The Law on Family Reunification in Ireland

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Given the ongoing lack of clarity on the criteria or issues to be considered by immigration officers determining matters on behalf of the Minister for Justice and Equality in relation to migrants’ rights and entitlements, this article proposes that it is essential that matters such as family reunification, which affect human and constitutional rights of migrants and their family members, should be the subject of material law.

It explores the current situation regarding immigration law and the developing policies on family reunification in Ireland and goes on to analyse recent case-law from the European and national courts, with a particular focus on the rights of Irish nationals to family reunification in their country of nationality, Ireland. In conclusion, the article proposes a number of ways in which the situation of families seeking reunification with family members from outside Ireland may be improved and, as part of this section, also touches briefly on the issue of access to legal remedies.

Introduction

One of the main difficulties for migrants and their family members in Ireland, including Irish nationals with family members from outside the EU, remains the lack of clear legislation setting out who gets to be in Ireland, for how long, on what conditions and with what rights (if any) attached. The title of this article may therefore as well be: ‘Which law on family reunification in Ireland?’.

The article will first explore the current situation regarding immigration law and the developing policies on family reunification in Ireland and will then go on to analyse recent case-law from the European and national courts, with a particular focus on the rights of Irish nationals to family reunification in their country of nationality, Ireland. To conclude, the article will propose a number of ways in which the situation of families seeking reunification with family members from outside Ireland may be improved and, as part of this section, will also touch briefly on the issue of access to legal remedies.

Immigration Law and Policy Development

Given the ongoing lack of clarity on the criteria or issues to be considered by immigration officers determining matters on behalf of the Minister for Justice and Equality in relation to migrants’ rights and entitlements, it is essential that matters such as family reunification, which affect human and constitutional rights of migrants and their family members, should be the subject of material law. This is also a requirement of Article 8(2) of the European Convention on Human Rights and Fundamental Freedoms (ECHR), which provides that any limitation of the right to family life must be ‘in accordance with the law’.

There have been years of consultations about immigration into Ireland, starting with a public consultation process on regular migration in 2001. At the time, the Government also commissioned the International Organization for Migration (IOM) to conduct a comparative study of international law and practice with regard to immigration.¹ This study, published in 2002, identified some measures adopted by other countries, as well as efforts to develop common migration policies on family reunion at European level, but made no specific policy recommendations on the issue. However, the study did highlight the then Irish birth right citizenship entitlements, irrespective of nationality of parents, and

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noted the general policy, at that time, to grant residence to non-EEA national parents and spouses of 
Irish citizens, signalling these as weaknesses and potential areas of immigration abuse.\textsuperscript{2}

In April 2005, the Department of Justice initiated a further process of consultation by publishing a 
discussion document, including proposals for future immigration and residence legislation. The 
discussion document reflected the pressing need for reform in almost all aspects of immigration law, 
policy and practice but it was argued that the single, most urgent issue requiring reform in this context 
was family reunification.\textsuperscript{3} In fact, the Department highlighted the issue and identified the importance of 
admitting family members of legally resident migrants. Significantly, it recognised that although higher 
levels of migration to Ireland were a relatively recent phenomenon, if the Irish experience of 
immigration mirrored that of other countries, particularly in Europe, then demand for family 
reunification would intensify. It was also acknowledged that provisions needed to be set out 
accessibly and transparently, by way of secondary legislation or practice guidelines, to ensure future 
immigration practices conform to constitutional obligations and reflect best practice.\textsuperscript{4}

Despite the Government’s recognition of the need to address immigration in a comprehensive 
statutory framework, there has been no comprehensive reform. Draft immigration and residence 
legislation was published in 2007, 2008 and 2010 but all of the Immigration Residence and Protection 
Bills – none of which was ultimately enacted – failed to provide clear rules regarding the rights and 
obligations of migrants seeking to come to Ireland, the conditions on which residence permissions 
would be granted or withdrawn and what entitlements migrants may or may not have while in the 
State. Instead, each of the bills sought to provide a legal skeleton, providing procedural rules which 
the Minister would then have had the power to ‘flesh out’ by making ‘immigration regulations’.

