mode, but only to a limited degree and within very particular circumstances.

Cumulatively, each of these categories, and the cross-cutting nature of the payments offered - due to the fact that they encompass contributory, non-contributory, and purely subsistence based payments - suggests that Ireland is more likely to align with the specific mode of welfare provision, based primarily upon this delineation between categories of payments. However, the imposition of administrative law principles *may* point towards a greater alignment with the universalist mode through alternate means, or at the very least, that the more austere elements of the specific mode are alleviated. This is however undermined by the fact that social assistance payments were subsequently refined so that persons with little personal capital can be left without benefit for a 'short period of time,'[107] allowing the Department to leave individuals without some form of payment so long as it does not become appreciable.

4.4 First-Instance Decision Making: The Powers of, and Constraints placed upon, Deciding Officers

Having explored the constitutional provisions relating to welfare provision, as well as social rights more generally - and the core legislation in place at the national level - it is necessary to examine the parameters within which the Irish legislative rules are applied from a administrative perspective. All formal first-instance determinations for an individual's welfare claim are made by Deciding Officers (DOs) within the Department of Employment Affairs and Social Protection (DEASP).

The purpose of the following two subsections, is to underline the boundaries within which these DOs operate: the powers granted to them; and the constraints placed upon them in making a determination. This allows for Section 4.5 to explore the practical operation of the first-instance decision making process, and how it has been altered over time in response to inward migration, often in quite fundamental ways.

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[106] *The State (James McLoughlin) v The Eastern Health Board, The Minister for Social Welfare and the Attorney General* [1952] IR 1.

[107] *Ayavoro v Minister for Social Welfare* [2009] IEHC 66.

4.4.1 A Judicial Performed Function: Deciding Officers

DOs are those within the DEASP - and are by extension responsible to the relevant Minister - who under statute[108] are required to conduct first-instance determinations concerning whether or not an individual is entitled to a particular welfare payment.[109] This requires that the DO look at the criteria set out in the Social Welfare (Consolidation) Act 2005, and any other relevant legislative instruments to see if the claimant has met the necessary preconditions. Although they are the only persons who can conduct such assessments, Horgan and Morgan have argued that

> '[i]n practice most applicants will, first, be advised by junior Department…. officials as to their entitlements to the benefit which is claimed. If the advice is in the negative, then the applicant can insist that a deciding officer adjudicate upon the claim.'[110]

This presents a large difficulty, insofar as applicants may not be aware that such advice is neither binding, nor do these junior officials have the express jurisdiction to make first-instance determinations. From a practical perspective, those who do not have the necessary power conferred upon them by the Minister through statute would immediately have their advice overturned if it was subject to review.[111] An inevitable consequence of this is that the process used may differ from the strict letter of the law. This will undermine the universalist mode's requirement that procedures are clear and effective, as only those with the powers to make a determination should do so, as well as that from an administrative justice perspective that the system is efficient - if that is what adequacy as a value is meant to imply.

In relation to administrative discretion, DOs must be 'free and unrestricted in discharging their functions'[112] as conferred upon them by the Minister through the Primary

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[108] Social Welfare Consolidation Act 2005, Section 301(1) - 'Subject to this Act, every question to which this section applies shall, save where the context otherwise requires, be decided by a deciding officer.'

[109] Discussed in D. Shortall, 'Social Welfare Rights of EU Citizens in Ireland - Ireland's Non-Compliance with EU Law' (PhD Thesis, NUI Galway, 2015), 247 et seq.

[110] G. Hogan & D.G. Morgan, *Administrative Law in Ireland* (4th edn, Round Hall, 2010), 305.

[111] *Z v Minister for Social Protection* [2012] JR.

[112] *McLoughlin v Minister for Social Welfare* [1952] IR 1, 27.

Act, and act 'freely and fairly as becomes anyone who is called upon to decide upon matters of right or obligation.'[113] It is, as the Court has held on more than one occasion, an administrative function which must be performed judicially[114] - i.e. the DO is bound by principles of natural and constitutional justice.[115] This does not alter the administrative nature of the decision from the perspective of the Irish courts. It merely reinforces that DOs must abide by concepts which would bind anyone acting in a similar capacity.[116] It does however ensure that the administration of the system should, in principle, be as effective as possible, as a DO's discretion remains somewhat constrained - including by additional principles of administrative law.

Circumstances which are capable of limiting a DO's discretion include where a welfare recipient has been in receipt of a payment for an appreciable period of time. Such payments may not be suspended or ceased without prior notice[117] in order to allow the claimant time to counter any case made in favour of the suspension or cessation of the payment.[118] DOs are also required to consider the questions or claims put before them[119] and cannot take into consideration extemporaneous or irrelevant factors. This could potentially fit within an efficiency-based model of administrative justice such as bureaucratic rationality, as it also places certain constraints on DOs which should then ensure a degree of accuracy in terms of the overall decisions rendered by the DEASP. Or, based

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[113] *McLoughlin v Minister for Social Welfare* [1952] IR 1.

[114] *Hoolahan v Minister for Social Welfare*, High Court, Barron J., unreported, 23rd July 1986.

[115] *Minister for Social, Community and Family Affairs v Scanlon* [2001] 1 I.R. 56, 87.

[116] *Minister for Social, Community and Family Affairs v Scanlon* [2001] 1 I.R. 56.

[117] Social Welfare Consolidation Act 2005, Section 334(2) - the Minister may suspend payments so long as the requirements of natural and constitutional justice are met. In reality, this action would be carried out by the Deciding Officer executing this power on behalf of the Minister.
See also, *Thompson v Minister for Social Welfare* [1989] IR 618 - 'I am satisfied, however, that before a Deciding Officer proceeds to a decision that an applicant who has been in receipt of unemployment assistance for some time, should have continuing payment disallowed, he should inform the person concerned that the position is being reviewed by him; the grounds upon which he is considering disallowing further payment; and the person concerned should be given an opportunity to answer the case made against him.'

[118] *Hoolahan v Minister for Social Welfare*, High Court, Barron J., unreported, 23rd July 1986 - 'What was essential was that the Prosecutrix should know fully the nature and extent of the case being made against her and that no decision should be made until she had been given proper opportunity to deal fully with the case.'

[119] *Murphy v Minister for Social Welfare*, unreported, High Court, 9 July 1987 - 'That was the only question submitted and so the deciding officer's jurisdiction was limited to deciding that question. He had no jurisdiction to decide a different question as he did. In doing that he acted ultra vires . What he ought to have done was to refuse to decide the question…The only jurisdiction of the Deciding Officer was to determine the question that was submitted to him. It seems to me to be self-evident that a deciding officer has no power to decide any question unless it is submitted to him for his decision…'

upon the moral judgment model, that DOs must focus on the factual circumstances of each case brought before them in order to ensure equitable outcomes.

These principles of administrative law again point towards the potential scope for the Courts to intervene based on procedural grounds which would give effect to universalist principles, or at least limit the severity of some of the more austere outcomes of the specific mode. The discretion of the DO is not substantively altered. Rather, the Courts impose limitations on the ways in which they execute the powers conferred upon them, and this may lead to a more clear and effective administrative set of practices which would bring it closer in line with the universalist mode from a practical perspective.

4.4.2 Procedural Requirements and Constraints Placed on Deciding Officers

As the previous subsection alluded to, the potential impact of principles of administrative law in the field of welfare payments can be quite significant. This can not only take the form of case law creating *vested rights*[120] to minimum income supports - like the supplementary welfare allowance - in order to ensure that there is an emphasis on the Department and State in providing some modicum of welfare provision, but also in shaping and selectively limiting the discretion of DOs to make certain that they cannot act arbitrarily or in a manner which would make it impossible for someone to claim a payment to which they would otherwise be entitled.

It is also the case that the jurisprudence of the Superior Courts and, to an arguably lesser extent the relevant Welfare Acts, place limitations on the State in how they operate the procedures for first-instance decision-making. The right to be heard and to dispute any claim(s) made by a DO present some of the most important procedural checks and balances operating in favour of a claimant. *Corcoran v The Minister for Social Welfare and The Attorney General*[121] held this to be of 'great importance' in the overall context of administering welfare payments. This was subsequently extended to where a claimant asks to submit further evidence for their claim or against a decision,[122] or

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[120] These are rights which, subject to the conditions for the payments being met, are deemed to concretise and attach to the individual - it is consequently extremely difficult for the DEASP to justify a refusal after this point.

[121] *Corcoran v The Minister for Social Welfare and The Attorney General* [1992] 2 I.R. 175.

[122] *McConnell v Eastern Health Board*, unreported, High Court, Hamilton J. 1 June 1983 - 'It is clear from the same that depending on the comments of the respondent in reply to his letter, he intended making further representations on behalf of the Prosecutor before any final decision was made. In my view, he should have been afforded such opportunity…'

where a DO quotes material from another department or source that the claimant is allowed to dispute this material.[123] This also gives rise to the duty for a DO to give reasons for their decisions which, although contained within the Primary Act and its supporting Regulations and S.I.s, is also governed by principles of administrative law.[124] An important point in this respect is that where no reason is given, it can be inferred by the Court that no such reason existed - or that there was no evidence to support it. In *The State (Daly) v. Minister for Agriculture*,[125] the Court established that:

> '[s]ince the Minister has failed to disclose the material upon which he acted or the reasons for his action there is no matter from which the court can determine whether or not such material was capable of supporting his decision. Since the Minister continues to refuse to supply this material, it must be presumed that there was no such material.'

The Courts are arguably capable of examining the 'reasonableness' of a decision made by an administrative officer, but case-law has been inconsistent on this point. As stated in *Mallak v Minister for Justice & Equality,*[126] 'the decision maker must be able to justify the refusal,' inferring that the procedural fairness and legitimacy of the process is examined instead of the merits of the original decision. A distinction that must be applied in relation to *Mallak*, is that this case applied in the immigration context where the relevant Minister had an absolute discretion conferred upon them to issue decisions - in cases dealing with welfare payments, it is possible that the courts would not be as deferential to an ordinary DO. The judgment in *Connolly v An Bord Pleanala*[127] suggests that the High Court is open to scrutinising the sufficiency of evidence provided to support a decision made by an administrative body or officer, but Fanagan has noted that this approach is at odds with the preceding case-law in this

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[123] *Kiely v Minister for Social Protection* [1971] IR 21, 28.

[124] *Mallak v Minister for Justice Equality & Law Reform* [2012] IESC 59 raised this as an issue of due process.

[125] [1987] I.R. 165.

[126] [2012] IESC 59.

[127] *Connolly v An Bord Pleanála* [2016] IEHC 322.

area.[128] Yet, the High Court has, in a series of recent decisions including *CP v Chief Appeals Officer, Social Welfare Appeals Office & the Minister for Social Protection*,[129] *MD v Minister for Social Protection*,[130] and *B v Minister for Social Protection,*[131] underscored that it is prepared to evaluate the fairness of the decision itself - particularly where the reason given does not appear to be sufficient - and this would open the door to a more substantive analysis of the factual circumstances of the case. This does however, still mean that the courts will engage primarily with the reasonableness of the decision rather than effectively rehearing the case in full on substantive grounds.

DOs, as well as the Minister and Social Welfare Appeals Office (SWAO), are also obligated under constitutional law and principles of natural justice to render decisions and ensure that the process is conducted within a reasonable period of time and without unnecessary delay. 'Reasonableness' in this context has yet to be clearly defined, and the closest that the Court came to defining what this meant was in *KM & DG v Minister for Justice*,[132] where Edwards J opined that it includes a consideration of: the complexity of the issue being assessed; the scope of the information that must be collected and analysed; the specific nature of the time period in which this decision is being made; how it might prejudice the applicant; and ultimately, how well the relevant administrative officer can justify the delay. The Court held that a 12 month delay in determining an individual's leave to remain in the State, during which time they could not work and were almost certainly unable to access welfare payments, was reasonable. Due to the fact that this case dealt primarily with immigration issues, it may not be wholly reflective of 'pure' welfare cases, but does provide an overall basis on which to assess what the courts deem to be a reasonable period of time in a similarly situated administrative setting.

This substantial body of case law and legal principles may cumulatively satisfy some of the conditions of the universalist mode, insofar as they may contribute towards the system being considered responsive and possessing clear and effective procedures. This

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[128] A. Fanagan, 'What is required of An Bord Pleanála in giving 'reasons' for EIA and AA decisions after Connolly?' [2017] 29(1) *Environmental Law and Management* 27, 29.

[129] [2013] IEHC 512.

[130] [2015] IEHC 206.

[131] 2014 (unreported).

[132] [2007] IEHC 234.

does not necessarily mean that these principles of administrative law, constitutional law and of natural justice will be followed in practice - but from a strictly legal vantage point, it suggests that the Irish welfare system does have a relatively well developed culture of *administrative* rights. It also would suggest that the Superior Courts believe that at minimum, the first-instance decision making process should comply with the bureaucratic rationality model of administrative justice, as decisions should be rendered within a reasonable time and that decisions should at least appear to be accurate upon judicial review.

4.5 The Effectiveness of First-Instance Decision Making

A cursory analysis of the legislative framework on welfare in Ireland illustrates how it appears to align more strongly with the specific mode of welfare provision. For example, the payments are stratified into social security and assistance, and there is a limited degree to which social rights can be judicially reviewed and enforced. On the other hand, the first-instance procedures and existence of administrative law principles do illustrate that in theory, the system is capable of being effective, and the values contained within Article 45 may display an effect at the legislative and administrative level. This would suggest a model of bureaucratic rationality should be in place, and comply with the overarching value of 'adequacy.'

The purpose of the following subsections, is to examine the extent to which the Irish welfare system was reshaped by the State's response to inward migration in the late 1990s and early 00s, as well as how it has changed more generally since this time - and how this has impacted upon first-instance decision making in practice. It will also explore the migrant experience of the Irish welfare system, as well as the real issues which allow it to be characterised by a high degree of opaqueness. At times, it will also attempt to outline how the Irish system has been Europeanised in a general sense - albeit with a highly selective approach being adopted by the State, and in line with its own objectives rather than any requirements established in EU law.

4.5.1 Shifts Within the Welfare Policies and Priorities of the State

Two central themes within this chapter are the extent to which the Irish welfare system can be said to have been fundamentally altered by the State's response to inward migration, and the ways in which the mode that Ireland most closely aligns with is not

only more specific for migrants, it is also highly opaque i.e. difficult to navigate and lacking in transparency. Part of this process of becoming more specific for migrants was also spurred on by the process of Europeanisation, which the Irish State utilised selectively and based upon their own particular objectives.

As noted in the introduction to this chapter, many members of staff within the DEASP believed there to be no true overarching principle underpinning welfare provision in Ireland, and where alterations to the way in which the system operates are made, it is not necessarily clear why these changes were made at all. This is in spite of the recommendation that the State implement a system based upon adequacy and likely complying with the efficient model of administrative justice. It has however, usually meant that entitlements have either tightened, that the payments themselves have been cut, or some combination of the two. This may imply that at the Departmental level, there is a stigma attached to recipients similar to the specific mode, and that entitlements are also more rigid, leading to fewer payments being issued. Secondly, the Irish State has often attributed quite fundamental alterations to the structure of the welfare system as it applies to migrants to external forces, such as the EU institutions, and used European concepts to make these changes.

This move towards a more restrictive welfare system was radical from an Irish perspective, but had been a long established practice in the United Kingdom, which the Irish State had, until the 1970s, often mimicked in terms of overall structure. Class-based justifications and the deployment of the 'deserving poor' became a central platform for the Conservative Party from the 1970s onwards, and became party of the UK government's legislative programme shortly after assuming power in May of 1979. This breakdown in social solidarity and retrenchment of their more developed welfare state even became a platform of 'New Labour,'[133] the successor in government to the Conservative, and has more recently been consolidated by the Conservative Party when they

[133] S. Todd, *The People: The Rise and Fall of the Working Class* (John Murray, 2015), 62; Interview with *Catholic Herald*, 22 December 1978 <http://margaretthatcher.org> accessed 19/09/2016; D. Hannan, 'If you pay people to be poor, you'll never run out of poor people' *The Daily Telegraph* (18 April 2009), A. Cowburn, 'More than 85% of public tips on benefit 'frauds' are false' The Guardian (27/02/2016) <https://www.theguardian.com/society/2016/feb/27/false-benefit-fraud-allegations> accessed 02/01/2017.

assumed power once again.[134] When the UK diverged in this new direction, the Irish welfare system continued to operate as it already had, with only minor amendments which did not affect its overall structure.

It was not until the latter part of the 1990s when, following largely unsubstantiated and anecdotal evidence that migrants were abusing welfare and immigration laws,[135] that the Irish State set about implementing its first programmatic alterations to the welfare system as well as centralising and consolidating its control in the immigration sphere. This can be seen in the creation of the Direct Provision system - which essentially created a parallel welfare scheme for asylum seekers[136] - the adoption of the Habitual Residence Condition (HRC),[137] the centralisation of the employment permit system,[138] and the adoption of the Immigration Acts of 1999, 2003, and 2004.[139] This shift followed on from a period of sustained economic growth known as the 'Celtic Tiger'

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[134] McKeever in particular explores the introduction of the Universal Credit and its implications from a variety of perspectives.
See G. McKeever, 'News: Charting the impact of tax and benefit changes; welfare reform and devolution; Universal Credit; Work Programme; Personal Independence Payment; Farewell to the AJTC and the Office of the Social Fund Commissioner; Employment and Support Allowance; Fitness for work; Housing benefit' (2013) 20 *Journal of Social Security Law* 100; G. McKeever, 'News: Universal Credit; Employment and Support Allowance; Redefining Child Poverty; Personal Independence Payment; Abolishing the oversight of administrative justice; Fraud, overpayments and underpayments' (2013) 20 Journal of Social Security Law 4; G. McKeever, 'News: Universal Credit; Personal Independence Payment; Direct lodgement of appeals; Housing Benefit; HMRC performance; Employment and Support Allowance; Child poverty; Back to work; Welfare reform and devolution' (2013) 20 Journal of Social Security Law 44; and G. McKeever, 'News: Universal Credit; Employment and Support Allowance; Benefit Cap; Jobseeker's Allowance Sanctions; Housing Benefit; Jobseeker's Allowance, Residence and Migrants; Personal Independence Payment' (2014) 21 *Journal of Social Security Law* 3.

[135] See R. Lentin, 'Ireland: Racial State and Crisis Racism' (2007) 30(4) *Ethnic and Racial Studies* 610; RTE, 'The Marian Finucane Show' *RTE Radio 1* (16 Oct 2003); B. Fanning & F. Mutwarasibo, 'Nationals/Non-Nationals: Immigration, Citizenship and Politics in the Republic of Ireland' (2007) 30(3) *Ethnic and Racial Studies* 439; M. Maguire & F. Murphy, *Integration in Ireland: The Everyday Lives of African Migrants* (Manchester University Press, 2012); C. Coulter, 'Figures Do Not Identify Status of Non-National Mothers,' *The Irish Times* (17 June 2004); M. Peillon, 'Strangers in our Midst' in E. Slater & M. Peillon (eds.), *Memories of the Present: A Sociological Chronicle of Ireland, 1997-1998* (Institute of Public Administration, 2000), 111; A. Haynes, M.J. Power & E. Devereux, 'How Irish politicians construct transnational EU migrants,' (Doras Luimni, 1/11/2010), 18 <http://dorasluimni.org/wp-content/uploads/pdf/publications/transnatmigrants.pdf> accessed 21/12/2016; I. Kerr, 'Outrage as FG suggests paying foreign workers to return home' (05/09/2008) <http://www.independent.ie/irish-news/outrage-as-fg-suggests-paying-foreign-workers-to-return-home-26474359.html> accessed 01/01/2017.

[136] See DSCFA, *SWA Circular 04/00 on Direct Provision* to Chief Executive Officers, Programme Managers, SWA Appeals Officers, Superintendent CWOs and CWO (10 April 2000); and DSCFA, *SWA Circular 05/00 on Direct Provision* to Chief Executive Officers, Programme Managers, SWA Appeals Officers, Superintendent CWOs and CWO (15 May 2000).

[137] Social Welfare (Consolidation) Act, Section 246(1).

[138] Employment Permits Act 2003, 2006 and 2014.

[139] See also, G. Titley, 'Getting Integration Right: Media Transnationalism and Domopolitics in Ireland' (2012) 35(5) *Ethnic and Racial Studies* 817, 821-22; J. O'Donoghue, *Dáil Debates*, Vol 500, No 1(9) (1999) <http://debates.oireachtas.ie/dail/1999/02/09/00021.asp#N4> accessed 03/02/2016.

and without any substantive changes being made to the welfare system in the early years of this important economic and societal shift.[140]

An interesting point to note, is that in 2004 the Irish State elected not to impose any restrictions on the newest EU Member States. In doing so, it was one of only a handful of countries. One way of rationalising this decision, is that the UK also determined that no restrictions was the most advantageous course of action, and due to the existence of the Common Travel Area between both States they sought to maintain regulatory parity on this issue. As Chapter Six will illustrate however, this cannot always be said to be the case, and the Common Travel has been used, at different points in time, for other purposes. It has also been argued that the United Kingdom believed that other Member States would predominantly find there to be no justification for the imposition of restrictions on the free movement of the citizens of these new accession states,[141] and Ireland may have operated under a similar assumption. However, an additional theory is that the Irish executive was already in the process of introducing the HRC and other restrictions on access to the welfare state, and that it did not, at that time, believe that further restrictions were necessary. What the ultimate underlying cause for this decision was could not be established during the course of this research, and it is possible that all three of these explanations were considered.

One interviewee highlighted that 'with regards to changes in the Irish welfare state, you had prior to 1999 a system that was based 'generally' on need, but now is primarily based on the kind of leave you have to remain in the State.'[142] This is not to say that there were not certain restrictions or controls that existed in relation to migrants prior to this point in time. TCN labour migrants have always had the potential that their permission to remain in the State may be revoked on the basis that they had become a 'burden'[143] on the financial resources of the State, and restrictions could also be at-

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[140] A. Nolan, "Welfare Rights in Crisis in the Eurozone: Ireland", in C. Kilpatrick and B. De Witte, *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges* (2014) EUI Working papers.

[141] E. Consterdine, 'The huge political cost of Blair's decision to allow Eastern European migrants unfettered access to Britain' (16/11/2016) *The Conversation* <https://theconversation.com/the-huge-political-cost-of-blairs-decision-to-allow-eastern-european-migrants-unfettered-access-to-britain-66077> accessed 06/02/2019.

[142] Interviewee 2.

[143] Chapter Six will discuss this concept in greater detail.

tached to an immigration permission or employment permit.[144] However, there had been no universal pre-emptive restrictions - such as the HRC - or exclusions based on a category of migrants as a whole - such as the parallel Direct Provision system - prior to this period of time.

Similarly, the invocation of welfare and 'birth tourism'[145] during the late 1990s and early part of this century feeds into the European-wide debate surrounding the construction of EU welfare law, and its treatment of those who are wholly economically-inactive. Although these views are perhaps only now becoming truly ascendant[146] - due in part to the increased presence of right-wing populist parties throughout the Union - EU enlargement has typically raised issues of ethnicity, security, borders, perceptions of certain nationalities and access to the welfare state.[147] The judgement of the Court of Justice in *Zhu and Chen*[148] in particular, which allowed for a Chinese national to stay in Northern Ireland to care for her child without that same child utilising their right to free movement, was, despite the particularities of the case, seen as a confirmation of this perceived 'birth tourism' trend.

This is not to say that this shift in the priorities of the State from a welfare perspective was the first time that the welfare system adopted an express ideology. As Section 2.3.6 highlights, Irish welfare policy always had certain characteristics, such as a reliance on external bodies to provide welfare state services, the adoption of laws similar if not identical to those in the United Kingdom, a reliance on administrative structures which preceded the existence of the Irish State, and maintenance of the status quo. The decision to operate a welfare system in this manner is itself ideological. It is simply the

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[144] See Chapter Six for a deeper exploration of this.

[145] B. Fanning & F. Mutwarasibo, 'Nationals/Non-Nationals: Immigration, Citizenship and Politics in the Republic of Ireland,' (2007) 30(3) *Ethnic and Racial Studies* 439-460.

[146] See for example, European Social Survey, 'Attitudes towards Immigration and their Antecedents: Topline Results from Round 7 of the European Social Survey' <http://www.europeansocialsurvey.org/docs/findings/ESS7_toplines_issue_7_immigration.pdf> accessed 11/07/2017; Viviane Reding, 'Main Message: Trieste Citizens' Dialogue,' Speech/13/706, European Commission (16/09/2013) <europa.eu/rapid/press-release_SPEECH-13-706_en.htm> (accessed 02/05/2017); Financial Times, 'Poll backlash expected amid hostility to migrants in EU,' *Financial Times*, (18/10/2013), <www.ft.com/intl/cms/s/0/945b9c46-3810-11e3-8668-00144feab7de.html#axzz2kbZVJyKA> accessed 08/07/2017; J. Stone, 'Fears for economy as number of EU migrants leaving Brexit Britain surges,' *Independent* 25/05/2017 < http://www.independent.co.uk/news/uk/politics/immigration-figures-down-policies-general-election-2017-a7754796.html> accessed 04/06/2017.

[147] W. Spohn & A. Triandafyllidou (eds.), *Europeanisation, National Identities and Migration: Changes in Boundary Constructions Between Western and Eastern Europe* (Routledge, 2003).

[148] C-200/02 [2004] ECLI:EU:C:2004:639.

case that the adoption of restrictive measures targeting migrants as a category of actual and potential welfare recipients was the first significant and sustained move away from this previous mode, and as part of an overt governmental programme. This new emphasis on migrants is also potentially indicative of the previous choice to often mimic the system in the United Kingdom, as external actors remained a primary motivator for national changes.

In a more general sense, following the Global Financial Crisis of 2008, the Irish State accepted a 'bailout' package of approximately €85 billion from the 'Troika' - which includes the European Commission and the European Central Bank (ECB) - requiring that substantial adjustments be made in all areas of public spending. Many of these adjustments were targeted at the DEASP's annual budget, and emphasised cuts to certain payments and categorises of payments, which totalled almost €750 million.[149] However, whilst the responsibility for these cuts is often attributed to the conditions of the bailout package - as well as the EU Institutions involved in its drafting, a more general form of Europeansiation - research conducted by Hick demonstrates that the Commission and ECB were generally 'agnostic to [specific] cuts, as long as [Ireland] make the macro,'[150] and that the State and well as the Minister for Employment Affairs and Social Protection took this as an opportunity to 'cut the cloth'[151] and 'make the system less passive.'[152] It presented another opportunity for the Irish State to implement changes to the welfare system by attributing these to external forces, rather than providing a comprehensive programme based on clear policies and underpinned by a coherent

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[149] European Commission, 'Ireland's economic crisis: how did it happen and what is being done about it?' <http://ec.europa.eu/ireland/economy/irelands_economic_crisis/index_en.htm> accessed 03/02/2017. On the banking crisis see B. Clarke & N. Hardiman, 'Crisis in the Irish Banking System' <http://www.ucd.ie/geary/static/publications/workingpapers/gearywp201203.pdf> last accessed 01/12/2016; R. Kitchin, C. O'Callaghan, M. Boyle & J. Gleeson, 'Placing neoliberalism: the rise and fall of Ireland's Celtic Tiger' (2012) 44(6) *Environment and Planning A* 1302; E. O'Leary, 'Reflecting on the Celtic Tiger: Before, During and After' (Department of Economics, UCC, 2010); K.A. Nolan, 'The impact of the crisis on fundamental rights across Member States of the EU- Country report on Ireland' <http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510016/IPOL_STU(2015)510016_EN.pdf> accessed 02/12/2016.

[150] R. Hick, 'Enter the Troika: The Politics of Social Security during Ireland's Bailout' (2017) *Journal of Social Policy* 1, 9.

[151] R. Hick, 'Enter the Troika: The Politics of Social Security during Ireland's Bailout' (2017) *Journal of Social Policy* 1, 7.

[152] R. Hick, 'Enter the Troika: The Politics of Social Security during Ireland's Bailout' (2017) *Journal of Social Policy* 1, 6.

ideology.[153] Both of these phases represent a form of Europeanisation which was consciously utilised by the Irish State to instigate changes whilst holding external actors responsible for these cuts. What was once successfully focused on migrants was now being utilised against welfare recipients more generally, regardless of their immigration status.[154]

4.5.2 The Reforms in Practice: A More Specific and Opaque Process of First Instance Decision-Making

The practical implications of these shifts within the construction and operation of the Irish welfare system have been quite marked. Interviewees argued that 'often at first-instance you've to show that your case is bullet proof and to put in a huge amount of supporting documentation, but you might still fail' and that this starts 'a battle to get everything the Department require in terms of information and documentation to bring it over the line and get it approved.'[155] Another interviewee supported this by stating that, 'it's quite fair to say that the Department does, like most other Member States, want to operate as conservative a welfare system as possible, to protect its own welfare and resources.'[156] This reticence to spend State monies was also highlighted by an internal review of the DEASP conducted in 2014, in which staff expressed that they must continually balance their responsibility towards their constituents with ensuring that the monies entrusted to them are spent in a prudent manner.[157] This was believed to be a latent cultural value within the Department, and one which is compounded by the higher

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[153] C. De la Porte & E. Heins, 'A new era of European integration? Governance of labour market and social policy since the sovereign debt crisis' 13(1) (2015) *Comparative European Politics* 8; H. Obinger, C. Schmitt & P. Starke, 'Policy diffusion and policy transfer in comparative welfare state research' 47(1) (2015) *Social Policy & Administration* 111.

[154] See also, the comments of the UN Committee on Economic. Social and Cultural Rights in respect of these changes -UN Committee on Economic, Social and Cultural Rights, 'Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland' (OHCHR, 2015), para.11.
Further reading, Department of Social Protection, 'Research Briefing: Social Impact Assessment of the main welfare and tax measures for 2015' (Department of Social Protection, 2015).

[155] Interviewee 4.

[156] Interviewee 7.

[157] Axiom Consulting, 'One DSP Organisational Development Initiative: Driving Strategy and Transformation Through Strategy' (21/08/2014), 8 - Staff within the DSP 'place enormous value on the service they provide to individuals and communities on behalf of the elected Government of the country. They are prudent and respectful in terms of how they use taxpayers' money.'

age profile of those working within the DEASP.[158] Newer members of staff, or those that had been integrated within the main DEASP structures after having previously been situated within other Departments - the latter of whom were viewed as embodying the 'client-focused' nature of the Department's work - argued that long-standing officers within the Department often displayed a lack of trust and respect for claimants.[159] This would still be indicative of an efficiency model of administrative justice, but one which is arguably more austere as it suggests that the system favours a reticence to grant payments in a general sense.

Supplementary Welfare Allowance (SWA), which is often granted whilst a claimant is awaiting a final determination to be made on a separate claim or where they cannot meet the criteria for further payments, was agreed to be much harder to obtain. For example,

> 'if you happen to make do without the SWA for a few weeks or months but your application ends up taking 6 months or a year, and you're couch-surfing, or like with some migrant communities who do band together and won't let someone be sleeping out on the street, there can be questions about how you made ends meet.'[160]

DOs may also make 'information requests in excess of what would be considered normal or reasonable,'[161] and this can include being 'asked to demonstrate and provide proof of how they provided for themselves between 2005 and 2008, which can be quite

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[158] Axiom Consulting, 'One DSP Organisational Development Initiative: Driving Strategy and Transformation Through Strategy' (21/08/2014), 10-11 - 'The culture is perceived by staff to be generally conservative. This is somewhat understandable given the nature of the services, the circumstances of many DSP clients, and the enormous sums of money handled by DSP on a weekly basis. The fact that the age profile of the DSP workforce is skewed towards longer tenured staff was also mentioned as a possible driver of conformity.'

[159] Axiom Consulting, 'One DSP Organisational Development Initiative: Driving Strategy and Transformation Through Strategy' (21/08/2014), 9 - 'New colleagues from FAS and HSE (CWS staff) seem to sense a lack of trust and respect for clients at DSP, while at the same time acknowledging the unique control challenges inherent in many traditional DSP payment schemes.'
And ibid, 'CWS staff who previously worked with the HSE are also seen by many as genuinely living this value. This is seen as a result of the particular nature of their clients' needs, their closeness to the community, the personal time they spend with their clients, and the discretion they can apply to their decisions.'

[160] Interviewee 5.

[161] Interviewee 4.

an outlandish request when you're making an application in 2017.'[162] This not only suggests that the entitlements are quite rigid, based on the way in which they are interpreted by DOs and the Department, but that there is a certain stigma attached to claimants - although in this instance, due to their reticence to make claims against the State unless it is absolutely necessary to do so. This stigma may inadvertently have a disproportionate impact on migrants, as research conducted with migrants living in Ireland illustrates that most migrants will attempt to survive without accessing a payment for as long as possible.[163] In particular, providing documentary evidence may constitute a significant hurdle, as migrants can often be more transient, and will not as readily have this information or documentation to hand when compared with Irish citizens.

The views of the interviewees that welfare payments have become more difficult to successfully claim has been confirmed by staff within the DEASP. A significant number of those polled in the 2014 study believed that the economic climate and political pressure to implement a more restrictive approach has led to a poorer standard of client care, with 'fewer qualifying payments, and lower payments.'[164] Elsewhere, it was argued that the increased focus on structure had led to an extremely 'black and white' approach which is often contrary to the interests of claimants.[165] As highlighted above, due to the lack of comparative cultural capital that migrants have and the increased likelihood that they at the very least believe that they will be subjected to more of a stigma than Irish citizens, this restrictive approach and lack of client care will make it more difficult for them to understand what is required of them and to successfully defend an application for welfare payments.

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[162] Interviewee 4,

[163] A. Barrett & Y. McCarthy, 'Immigrants in a booming economy: analysing their earnings and welfare dependence' (2007) 21(4/5) *Labour* 789; A. Barrett & Y. McCarthy, 'Immigrants and welfare programmes: exploring the interactions between immigrant characteristics, immigrant welfare dependence and welfare policy' (2008) 24(3) *Oxford Review of Economic Policy* 542; and V. Timonen & M. Doyle, 'In search of security: migrant workers' understandings, experiences and expectations regarding 'social protection' in Ireland' (2008) 38(1) *Journal of Social Policy* 157.

[164] Axiom Consulting, 'One DSP Organisational Development Initiative: Driving Strategy and Transformation Through Strategy' (21/08/2014), 9 - 'There is also some real concern among staff that the national economic climate has negatively impacted the level of client focus at DSP, with significant legislative changes and political pressure that change eligibility requirements and ultimately mean fewer qualifying applicants and lower payments.'

[165] Axiom Consulting, 'One DSP Organisational Development Initiative: Driving Strategy and Transformation Through Strategy' (21/08/2014), 11 - 'some staff believe an excessive value on structure and process means that the organisation can become more focused on doing things right rather than doing the right thing. Process becomes more important than outcomes. Staff lose the ability and comfort to appropriately apply their judgment or discretion. They believe this impedes change and client service. One staff member described DSP as "having a black & white mentality in a world of grey.'

It is also important to note that despite the emphasis on how DOs may be more restrictive in the granting of payments, this is a hierarchical issue. Namely, shifts within the culture of the Department as a whole has led to a system within which potentially restrictive or narrow decisions will be given. This is potentially indicative of an efficient model of welfare provision, but the opaque way in which the Department communicates its priorities and seems to emphasise that payments should be restricted goes beyond this and undermines the potential for it to be considered a system which emphasises bureaucratic rationality.

Ultimately, this not only means that the Irish welfare system is less responsive, it also, along with the increased emphasis on ensuring less generous and less predictable outcomes, places it more firmly in line with the specific mode of welfare provision. The emphasis on '*a black and white mentality in a world of grey'*[166] also means that more difficult or complex circumstances will potentially lead to negative determinations, and migrants will be the most commonly affected by this as it may be more difficult for them to understand and comply with the conditions set out for a particular payment, which will be discussed more below.

4.5.3 Information and Training

Two central issues that migrants face in terms of making a welfare claim - and which will undermine the effective operation of the welfare system - are whether they are provided with the correct - and adequate - levels of information and whether staff within the DEASP have been given the appropriate training. Information therefore relates to the level of guidance or information provided to claimants throughout the first-instance procedure, whilst training denotes the level of information provided to Deciding Officers and other frontline staff within the DEASP directing them in how the procedures should operate and what is required of them at this initial stage.

Many studies have demonstrated that migrants will face higher levels of difficulty in understanding and navigating Irish administrative systems due in large part to their lack of cultural, linguistic and other forms of personal capital. Consequently, this places an even greater emphasis on the DEASP to provide information regarding how the process operates, what payments a migrant may be entitled to, and what the requirements for

[166] Axiom Consulting, 'One DSP Organisational Development Initiative: Driving Strategy and Transformation Through Strategy' (21/08/2014), 11.

these payments are. It also places the Department on notice that it must provide adequate training to its staff to ensure that they know, among other things, what information should be given to claimants, what additional services may be available to them, and how the relevant law should be interpreted.

A 2008 review conducted on behalf of the DEASP logged many significant issues with the way in which its officers who deal directly with the public conduct themselves. For example, staff did not engage meaningfully with those presenting themselves to the DEASP and the training for these members of staff was often inadequate. This lack of training would in turn lead to difficulties in interpreting circulars, internal communications and other rules within the DEASP and could lead to incorrect determinations being made.[167]

At a more basic level, it is commonly reported that Deciding Officers and other client-facing roles within the DEASP do not provide adequate information to potential claimants and that the way in which the Department tracks a claim for welfare payments as it is being processed is similarly inadequate.[168] This is in conflict with the most recent Customer Charters produced by the DEASP, which underline that information should be provided, that it should be clear and concise and suited to the individual's needs.[169] Much of this may be attributed to the lack of focus within the Department. For example, staff elsewhere expressed the belief that the

> 'D[EA]SP operations might be at breaking point, and that the risk of a significant incident may be elevated. This is similar to concerns raised by D[EA]SP staff in local offices and scheme areas, who suggested that resources are being stretched too thin and across too many constantly changing priorities.'[170]

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[167] Grant Thornton, 'Strategic Review of the Customer Facing Services' (Department of Social Protection, 2008), 12 and annexes 2.

[168] Grant Thornton, 'Strategic Review of the Customer Facing Services' (Department of Social Protection, 2008), 12.

[169] Department of Social Protection, Customer Charter Action Plan 2013-2015 (Department of Social Protection); and Department of Social Protection, Customer Charter Action Plan 2016-2018 (Department of Social Protection).

[170] Axiom Consulting, 'One DSP Organisational Development Initiative: Driving Strategy and Transformation Through Strategy' (21/08/2014), 19.

This lack of resources and a lack of internal communication had led to a culture of 'sink or swim,'[171] and this is made worse by what staff saw as constantly shifting priorities which were often poorly communicated to them by senior management.[172] Changes in priorities and rapid transformations within the Department had also meant that there was an *'inconsistent use of current D[EA]SP brands in signage, printed materials, and client correspondence,'*[173] demonstrating the information and the form it takes may not always be representative of the full picture.

Information is of vital importance to any potential claimant. However, it is perhaps even more fundamental for migrants who will have a greater degree of difficulty in navigating the system. The less information available and the less personal assistance given, the less likely they are to be able to meet the qualifying conditions for a payment - even where it is one which if they were fully informed they would be entitled to claim. Many interviewees noted that the cultural and other difficulties migrants face will present barriers for them in accessing a payment,[174] and an even more acute barrier when - as the previous two subsections have highlighted - the alterations made within the DEASP means that it is less willing to grant payments generally. The application forms were noted by one interviewee as being so difficult that 'I've been in there myself trying to sort out an issue and have had difficulty figuring that out and I'm seen as an

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[171] Axiom Consulting, 'One DSP Organisational Development Initiative: Driving Strategy and Transformation Through Strategy' (21/08/2014), 10 - 'Others believe that teamwork is not a genuinely underlying value at DSP. They describe functional areas and divisions that operate independently, individuals focused on their own tasks with little interaction with colleagues, and a lack of meaningful interaction across grades. They also describe the culture as "sink or swim", where each person is on their own to figure things out and get the job done. They often feel taken for granted and undervalued, and more than one staff member cited a saying in DSP that "if only staff were as important as clients, then clients would get a much better service".'

[172] Axiom Consulting, 'One DSP Organisational Development Initiative: Driving Strategy and Transformation Through Strategy' (21/08/2014), 13-14 - 'There is a widespread perception that DSP leaders provide mixed or constantly changing messages around priorities, which impacts effectiveness and gives rise to a lack of clarity in relation to the DSP strategy and vision. Staff don't seem to fully understand the bigger picture because they are not being engaged in a way that helps them understand, and many suggest they experience very little two-way conversations with managers and leaders. Strategic communication channels are generally seen as less than effective and overly reliant on rare large-scale events and written communications, meaning important messages are being lost in transmission. There is no ongoing two-way conversation, with communication feeling more like an event than a process.'

[173] Axiom Consulting, 'One DSP Organisational Development Initiative: Driving Strategy and Transformation Through Strategy' (21/08/2014), 17.

[174] **Interviewee 4**: 'I mean, there's language difficulties, cultural difficulties. There's obviously people who are severely disadvantaged, and there's sort of a lack of understanding around the supports they might need. Even thinking of the jobseekers form they can fill out. They didn't have a job, or their last job was as a mineworker when they were very young.'

expert in this area.'[175] However, even more basic issues such as being able to establish which DEASP regional office to attend, as well as finding correct and sufficient information prior to applying were also highlighted as a cause for concern.[176] This was qualified by the interviewee noting that this 'applies across the board…but migrants will face additional barriers.'[177]

Whilst this doesn't suggest that the Department is knowingly providing false information or is intentionally attempting to limit access to welfare payments, it does show a lack of care in providing sufficient funding and training to the relevant decision-makers. As such, this brings it more in line with the specific mode of welfare provision by virtue of the way in which it operates, even if this is not necessarily by design. It also undermine the potential for this to even be viewed as an effective model of administrative justice, as staff within the Department do not always possess adequate resources to carry out their roles.

4.5.4 Linguistic Barriers and Racist Undertones in First Instance Decision-Making

As the previous section suggests, there is a general lack of training and funding available to ensure that the correct information is given to applicants and that they can be assisted in the appropriate manner. An extension of this, is the lack of training in terms of dealing with racism as it pertains to migrant claimants, in providing information and documentation to migrants in the most convenient language for them, and in making migrant claimants who do not speak English as a first language aware that translation services are available.

Cousins underlines that the Equal Status Acts of 2000-2004, which bar discrimination on the basis of nine grounds including race may be engaged on the ground of nationality, and that the (non-)provision of information in foreign languages raises issues under Section 3 of the 2000 Act.[178] This is due to the fact that migrants are less likely to be able to read English or Irish language documentation, and a general policy towards

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[175] Interviewee 5.

[176] Interviewee 5.

[177] Interviewee 5.

[178] Equal Status Act 2000, as amended by Section 48 of the Equality Act 2004.

providing all information in these two languages may be indirectly discriminatory.[179] He argues that more information is necessary to establish whether or not the failure to provide information and correspondence in the native language of the claimant will in reality raise a potential claim based on indirect discrimination, but such evidence would likely be difficult to compile and would still only constitute a potential cause of action - the outcome of which would be uncertain.

Translation services in particular are a requirement within the DEASP[180] and the DOJ - where migrants use one of their immigration services.[181] One interviewee - who's organisation provides its own translation services to its migrant clients having difficulty accessing welfare payments - noted that '[o]ften we would have to say to Community Welfare Officers or in the local offices that you know, you can provide an interpreter' and that 'they need to if or when a person requests it or if they feel that they can't conduct an interview to their satisfaction without an interpreter.'[182] A policy document dating back to 2002 establishes that all non-nationals *should* be sent to an officer qualified to deal with their specific needs.[183] This may not always be followed due to the lack of appropriate training within the Department, as well as the view that 'they are under pressure, and they want to deal with it as quickly as possible'[184] - or that it will lead to additional costs being imposed upon the DEASP. Failing to do so may lead to a greater number of negative outcomes in practice, as migrant claimants may not be able to fully articulate their position or even understand the representations being made to them by a DO or other official within the DEASP. This policy document also established that training and translation services would gradually be made more available over time and underlined what should be done in the event that a translator is not available. This specific translation policy was subsequently replaced by the DEASP Customer Charter,

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[179] Mel Cousins & ors, 'Technical Review of the Social Welfare Code to Examine its Compatibility with the Equal Status Acts: Final Report' (Review Gate, 2009-2011), 210-211.

[180] Department of Social Protection, 'Translation - Interpretative and Sign-Language Services' < http://www.welfare.ie/en/Pages/Translation--Interpretive-and-Sign-Language%C2%A0Services.aspx> last accessed 02/08/2017.

[181] Office for the Promotion of Migrant Integration, 'Social Protection Services'< http://www.integration.ie/website/omi/omiwebv6.nsf/page/infoformigrants-socialwelfare-en> last accessed 14/09/2017.

[182] Interviewee 4.

[183] Department of Social Protection, 'Non-National Customers: Guidelines for Staff' (2002), Chapter 3, Point 2 - 'For uniformity of approach, consider referring all cases concerning non-EEA nationals to a designated experienced officer within each section/office.'

[184] Interviewee 4.

with the two most recent Charters providing far less detail on how this service will work in practice, as well as how migrants can avail of it.[185] That this translation service seems to be somewhat haphazardly organised suggests the Department is unable to deal with difficult personal circumstances.

Another issue raised by both interviewees and within DEASP documentation was the lack of training designed to combat racism and to promote non-discrimination. The last set of formal, internal guidelines within the Department of Employment Affairs and Social Protection were adopted in 2002, and focused on the treatment of non-nationals/migrants.[186] These guidelines were heavily focused on refugees and asylum seekers and emphasised their welfare entitlements - as well as procedural requirements when dealing with migrant claims - rather than identifying potential signs of prejudice and how to deal with them where they arise.[187] Some information was included on how best to deal with potentially sensitive situations, but these remain focused on asylum seekers and refugees.[188] A request for information lodged with the Department found that this document has lapsed, although the date on which it ceased to have effect could not be provided. The procedural and other requirements for migrant claimants have instead been incorporated into the individual welfare payment guidelines[189] without any emphasis

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[185] See Department of Social Protection, Customer Charter Action Plan 2013-2015 (Department of Social Protection); and Department of Social Protection, Customer Charter Action Plan 2016-2018 (Department of Social Protection).

[186] Department of Social Protection, 'Non-National Customers: Guidelines for Staff' (Department of Social Protection, 2002).

[187] For example, Department of Social Protection, 'Non-National Customers: Guidelines for Staff' (2002), Chapter 3, Point 2) - 'Establish the immigration status of the customer, their partner and any dependants by examining their passports and/or interviewing them. All non-EEA nationals are issued with documentation from the D/JELR (asylum seekers card, Certificate of Registration, stamp on their passport etc.). Details of correct documentation for each type of customer are given in section 5 of this chapter. If the customer has transferred from another office, check the claim to ensure that the person's immigration status has been established and identity confirmed.'

[188] Department of Social Protection, 'Non-National Customers: Guidelines for Staff' (2002), Chapter 3, Point 3 - 'It is worth noting that the circumstances in which some asylum seekers/refugees left their country or the conditions from which they may have fled may make them especially vulnerable. It is therefore important that they are treated with empathy and understanding (see section at the end of this chapter). It is essential that staff do not display, by action or words, prejudice against the individual or their status. Such customers may be suspicious of state organisations based on their experience of government bodies in their own countries of origin. The Department is working to address this issue and both national and local liaison with specialist support organisations is being encouraged.'

[189] Email from the FOI unit within the Department of Social Protection, 14th of October 2016 (on file with author).

being placed on structural issues like racism and potential biases (both conscious and subconscious) towards migrants.

In 2008, a study of customer experiences found that, in addition to the need for consistent and comprehensive training in all areas, compulsory training in terms of racism and non-discrimination law more generally was of great benefit to both the Department and to claimants who may fall victim to varying degrees of discrimination.[190] In reality, 2008 also saw the end of the State's Action Plan Against Racism, with the final report underlining that the recommendations within the Action Plan were to be implemented after this point, following a review of each Department's own policies and regulations.[191] The closest the DEASP has come to doing so on the grounds of race, ethnicity or immigration status appears to be through the incorporation of the Customer Charter, which provides no guidance on this issue and has become less detailed over time. In reality, it only commits the Department to applying the principle of non-discrimination (to 'treat you equally, with courtesy and respect') and 'to promote staff awareness' on this issue.[192] An 'Equality Review of the Social Welfare Code' was conducted as part of the Action Plan Against Racism, but the wide remit of the Review meant that there was almost no attention given to structural issues like racism. Rather, the Department elected to emphasise the Review's finding that same-sex couples were being treated unfairly.[193] In a limited number of circumstances the ground of race is referred to, but primarily through the lens of nationality discrimination. Whilst both are related, they are not one and the same, particularly when one examines how these issues intersect. This failing is however again largely attributable to the scope of the review, which looks at each of the primary payments available within the DEASP and whether or not they comply with the nine grounds for discrimination under the Equal Status Acts.

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[190] Grant Thornton, 'Strategic Review of the Customer Facing Services' (Department of Social Protection, 2008), 124.

[191] Office for the Promotion of Migrant Integration, 'The National Action Plan Against Racism (NPAR) 2005 – 2008' (2008) < http://www.integration.ie/website/omi/omiwebv6.nsf/page/PCHK-7PNHH41312727-en/$File/NPAR%20Final%20Report%20Not%20an%20End%20Just%20a%20Beginning.pdf> accessed 09/0/9/2017.

[192] See Department of Social Protection, Customer Charter Action Plan 2013-2015 (Department of Social Protection), 18 versus Department of Social Protection, Customer Charter Action Plan 2016-2018 (Department of Social Protection), 10.

[193] Department of Social Protection, Annual Report 2010' (Department of Social Protection, 2010), 10 and 30.

The lack of any clear policies, internal sanctions for offending members of staff, or significant levels of training in this area is somewhat troubling. In two separate reports, a coalition of non-governmental organisations working with migrants found that there were numerous instances of inappropriate or racist behaviour being displayed by officers within the DEASP.[194] These reports also surveyed development managers from each of the 42 Citizens Information Services throughout Ireland who detailed further instances of racist or xenophobic behaviour.[195] Two of the interviewees with direct experience of working with migrants noted that, although not a general problem, staff within the Department may resort to stereotyping claimants, with some of the most common being based on race or nationality. In one instance, an interviewee qualified this by saying that they 'don't think it's rampant,' but the persistence of it 'calls for more training, more guidelines, and more sanctions when it does happen.'[196] The other participant underlined that '[t]hese are issues we would continually be highlighting with the Department of Social Protection in our communications with them.'[197] Although anecdotal, an interviewee also highlighted that they

> 'know of a social welfare office where behind the public counter there was a newspaper clipping on the wall talking about Nigerians committing welfare fraud. And this was up behind the counter where customers, as the Department calls them, were coming in to try and access payments. And seeing this on the wall. It was in an area where there was a Direct Provision centre, so the population was diverse, was going to see it, and had actually taken photos in order to report it as racism. The newspaper article was taken down rather quickly from the wall afterward.'[198]

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[194] Crosscare, Doras Luimni, Nasc, 'Person or Number? Issues Faced By Immigrants Accessing Social Protection' (2012) <http://www.livinginireland.ie/images/uploads/Person%20or%20Number.pdf> accessed 02/05/2016; Crosscare, Doras Luimni, Nasc, Citizens Information, FLAC, 'Person or Number? 2: A Second Examination of Issues Faced by Immigrants Accessing Social Protection' (2014) <http://dorasluimni.org/wp-content/uploads/2015/01/PON-2.pdf> accessed 02/05/2016.

[195] Crosscare, Doras Luimni, Nasc, Citizens Information, FLAC, 'Person or Number? 2: A Second Examination of Issues Faced by Immigrants Accessing Social Protection' (2014), 35 at Table 9 <http://dorasluimni.org/wp-content/uploads/2015/01/PON-2.pdf> accessed 02/05/2016.

[196] Interviewee 5.

[197] Interviewee 4.

[198] Interviewee 5.

Collectively, these issues surrounding language and race lead to a more restrictive welfare system for migrants in particular, as well as aligning the Irish system more closely with specific modes of welfare provision due to its lack of clear and effective procedures, the conservatism of the process, and the sharp distinction between the existence of principles of administrative law versus how well these are adhered to within the first instance decision-making procedure.

4.6 The Habitual Residence Condition: Principle v Practice

As discussed in Section 4.5.1, the welfare system prior to 1999 was based primarily on need - although it had already been delineated into social security and assistance payments in line with the specific mode. The State then slowly began to restrict access for migrants to the welfare system, before this restrictive approach was extended outwards and applied more generally to all recipients of welfare payments.

The Habitual Residence Condition (HRC) is one of these restrictive measures, and requires that a claimant establish Ireland as their 'centre of interest' before they can attempt to access particular kinds of payments. The purpose of the follow subsections is to explore how this test operates in principle versus in practice. At all times, it must be borne in mind that the HRC is one of the clearest manifestations of specific modes of welfare provision, as it attempts to not only restrict access, but also to make eligibility criteria more difficult to meet.

4.6.1 The Legal Basis for the Habitual Residence Condition

The HRC was originally adopted through Section 246(1) of the Social Welfare Consolidation Act 2005 which outlines that

> 'for the purposes of each provision of this Act specified in subsection (3), it shall be presumed, until the contrary is shown, that a person is not habitually resident in the State at the date of making of the application unless the person has been present in the State or any other part of the Common Travel Area for a continuous period of 2 years on that date.'[199]

[199] Social Welfare (Consolidation) Act, Section 246(2) defines the Common Travel Area as applying to "the United Kingdom of Great Britain and Northern Ireland, the Channel Islands and the Isle of Man."

The HRC is considered to be of general application, and is not as such capable of being *directly* discriminatory against migrants[200] as both citizens and migrants must satisfy it. However, it was adopted an immediate consequence of the inward migration of EU and non-EU migrants to Ireland, as well as being pulled directly from EU law. Within EU law, habitual and ordinary habitual residence for the purposes of accessing welfare payments in a host Member State, date back to the 1970s at the very least,[201] and remains a feature of EU welfare legislation to the present day.[202] As the preceding chapter noted, it is intended to facilitate a better coordination of EU welfare systems by determining which Member State is competent to process a welfare claim. This is limited however, by the fact that it only establishes whether or not an individual State is competent - no attempt, once an individual is deemed to lack habitual residence, is made to establish which other Member State would may be competent in their place, and there is no obligation to have them conduct a similar assessment. Thus, even at this most basic level, the HRC is more representative of the Member States' desire to limit access than it is to ensure that a citizen receives the correct payment from the State with the responsibility to do so. Member States do not have to integrate the HRC into national law where they wish to operate more generous standards, but can elect to incorporate it into national law. Consequently, at this national level, the HRC is a form of Europeanisation, but shaped by the Irish State's decision to adopt it rather than the EU making it mandatory in nature.

FLAC, a non-governmental organisation focused on equal access to justice, has suggested that the two requirements outlined in the test: that citizens establish that Ireland is their centre of interest; and that they have a legal right to reside in Ireland, are due

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[200] *Douglas v Minister for Social Protection* [2012] IEHC 27, para 15 - 'The entitlement to social welfare here… can operate… against an Irish citizen, against a French citizen, on precisely the same ground of habitual residence which is applied in Ireland…'

[201] See for example, Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community OJ L 149 , 05/07/1971 P. 0002 – 0050.

[202] Regulation 883/2004 on the Co-ordination of Social Security Systems OJ L166/1 of 2004, and 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ L158, 30.4.2004) [2004] OJ L229/35 for example.

directly to EU enlargement in the early to mid-2000s and to ensure that asylum seekers cannot satisfy the legal right to reside criteria respectively.[203]

4.6.2 To Which Payments Does the HRC Apply?

The HRC applies to fourteen separate categories of welfare payments, and these are outlined below in Table 4.1. In all instances, these payments can be considered, within the bounds of national law, to be non-contributory, social assistance payments made at the discretion of the DEASP. Consequently, the HRC is designed in such a way as to ensure that those who cannot satisfy this test are not able to draw any form of welfare payment paid for from the Department's budget as opposed to the Social Insurance fund. Payments such as the Child Benefit are however largely considered to be social security payments for the purposes of EU law, and cannot therefore be subject to a full application of the HRC where a Union citizen seeks to access it and where they meet the necessary criteria for dong so under both the EU and Irish rules[204] - although they can now be subject to a right to reside test.

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[203] FLAC, 'Submission to the OHCHR on the occasion of Ireland's second review under the Universal Periodic Review mechanism: A submission by FLAC to the Office of the United Nations High Commissioner for Human Rights' (FLAC, 2012), and Free Legal Aid Advice Centre, 'FLAC Concerns in relation to the Application of the Habitual Residence Requirement' (2008) <www.flac.ie/download/doc/flac_submission_to_ihrc_re_hrc_30.07.08.doc> accessed 20/04/2017.

[204] Case C-78/91 *Hughes* [1992] ECLI:EU:C:1992:331.

Table 4.1: Payments to which the HRC Applies

Payment
Blind Pension
Blind Welfare Allowance
State Pension (Non-Contributory)
Widow(er)'s or Surviving Civil Partner's Non Contributory Pension
Disability Allowance
Carer’s Allowance
Domiciliary Care Allowance
Guardian’s Payment (Non Contributory)
One Parent Family Payment
Child Benefit
Jobseeker’s Allowance
Jobseeker’s Allowance Transition
Supplementary Welfare Allowance (other than once off exceptional and urgent needs payments)
Back to Work Family Dividend

The HRC as it now stands includes two steps: establishing that an individual applying for a social welfare payment has the right to reside in the State; followed by establishing their actual habitual residence in Ireland - i.e. that it is their 'centre of interest'. The concept of the 'right to reside' was inserted by Section 15 of the Social Welfare and Pensions (No. 2) Act 2009, which amends Section 246 of the Social Welfare Consolidation Act 2005. This created a new Section 246(6) and necessitates that every DO in charge of carrying out first instance determinations for social welfare entitlements conducts an additional legal test to see whether or not the person seeking to establish habitual residence has the legal right to reside within Ireland. If the individual in question does not, they cannot be deemed to satisfy the HRC. In this respect, the 'right to reside' test answers the 'question of law' while the 'question of fact' is addressed by the HRC simpliciter. Persons who are considered to have a legal right to reside in Ireland are; Irish citizens; EU/EEA nationals who are engaged with the labour market (employed or self-employed); Non-EU nationals with a valid employment permit and residence permission; and refugees. Asylum seekers who are awaiting the determination of their claim cannot for the purposes of the 2005 Social Welfare (Consolidation) Act be considered habitually resident.[205] This is due to the fact that, whilst they may easily satisfy the conditions outlined below for the HRC simpliciter, they do not have a right to reside - without this right, there is no need to even assess whether or not they are habitually resident. The narrow definitions given for EU/EEA citizens who are capable of possessing a right to reside is also somewhat problematic. If Section 246(6) is taken literally,[206] then former workers and jobseekers may not be included and this would constitute a breach of EU law. However, the list is, at least from the perspective of the relevant EU rules, considered to be non-exhaustive,[207] and DOs must interpret it in a manner which upholds the integrity of EU law.[208]

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[205] Social Welfare (Consolidation) Act 2005, Section 246(7).

[206] Social Welfare Consolidation Act 2005, Section 246(6)(a), as amended by the Social Welfare and Pensions (No. 2) Act 2009, Section 15; and European Communities (Free Movement of Persons) Regulations 2015 (S.I. No. 548 of 2015).

[207] *Gusa v Minister for Social Protection & ors* [2016] IECA 237, para 14.

[208] Case C-103/88 *Fratelli Contanzo* [1989] ECLI:EU:C:1989:256, para 33.

Once an individual has established that they fall within one of these four categories, they must then establish their habitual residence under the simpliciter. The criteria to be taken into account by a DO within the DEASP[209] are:

1. the duration and continuity of the person's presence in the Member State concerned;
2. the nature of the activity pursued, including its stability or whether it is habitually pursued and the duration of any work contract, as well as the exercise of any additional non-remunerated activity;
3. the person's family status and family ties; in the case of students, the source of their income;
4. the person's housing situation and its permanence; and in which State the individual pays tax or makes contributions.

The criteria for the HRC is capable of being broken down even further, to the extent that it may constitute seven or eight steps rather than four. However, the important feature of this test is that the individual should be able to cumulatively satisfy them, and by extension, establish that the individual's 'centre of interest' rests in Ireland.[210] The operational guidelines on the HRC issued to DOs stresses that the test should be 'proportionate in its aim, which is to ensure there is a link between the claimant and the State. In this respect it should be remembered that an unduly harsh application of the Habitual Residence condition could be unlawful'.[211] Habitual residence is also calculated from the date on which the application is made to the DEASP, must remain continuous and can be reassessed where the applicant's circumstances may have changed.[212]

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[209] The Department of Employment Affairs and Social Protection is tasked with the administration of the Irish welfare system and other social supports. See <https://www.welfare.ie/en/Pages/home.aspx> accessed 01/11/2017.

[210] Social Welfare (Consolidation) Act, 2005, Section 246(1) and read in light of Article 11 of REGULATION (EC) No 987/2009 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems OJ L.284/1.

[211] Department of Social Protection, 'Guidelines for Deciding Officers on the determination of Habitual Residence' < http://www.welfare.ie/en/Pages/Habitual-Residence-Condition--Guidelines-for-Deciding-Offic.aspx> accessed 15/05/2016.

[212] Social Welfare (Consolidation) Act 2005, Section 264(1) as amended by the Social Welfare and Pensions Act 2014, Section 11.

These conditions for establishing an individual's centre of interest. as well as the more flexible conditions within the operational guidelines for the HRC, were added in order to satisfy a series of judgments rendered by the CJEU on this issue. In *Di Paolo*, the Court of Justice held that stable employment should be considered an almost immediate form of integration and, as such, should satisfy the HRC without reaching the prescribed statutory period.[213] Similarly, the conception of habitual residence adopted in *Swaddling*, which is considered to have a Union-wide meaning,[214] held that an 8 week period within the relevant UK legislation violated EU law by stipulating a specific period of time. Although the construction of the Section of the Irish Act may simply constitute a 'evidential presumption' - i.e. the presumption that this will constitute a clear satisfaction of the HRC - to apply it literally would mean that the original Section 246 of the 2005 Irish Act is most certainly non-compliant as it exceeds the statutory limit in *Swaddling* by 96 weeks, or by a magnitude of 13:1. The fact that social welfare law should be interpreted as strictly as provisions of the criminal law,[215] applying the 2 year bar as a mere practical guidance is also arguably not possible. Section 246(4) was subsequently added to amend this temporal requirement, bringing the Act in line the *Swaddling* judgment and Article 11 of Regulation 987/2009[216] which is directly applicable in the Irish context - although it was not until 2014 that the 2 year requirement was removed entirely.[217] That both judgments *pre-date* the adoption of the HRC in Ireland illustrates that there has been a lack of care taken on the part of the DEASP and the State, with both attempting to adopt a stricter definition than that which is available to them under EU law.

It may also be argued that the HRC as it was originally implemented by the Irish State could not be considered non-compliant with EU rules because the Commission considered bring an infringement action against Ireland on this issue under Article 258

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[213] Case 76/76 *Silvana di Paolo v Office national de l'emploi* [1977] ECLI:EU:C:1977:32, para 19 - 'In fact, whenever a worker has a stable employment in a Member State there is a presumption that he resides there, even if he has left his family in another State.'

[214] Case C-90/97 *Robin Swaddling v Adjudication Officer* [1999] ECLI:EU:C:1999:96.

[215] *Meagher v Minister for Social Protection* [2015] IESC 4 (2015), para 35.
Although the High Court did appear to be more deferential in *Mavocei v Minister for Social Protection & Ors,* unrep., High Court, McDermott J, 21 July 2017, para 40.

[216] REGULATION (EC) No 987/2009 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems OJ L.284/1.

[217] Section 11, Social Welfare and Pensions Act 2014, Section 11.

TFEU in 2004 but elected not to do so.[218] The difficulty with this argument, is that the Commission began its investigation at a very early point - the HRC had not yet taken full effect, the right to reside had yet to be adopted, and there were no available figures to suggest the actual impact that the HRC may have on Union citizens. Similarly, infringement actions in an area such as social security and assistance is not apolitical, and there may have been other considerations - such as the politically-sensitive nature of the welfare state - which caused the Commission to withdraw from the process.

Another potential issue raised in relation to the right to reside test in particular, was made by Cousins, who believed it to be a much more onerous procedural requirement than the HRC simpliciter for migrants, as Irish citizens will benefit from this right far more easily and many migrants may simply not possess it.[219] From the perspective of the Equal Status Acts, the right to reside is much harder to objectively justify due to the way in which it discriminates on the ground of nationality. The basis for this additional test criteria in Cousin's estimation appears to be identical to the HRC itself, insofar as it is designed to discourage 'welfare tourism,' a concept which the methodology for this thesis has established as lacking in merit. The persuasive argument put forward by FLAC that the right to reside test was introduced primarily to ensure that asylum seekers could not establish habitual residence while they are awaiting a determination of their claim, means that its adoption cannot be viewed solely as a means of dissuading further welfare tourism - it remains part of a larger programme to restrict access to the welfare state for non-nationals.

