REPORT
on the Free Movement of Workers in Ireland in 2002-2003

Rapporteur: Mr John Handoll

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Introduction

The purpose of this Report is to identify developments in Ireland in relation to the free movement of persons in the years 2002 and 2003.

In many of the areas covered by the Report, there have been no, or only piecemeal, material developments during this two-year period. With the exception of a couple of areas which have been the subject of public debate and are considered below, the free movement rules have largely been taken for granted and there has been virtually no judicial activity in relation to free movement. The contrast with immigration and asylum policy – largely affecting third-country nationals seeking immigration for employment or claiming refugee status – is striking.

Research for the Report has centred on publically available sources, supplemented where necessary with discussions with relevant administrators. Part of the reason for the relative dearth of developments may be the fact that a liberal approach has generally been taken to free movement, so that issues of compliance with EC law have rarely arisen. Developments in relation to free movement, including important judgments of the Court of Justice, are doubtless reviewed, but there has been little perceived need to change administrative practice, let alone effect legislative change. Account should also be taken of the fact that a relatively small political class and civil service have to deal with a wide range of issues and thus tend to focus on what needs to be done. Work on comprehensive immigration and residence legislation for modern-day Ireland – which could include provision in relation to persons covered by Community law – has not yet progressed much beyond an initial consultation stage (at least as far as the public record is concerned). The legislative framework for entry and residence rights of free-movers will be reviewed in the context of the implementation of Directive 2004/38 on the right of free movement and residence and this will be considered in subsequent reports.

There are a couple of significant developments relevant to the free movement of persons.

First, with the imminent enlargement of the EU, early 2004 saw a debate on the desirability of allowing nationals of the new Member States full access to the Irish labour market from 1 May 2004. In contrast to most of the 15 existing Member States, Ireland has decided to allow full access, though reserving the possibility to apply the working permit regime if labour market conditions require this. However, apparently as a direct consequence of concerns that enlargement might result in increasing "welfare tourism", it has been decided that social welfare payments will, from 1 May 2004, be available only to those persons, irrespective of nationality, who have been habitually resident in Ireland for at least two years prior to the claim.

Second, following a Supreme Court judgment in January 2003, which decided that the Minister for Justice had the power to deport non-national parents of Irish citizen children, the Minister for Justice decided that he would no longer entertain applications for residency from third-country nationals on the basis of the Irish nationality of their children. In 2004, an amendment to the Constitution ending the entitlement of children of third-country nationals born in Ireland to Irish citizenship was approved by a refe-

rendum. An Irish Nationality and Citizenship Bill setting out the legislative basis for the grant of citizenship to children of non-nationals has been introduced and it is intended that it should be adopted by the Oireachtas by the end of 2004.

Third, especially in the area of public sector employment, there has been a renewed drive to promote the use of the Irish language for official purposes in the State. At first sight, this could, in time, lead to Irish being required for access to a wider range of public jobs than hitherto, which could affect the mobility of workers in this area. However, it appears that the main effect of the legislation will be the increased use of Irish in documentation and correspondence and this will be the subject of contracting-out arrangements, with no effect on mobility.

The Report principally addresses developments in 2002 and 2003. However, in certain areas, a short description of the legal framework in force at the beginning of this period is provided, since this may enable a better understanding of relevant developments. Reference is also made to developments in 2004, where not to mention these developments would be misleading: a more considered analysis of some of these developments will be provided in the Report for 2004.

Chapter 1
Entry, Residence, Departure

The Framework for Beneficiaries of the EU Rules on Free Movement of Persons

The European Communities (Aliens) Regulations 1977[1] and the European Communities (Right of Residence for Non-Economically Active Persons) Regulations 1997[2] establish a special regime in relation to the entry and residence of nationals of other EU Member States, and their dependants, under the relevant Community Directives. The regime has been extended to other EEA nationals and their dependants under the European Communities (Amendment) Act 1993.[3]

The 1977 Regulations, which have been amended from time to time to cater for new Member States and to make minor amendments, cover EEA nationals qualifying as self-employed persons, service-providers and receivers and workers, those who have been employed or self-employed in the State and have retired or been unable to continue working by reason of incapacity or disease, as well as dependants of such persons. The Regulations do not cover those born in the UK.

The 1997 Regulations cover EEA nationals who are students, retired persons and a residual class of non-economically active persons and dependants of such persons. The Regulations do not generally apply (save for the obligation to apply for a residence document for a third-country national dependent) to those born in the United Kingdom.

Each of the 1977 and 1997 Regulations contains provisions on leave to land (enter), application for a residence permit, the right to remain and departure, with these provisions intended to implement the relevant EC Directives.

The Immigration Act 2004

In January 2004, the High Court declared that certain provisions of the Aliens Act 1935 and the Immigration Act 1999 were unconstitutional and provisions of the Aliens Order 1946 were otherwise unlawful.[4] This resulted in the swift introduction of the Immigration Act 2004,[5] which expresses in primary statute law the main elements of the law governing the State's operation of controls on the entry and presence in the State of non-nationals. An appeal to the Supreme Court was largely successful,[6] but it was decided to maintain the Immigration Act 2004 in full force and effect.

The 2004 Act is also addressed in Chapter 6. However, it should be noted here that Section 2 of the Act expressly provides that nothing in the Act is to derogate from any of the obligations of the State and the treaties governing the European Communities, any act adopted by an institution of those Communities, the European Communities (Aliens) Regulations 1977 or the European Communities (Right of Residence for Non-Economically Active Persons) Regulations 1997.

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1 SI No. 393 of 1977.
2 SI No. 57 of 1997.
3 No. 25 of 1993.
4 Leontjava and Chan (Judgment not yet reported).
5 No. 1 of 2004.
6 DDP, Ireland and the Attorney-General v Leontjava and Chang [2004] IESC 39 (23 June 2004).

A. Entry

General

Those covered by the 1977 and 1997 Regulations who produce a valid national identity card or passport as evidence of nationality and identity may not be refused leave to land unless she/she suffers from a specified disease or disability or his/her personal conduct has been such that it would be contrary to public policy or would endanger public security to
grant him/her leave to land.

The Common Travel Area

The Common Travel Area arrangements enable citizens of the UK and of Ireland to move between their respective jurisdictions without the requirement to carry a passport and to establish themselves and enter the labour market in either jurisdiction as if they were citizens. The passport-free travel arrangements also apply as between these jurisdictions and the Isle of Man and Channel Islands. Under the Aliens (Amendment) (No. 3) Order 1997,[7] Immigration Officers are permitted to carry out checks on persons arriving in the State from Great Britain or Northern Ireland, in order to identify non-UK nationals who are not entitled to enter Ireland.

The Amsterdam Protocol and The Retention of Border Controls

In a Protocol agreed in the Amsterdam Treaty, Ireland (together with the UK) is able to retain internal border controls – notwithstanding Article 14 of the EC Treaty – as long as it retains the Common Travel Area. As least as far as Ireland is concerned, the stated reason for this is the need to protect the integrity of the Common Travel Area. Ireland has "reluctantly" gone this route and, in a Declaration to the Final Act of the Amsterdam Treaty, it has declared its readiness to participate in the EC regime to the maximum extent compatible with the maintenance of the Common Travel Area.

