

Conceptualising the Irish Immigration System for Third-Country Migrants

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1. IRELAND IN CONTEXT

Ireland has always maintained a difficult relationship with migration. For most of its history, it has been a country of emigrants with a declining population (Sinnott 1995, Figure 1.1). This outward migration was so significant «that the electorate of the early and mid-1960s was pronouncedly middle aged» (Sinnott 1995, 5) and among those that remained roughly 30-40% were self-employed or agricultural employers and over 50% were involved in agriculture in some manner (Coakley, Gallagher 2005, figure 2.1). Less than 10% of the population represented a well-educated, upper middle-class strata (Sinnott 1995, figure 1.4). Secularisation was equally low, with data from the early 1970s demonstrating that weekly mass attendance was still above 90% (Coakley and Gallagher 2005, figure 2.2). The resulting society was one which was largely homogenous, despite the existence of indigenous minority groups such as the Travelling Community (Doyle 2004, 20) with whom the State has had an uneasy relationship based on their failure to recognise their distinct ethnic, social and cultural values.

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Scholars have long argued that as a result of this isolation and lack of social and economic development at a national level historically, Ireland has had great difficulty in reconstituting itself as a society which celebrates multiculturalism and diversity (MacEinri 2005; Fanning 2002; Fanning 2009).

In principle, Ireland would also have been forced to reexamine its own identity and views on and immigration with its accession, along with the United Kingdom, to what is now the European Union (EU) in 1973. The free movement of persons remains a fundamental cornerstone of EU law through Articles 18-21 (on the rights of citizens) and 45 (on the rights of workers) of the Treaty on the Functioning of the European Union (TFEU). Yet even in 2002, almost 30 years after joining the EU, Ireland's largest group of immigrants came from the United Kingdom and exceeded the next largest group of non-EU nationals by a factor of 10 (Gilmartin 2013). French and German citizens equally represented 15% of this total, demonstrating that even among EU nationals (Gilmartin 2013), the nature of those arriving in Ireland remained largely homogenous. Similarly, despite no executive since its accession to the Union demonstrating a marked degree of "euroskepticism" or negative attitudes towards further integration, the Irish State and its representatives have never shown a strong propensity to engage at an EU level. Instead, the government has constructed a passive relationship based on what one former Minister for Justice considered to be one of mutual self-interest¹. The result is that the State has been happy to reap the benefits of EU membership so long as the costs do not outweigh them.

What seems instead to have led to a re-evaluation of Ireland's position on immigration was its first continuous influx of refugees during the mid 1990s (Lentin 2007; White and Gilmartin 2008). This in turn led the State to legislatively implement the relevant United Nations Convention (1951 and 1967 respectively) for the first time through the Refugee Act, 1996, however within a short period of time the executive were arguing that subsequent legislation focused on the State's control of third-country migration flows into Ireland was necessary in light of the "new realities" of immigration within Ireland (O'Donoghue 1999). This can be seen in the number of legislative provisions which focus on issues of control, including trafficking², and those focused on the liability of carriers³ or deportation and detention⁴. This has also fed back into the State's relationship with the EU, and its continually evolving competence to legislate in the fields of third-country immigration and asylum. These competences are now formally established within Articles 107-109 TFEU, and allow the Union to adopt legislative

¹ Michael McDowell, 18th June 2001, quoted in the *Irish Times*, 19th June 2001.

² Child Trafficking and Pornography Act, 1998; Illegal Immigrants (Trafficking) Act, 2000; Criminal Law (Human Trafficking) Act, 2008.

³ Immigration Act, 2003, Section 2.

⁴ Immigration Act, 2003, Section 5 as amended by the Immigration Act, 2004, Section 16(8); Section 34 of the Civil Law (Miscellaneous Provisions) Act, 2011 amending Section 11 of the Immigration Act, 2004.

measures which will lay down common standards for the entry of such persons, as well as control measures against unlawful migration and border crossings. Both Ireland and the United Kingdom have at their discretion the ability to “opt-out” of any legislation in this field based on their potential to negatively impact on the CTA operating between both States, although it remains possible for both States to do so for ancillary reasons.

The purpose of this contribution is to provide an overview of how the Irish legal system governs third-country migration. It is anchored on a discussion of the two primary characteristics of the Irish immigration system: ministerial discretion and as the propensity to operate large sections of it on an almost purely administrative basis. This inevitably leads to circumstances within which a migrant’s rights and personal welfare are not the primary focus of the law in this area. In order to highlight these points, the contribution compares the Irish regime for long-term residence to the Long-Term Residence Directives⁵, and the Critical Skills Employment Permit to that of the Blue Card Directive⁶.