Applying two consecutive conditions with the same objective is also deemed by Cousins to be disproportionate to achieving this goal of reducing welfare tourism in Ireland - if that is the overall intent of the right to reside test. Cousins suggests that the Irish government, in adopting the measure, may have been relying on a comparable instrument being upheld in the UK upon judicial review, but notes that the CJEU may not be as willing to uphold it on the basis that it could limit the effective free movement of

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[218] 'in December 2004, the European Commission issued a Letter of Formal Notice indicating that it was concerned about the compatibility of the habitual residence condition with Ireland's obligations under Regulations 1408/71 and 1612/68, as well as the potential indirectly discriminatory effect on grounds of nationality and the direct discrimination between applicants from within the Common Travel Area as opposed to other Member States. In April 2006 the Commission decided not to pursue infringement proceedings against Ireland having been satisfied that the decision-making process underpinning the habitual residence condition is now in compliance with European jurisprudence.'
See Network on the Free Movement of Workers within the European Union, 'Ireland' (Report 2006), 32.

[219] Mel Cousins & ors, 'Technical Review of the Social Welfare Code to Examine its Compatibility with the Equal Status Acts: Final Report' (Review Gate, 2009-2011), 193.

EU citizens.[220] Whilst the author is likely correct in his assessment of the impact of the right to reside test on EU citizens resident in Ireland - and this is arguably supported by *Martinez Sala*[221] - this was subsequently proven to be incorrect in *Commission v UK*[222] where the Court of Justice not only upheld the right to reside criteria as being an objectively justifiable tool for reducing the number of potential welfare tourists, but also allowed it to be applied to additional categories of social security, such as the Child Benefit. The UK legislation does not however lead to an automatic exclusion from the welfare system for all persons who are unable to demonstrate that they have such a right, and this may distinguish the UK instrument from the equivalent Irish measure. The Irish position is far more literal, and does not allow for this limited 'safety valve,'[223] and could constitute an unjustifiable restriction on the freedom of movement. This 'safety valve' is also arguably mandated by *Brey*,[224] which presented core considerations which must be taken into account before an individual is refused social assistance - although this requirement has been reduced by the subsequent jurisprudence of the CJEU and the scalability of the judgment: *Brey* becomes stronger the longer and more embedded an EU citizen becomes within the host society.

It must also be borne in mind that the Commission raised concerns regarding Ireland's compliance with the HRC and sent out a formal letter of notification in 2004 that they may instigate an infringement proceeding against the Irish State if it could not show that it was in practice following the relevant EU jurisprudence. Upon further examination, the Commission elected not to bring an infringement proceeding against Ireland as they were satisfied that it was broadly compliant[225] - however, many of the developments in this area have taken place since this time, and do point towards the potential-non-compliance of Ireland in this area, an issue which will be discussed further in sections 4.6.3 and 4.6.4 as well as the chapter immediately following this.

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[220] Mel Cousins & ors, 'Technical Review of the Social Welfare Code to Examine its Compatibility with the Equal Status Acts: Final Report' (Review Gate, 2009-2011), 193.

[221] Case C-85/96 *María Martínez Sala v Freistaat Bayern* [1998] ECLI:EU:C:1998:217.

[222] Case C-308/14 *European Commission v United Kingdom of Great Britain and Northern Ireland* [2016] ECLI:EU:C:2016:436.

[223] D. Shortall, 'Social Welfare Rights of EU Citizens in Ireland' (2017) 20(1) *Irish Journal of European Law* 80, 96.

[224] Case C−140/12 *Pensionsversicherungsanstalt v Peter Brey* [2013] ECLI:EU:C:2013:565.

[225] Network on the Free Movement of Workers within the European Union, 'Ireland' (Report 2006), 32.

4.6.3 The HRC In Practice

As outlined above, the HRC is applicable to everyone who attempts to draw one of these fourteen payments, including Irish citizens.[226] However, the nature of the tests which fall under the HRC will grant national citizens a natural advantage: it is for example, much easier to establish your habitual or continuous residence in the State where you have never lived outside of the territory and where you have an automatic right to live there. Irish citizens will consequently be far more likely to satisfy the HRC simpliciter, or will at least fail at far lower rates than EU citizens or third-country national labour migrants, as well as having an automatic right to reside. On this basis, FLAC has argued that

> 'The Habitual Residence Condition has had a disproportionate impact on migrants, asylum seekers, Travellers, Roma, victims of domestic violence, children, people who are homeless and returning Irish emigrants.'[227]

The discriminatory impact of the HRC on minorities or marginalised groups, including migrants, has also been repeatedly raised at the international level.[228] This was clearly the intent, despite the formal application of it to all individuals regardless of their immigration status, and is therefore capable of being considered a restriction on access to the welfare system in line with the specific mode. Similarly, that EU citizens and TCN labour migrants are primarily able to satisfy the right to reside test by engaging in economic activity is a further criteria for the specific mode, as it creates far more burdensome entitlement conditions for accessing any social assistance payments.

It also moves the Irish welfare system from one which is generally in line with the specific mode, insofar as it is stratified between two separate steams of welfare pay-

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[226] *Douglas v Minister for Social Protection* [2012] IEHC 27, para 15 - 'The entitlement to social welfare here… can operate… against an Irish citizen, against a French citizen, on precisely the same ground of habitual residence which is applied in Ireland…'

[227] FLAC, 'Submission to the OHCHR on the occasion of Ireland's second review under the Universal Periodic Review mechanism: A submission by FLAC to the Office of the United Nations High Commissioner for Human Rights' (FLAC, 2012), 5.

[228] Office of the High Commissioner for Human Rights, Report of the UN Independent Expert on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona to the Human Rights Council (OHCHR, 2011), 11-12; UN Committee on Economic, Social and Cultural Rights, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland (OHCHR, 2015) para.21.

ments - social security and social assistance - to one which is even more specific and based upon having a right to reside and demonstrating habitual residence in order to access social assistance - a category of payments which is targeted at those who fall outside of the labour market or are uniquely vulnerable. This will, in a similar manner to the EU rules, operate to the detriment of those who are economically-inactive or engaged in unremunerated social labour which falls outside of the labour market. Migrants must therefore ensure that they continually commodify their labour so that they may then decommodify it - and in a way that does not apply to Irish citizens.

For migrants, the same broad issues they face in attempting to navigate the welfare system and access a payment outlined in Section 4.5 will be continual hurdles in terms of satisfying the HRC. An additional barrier will arise from the often highly subjective nature of the HRC simpliciter criteria, the second step within the HRC itself after the right to reside test has been answered in the affirmative. This raises an important question about the level of discretion granted to DOs in interpreting what constitutes an individual's centre of interest and whether or not they can be considered habitually resident in Ireland. A report conducted on behalf of the Department found that '*staff value and guard the independence of civil servants. They believe there should be no fear or favour in how they arrive at their decisions or how they treat individual clients.'*[229] This discretion is tempered by the fact that, as outlined in previous sections, there is an increasingly shift within the DEASP to restrict the number of payments issued to applicants. One interviewee adopted a very optimistic approach toward the limited nature of the discretion within the welfare system currently, believing that DOs and Appeals Officers (AOs) will invariably utilise what discretion they do have in order to reach more favourable outcomes in spite of the priorities of the Department itself, and that 'it's more a case of deliberately overlooking certain deficiencies to help a person'[230] Yet it was almost uniformly agreed that 'when you add something like the Habitual Residence Condition, which for many years has added this kind of subjectivity to those criteria, it creates a discretion in how to apply it all.'[231] The addition of the HRC and similar re-

[229] Axiom Consulting, 'One DSP Organisational Development Initiative: Driving Strategy and Transformation Through Strategy' (21/08/2014), 8.

[230] Interviewee 7.

[231] Interviewee 5.

quirements were considered to ‘make[s] everything murky or opaque’ and even 'deter people from applying for what they’re entitled to.’[232]

To alleviate some of these difficulties with the application of the HRC, DOs are encouraged to present non-Irish applicants for Jobseekers Allowance, the social assistance payment intended to the facilitate entry into the labour market, with a form NEEA2. This form poses a list of questions to be answered by the applicant, and ultimately aims ‘to assist Deciding Officers in processing applications by EEA and Non-EEA Nationals.' This does however pose several problems. Firstly, the questions are themselves subjective, and do not comprehensively list the documentation that will be required of them. These questions essentially mirror those that the DO will have to answer, and without adequate information, it will not be any easier for a migrant to establish what is being asked of them. Further, the decision to uniformly require every non-national to answer the questions on form NEEA2 may be indirectly discriminatory under the Equal Status Acts based on the ground of nationality.[233] NEEA1 forms are also provided to non-EEA nationals, a fact that will be dealt within in Chapter Six, where a Deciding Officer has legitimate concerns about the immigration status of the applicant. However, as previous sections have demonstrated, the requirement that form NEEA2 be presented to all non-national applicants may not be carried out in practice. This does not necessarily undermine that imposing such a requirement is potentially indirectly discriminatory, but again emphasises that the administration of the Irish welfare system is often extremely inadequate and opaque.

[232] Interviewee 5.

[233] This would apply based on the ground of race under the Equal Status Acts 2000-2004, as race in this context is considered to include colour, nationality, national or ethnic origins as grounds for discrimination - Section 3 of the Equal Status Act 2000 (as amended by the Equal Status Act 2004).

Table 4.2: Total HRC Appeals Per Annum Determined by SWAO[234]

Year	Allowed	Partially Alowed	Disallowed	Total
2004	36	1	155	192
2005	239	5	413	657
2006	269	24	493	786
2007	210	14	634	858
2008	179	18	818	1015
2009	279	49	1055	1383
2010	654	89	3392	4135
2011	2028	341	3180	5549
2012	1006	179	1233	2418
2013	475	79	808	1362
2014	471	67	762	1300
2015	342	31	510	886
2016	251	26	435	712
Total	**6439**	**923**	**13888**	**21253**
	30.30%	**4.34%**	**65.35%**	**100.00 %**

Returning to the HRC simpliciter, this discretion, and the difficulty in uniformly determining what does and does not satisfy the criteria under it, has led to consistent issues since its introduction in 2004. As Table 4.2 above illustrates, the number of appeals upheld fully or in part for the HRC since 2004 has been approximately 35% annu-

[234] Figures received on request from Social Welfare Appeals Office (SWAO) and updated based on Question No: 310 Ref No: 8738-17.

ally. In 2011 and 2012, this reached 42.7% and 49% respectively. Due to the extremely limited nature of the data collection engaged in by the DEASP and the Irish State in general, it is not possible to say with a high degree of certainty that this disproportionately impacts upon one particular category of migrant more than another (e.g. TCN labour migrants having higher refusal rates on the basis of the HRC than EU citizens). A ministerial question submitted by Donnchadh Ó Laoghaire TD on behalf of this study[235] - following several unsuccessful FOI requests to both the DEASP and SWAO - found that the Department had primarily collected data on the nationality of those refused payments by a Deciding Officer based on the HRC between 2010 and 2014. This is broken down into 'Irish' and 'Other' as represented in Table 4.3 below. Another ministerial question entered by Joan Collins TD on behalf of this study underscored that the SWAO does not keep data based on how many persons who are non-national successfully appeal the original decision.[236] Other evidence which may suggest a more particularised impact on EU citizens will be discuss in Chapter Five.

Table 4.3: Claims Disallowed under Habitual Residence Condition, 2005-2015

Year	Irish	Other	Total
2005	N/A	N/A	**4,599**
2006	N/A	N/A	**4,361**
2007	N/A	N/A	**5,123**
2008	N/A	N/A	**6.297**
2009	N/A	N/A	**10,582**
2010*	650	5,226	**5,906**
2011	455	4,039	**4,494**
2012**	428	2,389	**2,817**
2013	264	2,580	**2,844**
2014	240	2,318	**2,558**
2015**	N/A	N/A	**1,380**

*2010 figures are incomplete due to industrial action

** 2012-2015 figures do not include the Carers Allowance

[235] Question No: 328 Ref No: 31905-16.

[236] Question No: 310 Ref No: 8738-17.

On average, the number of welfare payments disallowed based on the HRC for immigrants will be 88.8% of the total refusals in any given year, and in 3 of the 5 years included the percentage is over 90%. Finally, comparing these figures with the number of appeals heard by the SWAO on this issue emphasises that the number of individuals who will continue to fight the refusal is far lower per year - despite the likelihood of 1 in 3 appeals being upheld either in full or in part. Even allowing for the potential outcome that a DO may overturn their decision before it reaches the formal appeals stage, this would suggest that most migrants will simply accept the first outcome.

The data in Tables 4.2 and 4.3 underscore several key issues in terms of the administration of the welfare system. On the one hand, it is quite clear that the overall impact of the HRC is disproportionately borne by migrants who will have a far greater difficulty in establishing that their 'centre of interest' lies in Ireland. On the other, the level of accuracy in recording this information illustrates how little the State often engages in critical reflection. This will mean that the ability to amend the HRC to allow for a more fair and balanced outcome in the majority of cases will likely be ignored, undermining the ability of the Irish welfare system to be considered fair, with effective procedures. Ultimately, in terms of first-instance decision making the HRC is emblematic of a process which leans even further towards the specific mode of welfare provision, albeit largely due to its ineffectiveness. The mere existence of the HRC is itself indicative of the specific mode, but to continually fail to alleviate its excesses consolidates this fact. Similarly, whilst the HRC may allow for an efficient model of administrative justice to be carried out, the way in which it is applied runs counter to this as it may not always be accurately applied.

4.7 The Appeals Process: The Forum for, and effectiveness of, the SWAO

Sections 4.5 and 4.6 underlined the particular issues with the ways in which the first-instance decision making process operates, and attempted to extrapolate out from this the impact these have on the lives of migrants in particular. This section will outline the general framework for appeals against a first-instance determination, as well as the issues present in this later stage. Consequently, it is not primarily concerned with how migrants are affected by this process, but will at times emphasise specific issues which are likely to impact upon them.

Once a negative decision has been rendered by a Deciding Officer against a claimant, it must be put in writing,[237] signed by the DO,[238] and outline the basis on which the refusal was made.[239] This will then be transposed into a memorandum issued by the Minister acting on behalf of the DEASP outlining the same criteria.[240] The following subsections will outline the basis for the Social Welfare Appeals Office (SWAO), the way in which the appeals procedure is conducted, and finally the way in which these procedures often prove insufficient.

In principle as well as in practice, the appeals procedure is perhaps the most consistent element of the overall welfare claims process due to its effectiveness and the frequency within which it tends to overturn first-instance determinations. However, that the appeals process is so vital and must review so many decisions made by DOs suggests that successfully lodging a welfare claim, particularly for migrants, remains extremely difficult.

4.7.1 The Social Welfare Appeals Office and Lodging an Appeal

The Social Welfare Appeals Office[241] is a quasi-judicial tribunal[242] which conducts appeals against first-instance decisions made by DOs within the DEASP on behalf of the Department as a whole.[243] The decision to confer this authority on an agency or body like the SWAO is based on the belief that reviewing determinations of this nature would be unsuitable for the primary courts system.[244] On this point, the rationale would

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[237] Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (S.I. No. 142/2007), Section 191(1).

[238] Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (S.I. No. 142/2007), Section 191(1).

[239] Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (S.I. No. 142/2007), Section 191(2).

[240] Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (S.I. No. 142/2007), Section 191(3) and (4).

[241] See <http://www.socialwelfareappeals.ie/> accessed 21/03/2016.

[242] As it complies with Hogan and Morgans' definition of such as being a 'body, independent of the Government or any other entity but at the same time not a court, which takes decisions affecting individual rights, according to some fairly precise (and usually legal) guidelines and by following a regular and fairly formal procedure.' [G. Hogan & D.G. Morgan, *Administrative Law in Ireland* (Round Hall, 2010), 284.]

[243] Discussed in D. Shortall, 'Social Welfare Rights of EU Citizens in Ireland - Ireland's Non-Compliance with EU Law' (PhD Thesis, NUI Galway, 2015), 279 et seq.

[244] D. Shortall, 'Social Welfare Rights of EU Citizens in Ireland - Ireland's Non-Compliance with EU Law' (PhD Thesis, NUI Galway, 2015), 285.

appear to be justifiable, as Appeals Officers (AOs) are allowed to review the facts of case brought before them in totality, and discern whether or not the original DO reached the appropriate conclusion. This will often involve reviewing the case for pertinent facts that may have been omitted or ignored by the DO at first instance, and goes far beyond a mere review conducted based on a point of law, or whether or not the decision is reasonably justifiable on the basis provided by the original DO.

Any appeal made against a first-instance decision issued by a DO within the DEASP must be made within 21 days of the original decision being issued[245] and in writing.[246] The application for an appeal must establish the facts and arguments upon which the individual is disputing the DO's decision.[247] It is within the Office's discretion to extend this 21 day period for lodging an appeal,[248] however it was not possible as part of this study to establish the degree of regularity with which this occurs in practice, nor the conditions under which the Office usually grants an extension.

Once the appeal has been lodged with the SWAO, the file is sent to the Minister and they must respond 'as soon as may be,'[249] with any and all documentation and other evidence which relates to the appellant and the case at hand.[250] The definition of 'as soon as may be' has never fully been articulated. The jurisprudence of the Superior Courts on this issue often conflicts, with the Supreme Court believing that the Department must be granted an amount of time that is 'practicable,'[251] and the High Court subsequently argued that 'some passage of time' was inherent within the Article itself.[252] At no point is a concreted standard created, and in this respect, principles of administrative law fail to restrict the Minister to an appreciable degree.

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[245] Social Welfare (Appeals) Regulations 1998 (S.I. No. 108 of 1998), Article 9(2) as amended by Social Welfare (Appeals) (Amendment) Regulations 2011 (S.I. No. 505 of 2011), Article 5.

[246] Social Welfare (Appeals) Regulations 1998 (S.I. No. 108 of 1998), Article 9(1) as amended by Social Welfare (Appeals) (Amendment) Regulations 2011 (S.I. No. 505 of 2011), Article 5.

[247] Social Welfare (Appeals) Regulations 1998 (S.I. No. 108 of 1998), Articles 9(4) and 9(5) as amended by Social Welfare (Appeals) (Amendment) Regulations 2011 (S.I. No. 505 of 2011), Article 5.

[248] Social Welfare (Appeals) Regulations 1998 (S.I. No. 108 of 1998), Article 9(3) as amended by Social Welfare (Appeals) (Amendment) Regulations 2011 (S.I. No. 505 of 2011), Article 5.

[249] Social Welfare (Appeals) Regulations 1998 (S.I. No. 108 of 1998), Article 10 as amended by Social Welfare (Appeals) (Amendment) Regulations 2011 (S.I. No. 505 of 2011), Article 5.

[250] Social Welfare (Appeals) Regulations 1998 (S.I. No. 108 of 1998), Article 10 as amended by Social Welfare (Appeals) (Amendment) Regulations 2011 (S.I. No. 505 of 2011), Article 5.

[251] *McCarthy & anor -v- Garda Siochana Complaints Tribunal & ors* [2002] IESC 18.

[252] *Minister for Justice Equality and Law Reform v L G* [2005] IEHC 310.

DOs can review their own opinion once the review process has begun, but unless the DO alters their original opinion by granting the contested payment, the appeals process will continue.[253] DOs may also refer directly to an AO on behalf of the unsuccessful claimant, although there is no emphasis on them to do so.[254] Whenever an appeal is lodged, the Chief Appeals Officer must notify the Minister for Social Protection.[255]

Appeals can be made summarily or by way of oral hearing, and there is no statutory obligation to hold an oral hearing. The Office *should* take into consideration where an oral hearing was requested but there is, at present, no absolute standard in this regard.[256] Based on the decision rendered in *Kiely v Minister for Social Welfare,*[257] oral hearings are only necessary where a summary appeal would be unable to resolve conflicts within the relevant documentary evidence. The practice of the SWAO is that where an oral hearing is requested, they will attempt to facilitate it, but this cannot be considered to impose an obligation on an AO or the SWAO generally. This remains the case even where a summary hearing led to a negative appeals decision, or where the AO is arguably placed on notice that an oral hearing would be more advantageous to the case at hand.[258] Where a further secondary appeal is granted, an oral hearing *may* also be used.[259] However, the decision in *K v Minister for Social Protection*[260] would suggest that where an appellant is informed that there will be an oral hearing, they *may* potentially rely upon this representation - although this does not appear to be considered to rise to the level of a legitimate expectation.

Overall, it would appear that in terms of the Office's remit and the process of lodging a claim that this is largely compliant with the universalist mode of welfare provision, insofar as it creates relatively clear procedures. Where it falls short is in binding the Minister to respond within a reasonable time, and consequently injects a degree of un-

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[253] Social Welfare (Consolidation) Act 2005, Section 301(3).

[254] Social Welfare (Consolidation) Act 2005, Section 303.

[255] Social Welfare (Consolidation) Act 2005, Section 301(3).

[256] *Galvin v the Chief Appeals Officer and the Minister for Social Welfare* [1997] 3 I.R. 240.

[257] [1977] 1 I.R. 267.

[258] *Aidan Smith v Chief Appeals Officer Social Welfare Appeals Office Minister for Social Protection* [2014] IEHC 633.

[259] *Aidan Smith v Chief Appeals Officer Social Welfare Appeals Office Minister for Social Protection* [2014] IEHC 633.

[260] [2012] Judicial Review.

certainty which will not help vindicate the rights of appellants. Similarly, the issue of where an oral appear will be granted must also be clarified and conveyed to appellants so that they can take account of this fact. This consequently means that from an administrative justice perspective, the appeals process is potentially efficient, but that this may be undermined by the lack of a specific timeframe being placed upon the SWAO to render a decision.

4.7.2 Administrative Law and the Role of the Appeals Officer

Similar to the first-instance procedure, principles of administrative law can act as an invaluable tool in ensuring that the process is as effective as possible and acts in the interests of appellants by limiting the potential for AOs and those within the SWAO to act arbitrarily. Unlike DOs, AOs have a far wider set of powers in terms of investigation and ensuring that the decision made at first-instance was correct. Whilst this does allow for the appeals process to be more effective, it can be problematic, and may limit the Irish welfare system's potential to comply with the universalist mode of welfare provision.

In terms of the principles of administrative law which apply to them, AOs are, like DOs, bound by the duty to disclose any evidence they gather and to present this to the appellant so that they may dispute it. *Duffy v. Eastern Health Board*[261] found that where this duty had not been complied with, it could amount to a breach of higher law principles, and constitutional and other higher law norms must also be followed by AOs at all times in conducting their duties. This administrative right of appellants is perhaps even more important during this process, as AOs may seek information from external persons or sources where this would help them adjudicate more fully on the appeal before them.[262] Witnesses can even be compelled to attend an oral hearing if one is held,[263] and to take an oath before giving their evidence.[264] Where they do not comply after having been compelled, they can be summarily convicted.[265]

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[261] unreported, High Court, ex tempore, 14 March 1988.

[262] Social Welfare (Appeals) Regulations 1998 (S.I. No. 108/1998), Article 12(a) as amended by Social Welfare (Appeals) (Amendment) Regulations 2011 (S.I. No. 505 of 2011), Article 5.

[263] Social Welfare (Consolidation) Act 2005, Sections 314(1) and 314(4).

[264] Social Welfare (Consolidation) Act 2005, Sections 313 and 314(4).

[265] Social Welfare (Consolidation) Act 2005, Sections 314(3).

Unlike a DO, AOs are not required to answer only the question put before them. In *Kiely v Minister for Social Welfare (No. 2)*[266] it was held that:

> 'The appeals officer may go outside the grounds on which the deciding officer made his decision and may decide the question as if it were being decided for the first time… The statutory intention, therefore, was that the appeals officer would be armed with the necessary jurisdiction to conduct a full and effective oral hearing de novo.'

AOs are consequently not limited by statute or other principles to answering the single or narrow set of questions put before them in deciding whether or not an appeal should be upheld in the applicant's favour or refused. This would satisfy the requirement of the universalist mode that the system be effective and responsive, whilst also taking into account more difficult personal circumstances if it used wisely in practice. This grants them a wide latitude to render their decision based on a full review of the case, and taking into account information or points of contention which may not have been raised by either the appellant or the original DO and DEASP. The result of this is a broad discretion to conduct their own investigation into the case at hand, which may in many instances benefit the appellant. However, it also raises concerns in relation to the potential for AOs who have not had adequate training for example, a common issue amongst DOs, to focus on points which may be irrelevant or may not have been raised by either party to the dispute based on a personal assessment of the case.

The Primary Act also outlines that no decision taken by an AO is final,[267] allowing for the Court to adopt a lenient approach in relation to the cases it chooses to hear following an appeal with the SWAO. An AO may also re-examine their own case or that of another Officer and revise the judgment where they deem it appropriate.[268] It is also the case that the Chief Appeals Officer may choose to review any appeals decision taken,

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[266] [1977] IR 267.

[267] Social Welfare (Consolidation) Act 2005, Sections 301 and 324.

[268] Section 317 of the Social Welfare (Consolidation) Act 2005 - 'An appeals officer may, at any time revise any decision of an appeals officer, where it appears to the appeals officer that the decision was erroneous in the light of new evidence or of new facts brought to his or her notice since the date on which it was given, or where it appears to the appeals officer that there has been any relevant change of circumstances since the decision was given.'

but this does not constitute a formal re-hearing.[269] Finally, the Chief Appeals Officer may choose to refer an appeal to the Circuit Court[270] or High Court,[271] although the rate at which this is carried out year on year and in what circumstances could not be established as part of this study, as the SWAO does not appear to keep formal statistics on this point.

This is perhaps one of the most responsive, but also most problematic features of the appeals process. Whilst it does satisfy many of the core tenets of universalist provision, insofar as it allows for as many opportunities as possible to have an unsuccessful appeal reheard in some form and therefore be considered effective, it also injects a degree of uncertainty, and can create issues with further appeals to the High Court. Where the Chief Appeals Officer chooses to informally review an earlier appeal but does not re-open the case, this may erode the short window of time in which an appellant may refer the case on a point of law to the High Court. This will already pose certain difficulties due to the often prohibitive costs involved in a High Court action - unless it is taken on a pro bono basis - and the likelihood that the appellant may have already been without welfare payments for a substantial period of time. In this respect, the lack of formalisation may actually be contrary to the needs of applicants, due to the high degree of flexibility afforded to the SWAO as a whole on this particular issue. The requirement that High Court appeals be based solely on a point of law will also limit the circumstances within which the case can be referred, and for migrants who may possess lower levels of English proficiency and socio-economic capital, as well as likely being unfamiliar with the Irish Courts and their operation, this will be even more difficult.

Both the SWAO and High Court are open to an appellant at first instance, and the Court has upheld that an applicant must determine whether they would like to conduct a formal judicial review, or continue within the administrative welfare appeals process.[272] Appellants must, in particular, following a negative decision by an AO decide whether to ask for a review by the Chief Appeals Officer or a secondary AO regarding the validity of the decision, or the High Court on a point of law. They cannot attempt to do both

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[269] *Castleisland* [2004] IESC 40.

[270] Social Welfare (Consolidation) Act 2005, Section 307.

[271] Social Welfare (Consolidation) Act 2005, Section 306.

[272] *State (Wilson) v Judge Neilan* Unreported, High Court, 18th April 1985.

simultaneously.[273] Whilst this may be an attempt to deter appellants from burdening both systems with appeals which may ultimately prove to be unsuccessful, or to choose the venue which will be most advantageous to them, the different tasks carried out by both the Chief Appeals Officer and the High Court mean that this is not reasonably possible. The Court may be capable of reviewing the reasonableness of a decision,[274] but overall such reviews appear to be relatively uncommon.

As the substance of any claim must realistically be dealt with by either the Chief Appeals Officer or an ordinary AO, the appellant will likely have to wait until they have made a decision before the appellant can attempt to trigger court proceedings. Due to the fact that the Chief Appeals Officer in particular undertakes an informal review, rather a rehearing of the case in full, they may elect not to do so. There is also little formal guidance on how this review operates and the parameters imposed on the Chief Appeals Officer in conducting it. The Superior Court Rules allow up to three months in which an appeal can be lodged with the High Court.[275] If it takes longer than three months for the Chief Appeals Officer to determine that they will not undertake a review of the appellate decision, or if they issue a fresh decision in either direction after this time, this may lead to circumstances in which a High Court appeal is no longer available. The Superior Courts are capable of granting extensions where there is compelling reason to do so,[276] but this does not rise to the level of an obligation.

What this ultimately means is that the nature of the AO's role allows for effective decisions to be made due to the level of flexibility they are afforded in executing their functions. It does, however, mean that from the perspective of the universalist mode, the way in which AOs choose to use these powers may be even more important than DOs who are more clearly bound by procedures in the formal sense. Further, the complexity of the appeals procedure in terms of deciding whether to request that the Chief Appeals Officer or AO review the original appeals decision in comparison to referring the appeal to the High Court on a point of law undermines this somewhat, as the procedure may be too difficult for an ordinary appellant to navigate.

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[273] *Neenan Travel Ltd v Minister for Social and Family Affairs* [2011] IEHC 458, para 4.5.

[274] *Castleisland Cattle Breeding Society v Minister for Social and Family Affairs* [2004] IESC 40.

[275] Order 84, Rule 21(1) of the Rules of the Superior Courts.

[276] Order 84, Rule 21(3), (4) and (5).

4.7.3 Issues with the SWAO in Practice: Too Little, Too Late

From a practical perspective, the SWAO and its appeals procedure appear to operate more effectively than it first-instance counterpart. This would certainly allow the welfare system to align more closely with the universalist mode of welfare provision from the standpoint of the SWAO alone. Unlike the main Department and the first-instance decision making process, the Office is also arguably operating an administrative process which is closer to the moral judgment model of administrative justice - as AOs and the Office seem to place a higher value on ensuring that the outcomes are fare and correct for the particular circumstances of a case. However, it is also quite clear that far too much importance is placed on the appeals process operating effectively in order to compensate for failures within the DEASP prior to this point. Similarly, the appeals procedure has itself been subject to some significant criticism due to failures in its own administration, which undermine its effectiveness.

Firstly, the independence of this Office has been often questioned.[277] As one interviewee noted, 'that they are employees of the Department does mean that [staff within the SWAO] aren't as independent as they should be.'[278] This concern has also been echoed internationally by the United Nations Committee on Economic, Social and Cultural Rights.[279] FLAC has emphasised that the welfare appeals procedure does not comply with international human rights standards and is not a fair, impartial and effective remedy due to the way in which the system is constructed (and the questionable independence of the SWAO).[280] There is a degree of evidence which would point towards the potential 'bleed' of conservatism from the DEASP into the SWAO has arisen within a small number of judicial reviews brought before the High Court. In *CP v Chief Ap-*

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[277] Northside Community Law Centre's, *The Social Welfare Appeals System: Accessible & Fair?* (NCLC, 2005), 2 - 'It operates separately from the Department of Social and Family Affairs with separate premises and staff. However, the Social Welfare Appeals Office, while stated to be independent, comes within the remit of the Department of Social and Family Affairs and is staffed by civil servants. Irrespective of whether the Social Welfare Appeals Office is independent in practice, it may be open to the perception that it is not independent in its structures.'
See also, G. Hogan and D.G. Morgan, *Administrative Law in Ireland* (4th edn.) (Round Hall, 2010), 308 - 'The system is administered by civil servants working in the Department of Social Welfare whose independence is not guaranteed by law and, who, perhaps, are influenced by departmental policy considerations.'

[278] Interviewee 5.

[279] UN Committee on Economic, Social and Cultural Rights, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland (OHCHR, 2015), para.21.

[280] FLAC, *Not Fair Enough: Making the Case for the Reform of the Social Welfare Appeals System* (FLAC, 2012).

peals Officer, Social Welfare Appeals Office & the Minister for Social Protection,[281] an AO had made a negative determination in refusing a domiciliary care allowance for the maintenance of a child living with autism. The child's parents sought further evidence to satisfy the test necessary to receive the payment, but the SWAO refused to hear the case. Hogan J later made an order quashing the decision of the AO, directing the Chief Appeals Officer to revise the decision. Similar outcomes were also reached in *MD v Minister for Social Protection*,[282] and *B v Minister for Social Protection*.[283] In each instance, it would appear that the AO acting in these cases utilised the narrowest reading of the provisions available to them. Conversely, this may also point towards a similar lack of resources and training being provided by the Department to the Appeals Office. Issues relating to marginalised groups - in this instance persons with disabilities - appear to be a persistent issue for the SWAO,[284] and one which has not been sufficiently addressed.

The lack of an administrative right to access previous decisions made by Officers within the SWAO is also quite problematic, as this potentially limits an appellant's ability to construct their appeal based on decisions that have been rendered by AOs in the past. This largely mirrors the issue with receiving adequate levels of information during the initial application and decision making processes, albeit in a more discrete way. Lay appellants, or those who choose not to be represented, may face particular difficulties in drafting an appeal, particularly without a database of decisions made by the SWAO which they can refer to. However, in *Jama v Minister for Social Protection*, Hedigan J held that: '*Public policy in this regard, notably in these straitened times, must surely outweigh a right of access to such information.'*[285] Consequently, there is no requirement for the Department and SWAO to create such a database from the perspective of the High Court. This differs from the standard applied in *Opesyitan & ors v Refugee*

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[281] [2013] IEHC 512.

[282] [2015] IEHC 206.

[283] 2014 (unreported).

[284] Ombudsman Casebook Issue 1 Autumn 2014 Carer's Allowance C22/13/1537; Ombudsman Casebook Issue 2 Winter 2014/15. Ombudsman Casebook Issue 1 Autumn 2014 Carer's Allowance C22/14/0447;Ombudsman's Casebook Issue 3 Spring 2015 Disability Allowance C22/14/1705; and Ombudsman's Casebook Issue 3 Spring 2015 disability Allowance C22/14/1694.

[285] [2011] IEHC 379, para 6.7.

Appeals Tribunal & ors, Fontu v Refugee Appeals,[286] where a failure to provide previous decisions of the Refugee Appeals Tribunal was considered to be a breach of the plaintiffs' rights to fair procedure. The only potential distinguishing characteristic between both cases is that sample decisions are usually included in the SWAO's annual reports, and that the Court argued against the obligation to create an *open* database. *Opesyitan* also emphasises that decisions should be available, and does not necessarily outline how this is to be achieved. Both cases do however demonstrate how limited the right to information may be within the Courts' estimation. An important point to note is that the data outlined in Section 4.6.3 demonstrates that the HRC will have a disproportionate impact on migrants, and the discussions preceding this on issues which will affect migrants throughout the first-instance process underlines that migrants will have a far more difficult time navigating the welfare system and vindicating their rights. Whilst *Opesyitan* dealt specifically with asylum seekers within the refugee procedures, and this engages certain national and international legal obligations incumbent upon the Irish State, to apply two wholly different standards to the same fundamental principle of administrative law does appear somewhat puzzling.

In rendering its decision in *Jama*, the Court did recognise and acknowledge the SWAO annual reports, which include redacted appeals decisions in the form of 'case studies.' Where an appellant is aware of these sample judgments, this can provide them with an additional basis on which to construct their appeal, and there are often a large number of these samples included within the report annually. For example, the 2016 Annual Report includes over 30 case studies, exploring both positive and negative determinations across a broad range of payments and which were refused at first instance based on different grounds.[287] Yet, no emphasis was placed on the need for these sample judgments to be continued, meaning that the SWAO could potentially cease to provide these without repercussion. Similarly, the samples provided may be substantially simpler in their presentation when they are compared directly to the factual circumstances of an appellant's case, as the SWAO redacts all identifying information and reduces the complexity of the case so that it is easily presentable. An FOI request made as part of this study seeking additional case studies that had not been previously published was

[286] [2006] IESC 53.

[287] Social Welfare Appeals Office, *Annual Report* (Social Welfare Appeals Office, 2016), 79 et. seq.

refused on the basis of 'data protection concerns'[288] rather than the potential burden this might place on the Office, and limits the ability of appellants to request samples which may directly relate to their case. This may again curtail the appellant's ability to make an informed appeal. Finally, given that these case studies or sample cases are not provided through a database, and are in no way optimised in terms of search functionality, an appellant will not only need to be aware of their existence, but also search through all of the annual reports made by the SWAO in an attempt to find the relevant 'case law,' and ensure that they reflect the current state of the law without this context necessarily being provided.

Similarly, whilst the SWAO may attempt to grant oral hearings where they are requested, they still maintain the ability to refuse such solicitations, and the impetus is primarily on the applicant to ask for a full oral hearing and be aware that this is an option. Deferring to the relevant authorities, in this instance the AOs themselves, in how hearings should be administered on a case by case basis arguably allows those best placed to make such decisions the ability to determine how the process should be conducted. However, this form of discretion granted to AOs assumes that there will be no difference in outcomes between those determined through a summary judgment on the one hand, and those made following an oral hearing on the other. It also infers that there will not be discrepancies between individual AOs in using their own personal skill and judgment. A natural consequence of reading efficiency into the system and its operation is that discrepancies will arise. Statistics from the SWAO have highlighted that in 2014, 64.7% of oral hearings were successful whereas only 45.1% of summary appeals were wholly or partially upheld.[289] This is in spite of the fact that only 31.2% of appeals in 2014 were heard orally, and 68.8% were conducted summarily.[290] This does not differ greatly from the 2013 statistics, which found that 60.1% of oral hearings were successful whereas only 41.6% of summary determinations were upheld,[291] suggesting that where an appellant is granted an oral hearing, they will have a higher chance of success.

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[288] Email on the 13/01/2016 [on file with the author].

[289] Office of Social Welfare Appeals, *Annual Report 2014* (2015), 7.

[290] Office of Social Welfare Appeals, *Annual Report 2014* (2015).

[291] Office of Social Welfare Appeals, *Annual Report 2014* (2015).

The issue of delays has also been raised by both FLAC, as well as several of the interviewees within this study. This cannot be wholly attributed to the SWAO itself, as it can only take action following the original determination being made by the DO and an appeal being lodged with them, rendering the overall delay cumulative in nature. Rather, it demonstrates how the 'adequacy' approach to administrative process within the welfare system generally can provide a lower standard of care than the efficiency or bureaucratic rationality model of administrative justice.

The limited constraints placed upon the Minister and the Department as a whole in making a first-instance determination - as outlined previously within this chapter - are also not their responsibility. However, appellants may often wait in excess of one year before an appeal has been heard in full and the AO has made a ruling, and as one interviewee highlighted 'I can tell you anecdotally that there are people who've ended up homeless because the presiding officer got the law wrong and then didn't give the payment.'[292] Where the Minister or his delegated officer within the Department decides not to grant Supplementary Welfare Allowance in the intervening period, this will likely leave the appellant without a source of income,[293] and this may in turn lead to destitution. A fellow interviewee highlighted the potential impact of this delay, describing how

> **'**I remember working with one Polish man who had a really strong case and was applying for jobseekers allowance. It ended up going to appeal, and by the time it came around he was destitute. He was offered a flight back to Poland. His family was here, but I couldn't get through to him when the appeal did come up because he had gone. And I think he was entitled to that payment.'[294]

This may also dissuade people from lodging an appeal if they know it is likely to leave them without any financial support, or at the very least, place great mental and physical distress upon them whilst awaiting a final determination to be made. These delays will also potentially have a greater impact on migrants, who may not have the same kind of familial and community support which would provide for them pending an appeal.

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[292] FLAC, 'Not Fair Enough: Making the case for the reform of the social welfare appeals system' (FLAC, 2012).

[293] Interviewee 7.

[294] Interviewee 5.

From a purely statistical perspective, in terms of the number of successful appeals granted by the Office - in whole or in part - the SWAO is highly successful in carrying out its duties. This can not only be seen in the statistics on the HRC outlined above, but also in a general sense.

In 2014 for example, of the 31,211 appeals lodged 56.5% were upheld in whole or in part, an increase of 1.5% from 2013's figure of 55%.[295] This high level of successful appeals highlights that, if every first-instance determination were assumed to be correct, 17,636 people would have wrongly been barred from accessing their statutory right to some form of welfare payment. Additionally, 17% of appeals made were upheld as a result of the original DO altering their decision in favour of the claimant, down from 21% in 2013.[296] This latter category is particularly troubling, as it means that DOs can - in almost one in five instances - change their mind when asked to reconsider their original decision. It is however, even less reassuring that such a high number of DOs will not reconsider their determination, and allow it to reach the formal appeal stage and be overturned, as this demonstrates an inability to critically engage with their original determination. The volume of successful appeals, either wholly or in part, articulates that this is also not an issue with a small number of DOs.

Whilst the Office is highly successful in the work that it does and in discharging its duties, it cannot fully remedy the damage that may have already been caused to claimants who had to wait for an appeal to be granted before receiving the payment they were entitled to. The responsiveness of, and positive outcomes from, the SWAO cannot fix the substantial, and long-standing issues with first instance decision-making from DOs within the DEASP. As one interviewee noted,

> There was of course a rise in appeals because there was a rise in applications, but routinely, more than 50% often, they're successful. What the Department will respond with that they didn't get the right information at the preliminary stage, but should that not trigger a response which demands they get that information at the outset? Because that will save your department money. That's an ongoing debate with the Department, but it's not just about being able to access a payment. It can

[295] Office of Social Welfare Appeals, *Annual Report 2014* (2015), 6.

[296] Office of Social Welfare Appeals, *Annual Report 2014* (2015).

have a detrimental impact on people's wellbeing, without even considering what impact it has on their rights.'[297]

Another important point from the perspective of migrants in a general sense, is that they are already less likely in many instances to engage with welfare programmes than Irish citizens, largely due to the perception that it may reflect negatively upon, impact upon their continued residence or simply a cultural attitude which does not encourage engagement.[298] Significant research[299] has also found that in relation to access to justice and administrative justice in particular, regardless of whether the appeals process is more effective than the first-instance procedure, individuals are less likely to enter an appeal due to their perception of the initial process[300] - both appeals and first-instance decision making is viewed as being comparable, and they do not believe that the decision will be altered. For migrants, who are already less likely to apply at all for a welfare payment in many instances, they may represent the most significant number of individuals who disengage entirely and fail to mount an appeal - this is in spite of the fact that the success rate for appeals against the HRC has remained consistently high on an annual basis since its introduction.

What becomes clear from the appeals process as a whole is that it appears to be better administered than first-instance adjudications. The procedural rules binding the Office, as well as the administrative rights granted to appellants are often unsatisfactory, but largely work in practice. This does, however, offer little consolation to individuals who may have been detrimentally impacted by a negative first-instance decision.

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[297] Interviewee 5.

[298] E. Quinn, E. Gusciute, A. Barrett and C. Joyce, 'Migrant Access to Social Security and Healthcare: Policies and Practice in Ireland,' (ERSI, July 2014); A. Barrett, & Y. McCarthy, 'Immigrants in a booming economy: analysing their earnings and welfare dependence' (2007) 21(4/5) *Labour* 789; A. Barrett & Y. McCarthy, 'Immigrants and welfare programmes: exploring the interactions between immigrant characteristics, immigrant welfare dependence and welfare policy' (2008) 24(3) *Oxford Review of Economic Policy* 542; V. Timonen & M. Doyle, 'In search of security: migrant workers' understandings, experiences and expectations regarding 'social protection' in Ireland' (2008) 38(1) *Journal of Social Policy* 157; and more generally J. Power & P. Szlovak, 'Migrants and the Irish Economy' (The Integration Centre, 2012), 20-22.

[299] V. Lens & S. Vorsanger, 'Complaining after claiming: Fair hearings after welfare reform' (2005) 79 *Social Service Review* 430; D. Cowan & S. Halliday, *The appeal of internal review: Law, administrative justice and the (non-)emergence of disputes* (Hart Publishing, 2003); S. Lloyd-Bostock & L. Mulcahy (eds.), *The social psychology of making and responding to hospital complaints: An account model of complaint behavior* (Oxford University Press, 1996); G. Miller & J.A. Holstein, *Dispute domains and welfare claims: Conflict and law in public bureaucracies* (JAI, 1996).

[300] V. Lens, 'Administrative Justice in Public Welfare Bureaucracies When Citizens (Don't) Complain' (May 2007) 39(3) *Administration and Society* 382.

Conclusion

The Irish welfare system is one which has been fundamentally reshaped by the Irish State's response to its first continuous influx of migrants from the late 1990s onwards. In a general sense, despite certain constitutional and principles of administrative law which highlight the potential for Ireland to align more closely with the universalist mode of welfare provision, it is strongly specific in terms of its application. This can most clearly be seen in the division between social security and social assistance, and the lack of a right to welfare payments outside of what is contained within the relevant legislation and certain other limited circumstances protected by common law principles.

For migrants, the system is even more specific than that which applies to Irish citizens due to the reforms undertaken by the State during the latter part of the Celtic Tiger period. This has ultimately meant that, from a legal standpoint, migrants face even greater difficulties than national citizens, and will find it more difficult to vindicate their rights in this area. The addition of the Habitual Residence Condition, the right to reside test, and other recent reforms to the system for migrants are clear examples of legislative provisions which are designed to create barriers to access. By falling outside of the labour market, migrants can effectively fall outside of the welfare system in a manner which is not equally applicable to Irish citizens.

These shifts within the system were part of the first significant and sustained legislative programme undertaken by the Irish State since the creation of the welfare state, and are partly attributable to the overall process of Europeanisation. The HRC, for example, pulls directly from EU law and the provisions laid out in Directive 2004/38/EC on co-ordinating access to social assistance. However, Ireland could have maintained a more preferential system for migrants and simply elected not to transpose the HRC into Irish law. Prior to 2004, this was in fact the case. Ireland likely chose to introduce the HRC in light of the increased number of asylum claims that it received in the latter part of the 1990s and early 2000s, as well as the accession of several Central and Eastern European Member States almost immediately after this. That the State did so within this context, and with such little consideration of whether this would comply with EU law, demonstrates the degree to which it sought to serve national interests through selective Europeanisation. Following the Financial Crisis of 2008 and the adoption of the 'Bailout Package' soon after this, the State then utilised similar tactics to reform the system gen-

erally, whilst continuing to argue that it was necessary in order to comply with the conditions laid out by the European Commission, European Central Bank, and the (non-EU) International Monetary Fund - despite these institutions being largely agnostic in terms of which payments were cut and how the necessary savings would be made.

The system has increasingly become one which is highly opaque and difficult to navigate. Processes which would, on a purely legislative level, appear to be fair are now under-resourced, often with poorly trained staff and constantly shifting priorities. This would create significant difficulties for anyone attempting to engage with the welfare system, but place a disproportionate burden on migrants who will not possess comparable levels of social and cultural capital with regards to the State's administrative processes, placing them at an almost immediate disadvantage. This is then compounded by the increased focus on refusing payments and treating clients with a degree of distrust, as migrants will often have more complex personal circumstances, may lack the documentation necessary to make an application 'airtight,' may not speak English as a first language, and will not have the same kind of familial and community networks necessary to support them whilst awaiting a determination of their claim at first-instance or during an appeal - particularly where Supplementary Welfare Allowance is refused.

What administrative set of 'values' this seems to suggest is unclear. It was recommended that the welfare system embody the notion of 'adequacy,' which is itself something that does not clearly align with any concept of administrative justice. This is made even harder by the fact that employees within the DEASP believe that there isn't any set of values which have been imposed from a hierarchical point of view. Staff may themselves focus on ensuring that applications are process quickly and clearly, but that does not necessarily correlate with how the system operates - particularly one which is under-resourced and thought to be operating with consistently changing priorities.

This ultimately raises two interrelated points about the mode of welfare provision which the Irish system most closely aligns with. Firstly, the Irish system has become more specific and opaque over time, and this has had a significant impact on the ability of migrants to access welfare payments as the reforms either sought to achieve this objective or simply have this effect in practice. The system as it applies to them is consequently even more specific and limited than that which it is applied to Irish citizens. If migrants must interact with the welfare system, they will have to ensure that their application is 'airtight,' as well as being able to support themselves until such time as the

payment is granted and in the event that the payment is discontinued. From an administrative justice perspective, this means that the effectiveness of the appeals process operated by the SWAO may be immaterial, as individuals will often assess the appeals process prior to lodging an appeal based on their initial experience - for migrants, this is potentially even more pronounced as they may be less likely to engage with welfare programmes at all. Secondly, the gradual Europeanisation of the system is one of the elements that has contributed to this problem, but it is a selective Europeanisation which ensures that the interests of the State are maintained and that national policy objectives are served. It also potentially raises questions of how committed Ireland is to fulfilling its obligations under EU law, and its willingness to uphold the integrity of the free movement of persons where it will allow the application of measures like the HRC to potentially conflict with both of these.

SECTION TWO - Applying the EU and Irish Modes to EU Citizens and TCN Labour Migrants

5. EU Citizens Resident in Ireland: The Importance of Technical Expertise

5.1 Introduction

As Chapter Three demonstrated, the European Union's legal framework governing welfare coordination presents somewhat of a paradox in terms of the mode which it most closely conforms with. On the one hand, its objective is clearly universalist, as it seeks to make it easier for individuals - in this case EU citizens and TCN labour migrants - to access the welfare system of their host State. On the other, the way in which it constructs its rules almost exclusively benefits those who are continually engaged in labour market activity. Decommodification under EU welfare rules is a direct result of constant commodification - it can only ever be slight, unless the individual in question is an EU citizen and qualifies for long-term residence. Ireland, as outlined in Chapter Four, also operates a welfare system which, in principle, has both universalist and specific characteristics but aligns more closely with the specific mode in reality due to the ineffective manner in which it operates at an administrative level, as well as changes made at a legislative level in response to inward migration. Thus, it is specific because of its opaqueness, whether intentional or not, and the more conscious decision to implement reforms which limit migrant access to the welfare system.

Building on these two separate systematic analyses, this chapter seeks to explore how EU law has impacted on welfare provision in Ireland for EU citizens as a distinct category of migrants, to assess what the effects of any changes brought about by the Europeanisation of Irish welfare law have been for such persons, and if this causes the Irish welfare system to realign itself with the two modes in any way. Or, put more simply, to underline the extent to which the imposition of EU rules and values have impacted upon welfare provision in Ireland. Throughout the course of the interviews conducted as part of this study, it was common for the interviewees to argue that EU citizens sit at the apex of a 'migrant hierarchy,' and they 'have privileges. That's part of our membership of the EU.'[1] In some instances, it was even put forward that 'you have more rights as an EU citizen and in certain cases, more rights than foreign nationals, but even

[1] Interviewee 1.

Irish citizens in certain scenarios.'[2] This can be seen, for example, in the often preferential rights granted by virtue of the Family Reunification Directive[3] and the extended definition of family adopted in legislation such as Regulation 492/2011 as discussed in Chapter Three. However, in arguing that Union citizens *may* have greater rights than other categories of migrants - such as third-country national labour migrants - in terms of access to welfare payments, interviewees underlined that 'whether or not those are applied is a different story.'[4] In some instances, they believed that 'if you had a different skin colour, if you had an accent indicating you weren't Irish, your social welfare claim is likely to get a lot more scrutiny that someone else's whose white, has no accent and has lived here their entire lives.'[5] One interviewee went even further, by highlighting that

> 'I think in practice you find that EU citizens, particularly when the recession hit, and they'd worked here for 8 or 10 years, they were out of work for what might have been the first time and could have difficulty accessing even a contributory payment. And even if they accessed that and it ran out and they tried to access an allowance, the attitude could be 'well just go home.' And this is their home. This is where they chose to make their home. They've put down roots here, they may be married or found a partner here, they may have children here who are in school. Or none of those things, but their entire circle of friends is here and their life is here.'[6]

The purpose of this chapter is therefore threefold. Firstly, it aims to establish the relevant rules in relation to EU citizens accessing welfare in Ireland. It seeks to examine how these rules operate within the Irish context and how they have been incorporated within Irish legislation where necessary. Then, it endeavours to elucidate the degree to which EU law has normatively impacted upon welfare provision for EU citizens using

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[2] Interviewee 6.

[3] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification OJ L 251, 3.10.2003, p. 12–18.

[4] Interviewee 5.

[5] Interviewee 2.

[6] Interviewee 5.

the concept of Europeanisation. In this respect, it places a particular emphasis on the preliminary reference procedure, a cornerstone of EU law which attempts to ensure the effectiveness and scope of Union rules by referring questions on points of EU law to the Court of Justice. Lastly, it conducts an analysis of some of the core barriers to accessing welfare payments for EU citizens in Ireland who must engage with the DEASP and SWAO in a practical sense. EU welfare law strongly aligns with the specific mode of welfare provision in practice, and it will be possible to look at thematic areas of the Irish implementation of these laws to answer all three questions.

Whilst these are by no means the only issues raised in relation to the impact of EU law on the Irish welfare state where it relates to EU citizens, they cumulatively suggest that the Irish welfare state behaves according to its own rules, and does not appear to be fully Europeanised. The level of Europeanisation that has taken place from a doctrinal perspective is quite high, but from a practical standpoint is, in certain key areas, extremely low, as the Irish executive and DEASP allow for an ineffective system (which at least partially hinders the free movement rights of EU citizens) to continue to operate, with evidence pointing towards the disproportionate burden this has had on citizens from Central and Eastern European Member States. What this ultimately says about the Irish welfare system as it relates to EU citizens is that, like the relevant EU rules, it aligns strongly with the specific mode. However, the often questionable implementation and lack of adherence to these same EU rules - what can be considered an overall lack of technical expertise - also means that it lacks sufficient clarity and can be somewhat arbitrary in nature, in a manner that does not reflect what is enshrined in EU law.

The chapter will also be structured based upon the three objectives outlined above. Section two will briefly introduce the relevant EU rules as they exist within the Irish context, identifying some of the most prevalent strands that became evident throughout the course of this study, as well as conducting a brief analysis of the DEASP Departmental guidelines relating to EU citizens resident in Ireland from a welfare perspective. The third section will then deal with the degree to which the Irish welfare system has been Europeanised by general constitutional values of EU law, focusing on the preliminary reference procedure and the effect that the reticence of the SWAO and Superior Courts to make such references has had on the free movement rights and right to welfare payments for EU citizens. This will be followed by a fourth section which will explore the issues which have arisen before the Superior Courts in relation to EU citizens

accessing welfare payments based once again on the thematic strands which became evident throughout the course of this study, before providing some brief concluding remarks.

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5.2 The Applicable Laws and Rules for EU Citizens

In terms of the legislation that applies to EU citizens present in Ireland, the majority of these have been outlined from the perspective of the EU welfare framework in Chapter Three. These include, but are not limited to: Regulation 883/04 on the coordination of social security schemes;[7] Regulation 987/2009 which gives further effect to Regulation 883/04;[8] Directive 2004/38/EC which deals with residency rights of EU citizens and access to social assistance;[9] and Regulation 492/2011, which is the current measure extending further protections to workers, those who can claim worker status and their family members or dependents.[10]

In respect of the Regulations outlined above, each of these are directly applicable in the Irish context, and do not therefore require further implementing measures.[11] Directives by comparison, such as Directive 2004/38/EC, outline the parameters within which Member States are expected to take action. As such, they require further implementation nationally. This has been achieved through both amendments to the Social Welfare (Consolidation) Act of 2005,[12] as well as through statutory instruments and other policy-based measures.[13] This creates a situation within which the DEASP and the State must not only ensure direct compliance with the Regulations immediately after they take effect, but also take further action at the national level to correctly interpret and imple-

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[7] Regulation 883/2004 on the Co-ordination of Social Security Systems [2004] OJ L166/1.

[8] Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems [2009] OJ L284/1.

[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 [2004] OJ L158/77.

[10] Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L141/1.

[11] Treaty on the Functioning of the European Union, Article 288.

[12] Arguably the Social Welfare (Consolidation) Act 2005, Section 246(1) which implements the Habitual Residence Condition is one such amendment, albeit one which the Irish State elects to implement as it could nominate to operate a more favourable system for EU citizens.

[13] See S.I. No. 548/2015 - European Communities (Free Movement of Persons) Regulations 2015; and S.I. No. 656/2006 - European Communities (Free Movement of Persons) (No. 2) Regulations 2006.

ment any new Directives adopted in this field. The Irish State is also bound by the constitutional provisions outlining the free movements themselves, the jurisprudence of the CJEU which has developed the rights of EU citizens over time in terms of access to welfare payments,[14] the protections granted by virtue of the Charter of Fundamental Rights,[15] and general principles of EU law such as the principle of 'good administration.'[16]

However, before exploring the manner in which these constitutional values and procedural requirements have impacted upon the Irish welfare system and potentially Europeanised the way in which it operates, it is necessary to briefly examine some of the most pertinent rules and their implementation within Irish law. Namely, the Habitual Residence Condition, the rights of self-employed citizens, and the administrative guidelines used by the Department of Employment Affairs and Social Protection and the Minister to interpret and give effect to their obligations under EU law.

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[14] See the TFEU, Articles 18, 20-21, 45, 48 and 49.
See also, Case C-53/81 *Levin Straatssecretaris van Justitie* [1982] ECLI:EU:C:1982:105; Case 66/85 *Lawrie-Blum* [1986] ECLI:EU:C:1986:284; Case C-196/87 *Steymann v Staatsecretaris van Justitie* [1988] ECLI:EU:C:1988:475; Case 139/85 *Kempf v Staatssecretaris van Justitie* ECLI:EU:C:1986:223, paras 11-12 150 Case C-357/89 *Raulin v Minister van Onderwijs en Wetenschappen* [1992] ECLI:EU:C:1992:87; Case C14/04 *Dellas and Others v Premier ministre and Ministre des Affaires sociales, du Travail et de la Solidarité* [2005] ECLI:EU:C:2005:728; Case C-268/99 *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie* [2001] ECLI:EU:C:2001:616; Case C-300/84 *Van Roosmalen v Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen* [1986] ECLI:EU:C:1986:402;. Joined cases C-51/96 and C-191/97 *Deliege v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo* [2000] ECLI:EU:C:2000:199; and Case C-268/99 *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie* [2001] ECLI:EU:C:2001:616.

[15] Case C-45/12 *Office national d'allocations familiales pour travailleurs salariés (ONAFTS) v Radia Hadj Ahmed* [2013] ECLI:EU:C:2013:390 - 'It must be recalled that the fundamental rights guaranteed in the legal order of the European Union, including the Charter, are applicable in all situations governed by European Union law, but not outside such situations.'
See also, Charter of Fundamental Rights, Article 34(1) and 34(3) on the rights to social security and assistance. For criticisms and commentary on these, see See S. O'Leary, 'Solidarity and Citizenship Rights in EU Law and the Welfare State' in G. de Burca (ed.), *In Search of Solidarity* (Oxford, 2005), 50; Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02); and Case C-571/10 *Servet Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others* [2012] ECLI:EU:C:2012:233 for the view that the social rights within the 'Solidarity Chapter' of the Charter are not cognisable by the CJEU. By contast, D. Shortall, 'Social Welfare Rights of EU Citizens in Ireland' (2017) 20(1) *Irish Journal of European Law* 80, 81; Case C-443/11 *Jeltes v Raad van bestuur van het Uitvoeringsinstituut werknem ersverzekerin -gen* [2013[ECLI:EU:C:2013:224, para 46; and Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government* [2008] ECLI:EU:C:2008:178, which suggest that these rights can, in very limited circumstances, take effect.
In relation to the procedural rights contained within the Charter, see Charter of Fundamental Rights, Articles 21, 27, 41, 42, 43 and 48.

[16] See, for example, Joined Cases 1-57 and 14-57 *Soci.t. des usines . tubes de la Sarre* [1957] ECLI:EU:C:1957:13; Case C-255/90 *Jean-Louis Burban v European Parliament* [1992] ECLI:EU:C:1992:153; and Case T-167/94 *Detlef Nölle v Council of the European Union and Commission of the European Communities* [1995] ECLI:EU:T:1995:169.

5.2.1 The Habitual Residence Condition, as Interpreted by Irish Law

As Chapter Four illustrated, the Habitual Residence Condition as it has been transposed into Irish law raises some significant questions regarding Ireland's compliance with EU law. For example, the original two year period of residence necessary to satisfy the HRC[17] - if applied in a literal manner - would be in clear violation of the judgment in *Swaddling*,[18] as well as the relevant Regulation which put the criteria outlined in *Swaddling* on a legislative footing. Who is considered to have a right to reside for the purposes of Irish law has been very narrowly defined, and would exclude jobseekers and former workers or self-employed persons when interpreted in a literal manner.[19] However, the DEASP does appear to have adopted a more functionalist approach in this regard. This is likely due to the requirement that this list of who possesses a right to reside is not considered exhaustive.[20] To do so would constitute a clear violation of EU law and DOs should ensure that the integrity of the relevant EU rules are maintained at all times.[21]

In its 2004 Report, the SWAO raised several immediate concerns regarding the HRC, including that it may be inconsistently applied,[22] that the burden of proof remains with the applicant to establish habitual residence,[23] and that there may be significant issues with the HRC formally applying to 'family payments' within the meaning of EU law but to which it cannot be applied where EU migrant workers are concerned.[24] In relation

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[17] Social Welfare (Consolidation) Act 2005, Section 246(1).

[18] Case C-90/97 *Robin Swaddling v Adjudication Officer* [1999] ECLI:EU:C:1999:96.

[19] Social Welfare Consolidation Act 2005, Section 246(6)(a), as amended by the Social Welfare and Pensions (No. 2) Act 2009, Section 15; and S.I. No. 548/2015 - European Communities (Free Movement of Persons) Regulations 2015.

[20] *Gusa v Minister for Social Protection & ors* [2016] IECA 237, para 14.

[21] Case C-103/88 *Fratelli Contanzo* [1989] ECLI:EU:C:1989:256, para 33.

[22] Social Welfare Appeals Office, Annual Report (Social Welfare Appeals Office, 2004), 10: 'Appeals Officers were concerned about the adequacy of safeguards to ensure consistency of the decision making process by the Department.'

[23] Social Welfare Appeals Office, Annual Report (Social Welfare Appeals Office, 2004), 10: 'The legislation is framed in a manner that presumes that a person shall not be habitually resident until the contrary is shown.'

[24] Social Welfare Appeals Office, Annual Report (Social Welfare Appeals Office, 2004), 10: 'There are particular concerns in relation to the application of the HRC to the Child Benefit Scheme – including a view that Child Benefit should have been excluded from the remit of the HRC altogether. Under EU legislation Child Benefit is a 'Family Benefit' which confers rights to "migrant workers" who are nationals of the European Economic Area (EEA) and resident in the State. What this means in effect is that the HRC cannot be applied in the manner envisaged for Child Benefit purposes to EU 'migrant workers.'

to the first two points, both Tables 4.2 and 4.3 have established that each of these concerns are chronic issues, that the Department and Minister were made aware of this, and that both the Department and the Minister have thus far failed to take action remains troubling. Although this data, which was requested via parliamentary question, suggested that it was not possible to provide more detailed breakdowns of the categories of migrants most affected by the application of the HRC based upon their country of origin, Cousins establishes that in the period from May of 2004 until April of 2006 at least, the Department was tracking this information to some degree.[25] The HRC was noted to have affected at its peak during this period: Irish citizens in 10% of cases, 18.8% of third-country national labour migrants, 49.3% of the most recent accession States and 61.9% of EU13 nationals.

Whilst this is an even more limited dataset than that provided directly for the study, it does suggest that EU citizens, particularly from Central and Eastern Europe were the most disadvantaged. The impact on the Roma community in Ireland has also been noted elsewhere in several instances, as they often suffer from existing forms of oppression or deprivation that are then compounded by the application of the habitual residence condition,[26] often resulting in destitution and child protection issues.[27]

5.2.2 Self-Employed EU Citizens and the Irish Welfare System

Self-employed persons exist in a somewhat more complex space in terms of EU welfare law than EU citizens who act as workers or direct employees within the meaning of Article 45 TFEU. As Chapter Three outlined, this is due to the fact that the self-employed are governed by Article 49 TFEU on the right of establishment, creating what

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[25] Mel Cousins & ors, 'Technical Review of the Social Welfare Code to Examine its Compatibility with the Equal Status Acts: Final Report' (Review Gate, 2009-2011), 189.

[26] Pavee Point, 'Habitual Residence Condition – Briefing Paper' 3 <http://www.paveepoint.ie/wp-content/uploads/2014/01/Briefing-Paper-HRC-and-Roma.pdf> accessed 01/10/2016 - 'Due to low literacy levels and language barriers for Roma, applicants may not have all the documentation needed to prove habitual residency and may face difficulties responding to the Department. They also may not have proof of residence if they are living with extended family. Roma often do not trust authorities, sometimes due to information having been used against them in the past in their home countries. There is little support for applicants in making their applications, in particular the availability of suitable translators.'

[27] Joint Committee on Education and Social Protection Debate, 'Habitual Residence Condition: Discussion with Pavee Point' (Wednesday, 6 February 2013) <http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/DebatesWebPack.nsf/committeetakes/EDJ2013020600009?opendocument> accessed 09/10/2016 - 'the habitual residence condition is resulting in serious issues of child poverty and destitution for Roma in Ireland. For example, social workers have reported concerns about young babies whose parents have no means to support them. Forced poverty is causing serious child protection issues. Social workers report that they are forced to consider taking a child into care simply to provide access to basic services. Social workers are frustrated that this is the only option for looking after these children.'

some scholars consider to be an anachronistic distinction between two categories of economically-active citizens.[28] Over time, this distinction has slowly been eroded, with the Court of Justice, through the concept of citizenship, gradually referring to the self-employed as another category of citizen who should not be subject to discrimination,[29] the adoption of Directive 2004/38/EC[30] - the Citizenship Directive -, and the modification of Article 48 TFEU post-Lisbon to include workers *and* self-employed persons within the Union's competence to enact legislation for the coordination of social security. In this respect, both are now viewed as 'migrant workers' for the purposes of EU welfare law. One of the sole exceptions that remains is Regulation 492/2011,[31] which was enacted on the basis of Article 46 TFEU and continues to apply solely to citizen workers.

