REPORT
on the Free Movement of Workers in Ireland in 2004

Rapporteur: 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 2004. Reference is also made to material developments in 2005.

Research for the report has centred on publicly available sources, largely found on the internet, supplemented where necessary with contacts with relevant administrators.

As with the previous report, 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. In contrast to free movement under the EC Treaty, attention has focused on the immigration and asylum field.

This may be about to change. Free movement issues have emerged in relation to access to social welfare benefits and, perhaps strangely, nationality policy. Ireland will also shortly have to implement the 2004 Residence Directive and it is likely that it will do so in the context of a fundamental reworking of its immigration and residence regime.

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 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 was decided that social welfare payments would, 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. The new arrangements were stated to be in full compliance with the principles set out in the *Collins* judgement, but the application of the new rules remains unpredictable and their application to certain benefits for workers from other Member States (including child benefit) is problematical. It is understood that the Commission has raised its concerns with the Irish Government in the context of possible Article 226 proceedings.

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 constitutional entitlement of children of third-country nationals born in Ireland to Irish citizenship was approved by a referendum. Consciously or not, this reflected the Opinion of the Advocate General in the *Chen* case that the availability of free movement rights available to children of third country nationals newly arrived in Northern Ireland, and to the supporting parent/s, could be avoided by removing the constitutional entitlement to Irish citizenship of all those born on the island of Ireland. With effect from 1 January 2005, children of third-country national parents born on the island of Ireland will generally qualify for *jus soli* citizenship if a parent has satisfied a minimum residence requirement.

The application of the public service exception in Article 39(4) of the EC Treaty to Irish public sector employment remains opaque. There is no list – in the legislation or even as a matter of administrative record – of posts reserved to Irish nationals (though it is hoped to obtain a list of recently advertised posts limited to Irish nationals, this will not be all-embracing). However, the bulk of the public service is open to nationals of other EU Member States. It is particularly noteworthy that access to the police force – *An Garda Síochána* – has recently been opened up not only to nationals of other EU Member States but also to

resident third-country nationals. In general terms, the lack of knowledge of Irish is not a significant obstacle for most public sector jobs: though there has been a renewed drive to promote the use of the Irish language for official purposes in the State, 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. One area of possible difficulty is that of mutual recognition of qualifications, where there is no published procedure and issues may be addressed on a somewhat ad hoc basis.

Chapter I
Entry, Residence, Departure

General

The Immigration Act 2004

The principal legislation governing the entry and the residence of non-nationals in the State has been the Aliens Act 1935 and the Aliens Order 1946 as amended, together with the regulations implementing the EU Rights of Residence Directives. In addition, the Immigration Act 1999 sets out the principles and procedures which govern the removal of non-nationals, including those covered by EU free movement provisions, from the State.

In a 1999 judgment, the majority of the Supreme Court in the *Laurentiu* case had decided that the section of the Aliens Act 1935 in relation to deportation was not consistent with the Constitution – since it infringed the sole and exclusive power of the Oireachtas to make laws for the State, or provide for subordinate legislation. The Immigration Act 1999 introduced as fresh legal basis for the deportation power and, in order to prevent challenges being made to orders under the 1935 Act, provided that certain of such orders were to be given statutory effect as if they were Acts of the Oireachtas.

In January 2004, the High Court declared that this provision of the Immigration Act 1999 was unconstitutional in that the Oireachtas could not thus determine that a provision in secondary legislation was to be treated as if it were an Act of the Oireachtas.[1] The judge also determined that certain provisions of the Aliens Order 1946 were ultra vires the 1935 Act.

This resulted in the swift introduction of the Immigration Act 2004,[2] 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.[3] It was held that the Oireachtas did have the power to incorporate into legislation secondary legislation by reference and that the High Court was only partially right in finding that provisions of the 1946 Order were ultra vires the 1935 Act. However, it was decided to maintain the Immigration Act 2004 in full force and effect – this clearly reduced the risk of further challenges to old secondary legislation on constitutional and other grounds.

The 2004 Act is also addressed in Chapter VI. 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.

1 Leontjava and Chang (Judgment not yet reported).
2 No. 1 of 2004.
3 DPP, *Ireland and the Attorney-General v. Leontjava and Chang* [2004] IESC 39 (23 June 2004).

Entry

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 persons exempt from Irish visa requirements. The States whose citizens do not require a visa include all 25 Member States, the remaining EEA Member States and Switzerland.

Residence

Directive 2004/38

In a discussion document issued in April 2005, the Department of Justice considered whether the transposition Directive 2004/38, due to be implemented by 30 April 2006, should be done by way of the forthcoming Immigration and Residence Bill, or by way of a separate legislative instrument. It was made clear that, between the passage of the Bill and legislation implementing the Directive, no groups should "fall between the cracks" of new legislation.

Departure

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.

The requirement of habitual residence is discussed further in Chapter IX.

Chapter II
Equality of Treatment

Text(s) in force

General

The statutory framework to combat discrimination in Ireland largely consists of three Equality Acts – the Employment Equality Act 1998, the Equal Status Act 2000 and the Equality Act 2004.