The contribution will be structured as follows. It will firstly discuss the relationship between Ireland and the EU with an particular emphasis placed on the area of third-country migration and on the opt-outs created by virtue of Ireland’s Common Travel Area with the United Kingdom. Then it will briefly look at the general mechanics of the Immigration Acts and the stamp system for residence before exploring the right to long-term residence at both an Irish and Union level. Section 4 will engage in a cursory examination of the employment permit system for third-country labour migrants and how the Irish and EU approaches differ in relation to highly-skilled workers. Finally, it will offer some concluding remarks which suggest that the relationship between Irish and EU law, and of Ireland’s decision to opt-out of the majority of EU legislation in the field of migration may merely be a means of ensuring that these characteristics are left unchanged and to the benefit of the executive.

2. CONCEPTUALISING IRISH IMMIGRATION LAW IN LIGHT OF EU MEMBERSHIP

In light of the gradual expansion of the Union’s competences within the areas of immigration and asylum, both Ireland and the United Kingdom sought remove themselves from the scope of the legislation enacted under these provisions. This discretion to ‘opt-out’ from the application of legislation enacted under Articles 77-79 TFEU as contained within Protocol 21 TFEU⁷ allows both States to

⁵ Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

⁶ 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.

⁷ See also Protocol on the Application of Certain Aspects of Article 26 TFEU, art. 3.

impose restrictions on internal migration from other Member States⁸ where it relates solely to the common border/travel area⁹, and to choose which new legislative acts to adopt under each of these Articles. Article 3(1) of Protocol 21 allows Ireland or the United Kingdom to notify the Council within three months of the proposal of a new legislative act that it wishes to take part in it, with the result that it can choose where and to what extent it takes part within the overall EU legal frameworks relating to immigration and asylum matters. Denmark operates a similar opt-out in these material fields¹⁰, but it is also a signatory State to the Schengen Convention et al., meaning that its ability to limit internal movement is further restricted again.

The justification for these opt-outs is generally tied to the operation of the Common Travel Area in place between Ireland and the United Kingdom. Although it exceeds the material scope of this chapter to examine it fully, the CTA facilitates a right to travel freely between the United Kingdom and the Republic of Ireland without a passport or onerous restrictions for citizens of both States. It was adopted in 1922 when Ireland became a dominion of the UK, and possesses no constitutional or formal legal basis. Instead it operates at an administrative level (Ryan 2001), and allows both States to navigate the complex social and political realities surrounding Northern Ireland in particular. In many respects the CTA operates in a similar manner to the Schengen Area¹¹, which allows for borderless travel between the majority of EU Member States as well as certain additional signatory States. Due to the politically sensitive nature of Northern Ireland and the common border operating between both it and the Republic of Ireland, The Irish State sought an exemption to the Schengen rules based on its supposed threat to the sanctity of the CTA¹². The UK by comparison, expressed concerns over the removal of border checks and its impact on illegal migration¹³, with Ireland countering that while it did not necessarily agree with this approach¹⁴, it was politically necessary to ensure parity with the UK position and to seek an

⁸ *Ibid.*, art. 1.

⁹ *Ibid.*, art. 2.

¹⁰ Protocol on the Position of Denmark, arts 1 and 2.

¹¹ Decision 1999/436/EC determining the legal basis for each of the provision or decisions which constitute the Schengen Acquis [1999] OJ L 176/19, Article 1; Schengen Implementing Convention, 1990, [2000] OJ L239,19; Regulation (EC) No 562/2006 establishing a community code on the rules regulating the movement of persons across borders (Schengen Border Code), [2006] OJ L105/1.

¹² 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.

¹³ Parliamentary Debates (Hansard). United Kingdom: House of Commons. 12 December 1996. col. 433–434.

¹⁴ Minister for Justice, Nora Owen, Dáil Debates volume 450 column 1171 (14 March 1995).

opt-out from Schengen¹⁵. This was subsequently incorporated into the Treaty of Amsterdam in three separate protocols, which allowed the UK and Ireland to opt-in to certain instruments underpinning the Schengen system with the consent of the other Schengen Area Members.

