

Justice, 2022

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Whereas the legislative agenda in 2020 and 2021 was dominated by the need to respond to the spread of Covid-19, the full-scale invasion of Ukraine by Russia in the early months of 2022 affected the policy and legislative agenda of the government. This was particularly evident in the changing approach to migration and international protection.

Reforms have also been continuing within An Garda Síochána, with some changes enacted and progress on other legislation. The year ended with a new Minister for Justice, although again on a temporary basis.

Regularisation of long-term undocumented migrants

An administrative scheme for the regularisation of long-term undocumented migrants residing in the state was opened in the earlier months of 2022. Strand 1 of the Regularisation of Long Term Undocumented Migrant Scheme, for long-term undocumented migrants in general, who were required to demonstrate residence for four years, or three years if they had children, was open from 31 January to 31 July. This strand was subject to a €500 application fee for a single applicant, or €700 for a family application. Strand 2, for international protection applicants, was open from 7 February to 7 August, with those who had applied for international protection prior to 7 February 2020 being eligible. Successful applicants were granted a Stamp 4 permission to remain in the state.

Ukraine

Since 2014 Russia has had troops on Ukrainian territory, between the occupation of Crimea and the support for separatist forces in Donetsk and Luhansk. On 24 February 2022 Russian forces launched a full-scale invasion of Ukraine. This led to the flight of thousands of Ukrainians from their homes. The immediate response of the Minister for Justice was to allow visa-free travel to Ireland for nationals of Ukraine on 25 February.¹

This preceded moves at an EU level. On 4 March the Council issued Decision (EU) 2022/382, establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, activating the Temporary Protection Directive.

Temporary protection is defined as ‘a procedure of exceptional character to provide, in the event of a mass influx or imminent mass influx of displaced persons who are unable to return to their country of origin, immediate and temporary protection’. Those to whom temporary protection applies are considered collectively, rather than the individualised assessment under the Qualification Directive. This was the first time the Temporary Protection Directive was activated. Temporary protection is provided for in Irish law by s. 60 of the International Protection Act 2015. Therefore, those who arrived in Ukraine after the date of its activation are distinct from nationals of other states seeking international protection.

Under Article 2(1) of the Decision, the persons to whom the temporary protection applies are:

- (a) Ukrainian nationals residing in Ukraine before 24 February 2022;
- (b) stateless persons, and nationals of third countries other than Ukraine, who benefited from international protection or equivalent national protection in Ukraine before 24 February 2022; and
- (c) family members of the persons referred to in points (a) and (b).

Therefore, it did not extend to third-country nationals who were in Ukraine with employment visas or other permissions, who could avail of the protection of their own country after the war began. In

¹ Immigration Act 2004 (Visas) (Amendment) Order 2022 (S.I. No. 86).

accordance with Directive 2001/55/EC, temporary protection will be in force for an initial period of one year, so extending to 3 March 2023. It will then be extended automatically by six monthly periods for a maximum of one year. The Commission may propose at any time that it be extended for a further year.²

The pressures on accommodation from those arriving from Ukraine mean that the ambitions of the Day report on ending direct provision are unlikely to be achieved (Bray, 2022).

The Civil Law (Miscellaneous Provisions) Act 2022 was enacted in July to provide for supports across different departments for Ukrainian nationals. Part 4 amended the Immigration Act 2004 to enable the introduction of an online registration process and removed references to registration districts. Part 5 of the Act allowed the Department of Justice to collect data for the Department of Social Protection for Ukrainians seeking a Personal Public Service Number and income support. Other parts of the same Act directed at the Department of Children, Equality, Disability, Integration and Youth provided for monthly payments to those who provided accommodation to Ukrainians and expanded childcare supports to Ukrainians under temporary protection, while parts directed at the Department of Transport provided support to the licensed haulage sector on an emergency basis and recognised driving licences of Ukrainian nationals. Separate to the response to Ukraine, but within the same legislation, Part 8 dealt with certain arrangements regarding a fresh inquest into the Stardust fire tragedy, which occurred in Dublin in 1981.

On 26 October Belarus and Russia were removed from the list of countries included in the Short Stay Visa Waiver Programme.³ In announcing this change, the Minister for Justice, Helen McEntee, said, ‘While, as a non-Schengen Member State, Ireland is not bound to comply with the Schengen approach. However as well as always requiring individual visa consideration for applications made directly to Ireland, I have today recommended to the government that we fully align our policy on waiver of visas granted in the United Kingdom. I have now signed a Statutory Instrument to remove Russia and Belarus from the list of countries who may avail of the Short Stay Visa Waiver Programme in light of the continued Russian aggression against Ukraine’ (Department of Justice, 2022b).

