Key Issues in Free Movement in Ireland – Seminar – Law Society of Ireland – 5 November 2010

Record of Proceedings[1]

Chairperson, Mr. John Handoll, Partner, William Fry, Solicitors, Dublin.

The chairperson, Mr. John Handoll, began by introducing the background to the Seminar and the programme for the day. He explained that he is the Irish representative on the European Network on Free Movement within the EU (coordinated by the Centre of Migration Law, Radhoud University, Nijmegen, and supervised by the European Commission). He went on to outline the speakers for the day and to note some current key issues in free movement in Ireland.

Professor Kay Hailbronner from the University of Konstanz would give an overview of the free movement of workers regime, while barrister and academic Mr. Jonathan Tomkin would look at some recent case-law. Mr. Handoll referred to the importance of Directive 2004/38/EC (the "2004 Residence Directive"), (implemented by Ireland in 2006), explaining that this Directive confirms and strengthens the link between free movement and Union citizenship. He referred to difficulties in implementation, including difficulties in relation to third-country national family members (as evidenced by the *Metock* case (C-127/08)) and "marriages of convenience". Ms. Catherine Cosgrave, a senior solicitor with the Immigrant Council of Ireland, would discuss these issues. The EU regime for the recognition of qualifications is a key driver in ensuring free movement: Ms. Claire Waterson would outline these rules as they apply in Ireland. Mr. Handoll also noted concerns about requiring language proficiency in relation to positions of employment, and stated that this issue would be expanded upon by Ms. Eva Massa of the Law Society's Law School. In relation to English-language competence, concerns have arisen in relation to the absence of the ability to assess linguistic competence under the mutual recognition regime potentially leading to risks for patients. Una O'Rourke, Head of Registration at the Medical Council, would elaborate on these difficulties.

He also raised the question of reverse discrimination. The free movement rules benefit free-movers who are Union citizens and their family members. However, those who have stayed at home do not benefit from free movement rules. The issue of whether this is a necessary, or unnecessary, evil of free movement would be explored by Ms. Hilkka Becker of the Immigrant Council of Ireland. The question of frontier workers and obstacles to mobility was explored in a North South Ministerial Council-commissioned Study on Obstacles to Mobility (published in 2001). It was timely to consider the extent of obstacles to mobility (taking into account the free movement of workers perspective and the case-law of the Court of Justice on frontier workers). The Joint Secretaries of the North South Ministerial Council, Ms. Mary Bunting and Ms. Anne Barrington, had come to speak about the Council's work. Mr. Joe Shiels, ITC Manager at the Centre for Cross Border Studies, would speak on the Border People Project. Mr. Les Allamby, Director of the Law Centre NI, would speak on cross-border issues from the Northern perspective. The vexed issue of the habitual residence condition, which has (subject to the application of free movement of workers rules) limited accessibility to social welfare payments, would be explored by Ms. Jo Kenny, Legal Officer in the Public Interest Law Alliance/FLAC.

Third-country nationals may enjoy free movement rights if they are in a family relationship with free-moving Union citizens, while other third-country nationals may be covered by specific EU measures covering third-country nationals (e.g. the EU/Turkey Association Agreement). Ireland has not signed up to a number of EU measures, such as the Long-Term Residents Directive and the Family Reunification Directive, but it was instructive to look at the application of these Directives nonetheless. Professor Kees Groenendijk would talk about these issues. Ireland had distinguished itself in relation to the "EU-8" by giving full free movement rights from the outset to the nationals of these Member States. Mr. Handoll noted however that, in tougher times, there has been less openness in relation to Bulgarian and Romanian nationals (who continue to have restricted access to the labour market). Concerns have arisen in relation to, amongst other things, the illegal employment of nationals of these two States and widespread deportations of Roma from Ireland. We would be hearing from a Romanian expert – Dr. Emod Veress – and an Irish solicitor on the front line – Ms. Leanora Frawley- on some of these issues.

[1] Record prepared by Sarah Lynam, Solicitor.

Professor Kay Halibronner, University of Konstanz, Germany. "Overview of the free movement of workers regime"

Professor Halibronner began by discussing the distinction between workers and non-economically active Union citizens. Free movement as a "worker" is enjoyed if there is any element of remuneration. Students can therefore potentially circumvent the rules by having a part-time job; in such cases the person will be a worker enjoying free movement rights. In relation to job-seeking Union citizens, the 2004 Residence Directive excludes job-seeking Union citizens for the whole period of job-seeking from access to social assistance unless they are workers or retain such status. In this regard, he referred to German legislation excluding foreign nationals from an unemployment allowance where the person's residence rights derive solely from job-seeking. In relation to this legislation, the ECJ drew a distinction between social assistance and financial benefits to facilitate access to the labour market - job-seeking Union citizens enjoy equal treatment with regard to financial benefits facilitating access to the labour market. Professor Halibronner observed that it can be difficult to distinguish between the two categories. He referred to a recent case (Federal Social Court of 19.20.2010 B 14 AS 23/10) which found that a 1953 European Agreement on Welfare (to which Ireland is a signatory) provides, in relation to social assistance, that there will be equal treatment for nationals of other contracting States lawfully on the territory.