In January 2012, the then Minister for Justice and Equality, Alan Shatter TD, outlined the 
Government’s plans for the year.\textsuperscript{5} In his statement, he also committed to developing a 
‘comprehensive policy approach to family reunification or settlement’,\textsuperscript{6} concentrating on cases 
involving non-EEA family members of Irish citizens and also those where both parties come from 
outside the EEA and acknowledged that:

\[\text{While the Government must retain the discretion to determine the State’s approach to} 
\quad \text{immigration, bearing in mind wider concerns of public policy ... a clear statement of} 
\quad \text{policy will be of benefit to prospective migrants and all those involved in immigration} 
\quad \text{management.}\]

While family reunification did not feature in the Minister’s more recent statement outlining immigration 
priorities for 2013,\textsuperscript{7} the Policy Document on Non-EEA Family Reunification\textsuperscript{8} was finally published in 
December 2013 and came into effect on 1 January 2014.

\textsuperscript{2}IOM (n1) 97-98.
\textsuperscript{3}Aisling Ryan, ‘Reform Issues in Irish Law and Practice’ (Migrant Workers and Human Rights Law Conference, Dublin, October 2005).
\textsuperscript{4}Department of Justice, Equality and Law Reform, ‘Immigration and Residence in Ireland – Outline Policy 
Proposals for an Immigration and Residence Bill – A Discussion Document’ (Department of Justice, Equality and 
2013.
\textsuperscript{5}Irish Naturalisation and Immigration Service (INIS), ‘Immigration in Ireland 2011 – A Year-End Snapshot – 
Major Changes and More to Follow’ (Department of Justice and Equality, January 2012) <www.inis.gov.ie/ 
en/INIS/Pages/Immigration%20in%20Ireland%202011%20%E2%80%93%20a%20year-end%20snapshot%20%E2%80%93%20 
major%20changes%20and%20more%20to%20follow> accessed 29 October 2013.
\textsuperscript{6}INIS, ‘Immigration in Ireland 2011 – A Year-End Snapshot – Major Changes and More to Follow’ (n5).
\textsuperscript{7}ibid.
\textsuperscript{8}Dáil Deb, 23 April 2013, unrevised. <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2013042300076#W 
\textsuperscript{9}INIS, ‘Policy Document on Non-EEA Family Reunification’ (Department of Justice and Equality, December 
Family Reunification Policies in Ireland

Despite the absence of comprehensive legislative reform, since 2001 there have been several fundamental legislative, policy and administrative changes. Some of these, for example the introduction of a change in policy in 2003 regarding the residence entitlements of parents of Irish citizen children as well as the subsequent judgment of the Court of Justice of the European Union (CJEU), in the Zambrano\(^\text{10}\) case, or measures introduced in 2006 to tackle alleged ‘sham marriages’ with EEA nationals exercising free movement, which had to be amended following the Metock\(^\text{11}\) judgment in 2008, have not been without controversy and have been the subject of much debate, as well as legal challenge.

Other changes, such as the overhaul of information provided on the Irish Naturalisation and Immigration Service (INIS) website, the extension of residence entitlements to de facto couples in 2006 and civil partners in 2010 as well as the introduction of spousal work permits, have been the subject of less debate in the immigration context but, arguably, were of significant importance to individuals.

In the past, the wide discretion of the Minister in the granting of family reunification has led to inconsistencies and a lack of transparency. While the new Policy Document on Non-EEA Family Reunification still ‘does not create or acknowledge any new rights of family reunification’\(^\text{12}\) and stresses that Ministerial discretion continues to apply to most of the decision making in the area of family reunification,\(^\text{13}\) it is to be hoped that it will contribute to more consistent decision making and clarity for applicants.

