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"Public order, national security and the rights of the third-country nationals in immigration and citizenship cases"

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Answers to questionnaire: Ireland

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Public Order, National Security and the Rights of Third-Country Nationals in Immigration and Citizenship Cases

Questionnaire answers of Ireland

Section A - General Questions

1. The Irish national legal framework in respect of immigration of third country nationals in relation to national security and public order derives from the fact that all initial decisions concerning immigration (with the exception of cases in the refugee and subsidiary protection field which are outside the scope of this questionnaire) involve a determination by the Minister for Justice and Equality (in some cases delegated in accordance with law by that Minister to appropriate officials). Section 4 of the Immigration Act, 1999 provides for the power of the Minister to make exclusion orders in respect of a third country national where necessary for reasons of national security or public policy.

Section 17 of the Immigration Act, 2004 provides that the Minister may require specified classes of third country nationals to be in possession of a visa when travelling to Ireland on grounds of maintaining, *inter alia*, national security and public order.

There are no special rules or procedures provided for in Irish law for challenging a decision of the Minister in this field. Thus the general law applies whereby any person, having standing, can challenge a public law decision which affects their rights or obligations by seeking judicial review from the High Court. The High Court is the court on which is conferred general unlimited jurisdiction, under the Irish Constitution, in all issues whether criminal or civil (including constitutional questions). The jurisdiction of the High Court, therefore, includes the power to judicially review any administrative act. Details of the process will be set out in response to other questions but there remains the possibility of an appeal from an adverse decision of the High Court to the Court of Appeal and/or the Supreme Court.

There is no prior administrative procedure subsequent to an adverse decision of the Minister in cases such as are covered by this questionnaire.

2. The law concerning citizenship is contained in the Irish Nationality and Citizenship Acts, 1956 – 2004 which define the entitlement, in law, to citizenship of Ireland. Any decision by the State authorities relating to citizenship is capable of being challenged through ordinary judicial review procedures. It follows that the general comments made in response to question 1 apply equally in this case. There are no special procedures applicable to citizenship cases.

3. In 2016, 41 cases were brought before the High Court with three of those cases being pursued on appeal to the Court of Appeal. There were no cases brought to the Supreme Court.

4. (a) There are no differences in the judicial procedure between immigration cases and other administrative cases. As a matter of practical convenience the business of the High Court is divided into a number of "lists" dealing with different categories of case. Because of the growth in the volume of immigration cases generally (predominantly refugee or subsidiary protection cases) a separate "list" operates for such cases which means that they are dealt with by a different panel of judges as compared with the so-called "judicial review" list which deals with most other judicial review cases. However, the "immigration list" does not distinguish between refugee/subsidiary protection cases and the sort of immigration or citizenship issues which are the subject of this questionnaire.

(b) In general the fact that issues of national security and public order arise do not make the procedures in immigration cases involving such issues different from the procedures in immigration cases generally. However, there may be issues concerning the compellability of evidence which do apply generally but may come into greater focus in such cases.

(c) The role of the judge of first instance is to control legality both procedural and substantive. In principle that role does not differ in an immigration case involving national security or public policy as

compared to any other administrative law case so that a decision may be quashed for procedural irregularity, failure to conduct the assessment in accordance with law or on the basis that the decision was one which cannot be rationally supported on the materials before the decision maker. The judge does not have power to alter the decision but may remit the matter back to the decision maker who is then required to make the decision in accordance with the law as determined by the judge.

(d) The court of last instance in all matters in the Irish legal system is the Supreme Court. Other than in two very exceptional circumstances not relevant to this questionnaire, the Supreme Court operates as a court of final appeal. Thus the role of the Supreme Court in administrative cases is to hear appeals either from the High Court or from the Court of Appeal. The power of the Supreme Court on hearing such appeals is the same as the power of the High Court in hearing a first instance judicial review.

(e) Under the provisions of the 33rd Amendment to the Irish Constitution, which came into effect in 2014, all cases now require leave from the Supreme Court in order that an appeal can be pursued. The rule or threshold does not differ as between administrative cases and any other type of case or, within administrative cases, between immigration cases or any other type. In order for leave to be granted the Supreme Court must be satisfied that the case involves "a matter of general public importance" or "that it is in the interests of justice" that a further appeal be pursued to the Supreme Court.

5. (a) There are no material differences in the judicial procedure between citizenship cases and other administrative cases. The comments made at 4(a) apply equally here.

(b) There are no formal differences in procedure between national security "public order cases" and any other type of case. The comment made in the answer to 4(b) applies equally here.

(c) Answer as per 4(c).

(d) Answer as per 4(d).

(e) Answer as per 4(e).