The Irish welfare system by comparison, has created a rather sharp delineation between the rights of workers and self-employed persons within national law and in terms of the welfare payments they are capable of accessing. Workers resident in Ireland pay into Class A of pay related social insurance (PRSI), whilst the self-employed pay into Class S. Due to the different classes of contributions made by both, individuals who act as self-employed service providers are considered to be excluded from applying for contributory social security payments. Shortall suggests this is attributable to the different levels of contribution[32] - the self-employed contribute at a reduced rate - made by both categories of economically-active persons. However, from the perspective of mobile EU citizens acting in a self-employed capacity, this raises important questions regarding Ireland's compliance with EU law in this respect. If this is taken literally, EU

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[28] D. Chalmers, G. Davies & G. Monti, *European Union Law* (3rd edn., Cambridge University Press, 2014), Chapter 19.

[29] See for example, Case 48-75 *Jean Noël Royer* [1976] ECLI:EU:C:1976:57, para 12; Case C-208/07 Petra von Chamier-Gliszczinski v Deutsche Angestellten-Krankenkasse [2009] ECLI:EU:C:2009:455; Case C-345/09 *J.A. van Delft and Others v College voor zorgverzekeringen* [2010] ECLI:EU:C:2010:610; and European Commission, Free movement and residence of Union citizens within the European Union (Oct 2004) <http://www.pedz.uni-mannheim.de/daten/edz-k/gdj/04/free_movement_281004_en.pdf> accessed 01/10/2017.

[30] Directive 2004/38/EC of the European Parliament and 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, 29 April 2004, 2004/38/EC OJ L 158/77.

[31] Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L141/1.

[32] D. Shortall, 'Social Welfare Rights of EU Citizens in Ireland' (2017) 20(1) *Irish Journal of European Law* 80, 88.

citizens who are self-employed in Ireland are unable to access anything outside of social assistance and special non-contributory cash benefits, and this potentially hinders the effectiveness of their right to free movement in the Irish context. From the perspective of Union law, Regulation 883/04 on the coordination of social security *should* apply to them.[33] What makes this more acute is that Regulation 492/2011 only allows workers, those who retain worker status and jobseekers to access minimum subsistence payments such as the Supplementary Welfare Allowance (SWA),[34] meaning that the self-employed already have less access to the welfare system of their host State in this regard.

On this point, EU law and the position of the Commission appears to be somewhat muted. In 2011, the Commission argued that 'The EU directive on the free movement of EU citizens (Directive 2004/38/EC) allows for restrictions of access to social assistance only, but it cannot restrict the access to social security benefits (including special non-contributory cash benefits),' and that 'in the absence of any such explicit derogation, the principle of equal treatment ensures that EU citizens may not be treated differently from the nationals of a Member State.'[35] The difficulty in this instance arises from the relationship between Union welfare rules and the competence of Member States, such as Ireland, to organise their national welfare systems as they see fit. Regulation 883/04 does not allow for discrimination based on the grounds of nationality, and a Union citizen has an equivocal right to equal treatment with citizens of their host State.[36] This has subsequently been qualified in terms of additionally recognised categories of social se-

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[33] Regulation 883/2004, art 1(b). See also, Case C-300/84 *Van Roosmalen v Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen* [1986] ECLI:EU:C:1986:402, para 21; Joined cases C-51/96 and C-191/97 *Deliege v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo* [2000] ECLI:EU:C:2000:199, paras 53 and 54; and Case C-268/99 *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie* [2001] ECLI:EU:C:2001:616, para 33.

[34] Regulation 492/201, Articles 2,5 and 7.
See also, Case 32-75 *Cristini v Société nationale des chemins de fer français* [1975] ECLI:EU:C:1975:120, para 12; Case C-249/83 Hoeckx v Openbaar Centrum voor Maatschappelijk Welzijn, Kalmthout ECLI:EU:C:1985:139, para 22; as well as Department of Social Protection, HRC - Guidelines for Deciding Officers on the determination of Habitual Residence, 14/7/2017, appendix 5 <http://www.welfare.ie/en/Pages/Habitual-Residence-Condition--Guidelines-for-Deciding-Offic.aspx#app5> accessed 02/01/2018.

[35] European Commission, Social security coordination: Commission requests United Kingdom to end discrimination of EU nationals residing in the UK regarding their rights to specific social benefits, 29 September 2011, 2.

[36] Regulation 883/04, Article 4.

curity to a certain extent by *Commission v UK*,[37] but Regulation 1408/71,[38] the precursor to Regulation 883/04, was adopted on the basis that a system which breaks down national barriers for EU citizens to access social security must be established in order to allow for an effective right to free movement. The Union does recognise that 'considerable differences existing between national social security legislations,'[39] and these are unaffected by EU law - even in instances such as this where the national rules are non-discriminatory but may have a substantial impact on the free movement rights of self-employed EU citizens.[40]

Ireland may therefore be compliant with EU law in this respect, but it is almost entirely on the basis that it has the competence to organise its welfare system as it desires. It has made no effort to Europeanise itself by moving towards a system of welfare provision which would be more effective for self-employed EU citizens. For self-employed EU citizens resident in Ireland, the welfare system is even more specific than that which applies to citizen workers.

5.2.3 Departmental Guidelines Relating to EU Citizens

EU welfare law can be highly complex. Not only is it a constantly evolving area of law, the manner in which payments are categorised and defined have been kept intentionally broad in order to ensure the greatest level of access possible for Union citizens - albeit whilst remaining heavily focused on the economically-active migrant worker. This does not mean that with due care the interactions between the different supranational rules cannot be established, and subsequently applied correctly within a national context to a specific set of factual circumstances. Rather, it puts the Member States on notice that the guidelines given to those applying these rules, in this instance Deciding

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[37] Case C-308/14 *European Commission v United Kingdom of Great Britain and Northern Ireland* [2016] ECLI:EU:C:2016:436.

[38] Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community OJ L 149 , 05/07/1971 P. 0002 – 0050.

[39] Regulation 1408/71, Preamble.

[40] Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECLI:EU:C:1978:49, para 17: 'Furthermore , in accordance with the principle of the precedence of community law, the relationship between provisions of the treaty and directly applicable measures of the institutions on the one hand and the national law of the member states on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but... and take precedence in, the legal order applicable in the territory of each of the member states - also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with community provisions.'

Officers and Appeals Officers within the DEASP and SWAO, must clearly outline how they are to be interpreted and applied based upon the different factual circumstances that will be presented to them, and on a consistent basis.

Both categories of Officers (DOs and AOs) maintain a discretion in making their determinations,[41] but are expected to follow any departmental guidelines in doing so, as well as being bound by the relevant legislation. Guidelines cannot alter the rights contained within the Regulations or within the legislation implementing the Directive. They are considered to be the correct interpretation of the rights contained within them, and the primary benchmark against which these officers assess the facts of the case brought before them at first-instance and at the appeals stage. Unfortunately, the guidelines created and maintained by the DEASP are often deeply unsatisfactory, and would potentially allow for incorrect determinations to be made. This is often due to the Department's apparent lack of care in relation to maintaining adequate guidelines. In terms of the variety of guidelines utilised by the Department, these can be general in character, which outline how EU rules are to be interpreted and applied in a global sense, or integrated into the guidelines for individual payments, which apply the EU rules where they are directly relevant and in a targeted manner.

In terms of the general guidelines, the volume currently published by the Department for EU/EEA citizens has many inconsistencies and demonstrates a lack of care in ensuring that these are up to date. In the introductory chapter to this volume for example,[42] there are several references to the 'European Communities' (EC) rather than the European Union, as well as including pre-Lisbon Treaty articles. The last Treaty amendments that the guidelines seem to formally recognise are those stemming from the Nice Treaty of 2001.[43] This is quite alarming in some respects, as the EC ceased to exist in

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[41] *McLoughlin v Minister for Social Welfare* [1952] IR 1, 27; *Hoolahan v Minister for Social Welfare*, High Court, unreported, 23rd July 1986; and *Minister for Social, Community and Family Affairs v Scanlon* [2001] 1 I.R. 56, 87.

[42] Department of Employment Affairs and Social Protection, 'An Introduction To The EC And The EEA And The Free Movement Of Workers' (11/11/2013) < http://www.welfare.ie/en/downloads/EUGuideline-Part1.pdf> accessed 02/02/2017.

[43] Department of Employment Affairs and Social Protection, 'An Introduction To The EC And The EEA And The Free Movement Of Workers' (11/11/2013) < http://www.welfare.ie/en/downloads/EUGuideline-Part1.pdf> accessed 02/02/2017, 3.

2009, and the guidelines have been infrequently, and unevenly updated in the almost 10 years since this time to reflect the developments that took place after 2001.[44]

The DEASP has also created an information booklet for applicants from a number of EU Member States, which attempts to explain to them how the Irish welfare system operates and what their entitlements are.[45] This refers to both EC and EU welfare rules somewhat interchangeably,[46] fails to reflect the accession of Croatia to the Union in 2013,[47] and is extremely broad in its approach. Rather than providing a comprehensive overview of the applicable EU rules in the area, it focuses on how the Irish welfare state operates in an overarching sense. This broadness is similarly reflected in the more recently information campaign undertaken by the DEASP to inform EU citizens of their rights in their native language[48] where, for example, the section on social security merely discusses Category A PRSI contributions, and does not detail the rights of such persons.[49] This approach varies greatly from the handbook created by the European Commission for EU citizens living in Ireland,[50] which succeeds in being clear and concise in

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[44] Department of Employment Affairs and Social Protection, 'An Introduction To The EC And The EEA And The Free Movement Of Workers' (11/11/2013) <http://www.welfare.ie/en/downloads/EUGuideline-Part1.pdf> accessed 02/02/2017, 4 - the 2007 accession States are reflected within the list of *EC* Member States; versus Department of Employment Affairs and Social Protection, 'An Introduction To Regulation 883/04' <http://www.welfare.ie/en/downloads/EUGuidelinePart2.pdf> accessed 02/02/2017 - refers to Regulation 987/09.

[45] Department of Employment Affairs and Social Protection, 'Your Social Security Rights in Ireland: A Guide for EU Citizens' <http://www.welfare.ie/en/downloads/socialsecurityrightsireland.pdf> accessed 19/05/2017.

[46] Department of Employment Affairs and Social Protection, 'Your Social Security Rights in Ireland: A Guide for EU Citizens' <http://www.welfare.ie/en/downloads/socialsecurityrightsireland.pdf> accessed 19/05/2017, 20.

[47] Department of Employment Affairs and Social Protection, 'Your Social Security Rights in Ireland: A Guide for EU Citizens' <http://www.welfare.ie/en/downloads/socialsecurityrightsireland.pdf> accessed 19/05/2017, 21.

[48] Department of Employment Affairs and Social Protection, 'Moving to or from Ireland' (11/04/2018) <http://www.welfare.ie/en/Pages/Moving-to-or-from-Ireland.aspx> accessed 16/04/2018 - includes guidance in 18 separate recognised languages of the EU.

[49] See for example, Department of Employment Affairs and Social Protection, 'Irlanda - Ghidul Pentru Un You Inceput' (12/11/2013) <http://www.welfare.ie/en/Pages/Romanian-1.aspx> accessed 16/04/2018.

[50] European Commission, 'Your Social Security Rights in Ireland' <http://ec.europa.eu/social/BlobServlet?docId=13764&langId=en> accessed 01/07/2017.

terms of the specific thresholds and requirements for individual payments,[51] as well as the welfare system generally.[52]

The Department has also created specific guidelines relating to individual payments, establishing how EU law relates to them. For example, the guidelines for Deciding Officers on the application of the Habitual Residence Condition specifically refer to the relevant national implementing measures, as well as how the HRC is to be applied to EU citizens seeking to access special non-contributory cash benefits.[53]

It is possible that these guidelines are simply those that are made available to the public, and that more detailed booklets are used internally to help DOs and AOs render their decisions. As Shortall notes, the Department operates an informal consolidated version of the Social Welfare (Consolidation) Act 2005 internally for its own use[54] - as there is no publicly available up to date version - and the same may be true in relation to the EU rules. This does however, raise questions concerning why these are not publicly available, and the negative impact this may have on EU citizens who are either making a claim or lodging a formal appeal. If this is not the case, then this means that are no comprehensive guidelines on the basis of which DO and AO can render their decisions. Such officers will have to reconcile these older guidelines with the guidance on individual payments, as well as reconciling these with the national legal provisions which can also be equally complex, if not more so, than the EU rules. This remains the case even where a DO or AO has the informal consolidated version of the Primary Act available to them.

This ultimately harks back to the idea that Ireland is willing to engage with the EU institutions and EU law where it is able to maximise the benefits of its membership

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[51] European Commission, 'Your Social Security Rights in Ireland' <http://ec.europa.eu/social/BlobServlet?docId=13764&langId=en> accessed 01/07/2017, 8-9 where the specific PRSI contributions into Class S for self-employed EU citizens are outlined in relation to maternal/paternal leave.

[52] European Commission, 'Your Social Security Rights in Ireland' <http://ec.europa.eu/social/BlobServlet?docId=13764&langId=en> accessed 01/07/2017, 7 and 12 for example refer to the concept of Habitual Residence. Rather than dealing with this in one section, it is detailed within every payment to which the concept and the HRC apply. Similarly, 15-17 detail the necessary mechanics of the healthcare system and how an EU citizen can interact with it under EU law.

[53] Department of Employment Affairs and Social Protection, 'HRC – Guidelines for Deciding Officers on the determination of Habitual Residence' <http://www.welfare.ie/en/Pages/Habitual-Residence-Condition--Guidelines-for-Deciding-Offic.aspx#app5> accessed 19/03/2016. See Appendixes 2-5 in particular.

[54] D. Shortall, 'Social Welfare Rights of EU Citizens in Ireland' (2017) 20(1) *Irish Journal of European Law* 80, 84 at footnote 86.

whilst imposing the lowest burden possible upon itself,[55] and that the DEASP has either a very limited technical expertise in this area,[56] or an inability to communicate this expertise effectively.[57] It may also have negative consequences for EU citizens, who could have a negative decision rendered against them based upon vague, incomplete, or misleading guidelines provided by the Department, particularly when they are often under-resourced and poorly trained.

5.3 Supremacy, Preliminary References and Europeanisation

Europeanisation can be both general in character as well as highly targeted. For example, the introduction of the HRC underlines the extent to which individual EU rules can be implemented in the national context to serve a national policy objective. A more general form of Europeanisation, may simply be a way in which a Member State adopts the principles and procedures which act as the foundations for EU law enforcement.

The following subsections will deal with two issues in turn: the principle of supremacy and the obligation upon all parts of the State to disapply national rules with they conflict with EU laws; and the preliminary reference procedure. They will focus on the specific issues of whether Ireland has been compliant with the obligation to disapply, and whether the Social Welfare Appeals Office can be considered a court or tribunal for the purposes of EU law, and is therefore capable of referring questions to the CJEU on a point of EU law, answering in the affirmative.

The principle of supremacy and the preliminary reference procedure are cornerstones of EU law. In demonstrating a marked reluctance to engage with these fundamental principles and procedure, the Irish State can be said to resist Europeanisation in a quite significant way, and this reluctance can have significant consequences. It also underlines some of the ingrained misunderstandings of this procedure by the Irish Superior Courts, the DEASP and SWAO, all of which are attributable in some way to a lack of technical understanding of how EU law operates, and which potentially contribute to a much more specific and opaque mode of welfare provision due to the errors, delays and

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[55] D. Scott, *Ireland's Contribution to the European Union* (Institute of European Affairs), 3.

[56] This is not a phenomena that applies wholly to Ireland however. As McKeever and Simpson highlight, reconciling EU welfare rules with national rules in the UK has at times proved to be problematic. See G. McKeever & M. Simpson, 'Worlds of welfare collide: implementing a European unemployment benefit scheme in the UK' (2017) 19(1) *European Journal of Social Security* 21.

[57] E. O'Halpin, 'Irish Parliamentary Culture and the EU: Formalities to be Observed' in P. Norton (ed.), *National Parliaments and the European Union* (Frank Cass, 1996), 124.

other barriers to accessing welfare payments that stem from this reluctance to make references to the CJEU - issues that will be dealt with in greater detail throughout Section 5.4.

5.3.1 The Principle of Supremacy: The Irish Position

The autonomy and supremacy of the European Union's legal order are long established principles of Union law. In the now famous *Van Gend en Loos*[58] case the Court of Justice acknowledged that EU law was distinct from both national and international law, constituting its own unique legal order, under which Member States had consciously limited their sovereign rights. This was then underlined in *Costa v ENEL* where the Court of Justice opined that once States had acceded to the Union and bound themselves to the Treaties, EU law 'became an integral part of the legal systems of the Member States which their courts are bound to apply.'[59] What this meant was that any conflict between national and EU rules must be resolved in favour of those which hold primacy, namely, those contained within EU law.

Whilst it may be questioned whether the original Member States of the Union believed the Treaties would develop their own legal autonomy and supreme legal value above national law, and that they had in fact willingly bound themselves to the obligations contained within them in a unique way, the arguments put forward by the States in *Van Gend en Loos* would certainly suggest that they believed the then EC Treaty to be simply another form of international agreement. However, to allow for national rules to apply ahead of EU rules would have undoubtedly undermined the effectiveness of the fledgling EU legal order.[60] This understanding also applies in the context of national constitutional provisions as well as ordinary administrative measures and, further, whether or not such measures existed prior to the adoption of Union rules.[61] Regardless

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[58] Case 26/62 *NV Algemene Transporten Expeditie Onderneming v Gend en Loos v Nederlandse Administrative der Belastingen* [1963] ECLI:EU:C:1963:1.

[59] Case 6/64 *Flaminio Costa v ENEL* [1964] ECLI:EU:C:1964:66, para 3.

[60] P. Craig & G. De Burca, *EU Law: Text, Cases and Materials* (Oxford University Press, 2008), 346.

[61] Case C-446/98 *Fazenda Publica v Camara* [2000] ECLI:EU:C:2000:691; Case C-473/93 *Commission v Luxembourg* [1996] ECLI:EU:C:1996:263; Case 11/70 *Internationale HandelsgesellschaftmbH v Einfuhr und Vorratsstelle fur Getreide und Futtermittel* [1970] ECLI:EU:C:1970:114; Case C-224/97 *Erich Ciola v Land Voralberg* [1999] ECLI:EU:C:1999:212; Case C-65/98 *Safet Eyüp v Landesgeschäftsstelle des Arbeitsmarktservice Vorarlberg* [2000] ECLI:EU:C:2000:336; and Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECLI:EU:C:1978:49.

of the level at which an action is taken by a Member State, the State must always remain compliant.

The effect of any decision to allow a Union rule to take primacy over a conflicting national provision is that of disapplication. The rule is not invalidated as no judicial review of the contested national rule is carried out. The rule continues to exist, but the national public body or relevant officer must set it aside so that its intended effects are inapplicable to the situation.[62] The Court of Justice has consistently argued that disapplication is separate from nullification by ruling that

> 'it cannot therefore… be inferred… that the incompatibility with Community law of a subsequently adopted rule of national law has the effect of rendering that rule of national law non-existent. Faced with such a situation, the national court is, however, obliged to disapply that rule, provided always that this obligation does not restrict the power of the competent national courts to apply, from among the various procedures available under national law, those which are appropriate for protecting the individual rights conferred by Community law.'[63]

The duty to disapply a legal measure which conflicts with EU rules dissipates where the repugnant measure is a decision of a national court of last instance, as the Court of Justice has never questioned the significance of the principle of *res judicata*.[64] However, even this position is partially qualified given that it is possible for individuals who have been injured by virtue of such a judicial decision to recover damages under the doctrine of Member State liability.[65] In a somewhat similar vein to disapplication, Member State liability in such circumstances does not overturn or invalidate the decision. Rather, liability is based on the view that Union citizens should not be left without any remedy in such circumstances.

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[62] Case C-118/00 *Gervais Larsy v Institut national d'assurances sociales pour travailleurs indépendants (INASTI)* [2001] ECLI:EU:C:2001:368; Case C-198/01 *CIF v Autorita Garante della Concorrenza del Mercato* [2003] ECLI:EU:C:2003:430.

[63] Joined Cases C-10/97 to Case C-22/97 *Ministerio delle Finanze v IN.CO.GE.'90 Srl, Camed Srl, Pomezia Progetti Appalti Srl (PPA), Edilcam Srl, A Cecchini & C. Srl, Emoda Srl, Sappesi Srl, Ing. Luigi Martini Srl, Giacomo Srl and Mafar Srl* [1998] ECLI:EU:C:1998:498, para 2.

[64] Case C-234/04 *Rosmarie Kapferer v Schlank & Schick GmbH* [2006] ECLI:EU:C:2006:178.

[65] Case C-224/01 *Gerhard Köbler v Republik Österreich* [2003] ECLI:EU:C:2003:513.

The Irish Constitution, by virtue of the Third Amendment, altered Article 29.4 to include a clause that states:

> 'No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of the Communities or prevents laws enacted, acts done or measures adopted by the Communities, or institutions thereof, from having the force of law in the State.'

This clause formally acknowledges the supremacy of EU law where it is applicable and *should* resolve any potential dispute on this issue at the constitutional level. The judgment in *Crotty v An Taoiseach*[66] complicated this picture somewhat in that it suggested that where subsequent Treaty amendments went beyond the current obligations envisaged by Union membership, an additional referendum would be necessary. In *Campus Oil Limited and ors v Minister for Industry and Energy and ors*,[67] the Supreme Court also held that the Court of Justice of the European Union (CJEU)

> 'is the only one having jurisdiction to give such binding interpretations. The national judge, by virtue of this power conferred upon him by the Treaty, exercises a function under Irish law in making such a request. The power is conferred upon him by the Treaty without any qualification, express or implied, to the effect that it is capable of being overruled by any other national court.'[68]

In this way, the Irish judiciary once again affirmed that the Court of Justice has final jurisdiction on the interpretation and application of EU rules which, arguably, underpins the importance of supremacy from this more limited perspective. The difficulty, however, arises in how this issue of primacy is *framed*. The implication of the *Campus Oil* judgment is that only courts can determine these issues, and that such courts are those that are defined within the Constitution itself. This, in spite of the Court of Justice having made it quite clear that this duty falls upon all public bodies applying rules of EU

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[66] *Crotty v An Taoiseach* [1987] IESC 4.

[67] *Campus Oil Limited and ors v Minister for Industry and Energy and ors* [1983] 1 I.R. 82.

[68] Quoted in *Data Protection Commissioner and anor v Facebook Ireland Limited And Maximillian Schrems* [2018] IESC 38, para 3.3.

law regardless of whether they are a court or tribunal. Article 34 of the Constitution acknowledges a very small number of official courts which include Courts of First Instance and a Court of Final Appeal.[69] The High Court is 'invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal'[70] thereby implying that it is the first such court, in the court hierarchy, capable of conducting judicial reviews and, in the result, capable of invalidating national laws.[71] The most significant limitation is contained within Article 37 of the Constitution which makes it clear that it is only the High Court that may act as a Court of First Instance on such matters of judicial review and that no court below it is has jurisdiction to do so. Higher courts, such as the Court of Appeal and Supreme Court, may conduct similar reviews and overturn or uphold determinations made by the High Court on the constitutional validity of national laws. In reality these provisions should be read in light of the principle of supremacy such that it is acknowledged that disapplication is a separate issue that may be carried out by any other public body or agent of the State where they find a conflict between national rules and those contained within EU law. To do so would in no way alter the actual jurisdiction of the High Court. Yet, as Hogan J. held in *Plesca v HSE*:[72]

> 'so far as EU law is concerned, it is plain that administrative agencies enjoy no power to determine that domestic enactments are incompatible with EU law and that this jurisdiction is reserved to the judicial branch.'

Consequently, once a public body falls outside of the narrow national constitutional definition of courts,[73] it is considered for the purposes of Irish law to be more limited in terms of the functions it can perform - regardless of whether it is effectively a court in practice but not in law. Under national law, administrative bodies are not capable of de-

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[69] Bunreacht na hÉireann, Article 34.2.

[70] Bunreacht na hÉireann, Article 34.3.1.

[71] Bunreacht na hÉireann, Article 34.3.2.

[72] *Plesca v HSE & ors*, unreported, Hogan J., High Court, 16 February 2011.
See also, *Minister for Justice, Equality and Law Reform and the Commissioner of An Garda Síochána v The Workplace Relations Commission & ors* [2017] IESC 43; and Case C-378/17 *Minister for Justice and Equality, The Commissioner of the Garda Síochána v Workplace Relations Commission*.

[73] Bunreacht na hÉireann, Articles 34 and 37.1.

termining whether an EU rule has been correctly implemented within national law, or to disapply a national rule in favour of the correct interpretation of an EU rule. Whilst Hogan J. did not expressly say that this is equivalent to a judicial review that, arguably, is the likely effect of such a statement.

5.3.2 The SWAO and Preliminary References

This is not only problematic from the perspective of supremacy but is also the case in relation to how courts are defined within EU law for the purposes of making a preliminary reference. The Treaty basis for making a preliminary reference is contained in Article 267 TFEU which states that:

> 'The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
> (a) the interpretation of the Treaties;
> (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.'

The procedure for the making of preliminary references under Article 267 has led to the development of general principles of EU law - such as direct effect - and ensured the ongoing expansion of the material scope of EU law.[74] The Article also regulates the relationship between Union law and the national legal systems of the Member States. This is particularly true where they may conflict or where the interpretation of the Treaties or a Union legal measure is unclear and must be clarified. A reference to the CJEU will subsequently ensure that Union law is 'given an autonomous and uniform interpretation throughout the European Union.'[75] Overall, the procedure is designed to make 'available to the national judge a means of eliminating difficulties which may be occasioned by the requirement of giving Community law its full effect.'[76]

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[74] For commentary in favour of as well as against the role of the CJEU in expanding the scope of EU law through the preliminary ruling procedure and its interpretation of EU law, see H. Rasmussen, *On Law and Policy of the European Court of Justice* (Martijnus Nijhoff, 1986); M. Dawson, 'The Political Face of Judicial Activism: Europe's Law-Politics Balance' in M. Dawson & Ors. (eds.), *Judicial Activism at the Court of Justice* (Edward Elgar, 2013), 11; J. Weiler, 'The Court of Justice on Trial' (1987) 24 *Common Market Law Review* 555; and T. Horsley, 'Reflections on the Role of the Court of Justice as the 'Motor' of European Integration: Legal Limits to Judicial Lawmaking' (2013) 50 *Common Market Law Review* 931.

[75] Case C-281/09 *Commission v Spain* [2011] ECLI:EU:C:2011:767, para 42.

[76] Case 166/77 *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974] ECLI:EU:C:1974:3.

A major limitation of the procedure is that at no point may the CJEU issue a ruling on a purely national legal matter or make a final determination in the pending case. The question(s) referred to the CJEU are transmitted back to the Member State court or tribunal and, in light of the answer(s) provided by the European Court, that same Member State court or tribunal will issue its final decision.[77] Preliminary references are, therefore, to be made by a national court or tribunal where the interpretation of Union law is necessary[78] in order for it to reach a conclusion.[79] The third paragraph of Article 267 TFEU only imposes an obligation on courts or tribunals with final jurisdiction or in the situation where there is no right of appeal. It has also been recently affirmed by the CJEU that the obligation to refer placed upon courts of final jurisdiction does not dissolve following a potentially conflicting provision of national law being upheld as constitutional.[80] This is because the national rule may still violate provisions of EU law. Where the answer is 'so obvious as to leave no scope for any reasonable doubt' or where the issue has already been dealt with in a previous judgment of the Court of Justice, the obligation dissipates.[81]

What constitutes a court or tribunal for the purposes of Article 267 TFEU is not specified within the Treaties. National definitions of these concepts are also, for the purposes of this Article, considered to be immaterial.[82] The criteria that the Court of Justice has applied in defining courts and tribunals are:

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[77] Case C-167/94 *Grau Gomis and Others* [1995] ECLI:EU:C:1995:113; Joined Cases C-37 and 38/96 *Sodiprem Sarl v Direction Generale des Douanes* [1998] ECLI:EU:C:1998:179; Joined Cases C-10 and 22/97 *Ministero Delle Finanze v IN.CO.GE '90 Srl* [1998] ECLI:EU:C:1998:498; Case 66/80 *SpA International Chemical Corporation v Amministrazione delle Finanze dello Stato* [1981] ECLI:EU:C:1981:102; Case 322/88 *Salvatore Grimaldi v Fonds des maladies professionnelles* [1989] ECLI:EU:C:1989:646; and T.C. Hartley, *The Foundations of European Community Law* (5th edn., Clarendon Press, 2002), 270-271.

[78] Case 75/63 *Mrs M.K.H. Hoekstra v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* [1964] ECLI:EU:C:1964:19; Case 20/64 *Albatros v Société des pétroles et des combustibles liquides* [1965] ECLI:EU:C:1965:8.

[79] Joined Cases C−338/04, C−359/04 and C−360/04 *Placanica and Others* [2007] ECLI:EU:C:2007:133.

[80] Case C-322/16 *Global Starnet* [2017] ECLI:EU:C:2017:985.

[81] Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECLI:EU:C:1982:335, para 21.

[82] Case C-43/71 *Politi s.a.s. v Ministry for Finance of the Italian Republic* [1971] ECLI:EU:C:1971:122; Case C-24/92 *Pierre Corbiau v Administration des contributions* [1993] ECLI:EU:C:1993:118.

"whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law, and whether it is independent.'[83]

Administrative bodies do not always satisfy these conditions but this usually arises where there are clear organisational links between the original body that made the disputed claim and cannot therefore be considered an independent third party in any sense.[84] It also arises where the body appears to act primarily in the capacity of an arbitrator prior to a formal legal process being initiated.[85] However, immigration adjudicators,[86] professional disciplinary bodies,[87] planning review boards,[88] tax adjudicators,[89] and others[90] have, for example, all been deemed to satisfy these criteria despite their being otherwise administrative in nature. Even if the position of the Irish courts was, as in in *Plesca*, that only courts can disapply conflicting national measures this would still fall foul of the principle of supremacy. It would, further, violate the concept of courts or tribunals embedded within EU law to which it is also similarly bound. Any reference made to the CJEU by a court or tribunal for the purposes of Article 267 TFEU is therefore not a judicial review. Nor is the decision to disapply an incorrect national interpre-

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[83] Case C-178/99 *Doris Salzmann* [2001] ECLI:EU:C:2001:331, para 22. See also Case C-54/96 *Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH* [1997] ECLI:EU:C:1997:413; Case C−53/03 *Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others v GlaxoSmithKline plc and GlaxoSmithKline AEVE* [2005] ECLI:EU:C:2005:333; Joined Cases C-9 and 118/97 *Proceedings brought by Raija-Liisa Jokela and Laura Pitkäranta* [1998] ECLI:EU:C:1998:497; Case C-407/98 *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist* [2000] ECLI:EU:C:2000:367; and Case C-195/98 *Osterreicher Gewerkschaftsbund, Gewerkschaft Öffentlicher Dienst v Republik Osterreich* [2000] ECLI:EU:C:2000:655.

[84] Case C-24/92 *Pierre Corbiau v Administration des contributions* [1993] ECLI:EU:C:1993:118.

[85] Case C-355/89 *Department of Health and Social Security v Christopher Stewart Barr and Montrose Holdings Ltd* [1991] ECLI:EU:C:1991:287; Case C-100/89 *Peter Kaefer and Andréa Procacci v French State* [1990] ECLI:EU:C:1990:456; Case C-125/04 *Guy Denuit and Betty Cordonier v Transorient-Mosaique Voyages and Culture SA* [2005] ECLI:EU:C:2005:69; and Case 102/81 *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mood Hochseefischerei Nordstern AG and Co. KG* [1982] ECLI:EU:C:1982:107.

[86] Case C-416/96 *Nour Eddline El-Yassini v Secretary of State for Home Department* [1999] ECLI:EU:C:1999:107.

[87] Case C-118/09 *Robert Koller* [2010] ECLI:EU:C:2010:805.

[88] Case C-205/08 *Umweltanwalt von Kärnten v Kärntner Landesregierung* [2009] ECLI:EU:C:2009:767.

[89] Case C-17/00 *François De Coster v Collège des bourgmestre et échevins de Watermael-Boitsfort* [2001] ECLI:EU:C:2001:651.

[90] Case C-54/96 *Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH* [1997] ECLI:EU:C:1997:413.

tation of an EU rule: it is simply a procedure which ensures that EU law is complied with and correctly transposed.[91]

Within the context of this thesis, it certainly appear that, based on the case law of the CJEU, the Office of Social Welfare Appeals is capable of satisfying the necessary characteristics of a court or tribunal for the purposes of Article 267 TFEU, as: it is provided for within the 2005 Primary Act; hears disputes between the DEASP and welfare claimants unsuccessful at first-instance; it applies the sections of the Primary Act as well as any relevant secondary legislation including EU law; and has relative functional independence. Even from a purely national perspective, it must be reiterated that a DO must perform their duties as if they were judicial in nature and are bound by principles of constitutional and natural justice,[92] and is considered to be 'quasi-judicial' in nature[93] - despite the very narrow constitutional definition of courts utilised in Ireland.[94] As one interviewee argued, 'an Appeals Officer would have an *untrammelled right* to make a reference' as '*[t]here's no question that [the SWAO is] a Court or Tribunal* for the purpose of Article 267 [TFEU],' and 'an Appeals Officer would have an untrammelled right to make a reference.'[95]

The third paragraph of Article 267 TFEU only imposes an obligation on courts or tribunals with final jurisdiction, or against which there is no right of appeal. This does not mean that an AO or the Chief Appeals Officer are incapable of referring questions to the CJEU. Rather, they are simply not *obligated* to do so i.e. it would be for the AO or Chief Appeals Officer to determine whether or not they believe the referral of a question to be 'necessary' for them to render their final decision. Where the answer is 'so obvi-

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[91] C-103/88 *Fratelli Costanzo v Comune di Milano* [1989] ECLI:EU:C:1989:256; Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECLI:EU:C:1990:395; Case C-188/89 *A. Foster and others v British Gas plc* [1990] ECLI:EU:C:1990:313.

[92] *Hoolahan v Minister for Social Welfare*, High Court, Barron J., unreported, 23rd July 1986; and *Minister for Social, Community and Family Affairs v Scanlon* [2001] 1 I.R. 56, 87.

[93] G. Hogan & D.G. Morgan, *Administrative Law in Ireland* (Round Hall, 2010), 284.

[94] Bunreacht na hEireann, Article 34.
See also, Article 37.1: 'Nothing in this Constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters, by any person or body of persons duly authorised by law to exercise such functions and powers, notwithstanding that such person or such body of persons is not a judge or a court appointed or established as such under this Constitution.'

[95] Interviewee 7.

ous as to leave no scope for any reasonable doubt' or where the issue has already been dealt with in a previous judgment of the Court of Justice, the obligation dissipates.[96]

During the course of this study, a formal request was sent to the SWAO in order to establish if they deem themselves to be a court or tribunal for the purposes of making a preliminary reference and if so, whether they have any procedures in place for making such a reference. It was made clear in their response that the SWAO has yet to refer a case to the Court of Justice, and that there are currently no procedural guidelines, communications or otherwise which would highlight circumstances in which an AO or the Chief Appeals Officer could do so.[97] That the SWAO has neither asked for clarification on a point of EU law or instructed those capable of doing so within the SWAO of this possibility is somewhat problematic, particularly given that the ability of the Chief Appeals Officer or an ordinary AO to deal with a new legal question or a technical point of law is limited. On the first point, both DOs and AOs are deemed to be bound to apply the law as it is written.[98]

The Irish position is that whilst the SWAO *may* be quasi-judicial in nature, it falls outside of the narrow national constitutional definition of Courts adopted nationally,[99] and is subsequently more limited in terms of the functions it can perform. As the preceding section underlines, administrative bodies are, from the perspective of national law, not capable of determining whether an EU has been properly implemented within national law, or to disapply a national rule in favour of the correct interpretation of an EU rule. Whilst the Court does not expressly say that this is equivalent to a judicial review, that is the likely effect of such a statement.

Any reference made to the CJEU by the SWAO is therefore not a judicial review, nor is the decision to disapply an incorrect national interpretation of an EU rule - it is simply a procedure which ensures that EU law is complied with and correctly transposed.[100]

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[96] Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECLI:EU:C:1982:335, para 21.

[97] Email received 18/10/2016, on file with the author.

[98] *Plesca v HSE & Ors*, unreported, Hogan J., High Court, 16 February 2011.
See also, *Minister for Justice, Equality and Law Reform & ors v The Workplace Relations Commission & ors* [2017] IESC 43; and Case C-378/17 *Minister for Justice and Equality, The Commissioner of the Garda Síochána v Workplace Relations Commission*.

[99] Bunreacht na hEireann, Articles 34 and 37.1.

[100] C-103/88 *Fratelli Costanzo v Comune di Milano* [1989] ECLI:EU:C:1989:256; Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion* SA [1990] ECLI:EU:C:1990:395; Case C-188/89 *A. Foster and others v British Gas plc* [1990] ECLI:EU:C:1990:313.

This belief that preliminary references are some form of judicial review, and that Courts are only those which are defined within Irish law, demonstrates a rather basic lack of technical expertise in relation to how EU law operates and the obligations it imposes upon its Member States and representatives - and one which has likely developed since the landmark decision in *Campus Oil*. As Section 5.2 suggests, as well as the thesis more broadly, the interpretation of EU law by the Irish State is often highly problematic, and demonstrates a lack of technical expertise at almost every level. Thus, the need to disapply or to refer questions to the CJEU is potentially of even greater importance where such issues arise.

If the SWAO were to make a preliminary reference to the Court of Justice on potential points of conflict, it could ensure that these issues were dealt with in a more timely and efficient manner, ensuring that the free movement rights of EU citizens are not unduly hampered.

5.3.3 Case C-378/17: The Irish Approach to Supremacy and Preliminary References Before the CJEU

Both of these issues have recently been dealt with by the Court of Justice in *Minister for Justice and Equality, Commissioner of An Garda Síochána v Workplace Relations Commission*[101] and the national case law that gave rise to this preliminary reference to the CJEU. From the perspective of the existing precedent, this judgment acted as a mere restatement of principles of EU law which the Irish State and Superior Courts should already have been compliant with, but now have a judgment specifically binding them to reformulate their processes to allow for non-constitutionally defined courts and the bureaucracy of the State more broadly to disapply conflicting national rules, and for bodies such as the SWAO to now make preliminary references.

The factual circumstances revolved around three individuals who, in 2005, had applied to join An Garda Síochána (the Irish police force). Whereas the applicants ranged in age from 36 to 48 years of age, the eligibility requirement for joining An Garda Síochána required that the applicant be between 18 and 35 years of age on the 1st of

[101] Case C−378/17 *Minister for Justice and Equality, Commissioner of An Garda Síochána v Workplace Relations Commission, notice parties: Ronald Boyle and Others* [2018] ECLI:EU:C:2018:979.

September in the year in which they applied.[102] By virtue of the applicants falling outside of this eligible age range, each had their application refused. One of the affected parties subsequently made a complaint to the Equality Tribunal arguing that the refusal constituted an unjustifiable discrimination on the basis of age and that the Statutory Instrument placing this on a legislative footing should be disapplied as it conflicted with the correct interpretation of Directive 2000/78/EC.[103] Upon discovering that the Tribunal would hear the application, and believing that the Tribunal had no capacity to disapply the age restriction in favour of an alternative interpretation of Directive 2000/78/EC, the Minister for Justice brought legal proceedings before the High Court challenging the Tribunal's decision to do so.[104]

In upholding the Minister's challenge to the Tribunal's decision to hear the matter, Charleton J. reasoned that while courts and administrative bodies are obligated to interpret Irish laws in light of any corresponding obligations within EU law it 'does not exten[d] to re-writing the legislation; to implying into it a provision which is not there; or to doing violence to its express language.'[105] He then went on to observe that

> 'there is no principle of European law which allows an administrative body or a court of limited jurisdiction to exceed its own authority in order to achieve a result, whereby it is of the view that European legislation has not been properly implemented at national level and that this situation is to be remedied by the re-ordering in ideal form of national legislation.'[106]

Charleton J. appears to draw a clear equivalence between disapplication and judicial review - going so far as to imply that to allow the Equality Tribunal to disapply the

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[102] Garda Síochána (Admissions and Appointments) Regulations 1988 (S.I, No. 164 of 1988), as amended. Regulation 5(1)(c), as amended by the Garda Síochána (Admissions and Appointments) (Amendment) Regulations 2001 (S.I. No. 498 of 2001) and the Garda Síochána (Admission and Appointments) (Amendment) Regulations 2004 (S.I. No. 749 of 2004)

[103] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation OJ L 303, 2.12.2000.

[104] *Minister for Justice Equality & Law Reform & anor v Director of the Equality Tribunal & ors* [2009] IEHC 72.

[105] *Minister for Justice Equality & Law Reform & anor v Director of the Equality Tribunal & ors* [2009] IEHC 72, para 7.

[106] *Minister for Justice Equality & Law Reform & anor v Director of the Equality Tribunal & ors* [2009] IEHC 72, para 8.

Statutory Instrument would potentially supersede the authority of the Irish legislature. This was cemented by the court's decision to highlight the jurisdiction of the High Court as established in Article 34 of the Constitution,[107] and in its reference to the *IMPACT* judgment of the CJEU,[108] which Charleton J. understood as establishing the case that the Equality Tribunal has no such jurisdiction to make determinations such as these. This is, arguably, false as *IMPACT* made it clear that forcing a claimant to make claims before both a specialised judicial body and an ordinary court would be a violation of the principle of effectiveness - an outcome that this case would lead to if the Equality Tribunal could hear complaints dealing with EU law while any decision to disapply would have to be left to the High Court. The *IMPACT* judgment does allow for the splitting of jurisdictions between bodies that deal with national and those that deal with EU law. As the Statutory Instrument in question has the potential to conflict with the State's obligations under Directive 2000/78/EC, and it would be the duty of the Tribunal to apply it, their jurisdiction includes the application of EU rules and is not split.

These same points were again raised on appeal to the Supreme Court[109] where, on behalf of the majority, Clarke J. reiterated that the constitutional definition of courts must be applied in such circumstances and that Article 37.1 establishes that

> 'Nothing in this constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters, by any person or body of persons duly authorised by law to exercise such functions and powers, notwithstanding that such person or such body of persons is not a judge or a court appointed or established as such under this constitution.'[110]

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[107] *Minister for Justice Equality & Law Reform & anor v Director of the Equality Tribunal & ors* [2009] IEHC 72.

[108] Case C-268/06 *Impact v Minister for Agriculture and Food, Minister for Arts, Sport and Tourism, Minister for Communications, Marine and Natural Resources, Minister for Foreign Affairs, Minister for Justice, Equality and Law Reform, Minister for Transport* [2008] ECLI:EU:C:2008:223.

[109] *Minister for Justice, Equality and Law Reform and the Commissioner of An Garda Síochána v The Workplace Relations Commission & ors* [2017] IESC 43.

[110] *Minister for Justice, Equality and Law Reform and the Commissioner of An Garda Síochána v The Workplace Relations Commission & ors* [2017] IESC 43, para 5.7.

From the court's perspective, 'a significant power to disapply duly enacted legislation could not be described as a limited power in the sense in which that term is used in Art. 37.1.'[111] The inevitable consequence of this is that the Workplace Relations Commission (WRC) - the jurisdiction of the Equality Tribunal had been transferred to the WRC in the intervening period - is merely capable of applying the law as it is written, not to set it aside, even if this potentially conflicts with EU law.

In attempting to justify this interpretation from the perspective of EU law, the court emphasised the procedural autonomy of Member States in determining which courts and tribunals have specific or limited jurisdictions.[112] This, however, is not directly relevant. Assigning a specific venue for a dispute is quite distinct from curtailing the capacity of a court or tribunal to effectively enforce EU rules. The Supreme Court also created a quite problematic justification for this division of competences between the Workplace Relations Commission and the High Court by arguing that in relation to 'national procedural structure, cases, such as those which are the subject of these proceedings, are highly likely to end up before the High Court in any event and might, indeed, involve further appeals within the courts system.'[113] Although it held, in the end, that it was not possible for the WRC to disapply the relevant Statutory Instrument on the basis that it did not comply with the national constitutional definition of a court, the Supreme Court also elected to refer a question to the Court of Justice asking if the WRC should still be allowed to hear the case in spite of this finding - a somewhat perplexing proposition.[114] The court also failed to define clearly the question it was referring outside of these somewhat convoluted parameters or, at least, failed to include the question within the written judgment.

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[111] *Minister for Justice, Equality and Law Reform and the Commissioner of An Garda Síochána v The Workplace Relations Commission & ors* [2017] IESC 43, para 5.8.

[112] *Minister for Justice, Equality and Law Reform and the Commissioner of An Garda Síochána v The Workplace Relations Commission & ors* [2017] IESC 43, para 6.1.

[113] *Minister for Justice, Equality and Law Reform and the Commissioner of An Garda Síochána v The Workplace Relations Commission & ors* [2017] IESC 43, para 7.1.

[114] *Minister for Justice, Equality and Law Reform and the Commissioner of An Garda Síochána v The Workplace Relations Commission & ors* [2017] IESC 43, para 10.3.

The Grand Chamber of the Court of Justice subsequently demonstrated a high degree of clarity and force in framing its judgment.[115] With regard to the admissibility of the question itself, the Court of Justice argued simply in favour of the presumption of relevance, based upon the fact that the question was not only referred in the spirit of cooperation underpinning the formal procedure of Article 267 TFEU, as well as the factual circumstances relating to a question of EU law.[116] It did not engage with the formulation of the question itself. As with the approach taken by the Advocate General, the Court then went on to examine the substance of the principle of supremacy and its relationship to disapplication. On this point, the Court was far more declarative in tone than AG Wahl. It did not discuss the *IMPACT* judgment or the principle of effectiveness. Whether or not a Member State can split jurisdictions between different judicial venues appeared to be of secondary concern to the principle of supremacy itself. The Court stated in unequivocal terms that

> 'any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of EU law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to disregard national legislative provisions which might prevent directly applicable EU rules from having full force and effect are incompatible with the requirements which are the very essence of EU law.'[117]

The effect of such a pronouncement is that anything which in effect splits the competence to disapply national rules which conflict with obligations imposed by virtue of EU law violates the principle of supremacy. This leaves no doubt that the Supreme Court's question concerning the ability of the Workplace Relations Commission to hear the case at hand but without the ability to disapply, if necessary, the impugned Statutory Instru-

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[115] Case C−378/17 *Minister for Justice and Equality, Commissioner of An Garda Síochána v Workplace Relations Commission, notice parties: Ronald Boyle and Others* [2018] ECLI:EU:C:2018:979.

[116] Case C−378/17 *Minister for Justice and Equality, Commissioner of An Garda Síochána v Workplace Relations Commission, notice parties: Ronald Boyle and Others* [2018] ECLI:EU:C:2018:979, paras 26 to 30.

[117] Case C−378/17 *Minister for Justice and Equality, Commissioner of An Garda Síochána v Workplace Relations Commission, notice parties: Ronald Boyle and Others* [2018] ECLI:EU:C:2018:979, para 36.

ment if it is in violation of Directive 2000/78/EC is immaterial. The WRC, if it is given the power to hear such a complaint, must also have the power to disapply. Any other course of action amounts to a clear contravention of this foundational Union principle. The Grand Chamber goes even further to rebut the argument consistently made by the Irish Superior Courts that only they may entertain the potential disapplication of national rules as, 'the Court has repeatedly held, that duty to disapply national legislation that is contrary to EU law is owed not only by national courts, but also by all organs of the State — including administrative authorities - called upon, within the exercise of their respective powers, to apply EU law.'[118] Unlike the Advocate General, the Grand Chamber equally held that the Workplace Relations Commission is a body clearly designed to deal with the application of Directive 2000/78/EC and, even using the argument put forward by the High Court and Superior Court that the WRC is a specialised judicial forum, it would be contradictory to allow for any other outcome to occur.[119]

The other notable point raised by the Court of Justice is that the WRC clearly complies with the definition of a court or tribunal for the purposes of Article 267 TFEU. It states in no uncertain terms that in this respect, '[r]ules of national law, even constitutional provisions, cannot be allowed to undermine the unity and effectiveness of EU law.'[120] The effect of this is that the Irish Superior Courts are put on notice that the definition of courts that they have been relying upon and which derives directly from Articles 34 and 37 of the Constitution cannot be applied to cases involving either disapplication or to the ability of non-constitutionally defined courts to make preliminary references to the Court of Justice.

The Court of Justice's unequivocal judgment in this respect now means that Ireland must bring itself into compliance with the principle of supremacy and the obligation to disapply. How quickly the Irish executive will be to implement this within its administrative practices and the courts within their judicial procedures is far from certain. This fundamental concept of Union law was never in doubt, and was arguably confirmed

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[118] Case C−378/17 *Minister for Justice and Equality, Commissioner of An Garda Síochána v Workplace Relations Commission, notice parties: Ronald Boyle and Others* [2018] ECLI:EU:C:2018:979, para 38.

[119] Case C−378/17 *Minister for Justice and Equality, Commissioner of An Garda Síochána v Workplace Relations Commission, notice parties: Ronald Boyle and Others* [2018] ECLI:EU:C:2018:979, para 46.

[120] Case C−378/17 *Minister for Justice and Equality, Commissioner of An Garda Síochána v Workplace Relations Commission, notice parties: Ronald Boyle and Others* [2018] ECLI:EU:C:2018:979, para 49.

once again in *IMPACT*. Yet, as this thesis consistently argues, the Irish State's ability to implement EU law correctly in its everyday praxis can sometimes be quite problematic. It would however, have a transformative effect on the administration of state bureaucracy, as agents of the State are now bound to disapply where it is necessary to do so, and in the process reducing the need for individuals to apply to the High Court on a point of law in the hopes that the same outcome is reached - particularly from a welfare perspective where there are significant hurdles that must be overcome to bring a case to the High Court and beyond.

In relation to the ability of non-constitutionally defined courts to make preliminary references to the Court of Justice on a point of EU law, this also holds the potential to deal with conflicts between national and EU rules and questions of interpretation before they reach the High Court. To restrict the ability to make a preliminary reference to the High Court and above under Article 267 TFEU has also constituted a clear violation of EU law, and one which the State has never sought to remedy. Bodies such as the Social Welfare Appeals Office - which clearly comply with the EU-wide definition of a court or tribunal - can, for example, now raise questions regarding the application of EU rules. In an area such as EU social security law - which is highly complex and often difficult to untangle - this is particularly true given that the SWAO has never made such a reference and has no procedure in place to do so, as well as dealing with individuals who are more likely to neither have the economic or social capital to bring an action before the High Court on a point of law.

Although it is unlikely in practice that a large number of ordinary DOs within the Department would disapply rules which they believe conflict with EU law, the SWAO has shown itself to be the most effective part of the welfare system, overturning incorrect determinations made by the DEASP at quite high rates in many instances. Allowing them the power to make references under Article 267 TFEU, provided that the Office established a clear process for doing and that AOs are given adequate training on how this is to operate in practice, could alleviate many issues for those EU citizens who do lodge an appeal - even if this still raises concerns regarding access to justice and administrative in particular due to the likelihood that many will simply leave the process after their original decision has been issued based on the belief that the SWAO will operate in a comparable manner to the main Department.

5.4 Barriers to Accessing Welfare Payments for EU Citizens

There are many barriers to accessing welfare payments which can be considered common to all categories of migrants regardless of whether they are EU citizens or TCN labour migrants. Most of these were detailed within Chapter Four in relation to first instance decision-making and the appeals process respectively. These include, but are not limited to: the overall difficulties in engaging with Irish administrative systems; the shifts in welfare law and policy from the late 1990s onwards; issues with the level of training given to DOs and the information provided to both them and applicants; and linguistic difficulties and the failure to implement anti-racism measures within the DEASP at first-instance in particular.

The following subsections will examine the extent to which the implementation and interpretation of EU welfare rules by the Irish State and those within the DEASP may create additional barriers which are in some way unique to EU citizens or which, by virtue of EU law, raise further questions regarding Ireland's compliance with and understanding of the applicable EU rules. These barriers are consequently differentiated from those which apply to TCN labour migrants by virtue of the separate legal arrangements that apply to them.

5.4.1 Delays within the Process

As Chapter Four underlined, both the first-instance decision making procedure within the DEASP and the appeals procedure within the SWAO are not bound by specific time constraints. Decisions do not need to be made within a specific time period, and this can lead to significant delays which are capable of leaving migrants of both categories without welfare payments for significant periods of time. Similarly, both the SWAO and High Court are open to an appellant when they lodge their initial appeal, and they must elect whether they will seek a formal judicial review, or continue within the welfare appeals process.[121] Both serve largely distinct purposes and appellants cannot attempt to do both simultaneously.[122] This creates significant difficulties for migrants, as they may not have the necessary familiarity with the Courts system to know how this operates in practice. It raises a particular concern in relation to EU citizens

[121] *State (Wilson) v Judge Neilan* Unreported, High Court, 18th April 1985.

[122] *Neenan Travel Ltd v Minister for Social and Family Affairs* [2011] IEHC 458, para 4.5.

however, as these delays may undermine a citizen's effective right to free movement, and come into conflict with the constitutional values of the Union.

Such issues could largely be avoided if the SWAO were to make preliminary references on points of EU law that appear to them to be unclear, rather than simply applying the guidelines and national implementing measures which may incorrectly apply or interpret EU rules. It also means that where the implementation or interpretation of EU law is being challenged, EU citizens must enter the court system, which will only compound this issue of delays even further. This point was raised by more than one interviewee as creating barriers for EU citizens to effectively vindicate their rights, with one noting that

> 'I remember working with one Polish man who had a really strong case and was applying for jobseekers allowance. It ended up going to appeal, and by the time it came around he was destitute. He was offered a flight back to Poland. His family was here, but I couldn't get through to him when the appeal did come up because he had gone. And I think he was entitled to that payment.'[123]

This is quite problematic, given that the Minister can grant an intermediate payment such as the Supplementary Welfare Allowance (SWA) pending an appeal. The Minister retains the power to created regulations to this effect, under the 2005 Act, and to outline how the granting of SWA would occur in practice.[124] Unfortunately, no such regulations appear to exist at present. Social benefits, such as those which guarantee a minimum level of subsistence - including the SWA - fall under the scope of Regulation 492/2011[125] meaning that EU citizens who become involuntarily unemployed cannot

[123] Interviewee 5.

[124] Social Welfare (Consolidation) Act 2005, Section 334(1) - 'Regulations may make provision in relation to matters arising— (a) pending the decision or determination under Part 2 , 3 , 4 , 5 , 6 , 7 , 8 , 9 or 10 or this Part (whether in the first instance or on an appeal or reference, and whether originally or on revision) of any claim.'

[125] Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union Text with EEA relevance OJ L 141, 27.5.2011.

have the HRC applied to them and *should* be able to access SWA,[126] but this is far from guaranteed. Similarly, where the Minister does not immediately grant SWA in such circumstances, an additional application will have to be made, and this may involve a further period of time elapsing before it is granted or refused.

This may lead to circumstances within which an EU citizen may effectively be left without a payment of any kind for an appreciable period of time. In some instances, a clear violation of the guidelines applicable to certain payments may even need to be referred to the Office of the Ombudsman before it is upheld.[127] A complaint lodged with the Ombudsman - following the formal appeals procedure being exhausted - can quite easily exceed a period one year before the Ombudsman issues a decision. Consequently, as one interviewee argued, 'it is a significant encroachment on free movement rights If you don't have a system that can respond quickly.'[128] In their experience, 'there are people who've ended up homeless because the presiding officer got the law wrong and then didn't give the payment. They were waiting maybe 6-8 months for the SWAO to make a decision. Sometimes a year.'[129]

The development of EU welfare law in particular has been predicated upon ensuring that the freedom of movement for EU citizens, but economically-active citizens in particular, are effective.[130] In addition, the free movement of citizens is considered to be a fundamental right which is not to be undermined.[131] This is not to say that EU law is

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[126] Case C-249/83 *Hoeckx v Openbaar Centrum voor Maatschappelijk Welzijn, Kalmthout* [1985] ECLI:EU:C:1985:139, para 22. See also Case 261/83 *Carmela Castelli v Office National des Pensions pour Travailleurs Salariés (ONPTS)* [1984] ECLI:EU:C:1984:280.
This is included within the Departmental Guidelines on the application of the HRC - Department of Social Protection, HRC - Guidelines for Deciding Officers on the determination of Habitual Residence, 14/7/2017, appendix 5, available at <http://www.welfare.ie/en/Pages/Habitual-Residence-Condition--Guidelines-for-Deciding-Offic.aspx#app5> accessed 02/03/2016.

[127] Office of the Ombudsman, 'Woman incorrectly refused Disability Allowance on habitually resident grounds' (11/12/2012) <https://www.ombudsman.ie/en/Case-Studies/Sample-Cases/Woman-incorrectly-refused-Disability-Allowance-on-habitually-resident-grounds.html> accessed 02/03/2016.

[128] Interviewee 7.

[129] Interviewee 7.

[130] Case C-360/97 *Herman Nijhuis v Bestuur van het Landelijk instituut sociale verzekeringen* [1999] ECLI:EU:C:1999:180, para 28 - 'It should be observed that, in order to safeguard the effective exercise of the right to freedom of movement enshrined in Article 48 of the Treaty, the Council is required, under Article 51 thereof, to set up a system to enable workers to overcome obstacles with which they might be confronted in national social security rules. In principle, the Council carried out that duty by introducing Regulation No 1408/71.'

[131] Joined Cases C-158 & 159/04 *Vassilopoulos* [2006] ECLI:EU:C:2006:212, para 40 - 'the freedoms of movement must be understood to be one of the essential elements of the 'fundamental status of nationals of the Member States.'

effective in all instances. It continues to utilise a highly specific and market-based mode of welfare provision, and the protections it grants are most easily invoked by those in stable employment or self-employed activity which is easily established and who has the personal capital to navigate state systems with relative ease. Cases such as *Dano*,[132] *Garcia-Nieto*[133] and *Alimanovic*[134] for example, have demonstrated how severe the impact of a literal reading of the relevant rules can be. *Commission v UK*[135] and *Ziolkowski*[136] also illustrate how the CJEU has slowly eroded, if not undermined, an effective right to free movement within the EU - primarily at the margins, but in potentially significant ways from a practical perspective. However, this potentially differs from the way in which delays exist normally within the Irish context, as they may leave a Union citizen, even where they are reasonably entitled to it, without a payment for an appreciable period of time. This could, as some interviewees have suggested, create circumstances within which Union citizens must either return to their Member State of origin or face destitution, with both effectively ending or derailing their free movement - those who return to their home State have ceased the movement itself, whilst those without a residence will not be able to provide the basic details necessary to continue to engage with the Irish State and its administrative systems.

Allowing for potential outcomes such as this, where citizens are deprived of a payment to which they are entitled for significant periods of time or even allowing for them to become destitute, raise serious questions about Ireland's relationship with EU law. It is a constitutional duty that the Irish State owes to Union citizens. It also makes the Irish mode of welfare provision as it applies to EU citizens more specific in terms of its effect.

5.4.2 'Family Benefits' and the HRC

In terms of access to 'family benefits,' the number of appeals made on the basis of the HRC against refusals for payments such as Child Benefit represent a relatively small

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[132] Case C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* [2014] ECLI:EU:C:2014:2358.

[133] Case C-299/14 *Garcia Nieto and others* [2016] EU:C:2016:114.

[134] Case C-67/14 *Jobcenter Berlin Neukölln v Alimanovic* [2015] ECLI:EU:C:2015:597.

[135] Case C-308/14 *Commission v United Kingdom* [2016] ECLI:EU:C:2016:436.

[136] Joined Cases C−424/10 and C−425/10 *Tomasz Ziolkowski, Barbara Szeja, Maria-Magdalena Szeja, Marlon Szeja v Land Berlin* [2011] ECLI:EU:C:2011:866.

proportion of the same. For economically-active mobile EU citizens, the HRC should not apply. However, evidence suggests that for those who fall outside of the clear definitions of worker or self-employed, the HRC can be a significant impediment.

As social security payments such as the Child Benefit are considered to be within the scope of Regulation 883/04, EU citizen applicants should not be subject to the HRC so long as the claimant can establish that they are economically-active i.e. they are a worker, retain worker status, derive it from another, or are self-employed, retain self-employed status or derive it from another. This is even a preferential position in comparison to Irish citizens who, where they have not returned to Ireland following several years living in Australia for example, fall under purely Irish rules and must be subject to the HRC - although with a far lower likelihood that they will fail to satisfy it. The difficulty that arises for Union citizens is where this is either incorrectly applied, or the individual falls outside of the scope of these protections.

Table 5.1 Appeals against Refusals for Child Benefit on the Basis of the of the HRC Annually and Total Appeals against the HRC Annually

Year	Allowed	Partially Allowed	Disallowed	Total
2014	23	6	70	99
2013	35	4	74	113
2012	94	33	121	248
2011	178	54	338	570
2010	82	21	441	544
2009	20	9	116	145
2008	17	5	72	94
2007	22	6	83	111
2006	24	8	52	84
2005	78	4	146	228
2004	9	1	90	100
Total	582	151	1603	2336

The available statistics on refusals for the Child Benefit due to a failure to satisfy the HRC points to the relatively low number when compared to the data contained within Chapter Four. For example, in 2011 when refusals for Child Benefit reached a peak of 570, the total number of refusals in that year based on an inability to establish habitual residence was 4,494 - 12% of the overall refusals. In 2005, this figure was 5%. This may be the result of the growth of the EU citizen population resident during this period of time[137] - but a gradual change within this segment of the population should not realistically lead to a 7% increase in refusals. This increase may be attributed to the onset of the Global Financial Crisis of 2008 and the subsequent decision by the Irish State to enter into a 'bailout package' which required that cuts to the State budget be made. However, as Chapter Four underlined, any adjustments were primarily determined by the Irish State and the Department, as well as their decision to focus on granting less payments and to place the onus on applicants in establishing that they are habitually resident in the State. The application of the HRC is likely to have a disproportionate impact on Union citizens, and in particular, on the most recent accession states from Central and Eastern Europe.[138] Some of the largest demographic changes between 2005 and 2011 were in the Romanian and Hungarian populations for example, and it *may* be the case that they are similarly overrepresented within this 7% increase in refusals based on the HRC.[139]

As previously mentioned, Roma and Romanian nationals are the the most likely to be affected by this, as they often lack the necessary documentation to lodge a successful claim, are unable to engage in sustained economic activity, or do not fully engage with the authorities due to the systemic discrimination they have often suffered.[140] This may

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[137] Central Statistics Office, 'EU Nationals Resident in Ireland in 2006 and 2011' (Census 2011 - Migration and Diversity) <https://www.cso.ie/en/census/census2011reports/census2011profile6migrationanddiversity-aprofileofdiversityinireland/> accessed 09/02/2019.

[138] Mel Cousins & ors, 'Technical Review of the Social Welfare Code to Examine its Compatibility with the Equal Status Acts: Final Report' (Review Gate, 2009-2011), 189 -The HRC during the period studied had impacted upon: Irish citizens in 10% of cases, 18.8% of third-country national labour migrants, 49.3% of the most recent accession States and 61.9% of EU13 nationals.

[139] See Table 4.2.

[140] Pavee Point, 'Habitual Residence Condition – Briefing Paper' 3 <http://www.paveepoint.ie/wp-content/uploads/2014/01/Briefing-Paper-HRC-and-Roma.pdf> accessed 01/10/2016; and Joint Committee on Education and Social Protection Debate, 'Habitual Residence Condition: Discussion with Pavee Point' (Wednesday, 6 February 2013) <http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/DebatesWebPack.nsf/committeetakes/EDJ2013020600009?opendocument> accessed 09/10/2016.

simply be a feature of the way in which access to such benefits is constructed within EU law, and in this respect, Ireland may in fact be considered fully compliant with the relevant EU rules. However, the emphasis within the Social Welfare (Consolidation) Act 2005 on applicants having to establish their habitual residence, and by extension placing the burden of proof on them, will also be a significant barrier, and this issue was raised by the SWAO as early as 2004.[141]

The implications of *Commission v UK,*[142] which allows the 'right to reside' criteria to be applied to recipients of Family Benefits, remains to be seen, as persons existing at the margins of worker or self-employed status are more likely to be adversely affected by this additional procedural requirement. This is of particular importance given that there have already been significant delays for successful applicants in accessing Child Benefit,[143] and Shortall believes that the Irish provision may already exceed what is applied in the United Kingdom,[144] leading to a greater number of individuals being ejected from the system.

Thus, Ireland largely aligns with the highly specific and market-based mode of welfare provision utilised by the EU, and accessing Child Benefit may become even more difficult based on the recent jurisprudence of the Court of Justice in *Commission v UK*. However, even with its compliance in this area, the issue of delays and the particular interpretation of the right to reside in Ireland do raise further questions which remain, as yet, unanswered.