Absence of Binding Legislation

Ireland remains the only EU Member State that does not have national family reunification rules enshrined in legislation, for anyone who is not covered by the EU Free Movement Directive\(^\text{14}\) or the Researchers Directive\(^\text{15}\) or is entitled to family reunification pursuant to Section 18 of the Refugee Act 1996 or Regulation 25 or 26 of the European Union (Subsidiary Protection) Regulations 2013.\(^\text{16}\)

The previous government decided not to opt into the Directive on the Right to Family Reunification.\(^\text{17}\) Notwithstanding that decision, family reunification rules should be inspired by international best practice and, given the fundamental importance of family life to all of society, future legislation should provide a clear entitlement for Irish citizens and legally resident migrants to be joined by immediate family members, including spouses or partners and minor children. Discretionary provisions should allow for the admission of other family members. In fact, Article 8(2) ECHR does require that any interference with the right to private and family life must, inter alia, be ‘in accordance with the law’. In other words, when a person applies for permission to remain with or join an Irish national or legally resident foreign national family member in Ireland, he or she must be able to predict the outcome of such application. In this regard the European Court of Human Rights has held that:

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\text{[A] norm cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.}^{18}
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\(^{10}\) Case C-34/09 Gerardo Ruiz Zambrano v Office National de l’Emploi (ONEm) [2011] ECR I-01177.


\(^{12}\) Family Reunification Policy Document (n9) 18.

\(^{13}\) Ibid 4.


\(^{16}\) SI 2013/426.


\(^{18}\) Sunday Times v The United Kingdom (1979) 2 EHRR 245, para 49.
The ‘cherry-picking’ by this and the previous governments when it comes to decisions whether to opt-in to EU measures in the area of immigration and asylum has led and will continue to lead to a lack of coherence and misalignment with other EU Member States.

In light of recent case law from the CJEU it is of the utmost concern that families in Ireland will be deprived of ‘solutions’ now proposed by the Court in the area of family reunification. In the recent cases of O and S v Maahanmuuttovirasto and Maahanmuuttovirasto v L,

for example, which concerned the rights of third country national step-fathers of Finnish citizen children to remain in Finland together with their legally resident wives, the CJEU identified several distinguishing factors between the children in those cases and the children in the Zambrano case, a case which will be described in more detail below. In the Finnish cases the Court held that the Union citizen children concerned would not be obliged to leave the territory of the Union if their step-fathers were refused permission to remain, as their mothers had permanent residence in Finland, their step-fathers did not have custody of the Union citizen children, and they were not legally, financially or emotionally dependent on their step-fathers. In the words of the Court:

Article 20 TFEU must be interpreted as not precluding a Member State from refusing to grant a third country national a residence permit on the basis of family reunification where that national seeks to reside with his spouse, who is also a third country national and resides lawfully in that Member State and is the mother of a child from a previous marriage who is a Union citizen, ... provided that such a refusal does not entail, for the Union citizen concerned, the denial of the genuine enjoyment of the substance of the rights conferred by the status of citizen of the Union, that being for the referring court to ascertain.

However, the Court then turned its attention to Directive 2003/86/EC on the right to family reunification, holding that applications for residence permits based on family relationships, like the ones made by the step-fathers in these cases, were covered by the Directive and stressing the applicability of Articles 7 (Respect for private and family life) and 24(2) and (3) (The rights of the child) of the Charter of Fundamental Rights of the European Union in relation to such applications.

While the best interest of any child involved in an application for family reunification will obviously have to be considered in any decision made by the Irish authorities also, particularly following the Children’s Referendum, the absence of a right to family reunification and legally binding provisions regarding the factors to be considered in such an application becomes particularly obvious in a situation where it is clear that the highest European court does increasingly rely on there being a coherent immigration and asylum system with the same criteria applicable in all Member States. It would be interesting to see how the Court would deal with this kind of reference coming from an Irish court.

Rights for Irish Citizens?