However, this opt-out cannot be entirely divorced from Ireland's own engagement with the EU as a set of supranational institutions and as a distinct legal order. Membership of the EU was at first seen as integral to the economic development of the Irish State, and its benefits were primarily couched in these terms. It also had the additional benefit that it decreased Ireland's reliance on trade with the United Kingdom, and consequently their political reliance on them (Laffan and O'Donnell 1999, 156). By the turn of this century, there were suggestions that the relationship between Ireland and the EU had matured into something more complex and sceptical (Gilland 1999). As the former Minister for Justice Michael McDowell argued, this change would be explicitly based on enlightened self-interest, necessitating a periodic cost-benefit analysis based on the economic costs of further legal and constitutional changes in light of the ongoing benefits of Union membership¹⁶. This increasingly acknowledged skepticism had little to do with the Union's policies or the ideological differences that might exist between Ireland and the EU: Ireland has primarily been characterised as strongly centrist in its outlook, with no strong ideological divides or agendas existing at a governmental and societal level. Instead, it was an open acknowledgement of the "conditional" nature of Ireland's acceptance of further integration.

The Irish government had to some degree always expressed a lack of interest in joining the burgeoning Common Foreign and Security Policy being developed by the EU, based partly on Ireland's status as a neutral State (Laffan 2001, 8). This meant that Ireland generally sought to ensure that the Common Foreign and Security Policy, and any area dealing with the external sphere did not impinge on that neutrality, whilst simultaneously taking a more active role as a sovereign nation in diplomatic affairs (Tontra 2002, 43). That this was soon followed by the opt-out from the application of the Schengen Area, and the differing reasons put forward by both Ireland and the UK for doing so would not be damaging by itself. However, there have been multiple occasions since this time that both Ireland and the UK have acted in ways that could threaten the CTA themselves rather willingly, or would at the very least call the sanctity of it into question.

Next, at different points in time 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, policy cooperation, and policy relating to immigration, asylum and visas was in the best

¹⁵ Minister for Justice, John O'Donoghue, Dáil Debates volume 501 column 1506 (9 March 1999).

¹⁶ Michael McDowell, 18th June 2001, quoted in the *Irish Times*, 19th June 2001.

interests of the United Kingdom¹⁷, and they chose to take part in the Schengen Acquis governing other headings within the Schengen Area¹⁸. Ireland also sought to take part in the Acquis, but did so three years after the United Kingdom, and has yet to have this formally recognised¹⁹. 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 (Shatter 2013).

That both countries have effectively chosen to integrate these provisions asymmetrically demonstrates the limited impact Schengen would have on the CTA, and that there are other interests involved in choosing what measures to enact, and which to ignore. Instead, it goes towards another form of enlightened self-interest, where it is in the best interest of both to be able to choose where it participates rather than being uniformly bound by it. The net consequences of this approach is that Ireland has been to some extent able to use the CTA as reason for not participating in an area of EU law for which it was already somewhat unwilling or uninterested in participating. It could then initiate legislation at a national level within this field, that of third-country migration, which would gain it political capital nationally and ensure that any resulting system remained firmly within their control to the detriment of the migrants in question.

3. THE IMMIGRATION ACTS AND STAMP SYSTEM IN BRIEF

The conditions governing the entry of persons from outside the EU/EEA are primarily established within the Immigration Acts.

For example, Section 17 of the Immigration Act, 2004 grants the Minister for Justice the power to require persons from specific countries to obtain a visa prior to landing in the State. It 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, a transit visa when passing through Ireland, as well as granting the Minister the power to issue new orders or revoke or amend this section to re-

¹⁷ 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, retrieved 21 February 2010, «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».

¹⁸ 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).

¹⁹ 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.

flect changes necessary to pursue these objectives. Such orders primarily tend to list the countries for whom its nationals must possess a visa, or who are not required under Irish law and have had that requirement waived²⁰. The Acts also govern the granting of permission to land²¹ for all those who do not intend to claim asylum²², the removal from the State for persons refused this permission²³, the execution of a deportation order²⁴, and orders excluding a person from entering the State²⁵.

From a more practical perspective, any person, even EU citizens, must present themselves at the Irish border along with valid travel documentation and a passport to the immigration official on duty²⁶. For third-country nationals, the immigration official may grant them “leave to land”, otherwise known as leave to enter the State, where they deem the requirements for this to have been met²⁷. For EU citizens, due to the rights existing under the Treaties, this constitutes a formal acknowledgement of their legal status due primarily to Ireland’s opt-out from the Schengen Area outlined above. Their leave to land in or enter the State is implicit outside of a very narrow set of exceptions. Immigration officials do however possess a wider degree of discretion to refuse entry to third-country nationals based on their delegated powers, although this cannot excuse clear or spurious errors in fact or in law²⁸. Even where a third-country national possesses a valid visa, the immigration official still retains the power to refuse entry to the State²⁹, and it must be noted that the process for granting a visa is equally subject to a high degree of discretion and a lack of formality³⁰.