In relation to indirect discrimination and the principle of territoriality, it is not clear whether ordinary residence or domicile may be required as a condition for access to financial benefits or support measures. The issue of other indirectly discriminatory practices affecting free movement of workers and Union citizens (e.g., in relation to the admission of students to study programmes) was also noted. Professor Halibronner raised the question of what will constitute a sufficient trans-border element in order to invoke free movement rights for third country national family members of Union citizens, noting that it may be difficult to draw the line. In his concluding remarks, he observed that the CJEU has failed to establish a coherent system of conditions for the application of the free movement rules and that, in future, more theory and methodology might be expected.

Mr. Jonathan Tomkin, BL, Director Irish Centre of European Law "Some recent cases in the area of free movement"

Mr. Tomkin outlined the recent case of *Secretary of State for Work and Pensions v. Taous Lassal* (C-162/09, 7 October 2010). It was suggested that this case is particularly interesting for a number of reasons. First, this decision provides a useful example of how the Court approaches the calculation of time periods set out in Directive 2004/38 (The 2004 Residence Directive). Second, the case provides guidance on the relationship between successive pieces of secondary legislation adopted to give effect to rights enshrined in the Treaty and the Charter. Third, it is interesting because the judgment displays a wide range of interpretative techniques and therefore provides interesting insight into reasoning methodology of the Court of Justice of the European Union.

In *Lassal*, the Court was asked to consider whether periods of residence completed in a Member State prior to the date of transposition of the 2004 Residence Directive are to be taken into account for the purposes of determining whether a Member State national has acquired a right of permanent residence under the 2004 Directive. The Court confirmed that the right of free movement is a primary and individual right conferred directly on Union citizens and reaffirmed in Article 45 of the Charter. Since the objective of the 2004 Residence Directive was to enhance free movement rights, it should not be interpreted in a way that would confer less rights than from the secondary legislation which it amends or repeals. In light of the purpose and to ensure the effectiveness of the 2004 Residence Directive, the Court found that periods of residence completed prior to the entry into force of that Directive are to be counted for the purposes of calculating whether a Union citizen has acquired permanent right of residence in the host Member State. Moreover, when considering the period of absence which could result in the loss of permanent residence, the Court had regard to the objective of the Directive to promote social cohesion and to strengthen the feeling of Union citizenship, and noted that this objective would be undermined if permanent residence could be lost on the sole ground of temporary absence of less than two consecutive years.

Mr. Tomkin also referred to various principles or interpretative rules that may be distilled from the Court's free movement case-law. First: post-citizenship, the simple fact of a Union citizen living in another Member State constitutes the exercise of Treaty rights, regardless of whether or not an

economic activity is pursued. Once falling within the scope of the Treaty, Union citizens are entitled to equal treatment under Article 18 TFEU. Reference was made to *Martinez Sala* (C-85/96) and *Nicolas Bressol* C-73/08. In relation to the prohibition of measures restricting free movement, Mr Tomkin referred to *Zanotti* (C-56/09), *Jipa* (C-33/07) and *Gottwald* (C-103/08). He noted that residence conditions will be carefully scrutinised by the CJEU, referring to *Nerkowska* case (C-499/06). Second: Freedom of movement as a fundamental freedom must be interpreted broadly, and any derogations are interpreted narrowly and must be justified and proportionate. By way of example, reference was made to the *Metock* case (C-127/08). Third: Mr Tomkin recalled that right of free movement directives derived from the Treaty and that national residence permits do not create free movement rights, but simply evidence existing rights conferred directly under EU law (referring in this regard to *Royer* (C-48/75 33) and *Oulane* (C-215/03)).

Fourth: Migrant Union citizens were entitled as a matter of Union law to enjoy the company of their family members regardless of their nationality and that this right derived also from Union law. Fifth: Mr. Tomkin suggested that the "Real Link" test elaborated in the Court's citizenship case-law continues to be of relevance when considering the nature and extent of Union citizens' rights in a host member State. Mr Tomkin concluded by highlighting important cases that will be "coming soon" including the *Zambrano* case (C-34/09, Opinion of Advocate General Sharpston, 30 September 2010) and *Ilonka Sayn-Wittgenstein*, (Case C-208/09 Opinion of AG Sharpston, 14 October 2010).