The Equality Act 2004,[4] enacted on 18 July 2004, contains a serious of amendments to the Employment Equality Act 1998, the Pension Act 1990 and the Equal Status Act 2000, seeking to give effect to the 2000 Employment and Race Equality Directives. In line with these Directives, amendments to the 1998 Act will allow positive 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 Explanatory Memorandum to the Equality Bill 2004 made it clear that it was intended to preserve the comprehensive and multi-ground approach to equality found in the 1998 and 2000 Acts "by transposing the Directives in a way which, where possible and appropriate, applies their provisions to each of the nine grounds and to both employment and service provision areas". The structure of the older Acts has thus been retained with amendments made on a Section by Section basis: it is regrettable that the opportunity was not taken to produce new consolidated legislation. Detailed commentary on shortcomings in implementing the Directives is to be found in the Ireland Country Report on Measures to Combat Discrimination.[5]

The Social Welfare (Miscellaneous Provisions) Act 2004 has amended the Pensions Act 1990 to give effect to the 2000 Directives in so far as they relate to occupational pensions.

Recognition of Qualifications

Nurses

St. Vincent's University Hospital v A Worker.[6] The dispute before the Labour Court related to a claim by the Irish Nurses Organisation on behalf of a worker for recognition, for incremental purposes, for service as a State Enrolled Nurse (SEN) in the UK. The worker had been employed for 16 years as a SEN in the UK. She then re-qualified as a Registered General Nurse (RGN) in 1994 and, on appointment to a staff nurse post in Dublin's St. Vincent's University Hospital in 1997 was put on a scale reflecting her experience as a RGN.

The Union contended that service as a SEN should have been recognised in the same way as an Irish nurse and that the failure to do so was in contravention of EC law. The Labour Court declined to entertain the complaint of infringement of EC rules, since it was con-

4 No. 24 of 2004.

5 Authored by Shivaun Quinlivan. Published on the European Commission's website. Given the complexity of the legislation and the Directives, it has not been possible for the present reporter to form a critical view of the Irish measures.

6 Labour Court Full Recommendation CD/04/229 (Appeal Decision) No. 459.

cerned with an appeal of a Rights Commissioner's recommendation under Section 13(9) of the Industrial Relation Act 1969 and there were "appropriate legislative processes for such complaints".

The Court was satisfied that hospital management were within their rights not to recognise periods of service as a SEN in the UK for incremental credit purposes. However, given the worker's placement at grade E Staff Nurse position in the UK since 1998, the Court considered that it would not be unreasonable to give additional incremental credit, due to the level of her skills and experience. It therefore determined that management should use its discretion and grant one additional increment with retrospective application.

Garda Siochána

Section 52 of the Garda Siochána Act 2005[7] provides for the appointment of members of the Police Service of Northern Ireland (PSNI) to ranks in the Garda Siochána not below the rank of superintendent. Candidates are to compete in a merit-based selection procedure with other applicants for appointment to the rank concerned. It is provided that, in determining the eligibility of a member of the PSNI to apply for appointment, appropriate recognition shall be given to the rank, experience and qualifications that would be required for appointment to an equivalent rank in the PSNI.

Fishing Vessels

The *Fisheries (Amendment) Act 2003* (No. 21 of 2003) transferred the function of sea-fishing boat licensing from the Minister for Communications, Marine and Natural Resources to the Licensing Authority for Sea-Fishing Boats with effect from 1 July 2003. The 2003 Act specifies that the Licensing Authority – the Registrar General of Fishing Boats or, under the superintendence of the Registrar General, the Deputy Registrar General of Fishing Boats – is independent in the performance of its functions subject to the law in relation to sea-fishing boat licensing and policy directives issued by the Minister for Communications, Marine and Natural Resources.

Section 4 of the 2003 Act introduced a new Section 222B of the *Fisheries (Consolidation) Act 1959* as amended. Under Section 222B(5), a sea-fishing boat licence is not to be granted unless the boat is wholly owned by a national of a Member State or a body corporate established under and subject to the law of a Member State and having its principal place of business there. Section 222B(7)(b) provides that a condition attached to a sea-fishing boat licence *may* "require that for so long as the licence is in force the members of the crew of such boat, or of any proportion of such members specified in the condition, shall be of a nationality specified in the condition". The relevant application form requires the number, nationality and qualifications of the crew to be stated.

Section 222B was amended, in non-material respects, by the Maritime Safety Act 2005.[8] The Sea-Fisheries and Maritime Jurisdiction Bill 2005[9] restates Section 4 of the 2003 Act – and hence Section 222B of the 1959 Act – with the amendments made by the 2005 Act "for ease of reference and administration". However, the nationality requirement is extended to cover nationals of EEA Member States, and not just nationals of EU Member States.

7 No. 20 of 2005.
8 No. 11 of 2005.
9 Bill No. 27 of 2005.

The question of application of Section 222B(7)(b) has not been addressed by the Licensing Authority (only the 2003 Annual Report has appeared to date) or by the Minister in any policy directive. In an earlier statement of policy in June 2002, it was made clear that it was a condition of licences generally that at least 50% of the crew of a boat had to be nationals of an EU Member State. This appeared in some way to relate to the power of the licensing authority to take account of the economic benefits which the operation of a boat would be likely to contribute to coastal communities and the Irish economy generally. This appears to reflect the current position and no statements of policy in relation to this were made in 2004 or to date in 2005.