²⁰ 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\(less%20than%203%20months\)](http://www.inis.gov.ie/en/INIS/Pages/short%20stay%20visas%20(less%20than%203%20months)).

²¹ Immigration Act, 2004, Section 4.

²² Refugees Act, 1996, Section 9.

²³ Immigration Act, 2003, Section 5 (as amended by the Immigration Act, 2004, Section 16(8)).

²⁴ Immigration Act, 1999, Section 3.

²⁵ Immigration Act, 1999, Section 4.

²⁶ 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)).

²⁷ Immigration Act, 2004, Section 4.

²⁸ *Nantharatnam v Minister for Justice*, Irish Times, October 4, 1983 (brought up in Hogan & White (eds), *Kelly: The Irish Constitution* (3rd ed) (Butterworths, 1994), 872); *State (Kugan & Elamkumaran) v The Station Sergeant, Fitzgibbon Street Garda Station* [1985] IR 658; High Court, July 1, 1985; *Gulyas and Borchardt v Minister for Justice, Equality and Law Reform* [2001] 3 IR 216; High Court, June 25, 2001.

²⁹ *VI v Minister for Justice, Equality and Law Reform* [2007] 4 I.R. 42.

³⁰ *T.A.R. and I.H. v Minister for Justice and Equality* [2014] IEHC 385; High Court, 30 July, 2014: it is only necessary that where a visa is refused the grounds for that refusal are given; *Ezenwaka &*

Once a third-country national has entered the State, it is necessary for them to register with Garda National Immigration Bureau (GNIB) or their nearest Garda station and present themselves to the Immigration Officer within that station³¹. They will be issued with a Certificate of Registration, which takes the form of a GNIB card detailing their immigration status and pay the required fee³². Persons must only register when they intend to remain in the state for a period exceeding 3 months in duration. There are broadly speaking eight stamps in total that can be given to third-country nationals by Immigration Officer representing the GNIB and along with their GNIB registration card, constitutes leave to remain within the State. These include³³: Stamp 0 (Temporary and Limited Permission)³⁴; Stamp 1 (permitted to remain on conditions that the holder does not enter employment unless the employer has obtained a permit, does not engage in any business or profession without the permission of the Minister for Justice and Equality and does not remain later than a specified date); Stamp 1A (permitted to remain in Ireland for the purpose of full time training with a named body until a specified date – Other employment is not allowed); Stamp 2 (permitted to remain in Ireland to pursue a course of studies on condition that they do not engage in any business or profession other than casual employment (defined as 20 hours per week during school term and up to 40 hours per week during school holidays) and does not remain later than a specified date); Stamp 2A (permitted to remain in Ireland to pursue a course of studies on condition that they does

Anor v MJELR [2011] IEHC 328, a Nigerian man was granted a visa in error and forced to return home. The Court only required that a fresh application be considered by the minister; *RMR & Anor v Minister for Justice, Equality and Law Reform* [2009] IEHC 279: «It is clear that the Minister is under no legal obligation to grant a visa – the grant or refusal of visas is entirely within his discretion and it is for the visa applicant to convince the Minister that he or she should be granted a visa. Government policy determines which foreign nationals require visas to visit or transit the State and whether they can work in the State. The inherent executive power and responsibility of the Government to formulate immigration policy is supplemented by statutory provisions including the Aliens Act 1935 and the Immigration Acts 1999, 2003 and 2004. There is at present no statutory framework for issuing visas» [para. 25].

³¹ 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.

³² Persons exempt from paying the fee: Convention Refugees; Persons who have been reunited 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 Dependents 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.

³³ Irish Naturalisation and Immigration Services, Stamps – Main Immigration <http://www.inis.gov.ie/en/INIS/Pages/Stamps>.

³⁴ 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>. Holder must receive no State benefits other than emergency medical assistance. Depending on the duration of their stay, they may require private medical insurance. Immigration status is sought in the normal way – there is no specific Stamp 0 application/approval process.

not enter employment, do not engage in any business or profession); Stamp 3 (permitted to remain in Ireland on conditions that they not enter employment, does not engage in any business or profession and does not remain later than a specified date); Stamp 4 (permitted to remain in Ireland until a specified date); Stamp 5 (Without Condition As To Time (WCATT))³⁵; and Stamp 6 (Dual Citizens) – Without Condition Endorsement³⁶. Those with Stamp 0, Stamp 2 and Stamp 2A are specifically barred from making recourse to State funds, meaning that they cannot draw welfare payments of any kind unless otherwise specifically provided for. Persons falling under Stamp 3 are also limited in what benefits they might access due to the fact that they are barred from engaging in employment. This means that they cannot accrue contributory benefits, and will also be limited by the Habitual Residence Condition with regard to the means-tested social assistance benefits they might access.