Ms. Catherine Cosgrave, Senior Solicitor, Immigrant Council of Ireland. "Free Movement: Key Issues for EC Nationals and Their Family Members"

Ms. Cosgrave began by giving an overview of key provisions on free movement including the relevant Treaty articles, the 2004 Residence Directive, the European Communities (Free Movement of Persons) (No.2) Regulations 2006, the *Metock* case (C-127/08) and the European Communities (Free Movement of Persons) Regulations 2008. She noted issues arising post *Metock*, in particular, in relation to the issue of "sham marriages". In this regard, Section 138 of the Immigration Residence and Protection Bill 2010 provides that the Minister may send a notice to parties requiring information to show that the marriage is not a marriage of convenience. Section 138 does not provide a right of appeal, the absence of which was said to be unusual considering the fundamental issue involved. The only remedy would be the possibility of judicial review in the High Court.

Ms. Cosgrave also highlighted other key issues, including the definition of qualifying family members in Article 2 of the 2004 Directive. A difficulty arises for officials in relation to members of the Bulgarian or Romanian community seeking to exercise rights in this context - do the current restrictions imposed on such nationals apply in this context? In relation to access to employment for third country nationals, the Irish authorities insist that such family members must have a residence card before taking up employment. This can give rise to difficulties in circumstances where a temporary Stamp 4 entitling the holder to work is not given during the period in which an applicant's application is being reviewed. While she noted that, in general, applicants can seek a concession, she pointed out that this is not applied uniformly.

She also outlined some of her concerns regarding procedural safeguards. In relation to the Irish implementing regulations, Regulation 21 does not specifically state the time period for the submission of a review application (this is only available on the application form). While Regulation 21 provides for an internal review by a more senior person, this person may be in the same department as the original decision maker and may therefore not be impartial. Ms. Cosgrave concluded that serious questions surround the transposition of the 2004 Residence Directive.

Ms. Claire Waterson, Senior Associate, William Fry, Solicitors, Dublin. "Recognition of Professional Qualifications"

Ms. Waterson began by noting that the EU regime governing the recognition of professional qualifications is concerned with qualifications and experience entitling someone to carry on a profession or other regulated activity, rather than with the equivalency and recognition of academic qualifications. The relevant regime is concerned with access to regulated professions (i.e., a professional activity the access to which is subject to the possession of specific qualifications). Ms. Waterson continued by identifying some of the widely regulated professions in the EU such as doctors, lawyers, architects, and certain other professions which are unregulated in Ireland but

regulated in other countries (e.g., snow boarding instructors in France). She outlined who can benefit from the rules in relation to recognition of professional qualifications and where the relevant rules are found. Directive 2005/36/EC, which covers mutual recognition, was implemented in Ireland by the Recognition of Professional Qualifications (Directive 2005/36/EC) Regulations 2008 and sectoral legislation.

The first mutual recognition regime is automatic recognition. This is a harmonisation of training standards at EU level leading to an automatic recognition, applying to, amongst other persons, doctors, nurses and dentists. The recognition and registration is administered by a number of competent authorities (e.g., the Medical Council). The second regime is a general system of recognition of qualifications. Competent authorities must permit access to a regulated profession under the same conditions as apply to its own nationals to applicants holding a qualification in another Member State (providing the relevant qualification meets certain conditions). Under this regime, competent authorities are entitled to impose compensation measures (adaption periods or aptitude tests) in some circumstances. Ms. Waterson also outlined the provisions that apply if the profession is not regulated in the home Member State. The third relevant regime for the recognition of professional experience applies to the industrial, craft and commercial activities listed in Annex IV of Directive 2005/36/EC. She concluded by highlighting some of the key issues arising in practice including the assessment of language competence, the imposition of compensation measures, the need for cooperation between national authorities and the forthcoming consultation on the operation of Directive 2005/36/EC. The consultation process has already started and provides an opportunity to address relevant issues and to improve the system.

Ms. Eva Massa, Law School, Law Society of Ireland. "Access to Employment: the Question of Language"

Ms. Massa began by outlining that language requirements are relevant to various issues including the free movement of workers, the provision of services in another Member State and the mutual recognition of professional qualifications. In relation to the free movement of workers, Regulation 1612/68 provides that language requirements are not a restriction when they are required by the post itself. Language requirements fundamentally can be regarded as discrimination or a restriction of free movement however, and must therefore always be justified.