Judicial practice

Covert discrimination

Campbell Catering v Rasaq[10]. 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 here race.

In the determination, the Labour Court referred to the 1995 *Schumacker* case,[11] 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 worker 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 Labour Court Determination ED/02/52, 23 July 2004 (www.labourcourt.ie).
11 Case C-279/93 *Finanzamt Koeln-Altstadt v Schumacker* [1995] ECR 1-225.

Chapter III
Employment in the Public Sector

Nationality Condition for Access to Public Employment

I have been asked to provide a complete overview of the current situation. In doing so, I have provided information in relation to specific Irish nationality requirements and Irish language requirements, which could be tantamount to a nationality requirement. What follows is an updated version of material appearing in the 2002 and 2003 Report.

The Civil Service

Nationality. There is no specific legal provision requiring the possession of Irish nationality for access to posts in the Civil Service.

Section 17 of the Civil Service Regulation Act 1956 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 relation to the holding of competitions, Section 16 of the Civil Service Commissioners Act 1956 provided that, subject to the consent of the Minister, the Commissioners might, in making regulations in respect of competitions, provide, amongst other matters, for "the confining of the competition to citizens of Ireland". It does not appear that any such regulations have been made. This Act has been repealed by the Public Service Management (Recruitment and Appointments) Act 2004, Section 58 makes it plain that the Minister for Finance is responsible for all matters relating to recruitment in the Civil Service, including "eligibility criteria".

Recruitment to *professional* posts (for example, engineers, accountants and lawyers) is fully open to nationals of the other EU Member States.

Recruitment to *administrative* posts is in principle open to nationals of the other EU Member States. However, there are certain posts in areas considered to be essential to the national interest (such as the diplomatic service and security posts) which are restricted to Irish nationals. There is no published list of such posts. However, when these jobs are advertised, it is specified that they are only open to Irish nationals. These include posts in the Department of the Taioseach (Prime Minister), the Office of the Revenue Commissioners, the Department of Defence, the Department of Justice, Equality and Law Reform and the Department of Foreign Affairs. The Head of Operations and Client Relations in the Public Appointments Service has agreed to put together a list of recently advertised positions which have been restricted to Irish nationals and this will be forwarded as soon as possible, not yet received.

Language. Section 58 of the Public Service Management (Recruitment and Appointments) Act 2004 makes it clear that the Minister is 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". Since all citizens have the right to conduct their business with Government 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 inter-

view may, take an optional language test. Candidates who satisfy the Public Appointments Service that they are proficient in both Irish and English will be awarded extra marks 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 candidates to be fluent in both Irish and English.

The Health Service

*Nationality***.** There are no nationality requirements for access to employment in the Health Service.

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.

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.[12] 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.

Education Sector

Nationality. There are no nationality requirements for recruitment.

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. Mention should also be made of the position in the universities, especially University College Galway.

> *Mainstream national schools.*[13] 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

12 Section 41 of the Defence Act 1954.

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

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".
Since September 2004, all current and past candidates for the S.G.C. have been granted a two-year extension to the normal five-year period and new applicants may request such an extension where they have failed to pass all the S.G.C. modules within the five-year period.
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.[14] 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.

Universities. In general, the Irish language is required only if it is required in the discipline concerned, for example, teaching Irish. However, in relation to University College Galway, Article 3 of the University College Galway Act 1929 imposes a duty on the body:
"making an appointment to any office or situation in the College, to appoint to such office or situation a person who is competent to discharge the duties thereof through the medium of the Irish language: provided a person so competent and also suitable in all other respects is to be found amongst the persons who are candidates or otherwise available for such appointment".

In practice, it appears that the College offers candidates for new posts an Irish test – composed of an essay and oral examination – on a voluntary basis. Successful performance in it can result in a candidate being favoured for appointment.
The College has made moves to have the test dropped and a request for amending the legislation has been made to the Department of Education and Science which has confirmed that it is reviewing the position.
In December 2004, and again in March 2005, there were reports that disappointed applicants to academic positions were taking legal proceedings in relation to the legislation. No judgment has yet appeared.

14 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".

Police (An Garda Síochána)

There has been no formal nationality or residence requirement for entry to An Garda Síochána, the Irish police service. However, the current requirement to hold a qualification in both Irish and English at Leaving Certificate level, or equivalent, has effectively limited entry to Irish citizens.

The position has changed radically as a result of the Garda Síochána (Admissions and Appointments) (Amendment) Regulations 2005[15] made in September 2005. The language requirement has been replaced with a requirement to hold a qualification to hold a qualification in two languages, at least one of which is to be Irish or English.

A new nationality and residence condition has also been introduced. Entry will now be open to:

i. nationals of an EU Member State, other EEA State or the Swiss Confederation; and
ii. nationals of any other state who are lawfully present in Ireland and have five years lawful residence there.

In order to ensure that An Garda Síochána can deliver on its very strong commitment to delivering a service in Irish, all Garda recruits will be required to achieve an appropriate standard in Irish before becoming full members of the force and recruits who do not have an Irish-language qualification will undergo basic training in that language.