² Recital 61.

³ Immigration Act 2004 (Visas) (Amendment) (No. 3) Order 2022 (S.I. No. 533).

International protection: Visas and procedures

In July the government suspended the operation of the Council of Europe Agreement on the Abolition of Visas for Refugees (Council of Europe) for a period of twelve months, based on a joint proposal from the Minister for Justice, Helen McEntee, and the Minister for Foreign Affairs, Simon Coveney (Department of the Taoiseach, 2022). Signatories to the agreement ordinarily exempt refugees who hold a Convention Travel Document issued by a signatory from the requirement to obtain a visa or pre-clearance where the purpose of the journey is solely for a visit of a maximum of three months.⁴ Article 7 of the Agreement allows for its suspension. The stated reason for its suspension was that the International Protection Office was receiving applications for international protection from people who had already been granted refugee status in another state. Under s. 21 of the International Protection Act 2015 ('the 2015 Act'), an application is deemed inadmissible if another member state of the EU has granted refugee status or subsidiary protection status to the person, or another country is their first country of asylum, and they can obtain sufficient protection there. However, the International Protection Office must process the application to make a determination of inadmissibility, which can be appealed to the International Protection Appeals Tribunal, before determining that it will not consider the merits of the case.

Under s. 72 of the 2015 Act, the minister may designate a country as a safe country of origin. This currently applies to Albania, Bosnia and Herzegovina, Georgia, Kosovo, Montenegro, North Macedonia, Serbia and South Africa.⁵ In October 2022 the International Protection Act 2015 was amended to allow the minister to prioritise applications for international protection from countries designated as safe countries of origin, and countries in respect of which there are a large number of applications.⁶ A new provision was also added to the legislation to allow the minister to accelerate any application, and procedures were put in place providing for this.⁷

⁴ Immigration Act 2004 (Visas) (Amendment) (No. 2) Order 2022 (S.I. No. 364).

⁵ International Protection Act 2015 (Safe Countries of Origin) Order 2018 (S.I. No. 121).

⁶ European Communities (International Protection Procedures) Regulations 2022 (S.I. No. 541).

⁷ International Protection Act 2015 (Procedures and Periods for Appeals) (Amendment) Regulations 2022 (S.I. No. 542).

Covid-19: End of restrictions

From April 2020 the whole of Ireland had been designated as an affected area for the purposes of restrictions to curtail the spread of Covid-19, allowing it to be subject to emergency provisions of the Health Act 1947.⁸ The restrictive measures imposed by the Minister for Health, including criminal sanctions, usually in the form of fixed penalties, were revoked in a series of orders in the first three months of 2022: on 22 January at 6 p.m. most restrictions were lifted, including the terms of entry to hospitality premises without a vaccination certificate, restricted guest numbers at weddings, limits on sporting and training events, and various fixed penalty notices.⁹ The requirement to wear face coverings on public transport and in businesses was lifted on 28 February.¹⁰ Restrictions on travel from certain states and requirements to fill in Covid-19 passenger locator forms were lifted on 6 March.¹¹

On 31 March the powers to impose further restrictions under the amendments to Health Act 1947 lapsed and the classification of the state as an affected area was revoked.¹² Regulations permitting the use of the EU Digital Covid Certificates were revoked as of 1 April.¹³ Although Covid-19 continued to be present, it was no longer a matter that was considered a justification for restrictions.

One measure which had been introduced as a temporary measure requiring continued authorisation by both Houses of the Oireachtas – the Civil Law (Miscellaneous Provisions) Act 2021 – was extended. However, this legislation was permissive rather than restrictive. The Act amended licensing laws to allow for outdoor sale and consumption of alcohol on a temporary basis and to allow for enforcement of licensing laws in an adapted form in these circumstances. In November

⁸ Health Act 1947 (Affected Areas) Order 2020 (S.I. No. 120).

⁹ Health Act 1947 (Regulations Relating to Certain Restrictions Under Section 31A) (Covid-19) (Revocation) Regulations 2022 (S.I. No. 27).

¹⁰ Health Act 1947 (Regulations relating to Face Coverings under Section 31A) (Covid-19) (Revocation) Regulations 2022 (S.I. No. 88).