Language requirements are also relevant to the provision of services in another Member State. In this regard she referred to Directive 2006/126 and noted that where the Member State has a policy of promoting its national language, it can require knowledge of this language in some instances (referring to *Anita Groener v Minister for Education and the City of Dublin Vocational Educational Committee* C-379/87). In relation to the mutual recognition of professional qualifications, Directive 2005/36 was applicable. Ms. Massa explained that language is not included in relation to the recognition of qualification as you are not dealing with employment as such, just the qualification. A Member State may however require certain knowledge of the national language where it is proportionate and necessary for the job. In *Gebhard and Consiglio Dell'Ordine Degli Avocati e Procuratori Di Milano* C-55/94, the Court found that any measure restricting free movement must be applied in a non-discriminatory manner and must be justified by the general interest, suitable for the objective pursued and must not go beyond what was necessary.

In relation to the lawyers' profession, in Ireland there is no language requirement for nationals of an EU Member State. By contrast, the UK has introduced a new scheme under which all international lawyers need to pass an English language competency test in order to meet the Common European Framework of Reference (CEFR) Level 2 for English language competency.

Una O'Rourke, Head of Registration, Medical Council. Regulation of doctors in Ireland

Ms. O'Rourke outlined issues the Medical Council was facing in relation to EU citizens who are coming to Ireland to practice as doctors, in particular, in relation to difficulties as to the ability of the Medical Council (under the mutual recognition regime) to assess the linguistic competence of such doctors.

She noted that in the interim the Medical Council was taking steps to address this problem. Measures taken include seeking a change in existing legislation, seeking a declaration on the registration application affirming language skills, advising employers to satisfy themselves as to their employees'

language skills, using the "Fitness to Practice" route and also using the Guide to Professional Conduct and Ethics which provides that if a doctor does not have the professional or language skills necessary he/she must refer the patient to a colleague who can meet those requirements (a complaint may therefore be made about the doctor on this basis).

Ms. Hilkka Becker, Senior Solicitor, Immigrant Council of Ireland. "Reverse Discrimination of Host Country Nationals, the Necessary Evil of Free Movement?"

Ms. Becker began by raising the question of whether Irish nationals should be afforded the same rights as citizens of the EU exercising the right of free movement, asking whether reverse discrimination might be contrary to Article 14 of the ECHR, Article 8 of the ECHR or Article 41 of the Irish Constitution.

The case of *Moylan v The Minister for Justice and Law Reform* involved a naturalized Irish citizen originally of Chinese origin who wanted her mother to join her from China. The applicant pleaded reverse discrimination contrary to Articles 14 and 8 ECHR and Article 41 of the Constitution. Leave was refused on the basis that the Court found that no discrimination was involved - the Court found that you could not compare the situation in the *Moylan* case with that of a family that had exercised its free movement rights. The Court also held that the applicant had failed to show that the mother was a dependent. In relation to the question of whether reverse discrimination is permitted by EU law, Ms. Becker referred to the Opinion of Advocat General Sharpston in the *Zambrano case* (C-34/09), noting that this indicates that all EU citizens, including those in purely internal situations, can rely on Article 18 TFEU (which prohibits discrimination). In this case, the Advocate General stated that if one insists that physical movement to a Member State other than the Member State of nationality is required before residence rights as a citizen of the Union can be invoked, the result risks being both strange and illogical. Ms. Becker also referred to, amongst other cases, the *Rottmann v Freistaat Bayern* decision (C-135/08) which, in the context of a decision withdrawing naturalisation, indicates that the adoption by a Member State of a measure in respect of one of its nationals must have regard to EU law. She concluded by advocating that we keep a close eye out for the judgment of the Court in the *Zambrano* case.

North South Ministerial Council (NSMC): Cross- Border Mobility Issues

Ms. Anne Barrington (Joint Secretary of the NSMC) introduced the background to the NSMC, stating that it was established in 1999 and is staffed by the Northern Ireland Civil Service and the Irish Civil Service.. She noted that all decisions are reached by agreement between North and South and that the NSMC brings together those with executive responsibilities in Northern Ireland with the Irish Government. The NSMC aims to develop consultation, co-operation and action within the island of Ireland on matters of mutual interest.

She outlined the Study on Obstacles to Mobility of persons between North and South (including workers, non-workers and students). Further to this study, key areas for consideration included the social security systems, pensions, health, education, banking and telecommunications. The study resulted in fifty recommendations, including setting up a website to provide information on relevant issues and the NSMC Joint Secretariat has a role to facilitate progress and monitor its development. The website is now well established and highly regarded. Other recommendations have also been progressed, including the provision of information on banking charges (such as the costs typical to cross border transactions) and on benefit entitlements.