Text(s) in force

The Aliens (Visas) Order 2002 (SI No. 78 of 2002), the Aliens (Visas) (No. 2) Order 2002 (SI No. 509 of 2002) and the Aliens (Visas) Order 2003 (SI No. 708 of 2003)

For the record, the Aliens (Visas) (No. 2) Order 2002, which replaced the Aliens (Visas) Order 2002 specifies the classes of persons who are required to have a transit visa and the classes of persons who are exempt from Irish visa requirements. The States whose citizens do not require an Irish visa include all current EU Member States (in the case of Slovakia, this covers holders of a valid diplomatic or official passport).

The Aliens (Visa) Order 2003 amended the second 2002 Order to add Slovakia to the list of States whose citizens do not require an Irish visa.

7 SI No. 277 of 1997.

Immigration Act 2004 (Visas) Order 2004 (SI No. 56 of 2004)
Section 17 of the Immigration Act 2004 (see above) provided a new statutory basis for the making of visa orders. The Immigration Act 2004 (Visas) Order 2004 – which replaces the 2003 Order - specifies the classes of persons who are required to have a transit visa and the classes of person exempt from Irish visa requirements. The States whose citizens do not require a visa include all 25 EU Member States, the remaining EEA Member States and Switzerland.

European Communities and Swiss Confederation Act 2001 (Commencement) Order 2002
In May 2002, the Minister for Foreign Affairs signed an Order bringing the European Communities and Swiss Confederation Act 2001 into force. This gives force in law in Ireland to a number of sectoral Agreements between the EC and Switzerland signed in 1999, including the Agreement on the Free Movement of Persons.

Under Section 3 of the 2001 Act, the provisions of the European Communities (Aliens) Regulations 1977 and the European Communities (Rights of Residence for Non Economically Active Persons) Regulations 1997 apply to Swiss nationals and their dependants in the same way as they apply to EEA nationals and their dependents.

Immigration Act 2003 (No. 26 of 2003)
Section 2 of the Immigration Act 2003 introduced provisions on the liability of carriers.[8] If a vehicle arrives in the State from a place other than Great Britain, Northern Ireland, the Channel Islands or the Isle of Man, the carrier concerned must assure that all persons on board the vehicle seeking to land in the State do so in accordance with any instructions from an immigration officer. The carrier must also ensure that each non-national on board the vehicle seeking to land has a valid passport or other document that establishes his/her identity and nationality and that anyone required to do so by law has a valid Irish transit visa.

Draft legislation, circulars, etc.
During 2002 and 2003, work was ongoing on the preparation of an Immigration and Residence Bill intended to repeal the Aliens Act 1935 and replace it with a comprehensive and modern legislative code covering the full range of the law on immigration and residence in Ireland.

Judicial practice
No recent cases in relation to the entry of persons covered by the EU, EEA or Swiss Agreement provisions have been found.

Miscellaneous (administrative practices, etc.)
I am not aware of any recent administrative practices.

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8 The 2003 Act also contained provisions on asylum, covering the safe country of origin concept and streamlining procedures.

Recent legal literature
None. Reference should be made to a comprehensive guide published by the Immigrant Council of Ireland: Handbook on Immigrants' Rights and Entitlements in Ireland (June 2003).

B. Residence

The 1977 and 1997 Regulations contain provisions on applications for residence permits, the issue of a first residence permit and the validity of residence permits. Residents permit are optional and only a very small proportion of persons eligible to do so have in fact applied for a permit.[9]

Text(s) in force
European Communities and Swiss Confederation Act 2001 (Commencement) Order 2002. See A., above.

Irish Nationality and Citizenship Act 2001
The possession of a residence permit is not mandatory, reflecting the fact that the permit is only evidence of the right to remain.

However, in the context of calculating the period of residence in the State for the purposes of an application for a certificate of naturalisation, Section 16A(1) of the Irish Nationality and Citizenship Act 2001 (which came into force on 1 December 2002) has provided that no period will be counted in which the non-national was not the holder of a permit under the 1977 or 1997 Regulations. To this extent, it qualifies the permissive nature of the permit.

Draft legislation, circulars, etc.
None.

Judicial practice
None.

Miscellaneous (administrative practices, etc.)
None.
Recent legal literature
None. Reference should be made to a comprehensive guide published by the Immigrant Council of Ireland: Handbook on Immigrants' Rights and Entitlements in Ireland (June 2003).

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9 In practice, non-national residents will register for the PPSN number, giving entitlement to social welfare allowances.

C. Departure

There have been no reported cases of departure of persons covered by the free movement rules in recent years. Indeed, there appears to have been only one case in the past few years known to the Department of Justice, and this did not involve formal deportation proceedings.

Text(s) in force
Persons failing to qualify as free-movers will cease to be covered by the 1977 and 1997 Regulations. Those Regulations also provide for departure, and deportation, on grounds of public policy or public security (or, before the grant of a first permit, public health grounds). The Regulation appear generally to conform to Community law requirements.

Draft legislation, circulars, etc.
None

Judicial practice
None

Miscellaneous (administrative practices, etc.)
In light of the requirement of habitual residence, in effect since 1 May 2004, a person – whether a Community or third-country national – who is not eligible for benefit will not be left destitute, but will, if he or she is otherwise not entitled to stay in Ireland, be able to avail of voluntary return. This appeared to be the policy of the Government when the requirement was introduced.

Recent legal literature
None.

Chapter II
Equality of Treatment

Text(s) in force
General
The Equality Act 2004,[10] enacted on 18 July 2004, contains a series of amendments to the Employment Equality Act 1998, the Pensions Act 1990 and the Equal Status Act 2000, giving effect to the 2000 Equality Directives. In line with these Directive, amendments to the 1998 Act will allow positive action measures to be taken to prevent or compensate for disadvantages linked to grounds such as race (including nationality), supplementing the existing grounds of gender, disability, age and membership of the Travelling community.

The Social Welfare (Miscellaneous Provisions) Act 2004 has extended protection against discrimination to other grounds, including race.

Draft legislation, circulars, etc.
None.

Judicial practice

Campbell Catering v Rasaq.[11] In the *Rasaq* case, a Nigerian national had been dismissed for allegedly stealing bananas. She succeeded in a claim under the Employment Equality Act 1998 that she had been discriminated on grounds of her race.

In the determination, the Labour Court referred to the 1995 *Schumacker* case,[12] where the European Court of Justice held that it was settled law that discrimination could arise not only through the application of different rules to comparable situations but by the application of the same rule to different situations.

The Labour Court stated that it was clear that many non-national workers encountered special difficulties in employment arising from a lack of knowledge concerning statutory and contractual employment rights together with differences of language and culture. In the case of disciplinary proceedings, employers had a positive duty to ensure that all workers fully understood what was alleged against them, the gravity of the alleged misconduct and their right to mount a full defence, including the right to representation. Special measures may be necessary in the case of non-national workers to ensure that this obligation was fulfilled and that the accused worker fully appreciated the gravity of the situation and was given appropriate facilitates and guidance in making a defence. In such cases, applying the same procedural standards to a non-national workers as would be applied to an Irish national could amount to the application of the same rules to different situations and could in itself amount to discrimination.