5.4.3 Jobseekers and the HRC

Another concern is whether or not Ireland accurately applies the principles relating to jobseekers established in EU law. 'Jobseeker' is a classification that can apply to both post-active workers - i.e. those previously in employment within Ireland who are now attempting to find work - and pre-active workers - those who enter a host Member State such as Ireland for the purposes of finding employment. Pre-active workers are protect-

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[141] Social Welfare Appeals Office, Annual Report (Social Welfare Appeals Office, 2004), 10: 'The legislation is framed in a manner that presumes that a person shall not be habitually resident until the contrary is shown.'

[142] Case C-308/14 *European Commission v United Kingdom of Great Britain and Northern Ireland* [2016] ECLI:EU:C:2016:436.

[143] Department of Social Protection, Annual Report (Department of Social Protection, 2011), Table 35.

[144] D. Shortall, 'Social Welfare Rights of EU Citizens in Ireland' (2017) 20(1) *Irish Journal of European Law* 80, 96.

ed by virtue of the fact that they have been in employment within Ireland or in another State,[145] whereas those who remained wholly-inactive prior to exercising their free movement rights and becoming a jobseeker receive protections from a combination of Article 45 TFEU directly, Regulations 883/04 as well as from the jurisprudence of the Court of Justice. This kind of distinction does not however, have any direct effect *strictu sensu*, and is simply a peculiarity within the construction of the rights of jobseekers at the Union level.

In the national context, the HRC applies to jobseeker's allowance by virtue of it being a social assistance payment under Irish law. This is expressly outlined in Section 141(9) of the 2005 Act which states that, '[a] person shall not be entitled to jobseeker's allowance under this section unless he or she is habitually resident in the State at the date of the making of the application for jobseeker's allowance.' EU law by comparison, requires that Member States do not discriminate against jobseekers by virtue of judgments such as *Antonissen*, which outlines that for a period of 6 months, jobseekers have a right to reside within the host State,[146] although this can be extended where the individual can demonstrate that they are still actively seeking employment[147] and it is feasible that they will find it.[148] It has also been held that payments intended to facilitate access to the labour market, such as jobseeker's allowance, are to be considered social security payment within the meaning of Regulation 883/04,[149] and cannot therefore be

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[145] REGULATION (EC) No 987/2009 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems OJ L.284/1, Article 11.

[146] Case C-292/89 *The Queen v Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen* [1991] ECLI:EU:C:1991:80 - 'In the absence of a Community provision prescribing the period during which Community nationals seeking employment in a Member State may stay there, a period of six months, such as that as laid down in the national legislation at issue in the main proceedings, does not appear in principle to be insufficient to enable the persons concerned to apprise themselves, in the host Member State, of offers of employment corresponding to their occupational qualifications and to take, where appropriate, the necessary steps in order to be engaged and, therefore, does not jeopardize the effectiveness of the principle of free movement. However, if after the expiry of that period the person concerned provides evidence that he is continuing to seek employment and that he has genuine chances of being engaged, he cannot be required to leave the territory of the host Member State.'

[147] Case C-292/89 *The Queen v Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen* [1991] ECLI:EU:C:1991:80, para 13; Case C-138/02 *Brian Francis Collins v Secretary of State for Work and Pensions* [2004] ECLI:EU:C:2004:172; Case C-171/91 *Dimitrios Tsiotras v Landeshauptstadt Stuttgart* [1993] ECLI:EU:C:1993:215.

[148] Directive 2004/38/EC, Article 14(4)(b) - 'the Union citizens entered the territory of the host Member State in order to seek employment. In this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.'

[149] Regulation 883/04, Article 3(1)(h).

unduly restricted in terms of an EU citizen moving to Ireland with the intention of searching for employment.[150]

This means that Section 141(9) of the 2005 Act is contrary to EU law, as it seeks to classify jobseeker's allowance as a social assistance payment *irrespective of who applies for it*. The decision to classify jobseeker's allowance as a 'pure' social assistance payment for the purposes of national law may constitute a minor infraction, insofar as national classifications are deemed irrelevant under EU law, however the decision to apply any part of the HRC to jobseekers from a secondary EU Member State where such persons can prove that they are actively seeking employment raises more substantive issues regarding Ireland's compliance with EU law. In particular, the decision to revoke an individual jobseeker's residency permission, or to deem them to have no right to reside where they comply with the conditions established in EU law, would almost certainly come into conflict with these embedded rights.

Other Member States, such as Germany, have recast the primary purpose of such payments to be subsistence, and this has been upheld by the Court of Justice in several instances.[151] This option is certainly available to Ireland, but it has thus far elected not to do so. The Irish Superior Courts have however often demonstrated a lack of technical expertise in this respect, treating the distinction between social assistance and social security as immaterial for the purposes of EU law,[152] or simply misreading the Social Welfare (Consolidation) Act so that jobseeker's allowance is considered to be a subsistence payment[153] - a reading that is not supported by the Act in any way. Thus, the Irish State may simply lack the technical expertise to exploit this potential for re-categorisation, or it may be indicative of the State's ambivalence towards the EU and its institutions.

The importance of retaining the classification of jobseeker's allowance as social assistance within the 2005 Act may ultimately be diminished if in a practical sense access for EU citizens is not limited on this basis. Yet, it provides another example of the Irish

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[150] Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze v Arbeitsgemeinschaft (ARGE) Nurnberg 900* [2009] ECLI:EU:C:2009:344.

[151] Case C-67/14 *Jobcenter Berlin Neukölln v Alimanovic* [2015] ECLI:EU:C:2015:597; and Case C-333/13 *Dano v Jobcenter Leipzig* [2014] ECLI:EU:C:2014:2358.

[152] M. Cousins, 'A2 workers and the right to reside in Ireland – Genov and Gusa v Minister for Social Protection' (2013) <https://works.bepress.com/mel_cousins/72/> accessed 02/03/2017, footnote 27.

[153] *Munteanu v Minister for Social Protection* [2017] IEHC 161, paras 124 and 125; and *Macovei v Minister for Social Protection*, unreported, High Court, 21 July 2017.

State's lack of technical expertise in relation to the relevant EU rules, as well as its potential resistance to these rules if they are cognisant of the issue.

5.4.4 Self-Employed EU Citizens and the Right to Reside

As previously highlighted, the HRC simpliciter and right to reside test can have a significant impact on access to welfare payments for EU citizens. An issue within this which was not referred to, is the specific way in which Ireland has interpreted the ability of self-employed persons to transition from this category and become jobseekers - and by virtue of transitioning from 'self-employed' to 'jobseeker' whether they can be considered to retain a right to reside.

The sharp delineation between workers and the self-employed nationally is potentially relevant on this issue. Ireland currently requires that self-employed EU citizens generate at least €5000 per annum for their activities,[154] or €96.15 per week in comparison to the €38 per week required to fall within the definition of a worker[155] - both are within the bounds of EU law[156] and are a national rather than a Union distinction. The difficulty is that, as outlined previously within this chapter, workers and the self-employed make PRSI contributions into separate funds, and the self-employed are not deemed to be entitled to social security payments by virtue of the smaller contribution they make. It is the position of the Court of Justice that there is nothing in Regulation 1408/71 or its successor Regulation 883/04 which allow for the diminution of a self-employed citizen's right to social security, and that includes payments such as jobseeker's allowance which have been brought under the umbrella of social security.[157] Consequently, whilst the self-employed are not strictly entitled to social security due to the way in which con-

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[154] Social Welfare (Consolidated Contributions and Insurability) Regulations 1996 (S.I. No. 312 of 1996), Article 92 as amended by Article 6 of the Social Welfare (Consolidated Contributions and Insurability) (Amendment) Regulations (S.I. No. 684 of 2010). See also, Social Welfare (Consolidation) Act 2005, Section 20(1)(a) and Schedule 1.

[155] Social Welfare (Consolidation) Act 2005, Section 12(2).

[156] D. Shortall, 'Social Welfare Rights of EU Citizens in Ireland' (2017) 20(1) *Irish Journal of European Law* 80, 88.

[157] Case 1/72 *Frilli* [1972] ECLI:EU:C:1972:56; Case C-356/89 *Stanton Newton* [1991] ECLI:EU:C:1991:265; Case 24/74 *Biason* [1974] ECLI:EU:C:1974:99; Joined Cases 379,380,381/85, 93/86 *Giletti* [1987] ECLI:EU:C:1987:98; Case 139/82 *Piscitello* [1983] ECLI:EU:C:1983:126; and Case C-78/91 *Hughes* [1992] ECLI:EU:C:1992:331.
See also, Case 187/73 [1974] ECLI:EU:C:1974:57, para 14 - 'The Court has repeatedly held that the distinction between benefits excluded from the scope of Regulation No 1408/71 and those which fall within its scope is based essentially on the constituent elements of the particular benefit, in particular its purposes and the conditions on which it is granted, and not on whether a benefit is classified as a social security benefit by national legislation.'

tributions are structured in Ireland, they should not have their access to a payment intended to facilitate access to the labour market limited.[158]

In the United Kingdom, the introduction of a right to reside test in line with Directive 2004/38/EC[159] was designed to ensure that economically inactive persons could not satisfy the Habitual Residence Condition[160] and as such, were unable to access social assistance.[161] This then appears to have been applied almost uniformly to payments which had been pulled within the definition of social security for the purposes of Regulation 883/04. The latter of which, at that time, the Commission believed to constitute a clear breach of EU rules, triggering the infringement action in *Commission v UK*. Although *Commission v UK* later held that certain social security payments can potentially be subject to a right to reside test, this has only be recognised in relation to family benefits, and not payments intended to facilitate access to the labour market like the non-contributory jobseeker's allowance in Ireland. It is *possible* that the Court could find that a right to reside test can be applied to all such social security payments, including jobseeker's payments, but it is unlikely to do so as this would significantly erode the free movement of persons, and of workers in particular. Therefore, the self-employed should equally be able to access jobseeker's payments where they transition to this category and without restrictions being placed upon them.

Unfortunately, this point was largely ignored by the United Kingdom, and later by Ireland, in determining that the self-employed cannot move from one category to anoth-

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[158] European Commission, Social security coordination: Commission requests United Kingdom to end discrimination of EU nationals residing in the UK regarding their rights to specific social benefits, 29 September 2011, 2.

[159] The Social Security (Persons from Abroad) Amendment Regulations 2006 (S.I. No. 1026 of 2006), Reg 9(4) - 'A claimant is not a person from abroad if he is— (a) a worker for the purposes of Council Directive No. 2004/38/EC; (b) a self-employed person for the purposes of that Directive; (c) a person who retains a status referred to in sub-paragraph (a) or (b) pursuant to Article 7(3) of that Directive; (d) a person who is a family member of a person referred to in sub- paragraph (a), (b) or (c) within the meaning of Article 2 of that Directive; (e) a person who has a right to reside permanently in the United Kingdom by virtue of Article 17 of that Directive...'

[160] *Patmalniece v Secretary of State for Work and Pensions* [2009] EWCA Civ 621 - '…the decision of the House of Lords in Chief Adjudication Officer v Wolke [1997] 1 WLR 1640 was perceived as creating a major difficulty in relation to economically inactive EU nationals.'

[161] *Patmalniece v Secretary of State for Work and Pensions* [2009] EWCA Civ 621, Para 10 - 'The underlying purpose of the introduction of a "right to reside" test into the UK's social security system was to protect that system from exploitation by those who do not wish to come to work but to live off benefits. The Committee had taken the view that the existing habitual residence test was sufficient to prevent "benefit tourism". The Secretary of State, however, concluded that the habitual residence test was ineffective in withholding entitlement to income-related benefits from those who had decided to live in the UK indefinitely without being economically active. The 2004 Regulations were: 'intended to fill a gap in measures to safeguard the public purse against exploitation by people with no right to reside here, irrespective of nationality.''

er by continually focusing on very narrow interpretations of Article 7(3) of Directive 2004/38/EC - which applies to social assistance and *should* be entirely irrelevant. Article 7(3) of the Directive outlines the circumstances in which a worker or self-employed person will retain this status for the purposes of accessing *social assistance* and consequently a right to reside, implying that self-employed persons retain this status in the same manner as workers. This would again arguably mean that they cannot be barred from accessing social assistance payments for which they are eligible where that status remains with them and until such time as it ceases to do so. The potential limitation of this retention of their status arises from subsections (b) and (c) state that worker or self-employed status is retained where:

> (b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;
>
> (c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than one year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months.'

A natural consequence of this emphasis within the Article on *employment* is that when read literally, as opposed to teleologically, Article 7(3) bars the self-employed from retaining their status, due to the fact that they are not leaving an employment relationship. A more purposive approach would infer that when considering the retention of self-employed status that equivalent words which would provide the self-employed with a comparable level of protection should be read into the provision. Again however, this should arguably not apply to cases involving jobseeker's payments based on their classification under EU law and being outside of the application of Directive 2004/38/EC.

Consequently, the Irish High Court, and more recently the CJEU itself, have had to grapple with the ability of self-employed persons to transition from self-employment into the role of jobseeker. In reality, this discussion should not be necessary, as EU law is relatively clear on this point. However, due to the position taken by Ireland and the

United Kingdom, the Court of Justice has had to engage in this question of whether or not it is possible to move from one category to another and refer to a Directive which not even relevant. The following subsections will explore the different approaches adopted by national courts and the CJEU itself, and how - by virtue of adopting the literal reading of Article 7(3) of Directive 2004/38/EC - Ireland has failed to comply with its obligations under EU law, as well as potentially demonstrating a further lack of technical expertise with regard to how Union rules operate.

5.4.5 Tilianu, Solovastru and the Self-Employed/Jobseeker 'Saga'

In *Tilianu*,[162] the plaintiff was a Romanian national who moved to the United Kingdom in June of 2008 and began to operate as a self-employed contractor within the construction industry, and evidence was produced to support this claim. This seemingly ceased by January of 2009, after which time he worked for a short period under the direction of a relative, but proof of this employment could not be provided to the court to support this claim. Subsequent to this, the plaintiff applied for a crisis loan and jobseeker's allowance to support himself - both of which were refused on the basis that he lacked a right to reside. Mr Tilianu countered that he had operated as a self-employed contractor for a sufficient period of time to have retained this status and had a clear right to right as a result. Consequently, Mr. Tilianu's case rested upon whether or not he satisfied the conditions included in Article 7(3) of Directive 2004/38/EC. If this provision did in fact apply solely to workers, then the cessation of his self-employed activities would result in an automatic loss of his right to reside in the UK, and whether or not he was habitually resident there would also be immaterial.

In particular, the Court of Appeal believed that no such right arose in the context of the self-employed due to the need to read Article 7(3) in a literal manner. On this point, they also referred to the emphasis on workers within the different language versions of the Directive generally, and treated workers and the self-employed as autonomous for the purposes of interpreting the Directive.[163] This does however ignore that the intended purpose of Directive 2004/38/EC is to

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[162] *R (Tilianu) v Secretary of State for Work and Pensions* [2010] EWCA Civ 1397.

[163] *R (Tilianu) v Secretary of State for Work and Pensions* [2010] EWCA Civ 1397, para 8.

> ‘to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens,'[164]

and thereby mitigate these more anachronistic distinctions between the rights of workers and the self-employed in terms of their access to welfare payments and residence rights. Similarly, the self-employed are referred to on five other occasions within the preamble to the legislation,[165] as well as being one of the primary addressees of Article 7 itself, and several other provisions dealing with protections extended to EU citizens.[166] In spite of the somewhat clear intentions of the legislation, the Court underlined that:

> ‘Further the wording of the Directive is not apt in Articles 7(3)(b)-(d) to cover self- employed persons. A distinction is drawn between workers, and having the status of worker on the one hand and self-employed persons on the other. That distinction is made in Article 7(1) and 7(3).’[167]

Jobseeker was also not considered by the Court to be a category which could be applied to the self-employed, as it deals with finding employment under the direction of another. In the Court’s estimation there was an intentional delineation made in Article 7(1) and 7(3) of the Directive which does not allow for the self-employed to be considered jobseekers in a material sense and derive any benefit from this status. If the EU legislation had intended benefits such as these to be extended to the self-employed, it would have been more clearly incorporated into the recitals or *travaux preparatoires*,[168] which suggests that the court was unwilling to view the intentions of the Directive in a teleological manner similar to the Court of Justice when it has historically looked at the

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[164] Directive 2004/38/EC, Recital 3.

[165] Directive 2004/38/EC, Recitals 4, 16, 19 and 22.

[166] Directive 2004/38/EC, Articles 8, 12, 13, 14, 17 and 24.

[167] *R (Tilianu) v Secretary of State for Work and Pensions* [2010] EWCA Civ 1397, Para 42.

[168] *R (Tilianu) v Secretary of State for Work and Pensions* [2010] EWCA Civ 1397, Para 24.

rights of EU citizens, both as workers and the self-employed, to access welfare payments in a host State.

The circumstances of *Tilaniu* bear outlining in full due to the influence it had on the Irish position on this issue, as well as the similarities between the factual circumstances in it and those brought before the Irish Superior Courts. Firstly, the UK position was adopted in its entirety by the Irish High Court in *Solovastru & Anor -v- Minister for Social Protection & ors.*[169] Secondly, the factual circumstances in *Solovastru* were quite similar to those of *Tilianu*, as the case dealt with the right to reside component of the HRC rather than the habitual residence simpliciter, and it also involved a Romanian national who had previously been self-employed but had since ceased this activity, and subsequently queried their inability to access jobseeker's allowance. The plaintiff argued that as he was available for and actively seeking work, he was under EU law entitled to access this specific category of payments due to jobseekers being considered workers within the Union's legal framework.[170]

An additional component that applied according to the Minister for Social Protection, was the restricted access that Romanian nationals had to the Irish labour market at that point in time. Romania was still in the process of fully acceding to the EU, and it was the Minister's position that the plaintiff must obtain an employment permit in order to allow them to fulfil the right to reside element of the HRC. Obtaining an employment permit was merely a procedural formality,[171] and did not impact on Mr. Solovastru's ability to work in the State. Interpreting the law in this manner would almost certainly have been contrary to the Accession Treaty.[172] Cousins further notes that by the time this claim had been made, the restrictions on Romanian citizens had been removed[173] and should therefore have been immaterial.

The High Court in *Solovastru* subsequently followed the line of reasoning developed in *Tilianu* by finding that this was equally applicable to the specific factual circum-

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[169] *Solovastru & Anor -v- Minister for Social Protection & ors* [2011] IEHC 532.

[170] It is stated in Section 141 of the Social Welfare (Consolidation) Act 2005 that being available for and actively seeking work are the necessary preconditions.

[171] Employment Permits Acts 2003, Section 2, as amended by Employment Permits Act 2006, Section 3.

[172] For example, Treaty of Accession 2005, Annex VII.

[173] M. Cousins, 'A2 workers and the right to reside in Ireland – Genov and Gusa v Minister for Social Protection' (2013) <https://works.bepress.com/mel_cousins/72/> accessed 02/03/2017, 3.

stances of the case at a hand. Self-employed EU citizens could not rely upon the national measure implementing Article 7(3) of Directive 2004/38.[174] Dunne J in particular highlighted the judgment in *Tilianu* and underscored that 'involuntary unemployment' as written in Article 7(3)(b) and (c) of the Directive can only be applied to workers.[175] This was based upon a literal reading of the Article rather than on the belief that there are no comparable circumstances which apply to the self-employed. It was also argued that the Directive drew clear distinctions between both categories of economically-active citizens through the act of referring to them separately.

Unlike the position of the Superior Courts with regard to the supremacy of EU law, the distinction between disapplication and judicial review and the definition of courts and tribunals for the purposes of EU law which show a relatively clear lack of technical expertise on the part of the Irish courts, the judgment in *Solovastru* is potentially more nuanced on this point. In an adversarial system of law, courts will be somewhat restricted by the facts of the case as it is presented to them and based on the arguments presented by counsel for both parties when they render their judgment. The High Court in this instance was not *wholly* confined to these arguments, but was unlikely to go outside of these where both parties appear to be contesting the same, albeit incorrect, point concerning the right to reside put before it in *Solovastru*. That the *Tilaniu* judgment appeared to support the decision reached by the Irish High Court complicates the matter even further.

However, even taking these factors into consideration, the High Court in *Solovastru* still makes several errors in law which display a lack of technical expertise. Cousins for example, notes that it is difficult to reconcile this with Dunne J underscoring that the self-employed are not precluded from being in receipt of jobseeker's allowance.[176] If this was meant to infer that only Irish citizens who are self-employed may subsequently be in receipt of jobseeker's allowance, then this would amount to a discrimination based on the grounds of nationality and be incompatible with EU law. The High Court ultimately believed that even if the plaintiff had a right to jobseeker's allowance, it would be for no more than six months, which underlines that the Court may have misclassified

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[174] See European Communities (Free Movement of Persons) (No.2) Regulations 2006, Article 6(2)(c)(ii).

[175] *Solovastru & Anor -v- Minister for Social Protection & ors* [2011] IEHC 532, 38-39.

[176] M. Cousins, 'A2 workers and the right to reside in Ireland – Genov and Gusa v Minister for Social Protection' (2013), 4 <https://works.bepress.com/mel_cousins/72/> (accessed 03/02/2017).

jobseeker's allowance as social assistance, as well as misreading the remaining provisions of the Directive which make clear that even if that was the case, Mr Solovastru would be entitled to access the payment for a significantly longer period of time.

It should also be noted that at the interlocutory hearing, the plaintiff in *Solovastru* requested a preliminary reference be sent to the Court of Justice to clarify the position of the of the relevant EU rules on the matter. This request was denied. Although the High Court is not a court of final jurisdiction, and therefore not obligated to refer such questions as cases can be further reviewed by both the Court of Appeal and Supreme Court in particular circumstances, in instances such as this dealing with a judicial review of administrative decisions it may be considered the *de facto* court of final jurisdiction. This is due to the rare occurrence of cases dealing with such matters being appealed to a higher Superior Court. While it is not, as such, a mandatory requirement, it should arguably put Justices within the High Court on notice that there is a strong impetus on them to do so. Finally, the interpretation adopted by the High Court had been pulled from the UK, who would subsequently be investigated by the Commission for their use of the right to reside test. Whilst *Commission v UK*[177] ultimately sided with the government of England & Wales on this matter, the Court of Justice only held the right to reside test to be applicable to family benefits and not jobseekers payments.

In spite of these issues, the transition from self-employed to jobseeker status arose in two subsequent cases: *Hrisca v Minister for Social Protection*,[178] which once again saw the High Court decline to make a preliminary reference to the CJEU - in this instance because it was on appeal to the Supreme Court[179] - and *Genov and Gusa v. Minister for Social Protection*,[180] from which the second-named plaintiff would mount a further appeal to the Court of Appeal,[181] and a preliminary reference would finally be made to the CJEU. *Gusa* raised each of these fundamental questions once again, as well as finally presenting the Court of Justice with the opportunity to interpret the relevant rules based upon a well-established technical understanding of the law.

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[177] Case C-308/14 [2016] ECLI:EU:C:2016:436.

[178] *Hrisca v Minister for Social Protection* unreported, High Court, 16 February 2012.

[179] unreported High Court, 16 February 2012, 22.

[180] [2013] IEHC 340.

[181] *Gusa -v- Minister for Social Protection & ors* [2016] IECA 237.

5.4.6 Gusa: Article 7(3) of Directive 2004/38/EC Before the CJEU

In this instance, which also dealt with a Romanian national, the plaintiff had conducted business as a self-employed person for a period of four years lasting from October of 2008 to the same month in 2012. During this time he made PRSI contributions on behalf of himself. Prior to this point, he had been supported financially by his adult son and daughter-in-law, and upon the dissolution of his business, he sought to once again rely on them in this manner. Unfortunately, his family intended to move to Canada, leaving him with no means to support himself. On this basis, he made a claim for jobseeker's allowance. Within his submissions, Mr. Gusa volunteered that he had unable to support himself upon his arrival in the State. This, he believed, meant that he was not entitled to claim a right to long-term residence under EU law until October of 2013, as opposed to November of 2012 (5 years following his actual arrival in the State).[182] His claim was subsequently refused by a DO within the DEASP due to his inability to satisfy the right to reside component of the HRC.[183] The Court then decided to refer three questions to the Court of Justice:

1. Does Article 7(1)(a) of Directive 2004/38/EC extend to Union citizens who have lawfully resided in a secondary Member State for a period of approximately four years the right to retain their status as a self-employed person for the purposes of the right to reside test included in Irish law;
2. If the answer to the first question is in the negative, will the primary protection for such persons be the right against expulsion in Article 14 of the same Directive, or is there a right to reside stemming from another provision of EU law; and
3. Is the application of the right to reside test to a special non-contributory social benefits such as jobseeker's allowance a violation of EU law, and in particular, Article 4 of Regulation 883/2004?[184]

It is interesting to note that, like *Solovastru*, the High Court in this instance also argued against a preliminary reference being made to the Court of Justice, and that it took

[182] *Gusa -v- Minister for Social Protection & ors* [2016] IECA 237, para 6.

[183] *Gusa -v- Minister for Social Protection & ors* [2016] IECA 237, para 5.

[184] *Gusa -v- Minister for Social Protection & ors* [2016] IECA 237, Para 62.

only one of the original applicants bringing the case to the Court of Appeal to ensure that this was carried out. However, as Cousins notes, Hedigan J argued that whether or not jobseeker's allowance was social security or assistance was immaterial, as in either instance the applicants would be a burden on the State.[185]

Returning to the questions referred themselves, they are almost identical to those posed in *Solovastru*. The Court of Appeal in *Gusa*, for the first time, acknowledges that this question of the right to reside and the scope of Article 7 of Directive 2004/38/EC for self-employed citizens may not be a settled matter, however it would only be of consideration if the primary purpose of the jobseeker's allowance is subsistence, bringing it within the scope of the Directive - which it is not. Similarly, the invocation of Article 14 in relation to deportation or removal from the State is not of immediate importance. Even within the context of the recent *Dano* and *Alimanovic* judgments, which Hedigan J refers to, the Article explicitly states that recourse to the social assistance system of a host Member State is not a sufficient ground for removal, and this would apply to both workers and the self-employed.[186] The competent Member State must instead assess whether or not they have become an 'undue burden,' which would imply that drawing social assistance for short periods would not be considered *strictu sensu* unreasonable.[187] Therefore, even *if* jobseeker's allowance was considered social assistance, this would not be possible.

The point of self-sufficiency during the early months of Mr. Gusa's residency is also questionable. Whilst he may have lacked adequate health insurance and his own independent means of support, he never sought to obtain welfare payments from the State or to access public healthcare at the State's expense. Rather, he was supported by his family, and cannot fall within the scope of being considered a burden within the meaning of Article 7(1)(b) of Directive 2004/38/EC - which specifically refers to the social assistance system. This point was raised by the Advocate General in their opinion, by specifically drawing attention to the presumption that if someone is not accessing the social assistance system of their host State then they are self-sufficient for the purposes

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[185] M. Cousins, 'A2 workers and the right to reside in Ireland – Genov and Gusa v Minister for Social Protection' (2013) <https://works.bepress.com/mel_cousins/72/> accessed 02/03/2017, footnote 27.

[186] Directive 2004/38/EC, Article 14(3).

[187] Directive 2004/38/EC, Article 14(1).

of EU law and obtaining long-term residence.[188] Ultimately however, this was merely one part of the decision, and the Advocate General returned to a more purposive interpretation of the Directive in reaching their overall conclusion, believing that Article 7(3)(b) applies equally to workers and to the self-employed, and that measures designed to undermine this as well as access to payments like jobseeker's assistance are incompatible with Union law.[189]

The Court of Justice[190] by comparison, ignored this question of long-term residence entirely by emphasising that Mr. Gusa himself did not assert any such right.[191] It was instead quick to underline that the intention of Directive 2004/38/EC remains, as outlined in the Recitals to the same,[192] to remedy the 'piecemeal approach' of prior generations of social security coordination legislation.[193] Although they also attempt to read the Directive literally,[194] the Court adopted a teleological interpretation of Article 7 and found that there was no objective rationale to read Article 7(3) in particular in such a way that self-employed persons would be granted less protections than workers.[195] The CJEU believed that treating genuinely self-employed persons in the same manner as someone who had never contributed to the host State would be particularly unfair.[196] This facilitates a reading of the Article as a whole which takes 'involuntary unemployment' as circumstances in which there is 'an absence of work for reasons beyond the

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[188] Case C−442/16 *Florea Gusa v Minister for Social Protection, Ireland, Attorney General* [2017] ECLI:EU:C:2017:607, paras 33-34.

[189] Case C−442/16 *Florea Gusa v Minister for Social Protection, Ireland, Attorney General* [2017] ECLI:EU:C:2017:607, para 91(2)-(4).

[190] Case C−442/16 *Florea Gusa v Minister for Social Protection, Ireland, Attorney General* [2017] ECLI:EU:C:2017:1004.

[191] Case C−442/16 *Florea Gusa v Minister for Social Protection, Ireland, Attorney General* [2017] ECLI:EU:C:2017:607, para 21.

[192] Directive 2004/38/EC, Recitals 3 and 4 in particular.

[193] Case C−442/16 *Florea Gusa v Minister for Social Protection, Ireland, Attorney General* [2017] ECLI:EU:C:2017:1004, paras 40-41.

[194] Case C−442/16 *Florea Gusa v Minister for Social Protection, Ireland, Attorney General* [2017] ECLI:EU:C:2017:607, paras 32-34.

[195] Case C−442/16 *Florea Gusa v Minister for Social Protection, Ireland, Attorney General* [2017] ECLI:EU:C:2017:1004, paras 42-44.

[196] Case C−442/16 *Florea Gusa v Minister for Social Protection, Ireland, Attorney General* [2017] ECLI:EU:C:2017:607, para 44.

control of the person concerned'[197] and therefore protects the self-employed within all four of the stated grounds set out in Article 7(3).[198]

The Court of Justice ultimately took the appropriate view of the intentions of Directive 2004/38/EC and Article 7(3) of the same in relation to the retention of self-employed status for the purposes of accessing social assistance. However, if the United Kingdom and Ireland had not adopted an entirely incorrect reading of EU law, and presumed, even prior to *Commission v UK*, that the right to reside could be applied to everything other than pure contributory social security payments, these cases would not have arisen. The questions that the Court of Justice inevitably answered were potentially significant and clarified an incongruity in the drafting of the Directive, but they were attached to a case which had almost nothing to do with the contested provision. It appears that this was a concerted practice on the part of the UK executive in order to limit access to welfare payments for EU citizens which was then upheld by the courts based upon the brief submitted in *Tilianu* and a misunderstanding of the applicable law, whereas the Irish position seems to have been driven by an assumption that the interpretation adopted in the UK was correct, the division with the Irish welfare system between workers and the self-employed, and the nature of the arguments presented in *Solovastru* which focused on Article 7 of 2004/38/EC. If the Superior Courts were more familiar with EU law and EU welfare rules in particular, or at least recognised their limited store of knowledge in these areas, this issue could have remedied at an earlier point in time through a preliminary reference.

5.4.7 The Tarola Judgment: A Continued Lack of Technical Expertise and Further Issues Relating to Jobseekers

A judicial review which emphasises many of the points underlined throughout this chapter, as well as the thesis as a whole, is *Tarola -v- Minister for Social Protection*.[199] These are: the lack of technical expertise exhibited by the Irish State; the inability of EU law to deal with complex circumstances; and the degree to which EU citizens from re-

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[197] Case C−442/16 *Florea Gusa v Minister for Social Protection, Ireland, Attorney General* [2017] ECLI:EU:C:2017:607, para 31.

[198] Case C−442/16 *Florea Gusa v Minister for Social Protection, Ireland, Attorney General* [2017] ECLI:EU:C:2017:607, paras 35-38.

[199] [2016] IEHC 206.

cent Central and Eastern European accession States appear to have difficulty engaging with both the Irish system and the EU rules to a disproportionate degree. *Tarola* sees almost all of these factors engaged with simultaneously, and within one particular case brought before the High Court.

Cousins notes that, despite the importance of factual circumstances in making a full determination, there appear to be very little on record in this case.[200] It appears that Mr. Tarola, a Romanian national, arrived in Ireland in 2007 and engaged in highly disparate and short periods of employment between 2007 and 2014. For a period of less than one month in 2014, he also acted as a self-employed contractor for a construction company. His primary means of supporting himself in the intervening periods was through charitable donations and financial assistance from his family. The Court acknowledged that no tax had been paid on the work he had carried out.

Much of this case hinges upon the lack of documentation being provided by the plaintiff. In 2013, Mr. Tarola made his first claim for jobseeker's allowance which was subsequently rejected due to his lack of habitual residence. He had failed to produce evidence establishing his residence within the State as well as his personal means from the date of his arrival until July of 2013. Within three months, he lodged a claim in respect of the supplementary welfare allowance, which was also refused based on the plaintiff failing to produce evidence of his means. In 2014 he made an application for jobseeker's allowance for a second time but was refused based upon the DO's belief that the evidence submitted suggested his centre of interest was outside of Ireland.

In this respect, the refusal of his application[201] for jobseeker's allowance draws on his lack of resources,[202] his lack of habitual residence,[203] and his unemployment of more than one year appears to refer to the allowable restrictions for workers who become involuntarily unemployed and their access to social assistance.[204] With regards to his resources, this point is largely irrelevant, as it would apply to someone attempting to access a social assistance payment - and a payment intended to facilitate access to the

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[200] M. Cousins, 'Establishing and Retaining a Right of Residence as a Worker under EU law - Tarola -v- Minister for Social Protection' (2016) <https://works.bepress.com/mel_cousins/98/> accessed 02/02/2018.

[201] *Tarola -v- Minister for Social Protection* [2016] IEHC 206, para 12.

[202] Directive 2004/38/EC, Article 7(1).

[203] Social Welfare (Consolidation) Act 2005, Section 246(1).

[204] Directive 2004/38/EC, Article 7(3)(b).

labour market such as jobseeker's allowance may be classified as such under Irish law but is a social security payment for the purposes of EU law and is therefore brought within the scope of Regulation 883/04 on the coordination of social security schemes.[205] Similarly, habitual residence cannot be applied to a payment such as this, as Regulation 883/04 arguably only requires *ordinary* habitual residence,[206] and demonstrating a degree of integration by virtue of engaging with the labour market of the host State, such as acting as a jobseeker, is usually considered to be indicative of this.[207]

The result of this emphasis on a 'blunderbuss' of arguably irrelevant issues,[208] is that the High Court, as well as Mr. Tarola's legal representatives, became somewhat fixated on whether or not the sporadic employment he had engaged in was sufficient to make him fall within the definition of a worker for the purposes of EU law, and therefore allow for the retention of that status, granting him a right to reside. In a similar vein to *Solovastru*, the arguments put before the High Court by both parties underlines an issue that it is of lesser relevance, and does mean that it is not entirely the High Court's fault that it then adjudicated upon them. This leads to an assessment of Article 7(3)(c) governing the retention of worker or self-employed status and states in the following circumstances:

> 'he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with

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[205] Case C-310/91 *Hugo Schmid v Belgiand State, represented by the Minister van Sociale Voorzorg* [1993] ECLI:EU:C:1993:221 found Disability Allowances were social benefits and Case C-249/83 *Vera Hoeckx v Openbaar Centrum voor Maatschappelijk Welzijn, Kalmthout* [1985] ECLI:EU:C:1985:139; Case 1/72 *Frilli* [1972] ECLI:EU:C:1972:56; Case C-356/89 *Stanton Newton* [1991] ECLI:EU:C:1991:265; Case 24/74 *Biason* [1974] ECLI:EU:C:1974:99; Joined Cases 379,380,381/85, and 93/86 *Giletti* [1987] ECLI:EU:C:1987:98; Case 139/82 *Piscitello* [1983] ECLI:EU:C:1983:126; and Case C-78/91 *Hughes* [1992] ECLI:EU:C:1992:331.

[206] Which differs in terms of the evidentiary burden that can be placed on a Union citizen to establish that they are resident in a host State.

[207] Case 76/76 *Silvana di Paolo v Office national de l'emploi* [1977] ECLI:EU:C:1977:32, para 19 - 'In fact, whenever a worker has a stable employment in a Member State there is a presumption that he resides there, even if he has left his family in another State.' Whilst this does refer to 'stable employment,' the broad definition given to the concept of worker and the inclusion of jobseekers with that same definition arguably means this precedent is equally applicable and unqualified.

[208] M. Cousins, 'Establishing and Retaining a Right of Residence as a Worker under EU law - Tarola -v- Minister for Social Protection' (2016) <https://works.bepress.com/mel_cousins/98/> accessed 02/02/2018.

the relevant employment office. In this case, the status of worker shall be retained for no less than six months.'

However, like in *Solovastru*, the Court then goes further and appears to make basic errors in law, which is an indicative of a lack of technical expertise in EU and Irish welfare rules. For example, White J misreads this provision as implemented in Irish legislation[209] and believes that it *only* applies to individuals who have completed fixed term contracts, and holds against Mr. Tarola on the basis that he is incapable of satisfying this criteria.[210] Further, at no point does the Court consider that as a social security payment that Directive 2004/38/EC is the incorrect legislation to apply in this instance, and that Mr. Tarola should be assessed on the basis of Regulation 883/04. If the Regulation were to be applied, it would simply be a case of assessing whether or not he is actively seeking employment[211] and it is feasible that they will find it,[212] as well as providing proof of his residence within the State, but due to the applicant's relatively poor ability to maintain documentation, it is still possible that he may not satisfy these requirements from an administrative perspective. The Directive could only reasonably apply in circumstances such as those established in *Alimanovic*,[213] where the national payment intended to facilitate access to the labour market has become 'mixed,' and its primary purpose becomes one of subsistence - and thereby transforming it into a special non-contributory cash benefit for the purposes of EU law.

The belief that jobseeker's allowance does constitute a mixed payment was put forward in *Munteanu v Minister for Social Protection and ors*,[214] where the Court posited

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[209] European Communities (Free Movement of Persons)(No. 2) Regulations 2006, Regulation 6(2)(c)(iii).

[210] *Tarola -v- Minister for Social Protection* [2016] IEHC 206, para 31.

[211] Case C-292/89 *The Queen v Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen* [1991] ECLI:EU:C:1991:80, para 13; Case C-138/02 *Brian Francis Collins v Secretary of State for Work and Pensions* [2004] ECLI:EU:C:2004:172; Case C-171/91 *Dimitrios Tsiotras v Landeshauptstadt Stuttgart* [1993] ECLI:EU:C:1993:215.

[212] Directive 2004/38/EC, Article 14(4)(b) - 'the Union citizens entered the territory of the host Member State in order to seek employment. In this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.'

[213] Case C-67/14 *Jobcenter Berlin Neukölln v Nazifa Alimanovic and Others* [2015] ECLI:EU:C:2015:597.

[214] *Munteanu v Minister for Social Protection* [2017] IEHC 161.

that it does include a minimum subsistence element.[215] As this subsistence component is: not referred to in the descriptions of the payments within the 2005 Act;[216] the unemployment payments conditions mirror those of a payment intended to facilitate access to the labour market under EU law;[217] and by mere virtue of the fact that the Supplementary Welfare Allowance exists as a separate and intentional subsistence payment,[218] such a reading is not possible.

In a subsequent hearing before the Court of Appeal, a preliminary reference was ultimately made to the Court of Justice in order to address some of these issues.[219] Yet, even the Court of Appeal in formulating their question led with the scope of Article 7(3)(c) in relation to the retention of worker status and phrased the request in order to emphasise access to social assistance on the basis of this article. It does make reference as a secondary question to whether or not the principle of equal treatment in relation to social security applies in such instances, but does not refer to Regulation 883/04 in any form - suggesting that the Court believes Directive 2004/38/EC to be the applicable legislation. Neither an Advocate General opinion nor judgment of the CJEU has been issued.

What the *Tarola* judgment underlines, is that the level of technical expertise in relation to EU law in Ireland is often very low. This can be explained in part by the way in which an adversarial system of law operates - both parties to a dispute bring their arguments to the court and the court is unlikely to step significantly outside of the parameters presented to it. Both *Solovastru* and *Tarola* also appear to have been complicated by the factual circumstances of each case as well as the arguments presented by counsel. However, with these judgments, as well as many of the others that they exist along side, the Superior Courts consistently make significant errors in interpretation which then compound this problem even further, and which - had they been aware of the correct interpretations - could have led to different outcomes. Consequently, whilst it is not possible to level the responsibility for these judgements entirely at the feet of the Superior

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[215] *Munteanu v Minister for Social Protection* [2017] IEHC 161, para 125.

[216] Social Welfare (Consolidation) Act 2005, Section 39.

[217] See for example, the Social Welfare (Consolidation) Act 2005, Section 62(5)(a)(iii).

[218] Social Welfare (Consolidation) Act 2005, Chapter 9.

[219] Case C-483/17 *Neculai Tarola v Minister for Social Protection*.

Courts, the Irish judiciary continues to misapply and misinterpret EU welfare rules in a manner which remains highly problematic.

Conclusion

In terms of its practical effect, the mode of welfare provision promoted at the Union level is unambiguous - it is highly specific and requires that individuals continually engage with the labour market to decommodify their labour to a limited extent. The same can almost be said for the Irish welfare system, which also aligns strongly with the specific mode - particularly where it applies to migrants - but is extremely opaque, with few processes operating in a transparent and effective manner. The question for EU citizens resident in Ireland is what this addition of opaqueness and disfunction has on their rights in what are, under other circumstances, immensely compatible systems. Ultimately, the mode as it applies to Union citizens can be said to remain specific, but with a lack of technical expertise and finesse in the application of EU rules which will, despite the tremendously codified nature of these same rules and their preferential status compared to TCN labour migrants, cause them unique difficulties - particularly where their personal circumstances are more complex, or the rules require a familiarity with how the relevant EU rules should be interpreted as part of a larger body of law.

This is not to say that the way in which the Irish system operates leads to large-scale non-compliance with EU rules. Ireland can, broadly speaking, be considered compliant with these where they apply to EU citizens. It is, for example, evident that for the majority of citizen workers resident in Ireland and who seek to access social security will not face any additional barriers compared to those outlined in Chapter Four, although the delays in processing these claims may still be somewhat unnecessary. What this opaqueness or ineffectiveness does seem to impact upon, is the development of a sufficient level of technical expertise in EU law, which means that in practice, the implementation of the HRC, the rights of self-employed citizens and jobseekers, often leave a lot to be desired - but without ever expressly breaking the State's obligations under EU law.

This lack of expertise is similarly evident in the guidelines provided to DOs and AOs. The EU rules can be very technical and often rather convoluted, drawing upon constitutional principles, the jurisprudence of the Court of Justice, and several Regulations or Directives simultaneously. Given an adequate amount of time, it is possible to

clearly establish how these different rules relate to each other and operate within a set of specific circumstances. This can then be written down in an accessible manner so that not only with officers within the DEASP and SWAO know what rules to apply to a specific case, it will also be possible for applicants to know what their entitlements are in advance. Such an approach has not been utilised in the Irish context. The overall guidelines on the rights of EU citizens for DOs and AOs are often vague, and out of date. More individualised issues may be dealt with within the guidelines for each payment, but it is difficult to understand how an EU Member State of over 40 years standing cannot even ensure that its departmental guidelines on access to the welfare system for Union citizens refer to the current Treaties.

From the perspective of the process of Europeanisation, the relevant EU welfare rules are, in many ways, sufficiently robust as to suggest that the Europeanisation of the Irish welfare system can be taken for granted. Member States such as Ireland maintain a certain discretion in how they organise their welfare systems, but this cannot facilitate the unequal treatment of EU citizens compared to Irish nationals. However, upon further review and a deeper analysis of the implementation of these EU rules into Irish law and within the ordinary practice of the Department or Superior Courts, the degree to which the European Union has directly influenced the Irish welfare system becomes far less certain.

Two of the most fundamental issues discussed within this chapter, are the lack of technical expertise which leads to often questionable implementation of those rules, and the degree to which Ireland seems to be reluctant to engage with the preliminary reference procedure. The procedure is designed refer questions regarding the implementation and interpretation of EU law to the Court of Justice, so that a uniform approach will be adopted throughout all of the Member States. It is an essential mechanism in that EU rules are correctly adhered to, and can therefore be seen as an engine of Europeanisation. The Court of Justice transmits answers to the Member State court or tribunal who ultimately render a decision based on these, meaning that it does not act as a formal judicial review *strictu sensu*, and is entirely in keeping with the the supremacy and autonomy of EU law, and the Court's monopoly on the interpretation of it. At no point should this be viewed as a combative process. However, the Irish Superior Courts, as well as the SWAO, maintain that the Office is incapable of making preliminary references as it

does not fall within the *national constitutional* definition of courts, and the Office cannot choose to interpret or apply the national rules other than how they written or perform a judicial review - which a preliminary reference appears to be viewed as by the Courts. Allowing the SWAO to perform both of these tasks is not only allowed for under EU law, it would also limit the need for appellants to challenge a misapplication of EU welfare rules before the High Court, which is a difficult and often expensive process in addition to being time consuming. At this most fundamental level, the Superior Courts in particular seem to place their interpretation of national law ahead of EU law, hindering Europeanisation. That the CJEU has recently issued a decision which highlights this non-compliance suggests that the State will have to adapt its administrative and judicial process to accommodate this, but how quickly it will do so - if at all - remains to be seen.

This lack of technical expertise also carries over into the last heading explored within this chapter, namely, the barriers to accessing welfare payments which are in some way specific to EU citizens. The *Tarola* judgment, demonstrates an almost complete inability to deal with the relevant EU rules, and is perhaps the most emblematic of this trend and the barriers that a lack of technical knowledge can create.

Delays within the process cannot themselves be viewed as unique, due to the often significant delays that exist for all individuals regardless of their immigration status, however, EU law requires that the freedom of movement enjoyed by EU citizens remain as effective as possible. To undermine this is to go against a bedrock constitutional value of the Union itself. To allow for significant delays to occur for EU citizens may consequently breach EU law, particularly if it leaves citizens who are entitled to a payment without any financial support for an appreciable period of time which subsequently leads to them becoming destitute, a point which was raised by interviews conducted as part of this research. This could be alleviated if the SWAO were to make preliminary references rather than questions on a point of EU law having to be brought to the High Court, as well as to grant SWA while appeals are pending by default.

Issues with the interpretation of the EU rules relating to the self-employed constitute the majority of the remaining barriers. The rules, as incorporated within Irish law, may themselves constitute a barrier to the free movement rights of the self-employed, but it has been the interpretation adopted by the High Court in a series of cases dealing with

Romanian nationals in relation to the retention of self-employed status under Directive 2004/38/EC and access to jobseekers payments that have created one of the most significant barriers. The High Court was itself following a similar precedent adopted in the United Kingdom, but a preliminary reference made at an earlier point in time, as well as reading the provisions in a less laboured manner, would have rectified this situation far sooner.

One overarching theme within the research for this chapter is the extent to which the EU rules themselves often seem incapable of dealing with complex personal circumstances, as well as the degree to which the same rules also make access to the welfare system so dependent upon commodifying one's labour to allow for a partial decommodification of it. This is consistently reflected in the case law of the CJEU as well as in judgments like *Gusa*, *Tilaniu*, *Solovastru* and *Tarola*. This then compounded by the lack of technical expertise within the Irish State which show a potentially even greater level of difficulty in determining how these cases should be dealt with.

Another, and which flows directly from the analysis in the preceding chapter, is how significant issues relating to administrative justice and access to justice more generally become when applied to specific categories of migrants. As Chapter 4 highlighted, the Irish welfare system is difficult to categorise as having a specific set of values - much like the overall mode, it is opaque. However, the underlying lack of expertise, the potential lack of care in transposing EU rules in Irish law and more fundamental issues with the system itself have made it difficult for Union citizens to engage with proper administrative procedures which could be said to be fair. Individuals are less likely to progress to the appeals stage where they have had negative experiences of the first-instance process, but for EU citizens it is often a strong possibility that they will be expected to proceed to the High Court - or beyond - in order to corrects errors which should not have occurred at all. This may be alleviated by the recent *WRC* ruling from the CJEU, but without a better technical understanding of the welfare rules more generally, errors may still arise.

When this is distilled down even further into the practical effects of this lack of technical expertise and inability to engage with EU law fully, it becomes clear that, in spite of the preferential legal status given to EU citizens, it may often mean quite little in terms of their ability to successfully vindicate their rights before the DEASP or the Courts. The Irish State is *largely* compliant with the relevant EU rules pertaining to the

coordination of access to national welfare systems, and does primarily fit within that specific and market-based mode promoted at the Union level. However, it is not as effective as it should realistically be, and the Irish State has often created additional barriers due to this lack of expertise, the inability to engage with EU law, as well as its resistance towards a more complete utilisation of the preliminary reference procedure and in recognising that every officer and official with a role to play within the welfare process must ensure that EU law is complied with, even where it requires them to disapply or set aside conflicting national measures.

6. TCN Labour Migrants - The Impact of Immigration and Welfare Rules, and Selective Europeanisation

6.1 Introduction

Labour migration has been a particular growth area in Ireland, particularly since the 1990s and the onset of the 'Celtic Tiger' period. This is not only true of mobile EU citizens relocating to Ireland, but for citizens of countries outside of the EU/EEA - TCN labour migrants. For example, between 2000 and 2008, 40% of newly registered nurses in Ireland came from third-countries/outside the EU.[1]

The adequacy of the Irish immigration system for TCN labour migrants has been highly contested by many of the interview subjects for this study. It was almost uniformly agreed that '[the immigration system is] definitely lacking in transparency and lacking in certainty. It's not very clear from the outside what people need to do, what their obligations are, what their duties are, what their rights will be.'[2] Another interviewee believed that 'it's very arbitrary and based to a large extent based on discretion, and ministerial discretion. It's just very hard for people to vindicate their rights and appeal decisions.'[3] Whilst some believed the immigration system for TCNs may have improved, it is now the case that 'there is an 85 page document. It's extremely contradictory within itself, but at least there is something now. You generally know where you stand, even if it's very confusing.'[4]

From the perspective of EU law in this area, Ireland has, based on Protocol 21 of the TFEU, elected to opt-out of all but one of the EU Directives which extend positive rights to TCN labour migrants. Its justification for doing in some circumstances has been that there is simply a lack of interest on the part of employers, government bodies and departments. In other instances, it has suggested that the benefits which would accrue to grantees such as access to welfare payments are too generous. The most common justification utilised is that the Irish system which precedes the Directives are more than adequate and operate in an almost identical manner. At no point in time has the

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[1] N. Humphries, R. Brugha, H. McGee, 'A profile of migrant nurses in Ireland' (2009) Nurse Migration Project Policy Brief 4.

[2] Interviewee 3.

[3] Interviewee 1.

[4] Interviewee 6.

State directly linked the decision to opt-out of such Directives on the basis that they might endanger the Common Travel Area - the rationale for the inclusion of the opt-out within the Treaties.[5]

In much the same way as the previous chapter examining EU citizens operated, the purpose of this chapter is threefold: to establish what are the relevant rules for third-country nationals attempting to access welfare payments in Ireland; to establish to what extent this has been Europeanised; and to explore what the impact of these rules and different forms of Europeanisation have had on the ability of TCN labour migrants to access welfare payments. At times, this examination will necessitate that case law and legislation dealing with asylum seekers is utilised due to the interrelated nature of the laws and jurisprudence governing TCNs generally and asylum seekers, however the issue of access to welfare payments for asylum seekers and newly recognised refugees falls outside of the scope of this thesis. Due to many of the rules and issues being discussed within this chapter applying to TCNs generally, this terms will often appear more frequently, but with the implicit understanding that they also apply to TCN labour migrants by virtue of being a subcategory of this larger group.

Overall, this chapter underlines the role that the national immigration system plays in creating additional barriers for TCN labour migrants accessing welfare payments by virtue of its interactions with the welfare system, which may also create issues regarding access to justice. It finds that welfare provision for this particular category of migrants mirrors that which applies to migrants generally, and which was explored in Chapter Four - namely, it aligns strongly with the specific mode due to its emphasis on labour market and activity and by virtue of its opaqueness. The addition of further immigration rules simply serves to muddy this situation even further, and grants the Irish State a discretion they do not have in relation to EU citizens. It also highlights that from the perspective of the ongoing process of Europeanisation, in this particular sphere the process is potentially more 'bottom up' than 'top down' - as Ireland has created a constitutionally-embedded exclusionary zone for itself in which it has an even greater degree of discretion in its treatment of TCNs.

In order to achieve these objectives, the chapter will also adopt the following structure. Section two will briefly explore the pertinent rules in regulating access to welfare

[5] C. Joyce, *Annual Policy Report on Migration and Asylum 2011: Ireland* (EMN Ireland, 2012), 22.

payments for third-country nationals. This includes the relevant immigration and employment permit legislation, as well as principles of administrative law which work in tandem with national welfare legislation. This will lead to a third section which outlines why these rules are primarily national in nature, and the way in which Ireland has Europeanised its own views in this area. Following on from this, the fourth section will highlight the ways in which the Irish immigration and employment permit systems create both formal and informal barriers to maintaining one's permission to reside within the State and to access welfare payments, as well as outlining the overall lack of 'joined-up thinking' between the multiple bodies administering them and the poor administration in each of these bodies, agencies and departments. This will be contrasted with the rights provided for under EU law for such persons in a fifth section, which emphasises: the potential administrative rights contained within each of the relevant EU Directives; what this might change within the processes conducted by the Departments and bodies under discussion; and the way Ireland has, in certain circumstances, followed the trends present within the EU measures but with far lower standards of protection afforded to TCN labour migrants. This latter issue will be discussed by providing a direct comparison between one of the Irish employment permits and its direct comparator under EU law. A sixth section will explore the concept of TCNs representing a 'burden on the State,' and the way in which the State may revoke even long-term residence based on this ill-defined criteria. It will also underline how EU law would eliminate the potential for such a criteria to be used arbitrarily - particularly how the Long-Term Residence Directives would completely eliminate the potential for this criteria to be applied at all where a TCN has been resident in the State for more than 5 years. A brief concluding section will immediately follow on from this.

6.2 The Rules Which Apply to Third-Country Nationals

As with any other group of migrants, TCNs are governed by the Social Welfare (Consolidation) Act 2005 where they attempt to access welfare payments - an act which can prove extremely difficult to decipher, even for specialists within the area. This is not helped by the often significant number of new Acts of the Oireachtas that are passed annually to amend it, or the equally large number of Statutory Instruments (S.I.) which make minor alterations to the Primary and supporting Acts, as well as giving further de-

tail to the more general provisions within them.[6] It is also necessary to consider the additional guidelines and circulars adopted within the DEASP that are capable of displaying legal effect.[7]

In addition to these legal provisions which deal with the welfare system *strictu sensu*, there are also the Immigration Acts,[8] which govern a TCN's residency and permission to remain in the State, and the Employment Permits Acts, which regulate access to the Irish labour market. Despite neither explicitly considering welfare payments to be within their scope, both elements can directly impact on a TCN's ability to access payments. These immigration focused instruments are also underpinned by constitutional principles and requirements of administrative law.

Beginning with the latter constitutional principles, the following subsections will briefly explore each of these TCN-focused areas of Irish law. Section 6.3 will then explore why these rules are almost exclusively national in nature, and the 'bottom up' Europeanisation of Ireland's special exclusionary zone in this respect.

6.2.1 Administrative and Constitutional Principles in the Immigration Field

From the perspective of constitutional and administrative law, the treatment of TCNs is, at times, analogous to the jurisprudence of the Superior Courts in relation to welfare payments. As established in *Minister for Social, Community and Family Affairs v Scanlon*,[9] the Court believed that any right to welfare payments is created through ordinary legislation alone and cannot be derived from an established constitutional right such as

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[6] See: Social Welfare (Section 290A (Agreement) Order 2015 (S.I. No. 601 of 2015); Social Welfare (Consolidated Contributions and Insurability) (Amendment) (No. 2) (Modifications of Insurance) Regulations 2015 (S.I. No. 600 of 2015); Social Welfare (Consolidated Claims, Payments and Control) (Amendment) (No. 9) (Change in Rates) Regulations 2015 (S.I. No. 598 of 2015); Social Welfare (Consolidated Claims, Payments and Control) (Amendment) (No. 8) (Jobseeker's Allowance Transition) Regulations 2015 (S.I. No. 597 of 2015); Social Welfare (Consolidated Claims, Payments and Control) (Amendment) (No. 7) (Homemakers) Regulations 2015 (S.I. No. 596 of 2015); Social Welfare (temporary provisions) regulations 2015 (S.I. No. 529 of 2015).

[7] *State (Kershaw) v Eastern Health Board* [1985] ILRM 235.

[8] Social Welfare (Section 290A (Agreement) Order 2015 (S.I. No. 601 of 2015); Social Welfare (Consolidated Contributions and Insurability) (Amendment) (No. 2) (Modifications of Insurance) Regulations 2015 (S.I. No. 600 of 2015); Social Welfare (Consolidated Claims, Payments and Control) (Amendment) (No. 9) (Change in Rates) Regulations 2015 (S.I. No. 598 of 2015); Social Welfare (Consolidated Claims, Payments and Control) (Amendment) (No. 8) (Jobseeker's Allowance Transition) Regulations 2015 (S.I. No. 597 of 2015); Social Welfare (Consolidated Claims, Payments and Control) (Amendment) (No. 7) (Homemakers) Regulations 2015 (S.I. No. 596 of 2015); Social Welfare (temporary provisions) regulations 2015 (S.I. No. 529 of 2015).

[9] [2001] 1 IR 64 - "It is an entitlement created by statute… I cannot identify any constitutional right to retain the benefit... The right to receive benefits in the first place… derive from the statute and do not partake of the nature of a property right."

the right to property - although other principles may also take effect in certain limited circumstances.[10] Where TCNs, EU and Irish citizens tend to diverge, is in respect of Irish immigration rules, and how other rights are often qualified in order to grant the State a wide discretion on such matters. This discretion will subsequently impact on what may otherwise be considered fundamental rights. The Superior Courts have often argued that even rights such as the enjoyment of a private, family life are qualified, but this is particularly true where they relate to third-country nationals. For example, an Irish-born citizen child may be removed from the territory of the State following a deportation order being levied against their parents once certain conditions have been satisfied.[11] Consequently, the rights of a TCN, even from a constitutional perspective, are continually balanced against the rights of the State in a way that would not reasonably apply to a citizen, or by virtue of EU law, to a Union citizen. This emphasis on the rights of the State likely draws upon its inherent power to maintain territorial integrity and control the flow of inward migration.[12] More recent decisions such as *Hussain v Minister for Justice, Equality and Law Reform*[13] have suggested that the Minister is always bound by the rule of law, but this does not limit the State's discretion *per se* where immigration matters are at issue.

This largely stems from the concept of equal treatment included within the Constitution. Walsh J mentioned obiter dicta in *The State (Nicolau) u An Bord Uchtala*[14] that

> '... Article 40.1 is not to be read as a guarantee or undertaking that all citizens shall be treated by law as equal for all purposes, but rather as an acknowledgement of the human equality of all citizens and that such equality shall be recog-

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[10] *Galvin v Minister for Social Welfare* [1997] 3 IR 240; *Wiley v Revenue Commissioner* [1993] ILRM 482; *Power v Minister for Social and Family Affairs* [2007] 1 IR 278; *State (Kershaw) v Eastern Health Board* [1985] ILRM 235, 239.

[11] See for example, *Lobe & Osayande v Minister for Justice, Equality and Law Reform* [2003] 1 IR 1 [2003] 3 ICLMD 57; *Fajujonu and Ors v Minister for Justice & Ors* [1990] 10 ILRM 234; and *Baby O & anor v Minister for Justice, Equality & Law Reform & ors* [2002] IESC 44 (2002).

[12] *Osheku v Ireland* [1986] IR 733, 746 - '*fundamental rights of the State itself as well as fundamental rights of the individual citizens, and the protection of the former may involve restrictions in circumstances of necessity on the latter.'*
Although this explicitly refers to the rights of citizens, it applied specifically to the immigration context and can be considered to have a more particular meaning that the Court would suggest, particularly in light of the surrounding case law in this area.

[13] [2011] IEHC 171, para 17 - 'this would not only be inconsistent with the rule of law, but it would be at odds with the guarantee of democratic government contained in Article 5 of the Constitution.'

[14] [1966] IR 567, 639.

nised in the laws of the State. The section itself [in its second sentence] recognises that inequality may or must result from some special abilities or from some special need and it is clear that the Article does not either envisage or guarantee equal measure in all things to all citizens.'

Article 40.1 allows for certain groups to be treated differently,[15] and this has been interpreted as necessitating that everyone *within* a particular class of persons be treated equally. It remains possible for the State to distinguish *between* classes where there is a legitimate reason for doing so.[16] For TCNs, this includes justifications based on public policy grounds[17] and the State is given a relatively wide remit in determining what these are as third-country nationals form

'a discrete category of persons whose entry, presence and expulsion from the State may be the subject of legislative and administrative measures which would not, and in many of its aspects, could not, be applied to its citizens.'[18]

The recent judgment in *Agha (a minor) & ors -v- Minister for Social Protection & ors, Osinuga (a minor) & anor -v- Minister for Social Protection & ors*[19] does, however, underline that citizens or anyone with an unqualified right to remain in the State should not have their right to equal treatment stemming from Article 40.1 violated due to their relationship with another individual who's immigration status may be limited or in question.

This relatively broad power of the State appears to be based on the idea that '[i]mmigration and [asylum] policy is part and parcel of the ongoing process by which a collective regulates for itself the terms in which it relates to its outside,'[20] allowing the State

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[15] *Re Planning and Development Bill 1999* [2000] 2 IR 321, 357.

[16] *Lowth v The Minister for Social Welfare* [1998] IR 321, 341; and *Brennan **a** Attorney- General* [1983] LRM 419.

[17] *In the Matter of Article 26 of the Constitution and Section 5 and Section 10 of the Illegal Immigrants (Trafficking Bill 1999)* [2000] 2 IR 321.

[18] *In the Matter of Article 26 of the Constitution and Section 5 and Section 10 of the Illegal Immigrants (Trafficking Bill 1999)* [2000] 2 IR 321, 383.

[19] [2018] IECA 155.

[20] H. Lindahl, 'Introduction' in H. Lindahl (ed.), *A Right to Inclusion and Exclusion? Normative Faultlines of the EU's Area of Freedom, Security and Justice* (Hart Publishing, 2009), 2.

to regulate the rights of TCNs, their residency conditions, and any integration requirements made of them upon having successfully gained entry to the State based upon an implicit form of parallelism.[21] Thus, the Department of Justice's assessment that placing requirements upon migrants is within its inherent powers[22] is arguably true, in spite of the relative inexperience of the State in dealing with inward migration and the small number of changes made to Irish immigration legislation prior to the mid-1990s.[23]

By virtue of the opt-out available on legislation regulating the entry, residence and rights of TCNs - discussed in Section 6.3 - EU citizens gain certain levels of protection by virtue of Articles 18-21, 45, 48 and 49 TFEU that do not apply to TCNs. Key to these Treaty provisions are the principle of non-discrimination[24] and the freedom of movement.[25] These ensure that national laws cannot affect Union citizens in a way that would not apply to national, Irish citizens,[26] and that not only have they the right to travel to Ireland, but the grounds on which they can be barred from entering as well as being removed from the territory are highly qualified.[27] Cumulatively, this means that the level of discretion granted to the Irish State in terms of applying immigration laws to TCNs is far broader than those which can be applied to EU citizens, and this has the potential to create even greater barriers in terms accessing welfare payments in Ireland for TCNS than rules regulating access to this system directly. Immigration status can consequently be viewed as the predominant body of law in this intersecting field (immigration and welfare), as a TCN must first have complied with all immigration requirements before they can even consider applying for a welfare payment. EU citizens may be lim-

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[21] K. Calavita, *Immigrants at the Margins: Law, Race, and exclusion in Southern Europe* (Cambridge University Press, 2005), 11.

[22] Freedom of Information No: 156/351/2017.

[23] The Aliens Act 1935 was the primary legislation in place until the 1996 Act was adopted, although it was not until the Immigration Act 1999 that the 1935 was unseated as being the primary act in force.

[24] Article 45 TFEU and and 18-20 TFEU.

[25] Article 45 TFEU and 21 TFEU.

[26] N. Nic Suibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice* (Oxford University Press, 2013), 144.
See also, A. Schrauwen, 'European Union Citizenship in the Treaty of Lisbon: Any Change at All?' (2008) 15 *Maastricht Journal of European and Comparative Law* 55; N. Nic Suibhne, 'EU Citizenship after Lisbon' in D. Ashiagbor, N. Countouris & I. Lianos (eds.), *The European Union after the Treaty of Lisbon* (Cambridge University Press, 2012), 138-42.

[27] See cases such as Joined Cases 115/81 and 116/81 *Adoui and Cornaill* [1982] EU:C:1982:183; Case 30/77 *Bouchereau* [1977] ECLI:EU:C:1977:172; Case 36/75 *Rutili* [1975] ECLI:EU:C:1975:137; Case 41/74 *Van Duyn* [1974] ECLI:EU:C:1974:133; Case 98/79 *Pecastaing* [1980] ECLI:EU:C:1980:69; and Case C-348/96 *Donatella Calfa* [1999] ECLI:EU:C:1999:6.

ited insofar as legislation such as Regulation 883/04[28] and Directive 2004/38/EC[29] apply certain preconditions to accessing the national welfare system, conditions that disproportionately affect economically-inactive or passive citizens - as well as those with complex personal circumstances or are a member of one of more minority groups - but there are clear rules relating to their immigration status by virtue of the concept of EU citizenship, its supporting legislation and case law. TCNs cannot benefit from these same kinds of rules or comparable levels of legal protection.