According to the Minister for Justice, Equality and Law Reform, the new changes will "open up entry to An Garda Síochána to persons in Ireland from all parts of the community and from all ethnic backgrounds. This is a hugely significant step which will help ensure that future intakes of recruits to An Garda Síochána reflect the composition of Irish society, to the benefit of the Force and the people it serves".

The Marine Sector

Nationality condition for access to the posts of captains and first officers of ships flying that Member State's flag

There is no Irish nationality condition for access to the posts of captain and first officer of an Irish-flagged ship.

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. 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.

It is very difficult to judge whether this raises difficulties under free movement rules. However, the lack of transparency and predictability does cause concerns.

15 S.I No. 560 of 2005.

Chapter IV
Family Members

Non-Nationals with Irish-Born Children

The position of third-country nationals with Irish citizen children is considered in Chapter VII.

It should be noted here that general concerns about "immigration for citizenship" and specific concerns about the implications of the *Chen* case (as they emerged from the opinion of the Advocate-General in May 2004) resulted in a change to the Irish Constitution in June 2004. The former constitutional right of virtually all those born on the island of Ireland to Irish citizenship (jus soli) has been qualified by a new Article 9(2) restricting the constitutional jus soli entitlement to persons born in the island of Ireland with at least one parent having or entitled to have Irish citizenship. (See, further, commentary in Chapters 5 and 6.)

Judicial practice

Deportation of Third-Country National Spouses of Irish Citizens

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 in 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.

Philip Fitpatrick and Claudia Fitzpatrick v Minister for Justice (High Court, 26 January 2005). This case followed on from the *F(P) and F(C)* case and involved the same parties. After deportation to Romania, Mrs. Fitzpatrick sought revocation of the deportation order and, upon the Minister's refusal, sought to quash the decision refusing revocation on the basis that he had failed specifically to address the impact of a refusal on the husband's marital circumstances and that the decision was disproportionate and irrational. The Court quashed the decision of the Minister on the basis of his failure to take into account the period during which the applicants lived together as a married couple in the State.

P(R) v Minister for Justice (High Court, 17 June 2004). An Ukrainian asylum-seeker was refused a declaration of refugee status and was the subject of a deportation order in April 2003. Three weeks after the making of the order, he married an Irish citizen and, informing the Minister of this marriage, husband and wife sought revocation of the order and an undertaking that the Minister would consider the changed circumstances in deciding whether he should be allowed to stay. The applicants obtained an interim injunction and an

undertaking that the man would not be deported pending a full hearing. In the full hearing, the judge found that all the evidence showed that the marriage was *bona fide* and that the Minister should have regard to the marriage of the applicants before deciding whether or not to deport. It was not contended that either of the applicants had a rights *per se* to have the deportation order revoked by reason of the marriage and the judge stressed that the decision could not affect either the right of the Minister to proceed with the implementation of the deportation decision or to establish any automatic stay on the order by reason of later events, including marriage.

Post-Nuptial Citizenship

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 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.

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

The *Chen* Case (Case C-200/02)

In the *Chen* case, the European Court of Justice addressed the question of the free movement rights of a child born of Chinese parents in Northern Ireland (and hence entitled to *ius soli* Irish citizenship) and her Chinese-national mother and made it clear that Irish citizen children born in the North and their carer parents could, where self-sufficient, enjoy rights of free movement in the UK.

In May 2004, Advocate General Tizzano had delivered his Opinion in the *Chen* case, concluding that a child of non-national parents born in Northern Ireland and hence entitled to Irish citizenship and enjoying, through her parents, sufficient resources to ensure that she would not become a burden on the finances of the host State, was entitled as a matter of Community law to reside in Northern Ireland. The need to give that right useful effect, as well as the prohibition of discrimination on grounds of nationality in Article 12 of the EC Treaty, entitled the non-national mother to a long-term residence permit. It was, to say the least, potentially embarrassing to the Irish Government to retain a citizenship regime, with such Community law consequences in another Member State. Indeed, as the Advocate General pointed out: "[i]n order to avoid such situations, the criterion [used by the Irish legislation for granting nationality] could have been moderated by the addition of a condition of settled residence of the parent within the territory of Ireland".

Such concerns, which many thought exaggerated or misplaced, resulted in an amendment to the Constitution in 2004 removing the *constitutional* entitlement to citizenship of those born in the island of Ireland where neither parent is an Irish citizen or entitled to be so. In June 2004, a Bill to amend Article 9 of the Constitution was passed by the people in a referendum. The resulting Twenty-Seventh Amendment of the Constitution Act was designed to remove the *constitutional* right to entitlement to Irish citizenship of persons born in the island of Ireland born after the date of enactment of the enactment of the Act who do not have, at the time of birth, at least one parent who is an Irish citizen or entitled to be an Irish citizen. Such persons are to be entitled to Irish citizenship only as provided by law.

Subsequent legislation coming into effect on 1 January 2005 has introduced a residence requirement to be satisfied by certain non-national parents before children born in the island of Ireland can benefit from ius soli citizenship. This has effectively removed the opportunity for persons in the position of Ms Chen and her mother to avail of free movement rights under Community law.