10 No. 24 of 2004.
11 Labour Court Determination ED/02/52, 23 July 2004 (www.labourcourt.ie).
12 Case C-279/93 *Finanzamt Koein- Altstadt v Schumacker* [1995] ECR 1-225.

Miscellaneous (administrative practices, etc.)
None

Recent legal literature
None

Chapter III
Employment in the Public Sector

Nationality and Irish Language Conditions for Access to Public Sector Employment
Current Position
The Irish public sector is commonly divided into a number of parts. The current position for each of these in relation to nationality and Irish language conditions is set out below.

1. The Civil Service
Nationality. There is no specific legal provision requiring the possession of Irish nationality for access to posts in the Civil Service. However, Section 17 of the Civil Service Regulation Act 1956 (which has been superseded by the Public Service (Recruitment and Appointments) Act 2004 – see below) provides that the Minister for Finance shall be responsible for the regulation and control of the Civil Service as well as the fixing of the terms and conditions of service of civil servants and the conditions governing their promotion. The Minister may, for this purpose, make such arrangements as he thinks fit and may cancel or vary such arrangements. In addition, in relation to holding competitions, Section 16 of the Civil Service Commissioners Act 1956 provides that, subject to the consent of the Minister, the Commissioners may, in making regulations in respect of competitions, provide, amongst other matters, for "the confining of the competition to citizens of Ireland".

Recruitment to *professional posts* (e.g., engineers, accountants and lawyers) is fully open to nationals of the other EU Member States. Recruitment to administrative posts is, subject to certain posts in areas considered to be essential to the national interest (such as diplomatic service and security), open to nationals of the other EU Member States. These include posts in:

- The Department of the Taoiseach (Prime Minister);
- The Office of the Revenue Commissioners;
- The Department of Defence;
- The Department of Justice, Equality and Law Reform;
- The Department of Foreign Affairs.

Language. Since all citizens have the right to conduct their business with Government Departments through Irish or English, there have to be sufficient staff available in the Civil Service to provide a service to Irish-speakers. In most open competitions, applicants invited to interview may, where they wish, have an assessment made of their ability to communication effectively in Irish and English. Those who communicate effectively in both languages gain extra credit which could result in a higher ranking for a competition.

Certain posts – such as posts in the Department of Rural, Community and Gaeltacht Affairs – will require applicants to be fluent in both Irish and English.

2. Health Services

Nationality. There are no nationality restrictions on recruitment.

Irish Language. There is no general requirement that applicants for jobs in the Health Services speak Irish. However, all citizens have the right to conduct their business with Health Boards through Irish and, in order to ensure that there are sufficient staff available to provide a service to Irish-speakers, applicants invited to a competitive interview may have an assessment made of their ability to communicate in English and in Irish.

3. Defence Forces

Nationality. Irish citizenship, or specific approval of the Minister for Defence, is required for recruitment to commissioned officer ranks in the Irish Defence Forces.[13] It is necessary to be ordinarily resident in Ireland in order to enter below this level.

Irish Language. There is no statutory requirement for those seeking access to commissioned officer or other ranks to have Irish language qualifications. All members of the Defence Forces are to be instructed in giving and receiving, in the Irish language, such commands and directions as are necessitated by the routine tasks of their ranks and appointments.

4. Education Sector

Nationality. There are no nationality restrictions on recruitment.

Irish Language. Teachers trained in Ireland will possess Irish language qualifications. In relation to teachers trained in another EU Member State, a distinction is drawn between those seeking appointment as teacher in mainstream national schools and those seeking appointment in second level schools.

Mainstream national schools.[14] Teachers trained in another EU Member State, whose qualifications have been assessed and accepted by the Department of Education and Science, but who do not possess an appropriate Irish language qualification will be granted a five-year period of *provisional recognition* to teach in national schools. During this period these teachers will be required to work towards meeting the Department's Irish language requirements and must, where necessary attend training courses to prepare for the Irish language examination, *Scrúdú Cáilíochta sa Ghaeilge* ("S.C.G"). To satisfy the Irish language requirements, applicants must pass the S.C.G and provide certification that they have resided in the *Gaeltacht* (an Irish-speaking area) while attending an approved three-week course or its aggregated equivalent. Although teachers with provisional recognition may be appointed as permanent, temporary or substitute teachers, the period of employment may not exceed the period granted for provisional recognition. The basis for the requirement is that teachers in national schools should be qualified to teach the range of primary school subject through Irish. Where a teacher with provisional recognition is employed, the school must show that appropriate arrangements have been made to teach the Irish curriculum to the teacher's class: the Department has made in clear that "under no circumstances should such a class be deprived of competent Irish language tuition".

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13 Section 41 of the Defence Act 1954.

14 See Department of Education and Science, Circular letter 25/00.

Full recognition is granted to those teachers who have already satisfied the language and all other requirements. This currently applies to teachers who have successfully completed certain courses with an Irish-language content in St. Mary's College, Belfast.

The above rules apply to "mainstream" national schools. A scheme of "restricted recognition" – designed to ensure that the teacher qualified under another jurisdiction cannot teach in a mainstream class – applies to certain categories of special schools and classes.

Second Level Schools. The requirement that all second level teachers should have passed the oral component of the *Ceard Teastas Gaeilge* – with teachers coming from other Member States allowed a period of three years after appointment to achieve this – was removed for the generality of second level teachers in June 1999.[15] Teachers of Irish and those employed in schools in the Gaeltacht and where Irish is the medium of instruction continue to be required to be fully proficient in Irish. This change was seen as facilitating the mobility of teachers between the Republic and Northern Ireland, to the benefit of teachers and pupils and to the education systems in both jurisdictions.

5. Police (Garda Siochana)

Nationality. There are no absolute nationality restrictions on recruitment. However, there is no internal transfer process and applicants from other countries must go through the ordinary recruitment process.

Irish Language. In order to be admitted as a Garda trainee, the person concerned must have obtained at least a D grade in at least 5 subjects including Irish, English and Maths in the Leaving Certificate Examination of the Department of Education or in another examination which, in the opinion of the Minister for Justice, Equality and Law Reform, is of a standard not lower than the standard of that examination.[16] This is justified on the basis that "constitutionally the Irish language is the first language of the State and there is a requirement on Government Departments and public bodies to provide an Irish language service to its citizens.[17] It appears that the language requirement will be dropped for a forthcoming competition to recruit an additional 2,000 Garda trainees.

6. Local Authorities

Nationality. There are no nationality restrictions on recruitment.

Irish Language. There is no general requirement that applicants for local authority jobs speak Irish. However, all citizens have the right to conduct their business with local authorities through Irish and, in order to ensure that there are sufficient staff available to provide a service to Irish-speakers, applicants invited to a competitive interview may have an assessment made of their ability to communicate in English and in Irish.

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15 See Minister's Press Release of 24 June 1999, reprinted in Department of Education and Science "Registration Council: Application for Recognition of Qualifications for the Purposes of registration as a Secondary Teacher".

16 Garda Síochána (Admissions and Appointments) Regulations 1988, made under Section 14 of the Police Forces Amalgamation Act 1925.

17 See FAQ at www.garda.ie.

7. Commercial and Non-Commercial State Bodies
Nationality. There are no nationality restrictions on recruitment.

Irish Language. None, save for linguistic requirements attached to specific jobs – e.g., for working in the Gaeltacht.