The judgment of the CJEU in the Zambrano case, a case concerning a Columbian national couple and their two Belgian national children resident in Belgium, which was delivered in March 2011, has now significantly altered the position at least of Irish citizen children with regard to the recognition of their rights as EU citizens resident in their own State of nationality. The CJEU established in this case that “[a] refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also the refusal to grant such a person a work permit has the effect of depriving ‘those children of the genuine enjoyment of the substance of the rights attaching to the status of European citizen’.

Following the Zambrano judgment, the INIS has introduced a specific application procedure for parents of Irish citizen children who are awaiting a decision in their case under Section 3 of the Immigration Act 1999, in other words, parents who have been informed of the intention of the Minister

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20 ibid para 82.
21 ibid.
22 Case C-34/09 Zambrano (n 10).
23 ibid paras 42-43.
24 ibid para 45.
for Justice and Equality to issue a deportation order in respect of them, parents of an Irish-born citizen child who have current permission to remain in the State on conditions restricting full access to the labour market, and parents of an Irish-born citizen child who have been deported or who have left the State on foot of a Deportation Order.

However, it must be noted that as a matter of public policy, the INIS has announced that the terms of the Zambrano judgment will not be applied to a third-country parent of an Irish-born citizen child or children, where the parent has been convicted of serious and/or persistent criminal offences. Furthermore – and this is probably an issue that may ultimately need to be clarified by the courts, at national or EU level – parents who have left Ireland of their own volition are currently excluded from the making of a Zambrano-type application in Ireland. One question that clearly arises here is whether Irish citizen children who are currently residing outside the State can be held liable for a decision made by their parents some time ago, which was then or now is contrary to their own best interest and whether the children, on that basis, can now be deprived from re-entering the State with their family members on whom they are dependent.

Irish Jurisprudence in the Area of Family Reunification for Irish Citizens

The High Court has applied the rules established by the CJEU in the Zambrano case in a number of judgments so far, for example in the cases of AO v Minister for Justice, Equality and Law Reform & Ors (No 2)25 and EA & Anor v Minister for Justice & Anor.26

In both of these judgments, the High Court clarified that ‘Ruiz-Zambrano turns on factors … such as dependency, residence in the territory of the Member State in question and the right of European citizens to enjoy one of the real benefits of that citizenship, namely, the right to reside within the territory of the Union’.27 In the latter case, Hogan J found that in a situation where the parents of an Irish citizen child were separated, and with the mother having been granted refugee status, it was not to be expected that the deportation of the father would in fact lead to a situation where the child would effectively be forced to leave Ireland and the wider EU. In such circumstances, he held, ‘there are no grounds for contending that [the father] is entitled to an interlocutory injunction restraining his deportation on Zambrano grounds’.28

Interestingly, when Hogan J went on to assess the child’s right to the care and company of his father under the Irish Constitution, he found himself coerced to the conclusion that ‘there [are] abundant grounds for suggesting that the substance of [the child’s] constitutional right to the care and company of his father would be denied were his father to be deported’ and that ‘[t]his would ordinarily be sufficient in itself to justify the grant of an interlocutory injunction restraining the deportation of [the father], his disreputable and egregious conduct notwithstanding’.29

He concluded that although the father in this case had ‘manipulated the asylum system’ and had ‘engaged in egregiously wrongful conduct’ and although ‘[h]e has no personal merits which would entitle him to administrative or judicial protection … the court must … approach this application not from the perspective of the father, but rather from that of the child’.30

It seems therefore that the rights of minor Irish citizens to remain in their country of nationality, and with that in the territory of the EU, as well as to the care and company of both their parents is best protected when courts and governments consider the situation of these children and their families based on a combination of national, international as well as EU human rights and citizenship law.