The next speaker, **Ms. Mary Bunting (Joint Secretary of the NSMC)**, noted there is no centralised statistics as to the extent of mobility and that there was more work to be done to address this information deficit. A NSMC institutional meeting in November 2009 considered work done in the past and asked if any new or emerging mobility issues needed to be addressed. The NSMC Joint Secretariat has undertaken some research and identified issues such as access to welfare benefits and the taxation system. In relation to the taxation system, Ms. Bunting noted some differences between the two systems, e.g., if you live in Northern Ireland but work in the Republic of Ireland, you pay tax to the Irish Government and the UK requires a top up for what you would have paid if you had worked in Northern Ireland. The Irish government does not require this. She also noted a further difference - in the UK, people can claim tax credits for childcare if the child is attending a UK regulated

childcare facility. If the child is attending nursery in the Irish State however, this credit cannot be claimed.

Ms. Bunting also referred to an information and advice deficit - people do not know where to get the right answers. In relation to the recognition of qualifications, issues often arose in highly regulated areas such as childcare. The following emerging issues were also noted: access to training, post taking too long to cross the border, issues in relation to grants for energy purposes and banking charges for cross-border transactions. The future direction may include possibly providing a "one stop shop facility" whereby people with questions could talk to a person about the relevant issues.

Les Allamby, Director, Law Centre, Northern Ireland

Mr. Allamby noted that since August 1994 there has been a habitual residence test for means-tested benefits in the UK and that in May 2004 this test was amended to include a right to reside requirement. The test is automatically satisfied for a "worker" under the 2004 Residence Directive and for certain other categories (such as persons who retain their status as a worker under the 2004 Residence Directive). The initial three months right to reside does not provide access to means tested benefits. In relation to the habitual residence condition, in the *Nessa* case (1999) the House of Lords found that to establish habitual residence, the person must be resident for an appreciable period of time (but recognised that he or she may apply straight away when resuming habitual residence). The *Swaddling* case (Case 94/97) found that to establish habitual residence an appreciable period of residence is not always required under Regulation 1408/71.

The right to reside is an issue for "A8" and "A2" nationals. A8 nationals must be in employment and must have registered the employment through the Home Office Worker Registration Scheme (or must be self-employed). In addition, for out of work benefits, the A8 national must have worked continuously in registered employment for twelve months (except for thirty days break) or must be self-employed and temporarily incapable. In relation to A2 nationals (i.e., Romania and Bulgaria) for in-work benefits they must have a worker authorisation (subject to specific exceptions) or must be self-employed. For out-of-work benefits, such persons must have worked legally for twelve months (except for 30 days). Mr. Allamby outlined some key cases regarding the right to reside, referring, for example, to the case of *Abdirahman v Secretary of State for Work and Pensions* (2007, EWCA) in which the Court found that the right to reside requirement was not contrary to what are now Articles 18 and 21 of the TFEU. In *Patmalniece v the Secretary of State for Work and Pensions* (2009 EWCA) the Court found that the right to reside test did not constitute direct discrimination. It held that the different test applicable to UK and Irish nationals (i.e., all UK and Irish nationals passed the right to reside test) was at most indirect discrimination and was in any event justifiable. This case will be heard on appeal at the Supreme Court later this month.

In relation to the right to reside of children, Mr. Allamby referred to *Baumbast* (C-413/99). This case found that children of EU citizens are entitled under Regulation 1612/68 to a right to reside in order to attend education and that the primary carer of the child derives a right to reside from the child (even if the parents are divorced or the EU citizen ceased to be a migrant worker in the UK). The *Ibrahim* case (C-310/08) provides that this right of residence under Article 12 of Regulation 1612/68 is not conditional on having sufficient resources and sickness insurance. The *Teixeira* case (C-480/08) further provides that the right is not conditional on the primary carer having worked in the Member State at the date on which the child started education. He also highlighted specific cross-border issues, in particular the lack of consistency between the social security systems in the North and the South and the lack of access to advice and information in Northern Ireland and Southern Ireland about the interaction of the two systems. For example, the failure of the UK system to recognise child care providers in Southern Ireland when providing help through tax credits.

Mr. Joe Shiels, ICT Manager, Centre for Cross Border Studies.

Mr. Shiels discussed the website www.borderpeople.info which is managed by the Centre for Cross Border Studies in partnership with the NSMC. The Centre is an independent and objective research centre established in 1999 with a full time role in relation to practical cross border issues. It focuses on education, health, planning and the economy. The cross border information on the website can be reviewed by theme, by category (e.g. employment), by life event (e.g. getting married) and by target group. There are 323 pages of information with 1,131 external links to other sources of information.