This residency stamp system operates on an administrative basis and falls within the discretion extended to the Minister, primarily by virtue of Section 4(5) of the 2004 Immigration Act. Section 4(7) of the same Act allows the Minister or their representative to renew or vary their permission to remain, but it does not emphasise at any point the rights of the migrant in question. The only obligation on the Minister or their delegated Immigration Officer is to consider the circumstances of the particular case before them (Section 4(10)). Section 9 then places an obligation on the migrant to register. It can therefore be considered a quite clear example of where the wide discretion granted to the executive is utilised to create an equally broad framework governing the relationship between the State and third-country migrants, with the emphasis unequivocally being placed on the rights of immigration officials.

3.1. Long-term Residence in Ireland and in EU law

The Immigrant Council of Ireland has highlighted that at present there is no legislation which establishes how long-term residence is granted, renewed, or revoked (Immigrant Council of Ireland 2001). Until 2005, there was in fact no system for granting anything other than short-term, temporary immigration statuses for third-country migrants unless they were considered to qualify for Stamp 5. This status presently requires that an individual has completed 8 years of lawful residence, having continually maintained a valid employment permit and having entered under an ordinary Stamp 1, a Stamp 4, where the individual has not acted as a temporary worker, or a Stamp 3 where the individual is not

³⁵ 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.

³⁶ Irish Naturalisation and Immigration Services, Without Condition Endorsement (Stamp 6), [http://www.inis.gov.ie/en/INIS/Pages/Without__Condition__Endorsement%20\(Stamp%206\)](http://www.inis.gov.ie/en/INIS/Pages/Without__Condition__Endorsement%20(Stamp%206)).

linked to 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 they might impact on this 8 years term. In 2005, it was made possible for third-country migrants to acquire long-term residence subject to certain administrative conditions being met. As with the similar status granted under Stamp 5, such persons need to have fulfilled 5 years (60 months) of continuous residence under either Stamp 1 or 4. Any period spent outside of the State has historically not considered towards this period (Immigrant Council of Ireland 2001, 16), and those who leave on a regular basis due to their ties in other countries will be 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 statuses with a difference of three years between their respective residency requirements is unknown. Equally unknown is what rights accrue to such persons by virtue of their long-term residence status due to the lack of information put forward by INIS. It is reasonable to assume that they have a greater right to remain than those who have shortened periods, but this has not been made overt or explicit. From a statutory perspective, there is nothing to suggest that they are less likely to be deported or have their status revoked on the same basis as those with other lesser residency periods. One example put forward by the Immigration Council of Ireland suggests that such persons can have their status revoked without a reason being given and be placed in a more precarious position once again (Immigrant Council of Ireland 2001, 19). Similarly, these statuses must be renewed whenever the holder obtains a new passport, which means there is an equal lack of clarity in what is required to maintain their status.

The High Court has confirmed the lack of a right to long-term residence even where a third-country national had complied with the necessary residency period and continuous employment. In *Muhammed Saleem v Minister for Justice, Equality and Law Reform*³⁷, the applicant had fulfilled the required residency period of 5 years necessary to apply for long-term residency and applied for the same. After 14/15 months of waiting, he brought forward judicial review proceedings regarding the delay in releasing a decision on his residency status. In the same month he was made redundant and became an undocumented migrant. When the Minister finally issued his decision on the matter, the application was refused on the basis that the applicant had not kept his permission to remain in the State up to date. The Court found against the applicant on the basis that there is no right to long-term residency and it is at the Minister's discretion. Lawful residence in the State and employment is always a necessary condition of being granted residency status also. The Court finally found that it was impossible to call the delay unreasonable.

³⁷ *Muhammed Saleem v Minister for Justice, Equality and Law Reform*, judgement of Mr Justice Cooke, 2nd June 2011.

The Minister retains an almost absolute discretion to refuse residence and naturalisation, with the only exceptions to this being where the process is unduly long, or where the refusal is not accompanied by a reason for the same³⁸. In such instances, the length must exceed what is considered to be patently unreasonable, and a reason must be given though it need not be detailed – it must simply provide some basis on which to challenge the decision or to allow for an amended application to be resubmitted having taken the grounds for refusal into consideration. The protections granted by even the Court in ensuring that the Minister does not misuse their power is therefore very limited, and consequently the level of procedural and rights-based certainty is lacking in almost every context where long-term residence is concerned. This does however ensure that the executive has the largest discretion possible in relation to granting and revoking it.