Section B – Substantive Issues

6. Statute law does not define terms such as public order, national security or the like. The case law of the Irish Superior Courts has, however, attempted to define such terms. As will be seen from the following brief description of some of the leading cases it might be said that there is not, as yet, a definitive or consistent interpretation placed on the terms. It may well require that a suitable case be brought, under the new constitutional architecture, to the Supreme Court before a definitive determination can be made.

Case Law

(a) In *Li v. Governor of Cloverhill Prison* [2012] IEHC 493 Hogan J. examined the definition of "public order" and "national security" under the s. 9(8)(a) Refugee Act 1996, holding that a narrow definition of the terms involving a serious threat to fundamental State interests was the correct interpretation of the legislation. It was held that non-compliance with immigration law did not justify the applicant's civil detention.

(b) Hogan J. disagreed with the decision of Charleton J., in *Yong Dong v. Governor of Cloverhill Prison* (ex tempore judgment, High Court, 13th November, 2012) in which Charleton J. adopted a broader interpretation of "public order" encompassing virtually all breaches of criminal law.

(c) In *Bennetts v. Governor of Cloverhill Prison* (ex tempore, High Court, 20th June, 2008) Birmingham J. held the applicant, who was a South African national, was lawfully detained pursuant to s. 9(8)(a) Refugee Act 1996 in circumstances where he had been deported from Australia and then from the United States for a variety of firearms, drink driving and domestic violence offences. Birmingham J. held that conviction for serious offences constituted a threat to public order for the purposes of s.

9(8)(a) and that the phrase could potentially be wider and may permit detention where a serious crime has not been committed.

7. If one takes the most recent decision of the High Court, being the decision in *Li*, as representing something of an evolution from the other case law referred to in para. 6, it might be said that the definition has been narrowed. However, it cannot be asserted with any confidence that the decision in *Li* necessarily represents an evolution in the case law but rather may represent a different view of the judge dealing with the case in question. As it happens the three judges who gave judgment in the cases referred to in the answer to 6 are now judges of appellate courts with Charleton J. being a judge of the Supreme Court and both Hogan and Birmingham JJ. being judges of the Court of Appeal.

8. (a) Under s. 4(3)(j) of the Immigration Act, 2004 an immigration officer may refuse permission to land if satisfied that the third country nationals entry into, or presence in, the State could pose a threat to national security or be contrary to public policy.

(b) Similar considerations would apply to short stay visas.

(c) & (d) However, under the Irish Nationality and Citizenship Act, 1956, national security and public order are not specified as grounds for refusing a certification of naturalisation (under s.19) or, under Part IV in respect of loss of citizenship.

The question of the status of rights under Art. 8 of the European Convention on Human Rights is itself the subject of current debate before the Irish Superior Courts. In two connected cases (*Balchand v. Minister* [2016] IECA 383 and *Luximon v. Minister* [2016] IECA 382), the Court of Appeal held that the Minister was obliged to consider Art. 8 rights in this context. However, both of those decisions were the subject of leave to appeal to the Supreme Court where the respective appeals remain pending. Those appeals will not be heard prior to the seminar.

9. (a) Under s. 3(6)(k) of the Immigration Act, 2003 the Minister is required to have regard to considerations of national security and public policy in determining whether to make a deportation order.

(b), (c) & (d) There is no material difference in respect of an immediate deportation order or a residence permit. However, such considerations do not have application in the case of revocation of naturalisation certificates or loss of citizenship.

10., 11. & 12. It is difficult to answer these questions with any precision having regard to the uncertainty as to the jurisprudence at this stage. A definitive view will only be formed when a suitable case concerning the definition of the proper scope of national security and public order finally comes to the Supreme Court.

13. It is likely that some consideration to this issue will be given by the Supreme Court in the appeals in *Balchand* and *Luximon* to which reference has already been made.

14. The most recent case law on these issues is set out. The precise principles to be applied in the context of children's rights remains to be the subject of a definitive decision of the Supreme Court.

(a) *Dos Santos v. Minister of Justice and Equality and Others* [2015] IECA 210.

The Court of Appeal held that the UN Convention on the Rights of the Child is not part of Irish domestic law. Section 3(6)(a) of the Immigration Act 1999, which obliged the Minister for Justice to take account of an applicant's age when deciding whether or not to make a deportation order against him or her, did not require him, when dealing with a minor applicant, to treat as a primary consideration the best interests of that child or, alternatively, to decide expressly whether deportation would be consistent with its best interests.

(b) *Ezenwake v. MJE* [2011] IEHC 328.

The plaintiff was a Nigerian national who had been granted residency in the State on account of an Irish born child. He was further granted a family reunification visa to allow his Nigerian wife and children join him to live in Ireland. Upon their arrival at Dublin airport, the wife and

children were refused entry on the basis that their visas had been issued in error and consequently, their admission to the State would be contrary to public policy pursuant to s. 4(3)(j) of the Immigration Act 2004.