Where relevant, the website provides equivalent North and South pages and highlights the frontier worker or cross border issue. He went on to list the top five search terms (top was "child benefit Ireland"), and the top most viewed pages (top was "minimum wage in Ireland"). From a recent study carried out for the EURES Cross-Border Partnership Mr. Shiels estimated that there are approximately 23,481 cross border workers on the Island of Ireland. In relation to possible next steps, he concluded that cross border mobility is not well catered at the moment and that a "one stop shop" may be the solution.

Ms. Jo Kenny, Legal Officer, Public Interest Law Alliance, Free Legal Advice Centre (FLAC). "Social Welfare and the Habitual Residence Condition"

Ms. Kenny outlined the background to the habitual residence condition (HRC), noting that it was introduced in Ireland in 2004. The HRC requires people who wish to access means-tested allowances to show that their "centre of interests" is in Ireland. The CJEU has defined what it means to be habitually resident: in *Swaddling* (C-90/97) the CJEU outlined the five factors to be considered in determining whether a person is habitually resident in a Member State.

She outlined some issues FLAC has encountered in relation to the HRC. She referred to the application of the "two-year rule" whereby decision-makers in some instances decide against the welfare applicant on the basis that they have not continuously resided in the State for two years (without weighing up the five *Swaddling* factors) – despite that fact that in *Swaddling* the ECJ agreed with the Advocate General's finding that the duration of residence is not a decisive element. This arises from the fact that our domestic legislation contains a rebuttable presumption that a person shall not be habitually resident until they have resided in the State for 2 years. Ms. Kenny concluded that this is contrary to EU law. Another issue highlighted was that of returning emigrants who are refused welfare benefits on the ground that they have lost their habitual residence in the State. There are potential EU law issues involved in this, for example overly-rigid application of the HRC to Irish nationals arguably hinders the right of freedom of movement under Article 21 TFEU (due to the "deterrence" factor). She also raised certain issues in relation to the fairness of procedures (e.g., in relation to anecdotal evidence of non-Irish nationals being advised by welfare offices not to apply for allowances as they would fail the HRC; in such cases, the outcome is being presupposed without applying the relevant law). The ECJ has held that residence tests are only justifiable if they are applied proportionately; she raised the question as to whether the HRC is being applied proportionately in relation to the individual circumstances of each case.

The Republic of Ireland, since December 2009, has supplemented the HRC with a right to reside test. To date, FLAC has not encountered many issues with this test. Ms. Kenny made some observations on legal challenges to this test in the UK. For example, in relation to the *Patmalniece* case, she observed that having found that there was a prima facie case of discrimination, the Court of Appeal failed to give meaningful consideration as to objective justification. In relation to the *Abdirahman* case, she questioned whether the Court of Appeal's finding that equal treatment under Article 12 (now Article 18 TFEU) could only be enjoyed where one exercised an EU based right to reside was correct in EU law. Arguably it was enjoyed by all EU citizens residing in other Member States. She concluded by observing that the questions of social welfare have given rise to important questions about our conception of EU citizenship.

Professor Kees Groenendijk, Radboud University, Nijmegen. "Union Citizens and Third Country Nationals, Status under the residence and migration directives"

Professor Groenendijk first spoke about the position of third country national (TCN) family members of EU migrants. He noted that the rights of TCNs were first established in Regulation 15 of 1961 and that the *Metock* case therefore did not constitute any revolution - the ECJ merely blocked the reversal of standing EU law by some Member States. In relation to the decision of Advocate General Sharpston in *Zambrano* (C-34/09) (which found that EU citizenship implies residence rights without the need for migration) he noted that this may signal an end to reverse discrimination against EU nationals under national immigration law in certain Member States.

He continued by discussing the rights of TCNs under Association Agreements, referring in particular to the Association Agreement with Turkey (Ankara Agreement 1963, Protocol 1971 and Council Decision

1/80). This Association Agreement is relevant in Ireland because judgements of the CJEU have interpreted the association rules with Turkey and are indicative of how the CJEU may interpret the EU migration and asylum directives with regard to TCNs. The CJEU uses an analogous interpretation of similar concepts. Case-law on free movement of EU workers also applies for Turkish workers, while the case-law on the Association Agreement with Turkey is relevant for the free movement of EU nationals. In this regard, he referred, by way of example, to the *Genc* case (which concerned the interpretation of "worker") as an example of case-law on Turkish workers influencing free movement rules.