This is not to say that there are no procedural limitations placed upon immigration officials, as principles constitutional and natural justice as well as principles of administrative law must be complied with at all times. Immigration officials, for example, may not base decisions on spurious or unreasonable requirements,[30] or make a decision based on an error in fact.[31] This is, however, arguably limited by the deference of the Superior Courts towards the Minister for Justice, who tend to emphasise whether the procedural fairness of the process rather than looking at the decision itself.[32] The Minister and their delegated officers must also ensure that reasons be given so that an unsuccessful applicant or someone denied entry into the State is capable of mounting an appeal.[33] The Court has not expressed how detailed this must be in order to facilitate an effective appeal,[34] and it would appear that in practice the reason need only be adequate, not sufficient.

Unlike where legitimate expectation may arise in a small number of instances in the welfare context, a similar principle does not apply in an immigration context. In particular, even where a TCN has received an entry visa it is still possible for an immigration

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[28] Regulation 883/2004 on the Co-ordination of Social Security Systems OJ L 166/1 of 2004.

[29] 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance) OJ L 158, 30.4.2004.

[30] *State (Kugan and Elamkumaran) v The Station Sergeant, Fitzgibbon Street Garda Station* [1985] IR 658; High Court, July 1, 1985.

[31] *Gulyas and Borchardt v Minister for Justice, Equality and Law Reform* [2001] 3 IR 216; High Court, June 25, 2001.

[32] *State (Bouzagou) v The Station Sergeant, Fitzgibbon Street Garda Station* [1986] ILRM 98; High Court, July 26, 1985.

[33] *T.A.R. and I.H. v Minister for Justice and Equality* [2014] IEHC 385; High Court, 30 July, 2014.

[34] *Mallak v Minister for Justice Equality & Law Reform* [2012] IESC 59 which overturned *Mallak v Minister for Justice* [2011] IEHC 306; unreported, High Court, July 22, 2011.

official to refuse them entry so long as it seems factually correct to do so.[35] Any subsequent application made for entry or reentry into the State must, however, be considered on its merits.[36] The same can also be said of the Minister's absolute discretion in granting naturalisation, and the Court has gone so far as to characterise the granting of it and other areas of absolute discretion as a 'privilege' rather than a right.[37] In such instances, the Minister is less constrained by principles of constitutional and natural justice, and can consider the broader immigration context in rendering their decision - even where they may have little relationship with the case at hand.[38] More generally, TCNs are considered to enjoy 'the constitutional right of access to the Courts and fairness of procedures in the Courts, [is to be] enjoyed by non-nationals and citizens alike,'[39] however this is also capable of being limited where it is justifiable to do so.

The Courts have usually chosen to restrict the ability of the Minister to detain TCNs pending either a deportation or in similar circumstances, although the margin of appreciation granted to them remains quite broad.[40] Decision must also be issued within a 'reasonable period' which has in certain circumstances been defined as 12 months or one year,[41] but this is subject to multiple factors which the Minister and the Department are to evaluate on a case by case basis. Where the Minister acts upon a legislative provision empowering them to take a particular action such as deportation, they must act within the confines of that provision.[42] Recent jurisprudence from the Superior Courts have also held that before the Minister issues a deportation order,[43] particularly against

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[35] *VI v Minister for Justice, Equality and Law Reform* [2007] 4 I.R. 42.

[36] *Ezenwaka & Anor v MJELR* [2011] IEHC 328.

[37] *Robert and Muresan v Minister for Justice, Equality and Law Reform*, unreported, High Court, Peart J., February II, 2004; and *Mallak v Minister for Justice, Equality and Law Reform* [2012] IESC 59.

[38] C. Murphy, 'Reconciling Sovereignty Claims with Individual Rights? Access to Citizenship After Mallak and Sulaimon,' (2013) 49 *Irish Jurist* 193, 196 quoting S*pila v Minister for Justice, Law Reform and Equality* [2012] IEHC 366 and *Mishra v Minister for Justice* [1996] 1 I.R. 189.

[39] *In the Matter of Article 26 of the Constitution and Section 5 and Section 10 of the Illegal Immigrants (Trafficking Bill 1999)* [2000] 2 IR 321, para 54.

[40] See *Ni v. Garda Commissioner* [2013] IEHC 134; *Toidze v Governor of Cloverhill Prison* [2011] IEHC 395; *Kristo v. Governor of Cloverhill Prison* [2013] IEHC 218; and *Ji Yoa Lan (orse. Rinji Nitta) v Minister for Justice* [1993] ILRM 64; High Court, July 29, 1991.

[41] *K M AND D G v The Minister for Justice, Equality and Law Reform, Ireland and the Attorney General* [2007] IEHC 234; [2007] 321 JR.

[42] *Sorin Laurentiu v. The Minister for Justice, Equality and Law Reform, Ireland and The Attorney General* [1999] 4 IR 26 ; [1998] No 127 JR.

[43] Immigration Act 2004, Section 4(7).

TCNs who have been resident in the State for an appreciable period of time, public policy dictates that their private and family life are taken into consideration.[44] To remove someone who has sufficient ties to the State and has built an enduring life in Ireland is likely contrary to the European Convention on Human Rights,[45] as well as higher legal principles such as those outlined above.

Cumulatively, what can be drawn from this kind of assessment is that the State's discretion in terms of TCNs generally is broader in nature, but remains bound by certain principles. The degree to which these limitations are sufficient remains somewhat debatable, given that the Immigration and Employment Permits Acts are often quite broad and lack detail. This could of course mean that the immigration system will be at least efficient from an administrative justice perspective, but with the degree of deference being given to the Minister and the State more broadly to control such matters, there is not necessarily the incentive to do so.

6.2.2 The Immigration Acts in Context

Much like the Irish welfare system, the Irish immigration system cannot be said to possess an overt ideological underpinning. It has instead primarily reshaped itself over time in response to migration, and can, as such, be considered reactive rather than proactive. For example, Ireland's lack of inward migration meant that the Aliens Act 1935 remained the primary act governing immigration within Ireland until the formal incorporation of the United Nations Convention and Protocol on the Status of Refugees[46] into Irish law through the Refugee Act in 1996.[47] However, as the preceding section highlights, the Minister and their delegated officers arguably maintain a broader discretion than in the ordinary welfare context, and the State has ensured through the broad construction of its immigration and employment permit legislation that this discretion remains intact. As a result, it is a far more 'State-centric' approach than that which has been adopted in the welfare sphere.

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[44] See L*uximon & Others v Minister for Justice and Equality* [2017] IESCDET 55; and *Balchand & Others v Minister for Justice and Equality* [2017] IESCDET 56. These were jointly appealed to the SC - *Luximon & ors -v- Minister for Justice & Equality* and *Bachand & ors -v- Minister for Justice & Equality* [2018] IESC 24.

[45] ECHR, Article 8.

[46] 1951 and 1967 respectively.

[47] 1996.

As previous chapters have made clear, the largest developments in terms of the Irish State's relationship with migrants from a welfare perspective took place in the late 1990s and early 2000s, when the executive began to selectively incorporate European values and legislative instruments into Irish law which the intention of restricting migrant access to the welfare system, and welfare state more generally. Subsequent to the 1996 Refugee Act, the State instigated a similar programme on reforms in the immigration sphere, with some of the most important pieces of legislation in this respect being the Immigration Acts of 1999, 2003 and 2004. These were seen as part of the overall process of 'getting immigration right'[48] and were meant to modernise this particular body of law to reflect the changing needs of the Irish State.[49] These acts saw the consolidation of the State's powers in relation to migrants from third-countries seeking to enter its territory in the broadest sense. Section 17 of the Immigration Act 2004 for example stipulates that

> 'the Minister may, for the purposes of ensuring the integrity of the immigration system, the maintenance of national security, public order or public health or the orderly regulation of the labour market…. by order declare'

that specific nationalities hold a valid visa on arrival in the State, or a transit visa when passing through Ireland. It also granted the Minister the power to issue new visa orders or revoke or amend this section to to pursue these objectives in a more dynamic manner if circumstances were to change.[50] Such orders tend to list the countries for whom its nationals must possess a visa to enter or pass through Ireland, as well as for who this requirement is waived.[51] The Acts further require that any person, even EU citizens, must present themselves at the Irish border, along with valid travel documentation and a

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[48] G. Titley, 'Getting Integration Right: Media Transnationalism and Domopolitics in Ireland' (2012) 35(5) *Ethnic and Racial Studies* 817, 821-22.

[49] J. O'Donoghue, *Dáil Debates* Vol 500, No 1(9) (1999) <http://debates.oireachtas.ie/dail/1999/02/09/00021.asp#N4> accessed 03/02/2016.

[50] Immigration Act 2004, Section 17, (a), (b), and (c).

[51] See the Immigration Act 2004 (Visas) Order 2014 (S.I. No. 473 of 2014); and Immigration Act 2004 (Visas) (Amendment) Order 2015 (S.I. No. 175 of 2015) for examples of this. In addition, there are also 'short-stay' visas for visits lasting less than three months detailed here: <http://www.inis.gov.ie/en/INIS/Pages/short%20stay%20visas%20(less%20than%203%20months)> accessed 20/06/2016.

passport, to the immigration official on duty.[52] For third-country nationals, the immigration official may grant them 'leave to land' or leave to enter the State where they deem the requirements for this to have been met.[53] For EU citizens, due to the rights existing under the Treaties, this constitutes a formal acknowledgement of their legal status.

Other sections outlined within the Acts empower the Minister for Justice to issue deportation orders[54] against those who have had their permission to remain in the State revoked, to formally remove them,[55] as well as to issue exclusion orders against individuals for whom the Minister wishes to deny reentry.[56] Much of this work is split between the Garda National Immigration Bureau (GNIB),[57] the Irish Naturalisation and Immigration Service (INIS)[58] and the Minister and their officers within the Department of Justice. The highly administrative and discretionary nature of this system is underlined by the way in which statutory instruments have been utilised for immigration matters. Of forty three such S.I.s recently in force and applying to the current Acts, nine deal with the application or processing fees to be charged when applying for a status,[59] five are commencement orders,[60] and of the remaining SIs, the majority deal with minor

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[52] This is a requirement of Section 34 of the Civil Law (Miscellaneous Provisions) Act 2011 which amends Section 11 of the Immigration Act 2004 (so long as they are not coming as a citizen of the Irish State, Great Britain or Northern Ireland when it is not a requirement - Section 11(4)).

[53] Immigration Act 2004, Section 4.

[54] Immigration Act 1999, Section 3.

[55] Immigration Act 2003, Section 5 (as amended by the Immigration Act, 2004, Section 16(8)).

[56] Immigration Act 1999, Section 4.

[57] Irish Naturalisation and Immigration Service, 'Immigration Registration' <http://www.inis.gov.ie/en/INIS/Pages/registration> accessed 01/03/2016.

[58] Irish Naturalisation and Immigration Service <http://www.inis.gov.ie/en/INIS/Pages/Home> accessed 01/03/2016.

[59] Immigration Act 2004 (Immigrant Investor Programme) (Application for Permission) (Fee) Regulations 2017 (S.I. No. 10 of 2017); Immigration Act 2004 (Student Probationary Extension) (Giving of Permission) (Fee) Regulations 2015 (S.I. No. 133 of 2015); Immigration Act 2004 (Atypical Working Scheme) (Application for Permission) (Fee) Regulations 2013 (S.I. No. 324 of 2013); Immigration Act 2004 (Immigrant Investor Programme) (Application for Permission) (Fee) Regulations 2012 (S.I. No. 258 of 2012); Immigration Act 2004 (Student Probationary Extension) (Giving of Permission) (Fee) Regulations 2015 (S.I. No. 133 of 2015); Immigration Act 2004 (Start-Up Entrepreneur Programme) (Application for Permission) (Fee) Regulations 2012 (S.I. No. 259 of 2012); Immigration Act 2004 (Registration Certificate Fee) Regulations 2012 (S.I. No. 444 of 2012); Immigration Act 2004 (Travel Document Fee) Regulations 2011 (S.I. No. 403/2011); and Immigration Act 2004 (Registration Certificate Fee) Regulations 2011 (S.I. No. 449 of 2011).

[60] Immigration Act 1999 (Section 11(1)(P)) (Commencement) Order 2000 (S.I. No. 364 of 2000); Immigration Act 1999 (Section 11) (Commencement) Order (S.I. No. 9 of 2000); Immigration Act 2003 (Section 7) (Commencement) Order 2003 (S.I. No. 415 of 2003); Immigration Act 2003 (Commencement) Order 2003 (S.I. No. 414 of 2003); Immigration Act 2003 (Section 8 Commencement) Order 2003 (S.I. No. 363 of 2003).

clarifications to the Acts or list the countries for whom an entry visa is required or waived.[61] None put the administration of this system on a legislative footing.

What this demonstrates overall is that, despite constant developments, the general immigration framework is quite opaque and tends to emphasise the powers of the State rather than the rights of TCNs. It is the consolidation and embedding of State power, rather than a 'rights centric' approach to migration, and this can also be seen in the construction of the Employment Permits Acts.

6.2.3 The Employment Permits Acts

The employment permit system, which governs the ability of TCN labour migrants to access the Irish labour market following their arrival in the State, is similarly reactive. Prior to 2004 work permits were entirely employer-led, and operated almost entirely on a non-legal, administrative basis, with minimal intervention from the Irish State. This meant that between 2000 and 2004, almost 100,000 work permits and employment visas were granted across multiple sectors. Many of these included positions of employment with low or marginal levels of remuneration.[62] Work permits bound TCN labour migrants to their employer for a term of one year.[63]

The adoption of the Employment Permits Act 2003 formalised this procedure, introducing a centralised system that attempted to regulate the issuance of every new permit at a State level. This applied to four broad categories of permits: work visas; work permits; intra-company transfers; as well as trainees. There were also separate permits issued for TCNs attempting to establish a business within Ireland.[64] The 2003 Act has been significantly amended twice since that time[65] through the 2006 and 2014 Acts. To-

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[61] See for example Immigration Act 2003 (Removal Places of Detention) Regulations 2005 (S.I. No. 56 of 2005); Immigration Act 2004 (Visas) Order 2014 (S.I. No. 473 of 2014); Immigration Act 1999 (Deportation) (Amendment) Regulations 2016 (S.I. No. 134 of 2016); Immigration Act 1999 (Deportation) (Amendment) Regulations 2017 (S.I. No. 74 of 2017); Immigration Act 2004 (Visas) (Amendment) Order 2016 (S.I. No. 502/2016).

[62] Martin Ruhs, 'Managing the Immigration and Employment of Non-EU Nationals in Ireland' *Studies in Public Policy* (2005), xi.

[63] Martin Ruhs, 'Managing the Immigration and Employment of Non-EU Nationals in Ireland' *Studies in Public Policy* (2005), 15.

[64] Martin Ruhs, 'Managing the Immigration and Employment of Non-EU Nationals in Ireland' *Studies in Public Policy* (2005), 13-14.

[65] Employment Permits Act 2006 and Employment Permits (Amendment) Act, 2014. Although there was also European Union (Accession of the Republic of Croatia) (Access to the Labour Market) Act 2013 which dealt specifically with the accession of Croatia to the EU and allowing access to the labour market for its citizens.

gether, these function as the primary legislation in the area. Additional acts and legal instruments, as well as guidelines, have been implemented, but these generally refer back to and support the primary Acts. The 2014 Act now recognises nine categories of permits which replace the original four, as well as an Atypical Work Scheme - which facilitates short-term periods of employment that are not covered by the Employment Permits Acts or the administrative procedures that give effect to them.[66] The permits themselves are broadly provided for within the Acts, but are expanded upon in Statutory Instrument 432/2014.[67]

Section 2 of the 2003 Act governs the employment of TCN labour migrants, and specifically outlines that a permit is required to enter employment or carry out work as a contractor within the state, or to make any arrangement with similar effect.[68] Employment permits are defined legislatively as being granted by the relevant Minister,[69] although in reality this is the purview of the Department of Business, Enterprise and Innovation (DBEI)[70] on her/his behalf and with their consent.[71] This provision is key to the functioning of the system as a whole, as it allows for the use of a Minister's near absolute discretion in issuing and refusing the grant of permits, as well as in administering the process. Alongside Section 2(B), these two provisions within the Acts provide a sizeable definition of the addressees of this legislation, with Section 3 defining the exclusionary zone for the Acts' application i.e. the nationals of certain states to whom it does not apply.

The broader functioning of the permit system is however left to other sections, with Section 4, 7, 16 and 20 of the 2006 Act outlining how to apply for a permit, the information to be provided, as well as the revocation and renewal procedures respectively. The administration of these permits is conducted by the DBEI in tandem with the other relevant immigration authorities. Statutory instruments in this field tend to be more technical in nature, and do outline in greater detail the way in which the permits will be ad-

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[66] Irish Naturalisation and Immigration Service, 'Atypical Working Schemes' <www.inis.gov.ie/en/INIS/Pages/Atypical%20Working%20Scheme%20Guidelines> accessed 12/06/2016.

[67] Employment Permits Regulations 2014 (S.I. No. 432/2014).

[68] Employment Permits Act 2003 (as amended by Employment Permits Act 2006, Section 2, 2(1).

[69] Employment Permits Act 2006, Section 8.

[70] Department of Business, Enterprise & Innovation, 'Employment Permits' <.https://www.dbei.ie/en/What-We-Do/Jobs-Workplace-and-Skills/Employment-Permits/> accessed 02/03/2017.

[71] This delegation of functions is dealt with in Section 36 of the 2006 Act.

ministered. The Employment Permit Regulations 2017,[72] for example, explains the purpose of each of the permits available as well as the conditions that must be satisfied in order to qualify for each, but does not expand upon the functioning of the relevant procedures. It also omits the rights of the applicant and the constraints placed on the DBEI. In this way, it too maintains a wide discretion in adopting appropriate procedures for the granting, renewal and revocation of employment permits so long as the broad conditions of the Acts are complied with.

6.3 Europeanising the Irish Approach: Protocol 21 to the TFEU

As the introductory chapters to this thesis highlighted, Ireland remains an often quite passive EU Member State, demonstrating a low level of competence with regards to how it operates and, as Chapter Five suggests, in meeting its legal obligations under Union law. The Irish executive has invariably attempted to maximise the benefits of EU membership in line with its own interests, and the way in which it has Europeanised its own form of 'exclusionary zone' in the area of third country migration is perhaps the best example of this. The Irish State has, in particular, expressed a marked ambivalence towards its participation in the development of the European Union's Common Foreign and Security Policy, as well as measures which allow greater mobility for TCN labour migrants to enter the EU. This has been based on two common arguments: Ireland's political neutrality in the international arena;[73] and the existence of the Common Travel Area (CTA) between Ireland the United Kingdom.

The issue of neutrality is somewhat problematic, given the State's attempts since obtaining statehood to take a more active role in diplomatic affairs with third countries.[74] This is ultimately limited by the Union's competences in this area,[75] particularly in terms of the Union's exclusive competence to conclude international agreements with third countries on behalf of the Member States, but Ireland has nonetheless sought to carve out a space for itself on the international stage. Even from a purely internal per-

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[72] Employment Permits Regulations 2017 (S.I. No. 95 of 2017).

[73] B. Laffan, *Organising for a Changing Europe: Irish Central Government and the European Union* (Policy Institute, 2001), 8.

[74] B. Tontra, 'Irish Foreign Policy: Small State in a Big World' in W. Crotty & D.E. Schmitt (eds.), *Ireland on the World Stage* (Longman, 2002), 43.

[75] See for example, Article 3(5) TEU, Articles 21(1) and (2) TEU, and 216 TFEU. See also Case 22/70 *Commission v Council* [1971] ECLI:EU:C:1971:32.

spective, much of Ireland's support for further EU integration has been somewhat contingent on the opening up of structural and other funds in return for further political integration or the extension of free movement rights for EU citizens. In exchange for political and policy based decisions, Ireland would effectively be compensated economically. Scott suggests that Ireland is 'conditionally integrationist,'[76] and Ireland's relationship with the EU institutions has often been considered neglectful and ignorant.[77] Support has remained relatively high within Irish society for continued EU membership,[78] yet a vast majority of citizens fail to understand what the EU and its primary functions are.[79] Similarly, as the preceding chapter demonstrated, this lack of familiarity with EU law and how it operates is expressed within the implementation of EU rules governing the coordination of social security and assistance by the DEASP as well as the judiciary -both of whom have shown a quite fundamental misunderstanding of the same at certain moments in time.

This is not to say that this kind of self-interest is unique to Ireland, or that other Member States do not attempt to maximise the benefits of their membership whilst attempting to ensure that it cedes as little sovereignty as possible. Rather, it is where this self-interest leads, and the overtness of it, that is distinctive. For example, the previous Minister for Justice Michael McDowell openly acknowledged that any decision to support new legislative instruments at the supranational level or to engage with further European integration generally is based on the Irish State's own 'enlightened self-interest.'[80] It is a continuous act of assessing each new legislative measures, *in addition to* seeking exemptions at the constitutional level and larger structural benefits, that makes Ireland relatively unique.

The existence of the CTA is perhaps the most important within the confines of this chapter and on this particular point, as it has been used as a basis for the 'opt-outs' extended to Ireland in terms of third country migration and access to the welfare state. The

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[76] D. Scott, *Ireland's Contribution to the European Union* (Institute of European Affairs), 3.

[77] E. O'Halpin, 'Irish Parliamentary Culture and the EU: Formalities to be Observed' in P. Norton (ed.), *National Parliaments and the European Union* (Frank Cass, 1996), 124.

[78] R. Sinnott, *Attitudes and Behaviours of the Irish Electorate in the Referendum on the Treaty of Nice,* results of a survey of public opinion carried out for the European Commission Representation in Ireland, 31st October, 2001.

[79] R. Sinnott, *Irish Voters Decide* (Manchester University Press, 1995), 34.

[80] Michael McDowell, 18th June 2001, quoted in the *Irish Times,* 19th June 2001.

Common Travel Area, as previously outlined, creates a relatively borderless travel area between the Republic of Ireland and the United Kingdom. The arrangements that make this possible are almost exclusively administrative, with many of these measure never being fully formalised in any way.[81] The continued existence of the CTA supports the current political status of Northern Ireland, and due to its politically sensitive nature, the Irish and UK States first sought an exemption to the Schengen Area and its rules so that it would not conflict with the operation of the CTA.[82] It should also be noted that the UK government has been similarly skeptical of European integration, and has in the past expressed its reticence towards joining this supranational system of borderless travel as it might lead to a rise in illegal immigration.[83] This view was not at that time shared by the Irish executive, who highlighted that parity was necessary to ensure the effectiveness of the CTA.[84] The Kingdom of Denmark has perhaps shown an even stronger resistance to measures relating to external migration, with 2015 referendum to alter this position being rejected by the public.[85] However, both the Danish and UK exemptions appear to be based more on long-standing societal views on migration than Ireland which, as the subsection following this will argue, has used its opt-out for other purposes.

During the negotiation phase of the Lisbon Treaty, both Ireland and the United Kingdom once again sought to solidify and consolidate these opt-outs, deciding that in this instance they would require the ability to selectively adopt EU legislative measures concluded within the fields of third-country labour migration and asylum, and which did not harm the CTA in any way. This was subsequently included in Protocol 21 TFEU.[86] On this basis, the Irish executive has decided to almost uniformly opt-out out of any Di-

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[81] B. Ryan, 'The Common Travel Area between Britain and Ireland' (2001) 64(6) *Modern Law Review* 855.

[82] Declaration by Ireland on Article 3 of the Protocol on the position of the United Kingdom and Ireland, Treaty of Amsterdam Amending the Treaty soon European Union, The Treaties Establishing the European Communities and Certain Related Acts.

[83] Parliamentary Debates (Hansard). United Kingdom: House of Commons. 12 December 1996. col. 433–434.

[84] Minister for Justice, Nora Owen, Dáil Debates volume 450 column 1171 (14 March 1995).

[85] BBC News, 'Denmark Votes No on Adopting EU Rules' *BBC News* (04/12/2015) < https://www.bbc.-com/news/world-europe-35002158> accessed 03/04/2017.

[86] See Protocol on the Application of Certain Aspects of Article 26 TFEU, Article 3.

rectives in this area. As such, the Single Permit Directive,[87] the Family Reunification Directive,[88] the Intra-Corporate Transferee (ICT) Directive,[89] the Seasonal Workers Directive,[90] the Long-Term Residence Directive,[91] and the Blue Card Directive,[92] amongst others, have never been adopted in Ireland - although the potential remains that Ireland may at some point in the future elect to be bound by them.[93] The only piece of EU legislation by which Ireland is currently bound is the Researchers' Directive,[94] which the State has enacted primarily on an administrative basis.[95] This has recently recast[96] due to perceived failures in its implementation across the EU Member States, as well as the general limitations of it as recognised by the European Commission Impact assessment,[97] and the Irish State has yet to adopt it. The majority of the measures the

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[87] Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State OJ L 23 343/1, 23.12.2011.

[88] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification OJ L 251, 3.10.2003.

[89] Directive 2014/66EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer OJ L 157, 27.5.2014.

[90] Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers OJ L 94, 28.3.2014.

[91] Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

[92] Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly-qualified employment [2009] OJ L155/17.

[93] In the asylum field for example, Ireland has nominated to opt-in to Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection OJ L. 180/96 -105/32; 29.6.2013 in light of the *N.H.V. and F.T. v The Minister for Justice and Equality (Respondent) and the Irish Human Rights Commission (Notice Party) [2015] IEHC 246* judgment which declared an absolute prohibition on the right to work for asylum seekers unconstitutional.

[94] COUNCIL DIRECTIVE 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research OJ L 289/15.

[95] Irish Naturalisation and Immigration Service, 'Researchers (on a Hosting Agreement)' <http://www.inis.gov.ie/en/INIS/Pages/Researchers> accessed 02/01/2016.

[96] Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the conditions of entry and residence of third-country nationals for the purposes of research, studies, pupil exchange, remunerated and unremunerated training , voluntary service and au pairing [RECAST] COM/2013/0151 final - 2013/0081.

[97] Impact Assessment (SWD (2013) 77, SWD (2013) 78 (summary)) for a Commission Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of research, studies, pupil exchange, remunerated and unremunerated training, voluntary service and au pairing, recasting and amending Directives 2004/114/EC and 2005/71/EC (COM (2013)151 final).

Irish State has agreed to implement focus on the control of migration flows in this area,[98] and place a heavy emphasis on the control of unlawful channels of migration.[99]

Article 2 of Protocol 20 also allows both Ireland and the United Kingdom to 'make arrangements' which allow for the functioning of the CTA. The limits of this discretion has not been fully tested to the informal nature of the CTA and the degree to which the free movement of persons already facilitates this borderless travel between both States. As such, Protocol 21 is perhaps the more substantive measure due to its ability to stop EU rules taking effect.

6.3.1 Europeanising the Irish Approach: The 'Opt-In' in Practice

Chapter Three established that the EU promotes a mode of welfare provision which is highly specific and market-based.[100] In respect of TCN labour migrants, this specificity is even more pronounced, as their access to welfare payments is heavily diffuse and sectoral, as well as being restricted almost exclusively to social security. Rather than being tied directly to market-building, as the rights of EU citizens often are, welfare payments for TCN labour migrants falls within the still developing competence to regulate access and residency for such persons to the territory of one of the Union's Member

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[98] CONVENTION determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (97/C 254/01); COUNCIL REGULATION (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national OJ L.50/1; REGULATION (EU) No 604/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) OJ L.180/31; COUNCIL REGULATION (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention OJ L.316/1; and REGULATION (EU) No 603/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast) OJ L.180/1.

[99] COUNCIL DIRECTIVE 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence OJ L.328/17; and DIRECTIVE 2011/36/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA OJ L.101/1.

[100] C. O'Brien, '*Civis Capitalist Sum:* Class as the New Guiding Principle of EU Free Movement Rights' (2016) 53 *Common Market Law Review* 937; D. Kochenov, 'On Tiles and Pillars: EU Citizenship as a Federal Denominator' in Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press, 2017) 1; P. Caro de Sousa, 'Quest for the Holy Grail' (2014) 20 *European Law Journal* 499; D Kochenov, 'Neo-Mediaeval Permutations of Personhood in Europe' in L. Azoulai et al (eds.), *Ideas of the Person and Personhood in European Union Law* (Hart Publishing, 2016).

States.[101] The Irish welfare state by comparison, is one which *should* be very Europeanised due to the scope of EU rules for Union citizens at the very least, but appears to accept European values and concepts only where it supports the national political agenda and, as the preceding chapter illustrates, the level of technical expertise within the Irish State in relation to EU welfare is a deeper cause for concern.

Selective Europeanisation in the context of welfare payments for TCN labour migrants, is most apparent within Protocols 20 and 21 of the TFEU, as the State has continually argued that the reason for any opt-out on Union legislation dealing with TCN labour migrants and any ensuing right to welfare payments is on the basis of the CTA. A cursory analysis of the actual justifications for opting-out of such legislation - as well as the number of times that the Irish government has potentially threatened the CTA through its own actions - does point to this being a primarily 'bottom up' means of Europeanising its own ambivalence towards the process of European integration. It also affords the State a far greater discretion for this additional category of migrants.

For example, documentation received under the Freedom of Information Act from the DBEI in respect of the ICT and Seasonal Workers Directives suggests that these were not recommended by the DBEI due to a lack of interest from stakeholders, with the only non-governmental body consulted being the Irish Business and Employers Confederation.[102] No civil society bodies representing organised labour or migrants directly were consulted. The Department of Justice (DOJ) by comparison argued against both of these Directives on the grounds that: the ICT would limit their ability to remove such persons from the territory of the State, limiting their discretion; whereas the Seasonal Workers Directive would necessitate that the State ensure the accommodation for grantees is of an adequate standard, as well as the lack of a lower limit on the duration of their stay.[103] A briefing note from the DBEI on the Single Permit Directive expresses direct concerns over the social rights included within it - such as to housing and social security - that would automatically be extended to persons entering under it, demonstrating that access to the welfare system is a potentially important factor in determining

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[101] V. Mitsilegas, 'The Border Paradox: The Surveillance of Movement in a Union without Internal Frontiers' in H Lindhal (ed.), *A Right to Inclusion and Exclusion? Normative Fault Lines of the EU's area of Freedom, Security and Justice: Essay in European Law* (Hart, 2009), 33.

[102] Memo to Minister re Intra-CT and Seasonal Directives, 29/09/2010.

[103] Immigration and Citizenship Policy Unit, EU Legal Migration Proposals for Directives on Conditions of Entry and Residence of Third Country Nationals in the Framework of Intra Corporate Transfer and for the Purpose of Seasonal Employment, 14/10/2010.

what is and isn't adopted nationally. An additional departmental note goes even further, and states that it would call into question the 'two year' habitual residence requirement[104] - which is already a breach of EU law and no long applied in practice.[105] This concern over access to welfare payments is further expressed in a submission by the DBEI to the Tánaiste relating to the Blue Card Directive,[106] and the DOJ emphasises that in relation to both proposals the same issues are broadly of concern to it.[107]

Both the DBEI and DOJ also suggest that where social security rights are a concern, further coordination through these Directives are unnecessary as some existing Union legislation extends the scope of Regulation 883/04,[108] and Regulation 1408/71[109] to TCN labour migrants. To suggest that this would provide a comparable level of protection compared to EU citizens is somewhat disingenuous, given that the relevant legislation both Departments refer to can only be engaged where there is intra-EU movement taking place and where there is lawful residence under the national law of the host State.[110]

Whilst these examples do not provide conclusive evidence that the State's reluctance to adopt such measures is based solely on the (often limited) social rights they extend to

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[104] Briefing Note re Single Permit Directive, 3-4; and Briefing Note (2) re Single Permit Directive, 13/11/2008.

[105] See Case 76/76 *Silvana di Paolo v Office national de l'emploi* [1977] ECLI:EU:C:1977:32; Case C-90/97 *Robin Swaddling v Adjudication Officer* [1999] ECLI:EU:C:1999:96; and Department of Social Protection, HRC - Guidelines for Deciding Officers on the determination of Habitual Residence, 14/7/2017 <http://www.welfare.ie/en/Pages/Habitual-Residence-Condition--Guidelines-for-Deciding-Offic.aspx#app5> accessed 02/01/2018.

[106] Ireland's Position on the Proposal for a Council Directive on the conditions of entry and residence of third country nationals for the purposes of highly qualified employment, known as the 'Blue Card' Directive (COM (2007) 637), 5.1; and Briefing Note for the Tánaiste on the Proposal for a Council Directive on the conditions of entry and residence of third country nationals for the purposes of highly qualified employment, 6.

[107] Policy document for Minister, Proposal for a Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State; and Briefing Note re Proposal for a Council Directive on the conditions of entry and residence for third-country nationals for the purpose of highly-qualified employment (the latter does emphasise however that the right to housing and education rather than social security).

[108] Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality OJ L 344, 29.12.2010, 1–3.

[109] Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality.

[110] Article 1, Regulation 859/2003 and Article 1, Regulation 1231/2010.

TCN labour migrants, they are included as a justification against their adoption, and the default position given is that the Irish regimes in place are equal to these in most respects.

The Irish executive has also often engaged with policy agendas that would arguably undermine, or potentially undermine, the Common Travel Area. This highlights the State's permissive attitude towards the CTA - other than where it can ensure that the executive is not bound by EU rules. For example, at different points in time both Ireland and the UK have expressed an interest in taking part, at least partially, in the Schengen Area. In 1999, a short time after the adoption of the Treaty of Amsterdam, the UK House of Lords Select Committee argued that full participation in respect of border controls and policy related to immigration, asylum and visas was in the best interests of the United Kingdom.[111] The UK subsequently elected to take part in the Schengen Acquis governing other headings within the Schengen Area.[112] Ireland also sought to take part in the Acquis, but did so three years after the United Kingdom.[113] More recently, Ireland chose to remove the barriers to free movement for citizens from the most recent EU accession states prior to the United Kingdom taking the same initiative[114] - which the preceding chapter underlines was at least partly the result of poor implementation of these transitional measures. That both countries have engaged with these provisions asymmetrically demonstrates the limited impact Schengen and free movement of other categories of migrants would have on the CTA, and that there are other interests involved in choosing what measures to enact, and what to ignore.

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[111] European Communities Select Committee of the House of Lords (2 March 1999), Part 4: Opinion of the Committee, Schengen and the United Kingdom's Border Controls - 'We believe that in the three major areas of Schengen-border controls, police co-operation (SIS) and visa/asylum/immigration policy- there is a strong case, in the interests of the United Kingdom and its people, for full United Kingdom participation.'

[112] Council Decision (2000/365/EC) of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis, OJ L 131, 1 June 2000, 43; Council Decision (2004/926/EC) of 22 December 2004 on the putting into effect of parts of the Schengen acquis by the United Kingdom of Great Britain and Northern Ireland (OJ L 395, 31 December 2004, 70.

[113] Council Decision (2002/192/EC) of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen acquis, OJ L 64, 7 March 2002, 20.

[114] A. Shatter, 'Immigration Policy' Dáil Debates (23/05/2013) <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2013052300062> accessed 02/01/2016.

Yet the clearest example of this passive attitude towards the CTA at the national level arises from the Belfast Agreement,[115] which ended a lengthy period of religious segregation enforced by the Protestant administration in Northern Ireland and allowed for a conciliatory form of self-governance to be created in its place. As part of its commitment to moving forward politically and socially on this issue, the 19th Amendment to the Irish constitution was adopted,[116] and inserted a new Article 2 within the Constitution which outlined that

> 'It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish Nation. That is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland.'

The right to pure ius soli or birthright citizenship was now constitutionalised where previously it was provided for through legislation,[117] through both birth and descent. However, within the context of the policies of the late 1990s and early 2000s which involved the integration of the Habitual Residence Condition into the 2005 Social Welfare (Consolidation) Act, the 'crackdown' on potential Central and Eastern European benefit tourists - as well as potentially the *Chen* judgment issued by the Court of Justice[118] - a further amendment (the 27th) was made to the Constitution to change this newly introduced 'birthright' citizenship to one which requires a degree of lineal descent.[119]

From a political standpoint, the 27th Amendment[120] caused significant difficulties in terms of the Belfast Agreement, and the changes it had introduced to Article 2 of the

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[115] Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (British-Irish Agreement) and Agreement Reached in Multi-Party Negotiations (Belfast Agreement), (10 April 1998).

[116] Nineteenth Amendment to the Constitution Act 1998. Article 3 of the Constitution of Ireland was also amended to include a recognition of the 'diversity of identities and traditions on the island of Ireland' as per Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (British-Irish Agreement) and Agreement Reached in Multi-Party Negotiations (Belfast Agreement), (10 April 1998).

[117] Irish Nationality and Citizenship Act 1956 and based on Article 9 of the Constitution of Ireland.

[118] C-200/02 *Zhu and Chen* [2004] ECLI:EU:C:2004:639.

[119] A. White & M. Gilmartin, 'Critical Geographies of Citizenship and Belonging in Ireland' (2008) 31(5) *Women's Studies International Forum* 390-9.

[120] Twenty-Seventh Amendment of the Constitution Act 2004.

Constitution - which had only a short time prior to this been altered to facilitate the Belfast Agreement. The Irish Human Rights Commission argued that the new amendment had not been given due consideration, particularly in light of the relative youth of its predecessor, and that the State had not established why it was required.[121] Unionists within Northern Ireland, particularly those who were hostile to the Belfast Agreement, also pointed to the referendum as a sign that the Agreement could itself be amended,[122] introducing the potential for further instability in Northern Ireland. The Irish and UK governments were ultimately forced to issue a joint statement to assure all parties that the Belfast Agreement and the status of citizens in Northern Ireland would not be affected by the amendment in any way.[123] Given the Irish executive's constant reassurances that any changes made in relation to third-country migration and asylum matters are simply part of 'getting it right' in this area,[124] it is difficult to suggest that in this particular context this was true. Rather, it would seem that the State sought to expand its discretion in this area and did so without fully considering the implications of its decision.

Thus, it would appear that the decision to Europeanise Ireland's ability to opt-out of EU legislation relating to third-country labour migration, as well as their ensuing rights to welfare payments, is driven more by Ireland's desire to maintain a greater degree of in relation to further EU integration in this particular field than a consistent concern for the CTA itself, or even due to long-standing social attitudes towards migration.

6.4 Barriers to Accessing Welfare Payments for TCN Labour Migrants: Formal and Informal

Broadly speaking, it is possible to break down the potential barriers which can be erected before TCNs into those that are formally created or provided for within legisla-

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[121] Human Rights Commission, 'Preliminary Observations on the Proposed Referendum on Citizenship and on the Twenty-Seventh Amendment to the Constitution Bill 2004' <Proposed Referendum on the 27th Amendment to the Constitution> accessed 08/12/2016.

[122] "Paisley: Referendum shows Agreement can change' *Breaking News* (15/04/2004) <http://www.breakingnews.ie/ireland/paisley-referendum-shows-agreement-can-change-143053.html> accessed 09/12/2016.

[123] 'Citizenship Referendum: Interpretative Declaration by the Irish and British Governments regarding the British Irish' Agreement' (20 April 2004) <http://eudo-citizenship.eu/NationalDB/docs/IRE%20Citizenship%20Referendum%20Interpretation.pdf> 06/12/2016.

[124] G. Titley, 'Getting Integration Right: Media Transnationalism and Domopolitics in Ireland' (2012) 35(5) *Ethnic and Racial Studies* 817, 821-22. See also, C. Joyce, *Annual Policy Report on Migration and Asylum 2011: Ireland* (EMN Ireland, 2012), 22.

tion, and those that result from the way in which the immigration and welfare systems interact and are administered. For example, from the perspective of the DEASP a TCN labour migrant is capable of satisfying the habitual residence condition where it is necessary to do so, and immigration officials require that their leave to reside within the State allows them to access to social welfare. Along with meeting the criteria for the welfare payment being applied for, this can be considered formal barriers which must be satisfied by TCN labour migrants in order to have their claim accepted. By comparison, informal barriers are additional or ancillary issues which arise from the way in which the different departments and agencies interact and conduct their work, such as the difficulty in maintaining an individual's immigration status, having the correct paperwork and also ensuring that the procedures are applied correctly and followed by the relevant Departments, agencies and bodies.

The distinction between these two categories will inevitably blur due to the need to navigate between three different agencies in terms of general immigration (the GNIB, INIS and the DOJ), the DBEI, as well as the DEASP. Several interview subject have highlighted an overall lack of 'joined-up thinking,' with the level of coordination '*between the departments is a disaster.*'[125] Certain provisions within both the Immigration Acts and Social Welfare Act allow for the exchange of information[126] in particular, and yet the guidelines provided by the DEASP do not make clear how this functions in reality and under what circumstances this would occur. The operational guidelines for jobseekers allowance refers only to TCN labour migrants themselves and not the entitlement of their spouses when it outlines that

> 'in relation to other non-EEA nationals who have been previously employed in Ireland the position is less certain and offices are advised to contact the Departments of Justice and Equality, and Jobs, Enterprise and Innovation, to ascertain the position regarding residence and the issue of work permits respectively.'[127]

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[125] Interviewee 4.

[126] Immigration Act 2003, Section 8(1) and Social Welfare Consolidation Act 2005, Section 261.

[127] Department of Social Protection, 'Non-EEA Nationals Who Have Previously Worked in Ireland, Jobseeker's Allowance - Operational Guidelines' <http://www.welfare.ie/en/Pages/Jobseekers-Allowance.aspx> accessed 28/02/17.

It does not go on to expand upon this, or explain the level of coordination that is carried out between these different departments, nor does it specifically outline the ways in which TCN labour migrants can find out what their residency status and entitlements are based on the specific permissions they were given. Guidelines provided in respect of the jobseeker's benefit payment do not even focus on the general entitlements of TCN labour migrants, and refer to them directly only when discussing the potential for them to receive increases for a qualified adult (IQA).[128] A Freedom of Information request made to the DBEI revealed that there are no guidelines from their perspective regulating the kinds of information that should be conveyed to a Deciding Officer within the DEASP if the DEASP were to contact them regarding a welfare claim made by a TCN labour migrant.[129] In answer to a request seeking information on the circumstances under which the DOJ, an INIS officer or other designated official may request information from the DEASP, they provided the legal basis on which information may be exchanged, and in doing so failed to address the question.[130]

The DEASP[131] made clear that where they have doubts as to an individual's immigration status they send an NEEA1[132] form to INIS officers seeking information on whether or not the individual is entitled to live in Ireland and entitled to seek employment within the State. Where they are barred from seeking future employment, a reason is requested. The same is not required where they are not considered to have a legal right to reside in the State. An internal report from the Decisions Advisory Office with regard to the Habitual Residence Condition found that common problems within the DEASP relate to information from the DOJ and GNIB not being kept on file, as well as a lack of information being sought regarding the basis on which immigration stamps were granted. This will inevitably have consequences for a TCN's labour migrant's right to access welfare payments.[133] Similarly, there appears to be nothing limiting or regulating the information that should be requested from the DBEI, despite this being included

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[128] Jobseeker's Benefit <http://www.welfare.ie/en/Pages/Jobseekers-Allowance.aspx> accessed 28/08/2017.

[129] Email received from DBEI FOI Unit on 06/02/2017 [email on file with author].

[130] Email received from DOJ FOI Unit on the 17/05/2017 [email on file with author].

[131] Email received from the DEASP FOI Unit on the 04/04/17 [email on file with author].

[132] On file with author.

[133] Decisions Advisory Office, *Review of Habitual Residence Condition in Appeals Submissions* (Nov 2013), point 2.1.

within the guidelines. Such an oversight makes clear that there is an overall lack of consistency and communication between Departments, underlining how easily a TCN labour migrant's access to welfare entitlements can be cut off or curtailed by poorly designed processes.

Efforts have been made within each of the Departments to make their internal processes function more effectively, however it was also noted that 'they've put them online and there's a lot more to deal with now'[134] as there are '*often more steps involved.'* This may eventually become more efficient, but has thus far led to longer and more complex processes which may in fact be less responsive. Therefore, in exploring these issues it becomes clear that even the most formal elements, such as the administration of the immigration permissions, the Habitual Residence Condition (HRC) and the administration of the employment permit division within the DBEI, will raise concerns about the way in which these administrative services are delivered.

6.4.1 Formal: Immigration Stamps and the Rights Attached to Them

From the perspective of the DOJ, the welfare entitlements of TCNs are determined by national welfare rules.[135] Immigration stamps or permissions simply provide TCNs with their lawful permission to reside within the State on a renewable basis. Each stamp deals with a different category or categories of TCNs, and will come attached with certain preconditions. This is qualified by the fact that the DOJ believes it is part of their responsibility and of their delegated officers to ensure that access to welfare state services is restricted for TCNs.[136] This is somewhat contradictory in tone, particularly given that immigration stamps are formally capable of precluding the bearer from accessing welfare state services - including welfare payments - as well as potentially barring holders from applying for an employment permit/gaining access to the labour market - the latter of which would grant the recipient access to contributory social security payments until either their permission ends or their contributions have ran out.

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[134] Interviewee 4.

[135] Freedom of Information No: 156/351/2017.

[136] Freedom of Information No: 156/351/2017.

Table 6.1[137] below illustrates how complex this system can be, particularly in discovering how each permission relates to labour market access and access to welfare payments. In many instances, it is not clearly stated on the main INIS website what these entitlements are. Those who are temporary in nature (Stamp 0), as well as students (Stamp 2 and 2A), have the least recourse to the welfare system, while those that are linked to Irish/EU/EEA citizens and refugees have the clearest rights, primarily by virtue of the legal protections they derive indirectly from another, or in the case of refugees, the obligations owed to them under international and national law. Those who possess either a Stamp 1, 4 or 5 do so primarily by virtue of their ability to access the labour market and to integrate within Irish society. It is for this reason that they derive most of their entitlements to welfare payments form contributory social security payments, save where they are capable of being considered habitually resident and can then access discretionary social assistance payment categories.

However, it must also be borne in mind that where they are capable of accessing social assistance, they must ensure that they do not become an 'undue burden,' as this could lead to the loss of their residence permission. This issue will be dealt with later in this chapter. It is also possible that a TCN in possession of a Stamp 1 may have their employment permit tied to a specific employer, and this will make it difficult for them to establish that they are 'capable of and actively seeking work.'

[137] The additional 'Stamp 6' which applies to dual citizens will not be considered within the confines of this chapter as it applies to individual's who have Irish citizenship as well of that of a secondary State, meaning their access to the welfare state is not truly limited.

Table 6.1: Immigration Permissions, Access to Employment and Welfare Payments[138]

Stamp Type	Category of Person	Employment	Social Welfare Access
0	Temporary stay; retiree; temporary oversees worker; visiting academic; etc.	Not Permitted	None
1	Non-EEA/TCN worker	Permitted	Access to contributory social security until residency has elapsed or contributions run out; Access to social assistance once the HRC is satisfied
1A	Permission to remain in Ireland in order to undergo further professional training with a specified qualifying body	Permitted but only with the specific body	None, bar exceptional circumstances.
1G	Student that has completed their studies and can look for full-time employment	40 hours per week but must receive an employment permit once permission lapses	None, bar exceptional circumstances.
2	Permission to study full-time	20 hours per week during term, 40 per week during summer months	None, bar exceptional circumstances.
2A	Permission to study full-time	Not Permitted	None, bar exceptional circumstances.
3	Non-EEA spouse/dependant of employment permit holder; Non-EEA visitor	Not Permitted bar certain circumstances	Usually none except in exceptional circumstances, the spouse of an EEA-spouse and capable of receiving Child Benefit by proxy, or victim of domestic abuse.
4	Spouse of Irish citizen, parent of Irish citizen, Refugee, family reunification for Refugee, Treaty rights to family reunification, other.	Permitted	Access to contributory social security until residency has elapsed or contributions run out; Access to social assistance once the HRC is satisfied
5	Long-Term Resident	Permitted	Access to contributory social security until residency has elapsed or contributions run out; Access to social assistance once the HRC is satisfied

[138] Irish Naturalisation and Immigration Services, Stamps - Main Immigration <http://www.inis.gov.ie/en/INIS/Pages/Stamps> (accessed 18/06/2016); Irish Naturalisation and Immigration Services,Temporary and Limited Permission as indicated by Stamp 0, <http://www.inis.gov.ie/en/INIS/Stamp%200.pdf/Files/Stamp%200.pdf.> (accessed 20/06/2016); Irish Naturalisation and Immigration Services, Without Condition As To Time Endorsements, <http://www.inis.gov.ie/en/INIS/Pages/Without_Condition_As_To_-Time_Endorsements> (accessed 18/06/2016);Irish Naturalisation and Immigration Services, Without Condition Endorsement (Stamp 6), <http://www.inis.gov.ie/en/INIS/Pages/Without_Condition_Endorsement%20(Stamp%206)> (accessed 18/06/2016); and E. Quinn, E. Gusciute, A. Barrett and C. Joyce, 'Migrant Access to Social Security and Healthcare: Policies and Practice in Ireland,' (ERSI, July 2014).

6.4.2 Informal: 'Varying' an Immigration Permission and the Associated Lack of Certainty

Even where a TCN can discover the nature of each stamp and the rights that attach to them, the reality is often far less certain. This is due to the fact that a stamp may be administratively varied by the INIS officer issuing it. Interviewee 3 noted, for example, that in certain circumstances a Stamp 4 may be issued on a discretionary basis, and by virtue of this minor addendum, the TCN in question may find themselves completely excluded from accessing the welfare state. They detailed one case they had dealt with personally where,

> 'children who are in the care of the State are granted a Stamp 4 based on exceptional circumstances. You might think, "fantastic, that child has their Stamp 4, so they can get access to employment, access to education, etc." This child has been in the care of the State since they were 3, they have completed their full education in Ireland… So the child still has this discretionary Stamp 4 when they turn 18. They've done fantastically in school, and apply to go to university. They then find that they cannot access funding, that they don't qualify for free fees because free fees and SUSI grants are limited to particular types of Stamps for which do not include the Stamp 4 where it applies to cases of exceptional circumstances or are on a discretionary basis.'

This is further supported by the description of the stamps themselves, and the way in which they can vary wildly within each of the broad numbers assigned to them. Although the example provided by the interview subject above stems from a broader welfare state issue, this would also arguably apply where a TCN attempts to access a welfare payment. Whilst this ability to vary a permission allows for a greater degree of flexibility for both immigration officials and the holder, it also means that their entitlements to welfare payments becomes less fixed, and this will make it more difficult for both migrants and the DEASP to correctly establish what their entitlements may be. As interviewee 1 argued, TCNs

'have a tendency not to use social welfare in case it reflects poorly on them. This would be non-EU migrants that are more conditioned by immigration law. EU citizens would not have that same kind of fear, they're different.'

This has also been supported by studies conducted by Barrett, McCarthy and others, who found that migrant participation in welfare programmes in Ireland is often lower than in other States due to their perception that it may reflect poorly upon them and their immigration status.[139] If TCNs cannot even clearly establish what their rights are in relation to welfare payments, they are likely to make even less demands of the system.

A further criteria laid down by INIS on maintaining a TCN's immigration permission following their redundancy or the loss of their employment whilst on an employment permit also suggests that a Stamp 4 may not always be directly related to long-term residence, and may instead be tied to their specific employment with more limited rights even after a five year period has elapsed.[140] This is also an issue in terms of maintaining an employment permit, and will be dealt with elsewhere in this chapter. Whether or not this issue of being able to vary a Stamp would be addressed by Ireland adopting EU law in this particular field is somewhat speculative in nature, due to the fact that the Irish State has almost exclusively elected not to take part in Directives concerned with TCN labour migration. This will however be considered later in this chapter.

6.4.3 Informal: Uncertainty and Complexity in the Administration of the Stamp System

Once a TCN has successfully entered the State, it is necessary for them to register with the GNIB, or to present themselves to the Immigration Officer at their nearest Gar-

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[139] A. Barrett, & Y. McCarthy, 'Immigrants in a booming economy: analysing their earnings and welfare dependence' (2007) 21(4/5) *Labour* 789; A. Barrett & Y. McCarthy, 'Immigrants and welfare programmes: exploring the interactions between immigrant characteristics, immigrant welfare dependence and welfare policy' (2008) 24(3) *Oxford Review of Economic Policy* 542; V. Timonen & M. Doyle, 'In search of security: migrant workers' understandings, experiences and expectations regarding 'social protection' in Ireland' (2008) 38(1) *Journal of Social Policy* 157; and more generally J. Power & P. Szlovak, 'Migrants and the Irish Economy' (The Integration Centre, 2012), 20-22.

[140] Irish Naturalisation and Immigration Service, 'Work Authorisation and Working Visa holders, Policy for 5 year workers and redundant workers: Updated immigration arrangements for 5 year workers and redundancy policy in respect of non-EEA workers' <http://www.inis.gov.ie/en/INIS/Pages/Policy%20-for%205%20year%20workers%20and%20redundant%20workers> accessed 28/02/2017.

da station.[141] They will then be issued with a Certificate of Registration or Intent, as well as a GNIB card which details their immigration status.[142] TCNs must only register where they will be remaining in the state for over 3 months.

These preliminary steps can have a significant impact on access to welfare payments for such persons where the immigration authorities and DEASP differ on the required documentation for example. Interviewee 4 emphasised that, in their work, it was common to find DOs within the DEASP mandating that a TCN produce a GNIB card before they can be considered entitled to a payment. This is in spite of the fact that the entitlement affixes to the Certificate of Registration or Intent - the primary document which establishes their permission to reside within the State.[143] They also underlined that it 'should be in their own guidelines that they do it this way,' and despite being less common now, 'it would still be a factor.' Overall, the interviewee stressed that '[t]here's definitely administrative gaps we would have to point out to the Department of Justice and INIS that would cause significant difficulties for people accessing social welfare or something else.'[144]

6.4.4 Informal: The Administration of the Immigration System - Existing Within a 'Time Warp'

A natural consequence of the way in which the immigration system is designed and administered, is that maintaining an immigration permission can at times prove to be extremely difficult. As one interviewee noted, '[i]t's very easy to fall outside of it. You can lose your status very easily and you can very easily become undocumented.' A loss of immigration status can have immediate consequences in terms of access to the welfare system.[145]

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[141] The Immigration Act 2004, Section 9 creates the legal obligation to register, while Schedule 2, Section 9 sets out the documentation required for this process.

[142] Person exempt from paying the fee: Convention Refugees; Persons who have been reunified with such refugees under section 18 of the Refugee Act 1996; Persons who are under 18 years of age at the time of registration; Spouses, widows and widowers of Irish citizens; Civil partners or surviving civil partners within the meaning of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 of Irish citizens; Spouses and Dependants of EU nationals who receive a residence permit under EU Directive 38/04; Programme Refugees, as defined by section 24 of the Refugee Act, 1996.

[143] Interviewee 4.

[144] Interviewee 4.

[145] Interviewee 1.

Table 6.2: Complaints made to the Ombudsman dealing with the administration of visa and other applications handled by the Department of Justice and its bodies/ agencies[146]

Year	Administration of applications	Delay	No Response	Quality of Service
2006	38	22	17	4.7
2007	53.7	19.5	14.1	0.6
2008	78.6	5.6	6.3	1.6
2009	84	1	9	1
2010	73.8	1.5	18.5	1.5
2011	70.9	1.8	10.9	1.8
	66.5	**8.6**	**12.6**	**1.9**

Much of this stems from the discretionary nature of the immigration system, and the degree to which the principles of administrative law that *should* be followed do not appear to be adhered to in practice. In Table 6.2 above, the Office of the Ombudsman's Annual Reports highlights how significantly issues such as poor administration, delays and even a lack of responses are within the immigration system. Over a six year period from 2006 to 2011, the complaints deemed admissible by the Ombudsman dealt in 66.5% of cases with poor administration, and delays or a complete lack of response constituted a further 20% of complaints. Whilst the complaints made in this regard also deal with visa and other applications processed by the DOJ and its agencies, it is indicative of how the DOJ conducts itself overall in relation to TCNs.

Consequently, civil society groups have often had to act preventatively, or as an intermediary, in order to ensure that where such issues arise, they are addressed as quickly as possible. As one interviewee outlined, '[w]e would do a lot of that kind of preventative work to stop something becoming a problem down the line. But that's only where we catch them.'[147] This is particularly true where the result of such issues may be a gap in a TCN's immigration permission. If the system operated effectively at first-instance,

[146] Compiled from figures available within the Ombudsman's Annual Reports, 2006-2011.

[147] Interviewee 4.

direct advocacy like this would be far less necessary, and would allow for NGOs and other representative groups to campaign for structural reforms.

The DOJ has made attempts in recent years to make its own internal processes more effective so that issue such as this no longer arise. The timeframe in which a decision should be reached is now considered to be between 6-12 months, although other applications '*exist in a time warp.'* For one interviewee, this is part of a conscious attitude that permeates the immigration system: 'they have the resources, but they also have the power to make you wait and make you feel like they have the power to ultimately make the decision.'[148] It is certainly true that there is no specific right to have a decision made within a set period of time, although one year is considered sufficient in most instances.[149] Employees within the DEASP are also often far more conservative than they might outwardly suggest,[150] and this may equally apply to other departments. It is, however, difficult to conclusively demonstrate this is an intentional strategy, as opposed to an implicit mindset that may result from the way in which the system is designed. The relevant immigration officers may not intend to cause distress, they may merely operate within a context that is not client-focused.

The distinction between whether or not this is done with malice or due to a degree of incompetence may in reality be somewhat irrelevant, as delays or other obstacles in maintaining or renewing an immigration permission will increase the likelihood that gaps will arise within a TCN labour migrant's status. This can affect the continuation of their employment permit, as well as the period of residence necessary to apply for long-term residence and citizenship through naturalisation - where immigration status must reach a certain continuous threshold to even be considered.[151] More importantly, in the short term, when a TCN labour migrant is in receipt of welfare payments,

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[148] Interviewee 1.

[149] *K M AND D G v The Minister for Justice, Equality and Law Reform, Ireland and the Attorney General* [2007] IEHC 234; [2007] 321 JR.

[150] Axiom Consulting, 'One DSP Organisational Development Initiative: Driving Strategy and Transformation Through Strategy' (21/08/2014), 10-11 - 'The culture is perceived by staff to be generally conservative. This is somewhat understandable given the nature of the services, the circumstances of many DSP clients, and the enormous sums of money handled by DSP on a weekly basis. The fact that the age profile of the DSP workforce is skewed towards longer tenured staff was also mentioned as a possible driver of conformity.'

[151] Interviewee 4.

'[p]ayments can be stopped as a result when this happens. We would often be able to create bridging periods where people come to us but it can be a case of your card expiring and your cut off immediately.'[152].

6.4.5 Formal: Maintaining An Employment Permit

Table 6.3: Employment Permit Statistics, 2000-2015[153]

Year	Total	New	Renewed	Refused	Withdrawn
2000	17873	-	-	-	-
2001	36373	-	-	-	-
2002	40310	-	-	-	-
2003	48001	-	-	-	-
2004	34569	-	-	-	-
2005	27136	-	-	-	-
2006	24854	-	-	-	-
2007	23076	-	-	-	-
2008	13567	-	-	-	-
2009	7962	4024	3938	1901	442
2010	7271	3394	3877	990	199
2011	5200	3184	2016	1007	201
2012	4007	2919	1088	829	246
2013	3863	3034	829	541	122
2014	5495	4861	634	504	144
2015	5163	4324	839	502	128

It was often noted by interview subjects that employment permits can be quite difficult to obtain,[154] as well as to renew. From the perspective of accessing welfare payments, employment permits are a procedural necessity in most respects, as it allows TCN labour migrants to accumulate contributory social security payments which they can draw from if they subsequently become unemployed. If they do not have labour

[152] Interviewee 4.

[153] Received on request from the Department of Business, Enterprise and Innovation.

[154] **Interviewee 1**: 'this is one of our main areas. People who try to get work permits, and I mean, it's very hard to get work permits.'

market access, they will only be entitled to social assistance payments, and only where they can satisfy the HRC.

In order to obtain many of these permits, a 'labour market needs' test may need to be conducted. These are carried out to ensure that the same position could not reasonably be filled by an Irish/EU/EEA citizen. Upon its introduction, Ruhs argued that there was little or no policy on how this mechanism would operate in practice.[155] However, there now appears to be a formal statutory basis for its existence,[156] and the current guidelines for it are relatively detailed. The test requires that the vacant post must have been advertised with the DEASP employment services/EURES employment network for 2 weeks, in a national newspaper for at least 3 days and in either a local newspaper or jobs website for 3 days, in order to ensure that an EU/EEA or Swiss citizen cannot be found to fill the vacancy. When registering the vacancy with the DEASP/EURES, the employer must specify whether it would necessitate a General Employment Permit application. If the employer is unable to find an EU/EEA or Swiss national, they must contact their local employment services office or Intreo centre within 4 weeks to ask for a decision to be made. In response to the employer's request, the employment services office will decide whether a General Employment Permit is justified to fill the vacancy. If the employer does not contact the local employment services office, the advertisement will continue but no employment permit can be issued for it.[157]

It is not difficult to envisage why, from a procedural perspective, permits might be difficult to maintain. Section 2 of the 2003 Act governs the employment of TCN labour migrants, and outlines that a permit is required to engage with the Irish labour market through either directly employment, as a self-employed contractor, or any arrangement with similar effect.[158] Employment permits are considered to be granted by the relevant Minister,[159] although in reality this is the purview of the DBEI on their behalf and with

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[155] Martin Ruhs, 'Managing the Immigration and Employment of Non-EU Nationals in Ireland' *Studies in Public Policy* (2005), 31.

[156] Employment Permits Act 2006, Section 10A as amended by Employment Permits (Amendment) Act 2014, Section 13 formally covers the grounds for restricting the grant of an employment permit.

[157] Department of Business, Enterprise and Innovation, 'Labour Market Needs Test' <https://www.dbei.ie/en/What-We-Do/Jobs-Workplace-and-Skills/Employment-Permits/Labour-Market-Needs-Test/> accessed 13/06/2016.

[158] Employment Permits Act 2003, as amended by Employment Permits Act 2006, Section 2-2(1).

[159] Employment Permits Act 2006, Section 8.

their consent.[160] This provision is key to the functioning of the system as a whole, as it allows for the use of a Minister's near absolute discretion to be used in issuing, refusing and administering the process. Alongside Section 2(B), these two singular provisions within the Acts provide a sizeable definition of the addressee or person to whom these pieces of legislation apply, with Section 3 defining the exclusionary zone for the Acts' application i.e. the nationals of certain states to whom it will not apply. The broader functioning of the permit system is assigned to other sections, with Section 4, 7, 16 and 20 of the 2006 Act outlining how to apply for a permit, the information to be provided, as well as revocation and renewal procedures respectively. These provisions can be quite general in their application and effect. For example, Section 12 allows the Minister to refuse the granting of an employment permit where it is not in the public interest to do so,[161] or where they deem the qualifications of the candidate to be incompatible with or unnecessary for the employment position they have been offered.[162] It is unlikely that these provisions would be applied so broadly in reality, yet the lack of clear legislative definitions for these concepts within the Act remains somewhat troubling. The latter ground for refusal in particular, allows the Minister to supersede the employer as an adequate judge of the candidate's suitability. Equally, the Minister may refuse the employment permit where the fee has not been included with the application.[163]

A more practical example of how the inadequacies of the employment permit system operates in reality, is the recent case of *Ling and Yip Limited v The Minister for Business, Enterprise and Innovation*.[164] In this instance, the renewal of an employment permit was refused because the previous permit and permission to remain in the State had lapsed, and the income fell below the required threshold for doing so. The High Court ultimately held that the wording of the legislation granted a discretion to the administrative officer in the DBEI to waive both of these requirements, but they had failed to do so based on their interpretation of the legislation and guidelines given to them. It was also found that the rationale provided to the applicant, and their subsequent failure to engage with them, breached key principles of administrative law. The court did appear

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[160] This delegation of functions is dealt with in Section 36 of the 2006 Act.

[161] Employment Permits Act 2006, Section 12(f).

[162] Employment Permits Act, Section 12(k)(i) and (ii).

[163] Employment Permits Act 2006, Section 12(b).

[164] *Ling and Yip Limited v The Minister for Business, Enterprise and Innovation* [2018] IEHC 546.

to express a degree of leniency based on the fact that the TCN labour migrant in question had lodged a renewal application a mere 8 days after the prior one had expired, and their long residence within the State - however, this ultimately illustrates how opaque the process can be, even for those working within it.

From a statistical perspective, the number of permits issued fell quite precipitously once the 2003 Act was adopted, however, it was not until 2009 that the Department began to collate more detailed data with regards to how many of the total in a given year are new, renewed, refused, or withdrawn. Part of this decline may be attributed to the Global Financial Crisis which began in 2008/2009, when the overall number of permits fell by almost 42% and continued to decline from this point onward. There is also a significant number of refusals and lack of renewals within this same period, which may be linked to an increased reluctance on the part of the DBEI to allow those who lost their positions during this period to remain within the State, or the growing number of unemployed Irish and EU citizens who could now fill vacancies where they became available. As one interviewee noted, 'what they tend to find are people who are on work permits and are looking to renew them but might have gaps in their employment and gaps in their immigration permission.'[165] Gaps within immigration permissions can occur quite easily due in part to long periods of time it can take for them to be processed, and the associated difficulties in maintaining their immigration status. Similar gaps within an employment permit are more likely to occur where there is an economic downturn and unemployment rises.