Recognition of Diplomas for Access to the Public Sector
The Office of the Civil Service and Local Appointments Commissioners operates a *non-published* procedure for the recognition of diplomas. It is sufficient for a copy of the diploma itself to be provided. Contact will be made with appropriate professional bodies and colleges and a decision will be taken after taking all factors into account. It appears that some attempt is made to ensure uniformity of treatment. A non-standard fee may be charged and reasonable time-limits are set. In case of rejection, there is the possibility of an ex gratia administrative appeal. There does not appear to have been any recourse to the courts in relation to a refusal to grant recognition.

Obligation to Participate in a Competition which Gives Access to a Training and afterwards to a Post in the Public Sector (Burbaud)
The only relevant competitions appears to be those for posts as Trainee Auditors in the Office of the Comptroller and Auditor General. Those who have passed, or are due to pass, the first stage examinations of a recognised consultancy body are eligible to compete for the post of Trainee Auditor, which will involve "on-the-job" training and funding and leave for professional training and examinations. Once training is completed, the Trainee Auditor will be eligible for promotion to Auditor. I understand, though the position is not entirely clear, that there are no publicly advertised positions for Auditors, so that a trained Auditor from Ireland or another Member State will not be able to occupy a post as Auditor in the Office where he/she has not served as Trainee Auditor there.

Recognition of Professional Experience and Seniority acquired in another Member State
In some circumstances and for some posts, the starting pay of a new recruit to the Civil Service may be at a higher incremental point than normal in recognition of work experience already gained. The essential condition for such higher starting pay is that the prior experience is relevant to the new job and the country in which the experience has been obtained is not material.
In the primary and second-level teaching sectors, a higher starting point on the salary scale is awarded for up to seven years' teaching experience in other EU Member States, save for the UK where the seven-year ceiling is not applied. (The Department of Education and Science is currently considering representations from teacher unions for the removal of the seven-year limit.)

Text(s) in force

Official Languages Act 2003
This Act is intended to ensure better availability and a higher standard of public services through Irish, by placing a statutory obligation on Departments of State and public bodies to make specific provision for delivery of such services in a coherent and agreed fashion through a statutory planning framework, known as a "scheme", to be agreed on a three-year renewable basis between the head of the body concerned and the Minister. It provides for the preparation of guidelines by the Minister for public bodies on the preparation of draft schemes. Schemes remain in force for 3 years and thereafter fall to be renewed. The intention is that the renewal mechanism will be used to secure a significant improvement in the level of public services available through Irish over time, as demand requires.

The law also contains requirements in relation to language use in correspondence with public bodies, bilingual publications of certain key documents, use of Irish in the courts, etc. and makes provision for the certification and status of the Irish language version of place names.

Although the Act does not prescribe an Irish-language requirement for employment in public bodies, it could in time result in more demanding Irish-language requirements for access to public jobs.

Draft legislation, circulars, etc.

The New Framework for Public Service Appointments
The Public Service Management (Recruitment and Appointments) Act 2004 has repealed the Civil Service Commissioners Act 1956 and introduced a new framework for recruitment to the Civil Service and other public service organisations with effect from October 2004.

The new framework will consist of an oversight body to be known as the Commission for Public Service Appointments (“CPSA”) licensing a centralised recruitment body to be known as the Public Appointments Service (“PAS”) and, if they wish to recruit directly, Government Departments, the Garda Síochána, local authorities, health boards, vocational educational committees and other prescribed public services bodies.

It is envisaged that the new Commission for Public Service Appointments will prepare and publish codes of practice which will set out the principles to be put in place in respect of recruitment and selection procedures and selection for promotion, including the protection of the public interest and any specific requirements for a post to which applicants are being recruited.

Existing Regulations under the 1956 Act will deemed to be codes of practice. Codes of practice are to include requirements relating to, amongst other matters, “knowledge and ability to enter on the discharge of the duties of the post concerned” and “suitability in all other relevant respects for appointment to the post concerned”. The Minister for Finance may, from time to time, specify requirements he or she considers necessary for applicants to comply with in respect of any particular posts or class of posts speci-

fied by that Minister. The Minister for Finance is to be responsible for all matters relating to recruitment in the Civil Service, including eligibility criteria.

The new system is expected to be launched later in 2004, after the Bill has completed its legislative passage. It is not thought that the new structure will materially affect the position as far as the application of Article 39(4) of the EC Treaty is concerned.

Language. Under the 2003 Bill, the Minister for Finance is to be responsible for all matters relating to recruitment in the Civil Service, including “the use or knowledge of the Irish language in the Civil Service or any part of it”.

Legislative trends following procedures of infringement set in motion by the Commission

Not applicable.

Judicial practice

I am not aware of any relevant case-law in the recent past.

Miscellaneous (administrative practices, etc.)

None

Recent legal literature

None

Chapter IV
Family Members

Non-Nationals with Irish-Born Children

In its 1989 judgment in the *Fajujonu* Case,[18] the Supreme Court held that where non-nationals had resided in Ireland for an appreciable time and had become a family unit within the State with children who were Irish citizens, those Irish citizen children had a constitutional right to the company, care and parentage of their parents within that family unit. At first sight, and subject to the exigencies of the public good, the children were entitled to exercise this right within the State. The Court further held that, although the non-national parents could not claim any particular right to remain in Ireland, they were entitled to assert a choice of residence on behalf of their infant children, in the interests of those infant children. The Minister of Justice could require the family so constituted to leave the State, but "only if, after due and proper consideration, he is satisfied that the interests of the common good and the protection of the State justifies an interference with what is clearly a constitutional right".

The Supreme Court considered the matter afresh in January 2003, in relation to third-country national applicants for refugee status, with Irish national children.[19] It had been decided in relation to these applicants that their applications should be examined in the UK, under Article 8 of the Dublin Convention. Deportation orders were issued, taking into account the (limited) period of time the family had been in the State, the application of the Dublin Convention and the necessity to preserve respect for the integrity of the asylum and immigration systems. A majority of the Supreme Court held that the constitutional right of the Irish-born child to the company, care and parentage of its parents within the State was not absolute and unqualified. The Minister for Justice was thus entitled to deport the non-national parents, accompanied by their Irish citizen children. The Irish-citizen child would, once it was no longer necessary to maintain the family unit, be able to assert the full rights of an Irish citizen in order to enter and reside in the State. As a result of the judgment, the Minister declared that he would no longer accept applications for residency for non-nationals on the basis of their parentage of an Irish-born (and hence) Irish citizen child.

Under the Twenty-Seventh Amendment of the Constitution Act 2004,[20] which was approved by a referendum held on 11 June 2004, a new Article 9(2) has been introduced into the Constitution to provide that:

> "1° Notwithstanding any other provision of this Constitution, a person born on the island of Ireland, which includes its islands and seas, who does not have, at the time of the birth of that person, at least one parent who is an Irish citizen or entitled to be an Irish citizen is not entitled to Irish citizenship or nationality, unless provided by law.
> 2° This section shall not apply to persons born before the date of the enactment of this section."

18 *Fajujonu v Minister for Justice* [1990] 2 IR 151.
19 *A.O. & D.L. v Minister for Justice* [2003] 1 IR 1.
20 24 June 2004.