Under EU law, long-term residence is regulated by the Long-Term Residence (LTR) Directives. They allow third-country migrants legally residing in a host Member State a far greater level of certainty and protection than the parallel Irish system. These are Directives 2011/98/EU³⁹ and 2003/109 EC (amended by Directive 2011/51/EU)⁴⁰. A Freedom of Information request was submitted in order to discover why these Directives were not adopted in Ireland, but this request was still pending at the time of publication.

Directive 2011/98 establishes that its primary material scope includes those from outside the Union as being tied to economic activity by linking residence to work and then by establishing that any resulting rights arise from being a worker. Articles 3.b and 3.c. of Directive 2011/98/EU reiterate that the essential precondition for gaining the right to long-term residence is lawful residence, but also provides for admission into a host Member State to not be directly for the purposes of work, potentially expanding this scope even further. The likely intention of art. 3 is however not to disadvantage family members of working TCNs, who although not generating economic activity themselves, are symbiotically tied to the worker as part of a familial unit. Refugees and those beneficiaries of ancillary/subsidiary forms of humanitarian protection may now also benefit from the LTR Directive since 2011 due to a series of legislative changes⁴¹.

³⁸ *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.

³⁹ 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.

⁴⁰ 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.

⁴¹ Council of the European Union, “Proposal for a Directive of the European Parliament and of the Council amending Council Directive 2003/109/EC to extend its scope to benefi-

The procedures and conditions as laid down in the Directives maintain a degree of flexibility, whilst also providing for a far greater degree of certainty than those who must rely solely on the Irish system of residency. Art. 4.1 states that 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 (such as a TCN student becoming a researcher and then gaining a work permit, all of which amount to 5 years in total; this is further supported by Directive 2003/109, art. 3.2). This is significant as it means that an individual can leave for short periods without risking the loss of their accrued time, and also facilitates an individual who transitions from one status to another throughout their life to consider each of these statuses cumulatively. The Irish system by comparison, appears to penalise those who create short gaps in their registration periods. It also does not provide for statuses that fall outside of those governed by the limited number of recognised stamps to be used in accruing the necessary 5-8 period depending on which long-term residence status is being applied for.

The LTR Directives also create statutory rights to information, equal treatment, and procedural guarantees (respectively arts 9, 12, and 8) that are absent from the Irish system due it being almost entirely administrative. Similarly, there are provisions dealing specifically with the withdrawal and loss of status and protections against expulsion (arts 9 and 12) which would render situations like those put forward by the Immigration Council of Ireland largely moot.

Thus, while the EU system as governed by the LTR Directives may be imperfect, it easily surpasses that which is in place in Ireland. The Irish system lacks almost any concrete statutory basis which consider the best interests of the migrant in question, and potentially renders them more precarious than they would otherwise be if Ireland had chosen to adopt EU law in this area.

4. THIRD COUNTRY LABOUR MIGRATION AND THE EMPLOYMENT PERMIT SYSTEM

Prior to 2003, work permits were 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 visas were granted across multiple sectors, and often encompassing positions of employment with low or marginal levels of remuneration. Work permits bound third-country labour migrants to their employer for a term of one year. There was little or no policy on how this should system overall should operate (Ruhs 2005, 31).

ciaries of international protection” 8427/11 ADD1 REV1 and also European Parliament and Council, “Directive of the European Parliament and of the Council amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection” PE-CONS 66/10 leading to the new Recast Directive.

This change within the system took place at roughly the same time as the 27th Amendment to the Constitution, and was arguably facilitated by a growth in anti-immigrant sentiment within Eurobarometer polls. This amendment diluted birthright citizenship for children born in Ireland who did not possess at least one Irish citizen as a parent at the time of their birth. The executive at the time argued that this constitutional change was necessary to ensure that persons, particularly asylum seekers, did not come to Ireland in order to acquire citizenship through their Irish-born children while their claim was being assessed. This issue had however already been dealt with judicially, rendering the referendum and amendment unnecessary (Mulally 2004). Regardless, polls highlighted a growing distrust of such persons due to the belief that immigrants were attracted to Ireland due to its increased economic prosperity and many would take advantage of this in order to extract more generous social benefits, often referred to as the “benefit tourist” (Crepaz 2007). The executive merely seized upon this negative sentiment to instigate a series of reforms which centralised their authority while tackling these perceived threats.