The *Collins* Case (C-138/02)

In the *Collins* judgment the Court of Justice established that it could be regarded as legitimate for a Member State to grant a job-seeker's allowance only after it is possible to establish that a genuine link exists between the job-seeker and the host Member State's employment market. The existence of such a link could be determined, in particular, by establishing that the person concerned has, for a reasonable period, in fact genuinely sought work in the Member State.

A residence requirement is, in principle, appropriate to ensure such a link, provided it is proportionate. Specifically:

a) its application by the national authorities must rest on clear criteria known in advance; and
b) provision must be made for the possibility of a means of redress of a judicial nature.

In any event, any residence requirement must not exceed what is necessary in order for the national authorities to be able to satisfy themselves that the person concerned is genuinely seeking work in the employment market of the host Member State.

The Court specifically ruled as follows:

> "The right to equal treatment laid down in … Article 39(2) EC …, read in conjunction with … Articles 12 EC and 17 EC …, does not preclude national legislation which makes entitlement to a jobseeker's allowance conditional on a residence requirement, in so far as that requirement may be justified on the basis of objective considerations that are independent of the nationality of the person concerned and proportionate to the legitimate aim of the national provisions."

The *Collins* judgment has been used to justify the introduction of a habitual residence requirement for a variety of social assistance payments. This is discussed in Chapter IX below. However, it should be noted here that the new Irish regime covers a far wider range of payments than a jobseeker's allowance and its application to workers from other Member States is problematical.

Chapter VI
General Immigration Law

General

Legislation

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 *Leontjava and Chang*). This resulted in the swift presentation of the Immigration Act 2004, which may be best 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 operations 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 opportunity was taken to clarify the definition of lawful and unlawful residence and to put on a firm legislative footing the derived Ministerial authority of immigration officers.

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.

In policy terms, 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 change from 1 May 2004 means that a person has to be "habitually resident" to qualify for social assistance payments.

Proposed Legislation

In June 2002, the Government committed to prepare a new Immigration and Residence Bill to consolidate legislation in the area and provide for future developments. In April 2005, the Department of Justice, Equality and Law Reform issued a discussion document containing outline policy proposals for an Immigration and Residence Bill which will:

> "seek to review, amend, consolidate and enhance the current body of legislation which dates from the Aliens Act 1935. In general, the Bill will not deal with the area of asylum, an area where policy is well-developed and where legislation has been substantially revised in recent times in the Refugee Act 1996 and subsequent amendments. However, certain areas where the immigration system and the asylum process interact, particularly in the area of removals, will be dealt with in the proposed legislation.

Changes in Nationality Law

In June 2004, a referendum approved a constitutional amendment removing the constitutional right to Irish citizenship of all those born in the island of Ireland. With the Irish Nationality and Citizenship Act 2004, children of non-Irish nationals (save for UK nationals) born after 1 January 2005 will be entitled to *jus soli* citizenship only if the non-national parents have satisfied minimum residence requirements. This constitutional *disentitlement* to citizenship and the resulting more restrictive *jus soli* entitlement to Irish nationality reflected concerns that there had been a degree of "citizenship tourism", with

non-nationals unlawfully resident in Ireland claiming residence rights on the basis of the birth of Irish citizen children and women in advanced stages of pregnancy coming to Ireland to give birth.

Studies

The International Organization for Migration (IOM) is currently carrying out a wide-ranging study of the phenomenon of migration in Ireland on behalf of the National Economic and Social Council. This will examine questions such as Irish migration trends in the international context, causes and determinants of migration, labour market performance of migrants, the economic and social effects of migration and fostering integration. The study is due to be completed in the course of 2005.

Non-National Parents of Irish Citizen Children

In its 2003 judgment in *L & O v. Minister for Justice*, which involved cases of rejected asylum seekers and asylum seekers covered by the Dublin Convention each with Irish children born in Ireland, it was held by a majority of the Supreme Court judges that non-national parents did not have the right to remain in the State by virtue of the residence rights of their Irish citizen children. The Court made it clear that where the Minister decided to deport the non-national parents – where this was in the common good on the basis of the need to preserve respect for the integrity of the asylum and immigration system – they could be accompanied by the Irish citizen child.

As a result of the 2003 Supreme Court judgment, the Minister for Justice, Equality and Law Reform decided no longer to accept applications for residency for persons on the basis of their parentage of an Irish-born (and hence Irish citizen) child. However, by mid-2004, it became clear that, of the estimated 11,000 persons subject to the possibility of deportation following the ruling, only around 1,000 had been given notice of deportation and a small number actually deported.

In January 2005, the Department of Justice, Equality and Law Reform introduced revised arrangements regarding the granting of permission to remain in the State of non-nationals who are the parent of an Irish-born child. These arrangements applied only to non-national parents of a child born in the State before 1 January 2005. Under the revised arrangements, which in practice involved quite onerous information and documentary requirements, *with applications to be submitted by 31 March 2005*, successful applicants were given permission to remain legally in the State for an initial period of two years, which may be renewed for a further three years subject to conditions.

Though not expressly characterised as such, these revised arrangements can be seen in terms of regularisation of a specific category of irregularly-present immigrants.