The possibility for children born in Ireland of non-national parents to possess Irish citizenship is the subject of Irish Nationality and Citizenship Bill 2004, which may be enacted by the Oireachtas by the end of this year.

The position of non-national parents of Irish citizen children (whether deriving their status from the Constitution or from statute) will have to be considered in the light of the *Chen* ruling of the Court of Justice.

Text(s) in force
See above.

Draft legislation, circulars, etc.
See above.

Judicial practice
Ouanoufi v. Minister for Justice, *Equality and Law Reform* (High Court, 10 April 2002)
A Nigerian national had sought asylum under a false name. He failed to participate further in the asylum process and worked without the requisite permit. A deportation order was issued in August 2001. He had an Irish citizen child with an Irish national in February 2002: although they notified their intention to marry, they did not do so. He claimed that the Minister failed to have regard to his domestic and family circumstances of the applicant when making the order. He also claimed that the Minister failed to protect and vindicate the rights of the child, by seeking to deport the father whilst the child as an Irish citizen remained in the State. The application was refused, inter alia on the basis that the rights of the child were not absolute and related to the family founded on marriage as recognised by the Constitution.

A.O. & D.L. v Minister for Justice [2003] 1 IR 1 (January 2003)
See above

Malsheva v Minister for Justice (High Court, 25 July 2003, unreported)
A Russian student was married to an Irish citizen in 2002 and was issued a visa based on this marriage to August 2003. A deportation order was made against her in April 2003. She successfully argued that the Minister had failed before making the order to take account of the family rights of the applicant and her Irish citizen husband recognised by Article 41 of the Constitution.

Animashaun v. Minister for Justice, Equality and Law Reform (High Court, 5 June 2003)
A Nigerian-born man was refused asylum. He sought to resist a deportation order on the grounds that he had a right of residence as the spouse of an EU citizen exercising free movement rights. His claim was rejected since the spouse could not be regarded as a worker in the State and no proof that the spouse was a worker was submitted despite adequate opportunity being given to the applicant.
F(P) and F(C) v Minister for Justice (High Court, 23 January 2004)

An Irish citizen was married to a Romanian national in November 2002. The Romanian national, who had arrived in Ireland under a false identity and had worked illegally, was the subject of a deportation order in May 2002 and she was deported in March 2003. The applicants sought injunctive relief and an order quashing the Minister's decision to refuse to revoke a deportation order. Relief was refused. The Court held, amongst other matters:

1. The right to reside in a particular place of the individual's choosing was not a fundamental or constitutional right of a citizen, whether married or not.
2. The husband was aware of his wife's precarious status in the jurisdiction and, following the UK Mahmood case (2001), Article 8 ECHR was not violated by the wife's deportation.
3. Aliens who were otherwise liable to deportation could not acquire an immunity by marrying an Irish citizen. There was no authority to support the proposition that an Irish citizen had a constitutional right under Article 41 of the Constitution to reside with his or her spouse in the jurisdiction.

Akram v. Minister for Justice, Equality and Law Reform ([2004] IEHC 33: High Court, 5 March 2004)
A Pakistani man had in 1987 acquired Irish citizenship by means of making a post-nuptial declaration under Section 8 of the Irish Nationality and Citizenship Act 1956. Shortly after the marriage, he went to Pakistan and "married" a second time, returning then to his wife in Ireland until their separation in 1990. He then moved with his second "wife" to Denmark, where they had a son in May 1993. In 1997, following his attempt to register his son as an Irish citizen, he was informed that the acceptance of his declaration of citizenship had been withdrawn and that he could not have a passport. This decision was quashed in 1999, on grounds of the breach of principles of natural and constitutional justice. On reconsidering the matter, the Minister decided that the applicant did not fulfil the statutory requirements for making a declaration of post-nuptial citizenship. He brought further judicial review proceedings in which it was held that (i) the applicant was unable, on grounds of res judicata in the earlier proceedings or issue estoppel, from raising the issue of the Minister's power to revisit and withdraw acceptance of a declaration of citizenship; and (ii) there was no breach of fair procedures.

Miscellaneous (administrative practices, etc.)
There have been a number of cases, reported in the national press, where non-nationals married, or engaged, to Irish nationals have been required to leave the State. As far as the application of free movement rules are concerned, non-national spouses of "free-moving" Irish nationals (see the *Carpenter* case) will not in practice be required to leave. However, where the Irish national is not regarded as a free-mover, the matter will be regarded as an internal one – not affected by Community rules – and the decision to deport will be made on that basis. The Irish courts have for long made it clear that – although family rights will be respected – there is no right of an Irish citizen to have the company of his/her non-national spouse in Ireland.

Recent legal literature

The emerging literature in relation to the change in nationality law will be reviewed in the 2004 Report.

Chapter V
Relevance/Influence/Follow-up of recent Court of Justice Judgments

There is nothing specific to report under this Chapter.

Chapter VI
General Immigration Law

Policies, texts and/or practices of a general nature with repercussions on free movement of workers (3rd country nationals' immigration for employment, Community citizens' priority, changes in general immigration law affecting also Community workers, etc.).

General

As a country of emigration for most of the past two centuries, Ireland has only relatively recently become a country of immigration. The emergence of a "Celtic Tiger" economy has resulted in the return of a significant number of Irish emigrants and the immigration of skilled and semi-skilled workers from the UK, other EU Member States and elsewhere. At the same time, Ireland has had to address the challenge of accommodating significant numbers of asylum-seekers and other immigrants (regular and irregular) in search of better opportunities.

In the field of asylum, Ireland participates in the Geneva Convention system and is bound by the international legal obligations arising out of that regime. It is also bound by international obligations on non-refoulement. Initially dealing with refugee applications on an administrative basis, specific refugee legislation – the Refugee Act 1996 – was adopted in 1996 and, after a rather fitful start, this legislation as amended (most recently by the Immigration Act 2003) provides the basis for a comprehensive statutory system of refugee protection. The costs involved in processing a large number of claims and providing support during the process – where a substantial proportion of applications are judged to be unfounded – has resulted in a tightening-up of procedures, which has arguably led to a reduction in the "pull" factor.

In the field of immigration, there is, in contrast to the asylum regime, a considerable element of ministerial discretion reflecting the judicially-endorsed belief that the "State must have very wide powers in the interest of the common good to control aliens, their entry into the State, their departure and their activities within the State". Subject always to international legal obligations, entry and stay entail executive discretion, subject to the prohibition of refoulement and to the observance of procedural and other conditions set out in the legislation and requirements of constitutional justice. Legislative change has been patchy, reflecting specific concerns (such as trafficking) or the need to replace constitutionally impugned legislation dating back fromthe days of the Irish Free State. Despite proposals to introduce new legislation on immigration and residence, the principal legislation governing entry and residence is the Aliens Act 1935 and – until very recently – the Aliens Order 1946 (as periodically amended). Following a 1999 Supreme Court ruling in the *Laurentiu* case that the deportation provisions under the 1935 Act were unconstitutional, the Immigration Act 1999 was passed, providing a new framework for deportation.

This was followed by the Illegal Immigrants (Trafficking) Act 2000, designed to combat the growing phenomenon of smuggling of migrants. The Immigration Act 2003 introduced carrier sanctions amongst other matters and the Employment Permits Act

2003 imposed sanctions on those employing persons without the requisite work permit.