¹¹ Health Act 1947 (Section 31A – Temporary Restrictions) (Covid-19) (Restrictions upon Travel to the State from Certain States) (No. 5) (Revocation) Regulations 2022 (S.I. No. 102); Health Act 1947 (Section 31A – Temporary Requirements) (Covid-19 Passenger Locator Form) (Revocation) Regulations 2022 (S.I. No. 103).

¹² Health and Criminal Justice (Covid-19) (Amendment) (No. 2) Act 2021, s. 1, and Health Act 1947 (Affected Areas) (Revocation) Order 2022 (S.I. No. 153).

¹³ Health Act 1947 (Section 31A – EU Digital Covid Certificates) (Revocation) Regulations 2022 (S.I. No. 140).

2022 the Dáil and the Seanad passed resolutions extending its operation until 31 May 2023 (Seanad Éireann, 2022). In proposing the Dáil resolution, Minister of State Niall Collins referred to the General Scheme of Sale of Alcohol Bill 2022, which was published by the Department of Justice (2022a) on 25 October. This legislation included specific regulations on outdoor seating areas. Collins also referred to the value of a measure creating options for those who would rather not visit indoor settings while Covid-19 was still circulating in the community (Dáil Éireann, 2022a).

Gardaí and criminal justice

Reforms within the Gardaí have continued following the 2018 report published by the Commission on the Future of Policing in Ireland (CFPI). The Garda Síochána (Functions and Operational Areas) Act 2022 provides changes necessary to facilitate the roll-out of a new Garda operating model, which was announced by the Garda Commissioner in August 2019. Prior to the move towards this model, there were twenty-eight divisions, each divided into districts. Each district was headed by a superintendent. Under the new model, Garda districts will no longer exist and, instead, there will be nineteen divisions. A division will have four functional areas, covering: community engagement, including roads and community policing; crime, including serious crime, security intelligence and immigration; performance assurance, including performance standards, internal discipline and engagement with the Garda Síochána Ombudsman Commission; and business services, including finance and logistics, human resources and general administration.

The new divisional model of policing will mean that all services will be managed and coordinated at divisional level. If successful, it would enhance the investigation of crime through the delivery of a greater range of specialised services in local areas, such as the investigation of sexual crime, domestic violence, cybercrime and economic crime.

Also following recommendations of the CFPI, the General Scheme of the Policing, Security and Community Safety Bill was published in 2021, and was introduced in the Dáil in early 2023. It would repeal the Garda Síochána Act 2005, the legislation which currently sets out the functions of the Garda Síochána, and the Garda Síochána (Policing Authority and Miscellaneous Provisions) Act 2015, which had established the Policing Authority. The new Bill would recognise the

prevention of harm, particularly to those who are vulnerable or at risk, and the protection and support of victims of crime as explicit functions of An Garda Síochána.¹⁴ It would establish the Board of An Garda Síochána, the National Community Safety Steering Group, the National Office for Community Safety, the Policing and Community Safety Authority, and an Independent Examiner of Security Legislation, while renaming the Garda Síochána Ombudsman Commission as Office of the Police Ombudsman. The department's stated purpose in producing the legislation is to recognise that community ought not to rest with the Gardai alone, but requires all state services to work with the Gardai (Department of Justice, 2021).

The Sex Offenders (Amendment) Bill 2021 passed final stages in the Dáil in October 2022. It awaits consideration by the Seanad. It would strengthen Garda powers in the monitoring of sex offenders in the community and would place the current Sex Offenders Risk and Assessment and Management (SORAM) monitoring process for high-risk offenders on a statutory footing.

The Criminal Justice (Miscellaneous Provisions) Bill 2022 will increase the maximum penalty for conspiracy to murder from ten years to life imprisonment. It will also amend the Non-Fatal Offences against the Person Act 1997 with separate offences of non-fatal strangulation and non-fatal suffocation, as adjuncts to the current offences in ss. 3 and 4 of that Act of assault causing harm and causing serious harm, and redefine the current definition of harassment in s. 10 as harassment or stalking, with a wider ambit.

The Criminal Justice (Incitement to Violence or Hatred and Hate Offences) Bill 2022 would repeal the Prohibition of Incitement to Hatred Act 1989, and create new offences of incitement to violence or hatred against persons on account of their protected characteristics, and of condonation, denial or gross trivialisation of genocide. It would also create a series of offences aggravated by hatred, which can be prosecuted with their parallel offences under the Criminal Damage Act 1991, the Criminal Justice (Public Order) Act 1994 and the Non-Fatal Offences against the Person Act 1997. The Bill gives effect to Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.