Hogan J. held that the decision to refuse permission to land was unlawful. Hogan J. held that public policy in this statutory context connoted a situation where the personal conduct of the immigrant posed "a real and immediate threat to fundamental policy interests of the State." [para. 13]. Hogan J. held that admission being contrary to Government policy does not in and of itself necessarily mean that the public policy threshold under s. 4(3)(j) has been reached.

15. (a) As noted above such matters will not lead to loss of nationality but would, in answer to question (b), potentially lead to the denial of a residence permit or the making of a deportation order.

16. This issue has not yet arisen before the Irish courts so far as the Supreme Court is aware.

17. & 18. These matters will be explored in the *Balchand* and *Luximon* cases. However, there is a further difficult case currently before the Irish Supreme Court (*YY v. Minister for Justice & Equality*) in which the Minister seeks to remove a person from Ireland for state security reasons but it is said, at the same time, that the person may face execution or other seriously adverse consequences if returned to the country of origin. It is likely that this case will be decided before the seminar.

NOTE:

It is regretted that it is not possible to answer some of these questions with greater precision. This is partly because such immigration and citizenship cases are relatively new, as a matter of practice, in the Irish legal system and few have come to the Supreme Court. Furthermore, it is hoped that it will be understood that, in the context of pending cases, it would be particularly inappropriate to comment in detail.

Section C - Procedural Fairness

19. This very issue is currently under consideration by the Supreme Court in the *YY* case concerning possible deportation to a country where the individual may face danger. A supplementary answer to this question will be provided when the judgment of the Court in that case is available.

20. This issue of reasons being made available both to the party affected and, thereby, to the Court in the event that the party affected seeks a review, will also be explored in the *YY* case to which reference has been made.

21. It is important in the context of this question to understand the underlying basis on which judicial review operates in Ireland. The initial onus rests on the party seeking judicial review to present evidence to the Court which is sufficient to establish a *prima facie* case for the unlawfulness of the measures sought to be challenged. This is done by means of a so-called *ex parte* application which involves an oral hearing at which only the applicant for judicial review appears or is represented. That applicant must present a legal document (a statement of grounds) setting out the basis on which it is contended that the measure under challenge is unlawful and must also file affidavit evidence (*i.e.* sworn written evidence) establishing any necessary facts. There is no procedure in Irish law which allows any party to present evidence to the Court which would not be available to the other party. Thus, to the extent that the State authorities may wish to put forward evidence to justify a public order case, that evidence must be made available to the other side. The State must, therefore, decide just how much evidence it is willing to put before the Court.

In addition, Irish procedural law permits the Court to make a so-called "discovery" order which is an order which requires a party to litigation to provide a sworn document disclosing any documentation which that party may have in its possession or power which is relevant to any issues of fact. The only exception is that a party may claim a legal privilege over documentation on a range of grounds including, for example, legal professional privilege. One such category of privilege involves a case where the State asserts that significant state interests would be impaired by the disclosure of the document concerned. In such a case a judge may

review the documents to conduct a balancing exercise as to whether the documents do indeed involve significant issues of state interest and, if so, whether those interests outweigh the interests in the disclosure, for the purposes of the proceedings, of the document concerned. It must, however, be emphasised that if such a document is excluded on the basis of state privilege, it will not form part of the evidence in the case at all. Furthermore, the judge who ultimately hears the case will be a different judge to the judge who conducted the exercise of determining whether the document should be disclosed so that, if the document is not disclosed, it will not form part of the materials which will be brought to the attention of the judge who ultimately determines the case. The extent to which the State's ability to defend judicial review claims in the national security field if it does not put forward sufficient evidence is a matter which may well be clarified in the case to which reference has already been made. Therefore, to answer the specific question raised in number 21, all of the evidence admissible in the case will always be open to the judge, the parties and any counsel representing any parties. However, if, for reasons of privilege, certain documentation is not required to be disclosed, that documentation will not be regarded as part of the evidence and will not, therefore, be made available to any of those individuals. However, it may have been made available to another judge for the purposes of determining whether state privilege can be asserted.

22. There are no special categories of judge for the purposes of accessing evidence of any type.

23. For the reasons set out in the answer to question 21 this does not arise.

24. See answer to question 21.

25. The simple answer to this question is yes. For the reasons noted in the answer to question 21, evidence is either admitted before the Court or not. If it is admitted then it must be available to all parties.

26. The simple answer to this question is yes. The full judgment of the Court will be available to the parties.

27. The rules concerning access to documentation, whether under general freedom of information legislation or under the Court's power to order discovery of documents

relevant to a case, (as discussed earlier) are not different dependent on the status of the individual seeking the documents.

28. There are no particular rules for the grant of priority in national security cases. However, any case may be the subject of an application for priority which would be considered on its merits and, doubtless, national security could be a factor properly taken into account. There are no special rules concerning security clearance relating to the judge who can hear such a case.