In a much-debated Supreme Court judgment in early 2003, which involved cases of rejected asylum seekers and asylum seekers covered by the Dublin Convention each with Irish citizen children born in Ireland, it was held – by a five to two majority of the judges – that non-national parents do not have the right to remain in the State by virtue of the residence rights of their Irish national children.[21] Rather, the Minister for Justice, Equality and Law Reform was entitled to deport the parents (if necessary to be accompanied by the citizen child)[22] where he considered that this was in the common good on the basis of the need to preserve respect for the integrity of the asylum and immigration system. As a result of the judgment, the Minister no longer accepts applications for residency for persons on the basis of their parentage of an Irish-born (and hence Irish citizen) child. Of the estimated 11,000 persons subject to the possibility of deportation following the ruling, only around 1,500 have to date been given notice of deportation and a relatively small number actually deported. Several hundred persons concerned are nationals of the new Member States – mainly of the Baltic States – and have been contacted by the Department for Justice to establish whether they are entitled to remain on some other basis.

In January 2004, the High Court declared that certain provisions of the Aliens Act 1935, of the Aliens Order 1946 and of the Immigration Act 1999 were unconstitutional (case of *Leontava and Chang*). This resulted in the swift presentation of the Immigration Bill 2004, which may best be characterised as emergency legislation. Reflecting the belief that no aspect of the Aliens Orders would, as secondary legislation, be safe from challenge, the Immigration Act 2004 expresses in primary statute the main elements of the law governing the State's operation of controls on entry and presence in the State of non-nationals (see, generally, the clear Explanatory and Financial Memorandum with the Bill). In essence, the Act reflects the content of the Aliens Orders as they stood immediately prior to the High Court judgment, with certain changes and additional provisions consistent with modern legislative practice. The Bill was subject to criticism from various NGOs and others, and it was suggested that adoption of the Act would result in Ireland being in breach of its international human rights obligations. This debate will doubtless resurface in the forthcoming Immigration and Residence Bill.

Ireland does not fully participate in the EU immigration and asylum regime, and did not participate in the precursor Schengen system. In a number of Protocols agreed in the Amsterdam Treaty, Ireland (as is the UK): (a) is able to retain border controls – notwithstanding Article 14 of the EC Treaty – as long as it retains the Common Travel Area; (b) does not participate in measures under the Title on Freedom, Security and Justice, although it may opt in completely or to particular measures; and (c) is not bound by the Schengen *Acquis*, though it may request to take part in some or all of the *Acquis*. At least as far as Ireland is concerned, the stated reason for this "flexibility" or

21 *L & O v Minister for Justice*

22 The Irish citizen child will have to leave if it is desired to maintain the integrity of the family unit, but may return at a later stage by virtue of his/her citizenship. In a number of recent instances, the child has remained in the care of other persons.

“variable geometry” is the need to protect the integrity of the Common Travel Area. Ireland has thus “reluctantly” gone this route and in a Declaration to the Final Act, it has declared its readiness to participate to the maximum extent compatible with the maintenance of the Common Travel Area.

Ireland has signed up to most of the adopted asylum measures. It has, up to now, not opted in to the proposed reception conditions Directive (although the UK has opted in).

In relation to immigration, it has, together with the UK, not opted in to the Directive on the status of legally-resident third-country nationals, apparently because the free movement provisions in Chapter III of that Directive could affect the integrity of the Common Travel Area. It has, however, opted in to proposed Directives on the conditions of entry and residence for employment, researchers and on the facilitation of unauthorized entry, transit and residence. It has generally participated in the measures designed to combat illegal immigration.

Ireland has requested and been allowed to participate in some elements of the Schengen *Acquis*. It is, with the exception of carrier sanctions, not participating in the measures relating to borders, including visas (save with regard to measures relating to the format of visas and other documents).

Up to now, the Irish courts have tended to see fundamental rights protection in the context of the Irish Constitution rather than the ECHR. Ireland has, after a long delay, incorporated the ECHR into Irish law, albeit in a somewhat indirect way reflecting the specific characteristics of the Irish Constitution (European Convention on Human Rights Act 2003). This, and the increasing involvement of Ireland in the European Union regime, could result in a less insular regime than that which has evolved up to now.

In policy terms, there has been little relationship between the treatment of persons covered by Community law and the treatment of non-privileged third-country nationals. However, as explained in Chapter II, the fear that “welfare tourism” might increase after enlargement in May 2004 resulted in a “habitual residence” test being introduced for all regardless of nationality. This is a clear case of general migration concerns reducing the level of treatment of persons covered by Community law, albeit in a manner that is designed to be compliant with the EC rules.

Chapter VII
EU Enlargement

After the accession of the new Member States to the European Union in 2004, the provisions on the free movement of the workers will be subject to a transitional period. During the first 2 years of the transitional period, national measures will be applied by current Member States to nationals of the new Member States seeking employment. Following this period, a review will be held by the Commission and a further review at the request of the new Member States. At the end of the 2 year period, the current Member States must declare whether they will open their labour markets and apply Community law on the free movement of workers, or whether they will continue with national measures for the remaining period.

The reports for the years 2004, 2005 and 2006 should contain information about national law concerning access of workers from new Member States to the current Member States, including relevant statistics. In addition, the report that covers the end of the 2 year period after the date of accession should say whether the Member State is lifting the transitional arrangements or continuing with national measures.

Ireland has decided to allow access to work by nationals of all eight of the acceding Member States subject to the transitional regime[23] from the date of their accession in May 2004. Section 3 of the Employment Benefits Act 2003, which was designed to tighten-up the rules on access to employment for non-nationals, provides that the requirements for employment permits will not apply to nationals of the acceding Member States after enlargement. However, it is provided that, in accordance with the Treaty of Accession, the Minister for Enterprise, Trade and Employment may re-impose the requirement for a limited period after accession, if labour market circumstances so require.

It should be noted that nationals of the new Member States who had asylum claims pending at the date of accession were given the opportunity to withdraw their claims. In any case, they were, from that date, denied reception facilities.

23 That is, the acceding Member States, save for Malta and Cyprus.

Chapter VIII
Statistics

Statistics (flux of Community workers/members of their family in comparison to third country nationals)
There are no published statistics in relation to Community workers/family members.

For the year 2002, 244,261 non-Irish persons were usually resident in Ireland out of a total of 3,858,495. Of the non-Irish residents, 59.5% were nationals of other EU Member States and 77.5% of these being UK nationals.

Repartition by sex/branch/skills-qualifications/region
Statistics are available on the estimated number of persons aged 15 years and over classified by nationality and occupation, which break down Irish and Non-Irish (UK, other EU and non-EU) nationals into 9 categories. These are annexed to this Report.

Trends

UK and (other) EU Immigrants in Ireland 1996-2003 (2003 figure is preliminary)

Nationality	1996	1997	1998	1999	2000	2001	2002	2003
UK	83,000	84,000	86,000	82,000	84,000	90,000	74,000	69,000
Rest of EU	50,000	55,000	61,000	69,000	82,000	65,000	81,000	69,000
TOTAL	133,000	139.000	147.000	151,000	166,000	155,000	155,000	138,000

Chapter IX
Social Security

Social Insurance

Social Security and Third Country Nationals
On 28 March 2002, both Houses of the Oireachtas approved the State's opt-in to Council Regulation (EC) 859/2003 extending the provisions of Regulations 1408/71 and 574/72 to nationals of third countries.