With regards to the adoption of the Employment Permits Act, 2003 in particular, it formalised the procedure for granting work permits by introducing a State-controlled system that attempted to regulate the issuance of the same. 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 third-country nationals attempting to establish a business within Ireland. The 2003 Act has been amended substantively twice since that time⁴². Additional Acts and legal instruments, guidelines, etc., have been implemented, but these generally refer back to and support the original. Section 2 governs the employment of non-nationals, and specifically outlines that a permit is required to enter employment within the State, carry out work as a contractor within the state, or any arrangement with similar effect⁴³. Employment permits are defined legislatively as being granted by the relevant Minister⁴⁴, although in reality this is the purview of the Department of Jobs, Enterprise and Innovation on her/his behalf and with their consent⁴⁵. This provision is key to the functioning of the system as a whole, as it facilitates the use of a Minister’s near absolute discretion in issuing, refusing and administering the process. The Acts provide a sizeable definition of the addressee or person to whom these pieces of legislation apply,

⁴² Number 16 of 2006, Employment Permits Act, 2006 and Number 26 of 2014, Employment Permits (Amendment) Act, 2014. Although there was also Number 21 of 2013, 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.

⁴³ Employment Permits Act, 2003 (as amended by Employment Permits Act, 2006, Section 2, 2(1).

⁴⁴ Employment Permits Act, 2006, Section 8.

⁴⁵ This delegation of functions is dealt with in Section 36 of the 2006 Act.

with Section 3 defining the exclusionary zone for the Acts' application i.e. the nationals of certain states to whom it does not apply⁴⁶. 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 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, or where they deem the qualifications of the candidate to be incompatible with or unnecessary for the employment position they have been offered. 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 simply not been included with the application.

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 relevant Department, it must be borne in mind that the Acts overall do not place an emphasis on the rights of the applicants. The procedural safeguards that do exist within the Acts are proposed 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 relate the social, civil and political rights that will accrue to successful candidates, again reinforcing that the Acts are focused on the executive's control of the process, as distinct from the State's obligation towards such persons. These may exist elsewhere in additional legislation, but the diffusion of these rights points to the potential lack of a centralised structure and clarity within the employment permit system by design.

The 2014 Employment Permits Act did however see a marked expansion in the variety of employment permits available. Almost none of these implement EU law pertaining to third-country migration, as the Irish executive has decided to almost uniformly opt-out of any directives in this area. The only directive Ireland is currently bound by is the Researchers' Directive⁴⁷. This is in the process of being recast⁴⁸ due to perceived failures in its implementation across the EU Member States, as well as the general limitations of it as recognised by the

⁴⁶ Persons from a State which «becomes a member of the European Union after the passing of this Act».

⁴⁷ 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.

⁴⁸ 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)151 final – 2013/0081.

European Commission Impact assessment⁴⁹. The Recast Directive would see additional categories be added, as well as Students Directive be incorporated into it, and as Ireland has chosen to opt-out of this latter instrument, it is difficult to forecast whether or not the executive will simply choose to remain bound by the original Researchers' Directive alone.

The 2014 Act instead 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 them⁵⁰. The permits themselves are broadly provided for within the Acts, but are expanded upon in Statutory Instrument 432/2014⁵¹.

4.1. *Critical Skills v Blue Cards*

A Critical Skills Employment Permit is intended to «attract highly skilled people into the labour market with the aim of encouraging them to take up permanent residence in the State»⁵² That the Blue Card Directive establishes its primary concern as being highly-skilled employment of longer than 3 months in duration demonstrates how easily they align from this perspective. What is noticeable however, is that the Directive also emphasises the need to ensure comparative economic and social rights with EU citizens for such persons (recital 7), 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 inferred that the Directive, despite being commendable, was unnecessary in light of the existing scheme in place⁵³, a position which was subsequently adopted by the Government in choosing to opt-out. The justification therefore has nothing to do with Ireland's CTA with the United Kingdom, but rather that the existing standard was more amenable to the executive.

It should be noted that with regard to the overall intake of third-country migrants (Art. 8(2)), Member States maintain a discretion in relation to how many

⁴⁹ 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).

⁵⁰ Irish Naturalisation and Immigration Service, *Atypical Working Schemes*, www.inis.gov.ie/en/INIS/Pages/Atypical%20Working%20Scheme%20Guidelines.

⁵¹ S.I. No. 432/2014, *Employment Permits Regulations 2014*.