Immigration for Employment

Under Section 2 of the Employment Permits Act 2003, a non-national may not be employed except in accordance with an employment permit granted by the Minister. Penalties apply to non-nationals who work, and those who employ them, without such a permit. The requirement does not apply to refugees, those entitled to enter and be employed in the State pursu-

ant to the European Communities Treaties and those permitted to remain by the Minister for Justice without the need for an employment permit.

The work permit system is administered by the Department of Enterprise, Trade and Employment which distinguishes between two main methods for acquiring permits. First, the standard Work Permit can be applied for by employers in Ireland, who are required to have demonstrated that they have made every attempt to employ an EEA national – and Accession State nationals. The Minister for Enterprise, Trade and Employment has designated, on a rolling basis, certain occupational sectors as ineligible for work permit application purposes, reflecting the belief that these jobs can be filled by workers from the EEA and Accession States. Those wishing to employ workers in eligible occupational sectors must be registered with the State employment agency – FÀS – for a four week period to see if the position can be filled by an EEA/Accession State worker and it must be shown that every effort has been made to source nationals from these States. Second, there is the Working Visa/Work Authorisation scheme which is designed to attract third-country nationals to sectors where skill shortages are acute – covering information technology workers, construction professionals and medical/ health care professionals. Applications for such workers can be made and processed at Irish embassies and Consulates abroad.

A third type of employment permit is the intra-company transfer facility, which allows companies to bring in senior personnel from overseas companies belonging to the same group to an Irish undertaking to fulfil a specific role on a temporary basis. Since October 2002, this has been granted on a case-by-case basis.

In February 2004, a Spousal Work Permits Scheme was introduced giving greater ease of access to employment for spouses of certain categories of non-EEA employees in the State. The new arrangements do not remove the requirement for a work permit for eligible spouses, but facilitate access to employment by: (a) not requiring the employer to advertise the job with FÁS (the State employment service); (b) allowing access to jobs (e.g., child minders) that would not otherwise be eligible for work permits; and (c) waiving the application fee.

The Employment Permits Bill 2005[16] is currently being debated by the legislature. It provides for a new employment permits system involving the establishment of a Green Card system for occupations where there are skills shortages, a re-established Intra-Company Transfer Scheme for temporary trans-national management transfers and a Work Permit Scheme for a restrictive list of occupations where there is labour rather than skills shortage. The Bill also contains a number of important new protections for migrant employees. Employment permits will be granted to the employee rather than to the employer, and the employee may now apply for a permit. The permit will contain a statement of rights and entitlements of the migrant worker, including the right to change employment by obtaining a permit for another employer. Employers will be prohibited from deducting expenses associated with recruitment from pay and from retaining personal documents belonging to the employee. Breaches of the new legislation will attract significant fines and, in the case of individuals, prison sentences.

From April 2000, all non-EEA nationals with permission to study in Ireland were, until recently, entitled to take up casual employment. This was abused by some education providers who offered courses to such nationals as a means of enabling access to the Irish labour market. Moreover, after the accession of the 10 new Member States in May 2004, it was considered that there was a plentiful supply of labour available to Irish employers and recog-

16 Bill No. 19 of 2005.

nised that preference had to be given to nationals of the EU Member States in access to employment. In December 2004, the Minister for Justice, Equality and Law Reform announced new arrangements, taking effect from 18 April 2005, preventing new students from outside the EU, the EEA or Switzerland from access to employment unless they are attending a full time programme of at least one-year's duration leading to a qualification recognised by the Minister for Education and Science. The Department of Education and Science has issued a note setting out provisional arrangements until March 2006, pending emerging developments in relation to the implementation of recommendations in the Report on the Internationalisation of Irish Education Services.

Chapter VII
EU Enlargement

Ireland has decided to allow access to work by nationals of all eight of the acceding Member States subject to the transitional regime from the date of their accession in May 2004. Section 3 of the Employment Permits Act 2003, which was designed to tighten-up the rules on access to employment for third-country nationals, provides that the requirements for employment permits will not apply to nationals of the acceding Member States after enlargement.

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. The question of such re-imposition has not so far arisen in practice. However, it should be noted that the Social Welfare (Miscellaneous Provisions) Act 2004, which entered into force on 1 May 2004, introduced a "habitual residence" test for obtaining certain social assistance payments: this appears partly to have reflected concerns that Ireland should not attract "welfare-scroungers" from the new Member States. This is addressed in more detail in Chapter IX.

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.

Statistical information on migration from the new Member States is provided in an annex to this Report. This sets out the number of Personal Public Service Numbers (PPS Nos.) allocated to national of each of the new Member States for April 2003, May 2003 and April 2004, and then on a monthly basis from May 2004 to September 2005. Since May 2004, there has been a huge relative increase in the number of PPS No allocations to nationals of these States, especially Poland, Lithuania, Latvia and Slovakia.

It will be seen that a total of 138,800 persons from the 10 new EU Member States have been allocated PPS Numbers since May 2004.