Inapplicability of the New "Habitual Residence" Condition
The habitual residence rules which came into force on 1 May 2004 (see under Social Assistance, below) do not apply to social insurance payments.

Social Assistance
Social assistance payments are means tested and may be paid to people who do not qualify for social insurance benefits. Until May 2004, EU citizens who were in Ireland and had little or on income were eligible for Unemployment Assistance or Supplementary Welfare Allowance if they satisfied the means test and, in the case of Unemployment Assistance, were genuinely looking for work.

The Social Welfare (Miscellaneous Provisions) Act 2004,[24] which entered into force on 1 May 2004 has introduced a "habitual residence" condition for obtaining certain social assistance payments under the Social Welfare (Consolidation) Act 1993[25] (as amended). These are:

- Unemployment Assistance;
- Old Age Non-Contributory Pension;
- Widow's and Orphan's Non-Contributory Pension;
- Lone Parent's Allowance;
- Carer's Allowance;
- Disability Allowance;
- Supplementary Welfare Allowance, save for exceptional and urgent needs payments;
- Child Benefits (with certain exceptions).

Certain other payments – pre-retirement allowance, blind pension, deserted wife's allowance and prisoner's wife's allowance – have not been made subject to the habitual residence condition.

No concrete test of habitual residence has been laid down in the Act. However, a new Section 208 A of the 1993 Act provides that

> "it shall be presumed until the contrary is shown, that a person is not habitually resident in the State at the date of making thr application concerned unless he has been present in the Sta-

24 No. 4 of 2004.
25 No. 27 of 1993.

te or any other part of the Common Travel Area for a continuous period of 2 years ending on that date".

According to guidelines issued by the Department of Social and Family Affairs,[26] the condition applies to applicants regardless of nationality.

As far as the negative statutory presumption is concerned, the Department accepts that a short holiday of, say two to three weeks in each year, will be accepted as not breaching the requirement of continuous residence in the CTA.

Where the negative presumption does not apply, there is no corresponding presumption that a person living in Ireland or elsewhere in the CTA is habitually resident.

The term "habitually resident" is "intended to convey some degree of permanence and is intended to refer to a regular physical presence enduring for some time, usually (but not always) beginning at a date in the past and intended to continue for a period of time into the foreseeable future": "the Department continues that the term " implies a close association between the applicant and the country from which payment is claimed and relies heavily on fact" and that the "most important factors for habitual residence are the length, continuity and general nature of actual residence rather than intention".

The decision on whether a person is habitually resident will be made on the basis of applying five factors set down by the European Court of Justice in deciding whether a person is so resident.[27] These factors, which are not exhaustive, are:

- the applicant's main centre of interest;
- length and continuity of residence in a particular country;
- length and purpose of absence from a country;
- nature and pattern of employment in a country;
- the future intention of the applicant concerned as it appears from all the circumstances.

No single factor will be conclusive and the evidential weight to be attributed to each factor will depend on the circumstances of each case.

The Department has indicated that the following will/ or are likely to satisfy the habitual residency condition:

- any applicant, regardless of nationality, who has spent most or all of his/her life in Ireland (should satisfy the condition);
- an applicant who has been present in Ireland for two years or more, works there and has a settled intention to remain in Ireland and make it his/her permanent home (will satisfy the condition);
- persons who have lived in other parts of the Common Travel Area for two years or more and then move to Ireland with the intention of settling there (quite likely to satisfy the condition);
- most applicants who have been in Ireland for more than two years prior to application (likely to satisfy the condition in absence of contrary indications).

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26 www.welfare.ie/publications/hrc.html.

27 See Case C-138/02 *Collins v Secretary of State for Work and Pensions* (Judgment of 23 March 2004).

It appears that the "habitual residence" requirement does not prevent a worker from claiming that a given social assistance payment constitutes a "social advantage" under Regulation 1612/68. This would, for example, apply to Child Benefit which will be available to all workers irrespective of length of stay.

It appears that the Social Welfare Appeals Office is beginning to hear cases relating to the habitual residence requirement. No information is publicly available on its approach. However, some indications may be given in its forthcoming 2004 Annual Report, which will be available some time in 2005.

OAP Means Assessment
The Social Welfare Appeals Office Annual Report 2003 has considered the treatment of the arrears of a pension from another Member State in assessing means for the Old Age Pension (OAP).

All cash income received by by an applicant for OAP is assessable as means – including pensions received from other sources. Such pensions are treated as cash income.

Occasionally it may happen that an Old Age (Non-Contributory) Pensioner is awarded a back-dated entitlement to pension from another EU State. Under EU provisions the lump sum arrears of the other pension are transmitted through the Pension Services Office for appropriate follow up action. The question arises as to whether the arrears of pension should then be assessed for OAP means purposes as 'capital' from the date received by the pensioner or whether it should be treated as 'deferred income' and assessed retrospectively from the date of the award..

Having researched the matter the Appeals Officers concluded that the arrears should be treated as deferred 'cash income' and assessed retrospectively from the date of the award. This is in accordance with Rule 1(4) of Part II of the Third Schedule to the Social Welfare (Consolidation) Act 1993. The effect of this is to treat the OAP that was paid as having been paid "on account" for the other pension.

Use of Interpreters
The Social Welfare Appeals Office Annual Report 2002 has noted the increasing number of appeals where the use of interpreters is required. The numbers involved are still relatively few, since in quite a number of instances non-national appellants are accompanied by a fellow-national who speaks English and who will assist in translating and assisting the appellants' understanding of the matters at issue.

Relationship between Regulation 1408/71 and Regulation 1612/68
Nothing to report.

Supplementary pension schemes
Section 26 of the Pensions (Amendment) Act 2002 implemented Council Directive 98/49/EC (the "Mobility Directive") by requiring that benefit as defined in that Section be provided on a non-discriminatory basis as between members who leave service because they have gone to a another Member State and members who leave for another

reason. This Section came into operation on 1 June 2002, by virtue of the Pensions (Amendment) Act 2002 (Part 1 and Sections 6, 9 to 12, 15 to 28, 30 to 36, 40, 44, 50 to 55 and 59 (Commencement) Order 2002 (SI No. 276 of 2002).

The Occupational Pension Schemes (Disclosure of Information) (Amendment) Regulations 2003 (SI No. 4 of 2003) give effect to Article 7 of Directive 98/49, requiring that those responsible for the management of pension scheme provide information to members who move to other Member States to the same extent as is given to members who remain.

Recent national reports

As part of an EU-level analysis of national pension systems and their readiness for the challenge of ageing, Ireland submitted a *National Strategy Report* in September 2002.

Department of Social and Family Affairs, *Annual Report 2002*.

See Department of Social and Family Affairs Measures, *Proposed Measures and Other Developments in Relation to the European Communities and the European Union – 1 January 2003 to 30 June 2003* (submitted to the Oireachtas, August 2003).

Legal Literature

None.

Chapter X
Establishment, Provision of Services, Students

Establishment

General
European Comnmunities (General System for the Recognition of Higher Education Diplomas and Professional Education and Training and Second General System for the Recognition of Professional Education and Training) (Amendment) Regulations 2003.