Whilst it is a procedural requirement that failed applicants and those who have had their permits revoked may appeal against any such decision being rendered by the Department, it must be borne in mind that the Acts do not place an emphasis on the rights of the applicants. The safeguards that do exist within the Acts are constructed in terms of the Minister and their representatives' power to act. Similarly, neither the Employment Permit Act of 2003 or 2006 contain any sections which establish the social, civil and political rights that will accrue to successful candidates, reinforcing that the Acts are focused on the executive's control of the process, as distinct from the State's obligation towards such persons.

[165] Interviewee 4.

6.4.6 Informal: How an Employment Permit is Affected by a Period of Unemployment

The relative complexity of the welfare system, the immigration system, and employment permit system was noted by one interviewee as creating circumstances in which 'you would… often see a lack of understanding among them about whether they are entitled to receive social welfare payments if they have a period of unemployment.'[166] A less explored issue within this, is how involuntarily unemployment as a TCN labour migrant may impact upon their permit overall.

Whilst access to welfare payments from an immigration perspective affixes almost exclusively to a TCN labour migrant's Stamp and their ability to satisfy the conditions set out in national welfare legislation, employment permits provide an additional avenue for accessing welfare payments, as holders are also capable of satisfying the right to reside test where they are in possession of one. They must also have an immigration Stamp, which may similarly grant them a right to reside,[167] however, an employment permit grants them access to the labour market and, by extension, the ability to accrue contributory social security payments, reducing their dependence on social assistance. In light of the need for TCNs to not be considered an 'undue burden' on the welfare system, they must discover what protections can be granted to them, where they become unemployed, either voluntarily or involuntarily, against their residence permission and employment permit being revoked or the non-renewal of their permit on this basis.

The guidelines for each permit often fail to establish how these factors interact, and the terms and conditions for each place an emphasis on becoming involuntarily unemployed through redundancy. The Critical Skills permit, for example, allows a holder up to 6 months to find another position where they are made redundant. No mention is made of whether or not the voluntarily leaving employment would be allowed, as changes in circumstances should be 'through no fault of the employee.'[168] The same also applies to the General Employment permit,[169] meaning that it is possible for some-

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[166] Interviewee 4.

[167] Social Welfare and Pensions (No. 2) Act 2009, Section 15 amending Section 246 of the Social Welfare (Consolidation) Act 2005. This created a new S.246(6) within the 2005 Welfare (Consolidation) Act.

[168] Department of Business, Enterprise and Innovation, 'Critical Skills Employment Permit' <https://www.dbei.ie/en/What-We-Do/Jobs-Workplace-and-Skills/Employment-Permits/Permit-Types/Critical-Skills-Employment-Permit/> accessed 02/09/2016.

[169] Department of Business, Enterprise and Innovation, 'General Employment Permit' <https://www.dbei.ie/en/What-We-Do/Jobs-Workplace-and-Skills/Employment-Permits/Permit-Types/General-Employment-Permit/> accessed 02/09/2016.

one to leave their employment but only where it can be established that it was through no fault of their own. By comparison, the Intra-Company Transfer,[170] and Contract for Services[171] permits omit any mention of redundancy and unemployment. Due to the intentionally short nature of their residence within the State, it is unlikely that TCN labour migrants with either of these permits would be able to claim welfare payments, particularly given that they are also unable to count their time on the permit towards an application for long-term residence. There is an additional scheme administered by INIS which allows for the regularisation of a TCN labour migrant's immigration status where they become unemployed or are made redundant outside of the conditions within each permit,[172] but such applications must be made after their status comes into question and remains at the discretion of the individual immigration official handling the application.

In relation to unemployment but not redundancy, a TCN labour migrant must be in possession of an employment permit and have been resident in Ireland for more than 5 years and be in possession of either a Stamp 1 or Stamp 4. Following the satisfaction of certain procedural requirements, they will be granted a temporary Stamp 4 for a period of one year so that they may either become self-employed or seek other employment. This is unlikely to cover most TCN labour migrants, as five years of residency would entitle them to already possess a Stamp 4 without the need for an employment permit. These issues are again not resolved within the guidelines, and it was not possible as part of this thesis to find documentation which could clarify these points.

The emphasis on redundancy and involuntary unemployment also raises additional concerns regarding a TCN's willingness to not only leave a potentially exploitative employment arrangement, but also to attempt to draw welfare payments in such circumstances. To leave their employment voluntarily may leave them without recourse to the welfare system, if doing so is considered to be in breach of their residency and employment permit conditions. It may also make renewing a permit more difficult in the

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[170] Department of Business, Enterprise and Innovation, 'Intra-Company Transfer Employment Permit' <https://www.dbei.ie/en/What-We-Do/Jobs-Workplace-and-Skills/Employment-Permits/Permit-Types/Intra-Company-Transfer-Employment-Permit/> accessed 02/09/2016.

[171] Department of Business, Enterprise and Innovation, 'Contract for Service Permit' <https://www.djei.ie/en/What-We-Do/Jobs-Workplace-and-Skills/Employment-Permits/Permit-Types/Contract-for-Services-Employment-Permit/> accessed 02/09/2016.

[172] Irish Naturalisation and Immigration Service, 'Work Authorisation and Working Visa holders, Policy for 5 year workers and redundant workers: Updated immigration arrangements for 5 year workers and redundancy policy in respect of non-EEA workers' <http://www.inis.gov.ie/en/INIS/Pages/Policy%20-for%205%20year%20workers%20and%20redundant%20workers> accessed 28/02/2017.

future, and notifying the DEASP as to the conditions under which they left may put both the the DEASP and DBEI on notice that the conditions affixed to the permit have potentially been breached.

Consequently, the difficulty in establishing the protections afforded to TCN labour migrants where they become unemployed may lead to circumstances in which they avoid accessing the welfare system as it may reflect poorly on their immigration permission. Much of this could be avoided if the DBEI and INIS were to simply provide more concrete guidelines for circumstances such as this, or if protections were specifically incorporated into legislation with the best interests of these individuals in mind.

6.4.7 Formal: The Habitual Residence Condition

Once a TCN is in possession of their immigration stamp constituting their right to reside within the State and/or an employment permit, they are capable of satisfying the first of two steps necessary to accessing social assistance payments in Ireland.[173] As previously mentioned, a permit will allow a TCN labour migrant to access contributory social security payments as a result of being able to access the labour market. They can engage in employment and build up social security contributions which can then be drawn down in the event of involuntary unemployment. However, where these entitlements have been exhausted, or are not available to them, they will have to attempt to access the discretionary social assistance payments[174] that are available in their place.

As outlined in Chapter Four, The Habitual Residence Condition is considered to be uniform in its application.[175] It was however part of the larger programme of reforms

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[173] Social Welfare and Pensions (No. 2) Act 2009 Section 15 amending Section 246 of the Social Welfare (Consolidation) Act 2005. This created a new S.246(6) which necessitates that any determining officer carries out an additional legal test to see whether or not the person seeking to establish habitual residence has the legal right to reside within Ireland. If the individual in question does not, they cannot be deemed to satisfy the HRC.
Those with a right to reside in Ireland are: Irish citizens under Irish Nationality and Citizenship Acts 1956 to 2004; EU Nationals who are employed or self employed; Non-EU nationals with residency or work permit; and Refugees.

[174] The Habitual Residence Condition applies to fourteen separate categories of welfare payments for TCNs with no link to an Irish/EU/EEA citizen or recognised refugee: (i) Blind Pension; (ii) Carer's Allowance; (iii) Child Benefit; (iv) Disability Allowance; (v) Domiciliary Care Allowance: (vi) Guardian's Payment (Non Contributory); (vii) Jobseeker's Allowance; (viii) Jobseeker's Allowance Transition; (ix) One Parent Family Payment; (x) State Pension (Non Contributory); (xi) Supplementary Welfare Allowance (other than once off exceptional and urgent needs payments); (xii) Widow(er)'s or Surviving Civil Partner's Non Contributory Pension; (xiii) the Blind Welfare Allowance; and (xvi) the Back to Work Dividend.

[175] *Douglas v Minister for Social Protection* [2012] IEHC 27, para 15 - 'The entitlement to social welfare here… can operate… against an Irish citizen, against a French citizen, on precisely the same ground of habitual residence which is applied in Ireland…'

introduced by the Irish State which sought to limit migrant access to the welfare system, as well as serving as an example of how a Europeanised value was adopted at the national level in Ireland to facilitate part of this shift.[176] It has also been argued that in addition to making it more difficult for EU citizens to access welfare payments, the HRC limits the right to reside for TCNs, and asylum seekers in particular.[177]

EU citizens will, despite the often poor implementation of Union welfare law in Ireland, derive certain legal benefits from their special legal status in comparison to TCN labour migrants. Engaging with the labour market is, for example, considered an immediate form of integration,[178] meaning that they *should* face less of a burden than TCNs in satisfying the HRC. EU citizens also benefit from the presumption that they have a right to move and reside freely,[179] so long as they do not become an 'undue burden' for the purposes of Directive 2004/38/EC, and where they are economically active they will automatically satisfy the right to reside criteria. Child Benefit and other social security payments capable of satisfying the criteria set out in *Hughes*[180] are also reclassified so that they fall within the material scope of Regulation 883/04 and do not engage with the HRC simpliciter[181] - although a right to reside component may be applied to these payments, and the scope of this has yet to be determined. TCN labour migrants by compari-

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[176] See for example, Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community OJ L 149 , 05/07/1971 P. 0002 – 0050; Regulation 883/2004 on the Co-ordination of Social Security Systems OJ L166/1 of 2004, and 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ L158, 30.4.2004) [2004] OJ L229/35 for example.

[177] FLAC, 'Submission to the OHCHR on the occasion of Ireland's second review under the Universal Periodic Review mechanism: A submission by FLAC to the Office of the United Nations High Commissioner for Human Rights' (FLAC, 2012), and Free Legal Aid Advice Centre, 'FLAC Concerns in relation to the Application of the Habitual Residence Requirement' (2008) <www.flac.ie/download/doc/flac_submission_to_ihrc_re_hrc_30.07.08.doc> Accessed 20 April 2017.

[178] Case 76/76 *Silvana di Paolo v Office national de l'emploi* [1977] ECLI:EU:C:1977:32, para 19 - 'In fact, whenever a worker has a stable employment in a Member State there is a presumption that he resides there, even if he has left his family in another State.'

[179] Articles 18-21 TFEU.

[180] Case C-78/91 *Hughes* [1992] ECLI:EU:C:1992:331.

[181] Although these may still be subject to a right to reside test - Case C-308/14 *Commission v UK* [2016] ECLI:EU:C:2016:436.

son, must ensure that their immigration permission is up to date[182] in order to do so, which as previous subsections have highlighted, is not an easy proposition.

Satisfying the preconditions for establishing habitual residence[183] and consequently establishing that one's 'centre of interest' rests in Ireland,[184] is the same for TCN labour migrants as it is EU citizens who are attempting to access social assistance payments. Pervious chapters have underlined that the data collected on this issue in terms of who is most affected by the application of the HRC is often highly inadequate, and attempts made as part of this study to establish more conclusively if EU citizens or TCN labour migrants are more affected by its impact[185] proved less effective than originally hoped. Table 4.3 does underline that in the limited set of data available, the number of welfare payments disallowed based on the HRC for migrants will on average be 88.8% of the total refusals in any given year, and in 3 of the 5 years included the percentage is over 90%.

As EU/EEA citizens, particularly those who are a worker or retain their worker status *should* have an easier time satisfying the HRC, it should follow that a greater number of refusals apply to TCN labour migrants. Yet Cousins established that in the period from May of 2004 until April of 2006,[186] refusals based on the Habitual Residence Condition affected 10% Irish citizens, 18.8% of third-country national labour migrants, and 61.9% of EU13 nationals. Whilst the figure for TCN labour migrants is significantly higher than Irish citizens, it pales in comparison to the number of EU citizens affected by it.

As Barrett and others have previously argued, migrants are often less likely to engage with state administrative systems, particularly that of welfare, where it may reflect

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[182] Social Welfare and Pensions (No. 2) Act, 2009 Section 15 amending Section 246 of the Social Welfare (Consolidation) Act 2005.

[183] As outlined in Chapter Four, these criteria can be divided even further into up to 8 separate criteria.

[184] Social Welfare (Consolidation) Act 2005, Section 246(1) and read in light of Article 11 of REGULATION (EC) No 987/2009 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems OJ L.284/1.

[185] See Question No: 328 Ref No: 31905-16; and Question No: 310 Ref No: 8738-17.

[186] Mel Cousins & ors, 'Technical Review of the Social Welfare Code to Examine its Compatibility with the Equal Status Acts: Final Report' (Review Gate, 2009-2011), 189.

badly upon their immigration status for example.[187] Individuals who have a negative experience of first-instance welfare determinations are more averse towards engaging with the appeals procedure, as they often presume that both procedures operate in a similar manner.[188] It is therefore possible that migrants are then over-represented in this number of unsuccessful first-instance decisions who do not lodge a subsequent appeal, as they already viewed engagement with the system as problematic in some way. Due to the fact that they are forced to engage with a greater number of state systems, TCN labour migrants are potentially the most likely category of lawful migrant who will be underrepresented within this group.

A counter-narrative to this, would be that their increased engagement with the DEASP, INIS, DOJ and DBEI among other State-run departments and agencies increases a TCN labour migrant's cultural understanding of how these processes work in an overarching sense, making it easier for them to navigate the HRC than EU citizens. This would however, require that every agency and department has comparable processes and ways in which they operate, making this a highly transferable skill, and that at the same time they would also be sufficiently distinct enough that TCNs would have a better experience of the process. Simply because the welfare and immigration systems both tend to be opaque does not mean that they are *the same kind* of opaque, or that the processes will vary to such a degree that their experience of it will be substantially different.

Thus, the clearest inference to draw from this trend is that EU citizens likely present themselves at far higher rates than TCNs because their status and clearer rights *should* benefit them, whereas the less concrete, more discretionary status of TCN labour migrants *likely* leads them to engage with the welfare system at lower rates compared to EU citizens, or other categories of lawful migrants.

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[187] A. Barrett, & Y. McCarthy, 'Immigrants in a booming economy: analysing their earnings and welfare dependence' (2007) 21(4/5) *Labour* 789; A. Barrett & Y. McCarthy, 'Immigrants and welfare programmes: exploring the interactions between immigrant characteristics, immigrant welfare dependence and welfare policy' (2008) 24(3) *Oxford Review of Economic Policy* 542; V. Timonen & M. Doyle, 'In search of security: migrant workers' understandings, experiences and expectations regarding 'social protection' in Ireland' (2008) 38(1) *Journal of Social Policy* 157; and more generally J. Power & P. Szlovak, 'Migrants and the Irish Economy' (The Integration Centre, 2012), 20-22.

[188] V. Lens, 'Administrative Justice in Public Welfare Bureaucracies When Citizens (Don't) Complain' (May 2007) 39(3) *Administration and Society* 382.

6.5 The Potential Impact of EU Law in Relation to TCN Labour Migrants

As the preceding section demonstrated, the intersection of national welfare, immigration and employment permit rules creates a plethora of potential barriers and disincentives for TCN labour migrants who may need to access the welfare system. During the course of this study, one interviewee underlined that EU law *may* display a significant effect if the Irish State did not engage Protocol 21 of the TFEU and if it were to implemented correctly.[189] This raises an important point that does not have to be considered for EU citizens. Namely, 'what impact would EU law likely have if it were to be implemented in this field?'

It is certainly true from the analysis conducted in Chapter Five dealing with the implementation of EU welfare law for Union citizens that the principle of good administration has had little to no effect in this area. However, by adopting the EU Directives dealing with TCN labour migration, Ireland would bound by the rights and principles contained within them. This may constitute a significant step forward, as the procedural guarantees these Directives grant would be of a higher standard than those that exist within national law currently.

The Directives in this area are not entirely without fault, and it is quite clear that they are largely predicated on the right to social security alone, that this right can vary significantly form sector to sector, and still allow an often significant margin of appreciation in implementing the provisions contained within them. In spite of this, they are far more balanced in terms of the interests of the Member States versus those of the applicants. The codified procedural rights they contain, in addition to the procedural guarantees contained within the general principles of EU law, as well as the Charter, are far more rights-orientated in principle than the Irish rules currently in place would appear to be based on the preceding analyses in this chapter. Interviewee 1 summarise this situation viewpoint by stating that

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[189] **Interviewee 1**: 'Most immigration related matters do not have a timeframe to answers to be given within. There are very few immigration related decisions that come in from EU law, but these are bound by timeframes. So for example, when you're applying for your own family reunification under the EU1 stamp which is for the non-EU spouses of EU citizens or workers, there's a principle of good administration which defines that it must be dealt with within a reasonable period, such as 6 months. So in that case they have to abide by that and it supersedes anything in Irish law.'

> ‘our immigration system is so ‘loose’ and not defined in any clear framework. The EU Directives would at least frame your immigration system within a certain pattern, which can only be good.’

The following subsections will attempt to outline what the potential effects of the relevant EU rules in this area may be if they were to be implemented, and what a ‘top down,’ versus 'bottom up' approach to Europeanisation could look like. This will then be followed by a brief assessment of how Irish immigration law may have been *indirectly* Europeanised by the EU Directives in this area.

6.5.1 Social Security under the Relevant EU Directives

The right to *social security* as contained within the Directives dealing with TCN labour migration differs greatly from current national regime in Ireland due, in large part, to the decision to specifically include a provision stating what these are where they exist for that particular category of migrants. Although TCN labour migrants would still be subject to the HRC when they apply for social assistance payments, they would no longer have to establish based on their immigration permission and employment permit what their right is, and how it interacts with a period of unemployment should that situation arise. As much of this has already been evaluated in full within Chapter Three, it is merely necessary to summarise the right as it is acknowledged within the relevant Union legislation.

Some of the legislation adopted under what is now Article 79 TFEU, does not include a welfare component. The Student Directive[190] for example, grants a limited right to take part in paid employment or engage in self-employed activities, and this cannot be less than 10 hours per week.[191] Member States may depart upwards from this and grant a more generous right, but it is merely the case that this 10 hour requirement be interpreted as broadly and as effectively as possible.[192] This includes access to the labour market, which must be interpreted as broadly and as effectively as possible - a

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[190] Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service OJ L 375, 23.12.2004.

[191] Directive 2004/114/EC, Article 16.

[192] See Case C-491/13 *Mohamed Ali Ben Alaya v Bundesrepublik Deutschland* [2014] ECLI:EU:C:2014:2187; and Case C-15/11 *Leopold Sommer v Landesgeschäftsstelle des Arbeitsmarktservice Wien* [2012] ECLI:EU:C:2012:116.

requirement that most Member States do not seem to have met in practice.[193] Member State *may* also allow such persons to access the contributions they have made to the social security system by this is not a mandatory requirement. The recently recast Directive[194] does provide a right to social security, albeit through a Recital rather than a more easily enforced Article,[195] but this Directive was also unimplemented in Ireland.

The Scientific Research Directive,[196] the only measure which is constructed primarily in terms of positive rights to which Ireland is party, grants an equal right to tax benefits,[197] access to goods and services,[198] and most importantly, access to social security in line with EU citizens within the meaning of Regulation 883/04.[199] It was not, however, possible as part of this study to establish if this is reflected in reality, particularly due to the wholly administrative nature of the Directive's implementation in Ireland. Ireland has also elected not to take part in the recast Directive which maintains the same right for researchers.[200]

Other instruments, such as the Blue Card Directive,[201] behave in a similar manner and grant the right to social security in line with Regulation 883/04,[202] but qualify this by stating that status holders cannot be unemployed for a period exceeding 3 months and may not be unemployed more than once within their host Member State.[203] The

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[193] European Commission, REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the application of Directive 2004/114/EC on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service COM(2011) 587 Final.

[194] Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing OJ L 132, 21.5.2016.

[195] Directive 2016/81, Recital 55.

[196] Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research OJ L 289, 3.11.2005. This will soon be recast to also include students within its scope [Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the conditions of entry and residence of third-country nationals for the purposes of research, studies, pupil exchange, remunerated and unremunerated training, voluntary service and au pairing COM(2013) 151 Final.

[197] Directive 2005/71/EC, Article 12(d).

[198] Directive 2005/71/EC, Article 12(e).

[199] Directive 2005/71/EC, Article 12(c).

[200] Directive 2016/81, Recital 55.

[201] Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly-qualified employment [2009] OJ L155/17.

[202] Directive 2009/50/EC, Article 14(e).

[203] Directive 2009/50/EC, Article 13.

Single Permit Directive (SDP)[204] mirrors the uneven level of protection given across many of the Directives by allowing status holders to access social security as defined in Article 3 of Regulation 883/04,[205] whilst qualifying access to education and vocational training,[206] tax benefits,[207] and social goods and services.[208] Access to social security also only applies to third-country workers who are in employment or who have been in employment for a minimum period of six months and who are registered as unemployed.[209]

Temporary workers, such as those governed by the Seasonal Workers Directive[210] and the Intra-Corporate Transferees Directive,[211] have even more conditions attached to their residence and access to the welfare state. Seasonal Workers are granted access to social security in line with Regulation 883/04,[212] but Member States may immediately exclude family and unemployment benefits from this equal treatment.[213] The Directive is otherwise concerned with their labour rights and ensuring that other social rights are vindicated. Intra-Corporate Transferees are granted the right to access social security as

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[204] Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State *OJEU* 23 December 2011, L-343/1.

[205] Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality [2003] OJ L 124/1 makes this possible.

[206] [Article 12(2)(i) to (iv) of SPD] can also be derogated from but only in the case of students, unpaid workers/trainees and volunteers [Article 12(2)(a)(ii) of SPD], as well as study/maintenance grants, or similar loans [Article 12(2)(a)(iii) of SPD]. They cannot exclude 'those third-country workers who are in employment or who have been employed and who are registered as unemployed' [Article 12(2)(a)(i) of SPD].

[207] Tax benefits may of course only be limited where 'the registered or usual place of residence of the family members of the third-country workers for whom he/she is claims benefits, lies in the territory of the Member State concerned' [Article 12(2)(c) of SPD]. Any such derogations must strike the balance between a Member State's sovereignty on issues of tax with their obligations under EU law.

[208] Goods and services can also concern items such as housing [Article 12(2)(d)(i) and (ii)], although this does not explicitly state whether the derogation can be complete or merely partial when it comes to some form of housing benefit.

[209] Directive 2011/98/EU, Article 12(2)(b).

[210] DIRECTIVE 2014/36/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers L 94/375 28.3.2014.

[211] DIRECTIVE 2014/66/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer L 157/1 27.5.2014.

[212] Directive 2014/36/EU, Article 23(1)(d).

[213] Directive 2014/36/EU, Article 23(2)(a).

defined within Article 3 of Regulation 883/04, however this would appear to include additional payments which have pulled within the scope of the Regulation such as Child Benefit.[214] Member States may also derogate from this right somewhat where a bilateral agreement exists between the third-country and the Member State, or where the law of that home State will apply.[215]

What becomes clear from viewing each of the Directives from the perspective of access to social security, is that whilst each of them may suffer from specific failings in one regard or another, the right to social security, where it exists, is relatively well established, and cannot fall below a certain standard. Where a Member State is capable of derogating from this right, the conditions under which this can be done are established in the same Directive. This differs greatly from the Irish system, which is extremely complex and often unclear on this specific question. The number of EU Directives may effectively mirror the number of immigration stamps used in Ireland for a similar purpose, but the Directives are quite fixed in nature, and may not be varied in the same manner as an immigration stamp. By opting in to these EU Directives, Ireland would be formally bound by less opaque standards, and TCN labour migrants themselves would have a more easily established right to social security on which they could rely and refer to.

However, as this thesis has consistently argued, the ability of the Irish State to even abide by its own national rules and procedural requirements is less than desirable. In addition, not only would the DEASP have to possess a level of technical expertise in the application of Regulation 883/04 -something that is often quite lacking - they would also need to know how this will be applied with a series of qualifications and addenda, and be able to readily distinguish these based on the Directive which applies to a TCN labour migrant. Thus, it is likely that the practical implementation of these Directives, if they were to be adopted nationally, would be similarly situated.

The Researcher Directive[216] - as mentioned above - is the only such measure to be implemented in Ireland, but not on a legislative basis. Rather, it has been adopted ad-

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[214] Directive 2014/66/EU, Article 18.

[215] Directive 2014/66/EU, Article 18(2)(c). Article 5 requires that other procedural requirements such as presenting proof of education and possession of valid travel documents, etc are also fulfilled.

[216] COUNCIL DIRECTIVE 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research OJ L 289/15.

ministratively by both INIS[217] and the DBEI,[218] neither of which refers to the social rights of researchers admitted to Ireland under the Directive. The DEASP by comparison, do not refer to the Directive within any of the guidelines for individual payments, or within the more general EU guidelines.[219] The latter is somewhat understandable, given that the EU guidelines are concerned almost exclusively with EU and EEA citizens, as well as being out of date in many respects. However, a complete lack of guidance on this issue in the guidelines of both Departments and INIS underlines that the Irish attitude towards its legal obligations under EU law is passive at best.

6.5.2 Procedural Safeguards and Guarantees Not Contained in Irish Law

Procedural rights are a fundamental feature of EU law, and as explored in Chapter Three, in addition to being embedded within legislation, these rights constitute general principles of Union law and are applicable where a Member State implements its EU law obligations. As a result, EU rules focus far more on the rights of individuals who fall within their material scope than anything contained within Irish law - the latter of which are predominantly concerned with the State and its powers. By adopting the EU Directives in this area, the procedural guarantees extended to TCN labour migrants in Ireland would potentially ensure that their right to social security is effective, as well as making it less difficult to maintain their status and navigate the immigration system as a whole.

This can be seen firstly in the SP Directive where, on a purely formal reading, Articles 8 and 9 grant specific procedural rights and a right to access information in line with those contained in the Charter and the general principles of EU law. Article 4 then provides the clearest manifestation of these rights, by necessitating that Member States create a single administrative procedure for issuing, amending or renewing permits. Where the conditions set out are met the permit will be granted.[220] This provides a de-

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[217] Irish Naturalisation and Immigration Service, 'Researchers (on a Hosting Agreement)' <http://www.inis.gov.ie/en/INIS/Pages/Researchers> accessed 02/01/2016.

[218] Department of Business, Enterprise and Innovation, 'Scheme for Accreditation of Research Organisations (Hosting Agreement Scheme)' <https://dbei.gov.ie/en/What-We-Do/Innovation-Research-Development/Hosting-Agreement-Scheme/> accessed 09/05/2015.

[219] Department of Employment Affairs and Social Protection, 'An Introduction To The EC And The EEA And The Free Movement Of Workers' (11/11/2013) <http://www.welfare.ie/en/downloads/EUGuideline-Part1.pdf> accessed 02/02/2017.

[220] Directive 2011/98/EU, Article 4(1) and (2).

gree of clarity that is otherwise missing from the Irish system. It does not remove the visa requirement for such persons *per se*, who may require one in order to enter their host Member State, and this consequently remains largely unregulated by EU law. There is, however, the potential that the requirement to streamline the permit procedure itself may spillover to or affect the visa process due to their intertwined nature, ultimately making the visa procedure more efficient. Additionally, while it may not remove the need to receive an immigration stamp and other existing requirements, they will need to compliment this singular procedure, and cannot alter the rights that exist within the Directive. This would mean that Stamps could not be altered or amended to affect rights to residence, welfare payments, etc. and could not create an unnecessary administrative burden for the holder. Ideally, these steps would have to be incorporated within the processes of these same Department and/or agencies to ensure that it does not become more than a single procedure. Persons who are residing within their host State for a short period of time may however find themselves falling outside of the scope of the Directive. Where a TCN labour migrant is likely to work for less than 6 months or is a student, it is possible for Member States to not apply the procedure to these people, although it is not possible to derogate from the equal treatment provisions.[221]

The Seasonal Workers Directive[222] is perhaps the most substantive in terms of the procedural protections extended to its subjects. It applies specifically to a TCN labour migrant who retains her/his principal place of residence in a third country and stays legally and temporarily in the territory of a Member State to carry out an activity dependent on the passing of the seasons, under one or more fixed-term work contracts concluded directly between that TCN labour migrant and the employer established in that Member State.[223] It regulates the direct-employment relationship, any agency that might hire seasonal workers as a third-party,[224] and incorporates civil society organisations who work directly with such migrant workers within the overall implementation process and operation of the Directive.[225] As a result, it is primarily focused on ensuring

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[221] Directive 2011/98/EU, Article 3(3).

[222] DIRECTIVE 2014/36/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers L 94/375 28.3.2014.

[223] DIRECTIVE 2014/36/EU, Article 3(b).

[224] DIRECTIVE 2014/36/EU, Recital (12).

[225] DIRECTIVE 2014/36/EU, Recital (13).

that such persons are not exploited and that their welfare is considered. This is further supported by Article 8 which allows for an employer to be barred from procuring seasonal workers where they have violated national law - including labour rights[226] - and where the employer has purposefully attempted within the last 12 months to replace a permanent job with an unsecured seasonal position.[227] However, applications can only be made by workers from outside of the EU, meaning that those who are already within the Union's territory cannot gain any protections that arise under the Directive, nor can their status be regularised for any period of time.[228]

These Directives and the procedural rights contained within them are largely indicative of all the legislative measures adopted within this field at a Union level, and stand in sharp contrast to the rights - or lack thereof - established in the relevant Irish legislation. As previous sections have made clear, the Employment Permit Acts lay down the prerogatives of the Irish State in granting these permits. There are no explicit references made to the rights of the applicants for or holders of these permissions, and the decision to retain this emphasis over that of the EU Directives would appear to be a conscious one - albeit one which is not overtly references in the decisions of the State in electing to opt-out. This is due in large part to their decision to rely on the supposed adequacy of the Irish system and its 'comparable' status. The Immigration Acts pays even less attention to the rights of the status holder, as it the State that is considered to be the almost exclusive addressees of the legislation. In the absence of legislation establishing strict limitations on the State in this respect, the Superior Courts have chosen to set narrow parameters within which the Minister can execute their power, and this means that the procedural guarantees extended to TCN labour migrants in this area of national law can never be as strong as those provided under EU law.

The difficulty arises from the need for the Irish State to implement these rights effectively and efficiently. Based on the implementation of the Researchers Directive,[229] which has again been achieved solely through administrative measures, there are no ref-

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[226] DIRECTIVE 2014/36/EU, Article 8(4)(a).

[227] DIRECTIVE 2014/36/EU, Article 8(4)(b).

[228] J. Hunt, 'Making the CAP Fit: Responding to the Exploitation of Migrant Agricultural Workers in the EU' 30(2) *The International Journal of Comparative Labour Law and Industrial Relations* (2014) 131–152, 142 discussing Article 2(1) of the Directive.

[229] COUNCIL DIRECTIVE 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research OJ L 289/15.

erences to the rights of applicants or recipients included within the guidelines provided by both INIS[230] and the DBEI.[231] Similarly, the Irish State's compliance with principles of administrative law has consistently shown itself to be deeply problematic due to the highly opaque nature of administrative systems in Ireland.

On this basis, it is unlikely, although not impossible, that the administrative law principles within these Directives and EU law as whole will significantly alter the way in which the Irish immigration system is administered without a significant shift structurally to achieve this - a shift that could be made without opting in to the relevant EU Directives.

6.5.3 Indirect Europeanisation: Comparing the Critical Skills Permit and the Blue Card Directive

The potential impact of the relevant Directives governing the entry and residence of TCN labour migrants and access to welfare payments is formally quite significant, but given the way in which Ireland has elected to implement the Researchers Directive, the only EU measure it opted in to within this field, as well as the way in which the immigration and welfare systems are operated, the practical effect of the other measures may be quite muted. Thus, the level of direct 'top down' Europeanisation is quite low within this field is low, and would likely remain so. There are, however, other potential examples of more indirect forms of Europeanisation, such as the way in which employment permits seem to often mirror the stated purposes of the Directives that they State elected to opt-out of.

One of the clearest examples of this is the way in which the Critical Skills Permit (CSP) and the status granted under the Blue Card Directive appear to be functionally identical, with the permit being adopted after the proposal for the Blue Card was put forward. This suggests that the Irish State sought to incorporate the Blue Card into Irish law without assuming the potential burden of the substantive and procedural rights created under EU law in comparison to the national administrative status created on the basis of the Employment Permits Acts. A Critical Skills Permit is intended to 'attract

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[230] Irish Naturalisation and Immigration Service, 'Researchers (on a Hosting Agreement)' <http://www.inis.gov.ie/en/INIS/Pages/Researchers> accessed 02/01/2016.

[231] Department of Business, Enterprise and Innovation, 'Scheme for Accreditation of Research Organisations (Hosting Agreement Scheme)' <https://dbei.gov.ie/en/What-We-Do/Innovation-Research-Development/Hosting-Agreement-Scheme/> accessed 09/05/2015.

highly skilled people into the labour market with the aim of encouraging them to take up permanent residence in the State.'[232] That the Blue Card Directive[233] establishes its primary concern as being highly-skilled employment of longer than 3 months in duration demonstrates how easily they align in this respect. Again however, what is noticeable is that the Directive also emphasises the need to ensure comparative social rights with EU citizens for such persons,[234] illustrating that its material scope extends beyond that of the Permit and that such rights will be codified rather than being left to ancillary legal instruments and systems. In 2008, the then Minister Micheál Martin argued that the Directive, despite being commendable, was unnecessary in light of the existing scheme in place,[235] a position which was subsequently adopted by the Government in choosing to opt-out. The justification has little to do with the CTA, and instead suggests that the existing standard was more amenable to the executive. It should be noted that with regard to the overall intake of TCN labour migrants,[236] Member States maintain a discretion in relation to how Blue Cards it chooses to issue to such persons. This means that if Ireland had concerns regarding how manyTCNs could enter under the Directive and how this would affect the CTA, the Directive would not immediately affect this.

From a legislative perspective, there are a mere 5 provisions within Part 3 of SI 432/2014[237] which specifically refer and apply to the Critical Skills Permit. Although the previously outlined sections of the 2006 and other Employment Permit Acts supplement these somewhat, those within the SI primarily deal with the name and purpose of the Permit, the minimum hours of work and the qualifications required based on the level of remuneration received on the applicant. Two further sections consider the list of qualifying and non-qualifying categories of employment, as well as providing an example of the form to be filled out by applicants. This is quite similar to the Directive in some respects, as it establishes that the salary of the individual in question must be

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[232] Department of Business, Enterprise and Innovation, 'Critical Skills Employment Permit' <https://www.dbei.ie/en/What-We-Do/Jobs-Workplace-and-Skills/Employment-Permits/Permit-Types/Critical-Skills-Employment-Permit/> accessed 02/09/2016.

[233] Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly-qualified employment [2009] OJ L155/17.

[234] Directive 2009/50/EC, Recital 7.

[235] Dáil Debates, 'Written Answers' 30 April 2008 <https://www.kildarestreet.com/wrans/?id=2008-04-30.620.0&s=%27blue+card+directive%27#g622.0.r> accessed 27/08/2016.

[236] Directive 2009/50/EC, Article 8(2).

[237] S.I. 432/2014, Sections 14-18.

1.2-1.5 times the national average.[238] By choosing not to emphasise the nature of employment that qualifies, the Directive grants a large degree of flexibility to employers to bring employees into the Union under its material scope. Guild further suggests that the income criteria also grants Member States a discretion, insofar as it sets a standard or ratio and not a particular amount.[239] Ireland could therefore, implement the highest ratio for example, eliminating those who fall below that standard and once again alleviating the potential impact this would have on the national system.

The Immigration and Employment Permits Acts broadly outline the procedures that must be followed in applying for, granting, refusing, and revoking employment permits. These provisions are often quite broad, and are couched in terms of the Minister and their department's discretion rather than the rights that are extended to persons applying for a CSP. Comparatively, Article 7 of the Blue Card Directive outlines that Member States shall grant an applicant every opportunity to obtain a Blue Card,[240] and outlines that the duration can be from one to four years in total.[241] It also provides for circumstances within which a contract for work is less than the proscribed period of the blue card within the host Member State. The two subsequent Articles deal with the conditions under which a Blue Card may be refused, withdrawn or not renewed respectively.[242] Article 11 goes further again, and outlines specific procedural safeguards that Member States shall enact - such as where an application is refused, withdrawn or not renewed, it must be sent to the applicant in writing, as well as outlining the grounds for doing so.[243] Similarly, where the information given is insufficient to process the claim fully, the applicant must be made aware of this, and told of the other forms of documentation that are required in order to issue a first-instance determination.[244] Despite the similarities between the Irish and EU legislation, the emphasis is entirely different, and under the latter, the emphasis is placed on the addressee of the legislation - a

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[238] Directive 2009/50/EC, Article 5.

[239] E. Guild, 'EU Policy on Labour Migration: A First Look at the Commission's Blue Card Initiative' CEPS Policy Brief 145 (2007), 5.

[240] Directive 2009/50/EC, Article 7(1).

[241] Directive 2009/50/EC, Article 7(2).

[242] Directive 2009/50/EC, Articles 8 and 9.

[243] Directive 2009/50/EC, Article 11(3).

[244] Directive 2009/50/EC, Article 11(2).

significant reversal in the framing of the procedure and the rights and obligations that are created throughout.

That the Irish State subsequently adopted this new category of employment permit after having opted out of the Blue Card Directive, with largely the same objectives and within the same general guidelines but with far lower standards of protection and codification legislatively speaking, suggests that this was likely a conscious decision intended to maintain the State's prerogative in this area. The Critical Skills Permit can consequently be considered the Blue Card Directive by another name, with the discretion of the Irish executive to maintain a system preferential to its interests over the interests of the applicants and status holders being maintained at all times. Consequently, it is another example of selective Europeanisation, albeit in a more indirect fashion. This suggests that the Irish State believes the Directives may impose a more significant burden than they originally envisaged when implementing the Researchers Directive several years prior, although such an assertion remains largely hypothetical at present.

6.6 Who is a 'Burden on the State' for the Purposes of Irish Law?

A final issue with regard to TCN labour migrants accessing welfare payments comes not at the preliminary stage, but in how a successful application for social assistance may impact on one's immigration permission. At present, it is possible for the Irish State to consider those who have accessed social assistance funds to be a 'burden on the state' and to potentially revoke their permission on that basis - even where they are a long-term resident.

The ability of the Minister for Justice and their representatives to grant a conditional 'leave to remain' is provided for in Section 4 of the Immigration Act, 2004. Previous sections have outlined how the immigration stamp system fills a large gap at the administrative level in how this permission operates, however the conditions that are attached to this are often unclear. One example of this is the need for TCNs to never become a 'burden on the State.'[245] Similar to the HRC, the adoption of which was directly influenced by the contents of Directive 2004/38/EC and similar EU welfare legislation, the concept of representing a 'burden on the State' is also embedded within the relevant EU rules. It is not, however, possible to suggest that this latter concept is a creation of EU

[245] Irish Naturalisation and Immigration Service, 'Permission to Remain for Non-EEA Nationals' < http://www.inis.gov.ie/en/INIS/Pages/non-eea-permission> accessed 02/03/2017.

law. Rather, it became embedded within the EU rules by virtue of the fears of its Member States that unrestricted access to the welfare system may endanger the welfare state in some way. This is also supported by the DOJ itself, who argued that the requirement for TCNs to possess sufficient means to support themselves, and consequently not become an undue burden on the financial resources of the State, is an implicit feature of Irish law, and like the discretion of the Minister, dates back to the founding of the State, if not before.[246] In spite of Ireland's relatively new experience of inward migration, and that the 1935 Act did not in any way provide for a 'sufficient means' or 'burden on the State' criteria to be applied,[247] this fits within the larger, State-centric approach to welfare provision used throughout Europe.

However, the legal basis provided by the Department to justify this discretion and the application of the burden criteria was somewhat difficult to parse. For example, a provision within the 2004 Immigration Act allows immigration officials to refuse leave to land or enter the State based on an objective determination that they do not have sufficient means to provide for themselves and their dependents,[248] but the DOJ incorrectly identified the Section in question.[249] It is also important to emphasise that this Section only applies to leave to land, and not in relation to an ongoing residence within the State. Secondly, the Department pointed towards a series of cases from the Superior Courts which they believe to create a long standing judicial precedent for this administrative criteria: *Khalimov v Minister for Justice, Equality and Law Reform*;[250] *Hassan Sheikh Ali v. Minister for Justice, Equality and Law Reform*;[251] *AAM v Minister for Justice and Equality*;[252] and *AMS v Minister for Justice and Equality*.[253] Not only do all of these cases take place after 1999, they also all deal with refusal to enter the State based on a lack of sufficient resources - not the Minister's discretion to apply it to someone

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[246] Freedom of Information No: 156/351/2017.

[247] Aliens Act 1935, Section 5(1)(a) allows the Minister to grant or bar entry to the State for an immigrant where appropriate.

[248] Immigration Act 2004, Section 4(3)(a).

[249] Identified as Section 4(2).

[250] [2010] IEHC 91.

[251] [2011] IEHC 115.

[252] [2013] IEHC 68.

[253] [2014] IESC 65.

who is having their permission renewed. The ability to 'protect' the financial resources of the State may be an implied power of Statehood, but the inability of the Department to correctly identify where this power comes remains troubling.

An ESRI report from 2014 notes that when a TCN's immigration permission is being renewed that all relevant factors will be examined to see if they have been complied with. A refusal to renew cannot be based solely on whether or not the applicant is a 'burden on the State' - it must be part of an overall assessment.[254] INIS and the DOJ acknowledges that this is merely one basis on which it might severe the 'immigration contract.'[255] However, at what point a TCN becomes a 'burden,' or how this is weighted in comparison to other relevant criteria, has yet to be explained. As Interviewee 6 argued, it remains unclear in terms of the basis on which a refusal to renew an immigration permission is made, as

> 'I've never seen a refusal based exclusively on social welfare. Being on social welfare is noted in the analysis of the decision. But they're quite cute about it. They won't say, 'we're refusing you on that basis' or 'we're refusing you based on this, that, and because you're on social welfare,' but it is certainly noted.'

Rather than rejecting an application on the sole basis of having made a social assistance claim or being in receipt of payments that fall within this category, such information is used as an additional consideration in the granting, renewal or refusal of a Stamp or even long-term residence status. This would also raise the question of if, for example, having drawn social assistance and being out of work at the time of an immigration permission being renewed would constitute two separate considerations, and therefore provide an adequate basis on which to refuse the application.

Due to the fact that this condition can be applied to any TCN within Ireland who has entered under the applicable Irish law and has accessed social assistance, as well as the ill-defined nature of the condition, permission to remain is highly conditional and subject to constant State scrutiny. As it is merely a State policy and not codified in any way,

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[254] E. Quinn, E. Gusciute, A. Barrett and C. Joyce, 'Migrant Access to Social Security and Healthcare: Policies and Practice in Ireland' (ERSI, July 2014), 31; and Freedom of Information No: 156/351/2017.

[255] Irish Naturalisation and Immigration Service, 'Policy Document on Non-EEA Family Reunification' (December 2016) <http://www.inis.gov.ie/en/INIS/Family%20Reunification%20Policy%20Document.pdf/Files/Family%20Reunification%20Policy%20Document.pdf> accessed 01/02/2017, para 8.2.

as evidenced by the lack of any guidelines at the governmental level on its application,[256] it is possible that this could be altered with each successive government taking office or new Minister appointed, leaving TCNs generally in an even more precarious position as they may be compliant in one period of time and not in another. Or, a Minister may apply the circumstances differently in different cases that are factually quite similar due to the subjective nature of the concept.

It was even suggested by one interview subject, that the condition *could* be applied to social security payments, which are a legislatively established right so long as the necessary preconditions have been met and the TCN labour migrant in question has built up sufficient contributions.[257] Officers within the DEASP are obligated to inform INIS and the DOJ when they believe that a TCN labour migrant might be capable of being considered a burden, but there is nothing barring them from informing immigration officials where a TCN labour migrant has accessed their legal entitlement to social security. There is also no specific bar on immigration officials to consider TCN labour migrants in such circumstances to be a potential burden in the future and to use this within their calculations.

A comparison of the EU Directives regulating the 'short-term' residence of TCN labour migrants, i.e. residence of less than 5 years, highlights that, in some respects, Irish law may actually be more generous than EU law, albeit only if the 'undue burden' criteria is applied solely to persons in receipt of social assistance. A TCN labour migrant living in Ireland can, under Irish law, potentially access social assistance so long as their immigration permission allows it and they can navigate the system successfully. This is by no means an easy task, as previous sections have continually highlighted, but they are not uniformly prohibited from doing so, and the State is then able to consider whether or not they have become an 'undue burden' in renewing their immigration permission.

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[256] Freedom of Information No: 156/351/2017 - the State said that it was incapable of providing any such guidelines or policy papers as they do not exist.

[257] **Interviewee** 1: 'that might be used against you when you were renewing your immigration status, even if it was your statutory right. You would in the past be disqualified in the past from getting citizenship or residence if you had received unemployment benefit, which was your right.'

EU law grants no right to social assistance for TCN labour migrants. In some instances, the legislation simply neglects to mention social assistance entirely.[258] The Single Permit Directive, for example, states that payments and other benefits which fall outside of the scope of Regulation 883/04 are simply not covered.[259] However, the majority of these Directives establish that the possession of sufficient financial resources is a precondition for remaining within the territory and that no attempt can be made to access social assistance.[260] The most severe interpretation of this requirement for self-sufficiency is the Blue Card Directive, which underlines that a lack of sufficient resources or attempts to draw upon the social assistance system of the host State can lead to a permit being refused or revoked.[261] The position of EU law is fixed, despite allowing Member States to maintain more generous systems, which the Irish system may be in this in this one particular area. The 'undue burden' criteria is highly opaque in this respect, and allows very little legal certainty, but in this single instance, the ambiguity is less restrictive than a literal application of the EU rules.

6.6.1 Can a Long-Term Resident Become a 'Burden on the State?'

Where this position arguably reverses itself, is once a TCN labour migrant has been granted long-term residence. Until 2005, there was no system for granting anything other than short-term, temporary immigration statuses under Irish law unless the individual qualified specifically for a Stamp 5. This status continues to require that an individual has completed 8 years of lawful residence, has continually maintained a valid employment permit and entered under an ordinary Stamp 1, a Stamp 4 where the individual never acted as a temporary worker, or a Stamp 3 where the individual was not linked to

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[258] Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service OJ L 375, 23.12.2004.

[259] Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State *OJEU* 23 December 2011, L-343/1, Recital 27.

[260] Directive 2005/71/EC, Article 6(2)(b); Directive 2016/801, Articles 7(1)(e), 28(6)(d), 29(2)(a)(iii) and 31(6)(d); DIRECTIVE 2014/66/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer L 157/1 27.5.2014, Article 5(5); and DIRECTIVE 2014/36/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers L 94/375 28.3.2014, Articles 5(3), 6(3), and Recital 46.

[261] Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly-qualified employment [2009] OJ L155/17, Articles 9(3)(b) and (d), and also 19(4)(b).

temporary employment. This remains an exceedingly high bar, particularly in light of how little information is given in relation to periods spent outside of the State during this time, and how absences from the State might impact on this 8 year qualification period. There is the significant likelihood that gaps in immigration permission will not be counted towards this threshold, meaning that in many circumstances a TCN may have to remain lawfully in Ireland in excess of this eight year requirement, as the Irish State maintains the discretion to determine what may be considered capable of satisfying this 8 year term.

In 2005, it was made possible for TCNs to acquire long-term residence subject to certain administrative conditions being met and where they have fulfilled a minimum of 5 years (60 months) of continuous residence under either a qualified Stamp 1 or 4. Any period spent outside of the State has again historically not considered towards this period, and those who leave on a regular basis due to their ties in other countries will be the most heavily penalised. Those who are successful will be granted a Stamp 4 that recognises their long-term residency. The rationale for maintaining two different Stamps which serve the same purpose but with a difference of three years between their respective residency requirements is unknown. The DOJ and INIS also have yet to establish what rights accrue to holders of long-term residency status. It is reasonable to assume that they *should* have a greater right to remain than those who have lesser statuses, but this has never been made explicit. In reality, from a statutory perspective there is nothing to suggest that long-term resident TCNs are less likely to deported or have their status revoked on the same basis as those with other less residency periods. Similarly, these long-term statuses must be renewed whenever the holder obtains a new passport - as well as when they are due to expire - which means that holders must renew without a relative security of residency. The High Court has to some extent confirmed this by establishing that there is no right to long-term residence - even where a TCN has complied with the necessary residency period and continuous employment[262] - and the Minister retains an almost absolute discretion to refuse residence and naturalisation. This was historically limited only by the requirement that the process not be undue long and that

[262] *Muhammed Saleem v Minister for Justice, Equality and Law Reform*, judgement of Mr Justice Cooke, 2nd June 2011.

a reason for the refusal be given.[263] The recent decision by the Supreme Court in joined cases of *Luximon & ors -v- Minister for Justice & Equality* and *Bachand & ors -v- Minister for Justice & Equality*[264] has partially reversed this, as it is now necessary that before the Minister attempt to remove any TCN from the State, regardless of their legal status, their personal and familial circumstances must be considered. A refusal to renew a TCN's immigration permission on minor grounds is therefore likely restricted, but it does not bar the State from using it as one of the potential justifications among many - so long as the reason seems to proportionate in a cumulative sense upon review.

The Long-Term Residence (LTR) Directive provides far more procedural and legal certainty than the discretionary status under Irish law. For example, under the LTR Directive, residence within a state must be habitual, but not necessarily continuous, for a period of 5 years,[265] which is a lesser burden than a Stamp 5 would impose. It also regulates and allows for the accumulation of different statuses towards this threshold, and outlines how absences from the territory factor in to this: students or those engaged in vocational training will have 50% of their residence during this period residence counted towards the 5 year total,[266] whilst other valid statuses will be evaluated on a 1:1 basis; and short absences will not affect the habitual nature of their residence so long as none of these trips outside of the territory exceed 6 months at any one time, or 10 months in total throughout the entire 5 years.[267] In both respects, this is clearer than the Irish position.

TCN labour migrants must ensure that they have adequate resources prior to this point,[268] as well as adequate health insurance,[269] but Member State may utilise a more generous regime. However, the most important point in relation to social assistance and

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[263] *K M AND D G v The Minister for Justice, Equality and Law Reform, Ireland and the Attorney General* [2007] IEHC 234; [2007] 321 JR; and *Mallak -v- Minister for Justice Equality & Law Reform* [2012] IESC 59.

[264] [2018] IESC 24.

[265] Directive 2003/109, Article 4(1).

[266] Directive 2003/109, Article 4(2).

[267] Directive 2003/109, Article 4(3) - Although Member States may allow for longer periods outside of the State without it affecting the 5 year habitual residency where they elect to do so.

[268] Directive 2003/109, Article 5(1)(a).

[269] Directive 2003/109, Article 5(1)(b).

the application of an undue burden test is that TCNs are granted a right to non-discrimination after becoming long-term residents. Under the LTR Directive, TCNs have equal access to social security, social assistance, social protection[270] as well as vocational training, education and grants, and tax advantages.[271] This was later refined in the *Kamberaj*[272] judgment to mean 'core benefits,' which 'cover[s] at least minimum income support, assistance in case of illness, pregnancy, parental assistance and long-term care,' and insofar as 'the modalities for granting such benefits are to be determined in accordance with that recital, by national law.'[273] This does allow for discrepancies to develop between Member States in terms of what this will mean in reality, and by extension, would empower Ireland to interpret this concept as narrowly as possible if it were to opt-in to the Directive.

From a procedural perspective, there are provisions dealing specifically with the withdrawal and loss of status[274] as well as protections against expulsion.[275] These provisions are perhaps the most significant in terms of expressly limiting a Member State's ability to apply a condition such as Ireland's 'burden' criteria. A TCN labour migrant may only have their long-term residence revoked where it is on the grounds of public policy or security, due to fraud or due to a prolonged and continuous absence from the state of 1 year or more.[276] Although it is not expressly stated, this would bar Irish immigration officials from applying the 'burden' criteria as there this would not fall within any of the stated grounds. Even in calculating whether a TCN '*constitutes an actual and sufficiently serious threat to public policy or public security,*'[277] the Member State must take into account the duration of their residence, their age, the consequences for the individual and their family, and the links they have built within the host State versus their

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[270] Directive 2003/109, Article 11(1)(d).

[271] Directive 2003/109, Article 11(1)(b), (e) and (f).

[272] Case C-571/10 *Servet Kamberaj v Istituto per l'Edilizia Sociale della Provincia autonoma di Bolzano (IPES) and Others* [2012] ECLI:EU:C:2012:233.

[273] Case C-571/10 *Servet Kamberaj v Istituto per l'Edilizia Sociale della Provincia autonoma di Bolzano (IPES) and Others* [2012] ECLI:EU:C:2012:233, Para 84.

[274] Directive 2003/109/EC, Article 9.

[275] Directive 2003/109/EC, Article 12.

[276] Directive 2003/109/EC, Article 9.

[277] Directive 2003/109/EC, Article 12(1).

links with their country of origin.[278] At no point may economic considerations such as the TCN labour migrant's potential redress to the welfare system be used against them as a public policy consideration.[279] The inclusion of this prohibition against applying economic criteria in deportation cases would also suggest that revocation or withdrawal of a permit.

Thus, whilst the Long-Term Residence Directives is far from perfect, and the rules prior to acquiring that status are in some respects less favourable than under Irish law, it easily surpasses the current practice for the granting of long-term residence in Ireland, as well as eliminating the potential application of the 'burden on the State' criteria. This latter practice may be not be widespread, but the fact remains that there is nothing barring the State from doing so.

Conclusion

The Irish welfare system, as it applies to TCN labour migrants, strongly aligns with the specific mode. This is due not only to the way in which immigration status determines access to the national system, the opaqueness of how both the immigration and welfare systems operate, but also due to the emphasis even the national rules place on continuous labour market activity.

That their access is often determined by the kind of immigration permission that a TCN is granted is a key distinguishing feature from EU citizens, and consequently, their status as a migrant is more overt and potentially more fundamental in their treatment. EU citizens *should* be granted a kind of preferential treatment based on their unique legal status and the highly codified nature of the rules relating to them. Secondly, because TCN labour migrants are subject to two separate systems: the immigration system; and the welfare system; successfully accessing a welfare payment mandates that they are able to navigate the intersection of the rules underlining the operation of both. The immigration system, much like that of welfare, is extremely opaque, with very little transparency and an even broader discretion is given to the Minister to utilise their inherent powers, as well as to supplement legislative provisions through administrative measures. What this *should* mean, is that in practice it is much more difficult for TCN

[278] Directive 2003/109/EC, Article 12(3).

[279] Directive 2003/109/EC, Article 12(2).

labour migrants to lodge a successful claim for welfare payments in comparison to EU citizens.

This does not appear to be the case. An analysis of the HRC for example, underlines that EU citizens are more likely to have a negative decision issued to them for failure to satisfy either the HRC simpliciter or the right to reside test. The dataset demonstrating this is certainly limited, and it remains the case that migrants are still disproportionately impacted by this legal requirement. This distinction is more likely attributable to the more discretionary immigration system which TCN labour migrants must continually engage with, and that this will dissuade them from engaging with other similar systems like welfare provision. The counter-argument to this, is that TCN labour migrants *may* possess a certain cultural familiarity which EU citizens do not - namely, a familiarity with the ways in which Irish administrative systems operate and could then be transferred over to the welfare system. However, as this the chapter and Chapter Five have highlighted, simply because two separate systems are opaque in the ways in which they operate does not mean that they are similar. The limited data that is available would therefore emphasise the likelihood that EU citizens tend to present themselves before the DEASP at far higher rates than TCN labour migrants because of their more secure status and clearer rights, whilst the latter are dissuaded from doing so because TCNs exist in a far more precarious legal space due to the high level of discretion afforded to the State in regulating their continued residence.

From an administrative justice perspective, the overlap of two highly opaque systems creates significant hurdles for ensuring that TCN labour migrants have sufficient access to justice, and can, at a minimum, maintain their immigration permissions and other associated statuses without placing an undue burden on them. The principle underpinning the system, even for a specific mode of welfare provision, should at least be one of efficiency, but much of the detail in this chapter underlines the degree to which ministerial discretion appears to undermine this. From this vantage point, it is not difficult to understand why TCNs may be less likely to engage with the separate welfare system when the immigration procedures can be so difficult to navigate, if not arbitrary.

The absence of applicable EU legislation in this area is due primarily to Protocol 21 of the Treaty on the Functioning of the European Union, which allows Ireland and the United Kingdom, to ‘opt-in’ or out of measures they deem (in)compatible with the Common Travel Area that exists between both States. Anything that potentially endan-

gers it will not be adopted. Ireland's use of the opt-out has, however, rarely been for this express purpose in practice. Rather, based upon the internal documentation received as part of this thesis, the State has utilised a variety of justifications, and in a select number of instances, access to the welfare state has been cited as a cause for concern. At no point has the sanctity of the CTA been invoked to justify an opt-out of a new European Directive within this documentation. The State has also often acted in a highly inconsistent manner in terms of protecting the CTA, with the 27th Amendment of the Constitution necessitating a joint statement by both the Irish and UK governments to assuage concerns after it was suggested that this might destabilise the fledgling State assembly in Northern Ireland.

The potential impact of EU law in this field is difficult to gauge, as the supranational rules in principle suggest that access to the welfare system and the immigration procedures would be far clearer and more streamlined. However, the implementation of the Researchers Directive, the sole measure in this area that Ireland opted in to, was achieved on a purely administrative basis. Similarly, based on the analysis conducted within the preceding chapter on EU citizens, Ireland's compliance with Union law is complicated by an overall lack of technical expertise in relation to EU rules. In a still developing field of competence such as third-country migration, the compliance may be even lower. A subtler form of Europeanisation does appear to have taken place in the creation of new categories employment permits, with Ireland's decision to create a national Critical Skills Permit rather than implementing the Blue Card Directive to be a relatively clear example of this. The CSP fulfils the same objectives of the Blue Card Directive, but in manner that is more amenable to the national government. It is an indirect form of Europeanisation.

Thus, through its interactions with national immigration laws, the Irish welfare system as it applies to TCN labour migrants is in principle more specific and even more opaque than that which applies to EU citizens. It places TCNs in a far more precarious position in comparison to EU citizens, whilst those who survive in this space may end up being able to engage more successfully than other categories of migrants, it is more likely that the lack of legal certainty afforded to them simply causes them to disengage from the welfare system more often than EU citizens.

CONCLUSION

7. Conclusions

7.1 Introduction

Access to welfare payments constitutes a fundamental social right which allows individuals to decommodify their labour by making them less dependent upon economic activity to fulfil basic material needs, and to protect themselves against insurable risks. Migrants have always existed within a difficult space in this respect, as they are seen as a potential danger to the sanctity and viability of national welfare systems, regardless of how accurate this is in reality. On this basis, States have continually sought to exclude them, to varying degrees, from accessing welfare payments.

The modes of welfare provision utilised and promoted at both the Irish and European Union level are, in many ways, quite similar in terms of their outcomes. Both align strongly with the specific mode due to the sharp division they create between social security and assistance; both necessitate that in order for migrants to decommodify their labour they must effectively ensure their continual engagement with the labour market; and both create a variety of general barriers to access for migrants - particularly migrants who exist at the margins of the labour market, or fall outside of it.

However, the Irish and EU systems diverge firstly in terms of their starting points, and then in their relationship with migration. EU welfare rules have sought to enfranchise migrants, who have historically been excluded from or limited in the extent to which they can access the welfare system of their host State. In this way, its outlook is universalist, albeit gradual and limited in terms of its outcomes which favour the economically-active citizen and TCN labour migrant. EU law consequently operates under the presumption that the welfare state as a whole cannot remain closed, and that migrants must be able to engage with it on some level.

The Irish system also has many universalist, or at least communitarian, undertones. The Constitution, in Article 45, acknowledges that the State *should* ensure the welfare of Irish society, and that a more particular duty is owed to vulnerable members of society. However, much like the EU rules, the Irish welfare system has always tended to align with the specific mode in practice due to the way in which it operates - with a lack of transparency and administrative procedures which do not operate effectively. This became even more pronounced in the late 1990s when, in response to Ireland's first experience of net inward migration, the State set about on its first significant programme

of reforms which made the welfare system even more specific for migrants than it is for Irish citizens. Thus, the Irish State's relationship with migration has led it to alter its welfare system to make it more restrictive, rather than to open it up to migrants - which stands in stark contrast with the purposes underlying EU welfare coordination.

EU law is but one example of how the welfare state began to open, as it first sought to ensure that Union citizens could move and reside freely in other Member States and access their host State's welfare system in order to make that right effective, before eventually being extended, to a lesser degree, to TCN labour migrants in particular. Due to the binding nature of the relevant EU rules, EU law does, however, have the potential to reshape the Irish welfare system in terms of both content of the applicable rules as well as in how the system operates on an individual level for affected persons. An important caveat that must be attached however, is that this capacity of EU law to alter or influence the Irish welfare system, and to move it closer to either the universalist or specific mode, is ultimately mitigated by the nature of EU welfare rules. The Union has never attempted to construct its own welfare state, and has instead created rules which facilitate access to the welfare systems of its Member States. EU welfare law has only sought to coordinate, to a limited extent, the way in which these national welfare systems operate - the shape and mode utilised at the national level should ultimately be the concern of the Member States themselves. What this means, is that the relationship between national and EU welfare rules is complex, and each set of rules must be constantly reconciled with one another.

What this thesis has found, is that this process of Europeanisation - the reshaping of the Irish welfare system for EU citizens and TCN labour migrants as a result of the adoption of EU rules - has proven to be highly multifaceted. At times, the Irish State has adopted rules nationally which sought to restrict access to the welfare system for migrants in light of the accession of Central and Eastern European States to the Union and even based on concepts of EU law. The adoption of these rules, such as the HRC and right to reside, was not however a binding legal requirement, and was based upon the State's own national policy agenda. Similarly, in respect of TCN labour migrants, in respect of whom the Irish State has almost exclusively opted out of the relevant EU rules, a more indirect form of Europeanisation took place when the State created employment permits that appeared to mimic the very Directives it had been deemed unnecessary to opt-in to. This indirect or passive Europeanisation demonstrates the space that has been

given to Member States to use the EU rules based on their own national self-interest. EU citizens by comparison, are the beneficiaries of a unique legal status which *should* grant them a preferential status in comparison to TCN labour migrants. On the surface, this would appear to be true, as Ireland can be said to be largely compliant with the binding rules that underpin the concept of EU citizenship and grant them access to the welfare system on the basis of it. Any new rules are incorporated at the legislative level where necessary, and new administrative practices are put in place to direct officers within the DEASP on how they should be executed. However, the actual practices of officers within the DEASP and habitual operation of the welfare system have remained largely unchanged, due to the overall lack of transparency and effective processes in place, as well as the State's lack of technical expertise in EU law.

What this ultimately means in terms of the particular barriers to accessing welfare payments that migrants, is that the actual operation of the welfare system is more important than the discrete rules that apply to EU citizens and TCN labour migrants as separate categories of migrants. The ineffective manner in which welfare services are delivered, as well as the rules which were adopted from the late 1990s onwards remain the most burdensome obstacles for *any* migrant, irrespective of the category into which they fall, from engaging successfully with the Department and ultimately receiving a payment. This does not mean that EU citizens and TCN labour migrants do not face their own individualised barriers. For example, Union citizens are, by virtue of the State's lack of technical expertise in the applicable rules, often subject to outcomes which run counter to the EU rules. TCN labour migrants by comparison, must learn to navigate not only the welfare system, but also the equally opaque immigration rules, which can often represent a greater hurdle to accessing welfare payments than the welfare rules themselves. Nonetheless, it is the general administration practices and mechanisms utilised by the DEASP which remain the most significant in terms of their overall impact.

The purpose of this chapter is to examine the overall contribution of the thesis to the literature on this issue. Rather than distilling down the findings from previous chapters, the following subsections will revisit the central research questions posed in the introduction, and develop them in light of the thesis' findings.

7.2 The Relevant Rules and Modes of Welfare Provision: Maintaining Old Hierarchies

The rules utilised at both the EU and Irish level highlight the historical tension between maintaining a system which allows the decommodification of labour in some way,[1] and the idea that this should be preserved primarily for citizens. In spite of continued Europeanisation and the creation of more robust welfare rules at the Union level, this tension remains an overriding feature of welfare provision where migrants are concerned.

As the introductory section to this thesis outlined, what is known as the welfare state today became a common feature of European, and Western, democracies following the end of WWII. The intention was to rebuild their societies in a more egalitarian direction.[2] The State would consequently allow for the decommodification of labour, meaning that individuals would become less dependent on their labour market activity to ensure that they have a basic standard of living, and to protect them against otherwise insurable risks. This is not to say that the welfare state ever sought to fully decommodify labour. Rather, its intention was to allow those who suffer from a short-term illness, or become involuntarily unemployed for example, a safety net until such time as they can re-enter the labour market. Decommodification is consequently partial in almost all instances - it simply varies, based on the particular mode being utilised, and based on the *degree* to which this takes place.[3] In this respect, the citizen and migrant are functionally quite similar, in that there is a presumption that they will engage with the labour market - that they may specifically be categorised as a labour migrant simply makes this point explicit, and their status more directly dependent upon labour market activity.