Ireland is bound by the EU asylum directives but not the directives on legal migration (with the exception of Directive 2005/71 on researchers). Professor Groenendijk noted that ECJ case-law on the migration directives (e.g., on Directive 2003/86 (Family Reunification)), will nevertheless be relevant for Ireland. He referred to the *Metock* case in this regard. In this case, the Court noted that under Directive 2003/86, the Member State would be obliged to authorise the entry in residence of the spouse of a TCN lawfully resident in its territory where the spouse was not already lawfully resident in another Member State but under the interpretation of Directive 2004/38 advanced by Ireland and other Member States would be free to refuse the entry and residence of the spouse of a Union citizen in the same circumstances. The Court concluded that this would be a paradoxical effect and used Directive 2003/86 as an additional argument for its ruling that the 2004 Residence Directive confers on all TCNs who are family members of a Union citizen and accompany or join the Union citizen in a Member State, other than that of which he is a national, rights of entry into and residence in that host Member State regardless of whether the TCN has already been lawfully resident in another Member State. Professor Groenendijk concluded by examining how one could explain the ECJ choices - he referred in this regard to the CJEU's perception of its task in the EU system as guaranteeing the uniform interpretation of legislation in Member States and bringing coherence to a patchwork of legislation. The general principles of EU law, and the general methods of interpretation, apply in all fields.

Dr. Emod Veress, Partner, Veress & Schulleri SCA Law Firm, Head of Department, Department of Legal Sciences, Sapienta University, Romania. "A2 States and Free Movement, Current Issues"

Dr Veress began by noting that after 45 years of Communism, Eastern Europe faced a complex transition to a market economy. This transitional process ended for Romania in 2007 with its integration into the European Union. At the lowest social level, Romania has a large ethnic minority - the Roma - which account for between half a million and two million of the Romanian population. While most Roma are relatively integrated, a minority of this community is marginalised. This marginalisation is accentuated by the exclusion of Roma by France and Germany. He noted that exclusion is not a solution to the Roma issue and that the real life situation of Roma is not fully covered by the relevant legislation in force. The 2004 Residence Directive provides for a three month residence period without any special conditions or formality. This can be extended in certain circumstances (e.g., where the relevant person has sufficient resources and sickness insurance). Dr Veress noted that Roma generally do not fulfil these conditions but that that, in itself, is not enough to justify the exclusion of Roma. Exclusion is provided for under Articles 27-33 of the 2004 Residence Directive only. The relevant conditions of these Articles must therefore be satisfied before exclusion occurs. For example, the decision to exclude must be based on public policy and must relate to the personal conduct of the applicant. Furthermore, the measures must be proportionate and properly motivated, with a right of appeal and time for the relevant person to leave. He concluded that a better solution to the Roma issue should focus on integration based on education and job creation.

Dr Veress finally noted that Romania must prepare itself to transfer from being a source of migration to being a destination for same; in particular it must be prepared for the issue of TCNs.

Ms. Leanora Frawley, Solicitor, Kelleher O'Doherty Solicitors. "The Roma and their Experience of the Criminal Law in Ireland"

Ms. Frawley discussed whether the Roma experience of the Irish criminal justice system differs to everybody else's and whether this affects the free movement of Roma as Union citizens. Roma are more likely to come to adverse Garda attention and are likely to face difficulties in court (given that it is an alien setting and that legal aid will only be granted if the accused person is assessed to be at risk of receiving a custodial sentence).

Ms. Frawley proceeded to outline the criminal offences most affecting the Roma community. Roma frequently face charges under the Public Order Act 1994, in particular Section 6 (threatening, abusive or insulting behaviour in a public place), Section 8 (failure to comply with a direction of a member of an Garda Siochana) and Section 9 (wilful obstruction). These offences mostly arise from begging (e.g., a Garda may allege that a person was begging aggressively and putting people in fear). Ms. Frawley commented that, in some cases, the Public Order Act 1994 is mis-used as way of re-criminalising begging (she also noted that under the new Criminal Justice (Public Order) Act 2010, which has yet to be enacted, begging will be prohibited within a ten metre distance of any business).

Obstructing traffic (Section 98 of the Road Traffic Act 1961) was noted as another charge often preferred (generally in relation to begging from cars or cleaning windscreens). Section 247 of the Children's Act 2001 prohibits causing or procuring a child to beg or receive alms in a public place. Ms. Frawley submitted that where the child is an infant strapped to the mother this is not sufficient to justify bringing a charge under this section.

In relation to casual trading offences under the Casual Trading Acts 1980 and 1995 (particularly the selling of roses at night to people in bars and restaurants), Ms. Frawley submitted that preferring charges for this type of activity under the Casual Trading Acts is open to challenge as an exception is made for door-to-door selling to private residences and businesses and, arguably, the selling of roses is no different to that. In relation to theft offences (particularly shoplifting and pick-pocketing), she noted a noticeable intolerance in the courts of non-nationals, particularly Eastern Europeans, including Roma, charged with these types of offences.