The situation of spouses of Irish nationals seeking permission to remain in the State as part of the family unit has so far been determined by ministerial discretion guided, inter alia, by the judgment of the Supreme Court in the case of Cirpaci (née McCormack) v The Minister for Justice, Equality & Law Reform, Ireland and the Attorney General (No 2) [2012] IEHC 371. 26

27 AO v Minister for Justice (n25) para 18 per Hogan J.
28 EA v Minister for Justice (n26) para 14.
29 ibid para 17.
30 ibid para 40.
Reform, placing much emphasis on matters such as a previous unsuccessful asylum application, the evasion of deportation and the immediate commencement of moves to be readmitted to the State following marriage to an Irish national without subsequent cohabitation for an appreciable time.

In the case of Troci & Anor v The Minister for Justice & Equality and Ors., the High Court addressed the question whether an adult Irish citizen, the second applicant in this case, Ms Healy, could rely on Article 21 of the Treaty on the Functioning of the European Union (TFEU), which provides that '[e]very citizen of the Union shall have the right to move and reside freely within the territory of the Member States', in seeking permission for her Albanian national husband to remain with her in Ireland.

The Court followed the judgments of the CJEU in the cases of McCarthy v Secretary of State for the Home Department, a case concerning a dual UK/Irish citizen, who had always lived in the UK, and her Jamaican spouse who were considered not to have any factor linking them with any of the situations governed by EU law as their situation was confined to a single Member State, and Dereci & Others v Bundesministerium für Inneres, an Austrian case relating to five families comprising various combinations of EU citizens and third-country nationals with different degrees of dependency.

In the Dereci case, the CJEU was essentially asked to identify in which cases the refusal of a residence or work permit would deprive the Union citizen of the genuine enjoyment of his / her citizenship rights and in which it would not. The Court reiterated that:

[The criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizen status refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole.]

Essentially though, the Court found it a matter for national courts to verify whether the refusal of a residence permit to a third-country national family member would lead, for the EU citizen, to the denial of the genuine enjoyment of the rights as a Union citizen.

In the Troci case, O’Keeffe J also referred to the most recent case of the CJEU on this topic, the case of O and S v Maahanmuuttoviras and Maahanmuuttoviras v L, mentioned above. In expressing regret that the CJEU did not give specific consideration to the five scenarios referred in the Dereci case, O’Keeffe J went on to hold that:

Until the CJEU gives further guidance in relation to the parameters of the rights identified in Zambrano, there are three objective yardsticks by which the denial of genuine enjoyment of rights emanating from EU citizenship can be measured: (i) the case of Ruiz Zambrano, (ii) the case of Mrs McCarthy and (iii) the cases of the Finnish citizen children in O, S and L.

O’Keeffe J considered, in the Troci case, that the position of the adult Irish citizen in that case was more comparable to that of the adult dual UK/Irish citizen in the McCarthy case than to that of the Finnish citizen children. He could not ‘identify any factor which would distinguish the position of Ms Healy from that of Mrs McCarthy, save the dual citizenship of Mrs McCarthy which the CJEU appears to have considered irrelevant’. He also noted that ‘[a]lthough this is not determinative, both Ms Healy

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36 Case C-256/11 Dereci (ibid) paras 66-68.
37 Joined Cases C-356 and 357/11 O, S and L (n19).
38 Troci v Minister for Justice (n32) para 46.
39 Case C-434/09 McCarthy (n34).
and Mrs McCarthy are “stationary EU citizens” - neither has exercised her right to freedom of movement’. 40

He continued to outline that like Mrs McCarthy in the UK, Ms Healy enjoyed an unconditional right to reside in her Member States of nationality and that there was no risk that she would have to leave the territory of the EU. He concluded that '[t]he deportation of Mr Troci will not see her deprived of her means of subsistence as she is not financially dependent on him, which was one of the distinguishing factors between the position of the Union citizen children in Zambrano and those in O, S and L’. 41

O’Keeffe J further emphasised that although ‘Ms Healy might prefer to reside with her husband in Ireland … it is clear from Dereci and O, S and L that such a desire is not determinative’. 42 Surprisingly, he did not consider the fact that Ms Healy was in stable employment in Ireland a matter that would have put her in a different position, for the purposes of the applicability of Articles 20 and 21 TFEU, from Mrs McCarthy who had never worked. He concluded that ‘it has not been established that there is a real impediment to Mr Troci and Ms Healy establishing family life elsewhere in the EU’. 43