¹⁴ Section 9 of the Policing, Security and Community Safety Bill 2023 compared s. 7 of the Garda Síochána Act 2005.

2022 jurisprudence on Garda powers

In *Dwyer v. The Commissioner of the Garda Síochána* [2020] IESC 4, the Supreme Court made a reference under Article 267 of the Treaty of the Functioning of the European Union in which it queried whether a system of universal retention of certain types of metadata for a fixed period of time was never permissible irrespective of how robust any regime for allowing access to such data may be, and whether impermissibility was prospective only. This arose in a challenge by Graham Dwyer to the use of mobile phone metadata in his 2015 trial and conviction for the murder of Elaine O'Hara. Part of the evidence deployed against him in the trial was obtained by Gardaí on foot of certain provisions of the Communications (Retention of Data) Act 2011. This 2011 Act, which provided for the retention of and access to telecommunications metadata, was enacted to give effect to Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks. However, in April 2014 the Court of Justice of the European Union declared the Directive invalid. Dwyer obtained a declaration against the Garda Commissioner and other state defendants from the High Court (O'Connor J) that s. 6(1)(a) of the 2011 Act was inconsistent with EU law. The state defendants appealed to the Supreme Court, who made a reference to the Court of Justice.

In April 2022, in *G.D. v. The Commissioner of the Garda Síochána* (C-140/20), the Court of Justice of the European Union held that the general and indiscriminate retention of electronic data under the Communications (Retention of Data) Act 2011 contravened Article 15(1) of Directive 2002/58 on privacy and electronic communications, as amended, read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter of Fundamental Rights. The Communications (Retention of Data) (Amendment) Act 2022 was enacted in July and, when commenced, will amend the 2011 Act to comply with the findings of the Court of Justice. The new provisions would create preservation orders (the new s. 7A) and production orders (the new s. 7C), which allow for preservation and production of certain categories of communications data in individual circumstances, subject to judicial approval. Being subject to judicial scrutiny, these legal orders evade the indiscriminate nature impugned by the Court of Justice. Dwyer's appeal against his conviction was heard by the Court of Appeal in December, with the unlawful use of his mobile phone data forming

part of his case that a verdict of not guilty should have been directed at his trial (O'Donnell, 2022; Reynolds, 2022).

On 31 May, in *DPP (Garda Varley) v. Davitt* [2022] IEHC 320, Bolger J held that there was no statutory basis for the practice in the District Court of presenting Gardaí prosecuting cases in which they were not the named prosecutor. The Garda Síochána (Amendment) Act 2022 was swiftly enacted on 17 June. It amended s. 8 of the Garda Síochána Act 2005 to give specific authorisation that where a prosecution was instituted by a member of An Garda Síochána, the conduct of the prosecution could be conducted 'by that member or any other such member'. These provisions are provided in similar form by s. 10(3) of the Policing, Security and Community Safety Bill 2023.

Section 29(1) of the Offences against the State Act 1939, as amended by the Criminal Justice (Search Warrants) Act 2012, permits a Garda superintendent 'independent of the investigation of the offence' to authorise a search warrant in circumstances of urgency such that it is impracticable to apply to a District Court judge. This amendment had been enacted in response to the findings of *Damache v. Director of Public Prosecutions* [2012] IESC 11, [2012] 2 IR 266. In *People (DPP) v. Behan* [2022] IESC 23 the Supreme Court held that the division detective superintendent who had issued the warrant for the arrest of the defendant could not be considered to have been independent, as they held a supervisory role in the chain of command over the investigating Gardaí. O'Malley J wrote for the majority (Dunne and Baker JJ concurring) and found that, although the search warrant ought not to have been authorised, the court could apply the proviso in s. 3(1)(a) of the Criminal Procedure Act 1993 to affirm a conviction – notwithstanding that it was of the opinion that a point raised in the appeal might be decided in favour of the defendant – if it considered that no miscarriage of justice had actually occurred. The court ultimately dismissed the defendant's appeal. In separate dissenting judgments, Charleton and Woulfe JJ would have dismissed the point in the appeal, as the issuing officer was not in charge of the investigation at the time of the issuing of the warrant.