She referred to frequently seeing Roma charged under Section 12 of the Immigration Act 2004 (which provides that every non-national shall produce on demand a valid passport/equivalent document, and, where applicable, his or her registration certificate). Ms. Frawley submitted that Ireland is in breach of the 2004 Residence Directive (in particular, Article 24 (equal treatment)) in this regard, in that non-Irish citizens who are Union citizens are required to carry and produce on demand identity papers while Irish citizens are not. She also noted State ordered removal of Roma from Ireland is particularly interesting at the moment (given the recently publicised difficulties facing the Roma in France). She has successfully challenged all proposals for removal, removal orders and consequential exclusion periods made on her clients, largely on three grounds; procedural grounds, where there is insufficient evidence of a genuine, present and sufficiently serious threat (Article 27(2) of the 2004 Residence Directive) and on humanitarian grounds.

Specific Issues of Interest to the European Commission (please note that the below responses are, in general, drawn from the above record of proceedings - information relevant to the specific issues of interest to the Commission is replicated below for convenience).

1- Access to social assistance for frontier workers from Northern Ireland: obstacles identified?

Ms. Mary Bunting (Joint Secretary of the NSMC) noted that access to welfare benefits has caused some obstacles for frontier workers (but did not give specific examples of same). Ms. Bunting also referred to an information and advice deficit - people do not know where to get the right answers. Mr. Les Allamby (Director, Law Centre, Northern Ireland) highlighted the lack of consistency between the social security systems in Northern Ireland and Southern Ireland and the lack of access to advice and information about the interaction of the two systems.

Ms. Jo Kenny (Legal Officer, Public Interest Law Alliance, Free Legal Advice Centre) outlined the general background to the habitual residence condition (HRC). The HRC requires people who wish to access means-tested allowances to show that their "centre of interests" is in Ireland. This may be an obstacle to access to social assistance for frontier workers from Northern Ireland (although this specific issue was not discussed at the seminar).

2- Are there figures available of Romanian and Bulgarian nationals currently working in Ireland? Has the economic downturn influenced the arrival/departure of workers from/to these two Member States?

These issues were not addressed at the seminar. Furthermore, there does not appear to be any publically available information on the number of Romanian and Bulgarian nationals currently working in Ireland.

Some guidance in relation to whether the economic downturn has influenced the arrival/departure of such workers may be taken from statistics on the number of work permits issued to Romanian and Bulgarian nationals each year. In 2010, 70 permits were issued to Bulgarian nationals, while 771 such permits were issued to Romanian nationals. In 2009, 29 permits were issued to Bulgarian nationals, while 196 such permits were issued to Romanian nationals. In 2008, 22 permits were issued to Bulgarian nationals, while 1204 permits were issued to Romanian nationals. (Source: http://www.deti.ie/labour/workpermits/statistics.htm). While these figures do not clearly indicate a reduction in the numbers of Romanians and Bulgarians working in Ireland, press reports indicate that the economic recession is creating problems for Romanians and Bulgarian immigrants who are looking for jobs (for example: http://www.metroeireann.com/article/irelands-grim-reality,2010)

3- Are there any specific information tools in place in order to better inform EU migrant workers on their rights.

Ms. Anne Barrington (Joint Secretary of the NSMC) outlined the Study on Obstacles to Mobility of persons between North and South (including workers, non-workers and students). The study resulted in fifty recommendations, including the setting up of a website to provide information on relevant North-South issues. The website is now well established and highly regarded. Other recommendations have also been progressed, including the provision of information on on benefit entitlements. Mr. Joe Shiels (ICT Manager, Centre for Cross Border Studies) discussed the above-mentioned website (www.borderpeople.info) which is managed by the Centre for Cross Border Studies in partnership with the NSMC. The cross border information on the website can be reviewed by theme, by category (e.g. employment), by life event (e.g. getting married) and by target group. There are 323 pages of information with 1,131 external links to other sources of information. Where relevant, the website provides equivalent North and South pages and highlights the frontier worker or cross border issue. In relation to possible next steps, Mr.Shiels concluded that cross border mobility is not well catered at the moment and that a “one stop shop” may be the solution. Ms. Mary Bunting (Joint Secretary of the NSMC) also noted that the future direction may include possibly providing a “one stop shop facility” whereby people with questions could talk to a person about the relevant issues.

Although not specifically discussed at the seminar, there are also specific information tools in place in order to better inform general EU migrant workers (as opposed to just workers from Northern Ireland) of their rights. For example, the Immigrant Council of Ireland website (http://www.immigrantcouncil.ie) and the Citizen’s Information website (http://www.citizensinformation.ie/en/) provide such information.