These figures should be treated with some caution. Though they provide a measure of inward migration by persons intending to spend some time in Ireland, they do not measure the number of people leaving the country (some people come to work for a short while and then leave)[17]. The Central Statistics Office did not use PPS data in compiling its Population and Migration Estimates in April 2005 for this reason, but relied on data compiled from surveys. Its estimates for migration from the 10 EU Member States (26,200 for 2005 and a proportion of the "rest of the world" figure of 19,700 for 2004) fall way short of the figures given for PPS Number allocations.

No clearer statistical information could be obtained from data on residence permits. Residence permits are optional and only a very small proportion of persons eligible to do so have in fact applied for a permit.

17 T here is no procedure for surrendering the PPS number on leaving.

Chapter VIII
Statistics

The Central Statistics Office has produced statistics on estimated migration classified by sex and country of destination/origin, for 2000-2005. These are attached as an appendix.

It will be seen that there has been consistent net migration during this period in relation to persons coming from the 15 old EU Member States, and relatively high net migration for those coming from the 10 new EU Member States in 2005.

The Department of Enterprise, Trade and Employment produces statistics on work permits on an ongoing basis. The relevant data for 2004 is supplied with this report.

Chapter IX
Social Security

Inapplicability of the New "Habitual Residence" Condition to Social Insurance Payments

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 Payments: Introduction of a "Habitual Residence" Requirement

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 no 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,[18] 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[19] (as amended) These are:

- Unemployment Assistance;
- Old Age Non-Contributory Pension;
- Widow's and Orphan's Non-Contributory Pension;
- Lone Parent'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 his/her application concerned unless he has been present in the State 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[20], 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

18 No. 4 of 2004.
19 No. 27 of 1993.
20 www.welfare.ie/publications/hrc.html.

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". It implies a close association between the applicant and the country from which payment is claimed and relies heavily on the 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 in the State is one for determination by a statutorily appointed Deciding Officer or in the case of Supplementary Welfare Allowance, an officer of the Health Board who is duly authorised to determine entitlement. The decision will be made on the basis of applying five factors set down by the European Court of Justice in deciding whether a person is habitual resident.[21] 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.

The officers will have to regard to these five factors and to any additional information elicited by way of further enquiries. 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/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 makes is his/her permanent home (*will* satisfy the condition);
- Persons who has lived in other parts of the Common Travel Area for two years or more and then moved 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*).

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 be available to all workers irrespective of length of stay.

As provided for by law, decisions of the Deciding Officer can be appealed to the independent Social Welfare Appeals Officer or, in the case of Supplementary Welfare Allowance to a Health Board Appeals Officer and if necessary subsequently, to the independent Social Welfare Appeals Office.

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

The Social Welfare Appeals Office is beginning to hear cases relating to the habitual residence requirement. According to its 2004 Annual Report, Appeals Officers have been concerned about the adequacy of safeguards to ensure consistency of the decision-making process: for example, whether a person could satisfy the condition for the purposes of Supplementary Welfare Allowance, but not for unemployment assistance.

In one appeal, it was held that a native of a South African country seeking One Parent Family Payment should be regarded as habitually resident in Ireland where she had spent more than two years in Ireland, had worked there, her family was based there and her father and stepmother worked in Ireland. The Appeals Officer noted her statement that she intended to remain in Ireland and had hopes of finding work. He was satisfied that the weight of the evidence and the circumstances of the case indicated that the appellant should be regarded as habitually resident in Ireland.

Social Welfare Appeals Officers have expressed concerns about the application of the habitual residence condition to the Child Benefit Scheme. The Social Welfare Appeals Office has pointed out that the condition cannot be applied for Child Benefit claimed by those claiming EEA free movement of workers rights. Concerns have also been expressed that the condition might be in breach of the UN Convention on the Rights of the Child, to which Ireland is signatory. These concerns have been passed on to the Department of Social and Family Affairs and are to be considered as part of an ongoing review of the operation of the habitual residence condition.

Special Weekly Island Allowance extended to Inhabitants from other EU Member States

On 25 March 2005, the Minister for Social Affairs announced that a special island allowance of € 12.70 per week is to be paid for the first time to recipients of pensions from other EU States who are residing on any one of 33 designated islands off the Irish coastline. Until now the payment was confined to people who were in receipt of certain Irish welfare payments: Old Age (Contributory or Non-Contributory Pension); Blind Pension; Retirement Pension; Invalidity Pension; Widow(er)'s (Contributory or Non-Contributory) Pension; Carer's Allowance; One Parent Family Payment; Widow(er)'s Benefit Under the Occupational Injuries Scheme.

Section 10 of the Social Welfare and Pensions Act 2005 therefore introduced a new Section 203F of the Social Welfare (Consolidation) Act 1993 extending the allowance to persons ordinarily resident on an island and entitled to or receiving a payment from another Member State which corresponds to a one of a number of specified pensions under the 1993 Act.

It appears that the European Commission raised the legality of the non-entitlement of island residents in receipts of pensions from other Member States and that the new legislation responds to this concern.

The extension of the allowance payment will add about a further 50 to the 533 people who are already in receipt of the special allowance which was introduced in 2001 in recognition of the fact that people living on islands cut off from the mainland can face considerable extra expense in availing of basic services.