Civil justice

Personal injuries litigation has undergone significant changes since the Judicial Council was given authority in April 2021 to set personal injuries guidelines to take the place of the former *Book of Quantum*. Both the Personal Injuries Assessment Board and the courts have

been required to have regard to these guidelines in setting awards for damages. It was in 2022 that the impact of this was seen: *The Irish Times* reported that there had been a significant reduction in the number of High Court personal injuries claims after their introduction, with an average of 223 per month in the first nine months of 2022, compared with 666 per month in 2019 (Carolan, 2023). In June, in *Delaney v Personal Injuries Assessment Board* [2022] IEHC 321, the High Court (Meenan J) rejected a plenary challenge on constitutional grounds to the authority of the Judicial Council in setting these guidelines. In November the Supreme Court granted the plaintiff leave to appeal against this decision ([2022] IESCDET 133). The appeal will be heard by the Supreme Court in February 2023.

While the personal injuries guidelines focused on the scale of the award of costs, further legislative reform aims to reduce the recourse to the courts in personal injuries. Under the Personal Injuries Resolution Board Act 2022, the Personal Injuries Assessment Board will be restructured and renamed as the Personal Injuries Resolution Board. Its remit will be extended from making an initial assessment of a claim for personal injuries to allow the board to appoint mediators to seek a resolution of claims. This would increase the number of personal injury claims resolved by the board without recourse to litigation (Dáil Éireann, 2022b). The legislation also creates new offences of providing false or misleading information to the board. The Garda Síochána (Compensation) Act 2022 had a similar goal; it repealed and replaced the Garda Síochána (Compensation) Acts 1941 to 1945, aiming to reduce the time it takes for the processing of an application for compensation, and making available avenues for settlement and resolution at the earliest possible stage to reduce the number of applications that proceed to court.

The Judicial Appointments Commission Bill 2022 has passed all Dáil stages and debate is continuing in the Seanad. It is a reformulation of the Judicial Appointments Commission Bill 2017, which had been proposed at the instigation of Shane Ross and lapsed at the dissolution of the thirty-second Dáil in January 2020. The Commission would consist of nine members: the Chief Justice acting as chair, three other judicial members, four lay members, and the attorney general as a non-voting member. The lay members would be recruited through the Public Appointments Service based on their experience of business and finance, corporate governance and human resources, the courts and the operation of the justice system, and the importance of protection of human rights and equality.

Citizenship

The Courts and Civil Law (Miscellaneous Provisions) Bill 2022 contains amendments to the law on citizenship in s. 15 of the Irish Nationality and Citizenship Act 1956 that reflect recent jurisprudence.

In *Iurescu (a minor) v Minister for Justice and Equality* [2019] IEHC 535 the High Court (Keane J) held that the minister erred in rejecting an application for citizenship of a minor born in the state based on findings against the character of the father, who had made the application on behalf of their daughter. The Bill proposes to insert a new s. 15B, regarding naturalisation of minors born in state, providing that where an application is made on behalf of a minor, it is the good character of the minor that is assessed, in terms reflecting restrictions on criminal proceedings against children in s. 52 of the Children Act 2001, as substituted by s. 129 of the Criminal Justice Act 2006. On this basis, where a minor is under the age of fourteen at the date of the application, the requirement to demonstrate good character shall only apply where they are awaiting trial for, or have been convicted for, murder, manslaughter, rape, rape under s. 4 of the Criminal Law (Rape) (Amendment) Act 1990, or aggravated sexual assault within the meaning of s. 3 of that Act.

In *Jones v Minister for Justice* [2019] IECA 285 the Court of Appeal upheld a decision of the minister refusing a certificate of naturalisation after a finding that the applicant had not been in continuous residence in the year prior to his application, while doing so in less restrictive terms than had been allowed in the High Court. The proposed s. 15C provides that continuous residence may not include absences of more than seventy days, and an additional thirty days in exceptional circumstances, including family or personal circumstances, health requirements of themselves or a family member, and requirements of employment or study.

Minister

The Minister for Justice, Helen McEntee, took maternity leave on 25 November, and the department was reassigned to Heather Humphreys, who had previously served as Minister for Justice from April to November 2021, when McEntee was previously on maternity leave. When the new government was formed under Taoiseach Leo Varadkar on 17 December, Simon Harris was named as Minister for Justice, in addition to his post as Minister for Further and Higher

Education, Research, Innovation and Science, with McEntee to continue in government as a minister without portfolio until her return from maternity leave. James Browne continues as minister of state (Dáil Éireann, 2023).

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