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[1] A. Ingvarsson, 'Migrants and the Welfare State: An Examination of Variation in Migrants' Access to Social Benefits' <https://www.ibei.org/migrants-and-the-welfare-state-an-examination-of-variation-in-migrants-access-to-social-benefits_37765.pdf> accessed 14/12/2017, 2; G. Esping-Andersen, *Politics against Markets: The Social Democratic Road to Power* (Princeton University Press, 1985), 245; T.H. Marshall, 'Citizenship and Social Class' in T.H. Marshall & T. Bottomore (eds.), *Citizenship and Social Class* (Pluto Press, 1992).

[2] G. Malone, *Regulating Europe* (Routledge, 1996); A.S. Milward & V. Sorensen, 'Interdependence or Integration? A National Choice' in A.S. Milward, F.M.B. Lynch, F. Romero, R. Ranieri & V. Sorensen (eds.), *The Frontier of National Sovereignty: History and Theory 1945-1992* (Routledge, 2015); Alan S. Milward, *The European Rescue of the Nation-State* (Routledge, 2000); T. Judt, *Postwar: A History of Europe Since 1945* (Penguin, 2005); and M. Kleinman, *A European Welfare State? European Union Social Policy in Context* (Palgrave, 2002).

[3] W.H. Beveridge, *Full Employment in a Free Society* (2nd edn, Allen and Unwin, 1967), 249; N. Barr, *The Economics of the Welfare State* (3rd edn, OUP, 1998); and M. Panic, *Globalisation and National Economic Welfare* (Palgrave Macmillan, 2003).

However, the welfare state as it was conceived at this time, was a strongly nationalistic invention. It sought to provide primarily for *citizens* of that State, as well as those who were sufficiently integrated into that society. On this basis, States have often sought to adopt measures which establish whether or not an individual has sufficient links with the State before they can attempt to access a welfare payment. This include, but are not limited to: citizenship requirements; habitual residence tests; establishing a right to reside; and integration thresholds - of which, establishing long-long-term residence is perhaps the clearest example. By ensuring that migrants are sufficiently integrated, the State can protect itself against a large number of claims which could potentially undermine the welfare system or lead to its destruction. Allowing unrestricted access for migrants might, from a Statist perspective, 'open the floodgates' to a potentially unlimited number of claims made against the welfare system by migrants.[4] Conversely, other justifications are more internal and introspective. They concern a society's conception of social solidarity, and how malleable they view that concept as being. The society in question may, for example, react negatively to an increased diversity, and feel threatened by migrant populations.[5] Their idea of the welfare state is tied to the notion that it should be kept primarily for citizens, or those who look and act like them, and share their particular values. This narrower sense of solidarity will however, lead to similar outcomes - that welfare provision, particularly for migrants, is retrenched. Due to the internal and external justifications that are often used to validate restrictions being placed on migrants attempting to access the national welfare system, it is largely unsur-

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[4] B. Anderson, 'British Jobs for British Workers?: Understanding Demand for Migrant Workers in a Recession' (2010) 11 *The Whitehead Journal of Diplomacy and International Relations* 103, 104; L. Jensen, 'Patterns of Immigration and Public Assistance Utilization,' (1988) 22(1) *International Migration Review* 51; G.J. Borjas & L. Hilton, 'Immigration and the Welfare State: Immigrant Participation in Means-tested Entitlement Programs' (1996) 111(2) *Quarterly Journal of Economics* 574; and G.J. Borjas & S.J. Trejo, 'Immigrant Participation in the Welfare System' (1991) 44(2) *Industrial and Labor Relations Review* 195; H. Brücker, G.S. Epstein, B. McCormick, G. Saint-Paul, A. Venturini & K. Zimmermann, 'Welfare State Provision' in T. Boeri, G. Hanson & B. McCormick (eds.), *Immigration Policy and the Welfare State* (Oxford University Press, 2002); J. Hansen & M. Lofstrom, 'Immigrant Assimilation and Welfare Participation: Do Immigrants Assimilate into or out of Welfare?' (2003) 38(1) *Journal of Human Resources* 74; J. Hansen & M. Lofstrom, 'Immigrant-Native Differences in Welfare Participation: The Role of Entry and Exit Rates' (2006) IZA Discussion Paper 2261; J. Hansen & M. Lofstrom, 'The Dynamics of Immigrant Welfare and Labor Market Behaviour,' (2009) 22(4) *Journal of Population Economics* 941.

[5] A. Appadurai, *Fear of Small Numbers: An Essay on the Geography of Anger* (Duke University Press, 2002), 83; A. Pred, *Even in Sweden: Racisms, Racialized Spaces, and the Popular Geographical Imagination* (University of California Press, 2000), 31; J. Esposito & I. Kalin (eds.), *Islamophobia* (Oxford University Press, 2011); A. Lentin & G. Titley, *The Crises of Multiculturalism: Racism in a Neoliberal Age* (Zed Books, 2011); L. Chavez, *The Latino Threat: Constructing Immigrants, Citizens, and the Nation* (2nd edn, Stanford University Press, 2013); K. Calavita, *Immigrants at the Margins: Law, Race, and exclusion in Southern Europe* (Cambridge University Press, 2005), 166; and P. Scheepers, M. Gijsberts & M. Coenders, 'Ethnic exclusionism in European countries. Public opposition to civil rights for legal migrants as a response to perceived ethnic threat' (2002) 18(1) *European sociological review* 17.

prising that the Irish and EU welfare rules both align quite strongly with the specific mode, and place a significant emphasis on pre-existing labour market activity and integration in order for migrants to access different categories of welfare payments in practice. Where they tend to diverge, is in how they *arrived* at these similar points on the overall spectrum of welfare provision.

Table 7.1: EU Welfare Rules - Alignment with the Two Modes

Characteristic	Universalist	Specific
Existence of universalism as a principle	EU welfare rules are based in universalism - opening up access to the welfare system.	In practice, the EU rules are constructed as being primarily based on economic activity.
Welfare as a right	The Charter contains a right to social security and assistance, as does the relevant legislation.	The Charter, in respect of this right, appears to be capable of only indirect application at present. The construction of the legislative rights are also predicated on labour market activity.
Delineation between categories of payments	EU rules have developed consistently over time to allow greater access to all payments.	The categories are sharply divided into social security and social assistance, as well as the addition of two further categories.
Effective procedures and procedural rights	The procedures are quite clear, and the legislation is well codified. Procedural rights in the legislation and Charter.	Procedural rights are dependent on implementation, and Charter rights are underdeveloped.
Rigidity of Entitlements	Entitlements to welfare payments have grown with the adoption of broad concepts and new categories of payments being added.	These entitlements can be extremely rigid, particularly for individuals who do not have worker/self-employed status or exist outside the labour market.

The EU welfare rules exist within an interesting space from the perspective of the two separate modes. In principle, the impulses of EU law are broadly universalist - the EU is expressly attempting to open up the welfare state, and by extension the welfare system, to migrants, who were previously excluded in a variety of ways. In this respect, it has brought about a significant transformation in how welfare provision operates for each of its Member States, as it attempts to simplify and reduce the barriers that would impede the effective free movement of EU citizens and - more recently - TCN labour

migrants. For the first time in European history, there is a binding body of supranational rules which ensure that individuals can cross internal borders more easily, and allow for them to integrate more fully over time. In addition, as Table 7.1 suggests, the EU system is capable of being said to align with many of the other core characteristics or tenets of the universalist mode from a formal perspective. This is evident in how the rules themselves are well codified, that there is a constitutional right to welfare payments, that the procedures as they are envisaged under EU law are effective, and that there are administrative rights which frame the operation of the legislation and EU law generally.

The difficulty with this universalist impulse, is that it is undercut by the way in which the EU rules which underpin it have been constructed, the justifications given by the EU for doing so, and the way in which national concerns have become embedded within these EU rules. These lead to a system of welfare coordination which aligns with the specific mode quite strongly in practice. For example, the EU has historically drawn from the most developed competences of the Union, which are economic in nature, to create legislation in the welfare field, as they lack the competence to do so from a purely 'social' perspective. This was due to the resistance of the Member States towards allowing the Union to move into fields of social policy, like welfare provision. It ultimately proved to be far easier for the Union to adopt well codified and complex rules on welfare coordination which focused on the free movement of labour as a factor of production within the EU than in attempting to convince the Member States to allow for a supranational welfare system or welfare state to be created. The EU also drew upon, and embedded within the constitutional DNA of its welfare rules, the concerns of the Member States in relation to migrant access to welfare payments. These include the HRC, an emphasis on self-sufficiency and the inclusion of an 'undue burden' requirement within much of the legislation, as well as the jurisprudence of the CJEU.

Where the Union's competence is less developed, and the nature of the migration is more overt - due to the artificial division that is usually created between EU citizens on the one hand, and TCNs on the other[6] - these rules also become more specific and market-based, as is the case with TCN labour migrants. TCN labour migrants are treated as a clearer category of migrants than the internally mobile citizen, and the emphasis on self-sufficiency, and to limit access to social assistance becomes even more pro-

[6] M. Ruhs,'Migrants', 'Mobile Citizens' and the Borders of Exclusion in the European Union' in R. Baubock (ed.), *Debating European Citizenship* (Springer, 2018), 163-168.

nounced. It is possible, and in many ways likely, that the rights of TCN labour migrants will grow, and eventually reach a similar endpoint as EU citizens. However, this may take a significant period of time to occur, and will require that the Member States continually agree to this expansion of welfare rights for TCN labour migrants, as well as removing the highly sectorial approach that has thus far been followed in favour of legislation which is more unified and comprehensive in nature.

Table 7.2: Irish Welfare Rules Alignment with the Two Modes

Characteristic	Universalist	Specific
Existence of universalism as a principle	Article 45 of the Constitution draws on a more universalist, or communitarian impulse to provide a basic standard of living for society and protect the vulnerable.	Article 45 is capable of only indirect effect and is not judicially enforceable.
Welfare as a right	SWA is an example of a 'vested' right to welfare payments, and there are many legislative rights to specific payments.	There is no ***constitutional*** right to welfare, 'vested' rights are limitable by immigration status, and legislation can be amended.
Delineation between categories of payments	Within social assistance are some 'universal' payments.	Categories are sharply divided into social security and social assistance.
Effective procedures and procedural rights	The Courts have consistently acknowledged that principles of administrative law apply. The legislation also sets out relatively clear and flexible procedures.	Administrative rights have not had a significant impact on the administration of the system, which is extremely opaque, and quite inefficient.
Rigidity of Entitlements	In principle, once the preconditions for a payment are met, the payment should be granted.	These entitlements can be extremely rigid, particularly for migrants who are subject to many additional administrative burdens - the poor administration of the system compounds this.

Ireland, by comparison, despite its long-standing membership of the EU, has only recently began to experience inward migration. When there was eventual influx of both EU and non-EU migrants, it redrew the boundaries of its welfare system for the first time in its history to bring it more strongly in line with the specific mode of welfare provision, particularly for migrants. Some of these alterations were drawn directly from

EU law, whilst others were driven by changes to immigration rules and as part of a broader programme to more firmly establish the State's prerogative on these issues, and so that they may viewed by the electorate as proactive in the face of a shifting political and social landscape. Prior to these changes to the welfare system being made, the Irish State had largely imported many of the central tenets of the system in the UK - albeit in a more limited form and without a clear rationale for doing so. When the UK diverged in the 1970s, Ireland remained as it had been, with only minor amendments made to the welfare system. Unlike the EU rules - which are universalist in outlook but far more specific in terms of outcome - the Irish welfare system represents a State which - in response to migration - increasingly limits its sense of social solidarity. The adoption of individual rules or alterations focused on different categories of migrants leads to more specific outcomes - however, even in adopting this more restrictive approach, any reforms that Ireland implements tend to be reactive in nature, although the overall approach appears to be piecemeal and quixotic by design.

As both legal systems began with different starting points - the EU as a system attempting to deal with migrant access to welfare (within certain legal confines), and Ireland as a State with no inward migration - their trajectories are largely inverted. However, both ultimately demonstrate that even in an atmosphere of continued Europeanisation and the move toward a closer union, this classic tension has yet to be resolved. If anything, the creation of EU welfare rules has simply moved national concerns and legal arrangements designed to limit migrant access to welfare to the supranational level. What were once national concerns about the welfare state and the impact of migration have now been extrapolated outwards, and are now 'Europeanised,' and Member States like Ireland will continue to define their welfare systems and the mode it most closely aligns with in opposition to to migrants unless a new and entirely unique approach is adopted at both levels.

7.3 Europeanisation: The Importance of Praxis

The central antagonism within the process of Europeanisation has been, and remains, the way in which EU rules maintain their own supremacy and effectiveness,[7] whilst Member States have conversely attempted to maximise the benefits of Union member-

[7] Case 6/64 *Flaminio Costa v ENEL* [1964] ECLI:EU:C:1964:66; and Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECLI:EU:C:1978:49.

ship without ceding additional areas of competences or national sovereignty to the European Union.[8]

As discussed in the early chapters, Europeanisation is, in Zahn's estimation, 'a process of domestic change that can be attributed to European integration.'[9] This definition views Europeanisation as being primarily 'top down,' and one within which EU rules alter the scope of national rules and policies. However, other scholars have viewed Europeanisation as being 'multi-directional,' meaning that, in some instances, national rules and policies can influence the formulation of EU rules and policies from the 'bottom up.' An area of conflict, such as welfare provision, presents one of the best opportunities for analysing the effects of this process, as the welfare state is a highly contested area of national sovereignty,[10] and one which the Member States fear may be undone by opening it fully to migrants.[11] This thesis has therefore sought to examine the extent

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[8] A.S. Milward, F.M.B. Lynch, F. Romero, R. Ranieri, V. Sørensen (eds.), *The Frontier of National Sovereignty: History and Theory 1945-1992* (Routledge Revivals, 2016); and in particular, A.S. Milward & V. Sørensen, 'Interdependence or Integration? A National Choice' in the same volume.

[9] R. Zahn, *New Labour Laws in Old Member States: Trade Union Responses to European Enlargement* (Cambridge University Press, 2017), 67.
This should be viewed alongside with K. Featherstone, 'Introduction: In the Name of Europe'. In K. Featherstone & C. Radaelli (eds), *The Politics of Europeanization* (Oxford University Press, 2003), 3; M. Vink, 'What is Europeanisation and other Questions on a New Research Agenda' (2003) 3(1) *European Consortium for Political Research*; and J. Olsen, 'The Many Faces of Europeanization' (2002) 40(5) *Journal of Common Market Studies* 921.

[10] V. Mitsilegas, 'The Place of the Victim in Europe's Area of Criminal Justice' in F. Ippolito & S. Iglesias Sanchez (eds.),*Protecting Vulnerable Groups: The European Human Rights Framework* (Hart, 2015), 313; J. Toth, & E. Sik, 'Joining an EU identity. Integration of Hungary or the Hungarians?' in W. Spohn & A. Triandafyllidou (eds.), *Europeanisation, National Identities and Migration: Changes in Boundary Constructions between Western and Eastern Europe* (Routledge, 2003); N. Trimikliniotis, 'Nationality and Citizenship in Cyprus since 1945: Communal Citizenship, Gendered Nationality and the Adventures of a Post-Colonial Subject in a Divided Country' in R. Baubock, B, Perchinig & W. Sievers (eds.), *Citizenship Policies in the New Europe* (Amsterdam University Press, 2009), Section 13.3.1; and Elspeth Guild et al, 'Understanding the Contest of Community: Illiberal Practices in the EU?' in Elspeth Guild, Kees Groenendijk & Sergio Carrera (eds), *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU* (Ashgate, 2009), 5.

[11] E. Guild, 'The Europeanisation of Europe's Asylum Policy' (2006) 18 *International Journal of Refugee Law* 630, 636-637; T. Schulten *A European Solidaristic Wage Policy? Conceptual Reflections on a Europeanisation of Trade Union Wage Policy* (ETUI, 2001); V. Glassner & P. Pochet, *Why Trade Unions Seek to Coordinate Wages and Collective Bargaining in the Eurozone: Past Developments and Future Prospects* (ETUI, 2011); P. Marginson, 'Between Europeanisation and Regime Competition: Labour Market Regulation Following EU Enlargement' (2006) (79) Warwick Papers in Industrial Relations; A. Kicinger, 'Beyond the focus on Europeanisation: Polish migration policy 1989-2004' (2009) 35(1) *Journal of Ethnic and Migration Studies* 79; M. Borkert & W. Bosswick, 'The Case of Germany' in G. Zincone, R. Penninx & M. Borkert (eds.), *Migration Policymaking in Europe: The Dynamics of Actors and Contexts in Past and Present* (Amsterdam University Press, 2011), 95; S. Carrera & A. Wiesbrock, 'Civic Integration of Third-Country Nationals: Nationalism versus Europeanisation in the Common EU Immigration Policy' (ENACT Report, 2009); and A. Faure Atger, 'Competing Interests in the Europeanisation of Labour Migration Rules', in E. Guild & S. Mantu (eds.), *Constructing and Imagining Labour Migration: Perspectives of Control From Five Continents* (Ashgate, 2010), 157.

to which Europeanisation can be said to be *both* 'top down' and 'bottom up,' or if it is merely a process within which EU rules display the greatest influence.

The Irish experience confirms that, not only is the EU capable of re-orientating the national rules and policies of its Member States, the Member States are also capable of directing this process to a certain degree. Europeanisation *is* multi-directional, but the 'top down' transformation of the national space is more overt. An area of law and policy which presents a far clearer example of Europeanisation from a 'top down' perspective is that of immigration rules. What is evident from an examination of EU citizens in particular, is that their right to move and reside freely within the EU - and by extension, in Ireland - is never in doubt. Articles 18 and 20 TFEU underline that any citizen, irrespective of their economic activity, can move to and reside in a secondary Member State, and can continue to utilise this right with limited restrictions placed upon them. They may be limited in terms of their access to the national welfare system, but their unique legal status and the rights that accrue by virtue of it are firmly embedded within the constitution DNA of the Union. Similarly, the adoption of 79 TFEU in respect of TCNs, and TCN labour migrants in particular, signals that those who enter under one of the legal status provided for - for example, the Single Permit Directive, the Seasonal Workers Directive, or Blue Card Directive - have certain rights which limit the discretion of those Member States that have incorporated them into national law. TCNs may not have a comparable status to Union citizens, but in both instances, the relevant EU rules have directly influenced national rules and policies in the immigration field.

In terms of 'bottom up' Europeanisation, the Irish State has sought to ensure that it maximises its own benefits with each new legislative proposal put forward by the Commission, with the provisions and legislations that it adopts on a selective basis, as well as seeking to establish national prerogatives at a Union constitutional level. This is clear from the adoption of the Habitual Residence Condition and selective adoption of Directives relating to TCN labour migration on the one hand, and in the addition of Protocols 20 and 21 to the TFEU which allow Ireland a liminal space to adopt new rules in the field of TCN labour migration on the other. This is not unusual, as EU Member States continually seek such exceptions and exemptions, and to maximise their interests

while minimising their loss of sovereignty.[12] However, it does illustrate how additional Protocols and exclusionary zones from the application of EU rules can impact upon this process. Similarly, the way in which Ireland chose to quite closely mimic several of the Directives that they elected to opt-out of - in a lesser form and with lower levels of protection being afforded to TCN labour migrants under these purely Irish rules - demonstrates how Europeanisation can even be indirect in nature.

Where the Irish experience is more instructive on the process of Europeanisation, particularly from a 'top down' perspective, is in respect of the State's everyday praxis; namely, the way in which Ireland embodies and practices this concept in a habitual sense. What comes to light through an analysis of this kind, is that Europeanisation is not simply something which is engaged with at specific points in time, such as where new legislation is being negotiated or implemented or a Treaty is being similarly negotiated and ratified, but in the everyday conduct of the Member States within their domestic systems. In order to truly impact the functioning and operation of the Irish welfare system, EU rules must change the way in which the Irish State behaves in this sphere, underlining the importance of this micro level.

The first element of this, is the way in which the Irish State has often implemented and utilised EU rules contrary to the intentions of the EU institutions, and in some instances, to the detriment of the free movement of persons. As Chapter Five underlined, Ireland is a potentially strong example of Europeanisation from the perspective of EU welfare rules where they apply to Union citizens. The State has consistently incorporated any new obligations into national law where necessary, and has created administrative guidelines so that DOs and AOs within the DEASP and SWAO are aware of how the EU rules should be applied to a particular set of factual circumstances. However, it is often the case that these EU rules are not incorporated in a manner which is consistent with the intention and purpose of these same rules, and that the administrative guidelines created are vague or are not sufficiently comprehensive. As a result, EU rules are incorporated into national law, instrumentalised, and then often mis-applied.

This raises a deeper question of the State's everyday praxis in relation to the relevant EU rules. The legislature, the DEASP and SWAO, as well as the Superior Courts all ap-

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[12] A.S. Milward, F.M.B. Lynch, F. Romero, R. Ranieri, V. Sørensen (eds.), *The Frontier of National Sovereignty: History and Theory 1945-1992* (Routledge Revivals, 2016); and in particular, A.S. Milward & V. Sørensen, 'Interdependence or Integration? A National Choice' in the same volume.

pear to lack the necessary technical expertise where EU welfare rules are concerned - albeit to differing degrees and based on how technical the issues under discussion are. Or, put more simply, the difficulty these different institutions and bodies seem to have in correctly establishing and applying EU welfare rules to the facts of an individual case. It is not only DOs and AOs within the DEASP and SWAO who appear to have difficulty engaging with EU welfare rules. It is also the executive, the office of parliamentary draftsmen, and the judiciary itself. The High Court - perhaps due to the limited number of cases directly involving EU welfare rules brought before them, as well as their relative inexperience in dealing with national welfare rules - has demonstrated a reluctance to engage with the preliminary reference procedure, and in certain instances, an inability to correctly apply EU welfare rules to the particulars of a case. This is also evident within the SWAO - who have no procedure for making a preliminary reference - and who also seem to have difficulty reconciling EU and Irish welfare rules with one another and applying them to a given set of circumstances. In a similar manner to the current application of the HRC in Ireland, a misapplication of EU rules can have severe consequences for the effective right to free movement for EU citizens - a fundamental constitutional value within EU law. This will arguably have to change in light of the recent decision issued against Ireland by the CJEU, but when the State will change its praxis to reflect this remains to be seen.

This is not surprising, as the Irish system is highly opaque and often fails to operate in an efficient and effective manner for all applicants. However, the lack of influence that these highly codified EU welfare rules have had on the overall administration of the Irish welfare system demonstrates that Europeanisation cannot simply be thought of in terms of the structural effect on national laws and policies. As Chapter Three outlined, EU welfare rules can be extremely complex, and the evolving nature of them requires that States remain up-to-date on any new rules that have been adopted, as well as the case law of the CJEU on the interpretation of these same rules. This will inevitably mean that there will be some instances in which an incorrect determination is made due to the lack of clear guidance on a particular issue, or the potential that a rule may be interpreted in more than one manner. Nonetheless, other Member States such as Germany are not only more open to making preliminary references to solve these potential ambiguities, they are also capable of understanding the EU rules to such a degree that they

are capable of exploiting them to the State's benefit. For example, both *Dano*[13] and *Alimanovic*[14] concern a German rule that had recast a payment intended to facilitate access to a labour market as being one which was primarily concerned with subsistence. The way in which they had carefully rewritten this rule allowed them to bring this jobseeker payment out of the category of social security and recast it as a social assistance payment - and therefore limit an economically-inactive EU citizen's access to it. If other Member States are capable of exploiting the EU rules in this manner, then Ireland is certainly capable of developing a more functional technical understanding of how they operate.

A clear example of how Europeanisation is multi-directional is the HRC - which was incorporated into EU law to reflect the interests of the Member States in order to ensure a more limited access to the native social assistance system for mobile EU citizens. From a 'top down' Union-specific perspective, the HRC is conversely focused on determining which Member State is competent to process a welfare claim. However, the principle adopted at the EU level will often not be reflected in practice. As the Irish example illustrates, the HRC as it has been incorporated into Irish law, simply determines whether *Ireland* is competent to deal with a claim for social assistance. If an EU citizen resident in the State is deemed to not be habitually resident, no further attempt is made to determine which Member State should take responsibility for it. Consequently, it is a method of determining if the specific Member State in which a claim was lodged is competent, which does little for the overall coordination of welfare provision at the Union level and may simply allow Union citizens to fall within the margins, without any recourse to the welfare system. This latter issue of its impact on EU citizens can also be seen in the Irish example. In 2004, in light of additional Central and Eastern European Member States acceding to the Union, the Irish executive adopted the HRC to make the welfare system more specific for them, and to limit their access to it. A national provision pulled into EU law was imported back down to the national level. Since this time, the Habitual Residence Condition has continued to have a significantly disproportionate impact on migrants, and on EU citizens in particular. To consistently limit the access mobile EU citizens resident in Ireland have to the social assistance system, particularly given the often high numbers of success appeals, suggests that the imple-

[13] Case C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* [2014] ECLI:EU:C:2014:2358.

[14] Case C-67/14 *Jobcenter Berlin Neukölln v Alimanovic* [2015] ECLI:EU:C:2015:597.

mentation run counter to the idea that the EU rules on welfare coordination are meant to make their free movement more effective.

Overall, what can be drawn from the process of Europeanisation is that it is multi-directional - but the influence of EU rules on the national space are more overt and much more effective. In terms of national immigration rules, these have been almost exclusively replaced by the constitutional provisions relating to the free movement of persons, allowing EU citizens to move and reside in other Member States with minimal restrictions. Migration from outside the EU has also been increasingly regulated by new EU Directives. These do not allow a comparative right to enter the EU as Union citizens have to move from Member State to Member State, but once a TCN labour migrant has entered under one of the relevant Directives, they have clearly defined legal rights stemming directly from EU law. This latter category of regulation is limited in the Irish context by virtue of Protocol 21 to the TFEU, but where Ireland does opt-in to such Directives, their immigration rules *should* be Europeanised.

This picture becomes more complicated when dealing with welfare rules. In principle, Ireland is a prime example of how EU rules in this area have opened up the Irish welfare system, albeit primarily for EU citizens. Ireland has consistently adopted any new rules, instrumentalised them in the administrative setting, but then often mis-applied these rules due to uneven implementation and a lack of technical expertise. EU welfare rules can be extremely complex and difficult to distill down and apply to a particular set of factual circumstances, but other Member States like Germany have been capable of not only learning these rules, but referring questions to the CJEU where they uncertain with regard to the application, as well as rewriting their national rules to limit access for EU citizens to particular categories of payments.

The effects of EU rules on Member States and vice versa must therefore be viewed in terms of their effects on the everyday behaviours of the EU institutions and the Member States themselves, which far outlast the original process of negotiating a new Treaty or legislative initiative, and illustrate the extent to which laws and policies have actually been altered.

7.4 Barriers to Access: The Importance of Good Administration

As Section 7.2 highlighted, there are often mechanisms which have been utilised within both European Union and national rules in order to restrict access to the welfare system for migrants, including: habitual residence conditions, right to reside criteria, and ensuring that a migrant has become an undue burden on the native social assistance system. The effects that these preconditions have had on a migrant's ability to access the Irish welfare provision cannot be overstated. As the preceding section emphasised, the HRC in particular has had a particular impact on the lives of mobile EU citizens resident in Ireland, and Chapter Four also underlined the overall disproportionate impact the HRC has had on migrants irrespective of the category to which they belong. Conditions such as these will necessitate that migrants continually engage with the Irish labour market in order to access almost any form of welfare payment, but social assistance in particular, which even in a specific mode of welfare provision should be available to those who are are deemed to be sufficiently in need.

This also returns to the central tension in EU welfare law - the perceived need of the Member States to adopt national policies which protect the welfare system from the 'floodgates' opening if migrants were granted unrestricted access to it, and the desire of the EU to continually open up access in line with its more universalist desires. EU law has been significant in the ways in which it has eliminated directly discriminatory measures which limit access to the welfare system for migrants based solely on their nationality or citizenship. Member States cannot return to a situation within which they can completely restrict access to the welfare system, but they can continue to utilise measures like the HRC which exist in EU law that allow for a more restrictive approach to be utilised - and are arguably indirectly discriminatory in nature. This is not to say that each category of migrant does not face barriers which are unique to them. TCN labour migrants for example, must not only engage with the DEASP but also the DBEI and DOJ - the latter of whom are equally opaque and as frequently liable to providing an inadequate level of service. There is a further lack of 'joined up thinking' between each of these Departments and the agencies and bodies which operate within their respective jurisdictions, meaning that they have a very limited capacity to coordinate and engage with one another and this can also lead to negative outcomes for TCN labour migrants.

EU citizens face all of the inherent difficulties of a system which aligns strongly with the specific mode in practice, and particularly for those who fall outside of the labour

market. TCN labour migrants are also subject to similar difficulties, as they must also engage with a welfare system which can be quite restrictive. However, EU rules are often quite complex, and need to be well codified and implemented within a Member State's legal system in order to ensure that EU citizens can effectively vindicate their rights, or else they will face additional issues as a result of a lack of technical expertise. Significantly, the implementation of the HRC in Irish law appears to disproportionately burden EU citizens when compared with TCN labour migrants. This is likely due to a TCN labour migrant's decreased propensity towards making a welfare claim due to their more precarious legal position than EU citizens, and the greater likelihood that EU citizens will make a claim due to their more readily established rights. However, it also suggests that a provision of EU law has, in practice, undermined the right to an effective free movement of Union citizens living in Ireland, running contrary to its stated intentions and the foundational constitutional concept of the free movement of persons. This has been most acute in relation to the the self-employed, and particularly where they attempt to transition to become jobseekers. The Irish State's interpretation of these circumstances was, in the past, at odds with EU law, and the case law points to the particular issues this has created for Romanian nationals involved in marginal labour market activity.

One of the clearest and most significant findings of this thesis, is how ineffective the categorical distinctions utilised throughout - that of mobile EU citizens and TCN labour migrants - appear to be in practice when migrants are faced with widespread, systematic issues in how the Irish welfare system is administered. In particular, the general functioning of the Irish welfare system, and the often quite glaring deficiencies within how the Irish State provides front-facing bureaucratic services, present the clearest barriers to accessing welfare payments for any migrant attempting to do so. Such a finding is not in itself novel. Previous studies have concluded that administrative services in Ireland are often lacking in clarity, and that this will present particular difficulties for migrants who have not engaged with Irish bureaucracy to the same extent as Irish citizens.[15]

[15] B. Migge and M. Gilmartin, 'Migrants and Healthcare: Investigating Patient Mobility Among Migrants in Ireland,' (2011) 17(5) *Health & Place* 1144-9; M. Farrell, M. Mahon and J. McDonagh, 'The Rural as a Return Migration Destination,' (2012) 4(1) *European Countryside* 31-44; M. Gilmartin and B. Migge, 'European Migrants in Ireland: Pathways to Integration,' (2013) *European Urban and Regional Studies*; V. Ledwith and K. Reilly, 'Two Tiers Emerging? School Choice and Educational Achievement Disparities Among Young Migrants and Non-Migrants in Galway City and Urban Fringe,' (2013) 19(1) *Population, Space and Place* 46-59.

What is potentially unique in this instance, is the extent to which this thesis outlines how opaque and convoluted the Irish welfare and immigration systems are, with one interviewee noting that even as an expert in the field, it would be difficult for even a qualified lawyer to successfully make a claim for welfare payments.[16]

Part of this stems from the lack of expertise in welfare law generally within Irish bureaucracy. This is particularly pronounced in respect of EU law, but as Chapter Four underlined, the DEASP is increasingly underfunded, with, in many instances, insufficiently trained staff and constantly shifting priorities. Employees within the Department believed that, even from an internal perspective, their was very little guidance provided to them and there was no clear vision for the Department or the State's role in providing welfare services.[17] For migrant-specific cases, DOs lacked further guidance on when translation services should be provided, as well as racial sensitivity training. What this has meant is that DOs are often ill-equipped to deal with even the most basic welfare claims, let alone with more complex migrant-related cases which engage with other issues and areas of law.

7.5 The Way Forward

This thesis has a sought to shed light on an under-explored area of Irish law and practice that is often very poorly understood - namely, how the welfare system operates for different categories of migrants under separate regulatory regimes when these categories are viewed side-by-side. Ultimately, despite finding that EU law has often lacked the clarifying force it might otherwise have if it was implemented fully and effectively, the thesis has identified distinct shortcomings in how the welfare system operates in a global sense, and which are capable of being addressed and reformed.

The administration of the Irish welfare system leaves a lot to be desired. It is highly opaque, and can be extremely difficult to successfully navigate. However, because so

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[16] **Interviewee 5:** 'For a lawyer it's difficult, never mind an ordinary person who actually has to rely on the thing.'

[17] Axiom Consulting, 'One DSP Organisational Development Initiative: Driving Strategy and Transformation Through Strategy' (21/08/2014), 13-14 - 'There is a widespread perception that DSP leaders provide mixed or constantly changing messages around priorities, which impacts effectiveness and gives rise to a lack of clarity in relation to the DSP strategy and vision. Staff don't seem to fully understand the bigger picture because they are not being engaged in a way that helps them understand, and many suggest they experience very little two-way conversations with managers and leaders. Strategic communication channels are generally seen as less than effective and overly reliant on rare large-scale events and written communications, meaning important messages are being lost in transmission. There is no ongoing two-way conversation, with communication feeling more like an event than a process.'

many of the failings within the system are at this particular level, targeted reforms could prove to be extremely successful. This is particularly true, given how many of these shortcomings are related in some way to a lack of resources. For example, if ordinary officers within the DEASP were given more training in both national welfare rules and their interaction with immigration rules, as well as the relationship between EU welfare rules and those at the national level, DOs would be less likely to make errors in fact and in law. Similarly, an increase in the number of DOs and the resources they have access to would like reduce the burden placed upon them and lead to a higher quality of decision being made in each case, reducing the number of misapplications. The same can also be said for those within the DOJ and INIS, who, if they were provided with a more client-focused training and an increase in the resources they can utilise, would also likely render a higher quality of decision in immigration matters - with less lapses in immigration permissions, TCN labour migrants would be less likely to fall outside of the system, or have their welfare cut off by virtue of a lapse in their permission.

A clearer, and more effective set of processes within the relevant Departments and agencies would also simplify matters greatly. If both decision makers and migrants knew exactly what was expected of them, within what time period a decision will be reached, the ability for migrants to track any of their applications in real time and how to move forward with a potential appeal if necessary, agents of the State, as well as migrants themselves, would be better informed and errors could be spotted more easily. An increase in resources would also feed into these new processes, as DOs would know at which point an interpreter should be appointed for migrant clients, and this could be provided in a timely manner to a sufficiently high standard.

Resources must also be given to those within the DEASP who are responsible for drawing up guidelines on the application of welfare rules, and EU welfare rules in particular. Those that are available vary wildly in quality, and although they are usually sufficient, they may also lead to confusion or incorrect decision being made. Redrafting both the comprehensive guidelines on how Irish and EU welfare rules interact, as well as within each of the individual payments, would give officers within the DEASP and SWAO more precise information to work with.

Not all of the changes required are purely at the administrative level. Similar changes would also be necessary within both the Courts and within the legislative branch. If judges within the Superior Courts were themselves trained in the application of EU wel-

fare rules where required, or by providing them with a judicial researcher who is specifically qualified in the application of welfare rules, the potential number of misapplications at this point would also be reduced - or, alternatively, may lead to a greater number of preliminary references being made so that the Court of Justice can definitively answer any questions on the interpretation and application of EU welfare rules on their behalf. This does not replace the need for the SWAO to recognise that it too is a court or tribunal for the purposes of making a preliminary references - and that a procedure must be developed to allow this to occur - it does however mean that where a case reaches the High Court or Court of Appeal, the appropriate decision will be made and without further delay.

The legislature, for its part, should either replace the 2005 Primary Act with a new version which consolidates the existing law within it, or provide an easily accessible consolidated version which illustrates how every subsequent Act and Statutory Instrument has altered it. If DOs and migrants had a 'live version' of the Act, it would be easier for both parties to establish what their rights and obligations are, and then to apply the relevant EU rules in light of these. This is not to say that further action on the EU rules is unnecessary. The original adoption of the HRC for example, highlights that legislative draftsmen should also be trained more thoroughly in this body of rules, or to assign specialist draftsmen to EU law and EU welfare rules in particular where necessary to ensure so that they are complied with and transposed in the clearest possible manner. If the rules themselves are clear, then the DEASP would by extension, be able to draft better guidelines.

The difficulty with these changes, is that they require the State to change its attitude to welfare provision at the macro level in order to have better micro level outcomes. Or, put more simply, without alterations to the structure of the system, the day to day operations of the processes within it cannot improve for migrants who attempt to engage with it. Whilst this is by no means an easy proposition, it is hoped that this thesis can provide a basis for such reforms, to allow policy-makers to see what must be done to improve the welfare system, and for activists to force change through more direct action. However, until such time as the State actively changes its ideological approach to welfare provision, or is forced to do so by civil society or some form of popular movement, it is likely that the welfare system will continue to be open to substantive critique.

Appendix: Interview Material

Interviewee 1 - Immigration NGO Worker

Interviewer:

What kind of person tends to call in for assistance from your office? Would they be EU citizens primarily, or third country nationals, or asylum seekers?

Interviewee:

We say that about 80 percent of the people who come see the [MRCI} would be non-EU migrants. We would really be quite focused or specialised towards employment law and immigration law. Generally the people who come to see us would be seeking advice on their immigration status and advice on their rights and entitlement in terms of employment law. And about 80 percent of our users would be non-nationals. About 20 percent would be from the EU, but these tend to be nationals of the more recent accession state since they tend to be a new member states nationals. People do come here sometimes seeking advice on social welfare but we wouldn't be a specialist agency in that regards. We would however have the figures in terms of presenting issues and I could tell you the percentage of people who are coming here asking about that as an issue.

Interviewer:

Do you find that the nature of an individual's immigration status has an impact on what they're entitled to?

Interviewee:

Do you meant that by virtue of an unstable immigration status that it impacts on their rights? Yes, definitely.

I mean the main population that we see is undocumented migrants so these are people without legal status and consequently they might not be able to access most rights. For non-EU migrants in general, they'll all experience different barriers when accessing social protection. So international students would be a big category of non-EU migrants here and they are barred from accessing most social welfare entitlements. They're a big category of people accessing our services.

Interviewer:

Yes, the HRC (Habitual Residence Condition) seems to be a common issue.

Interviewee:

In terms of welfare that would be the main thing that people tend to ask for advice on, as it's very hard to get around. It can be many things, such as proving their employment, proving their address, or simply establishing that Ireland is their main centre of interest as well. You're probably already familiar with the report from Crosscare in relation to the HRC already on that.

Interviewer:

On the immigration system more generally, would you consider it relatively easy or difficult to navigate from the perspective of migrants themselves?

Interviewee:

Well in general people don't necessarily perceive themselves as being in a system, you know. They have their lives and they don't function in relation to that. But it is difficult in our system to maintain your status. It's very easy to fall outside of it. You can lose your status very easily and you can very easily become undocumented. Things like that will then impact on everything else like your ability to access rights like social welfare. The problem with the Irish immigration system as you've probably found out is that it's not properly enshrined in legislation. So it's very arbitrary and based to a large extent based on discretion, and ministerial discretion. It's just very hard for people to vindicate their rights and appeal decisions.

Interviewer:

Would you find that discretion comes into play a lot?

Interviewee:

Certainly. In terms of immigrations, yes. It's the way our system is written that you cannot expect a decision of any sort. Like the reason why they are giving you something or taking something away from you in terms of rights. They don't have an obligation to provide substantive reasons. You're familiar with the HRC, which is completely based on the discretionary latitude of the deciding officer. But I believe you can appeal that decision, whereas other immigration related decisions you cannot make an appeal. There might not be an appeals process because everything tends to be completely discretionary. So it's pure discretion that we're basing our immigration laws on.

Most immigration related matters do not have a timeframe to answers to be given within. There are very few immigration related decisions that come in from EU law, but these are bound by timeframes. So for example, when you're applying for your own family reunification under the EU1 stamp which is for the non-EU spouses of EU citizens or workers, there's a principle of good administration which defines that it must be dealt with within a reasonable period, such as 6 months. So in that case they have to abide by that and it supersedes anything in Irish law. Whereas someone else applying for some kind of permission to remain, to the Minister, they don't have any kind of obligation to answer you in any timeframe.

They have gotten a bit better in trying to give you an indication of when you can expect a decision, but they're not bound by it. So they can say that they will try to answer your application 6 or 12 months but if they don't, then you can't hold them accountable for not doing so. Some applications just exist in a time-warp. It's a way they can exercise power over the applicants - they will just make you wait. Most of the decisions do not require 6 months or 12 months to be processed. They have the resources, but they also have the power to make you wait and make you feel like they have the power to ultimately make the decision. That's one of the main problems with our immigration system.

Interviewer:

Would you get many requests which deal with work permits on a day-to-day basis?

Interviewee:

Yes this is one of our main areas. People who try to get work permits, and I mean, it's very hard to get work permits. Or people who had work permits but became undocumented and are now trying to re-enter the system.

Interviewer:

Do you believe signing up to the EU Directives relating to third-country labour migration that we would be in a better or worse position legally speaking?

Interviewee:

Yes definitely better. I mean we're not signatories to any of the Directives that came out of this area and that has a huge impact on how our immigration system is implemented. The fact that we don't have a long term residence status enshrined in law. The fact that

there's no Employers Sanction Directive or Returns Directive here, which have negative aspects but also have a positive side. It's just that our immigration system is so 'loose' and not defined in any clear framework. The EU Directives would at least frame your immigration system within a certain pattern, which can only be good.

The Single Permit Directive would mean that your residence permit is the same as your work permit. So you've one Department to deal with rather than a few. You won't have the problem of Departments that don't communicate, which just makes it so easy for mistakes to happen and for you to fall outside of the system. Streamlining it would be a very positive thing, but in order to do that you would need to have a change the legislation, and something like the Single Permit Directive would something that could take us down that line.

Interviewer:

Has the re-activation work permit been helpful in your work?

Interviewee:

Yes. So the reactivation measure comes from a policy that we advocated for a long time ago, about 10 years ago. Back then it was referred to as a 'bridging visa,' and the idea was that if you had possessed a work permit but became undocumented then you could apply for a temporary immigration status in order to reapply for an employment permit. That then got formalised for a short period of time under the 'undocumented workers' scheme, which was open for a short period of time in and around 2009/2010. And then that principle got embedded in the legislation subsequent to that under the name of the 'employment re-activation permit.' It's very useful, it's very practical. People feel more secure with it. You know that if you had a work permit at some point, you would more likely than not be able to come back into the system. Now of course it doesn't really address the main issues and the problems of the system itself. It's tied to one employer and when that employer lets you go or doesn't treat you well, well then you can easily follow out of the system yet again. But at least there is a mechanism that allows you to come back and try once again.

Interviewer:

Would issues with an employer be quite common?

Interviewee:

Yes, that there's exploitation, or difficulty accessing rights. So certainly people are being paid under the minimum wage, or people not being clear about what their statutory entitlements are. Yes definitely.

Interviewer:

Are there any other core issues or trends you would encounter a lot?

Interviewee:

One thing that really discourages people from accessing their social rights is the treatment that you get. It is not a problem confined to migrants, but you will find that the experience of using social welfare or interacting with them in social welfare offices for migrants is pretty negative. There's a lot of racism and bad service. That's something that discourages people from interacting with the social protection system, and that's kind of worrying when they're trying to access a welfare payment, but also in hat it will not make people want to engage with other social services. People might begin the view employment services and other offices as part of welfare and think 'I don't want to go near there because they've treated me badly in the past.'

It was also prevalent in the past, I'm not sure if it's still common now, that if you accessed social welfare that that might be used against you when you were renewing your immigration status, even if it was your statutory right. You would in the past be disqualified in the past from getting citizenship or residence if you had received unemployment benefit, which was your right. It's my understanding that it has moved away from that, but it just shows that that type of information is being monitored by the State, and there's nothing that impedes them from applying those rules again. Because citizenship legislation or the granting of citizenship is discretionary. If they wanted to start using that as a condition for granting citizenship or not, they could. People have a tendency not to use social welfare in case it reflects poorly on them. This would be non-EU migrants that are more conditioned by immigration law. EU citizens would not have that same kind of fear, they're different.

Interviewer:

On that point, would you think that there's a kind of hierarchy in place between different categories of migrants, including EU citizens.

Interviewee:

Definitely. Definitely. EU citizens have more clarity with regard to the rights they have and they would be more aware of this. It's much clearer in legislative terms and not just in Ireland, because it applies in all EU Member States. EU nationals have privileges. That's part of our membership of the EU. Non-EU citizens by comparison tend not to fully avail of their rights or might not necessarily want to go and fight for their rights in case there are repercussions.

Interviewee 2 - Asylum Law Academic

Interviewer:

What can you tell me about the way in which the payment under Direct Provision operates, particularly its legality.

Interviewee:

It's an unusual enough set up in terms of it being established by administrators circulars, and that took place before the displacement of asylum seekers from the social welfare system. So you had two different regimes operating at the same time: one, a legal regime, between 1999 and 2000, and 2000 and 2009 saying, asylum seekers were not explicitly excluded from welfare provisions. So that once they met any of the legal requirements on social welfare consolidation acts, they would be entitled to a payment. So that was the legal theory at least, but this was subject to the 'administrative system' that was established by the Department of Social Protection on the advice of the Department of Justice. So in terms of legalities for the first 9-10 years it was quite suspicious in terms of whether or not you can have two systems which says you have accommodation, your food, your €19.10 a week, and another which says an administrative provision saying that an illegal provision saying well once you meet any of the criteria under the 2005 Social Welfare Consolidation Act, you have access to certain welfare payments.

And, so my thoughts on that is that the lack of any kind of legal challenge in between that period, or the limited nature of legal challenges in that period simply had to do with social welfare not being a 'priority area,' and legal practitioners were not familiar with it. That's quite unlike the United Kingdom where you, at least for a time, had legal aid available to challenge welfare decisions of welfare bodies. Because there was similar system here, Irish legal practitioners did not have the necessary understanding of how the system worked to challenge it successfully, or even to consider it.

So you had two separate systems operating: the administrative trumping the legal. And while there was the habitual residence condition in 2004, it was not clarified for asylum seekers until 2009. So between 2004 and 2009 asylum seekers could potentially be considered habitually resident. No. Then the Chief Appeals Officer saw and Office of Social Welfare Appeals found that to be the case and gave a ruling to that effect, you saw immediate legislation being brought forward in 2009 that said no, asylum seekers cannot be considered habitually resident and from 2009 onwards are completely excluded

from the Social Welfare Acts. Consequently, this meant that the only system remaining was the administrative regime of Direct Provision.

What becomes apparent from all of this is that you have issues determining, particularly between 1999 and 2009, what precisely was the legal basis for creating and regulating Direct Provision. The answer is very confused but the only reason it wasn't challenged in that period is an absolute lack of engagement with social welfare law in Ireland on the part of practitioners. The issue with the habitual residence condition between 2004 and 2009 for example was raised within the system itself by the Chief Appeals Officer.

Post 2009, you had parliament excluding asylum seekers from having any access to welfare provision, with the exception of urgent and exceptional needs payments. But at the same time policy discourse uncovered in FOI documents have said repeatedly that the Direct Provision allowance is a Supplementary Welfare Allowance payment. It was put as that in government estimates on social protection funding and expenses. So on the one hand you had the Department of Social Protection saying 'this is a supplementary welfare allowance,' but qualifying that by saying Oh we are only paying this on an administrative basis under the direction of the Department of Justice. But there is no government decision, that I have uncovered anyway, that has said that it's under the direction of the Department of Justice. That's just how the Department of Social Protection have conducted themselves in this area.

Interviewer:

But isn't it true that Circulars shouldn't be capable of altering your entitlements under the Primary Act? Are there not issues with that?

Interviewee:

Well that's where issues get somewhat complex, in that between 1999 and 2003, your Community Welfare Officer had almost complete control over whether or not you were permitted to receive rent allowance and whether or permitted a full rate of supplementary welfare allowance. Then from 2003 you had 'oh well, asylum seekers can't be paid rent allowance.'

So for the 3-4 year period you had a very clear answer from the perspective of the Social Welfare Acts, but you had the Administrative State saying, "no we're not dealing with it under the Social Welfare Acts, we're going to say that with Direct Provision there's accommodation in kind and under the Social Welfare Act of 2005, supplemen-

tary welfare allowance can be reduced depending on what you have access to in terms of accommodation, whether you pay that accommodation, whether you've access to a regular source of food, so you had you the Department of Social Protection and individually Community Welfare Officers are saying, 'well we're going to put a price on direct provision accommodation you get, the food you get, and that will always leave us where a monetary payment of €19.10 per week for an adult or €9.60 per week for a child.' So you simply had the administrative bodies within the State all colluding to undermine their legal entitlements under the 2005 Act. That wasn't challenged as I said earlier because practitioners simply didn't have the knowledge of social welfare law and not only practitioners because judges don't either. So if there had been a challenge taken and appear before the Courts, you would have probably seen issues pertaining to procedural rules on standing or 'actually you can't question the entitlement of a whole group to payments.' So it was just an example of the Administrative State trumping the Legal State and everyone colluding on that point. There were of course a number of exceptions: pregnant women, one parent families headed by women in 99 and 2000 and three there were generally allowed leave Direct Provision after six months and sometimes persons with mental health difficulties, but for the latter, this usually would have been women once again. Men generally would not have appeared as sympathetic figures to a lot of Community Welfare Officers. So you have a number of people who were, in practical terms, made exceptions to a rule. That was even recognised under Circular 005/00, which established that they could make certain exceptions as needed, because communal accommodation and very low rate of subsistence will not be appropriate for everyone. So for that period of time from 1999 to 2003 you had Community Welfare Officers making certain exceptions. How they made these exceptions, what legal basis they used is unclear because we don't know for a variety of reasons we it just wouldn't be possible to access those decisions because they were or are made by means of one or two lines added at the end of a file. So you just have this emergence of the distinction being made between the Administrative State and Legal State.

Interviewer:

Do you think there are issues with the presumption that the payment within Direct Provision is supposedly means-tested but there is no divergence in the payment? Despite the fact that the accommodation and level of provision can differ from person to person

in each centre, the Administrative State treats this as always giving rise to the exact same amount for every asylum seeker.

Interviewee:

Absolutely to do it was it was you know another example of where, at least between 1990 and 2003/2004, if there was an issue of entitlement to the one parent family payment or a number of other payments, then that generally, but not always would have been paid. That's in addition to the €19.10 per week, despite the fact that it was just administrative convenience. Once you enter into Direct Provision, we'll give you your allowance, we will not actually do an investigation as to your means at all. We won't consider whether the means that you have satisfy your needs of statutory Supplementary Welfare Allowance. We'll simply have an across the board €19.10 payment per week, with no questions asked as to whether the payment actually meets the needs that you have. So we will simply say the Supplementary Welfare Allowance is €19.10 per week for asylum seekers and we can assume that because you have bed and board and that will potentially only extent to other very limited elements of the welfare state. These would include the back to school, the clothing and footwear allowance, and a number of other expenses such as travel which will actually be considered to fall within the exceptional or urgent needs payments on a kind of ad hoc basis. There's no entitlement to work, but the travel allowance would generally be granted to allow asylum seekers to attend meetings with the status determination bodies, etc.

Interviewer:

Do you think the creation of the Direct Provision system fall within the same kind of move against migrants more generally, such as the adoption of the Habitual Residence Condition, the Employment Permits Act, 2003 et seq and the Citizenship Referendum?

Interviewee:

Well, with the Habitual Residence Condition for example, the argument is that it was an Act of the Oireachtas, and the then Minister for Social Protection Mary Hanafin said that this was for new EU citizens, who haven't established themselves as workers in the State, but that once they have, they can gain immediate access to the welfare state with the proscribed limits. As that debate was progressing in the Dáil, asylum seekers were increasingly invoked, with TDs saying, 'oh, it will also exclude asylum seekers because they are catered from within the Direct Provision system.'

You had that kind of panic on the 'breach of borders by birth,' you had panic regarding the Employment Permits Acts relating to this new swathe of low paid workers, and how Irish workers will be impacted by these migrants. The Habitual Residence Condition for these persons would be a law that prevents those who don't have a job or aren't looking for one from accessing the welfare state. If you're not here lawfully, excluding asylum seekers, you do not have access to the welfare state. If you're an asylum seeker you have your limited payment and whatever other payments within the welfare state that you might qualifying for on an ad hoc basis following a determination being made by your Community Welfare

The political narrative at the time was that the UK and France among others were warning us that our welfare system was attracting people with generous welfare payments into this state. This was seen as a dent in the European borders that had to be dealt with. And they chose the Habitual Residence Condition in particular to deal with that. The Citizenship Referendum was just a natural kind of extension of this political narrative: we will now define those who belong as having some sort of blood relationship with the State and its citizens, or failing that, a long-term residency link. That would have fed into narratives of, you know, feckless scroungers coming here, getting access to health care systems, getting access to welfare payments. This led to a view of the welfare state being insular, it only caters to those who have some sort of, if not citizenship link at least along from residency link, or those who are citizens but have come home. These measures were just a vehicle for that viewpoint within this time period. So the overall narrative was protect the welfare state, protect the borders of the state, protect the borders of the European Union and stop Ireland from being a soft spot for foreign, large scale welfare fraud.

Interviewer:

In relation to the recent High Court judgment in CA, how would you view the Court's specific finding on the nature of the Direct Provision payment and its legality?

Interviewee:

I think that it's a little confusing, given that you had ten years of documentation from the Department of Social Protection saying it is a supplementary welfare allowance payment. Then when they were presenting oral arguments before the court, they said it's

an administrative payment granted at the direction of the Department of Justice. It's just that for budgetary and other reasons that they just put it within that specific column. The judge accepted that argument and held that it was clearly an administrative payment.

I reject that specific method of analysis, given that 'if it looks like a duck, if it quacks like a duck, it's a duck.' The Judge however argued that, it's called the supplementary welfare allowance payment, it's even administered by the exact same people who administer supplementary welfare allowance, But it's not a supplementary welfare allowance payment. So the decision is puzzling. But but what's probably more important with the decision is that the Court said, 'even if I'm wrong and it's clearly SWA, the applicant doesn't have standing to challenge the payment based on the MhicMhathuna case.' That dealt with a married mother seeking to challenged a payment granted to unmarried mothers, and as a married mother she could never qualify for the payment she was challenging. So the Judge argues that that decision justifies him in saying that CA will never have standing to challenge this payment. That's confusing because he had an entitlement, albeit administratively, because of administrative circulars. MhicMhathuna clearly didn't come within any of the qualifying criteria, whereas CA came within the qualifying criteria for the Direct Provision allowance. On whether or not this was a Supplementary Welfare Allowance, he said, 'no, it's not.' That seems to go against all sorts of common sense in terms of how it was administratively dealt with and seems to give the Department of Social Protection, and by extension the Department of Justice, a lot of leeway in terms of how it would deal with issues in in this area. It also goes against what was 14 years of evidence at that point in time establishing it as a Supplementary Welfare Allowance payment through emails, circulars, and other internal communications. You even had in 2006 the Attorney General communicating that the legal basis for Direct Provision was rather suspect, because if asylum seekers can't be habitual resident, then how can they be paid the Supplementary Welfare Allowance? If the argument in CA had been successful, that would have meant that the Government would have had to immediately stop administering the payment of €19.10 per week and rush through new legislation permitting them to make that payment.

But the Judge wasn't impressed with that line of argument presented by the applicants' council that he should effectively stop the payment. Because Court of Appeal is unlikely to be ruling on this, due to CA being granted subsidiary protection, it's difficult to suggest what decision they would have rendered. If they do, it's possible they will adopt the

same reasoning, just as they did in the CTA right to work for asylum seekers case. So that would be that the State has a very wide margin of appreciation or discretion in dealing with asylum seekers, migrants more generally, but in particular asylum seekers.

Interviewer:

What are your thoughts on the case in Northern Ireland which found systemic issues with Direct Provision, and more generally the ability to bring large scale challenges to legal systems in Ireland.

Interviewee:

Just from case law over the 15-20 years when immigration and asylum issues have been brought before the court, the court has always gone to great pains to say that, 'this is just a matter of legal interpretation. This is just a matter of us deciding how a particular legislative provision or measure must be interpreted.' From Lobe & Osayande onwards you would have gotten a sense that, actually yes the State has a of powers in this area. We don't want to overly restrict State prerogatives in this area, particularly where they relate to removal of an individual from the territory of the State.

Not so much in terms of rights within the state. So when it comes to removal, once a decision is made fairly, or at least not irrationally or unreasonableness attaching to the decision, which is a pretty high standard to prove, we're going to leave to State's large margin of discretion intact. Judges will then only a review these decisions where they are absolutely unreasonable or irrational. And more recently we see some High Court judges, who's language emphasises those being trafficked into this state, and the state then being forced to accommodate them. The language is different. There's a deep questioning of whether or not they will even come within the definition of a refugee for the purposes of the obligations that would subsequently impose on the State. And then there's an underlying question of why the State has to spend so much on on this area of law, and you will usually find that up to a quarter of the high court judicial review list is absolutely overrun with challenges against, for example, decisions from the Refugees Appeals Tribunal. In the last number of years there has been more of a willingness of judges to buy into the narrative of the State being under attack from those who claim so asylum. It's not overly widespread, but it is increasingly more apparent over the last two or three years. Before that it would have been a few statements here and there from the judiciary arguing that their role is in ensuring that the State hasn't been taken advantage

of by these asylum seekers, but now it's more pronounced that their role is as guardian of the borders. And that just always seems to happily coincide with the government's own strategies or political agenda.

Interviewer:

The Government has always argued that the Direct Provision system is not only effective, but also compliant with all of their obligations under international law. What do you think of this?

Interviewee:

International standards are very limited, so they're not overly complicated to comply with. Mainly because international human rights law is good at broad picture issues, but when you distill it down even further to the particularities of an issue or specific area. So for example, if you take the concluding recommendations or comments from the relevant UN committees, you'll see mentions of reasonable, legitimate, even proportionate restrictions on the rights of asylum seekers are permitted. The Committee on the Rights of the Child is perhaps the only treaty body that has said where children are concerned, immigration status cannot be introduced into the equation when determining the rights that they will have. Other bodies will not apply that same standard in all circumstances, particularly in relation to the civil, political and social rights enjoy be asylum seekers generally. Often you'll find that a particular committee just won't engage with the substance of rights for asylum seekers, even through general comments and reports. That means it can be hard to find out what the actual obligations on State under international law with regards to asylum seekers actually are. Does it have a significant power? Probably not. The narrative of a 'Europe under attack' from asylum seekers is so well-established within political and legal discourse, which then filters into judicial discourse, that it becomes natural that States would differentiate the rights and protections given to asylum seekers, citizens, residents. Also, given the temporary nature or supposed temporary nature of an asylum seeker remaining within the State under that status, you do not have access to the full array of rights you otherwise would have once granted refugee status, or subsidiary protection. So in the international system of human rights, primarily the treaty system, is so ambiguous on why certain rights are absolute, and other rights can be differentiated based on status or even derogated from in certain circumstances. I don't see international human rights law as presenting any real barrier to nation states to

determine how they will receive asylum seekers, and in particular, what their socio-economic rights will be while they're awaiting status determination.

Interviewer:

But some other jurisdiction do seem to have applied international human rights law, such as the ECHR to condemn the system of Direct Provision here.

Interviewee:

I don't know that I agree. The Northern Ireland judgment is limited. It's limited for a number of reasons. One, it involved the obligation on the UK authorities to comply with the best interests of the child, and the conditions created under s55 of the Borders and Nationality Act, 2009. Also the judge was just plainly wrong a number of points. For example, he said that Direct Provision was an obligation when it's not. He said the kids had to leave school on the day they turn 16 years of age, that's not the case. And had made a number of rather fairly significant errors that if he had actually read the relevant documents you would not have made. The reports the NI Judge relied upon were also determined to be of no particular relevance by the Irish Court in the CA Case.

On the broader picture issue of Direct Provision potentially constituting inhuman or degrading treatment and a violation of private and family life, that only got a hearing because of the best interests of the child. That then was then translated into, "well is the system in the best interests of a minor applicant in the Northern Irish case?" And the judge found that, no it wasn't in their best interest. This was because the ability to carry out a normal family life cannot be assumed, there is no ability to enter into the workforce for the carers of children in Direct Provision, and so basically children will be growing up in a very alien and decadent cook. So basically children would be growing up in a very alien environment that would not be conducive to their best interests. So the Northern Irish case has hasn't had any impact outside of that one ruling thus far. It wasn't cited, despite being opened before the Court in the CA Case. The judge in fact was quite critical of the applicant's council in CA for attempting to open up a lot of documents, including many NGO reports of the Irish Refugee Council, FLAC, etc. The Judge was quite critical of this attempt and essentially said that the purposes of judicial review was to assess legality, counsel for the applicant did not want an oral hearing and the judge said that regarding the substance of the issue, he couldn't make a decision on whether Direct Provision could be considered inhuman or degrading treatment. He

leaned however towards finding that it probably wasn't inhuman or degrading treatment, although it *might* be a violation of the right to maintain a private and family life. Because there was conflicting evidence from both the applicants and the Department of Justice, particularly in the affidavits submitted, without the benefit of oral evidence and oral cross-examination, he couldn't rule on the question of whether or not it did in fact violate the right to a private, family life. I think it would be quite clear that yes it does impact on the right to a private family life. If oral evidence had potentially been heard, or if the judge on the documentary evidence said "well actually, I'm prepared to accept that it is an interference of the right to private and family life" the judge would have then had to ask is that an interference which can be considered to be in accordance with the law. That's where it immediately would have come a cropper for the State because it's not in accordance with law. Circulars, administrative provisions, which are private and can only be obtained through FOI, and with great difficulty in some instances are not in accordance with law in light of the European Court of Human Rights jurisprudence in this area. So the CA Case while not adopting the approach of the Northern Irish Court did leave a number of number of fairly significant questions unanswered with regards to whether Direct Provision can, for a particular applicant, violate her or his right to private and family life, or in very certain circumstances, could be considered serious enough to constitute inhuman or degrading treatment. Applying this kind of crossed judicial pollination of standards, of international standards, because you also have the ECtHR decisions in SS and others, you would find it very hard to reach that threshold necessary to constitute a violation of the right to be free from inhuman or degrading treatment. That would even be with the significant amount of time spent by asylum seekers within the Direct Provision system, because the Irish Courts and State can argue that this is different enough to not reach that requisite level of violation of Article 3 or Article 8. With the Northern Irish judgment, they were just going to ignore that regardless to a large extent.

Interviewer:

Do you think there's an argument for Article 14 of the Convention to be used in conjunction with Article 1 of Protocol 1 with regard to asylum seekers in Direct Provision and the payment they receive?

Interviewee:

Well if by that you mean as a right to property, then social assistance will only be considered as such where there is no discretion, as in the CA Case. Where it's at the discretion of the State, it's a very hard decision to determine in advance. You have the case against Iceland, which found that social security or assistance can constitute a property right, but that doesn't mean the State can't withdraw that payment. And those were also rights which were legislatively established. In the case of Direct Provision allowances or payments, these aren't legislatively established. It's a discretionary payment which the State has the power to do according to the CA Case. I would think that it would only have merit where the payment is revoked without any reason and also falling within one of the clearly established grounds created under Article 14. That might invoke Article 1, Protocol 1.

It be interesting see how the ECtHR would potentially deal with that issue. But ultimately I think the Irish Courts would say it's not capable of being considered a property right, particularly due to it being a discretionary payment. It would have sufficient case law from the ECtHR on this issue to suggest that it's different from the Iceland case, that it's significantly different from the Collins case, or the United Kingdom case in 2014 because of the discretionary or administrative nature of the payment. It's not a legal or vested right as such. It's de facto granted to all, but I would still think it has to invoke one of the substantive grounds under Article 14 and demonstrate a particular form of discrimination, rather than it being prima facie being discriminatory. You might get a particularised win, but you wouldn't be able to make a large, systemic argument for discrimination against asylum seekers in general.

Interviewer:

How would you rate the legacy of the Working Group's Report on Direct Provision?

Interviewee:

Well it's a report of two halves. The first half report deals with the status termination process, and a lot of the recommendations that were made were incorporated into the International Protection Act. Not because the government were systematically applying the recommendations within it, but because that Act had proceeded the Working Group by quite some time and were as such, already there.

On the second section which dealt with Direct Provision system, and the of social welfare elements of it, a lot of recommendations were going to be limited from the begin-

ning, because the Working Group could not challenge the existence of the Direct Provision system, and could therefore only make recommendations which would potentially lead to the improvement of it. Very little, to none of these improvements have actually taken place. And this is now at least 18 months after the publication of the finalised report. I imagine that very few additional recommendations contained within the report will be implemented within the lifetime of this government. With regard to the payment in particular, where adults were recommended to receive an increased rate of in and around 39 euro and children at roughly 28 euro, we've seen a 6 euro increase in the Direct Provision allowance for children and no increase for adults.

On the accommodation provision, the government had an opportunity to put structures in place that would have enabled people to cook, and more generally to impose conditions which would have granted those living within accommodation centres to have some semblance of a private and family life. The Working Group really only said that there should be no shared rooms after 12 months has elapsed, and even that was very deferential towards the State in imposing a substantive obligation in that regards, as it said that within 3-4 months they should find something more adequate. There is no evidence that accommodation stock has been brought online to meet that recommendation.