Chapter X
Establishment, Provision of Services, Students

Establishment

General

In a case before the High Court – *Leahy-Grimshaw v King's Inns*[22] – the applicant had been called to the English Bar but did not obtain a pupillage (on-the-job training) or practise as a self-employed barrister. She applied to be automatically admitted to the Irish Bar under Directive 89/84, but she was informed by the King's Inns (the body responsible for the training and admission of Irish barristers) that her application was to be refused under the Directive and would be considered when a procedure was put in place to deal with applications from EU applicants which would assess the knowledge and skills of such applicants. This decision was appealed under the European Communities (General System for the Recognition of Higher Diplomas) Regulation 1991. The applicant also sought an order of mandamus requiring the King's Inns to determine her application pursuant to her right of establishment.

The application was dismissed on the grounds that:

1. The EC Treaty did not confer an automatic entitlement to be admitted to the Irish Bar but rather an entitlement to have the King's Inns assess the extent of the applicant's qualifications and the degree to which those qualification should be supplemented in the Irish jurisdiction.
2. The applicant was out of time for appealing the decision under the 2001 Regulations.
3. The applicant did not comply with the mutual recognition provisions of the 1989 Directive or the 1991 Regulations, since she did not have the right to practise as an independent barrister in England and Wales.
4. It was reasonable that an overall scheme for ascertaining the degree and amount of information and expertise that EU applicants for admission to the Irish Bar possessed should be put in place – rather than ad hoc decisions based on individual cases – and the King's Inns had acted reasonably and in a timely manner.

It should be noted that a procedure to assess the knowledge and skills of EU applicants was put in place in November 2004.

Lawyers

The European Communities (Lawyers' Establishment) Regulations 2003 (Qualifying Certificate 2005) Regulations 2004,[23] made by the Law Society of Ireland, are intended to give effect to the Lawyers' Establishment Directive as provided for in the 2003 Regulations and came into force on 1 January 2005. The Regulations contain provisions on the making of an application for, and issue of, a qualifying certificate for registered lawyers, as well as for the payment of a Registration Fee and contribution to the Compensation Fund.

The European Communities (Lawyers' Establishment) (Amendment) Regulations 2004[24] extend the European Communities (Lawyers' Establishment) Regulations 2003 to

22 19/4/2005 (2004/878JR): not yet reported.
23 SI No. 799 of 2004.
24 SI No. 752 of 2004.

lawyers from the 10 new Member States. The latter Regulations gave effect to Directive 98/5/EC to facilitate practice of the profession of a lawyer on a permanent basis in a Member State other than that in which the qualification was obtained.

The Rules of the Superior Courts (Lawyers' Establishment Regulations) 2005[25] amend the Rules of the Superior Courts 1986 and prescribe procedures in respect of the European Communities (Lawyers ' Establishment) Regulations 2003 (as amended).

Pharmacists

The European Communities (Recognition of Qualifications in Pharmacy (Amendment) Regulations 2004[26] 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[27] where the qualifications held do not comply fully with the qualification requirements laid down in the Directives.

Veterinarians

The European Communities (Recognition of Qualifications in Veterinary Medicine) Regulations 2004[28] 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.

The Veterinary Practice Act 2005[29] is designed to update and replace the Veterinary Surgeons Act 1931 (as amended in 1952 and 1960). It generally recognises that the environment in which this self-governing profession operates has changed significantly by virtue of membership of the EU, advances in technology and an increasing emphasis on food safety and animal welfare. The Minister for Agriculture and Food is by order to appoint a day to be the establishment day for the new Veterinary Council of Ireland (this has not yet occurred).

Among the specified functions of the Veterinary Council of Ireland is, where appropriate, to act as the competent authority for the purposes of mutual recognition obtained in or recognised by Member States and all matters referred to in the mutual recognition directives relating to veterinarians. Section 43 contains provisions on compliance with European Union requirements, implementing the regime set out in Directives 78/1026 and 78/1027 (as amended) in relation to establishment and the provision of services, and provides for an appeal to the High Court in the case of a decision not to register. A detailed Schedule 3 contains more detailed rules on the treatment of applications under mutual recognition requirements of the EU and of applications for temporary registration for the provision of services.

25 SI No. 15 of 2005.
26 SI No. 187 of 2004,
27 Czech Republic, Slovakia, Slovenia and the three Baltic States.
28 SI No. 265 of 2004.
29 No. 22 of 2005.

Provision of Services

Lawyers

The European Communities (Freedom to Provide Services) (Lawyers) (Amendment) Regulations 2004[30] extend the European Communities (Freedom to Provide Services) (Lawyers) Regulations 1979 to 1999 to lawyers from the 10 new Member States. The latter Regulations give effect to Council Directive 77/249/EEC so as to enable lawyers from other Member States to purse professional activities in the State by way of provision of services.

30 SI No. 753 of 2004.

Chapter XI
Miscellaneous

Studies, seminars, reports, legal literature

Binchy , W. and others (2004), *The Citizenship Referendum: Implications for the Constitution and Human Rights*, Dublin: The Law School, Trinity College Dublin 2004.

Ryan, B. (2004), 'The Celtic Cubs: The Controversy over Birthright Citizenship in Ireland', *European Journal of Migration and Law* 6: 173-193, 2004.