These Regulations give legal effect to Council Directive 2001/19/EC insofar as it relates to the amendment of Council Directives 89/48/EEC and 92/51/EEC on the general system for the recognition of professional qualifications.

Doctors
The Medical Practitioners (Amendment Act 2003 (No. 17 of 2002) provides that account be taken of professional experience in assessing an application by a temporary register doctor for full registration on the register of Medical Practitioners. It also makes provision for internship registration and temporary registration to apply in a number of health care settings, and enables any EU citizen who has obtained his/her primary degree within the EU to apply for internship registration in Ireland. The Act came into operation on 1 May 2002 by virtue of the Medical Practitioners (Amendment) Act 2002, (Commencement) Order 2002 (SI No. 159 of 2002).

Medical Council Rules approved by the Minister in July 2002 prescribe a number of bodies in the other 14 Member States which may grant a Certificate of Experience and the period of employment required for the grant of such Certificate (SI No. 352 of 2003). Other Medical Council Rules prescribe the categories, duties and procedures applying to applicants seeking registration (SIs Nos. 286 and 287 of 2003).

Veterinarians
The European Communities (Recognition of Qualifications in Veterinary Medicine) Regulations 2003[28] implement Directive 2001/19/EC of the European Parliament and of the Council by extending the circumstances under which the Veterinary Council of Ireland is obliged to recognise or consider qualifications as a veterinary surgeon gained outside of Ireland. The Council is now obliged to recognise qualifications of a veterinary surgeon obtained in a Member State of the EU or a member of the European Free Trade Association not only, as before, where such qualifications are listed for the State concerned in the appropriate Annex to the Directive, but also, where the qualifications, while not listed in the Directive, have been certified by the State concerned as being of the standard required by the Directive and recognised as such by that State. The Veterinary Council is also now obliged to examine applications for registration from persons with a relevant Third Country qualification where such qualification has already been recognised by another Member State. These Regulations also consolidate into one in-

28 SI No. 288 of 2003.

strument all previous Regulations in relation to recognition of qualifications deriving from EU obligations.[29]

The European Communities (Recognition of Qualifications in Veterinary Medicine) Regulations 2004[30] extend the circumstances which the Veterinary Council of Ireland is required to take account of when examining applications for recognition from persons with a relevant Third Country qualification where such a qualification has already been recognised in another Member State. These Regulations also amend the mutual recognition arrangements to take account of the accession of the new Member States on 1 May 2004.

Pharmacists

The European Communities (Recognition of Qualifications in Pharmacy) (Amendment) Regulations 2003 (SI No 352 of 2003) implement Directive 2001/19/EC of the European Parliament and Council amending Council Directives 85/432/EEC and 85/433 concerning the profession of pharmacist.

The Regulations update the list of qualifications in pharmacy that are recognised for the purpose of free movement within the EC and regularise the position of pharmacists holding qualifications from other Member States whose titles do not correspond to those set out in the Schedule of Diplomas, Certificates and other Evidence of Formal Qualifications in Pharmacy. The Regulations also provide that reasons be given in cases where applications are rejected.

The European Communities (Recognition of Qualifications in Pharmacy (Amendment) Regulations 2004[31] give effect to amendments of Council Directive 85/433/EC on the mutual recognition of diplomas, certificates and other evidence of formal qualifications in pharmacy contained in the 2003 Accession Treaty. The Regulations add the qualifications that are awarded in the ten new Member States to the list of qualifications that are already recognised for the purpose of registration as a pharmacist in Ireland. The Regulations also set out the procedures to be followed in the case of applicants from some of these States[32] where the qualifications held do not comply fully with the qualification requirements laid down in the Directives.

Sam McCauley Chemists (Blackpool) Limited and Mark Sajda v. Pharmaceutical Society of Ireland et al (High Court, 31 July 2002)

This case concerned a pharmacy in Cork which sought to employ a qualified Scottish pharmacist as supervising person. The pharmacy had been open for less than three years and relevant national provisions effectively provided, in accordance with Article 2(2) of Directive 85/433/EC, that the mutual recognition provisions did not apply to such "new pharmacies", thereby preventing the employment of the Scottish-qualified pharmacist. The plaintiffs in this case impugned the validity of the national Regulations under Article 15.2 of the Constitution, which vests the sole and exclusive power of ma-

29 S.I. No. 391/1980, S.I. No. 323/1982, S.I. No. 159/1987, S.I. No. 253/1992, S.I. No. 268/1994.
30 SI No. 265 of 2004.
31 SI No. 187 of 2004,
32 Czech Republic, Slovakia, Slovenia and the three Baltic States.

king laws for the State in the Oireachtas, subject to the limitation in Article 29.4.5 in respect of laws enacted, acts done or measures adopted by the State which are necessitated by the obligations of EU/EC membership. The High Court rejected the applicants' argument. In applying the derogation for "new pharmacies", the relevant provisions simply repeated what was in the Directive and, since there was no change in the law in this respect, this could not be regarded as legislating.

Lawyers
The Solicitors (Amendment) Act 2002 (No. 19 of 2002) provides the basis for Regulations implementing Directive 98/5 (see below).

The European Communities (Lawyers' Establishment) Regulations 2003 (SI No. 732 of 2003) introduced the measures necessary to comply with Directive 98/5 of the European Parliament and Council to facilitate practice of the profession of a lawyer on a permanent basis in a Member State (and with related instruments applying to the other EEA member States and Switzerland). Provision is made for the registration of such lawyers, their professional activities, conduct and discipline and, subject to certain conditions, their admission into the professions of barrister and solicitor.

Architects
The European Communities (Establishment and Provision of Services in Architecture) (Amendment) Regulations 2003 (SI No. 686 of 2003) transpose into national law the technical amendments of the Architects Directive (Council Directive 85/384/EEC) made by Council Directive 2001/19/EC.

Establishment under the Europe Agreements: The Gonescu Case
The judgment of the Supreme Court in the *Gonescu* case, delivered on 30 July 2003,[33] considered the position of self-employed Romanian nationals under the Europe Agreement with Romania. The relevant Irish rules provided that Europe Agreement nationals who did not already have legal entitlement to live in the State had to make their applications for leave to enter and reside in the State as self-employed persons from outside the State. Persons already in the State, but who had no entitlement to reside there, were required to leave the State and make their application from their home country.

Referring to a number of cases decided by the European Court of Justice – in particular, the *Barkoci* case,[34] the Supreme Court held that the Europe Agreements, although entitling the persons concerned to apply for establishment rights from their own country, did not grant them a right to remain in the State in the face of a lawful deportation order, in order to pursue an application for establishment rights. This had to be done from their home country through normal channels.

33 *Gonescu v Minister for Justice, Equality and Law Reform, etc.* [2003] IESC 44.
34 C-257/99 *Barkoci* [2001] ECR I-6557.

Provision of Services

Nothing to report.

Students

Nothing to report.

Recent Legal Literature
Nothing to report.

Chapter XI
Miscellaneous

Studies, seminars, reports, legal literature (copies)

White, Robin, Nationality, Citizenship and the Meaning of Naturalisation, in (2002) 53 *NILQ* 288.