Other recommendations which were related to separated children, who qualified as such when hen they arrived but subsequently aged out of that category due to the length of time they were held in Direct Provision was highly peculiar, as it emphasised that such persons and their carers needed to have their resilience built in order to deal with the Direct Provision system later. It really emphasised that they needed to be prepared for institutional living, and I'm not sure when we began to do so in such a manner. This suggests a very basic lack of understanding regarding human rights norms, particularly that they didn't even engage with the ambiguity around discovering what their human rights obligations might be in such circumstances.

Overall, the Report was very conditional, emphasising that you know, after 15 months, perhaps, you won't have to share a room, or subject to contractual obligations certain persons might be granted the ability to cook for themselves, or that parents might be able to make a packed lunch for their children. The Report could never dismantle the system, but yet so readily proposed changes that feel peculiar, in that these things were primarily policy. They were very soft, and did not seem to take into account the concerns surrounding Direct Provision. Even if they had all been adopted, and they have

not and will not be adopted, you would question whether the Working Group was method to stop asylum seekers protesting. That had become an issue in and around the time the WG was announced, and this diverted a lot of energies, particularly in the NGO sphere, from engaging with and facilitating these measures. It was a good way to take the steam out of that and out of a more rights-centred approach to asylum reception conditions, dismantling Direct Provision in the process.

Interviewer:

Do you think we opted-in to the Reception Conditions Directives, either or both, that this would necessitate changes to the Direct Provision system?

Interviewee:

No, no, no. Either under the original or recast Ireland clearly complies with the obligations it would impose on it. The one real exception is with regards to the right to work, but it complies with all the other elements. The language is so limited in saying what a Member State's obligations really are. Those obligations are shelter, food, and States *may* grant them a monetary allowance. Perhaps it might also make a difference with regards to the category of vulnerable persons, but I would if it really would. That's because the obligation to assess them prior to entering is so poorly defined, and even after they enter, it's very soft. And even then, you've to question what real burden that imposes on Member States in providing for disabled persons, pregnant women, minors, torture survivors or rape victims because it does specifically necessitate anything be done. It really wouldn't add much, other than the right to work, but I think nationally that's off the table anyway and not something the government would want imposed on them, even in the limited form its in. Because of pull factors, etc.

Interviewer:

More generally, do you think there is a kind of the legal hierarchy for different classes or categories of migrants? Particularly in this context, EU citizens, third-country labour migrants and asylum seekers.

Interviewee:

Yes. I mean legislatively, you can see EU citizens having the same rights of access to the Irish welfare state. Is that how it works in reality? I would highly doubt it, but I've no idea. In reality, I would think that if you had a different skin colour, if you had an

accent indicating you weren't Irish, your social welfare claim is likely to get a lot more scrutiny that someone else's whose white, has no accent and has lived here their entire lives. For example, the CA Case brought up 20 or so social assistance schemes that are purely discretionary and largely supplementary to core welfare entitlements. Those core welfare entitlements, of which you can question whether or not they're really adequate for a decent standard of living, say that these are a threshold that no person should presumably fall below, and yet you have the Direct Provision allowance or payment which is far below anything else that other migrants might be entitled to. So it's a certain standard of living you're entitled to unless you're an asylum seeker, or unless you're a third-country migrant that can't meet the habitual residence condition. So with regards to changes in the Irish welfare state, you had prior to 1999 a system that was based 'generally' on need, but now is primarily based on the kind of leave you have to remain in the State. It became about how your legal status compared to Irish citizens and secure EU citizens, who are top of the hierarchy. Below them are non-EU migrant workers, then asylum seekers, then ultimately you have irregular migrants who can't access the welfare state because they have no legal status and are barred as a result.

Interviewer:

Anything you would like to add?

Interviewee:

I'll plead the fifth.

Interviewee 3 - Immigration NGO Worker (2)

Interviewer:

How would you describe the Irish immigration framework? Is it well established or highly discretionary or somewhere in between?

Interviewee:

It's definitely lacking in transparency and lacking in certainty. It's not very clear from the outside what people need to do, what their obligations are, what their duties are, what their rights will be.

One of the big problems is the absence of an independent appeals mechanism in a lot of areas. So in some instances there's an internal appeal, in others there's nothing at all, and even for the internal reviews, these should be fully independent. That then means that often people are reliant on challenging decisions before the High Court, which is itself very difficult, and potentially very costly. It would require a lot of determination on the part of the appellant, and require access to legal advice and legal representation.

The Minister still retains a wide discretion in a large number of areas. Although consolidated immigration legislation has been promised by current and consecutive previous governments, that has not been ever implemented. So the Immigration, Residence and Protection Bill, which began to be drafted a decade or more ago, has seen only the sections relating to international protection extracted. Although at least those sections have now been implemented. But all the other sections of that Bill which promised to really consolidate, clarify and simplify legislation on general immigration matters have been shelved, and there doesn't seem to be any commitment at the moment to introduce that kind of general consolidation of legislation. So we're still in a place where immigration law and policy is very unclear and very dependent on ministerial discretion.

Interviewer:

And would it be difficult to find information on what does exist?

Interviewee:

This is extremely difficult, and what is there is very unclear. I did see, for example, that the INIS website last week tried to make some amendments to clarify immigration permissions and maybe it's a little better, but it's not great, and even navigating the website is extremely difficult.

It is impossible to get through to anybody in the Department of Justice ever. Even to speak about your status or about the situation in general or even to get advice. So therefore in the absence of that possibility what happened the individuals are relying on accessing free legal advice. That may be over the phone, through NGOs, or through Citizens Information. Through other different means like that. It's just so difficult to access the Department of Justice to get information. And it's just extremely unclear overall.

From research carried out by speaking to social workers, guardian ad litem, and 19 young people about their experiences of the immigration system and the difficulties they face in accessing information, many of them became undocumented. Even the social workers and guardians had the same kinds of difficulties accessing information and services, and this meant that they often didn't know about legal obligations for young people to register when they turn 16, as many thought it was 18, and they had no one who was readily accessible to tell them otherwise. People find it so impenetrable that they are becoming undocumented completely unnecessarily, simply due to lack of information and lack of advice.

Interviewer:

Would you find that each little office or department or decision-makers has its own kind of discretion that can impede people accessing their rights, or that makes their status less stable?

Interviewee:

So, for example, children who are in the care of the State are granted a Stamp 4 based on exceptional circumstances. You might think, 'fantastic, that child has their Stamp 4, so they can get access to employment, access to education, etc.' This child has been in the care of the State since they were 3, they have completed their full education in Ireland, but didn't know about applying for citizenship, or maybe even thought it was impossible because the social worker wasn't allowed to sign their application form and they don't know the parents' immigration status. So the child still has this discretionary Stamp 4 when they turn 18. They've done fantastically in school, and apply to go to university. They then find that they cannot access funding, that they don't qualify for free fees because free fees and SUSI grants are limited to particular types of Stamps for which do not include the Stamp 4 where it applies to cases of exceptional circumstances or are on a discretionary basis.

There's a complete lack of 'joined-up' thinking. I have to hope that's not intentional or done on purpose. And I can't see that that kind of policy would be intentional, because people who in respect of whom a letter of an intention to deport was issued or in respect of whom a deportation order was revoked would be entitled to free fees and to access SUSI grants. It's just completely arbitrary.

I believe that it is similar between other departments as well. A complete lack of 'joined up' thinking that would ensure all categories of persons on the same kinds of permissions would get the same thing. I think looking to see on what basis it was granted isn't a particularly helpful way because realistically, a Stamp 4 should be somewhat uniform. But it's just not the case.

Interviewer:

Would you have a lot of issues with the different kinds of immigration stamps? And even say citizenship applications?

Interviewee:

Generally not, as I would say that citizenship as an area has improved a lot over the last number of years. Broadly speaking, if someone can show that they have the appropriate permissions, that is accepted and we don't see very many now being refused, except where there's maybe some criminal record, or in situations of statelessness, or in situations where persons cannot get their original documentation. But not so much around stamps, because usually people can or at least will only apply where they have the necessary stamps. Sometimes there are issues with minors getting citizenship, because they can't demonstrate their parents' immigration status is, potentially because they don't live with their parents anymore. They may be in care, or their parents don't want to provide that information. And the State has never created any specific individual permission for those minors.

Interviewer:

Would there be any other common barriers that the clients you would represent face?

Interviewee:

Well the Habitual Residence Condition, particularly from the perspective of non-EU migrants would be a real barrier. Most of our EU Treaty cases would focus on the particularly vulnerable cases.

But a lot of the time our EU Treaty cases would see the people who've slipped through the cracks. So, for example, this week one of our clients was granted permanent residence. And she had been in a relationship that broke down and with an EU -national and was refused permission at first, but they later got a divorce and it was on that basis that she was granted residence. So it was we took that case because we were working on this thing. EU Treaty cases are in an area that's developing all the time, so it is very interesting. I've also represented somebody who even experienced domestic violence just after submitting the EU1 form, after her marriage. And even before it came back from INIS, she experienced difficulties and had to exit that relationship. But thankfully she was granted permission to retain her residence on the basis of domestic violence.

Interviewer:

Would you see many Zambrano cases, or are they relatively infrequent?

Interviewee:

Oh yeah, we see a lot of those as well. They're usually resolved quite easily, but the information service here would see a lot of them. They would require evidence of the parents' involvement in the child's life, which is an acceptable condition.

Interviewer:

How well do you think Ministerial discretion is used?

Interviewee:

To a large extent, it does matter how the discretion is used by the Minster, because it is possible that it would vary, and we never knew who was going to be the new Minister and how they were going to use it. There isn't a safety net against it usage at all. I think there will always be a necessity for some level of discretion, but it needs to be within the context of a framework that has clear rules.

We have seen for example in applications for naturalisation, persons for whom we were advocating, who were siblings in identical circumstances. One was granted citizenship and the other wasn't. The applications were made with some documents on the same day. And there's no reasons given for that. Now certainly naturalisation applications have improved, and the processing times have improved, but we know when we make an application that's strong and is backed up that that application and the ones like it will be successful. But that really isn't good enough because only individuals should be

able to access that themselves without a lot of the time recourse to legal advice. And there is certainly a lot of discretion that yes of course there is.

And even for example, with the children again, we see children in identical circumstances being granted different permissions to reside, with very different outcomes for them. So even now children who have come to Ireland with their families are still sometimes granted a Stamp 2, which is really only suitable for international students. There isn't any real clarity on whether children be granted Stamp 3 or Stamp 4 in different circumstances, and on what basis those differences will be based on.

Ultimately we find that where there is a very vulnerable case, the Department(s) exercise that discretion in favour of applicants, and certainly there are a lot of positive decisions. If you can get the application to the right person, it's even easier. One of the young people, who will also be at our conference tomorrow, came to Ireland when she was 12 and didn't know her obligation to register. When she turned 18 she went down to GNIB with all of her documents ready so that she could register. That wasn't possible because she had missed the deadline to register, when she was 16. She was asked to write a number of letters and she never received any replies. She tried access legal advice a number of times, they would save up to get 100 euro and then, you know, needed to use that money for something else. So. She came to our attention because she was accessing homelessness services but couldn't go on the housing list because she was undocumented. That was even though her mum and her siblings had permission to reside in the State. As long as we wrote the letter on her behalf she has granted permission to reside. That should have been resolved when she presented at INIS herself. Or when she attended GNIB or through one of the letters she sent at that time. Not three years later when she had already experienced homelessness.

So, you know, there needs to be an element of discretion, but within a framework that easy to navigate and is accessible to people. That's clear, that people know where to send their applications to. That it's not just all based on knowing the right person as so much as Irish policy is.

Interviewee 4 - Welfare and Immigration NGO Worker

Interviewer:

I'm just wondering what the composition of your client list would be. For example, would they be predominantly EU citizens, Non-EU migrants or even asylum seekers?

Interviewee:

We would deal with the entire gambit of migrants, as our service deals with housing and welfare, a migrant service, and a refugee service. We operate all of these services from one building, with a drop-in centre located around the corner from here. But that means about 90% of the people who present to us or come to our services would have a country of origin outside of Ireland. They may now be naturalised Irish citizens, but they would from come from another country originally. From that we would draw people from third countries, people currently in the asylum system, people who have been granted refugee status or have leave to remain. We would meet people who are here on work visas, international students, but a lot of the work within the welfare and housing division would be done with those from within the EU. So people who travel from other EU countries.

Interviewer:

What would be the most common kinds of EU nationals you would encounter.

Interviewee:

Well our services within the housing and welfare sphere is primarily advocacy based. So information around housing and access to social welfare and the difficulties with those. We offer our services with the assistance of interpreters. We have a Polish interpreter, a Roma and Romanian interpreter, so it would primarily be Polish and Romanian and then after that we would see a mix of other Eastern European nationals with the EU category.

Interviewer:

Would they have common difficulties in accessing social welfare?

Interviewee:

Absolutely. I suppose, you know, when you look at the rules governing access to social protection and to you know social housing support and stuff like that, there are general

rules and then there are other criteria that will impact more on a migrants on people from migrant communities.

So you'll have the general stuff like filling out application forms, other things that apply when making a request of Social Protection, or when it comes to applying the Habitual Residence Condition. There will be more of an overall struggle to meet those conditions. Specifically in relation to providing information, migrants will struggle more to provide the necessary information because it's not a readily at hand, or it's not as easy for them to get. So often people are required to provide evidence from their country of origin with regard to questions such as :are you receiving a social welfare payment in Romania or in Germany or in Spain. That can be a struggle to get. These things are just a general barrier and create a struggle for them. So so the general rules apply, but they will impact differently on foreign nationals.

With regard to housing, there are particular rules that are applied to people from outside of Ireland, so that's a very specific barrier for them and impacts quite specifically on them.

Interviewer:

Would the Habitual Residence Condition be a very common problems for migrants?

Interviewee:

The HRC used to be one of the biggest hurdles with regards to refusals, but we've been seeing in recent years that this has lessened in recent years. We would be part of the Migrant Consultative Forum, which means we work with a number of other NGO groups and collectively meet with representatives from the Department of Social Protection three times a year. We would all highlight difficulties faced by the migrants we encounter in accessing Social Protection and bring that to the forum. Mainly we've been pushing for greater training on the HRC a lot of the time on applying the five factors. Some of them are quite subjective and even the level of and kinds of information given can lead to different decisions being made, as well as based on the decision-makers understanding of how to examine the application. As you can imagine, you can get wildly different outcomes.

From the very high level it was, we've seen it reduce quite significantly. So refusals based on the HRC are not as common for us as they used to be, but it's still a key factor.

Interviewer:

So as you've suggested, would you think that the level of discretion can be important in making the appropriate decision first time?

Interviewee:

Yeah, it's kind of the whole package. Because obviously if you engage with a statutory body and English is not your first language for example, you're at a disadvantage. Then there's a lot of information that people have to provide. There's even less of a cultural understanding of the system works among migrants. We find that there's a clear expectation that when a migrant lodges an application for social welfare, they expect that it will be processed and within a reasonable time, and after two months of waiting, they come to us and say "oh, I've no money and I'm about to be made homeless." And when we check into it, they made the application but they don't know that they had to constantly follow up on it, because they thought it was just a matter of submitting the form. So there's things like that where migrants wouldn't be as quick to go back to the Department and say 'what's happening with my case? I've been waiting x number of weeks and nothing has happened.'

The system needs to be tightened up, and they have been trying in the last number of years, but migrants might have that kind of expectation that their case will be progressing, when they absolutely aren't, without having to chase after it. People in migrant communities are also often more transient, and will then have more difficulty providing proof of their address, especially when there's been a change of address. Social Protection might say 'give me a rent agreement,' but the answer is that they're not named on the agreement but they're still asked to provide it. Or they'll be asked instead for a letter from the landlord and the landlord might not know that they're staying there for a short period of time. Stuff like that. When you're more transient and part of a less settled population, that will cause problems for people. Providing proof like this is often a stumbling block and a barrier to applications progressing as smoothly you would like them to.

Interviewer:

Are there any categories of payments that migrants seem to have a greater deal of difficulty with?

Interviewee:

What we're seeing at the moment is that someone will make an application for a primary payment and while they're waiting on that to come through, they'll make another application for the supplementary welfare allowance. Supplementary welfare allowance used to be easier and quicker to get, but now we're seeing that there are information requests in excess of what would be considered normal or reasonable. Obviously there needs to be checks and balances, and that's absolutely fine. But they can get asked to demonstrate and provide proof of how they provided for themselves between 2005 and 2008, which can be quite an outlandish request when you're making an application in 2017. It's meant to be a 'catch all' payment, and what was and should be easier is getting more difficult to access. Community Welfare Officers are kind of saying 'oh you've an application in for jobseekers allowance and that will come through soon, but when it doesn't you have people left without a payment for what can be quite a considerable period.

We're also seeing with migrants that because of the nature of their work, which can often be either the service sector or construction or involve manual labour that there a lot of requests for injuries and work-related illnesses. A lot of people we would meet would also be making applications for disability payments, and a lot of those would be struck down at first instance. But after we intervene and look for an appeal, they'll a lot of time being awarded it on appeal. What that means is often at first-instance you've to show that your case is bullet proof and to put in a huge amount of supporting documentation, but you might still fail at first instance. That's a pattern we've noticed in the last year or at least the last 6 months of it - most payments are refused and then there's a battle to get everything the Department require in terms of information and documentation to bring it over the line and get it approved.

Interviewer:

Would these be the exact same issues for non-EU labour migrants, or would you find that immigration status is an additional barrier?

Interviewee:

Well obviously for people coming from outside the EU, immigration status plays a big part. You have to have to have the required stamp, which is basically Stamp 4. There are other stamps which can entitle you to a payment, but sometimes people on others like a Stamp 2 are reluctant to apply. I mean you might be entitled, but we've found that can

impact on applying for permanent residence or naturalisation or what have you. Or even on changing your Stamp. There's also a lack of understanding when it comes to who is eligible for social welfare payments, because it's not always easy to find out what specific payments you could access.

There's definitely issues we've found where a person's Stamp is about to expire, and there's difficulties getting it renewed. Especially where there's gaps. Because now you've to apply for an appointment with GNIB, which involves going online as part of renewing your residency card. Often there can be significant waiting periods and then your card can expire in the interim. Payments can be stopped as a result when this happens. We would often be able to create bridging periods where people come to us but it can be a case of your card expiring and your cut off immediately.

We would also see cases surrounding the 'date of grant'. So Deciding Officers will look for your GNIB and if you can't produce it, the payments you applied for won't take effect, or the application will be stopped. But once you have a letter to establish your residency in Ireland, this shouldn't happen. So we end up having to go to the Department and say, 'yes they don't have their GNIB card, but their grant letter establishes the duration of their residency from x date to y date and that should be what you use in your assessment of their application.' We would have to point that out to them, even though it should be in their own guidelines that they do it this way. That wouldn't happen as much anymore for us because circumstances have improved, but it would still be a factor.

Interviewer:

So would that be a lack of 'joined-up thinking' between the Departments or something else?

Interviewee:

Well the 'joined-up thinking' between the Departments is a disaster. We also participate in a forum with INIS that raises issues relating to customer services and the blocks and barriers migrants face in dealing with INIS and progressing their applications. Like not receiving letters about your status, or you get a GNIB card but no grant letter, you get told verbally something is going to be approved but you don't get given anything in writing. There's definitely administrative gaps we would have to point out to the Department of Justice and INIS that would cause significant difficulties for people access-

ing social welfare or something else. But we're a long way off all of those things being joined up. Because we deal with immigration and social welfare and housing we can catch these things and let someone know 'you've 8 weeks left on your GNIB card so you need to get this sorted now before it expires.' We would do a lot of that kind of preventative work to stop something becoming a problem down the line. But that's only where we catch them. You'll still have people who think that they can go down and sort things out when they come up, but it's not like that anymore. These systems have changed. They've put them online and there's a lot more to deal with now. I mean even to get a PPS number, you've a big problem because you've to make an appointment which might take 3 weeks and you have 5 kids arriving under say, family reunification.

Interviewer:

So the system isn't necessarily getting easier as it is streamlined, it might actually involve more steps?

Interviewee:

Yes, there's often more steps involved. The department or local office may have more control over how they manage things better, and it's definitely more formalised, but I suppose when it comes to dealing with a crisis that arises or a change in circumstances, it can be trickier to navigate the new procedures.

Interviewer:

Yes, issues with how to navigate the issue seem to be raised quite often.

Interviewee:

We're always trying to look out for these pitfalls and help make appointments, because we're very aware of them in the work we carry out here.

Interviewer:

When it comes to asylum seekers and even refugees, what would be, I suppose, the most common issues you would see coming up in terms of social welfare?

Interviewee:

For asylum seekers, you know, those who leave Direct Provision voluntarily have no access to social welfare. Or their Direct Provision payment, because they cease to qualify once they leave. And then they're left with no income at all. What would be interest-

ing for us are cases where we see an asylum seeker who's still in Direct Provision but is a the spouse of a recognised refugee, and the spouse in Direct Provision is still waiting on their application to be processed. Where they come into us, once we've proved that there's an enduring relationship and everything else that necessary exists, we can try and intervene with the Department and get them onto the refugee spouse's payment. But there would actually be a lot of knowledge out there that this can happen. We'll see refusals based on the status of asylum seekers, but that can be fixed where the other has refugee status or leave to remain or a Stamp 4 status.

But then, you know, asylum seekers obviously can't get child benefit, and everything else that goes with that. With refugees, their refugee status is the 'golden ticket' because you have the same rights and entitlements as an Irish citizen. You can also satisfy the Habitual Residence Condition which asylum seekers can't. So they have a much easier time because their status is much more easily understood.

We're also seeing people who come in under family reunification, and you've an applicant who has gotten their refugee status but who is living in a single room bedsit and has been granted the ability to bring in his elderly and infirm parents, his uncle who has a disability, and his several kids. That means everyone needs a PPS number, they all need somewhere they can live. But they might end up all trying to live in the bedsit, the landlord catches them, they're evicted, and then they become homeless. There are no specific supports that kick in those cases, for people arriving under family reunification. We have recently produced material on this so that people are aware that they need to do these things immediately upon arrival in order to get payments and stuff like that. You have to get your GNIB card, you have to get your PPS number, so we're step by step telling people in these situations that these are the things you have to do.

It is also of concern that those in direct provision who have ben granted leave to remain or refugee status cannot access full social protection payments for long periods where they cannot exit the accommodation centres into their own accommodation. They are significant disadvantaged as they cannot save for a deposit and this can delay exit form the DP centres or can drive people out of the DP centres into unstable accommodation often resulting in homelessness soon after.

Interviewer:

Would you have encountered any of the programme refugees at all?

Interviewee:

Not yet, no they haven't accessed our services here and I haven't heard from anyone about them. But then they're more likely to be relocated outside of the Dublin area.

Interviewer:

I'm just wondering if you think that EU or EEA citizens are placed in a better positions when it comes to the welfare rights they have, or that there's common issues that get in the way of that and apply to all migrants?

Interviewee:

Not really, no. I don't think they do. I think they face common difficulties. I mean, there's language difficulties, cultural difficulties. There's obviously people who are severely disadvantaged, and there's sort of a lack of understanding around the supports they might need. Even thinking of the jobseekers form they can fill out. They didn't have a job, or their last job was as a mineworker when they were very young. Yes they need support, and english language assistance, and an assigned caseworker. There's potential for that stuff to be supplied under the jobs reactivation scheme, but if you're generally serious about providing supports then do that.

We also get cases where even people born here or who've acquired citizenship come into us and they felt that they were disrespected, or they weren't listened to. We see that from migrant communities too, and there might be what some people consider to be a racist undertone to what was said to them. We even find overt kinds of racist language being reported to us. These are issues we would continually be highlighting with the Department of Social Protection in our communications with them.

Often we would have to say to Community Welfare Officers or in the local offices that you know, you can provide an interpreter. That they need to if or when a person requests it or if they feel that they can't conduct an interview to their satisfaction without an interpreter. I suppose they might feel they are under pressure, and they want to deal with it as quickly as possible. But would have to say that you can't make a proper decision unless you can communicate properly with the applicant, especially if you're going to refuse a payment because you need to be as fair to them as you can be and try to open things up as much as possible.

We also find with members of migrant communities in general that when it comes to filling out forms or you know, you're a jobseeker, you're trying to provide information

on what you did to try and find a job but english is at least you're second language, there is a challenge in that for a lot of people. Form filling if you're operating through a second language can be significantly more difficult. Then you might have to go online and you might need new computer or compute literacy skills. You need a whole heap of different skills that sometimes people don't have. It's supposed to opening up access but these can often be barriers to people too.

Interviewer:

Would you encounter many issues with work permits here in terms of social welfare and accessing it?

Interviewee:

That wouldn't be an area I work in directly, but it is something that they would look at here. What they tend to find are people who are on work permits and are looking to renew them but might have gaps in their employment and gaps in their immigration permission. And then you would, you know, often see a lack of understanding among them about whether they are entitled to receive social welfare payments if they have a period of unemployment. That can cause problems for people too.

Interviewer:

Is there anything you would like to add before we finish or anything you think I missed?

Interviewee:

I think we've covered everything. But there have been some improvements made that have take a long time to happen. We would be looking for anti-racism training, and very particular anti-racism training as a mandatory requirement in the Department's training modules.

We would interact with the new Communities unit, and they make decent decisions and are being very helpful. Sometimes they would send people down to us if they know 'ok, this is a tricky case' and then we can help get them over the line and get them some help navigating the system. Which is good because then we have less refusals at first instance.

We only really have people present themselves to us when they're in difficulty, or at least the majority of people who come to us have been refused or haven't had an application processed. We would often represent them on appeal in oral hearings, and we

have a quite good success rate with regards to the outcomes there. But again, the main things are the requests for information from overseas which people really struggle to get. Like proving that they're not receiving child benefit in Poland, or that you don't have housing or property in Somalia or something. Prove you don't have extra income when it comes to rent allowance. They come with a whole lot of bells and whistles when it comes to providing proof and to get access to the payment.

When people meet those costs themselves, we often meet people who are paying their rent out of their primary payment and have really put themselves under significant financial hardship to do that, because they can't progress through the system.

An issue we see a lot of is where a persons primary payment is stopped with or without prior warning. In these instances a person may be invited to meet with a social welfare inspector or there may be an assumption that the person will present themselves. The SWI may deal with the primary payment but it is not often apparent to the applicant that a secondary payment such as rent supplement is also stopped. People can often struggle in these meeting with an inspector and are often given a short time frame to provide evidence that they will struggle to source. This can lead to refusals and people having to enter into a protracted appeals process. Unfortunately people do not have the support to address the problem in a timely manor leading to additional difficulties. In many of these instances the department fails to advise the claimant that the payment is to stop in advance of it being stopped which directly contravenes their own operational guidelines. This failure to adhere to their own rules can cause serious distress to a person / family and can put them at risk of homelessness.

Interviewee 5 - Independent Expert in Social Welfare Law and Policy

Interviewer:

Just to start off, I'm wondering how you would characterise the Irish welfare system and how it works.

Interviewee:

Complex. It's a bit of a web. There are so many different payments available, the decentralised nature of the system itself doesn't help, and I think that while there is a lot of information available if you know where to go. But I think for those who have accessed the welfare system, many of whom are marginalised, who have literacy difficulties, for whom English is not their first language, the system is extra difficult to navigate.

Even the payments themselves can be ridiculously complex, and unnecessarily so. A lot could be done to fix the system. Obviously it has a huge budget, but I don't know if it's always used in the most efficient way. An example of that would be the increase in the number of appeals and the money that's had to be put into the Office of Social Welfare Appeals rather than putting money into the application process and how that could be done in a better way. I think that could save a lot of money.

And then there's the fact that you have a Social Welfare Act, the primary act, which is dated 2005 and we're in 2017 now. Unless you're lucky to get an annotated version of it with every subsequent instrument included in it, you have to read 3 or 4 different statutes together, understand what they mean, what they then mean together, and make it accessible for yourself. So it's not accessible for the people who need it most.

Interviewer:

Yes, there can be a huge number of Statutory Instruments in any year on top of the Act and the amending legislation.

Interviewee:

Yes, and you've to figure out what is in force, what parts haven't yet been commenced. For a lawyer it's difficult, never mind an ordinary person who actually has to rely on the thing.

Interviewer:

Would you have found that discretion in decision-making and apply these statutory provisions would be a big factor as well?

Interviewee:

Yes, it can be quite subjective. I mean, some of the criteria are very clear and planned out, while others are highly subjective. So for example, the eligibility criteria can be straightforward, but then when you add something like the Habitual Residence Condition, which for many years has added this kind of subjectivity to those criteria, it creates a discretion in how to apply it all. And that's just on the literal application, because I've come across some decision makers who've taken a dislike to someone, and perhaps made decisions against them based on that. That reason isn't clear, it isn't set out in writing, but clearly a wrong decision is made. And that might not only go to social welfare appeals but I've seen some go right the way through to the Ombudsman. I saw one particular case where the Ombudsman launched an investigation into it and the law was misapplied. The person had been in Direct Provision but had left, and the decision maker applied a condition which should not have been applied, and the law was quite clear on this. The only rationale I could find was that something had been triggered in them that made them think 'well no, this person is not going to get this payment.'

Interviewer:

Do you think that xenophobia or racism played a role or did it seem to be more of a personal distaste for them?

Interviewee:

Sometimes it does. There is racism and xenophobia in the welfare system, and I say this because, without saying where it was exactly, I know of a social welfare office where behind the public counter there was a newspaper clipping on the wall talking about Nigerians committing welfare fraud. And this was up behind the counter where customers, as the Department calls them, were coming in to try and access payments. And seeing this on the wall. It was in an area where there was a Direct Provision centre, so the population was diverse, was going to see it, and had actually taken photos in order to report it as racism. The newspaper article was taken down rather quickly from the wall afterward.

I wouldn't want to generalise. I don't think it's rampant, but I do think it exists and that the Department has taken that on board. It's not even just racism and xenophobia, be-

cause lone parents also face discrimination. It just calls for more training, more guidelines, and more sanctions when it does happen.

Interviewer:

Have you found that difficulties with filling out forms, having the right information, knowing who to speak to are more significant factors for migrants than the Habitual Residence Condition or are they all significant in their own way?

Interviewee:

I think that filling out the forms, knowing who to go to and things like that can be barriers for everyone. I mean, I've been in there myself trying to sort out an issue and have had difficulty figuring that out and I'm seen as an expert in this area. Because you've to find out which of the offices is your local one, whether or not you can walk in or if you need an appointment, what information you've to bring with you. There needs to be more information out there. That's difficult enough, just trying to get to the point that you're applying and having a decision made. That's a success in itself. But when you add other factors to that like the HRC or other eligibility criteria that people might not know how to demonstrate, that makes everything murky or opaque. People don't know how to get around it and it can be demoralising, or worse than that, deter people from applying for what they're entitled to. I think all of that adds to the number of appeals, because you can see that lots of people don't know how to use the system. There was of course a rise in appeals because there was a rise in applications, but routinely, more than 50% often, they're successful. What the Department will respond with that they didn't get the right information at the preliminary stage, but should that not trigger a response which demands they get that information at the outset? Because that will save your department money. That's an ongoing debate with the Department, but it's not just about being able to access a payment. It can have a detrimental impact on people's wellbeing, without even considering what impact it has on their rights.

That applies across the board, so not just to migrants. But migrants will face additional barriers.

Interviewer:

Would one of those also be immigration status?

Interviewee:

Yes, I've seen that happen. There's been a number of cases where, at least for a time after the right to reside came in, that people had been granted leave to remain for a number of years after leaving Direct Provision. Usually for 1, 2, or maybe 3, but never more than 3. And maybe they had been in the country for 10 or 12 years. But they would go to apply for social housing or social welfare, and the right to reside would be applied. The wording had been changed in a minor way, but one that made a huge difference, because now you couldn't be a burden on the state. So you would see social housing or social welfare deciding officers say 'you're not eligible for anything now because you can't be a burden on the state.' That was even for universal payments like child benefit or to access social housing waiting lists. There were challenges to that by a number of different organisations, but it did seem to be resolved, at least for a time. I'm not sure to what extent that might still happen.

Interviewer:

Just going back to your point about the high level of successful appeals, do you think that that particular mechanism works quite well, or are there still issues with the Office overall?

Interviewee:

The Office is still part of the Department, the issue of independence does cause an issue for some people. The Appeals Officers in general, that they are employees of the Department does mean that they aren't as independent as they should be, but you know, the Office will say that a 50% or 60% success rate shows that they are quite independent and they do overturn the decisions of their colleagues. And for a lot of people that is the case. But I have also been in a few appeals procedures where their personality came into it, where they made outrageous comments, and refused to grant an appeal. Those then went to the Chief Appeals Officer, and were overturned eventually, and after a long review. So that personality and subjectivity or discretion still creep in, and the fact that an Appeals Officer can transfer back to the main Department afterwards raises questions about the division between the two. You're not going to have people who are successful in their appeal complain about it, so that's why it's important to look at the Ombudsman's Report, where social welfare features heavily every year.

Overall the system of appeals works fine, but it can be improved. I think though that there's a resistance to change, but the scope for improvement is there.

Interviewer:

Would you have had much experience dealing with asylum seekers? Particularly the payments outside of their allowance that are available to them.

Interviewee:

It used to be that, back in 2006 or 2007, it was seen as a given that you would get exceptional needs payments for clothing. So much so that they were actually called clothing allowances by people within the system. Then given the HRC and it being applied to payments which it hadn't previously been applied to before like the domiciliary care allowance, so you had people cut off when they needed it most. And certainly under the last government, those payments were reduced, and the availability of them were reduced. That's partly because the budget was reduced, but the former Minister also wanted to standardise those kinds of payments for things like a school coat. That's because Community Welfare Officers were granting different amounts for the same kind of item. And the attitude seemed to be 'why don't they just shop in Pennys?' Well I had to think 'do you shop in Pennys yourself?' So it isn't a very fair standard to apply.

I'm not sure what the situation is now exactly. I know in the past that there might have been a Community Welfare Officer located there. In some centres that was a really good thing, whereas in others, conflicts arose for whatever reason with residents. But certainly exceptional needs payments and those kinds of payments are much harder to get for everyone. We have come to a point where decision makers are seen as the 'guardians of the purse'. That they should be refusing payments rather than looking at the situation and thinking 'this person is in need and I need to do it.'

If that answers your question.

Interviewer:

No, that seems to be a trend. That it's harder to get, for example, supplementary welfare allowance since CWOs have been brought back into the Department.

Interviewee:

That's definitely important because if you happen to make do without the SWA for a few weeks or months but your application ends up taking 6 months or a year, and you're couch-surfing, or like with some migrant communities who do band together and won't let someone be sleeping out on the street, there can be questions about how you made

ends meet. ‘Were you working illegally? You must have been to survive all that time.’ Or, ‘actually, you don’t need this payment because if you survived without it for that long then off you go.’ There’s that attitude among some people, although I’m not saying it applies across the board.

Interviewer:

Lastly, do you think in terms of EU citizens, third-country nationals and asylum seekers there’s a kind of legal hierarchy in terms of the access they get to social welfare?

Interviewee:

I think EU migrant workers definitely have more rights in terms of EU law, and that you can see them and they’re very tangible. Now whether or not those are applied is a different story. In theory they definitely do, but I think in practice you find that EU citizens, particularly when the recession hit, and they’d worked here for 8 or 10 years, they were out of work for what might have been the first time and could have difficulty accessing even a contributory payment. And even if they accessed that and it ran out and they tried to access an allowance, the attitude could be ‘well just go home.’ And this is their home. This is where they chose to make their home. They’ve put down roots here, they may be married or found a partner here, they may have children here who are in school. Or none of those things, but their entire circle of friends is here and their life is here. So I think in practice they were particularly impacted by the recession and those attitudes afterwards. I remember working with one Polish man who had a really strong case and was applying for jobseekers allowance. It ended up going to appeal, and by the time it came around he was destitute. He was offered a flight back to Poland. His family was here, but I couldn’t get through to him when the appeal did come up because he had gone. And I think he was entitled to that payment. So even EU citizens face difficulties, but when it comes to third-country nationals, particularly asylum seekers, they’ve faced issues for many years now. And they’re so limited in what they can actually get that it’s a wonder they can get by and integrate into local communities at all. I think that immigration status does come into it and there is that hierarchy. It’s much easier as a lawyer to argue in favour of an EU migrant worker than it is for a third-country national because you can’t point to EU law and you can’t actually use that as a tool. But then welfare cases don’t usually get as far as court as they are often settled so it can even quite difficult to litigate on it across the board.

Interviewee 6 - Legal Counsel Practicing Immigration, Asylum and Welfare Cases

Interviewer:

Firstly, I'm just wondering what kind of cases you tend to deal with most often.

Interviewee:

Well there's two main that I would deal with. General immigration and then what we call international protection, which I suppose encompasses asylum and subsidiary protection.

Let's focus on that first to get it out of the way. So international protection has changed dramatically in the last six weeks when the International Protection Act 2015 finally commenced after waiting for it to pass since 2006 (previous bill dealing with a single procedure– now shelved). Now we have a single procedure which means that both asylum and subsidiary protection applications are considered together. Which means that hopefully we won't experience the kind of delays we have experienced in the past, and people won't have to spend 8, 9, or even 10 years in the asylum system. The vast majority of cases are referred to us from the Legal Aid Board dealing with various clients at different stages of the process. Some of them might be fresh applicants, some maybe didn't have anybody at first instance and now need help with their appeal. They would go to the Legal Aid Board and if they don't have the capacity with their in-house solicitors to deal with it then they would refer that to private solicitors in their panel. We would be on that panel. So I suppose most of our international protection work comes from referrals made by the Legal Aid Board.

You would often have people who have been declared refugees or persons with subsidiary protection status, and they might want to apply for family members to join and whatnot, so that's a refugee family reunification issue, distinct from general immigration family reunification. Because you then have family reunification applications not made by refugees but by ordinary people who are not nationals but who are legally residing here. Those have a much more restrictive regime applying to them because generally in refuge family reunification it's a bit more generous in the sense that, for example, there is an absolute right to bring your spouse and your children over once you have status. No such right exists for somebody who is here and has a work permit. You also have applications for family reunification made by EU nationals residing here, in respect of non-EU family members and you would have an almost absolute right in cer-

tain cases i.e. spouse and children. We're not normally instructed to make short term/ visit visa applications, we are normally involved in the appeal against a refusal, or long term visa applications.

There's also naturalisation applications, there will also be applications for residency based on marriage to an Irish citizen, EU citizen, or residency based on being the parent of an Irish child. There are also cases where people are facing deportation. Also, these might be deportation orders that when they were issued were not challengeable but something happened subsequent to that and we might be able to make an application to the Minister to revoke the order.

There's many, many, many different scenarios. It's extremely demanding because you might have clients who are very articulate and very well educated who tend to provide instructions that are accurate and truthful and it's all done in a comprehensive manner. It's very easy to work with them. And then you might be working with say a victim of torture who doesn't speak any English and you know, you might get very basic instructions.

Interviewer:

On that last point, would you generally find that these immigration and asylum systems easy to navigate?

Interviewee:

Certainly not. No, not at all. That said, in terms of asylum I can tell you that we're certainly better than Greece. I think if you compare here to other European countries, we're not that bad, but I given the size of Ireland and the number of people we have here from outside Europe, it's not significant really compared to other EU member states. I mean, think of Greece, Italy and Germany. It's a pity that successive governments have failed to appropriately develop a fair clear and rational immigration system given the comparatively small numbers we have.

Things have certainly improved over the years. Things are much clearer and transparent now then they were 10 years ago. I mean, in terms of general immigration, if you log onto the INIS website, you can more or less find the answers that you're looking for. But in many cases people do go to a lawyer because they say, 'look I'm just finding it extremely complicated and even contradictory.' But at least now the information is generally there, where it wasn't in the past. For example, take family reunification (regarding

non-refugees). There was nothing in law, nothing in the Act, and nothing in terms of published policy. You did not see what they were looking for, what the financial threshold was if there was one, or what have you. Now there is an 85 page document. It's extremely contradictory within itself, but at least there is something now. You generally know where you stand, even if it's very confusing, things have improved in terms of general immigration.

In terms of international protection/asylum, I believe we created a monster. It's mostly gone now obviously with the new Act, and there's obviously things in the new Act that I'm not happy with, but in terms of ditching the monster, I'm happy because what we had was an aberration. It really was, because we were the only country in Europe with a split procedure.

It might also be politically incorrect to say this, but I don't have a problem with Direct Provision in principle. I have a problem with the length of time in direct provision and level of deprivation and particular with regards to kids in the system for say 8 years. I don't think being in Direct Provision for 6 months or 1 year maximum while your application is being process or being moved somewhere else is wrong so long as minimum standards are preserved and there is an independent complaints mechanism. The procedure would at least have appear to have improved with the 2015 Act, but the problem is that you have a Direct Provision system where people are living in these places for 8, 9, 10 years, and that's absolutely crazy.

So for both, I want to believe that things are more clear now, but I can certainly tell you that the immigration and asylum lists in the High Court are probably the busiest there because of things going wrong. We've seen that for a while now.

Interviewer:

Would many of those issues also be the use of discretion?

Interviewee:

Oh certainly. I mean, if you just look at it in terms of general immigration, it's all about discretion. That's certainly the minister's decision in any event. Lawyers will argue that if it's the spouse of an EU citizen for example, the Minister does not really have the discretion you know to decide whether or not they can join them here. Even for Irish citizens the Minister would say that there's no right, but there is according to the High Court *(Gorry v MJE)* It's not in the law but it emanates from the Constitution. Although

that point is under appeal by the Minister. The Minister does not want a prima facie constitutional right of husband and wife to reside together because the Minister's default position in general immigration is 'I have a discretion.' I suppose most countries will have that approach, discretion will always be there.

In terms of international protection, the decisions are made by individuals. And decision-makers may have certain views and they might have certain blind spots as well. But that applies to lawyers too. I might have a really good case I could make but I didn't see it, and It's my fault. And vice versa.

Interviewer:

Would you have many cases where people have trouble maintaining their immigration status? So for example, they apply to renew their visa or work permit and then it doesn't come through in time or something goes wrong?

Interviewee:

Yes that's certainly a prominent feature, and it's certainly something lawyers would deal with all the time. Someone would come to us and say that they were grant a specific type of permission based their relationship status but that's changed and the Minister will not renew it. That certainly happens again because of the discretion. And I suppose people then have to 'lawyer up' and make a presentation say that the change in circumstances is just how things are. In some cases they're right and in some case they're wrong. But yes, absolutely. It's a feature. Renewals, and even gaps in your status that cause problems with your employers, the Department of Social Protection and so on.

Interviewer:

On that, would you have any issues with work permits at all?

Interviewee:

It's not really something we would take on in our practice, but mostly they would be done by the 'Big Five' accountancy firms or international corporate immigration firms. We do the odd employment permit, but these firms have corporate immigration departments. Sometimes we are successful and sometimes we are not. They're highly difficult cases, particularly where you're not a highly skilled professional.

And yes, gaps in work permits are a problem. The Department of Jobs might not renew in time and then the person has to go back later to have their immigration status renewed and there's a gap there which they have to explain. Gaps have always been there and are here to stay. Sometimes we can argue that they should disregard the gap, but only if they come to us and that depends on the particular facts of the case.

Interviewer:

What kind of cases would you get brought to you that deal directly with social protection or social welfare?

Interviewee:

We wouldn't have a lot that deal directly with social welfare. Though, we have cases which would deal with child benefit and the children are Irish born. We would be looking for those payments to be backdated until the time the child was born, but the Department's position is that they do not qualify because of the (parents') habitual residence condition. But the period we are seeking the child benefit for precedes the HRC and can't be applied. Another case we have deals with the mother of a child who is a non-EU citizen who applied for child benefit payments after the introduction of the HRC, but the Department says they can only qualify from the day that the Minister grants you an immigration permission. But the father is an Irish citizen, so there's no residency issue here. They argue that the Statutory Instrument in place allows them to only pay the mother. They can't pay it to the father. So we question the constitutionality of the Statutory Instrument because that just can't be correct.

Social welfare law is fascinating, it's extremely technical. But it's not something I thoroughly enjoy.

Interviewer:

Would you have encountered the Habitual Residence Condition much in the cases that you've dealt with?

Interviewee:

The Habitual Residence Condition has certainly been the figurehead behind a lot of refusals for non-nationals since it was introduced. You know who does a lot of work on this? FLAC. They're in a good position to give you more information.

The EU law is another thing. Take the Solovastru case. We would say that if you're self-employed for a period of time and then cease to be self-employed, the Directive makes no distinction between that and an employee if you're genuinely looking for work for social welfare purposes you should be OK. But the Department of Social Protection seems to have a problem with that.

Interviewer:

Do you think that the way laws tend to be constructed give EU citizens a better status than non-EU citizens or asylum seekers?

Interviewee:

They have to. But I mean uncannily, on paper, (EU citizens) have for example far more favourable family reunification rights than Irish citizens. If you are an Irish citizen and your wife is Russian, versus a Spanish citizen with a Russian wife, the Spanish person is entitled to have his wife join him in Ireland, and get a residency permit and work once they establish that they're using their EU Treaty rights. However as an Irish citizen you would have to prove your relationship history, provide proof with photos and evidence of how you met, how the relationship developed. Then you should demonstrate that in the last 3 years your income has cumulatively been €40,000 per year. Then you have to prove your wife is dependent on you. And every single document is going to be examined exhaustively, and ultimately the Minister still retains their discretion. So yes, you'll see that in fact you have more rights as an EU citizen and in certain cases, more rights than foreign nationals, but even Irish citizens in certain scenarios. It's the paradox of it.

Interviewer:

How often would you encounter issues with naturalisation?

Interviewee:

Naturalisation is the ultimate discretionary exercise. Absolutely, yes. If you fulfil the recognisable residency period, which is 5 years of lawful residence, not including gaps that can't be explained, but let's say we overcome that hurdle, then the Minister has to be satisfied that you're of good character. The Minister has a very wide discretion and the settled position of the Courts seems to be that as long as the information is correct, it's fine. I mean, I don't think comparatively that if you came to the attention of the Gardai, were brought to trial and later acquitted that the Minister could rely on that.

The way I see it, the Minister weighs your employment record, tax record, and criminal record. If you've a criminal conviction and you're on social welfare, certainly, forget about it.

Interviewer:

Do you have problems with what that means, good character?

Interviewee:

Yes, a lot. Because, I might have been stopped for not taxing my car in time in 2009. I get fined, but the penalty was not paid in time for whatever reason. I end up in court and explain everything to the judge, it all gets sorted, but on that basis alone I have a record of conviction and the Minister can find that I'm not of good character.

Interviewer:

Have you found that drawing social welfare is a consideration on its own?

Interviewee:

I've never seen a refusal based exclusively on social welfare. Being on social welfare is noted in the analysis of the decision. But they're quite cute about it. They wont say, 'we're refusing you on that basis' or 'we're refusing you based on this, that, and because you're on social welfare,' but it is certainly noted.

Interviewer:

Are Zambrano applications common?

Interviewee:

Zambrano has been traditionally misconstrued, first of all by lawyers. Everyone thought 'okay, that's it. If you have an Irish-born child, EU law say this.' Well, not really. Both parents must be non-EU citizens for it to be a pure Zambrano case. If one of the parents has EU citizen or even a right to residence then that doesn't mean the child has to leave the EU. The Minister does entertain Zambrano applications, but because they're not strictly Zambrano cases I prefer to call them applications for residency based on the parentage of an Irish born child. And these applications are in fairness to them, are entertained and considered. It could take maybe a year to be processed, but generally if the

person has not come to adverse Garda attention and can show an active role in the child's life and has job prospects, the Minister tends to grant those.

Interviewer:

Anything that you would like to add?

Interviewee:

Not really, but I would be happy to answer any questions.

Interviewee 7 - Social Welfare Law Practitioner/Academic

Interviewer:

From your own personal and professional experience, how would you categorise the Irish welfare system? Is it quite complex, or highly codified?

Interviewee:

I think the best way of answering that is to say that the Social Welfare Code in Ireland was described by a former High Court Justice who now sits in the Supreme Court as labyrinthine. That's a very good description of it.

And that's just the Irish aspect of that picture. But for your research I would say that there is certainly a lot of difficulty that arise for judges, advocates and Deciding Officers in determining what the rights of EU citizens are within that framework. There's quite a few areas where it's uncertain and a reference should be made to the Court of Justice. A few are coming now from the High Court and the Court of Appeal in relation to social welfare, but that does leave the Department of Social Protection in a very difficult situation.

I think it's quite fair to say that the Department does, like most other Member States, want to operate as conservative a welfare system as possible, to protect its own welfare and resources. If it can avoid giving EU citizens social welfare, they will. But that's also not to say that there's an intention to deprive someone of their rights deliberately. They feel their interpretation is the correct one, and on that basis you won't receive it. One of the more simple examples of this would be self-employed people working in Ireland. You'll see from your own research that it's very clear an ordinary PAYE worker will have their rights determined in a quite straightforward manner by virtue of their employment relationship. The Court of Justice has said that someone who has worked for a month has established a sufficient amount of time for them to be considered a worker under Directive 2004/38. On that basis, provided they can obviously establish residence and all of that, they'll be entitled to social assistance for 6 months. A self-employed person by comparison, who has worked in Ireland for four years and is fully tax compliant is deemed to lose their right to reside the minute they say they're unemployed and are entitled to no social welfare according to Ireland. The UK also follow that position of course, and that point is also being referred to the Court of Justice at the moment. Now

that's just one example of the complex issues you will come across when looking at the Irish welfare system, and more specifically at how it works for EU citizens.

Interviewer:

There does certainly seem to be an over-representation of the self-employed in cases brought before the High Court. Particularly EU citizens who were self-employed and then engaged in periodic work, with the question being whether they can be a jobseeker or not after being self-employed.

Interviewee:

Yes, exactly. Social welfare law is definitely highly politicised at the moment. And that's at the EU level. if you have a question before the Court of Justice, often you find that 10 other Member States and submitting their thoughts on the case. They often want a conservative outcome and a conservative view of welfare law. Funnily enough that didn't happen in the recent *Gusa* case that's pending before the Court. There's a lot of countries that take the view that Mr. Gusa is fully entitled as former self-employed person. The Commission are also fully behind Mr. Gusa. But in cases like *Brey* for example, one of the first questions on the lips of the Advocate General was 'can a person in this particular economic environment say they have a right like this?' That's a clearly political question. It has nothing to do with the law. And anecdotally I'm told that within the Court of Justice itself these cases are viewed as highly controversial, and you have a division between those saying that the boat needs to be pushed out and those that want to pull it back in again. That's of course rumour. I don't know whether it's true or not.

But yes, going back to the original question of if the system is complex or not, it's very difficult for certain categories of persons to succeed. I'm sure you've also come across first time jobseekers. That's extremely, complex. Some Member States are even trying to get out from that obligation. Cases like *Collins* and *Antonissen* make it clear that a payment intended to facilitate access to the labour market cannot be treated as social assistance. But countries like Germany have amalgamated their version of the supplementary welfare allowance, the basic subsistence payment, with the jobseekers allowance into one single payment. In trying to determine whether or not that single payment is then social assistance or a payment intended to facilitate access to the labour market, the Court of Justice has applied the 'predominant purpose' test. And the Court has agreed with Germany that the new, singular payment is social assistance because its

primary purpose is the subsistence of the person and their family. That means it's partially a payment to facilitate access to the labour market, but the predominant purpose makes it social assistance under EU law.

In Ireland, jobseekers allowance is clearly a payment intended to facilitate access to the labour market. The title on it is social assistance, but that doesn't matter. Supplementary welfare allowance is social assistance, because it's a subsistence payment. But in this jurisdiction we incorrectly treat all non-contributory payments as social assistance Whether it's contributory or not doesn't matter.

Interviewer:

Especially for the purposes of EU law.

Interviewee:

Exactly, exactly. EU law does not make that distinction. That's a common fallacy in Member States, but Regulation 883/04 on social security doesn't care if it's contributory. There's no contributory requirement for a Child Benefit for example, and that's social security for the purposes of EU law. Carers Allowance is another. Ireland lost that as a special non-contributory cash benefit. According to the EU it's not and should be exportable.

Interviewer:

Does this mean you would really see a lot of the issues arising within the Irish system for EU citizens being that they have to apply EU law, which is even more complex?

Interviewee:

I think that's a good point. Because it would seem sometimes like the Court of Justice is itself unsure on some of these matters. Many looked at *Brey* and thought, great, that settles this now once and for all. There's going to be an almost parallel residency test for those with no right to reside. It will be an examination of their personal circumstances, how long they've been here, etc. And it would have meant that reasonably speaking, everyone was entitled to some degree of social protection. That could be a few weeks, or months depending on the particulars of the case. But then there's *Dano* and *Alimanovic* and *Garcia-Nieto*. Those are three refinements of *Brey*, and I would suspect we'll see even more.

Interviewer:

Would you agree that the arguments in *Dano* and the other cases you mentioned is even now seeping into cases like *Commission v UK* which have nothing to do with social assistance?

Interviewee:

Well I think that a large part of the reason the UK got off the hook in that case was due to the way in which the case was heard. The Court didn't have an individual before them, it wasn't like a preliminary reference involving a person who can cite facts. The other large factor was that the Commission argued that people would be excluded from accessing Child Benefit without an individual consideration, and the UK said that they didn't, because they assessed whether or not the person was a job-seeker. And that was one of the things they were able to do.

Then if you look at the UK legislation, someone can derive an entitlement to an inherent right to reside based on being a jobseeker, someone who is actively seeking employment. I can't do that. here if I'm an EU citizen. We don't have that in our legislation. If you applied for Child Benefit in Ireland as a jobseeker, the DSP would say that you've no right to reside and that would be the end of it. There's no assessment. There's no inquiry to see if you might have another right to reside based on being a jobseeker. So that's how I think the UK mostly got out of it.

What we have is some kind of a you know transitional like state for three months with no conditions. But. You're not. You can't guess. And there's social protection in this jurisdiction. As a job-seeker. As a as someone who's trying to be you know entered there. Yeah. In other words there's no assessment if you apply for a child benefit. And what I would say to you is you've no right to decide that the end of it. They won't actually inquire as to whether or not you're a job-seeker to see you have all the right to reside. And I think that's one of the reasons why they got over that.

There's a recent case called *Munteanu* which might be very helpful on this.

Interviewer:

Would you find that discretion is an issue when it comes to decision makers within the DSP using that to find against someone, or is it again an issue of the complexity of the system and then of EU law on top of that compounding the problem?

Interviewee:

I have come across some Deciding Officers and Appeals Officers who are highly sympathetic towards people making a claim, but they don't really have any discretion to make an alternative finding. They have to apply the law and don't really have that much discretion, but you might find that sometimes they will overlook a certain factor or certain deficiencies within a claimant's case in order to assist them. Now I suppose it might also be said that in general there are people, Deciding Officers and Appeals Officers that take a different view and take a very conservative view of the law. They wouldn't operate within that more flexible area, but I mean you the law is the law as it's written and you usually either have an entitlement or you don't. There isn't really that much discretion to take a very different approach. So it's more a case of deliberately overlooking certain deficiencies to help a person. I think that's pretty commendable when that's the case, and that's how they do it.

Interviewer:

In terms of the appeals process, it seems to work quite well. The successful rate of appeals, wholly or in part is quite high, but I suppose from an EU law perspective, they're capable of being considered a Court or Tribunal and can therefore make preliminary references to the Court of Justice to ensure that the law as applied or written here is correct but they have no procedure in place to do so. That leaves a lot to the High Court.

Interviewee:

Well this is a very significant issue in terms of EU law. I've certainly been trying to find a case with which you could challenge this. First of all, an Appeals Officer would have an untrammelled right to make a reference. There's no question in my mind that it's a Court or Tribunal for the purpose of Article 267 [TFEU], because there's dozens of other such bodies or organisations across Europe that serve the same function and are making references. And all the leading academics over the years have said that the SWAO is a Court or Tribunal. So that's not an issue. The problem is that there seems to be an unwritten policy that that's a matter for the High Court.

If I am a lay person going into an appeal with a very difficult question is now faced with having to go to the High Court, either by way of judicial review or an appeal on the point of law. And once you go down the road of an appeal on a point of law, the rules say that your costs normally aren't ordered against you. Why should a person have to go through all the trouble of hiring a legal team for them to run their case? Or even for that

matter, if they had a legal team with them in the SWAO, why not just make the reference from there? It's very simple. You make the reference and it's dealt with. It would save an inordinate amount of time and money because litigation at the Superior Court level is very expensive. Why not do it as directed at the office? I think it's a fundamental flaw that they refuse to entertain references.

Interviewer:

Are there any other payments, outside of say the obvious ones like jobseekers allowance, that you tend to see coming up very frequently?

Interviewee:

Supplementary Welfare Allowance would come up a lot, but less so now. Many of the payments come up quite a bit - some of the pensions, Disability Allowances, Illness Benefits. I've run cases involving all of the payments. Where people were unlawfully refused payments. It's really more related to the people and their circumstances than the payment itself. There's been one group of people who have been subject to an appalling level of discrimination since 2007. That would be Romanian nationals.

Interviewer:

Yes it's quite strange that almost all of the case law coming from the High Court in general relates to Romanian citizens.

Interviewee:

It really is. And the extent to which the State used the permitted derogations was completely wrong in this jurisdiction. You had in various different Departments like the Department of Jobs, Enterprise and Innovation saying one thing on their website about their rights and the Department of Social Protection would follow that. The Department of Jobs was routinely if not always wrong in the approach they took, particularly in relation to the requirement for employment permits. Only some people were required to have them but the view seems to have been taken that everyone needed one. It was rather remarkable. Then you had very serious situations arising for some claimants. Many were told to leave their job or they were effectively imprisoned, brought before the Courts for a breach of the Employment Permits Acts. In one case a person's husband was self-employed. Because of that, his wife didn't require an employment permit, but the Department didn't think that was the case. Of the 25 cases I came across, none of

them were heard because they were all settled by the State. That's the real reason why the restrictions were lifted two years early.

Interviewer:

I had been wondering what the reason for that change was, because there was justification given for why the policy continued in the UK but lifted here.

Interviewee:

They couldn't stand over it anymore. They had gotten it completely wrong and they couldn't fix it. The easiest thing to do was to lift the restrictions and say nothing more about it. There probably would have been another 100 cases if they hadn't.

Interviewer:

Just following on from that, how well do you think Ireland complies with the right to good administration and all of the procedural rights contained in EU law where it's being applied?

Interviewee:

I would have said that the Appeals Office is generally quite good, and you can see that from the success rate. Where I find they fall down is in relation to the more complex cases involving EU law. And that feeds back into their refusal to make references to the Court of Justice.

Obviously this is an appeal on the point of law to the High Court, but I don't see why that should be necessary if you could just go straight to the Court of Justice. You don't need a High Court judge to to tell you that a case is very complex and the answer to the question put before them is unclear. Most people could figure that out from hearing arguments on both sides, but they just won't make the reference.

I would have serious concerns about delays in the appeals system. The Statutory Instrument governing appeals states that the appeal has to be heard promptly, but I've heard of people waiting a year for an appeal. In fact I acted in a case where even though the appeal had been heard, the decision itself wasn't given for a very significant amount of time. I can't remember exactly how long was but it was quite significant. Months upon months upon months.

The first instance decision making is problematic. There is failure to recognise that as an emanation of the state, the Department of Social Protection has a duty to apply EU

law in the same manner as a Court. It goes further than that, as they have to display conflicting provisions of national law. Often they will say that in X, Y, or Z case the High Court said that this was the outcome, but the Deciding Officer and the Department are entitled to adopt their own view in relation to EU law. Naturally however, they might follow the more conservative view given by the Court. That can be very problematic. There's an onus on them to apply the law in the correct way and not wait 6 or 7 years for an issue to enter the Court system.

I mean the issue of social welfare entitlements for the self-employed was first raised in an introductory injunction hearing in 2010. And one point it was in the High Court, the Court of Appeal and the Supreme Court. The case from 2010 is now stayed in the Supreme Court, the *Solovastru* case pending the outcome of the *Gusa* case. So you can see there's significant delays. I mean the court said things have to you know they're going you have to wait for a hearing date.

Interviewer:

Are there many issues with the SWA being given pending an appeal or does it tend to be given? As that could have a big impact if someone is completely cut off from the welfare system.

Interviewee:

The operational guidelines for SWA have always said that it's for people who aren't entitled to primary payment or people who have an issue pending. But not everybody gets pending an appeal. There's a particular provision of the Social Welfare Consolidation Act, 2005 which empower the Minister to make regulations governing the payment of SWA to people pending an appeal but from what I know, no regulations have ever been made. And because it's a conditional provision, you can't compel the Minister to take action. Which is problematic, because some people get it pending an appeal and others don't.

Interviewer:

It does seem that it is usually given, but if as one person suggested a Polish national is waiting one year for an appeal and isn't given it, they may simply leave.

Interviewee:

Correct. I mean that's part of the problem. It is a significant encroachment on free movement rights If you don't have a system that can respond quickly. I can tell you anecdotally that there are people who've ended up homeless because the presiding officer got the law wrong and then didn't give the payment. They were waiting maybe 6-8 months for the SWAO to make a decision. Sometimes a year. But the problem is that whilst you could argue that it's not in compliance with EU law and good administrative practice, there are remedies available, such as an order of mandamus compelling the Department to give them a prompt hearing. Alternatively they can judicially review the first instance decision maker on the basis that there's an error of law. They can even look for an injunction if they wanted to. So there are remedies available. And those remedies are sought by a lawyer on a pro bono basis.

Interviewer:

Would EU nationals be the main category of people you would encounter, or would you often come across cases involving third-country nationals or other kinds of immigrants?

Interviewee:

I definitely find cases with non-EU nationals, and even quite a few cases involving Irish nationals. In a number of cases taken 6-7 years ago in particular, there were third-country nationals being treated appallingly. So for example, someone brought an appeal for SWA through the old HSE procedure and then to the ordinary appeals process. In the intervening period, their landlord had been given enough time to bring them to the PRTB and have them evicted. They ended up homeless.

Interviewer:

Are there certain issue or peculiarities that apply to all migrants or to everyone in attempting to use the social welfare system?

Interviewee:

Different areas will often impact on groups differently. At the moment there are a number of cases involving Child Benefit for non-EU mothers of Irish citizen children. Have you seen those cases? What's your opinion on those by the way? As a matter of interest.

Interviewer:

I would have reservations about some, given the discretionary nature of the scheme administered by the Department of Justice under the *Zambrano* ruling. The Department

tends to be more generous in granting them lawful residence but there's potential issues, for now, with whether or not they have an explicit right where there's an EU spouse or parent who can be primary caregiver. And then that feeds into social welfare entitlements.

Interviewee:

Well in some cases the father made the application for Child Benefit but was refused on the basis that it attaches to the mother as she has permanent custody. The father might have some degree of access, but the mother retains the primary custody. In some cases, 100%, or virtually all of the time. So there's no rule contained within the statutory instrument for fathers in those circumstances. Remarkably when you compare it to EU law, the father as an EU national working in the State would have access even if his children were not living with him. In relation to your point that you raised there in saying that there is quick discretionary grant of leave to remain, if the person is claiming *Zambrano* rights, it's not discretionary. They have to be given a right to reside and a right to work. It's actually not a discretion in my opinion. They made it clear that a person couldn't if it meant the children had to leave the European Union.

Interviewer:

Zambrano has been ring-fenced in many ways, and so I would always be cautious in cases which fall at the margin.

Interviewer:

Even though EU law can be quite complex, would you still find that EU citizens will have clearer rights than non-EU nationals in terms of social welfare here?

Interviewee:

Well you do have Regulation 883/04 applying to third-country nationals, but as you know, only when they're exercising free movement within the EU. Does Directive 2004/38 apply? Yes, if they're exercising their intra-EU free movement rights legally. When you look at the *McCarthy* case, it doesn't apply to third-country nationals in the absence of free movement. They're at the mercy of national law and they're going to get very limited assistance from EU law.

Is that what you're finding?

Interviewer:

There's also the Directives for third-country labour migration that we've almost uniformly opted out of, and those would be helpful from what I've found. They're not perfect, but they have clear rights and don't require an exercise of free movement to create a right to social security in line with Regulation 883/04, and so on.

Interviewee:

Well there is Directive 2004/83 on refugee status and subsidiary protection. It's been recast but we only opted in to the original. Article 23(2) of it states "Member States shall ensure that family members of the beneficiary of refugee or subsidiary protection status, who do not individually qualify for such status, are entitled to claim the benefits referred to in Articles 24 to 34, in accordance with national procedures and as far as it is compatible with the personal legal status of the family member. In so far as the family members of beneficiaries of subsidiary protection status are concerned, Member States may define the conditions applicable to such benefits. In these cases, Member States shall ensure that any benefits provided guarantee an adequate standard of living."

There's essentially an obligation on Member States to, if one person within the family gets refugee status, even if the other people have their status hasn't yet been determined, that they shouldn't be deprived of the social welfare entitlements that would come from the one person who did get refugee status.

Interviewer:

Yes, it has been pointed out that if the Department of Social Protection is made aware of this, then they'll apply it. But that often it's not the default position.

Interviewee:

The problem is that if the child gets it refugee status, that's more difficult. In the *Agahah* case, the Irish position is also different from the U.K. position, in the U.K. they'll backdate child benefit.

Now obviously there's a degree of flexibility in that Directive for Member States. But you know, it's limited by statute and international law.

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