⁵² Department of Jobs, Enterprise and Innovation, *Critical Skills Employment Permit*, <http://www.djei.ie/en/What-We-Do/Jobs-Workplace-and-Skills/Employment-Permits/Permit-Types/Critical-Skills-Employment-Permit/>.

⁵³ 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>.

Blue Cards it chooses to issue to such persons. This means that if Ireland had concerns regarding how many third-country migrants could enter under the Directive and how this would effect the CTA, the Directive would not immediately impact upon this.

From a legislative perspective, there are a mere 5 provisions within Part 3 of SI 432/2014 (Sections 14-18) 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 heavily, those within the SI primarily deal with the name and purpose of the Permit, the minimum hours of work and 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 2009/50/EC which establishes that the salary of the individual in question must be 1.2-1.5 times the national average (art. 5), rather than emphasising the nature of employment that qualifies, granting 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 allows the Member States a discretion, in so far as it sets a standard or ratio and not a particular amount (Guild 2007, 5). Therefore Ireland could for example, implement the highest ratio, impinging on those who fall below that standard and it would mitigate once again the potential impact this would have on the national system.

As outlined above, the 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 couched in terms of the Minister and her/his department's discretion rather than the rights that are extended to persons applying for a critical skills permit. Comparatively, Article 7 of the Blue Card Directive outlines that Member States shall grant an applicant every opportunity to obtain a Blue Card, and outlines that the duration can be from one to four years in total. 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 (Articles 8 and 9). Article 11 then provide for specific procedural safeguards that Member States shall enact, such as that 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. Similarly, where the information given is insufficient to process the claim fully, the applicant must be made aware of this and what other forms of documentation are required. Despite the similarities between the Irish and EU legislation, the emphasis is entirely different, and under the latter, it is the individual that is the addressee of the legislation. It is as such, an important inversion in many ways.

As the previous subsection relating to the Long-Term Residence Directives has highlighted, the EU legislation in this area is far from perfect. However like them the Blue Card Directive and its minimum standards generally exceeds those set down by the comparative Irish system created through the Employment Permits Acts. It also highlights that the justification of the CTA in creating this opt-out has subsequently been used for other purposes, and that a consequence of this has been to create a far less migrant-friendly system, which demonstrates a high degree of deference towards the Irish State in this area.

5. CONCLUDING REMARKS

This chapter has attempted to outline the Irish immigration system in brief and concise terms. It has done so by primarily engaging with how Irish law relates to EU law, and the latter's growing competence within this material field and by looking more specifically at the legislation governing the entry and residence of third-country labour migrants from a comparative perspective.

Ireland's relationship with the EU in general terms can be characterised as one of low engagement. As a long-standing Member State, Ireland has never demonstrated a strongly integrationist attitude, nor has it attempted to engage with its citizens regarding the scope, importance, or general mechanics of the EU and its institutions. Instead, Ireland has sought to benefit from EU membership without bearing any significant costs being imposed on it. In particular, Ireland had often expressed a reticence towards the EU acting on its behalf on the global stage, albeit without making any overt criticisms of the Union in this regard. Instead, it has sought and been granted opt-outs in several key external fields under the Treaties based on the Common Travel Area shared with the United Kingdom, and the politically sensitive nature of Northern Ireland. Ireland has then sought to use these opt-outs to almost unilaterally avoid the imposition of EU legal instruments and rules in relation to third-country migration.

Although it is not possible to make a conclusive argument on this point, the chapter has argued that through the opt-outs from the Long-Term Residence Directives and the Blue Card Directive, Ireland has managed to operate a comparative legal system for third-country labour migrants which has granted the executive a far wider discretion in how it must treat such persons. The long-term residence system nationally is almost entirely administrative and as such is almost solely within the purview of the relevant Minister. At no point does this status appear to offer migrants within its scope a substantive right, or set of procedural guarantees similar to even the minimum or common standards laid down in EU law. Similarly, the executive chose to opt-out of the Blue Card Directive based on their assessment of the existing national system as being sufficient. through the use of these opt-outs Ireland has managed to maintain parallel systems which impose a far lower burden on the State, and speak to its conception of Union

membership as being a constant cost-benefit analysis driven by enlightened self-interest. Ireland will predominantly try to avoid new measures within this field at the Union level which place any additional burden on them, even if this would benefit the addressees of such laws. Given that the Irish executive has once again signalled that it will not take part in the recast Blue Card Directive (see European Commission 2016), this self-interest and ability to avoid higher burdens being imposed on it is likely to continue.

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