Unlike the cases involving Irish citizen children referred to earlier, the Court concurred with the Respondent that ‘there was no compelling evidence that it would be unreasonable to expect [Ms Healy] to join Mr Troci in Albania’ 44 and also rejected the argument that Article 41 of the Constitution should not be so weakly interpreted as to sanction reverse discrimination of Irish citizens under EU law. 45

Irish case-law on this issue is constantly evolving and most recently, in January 2014, Mac Eochaidh J expressed the view that Irish nationals married to a non-Irish national have a *prima facie* constitutional right to reside in Ireland with their spouse, albeit subject to lawful regulation. He stressed however, that '[t]he right is not absolute' and that '[t]he State is not obliged in every case to accept the country of residence chosen by such a couple’. 46 For example:

> ['T']he couple who marry on a whim in a drive-in church in Las Vegas having met earlier in the evening, may well find that their circumstances do not trigger the respect for marriage reflected in the provisions of Article 41 of the Constitution and a consequential right to reside in the State. 47

**Access to Justice?**

Lengthy delays and inconsistencies in decision-making in the area of immigration and asylum have led to many challenges, leading to the so-called ‘Asylum List’ in the High Court having a backlog of at least 1,000 cases 48 with an average delay of 2 years. 49 In the view of the author, it is therefore crucial that the Government honours its commitment in the Programme for Government 2011-2016 50 to ‘introduce comprehensive reforms of the immigration, residency and asylum systems, which will include a statutory appeals system’. 51 The establishment of an independent appeals mechanism, if designed in a way that would make challenges of the procedure through High Court proceedings unlikely, would provide transparency and could also be more cost efficient.

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40 Troci v Minister for Justice (n32) para 46.
41 ibid.
42 ibid.
43 ibid para 47.
44 ibid para 54 per O’Keeffe J.
45 ibid para 57.
47 ibid.
48 Mary Carolan, ‘Supreme Court Overturns Asylum Ruling’ The Irish Times (Dublin, 17 October 2012).
51 ibid 51.

[2014] 17 (1) IJEL
Furthermore, an independent appeals mechanism is the only way to ensure access to fair procedures and effective remedies for migrants and their family members seeking to challenge decisions affecting their human rights as protected under the ECHR, in particular Articles 3 (prohibition of torture) and Article 8 (right to family life), as required by Articles 6 (right to a fair trial) and 13 (right to an effective remedy) of the ECHR.

Currently, people seeking to challenge decisions refusing them permission to enter or remain in the State – for example for the purpose of family reunification or the preservation of the family unit – are effectively forced to seek judicial review by the High Court instead of accessing a more efficient ‘Immigration Appeals Tribunal’ which, unlike the High Court, would also have the power to alter or vary an administrative decision.

**Conclusion: A lot done – more to do!**

The publication of the Family Reunification Policy in December 2013 has certainly added to the transparency of the decision-making process for those seeking family reunification in Ireland, both where the sponsor is an Irish national and where he or she is from outside the EEA. Nevertheless, without the introduction of an actual right to family reunification – on fulfilment of certain conditions – Ireland will continue to lag behind its European counterparts. Families seeking reunification in Ireland will continue to have to rely on ministerial discretion and – due to the decision not to opt-in to the Family Reunification Directive – decisions on family reunification with legally resident foreign nationals from outside the EU will not be governed by the Charter of Fundamental Rights of the European Union or subject to the judicial oversight of the CJEU.

Whether the re-publication of an amended Immigration, Residence and Protection Bill – no longer expected before the end of 2014 – will go ahead, remains an open question. However, it can only be hoped that whenever the Bill does come, it will address the shortcomings of the current system and will finally lead to an immigration system that is fair, efficient and just for all.