



Cúirt Uachtarach na hÉireann
Supreme Court of Ireland

**Vindicating the Rights of Non-Citizens and Stateless Persons:
An Irish Perspective**

**Delivered by Ms Justice Aileen Donnelly to the Scientific and Advisory
Council of the Constitutional Court of the Republic of Kazakhstan on 6
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1. The question of the rights of non-citizens under national constitutions and their access to courts to vindicate these rights is of ever-increasing relevance in light of our modern era of globalisation. It is important, as our national societies become more diverse in terms of non-citizens and stateless individuals, that the law is clear and compassionate in its treatment of the rights of these individuals.
2. Chairperson, Judges of the Constitutional Court, and honoured guests, it is a pleasure to be addressing this meeting remotely from Dublin. By way of introduction, I am a judge of the Supreme Court of Ireland, which is the apex constitutional court and court of final appeal for all criminal, civil, and administrative cases. We hear appeals when matters of general public importance arise. I hope that my presentation can offer some insight on an approach to the vindication of the rights of non-citizens and stateless persons which is grounded in human dignity. I propose to discuss some of the caselaw from the Irish jurisdiction which has recognised the rights of non-citizens' access to the courts but I also would like to spend some time looking at how the Irish Supreme Court has dealt with the rights of non-citizens under the Constitution in general.

¹ I am grateful for the work of my Judicial Assistant Eoin Ryan in preparation for this presentation.

3. In a 2014 article, Irish Professor William Binchy made the following comment which I think bears repeating when considering the rights of non-citizens:

“Human dignity involves the notion of the inherent value and equal worth of every human being. This is a radical and transformative concept, which forces us to recognise in the stranger a creature of inestimable value. It breaks down the sense of <them and us> which can attach to notions of citizenship and alienage.”²

It is this approach of human dignity and the inherent value of an individual as a human being that the Irish courts have adopted in their approach to the rights of non-citizens.

Provisions of the Constitution

4. Before examining the jurisprudence, it may be useful to consider the wording of some of the articles in the Irish Constitution which confer rights on individuals. Many of the rights set out in our Constitution expressly refer to citizens. To name just two examples, Article 40.1, known as the equality guarantee, provides that “[a]ll citizens shall, as human persons, be held equal before the law” and Article 40.3 commits the State to respect, and by its laws to defend and vindicate “the personal rights of the citizen”.
5. However, not all the provisions of the Constitution refer to ‘citizens’ when setting out the fundamental rights of individual persons. In contrast to the aforementioned articles, Article 38.1 which provides for the right to a fair trial, states that “[n]o *person* shall be tried to any criminal charge save in due course of law”. Indeed, the fundamental protections set out in Articles 41, 42, and 42A which pertain to the rights of the family, education rights, and the rights of the child respectively, make no reference to either citizens or persons.

² William Binchy, ‘Human Rights, Constitutions and Non-Citizens’ (2014) 71 *Persona & Derecho* 275, 277.

6. I make reference to these provisions to demonstrate that there are approaches which courts may take that do not necessarily restrict non-citizens from constitutional protections in spite of what may appear to be, *prima facie*, exclusionary language. I note that the Kazakhstan Constitution provides what may perhaps be a simpler approach in Article 12.4 which states that: "Aliens and stateless persons in the Republic shall enjoy the rights and freedoms and bear the duties established for citizens, unless otherwise provided by the Constitution, laws and international treaties."

Access to the Courts

7. The specific question of non-citizens' access to the Irish courts was considered in a case by the name of *The State (McFadden) v Governor of Mountjoy Prison (No 1)* ("McFadden").³ The High Court found that by virtue of Article 38.1, all individuals enjoyed the same rights of fair procedure in the administration of justice by the courts regardless of an individual's citizenship status. Barrington J observed that:

"[W]hen the Constitution prescribes basic fairness of procedures in the administration of the law it does so, not only because citizens have rights, but also because the Courts in the administration of justice are expected to observe certain forms of due process enshrined in the Constitution. Once the Courts have seisin of a dispute, it is difficult to see how the standards they should apply in investigating it should, in fairness, be any different in the case of [a non-citizen] than those to be applied in the case of a citizen."

8. This view was approved by the Supreme Court in *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999*.⁴ The Court held that non-citizens enjoyed a right of access to the courts stating:

"It would be contrary to the very notion of a state founded on the rule of law, as this State is, and one in which, pursuant to Article 34

³ [1981] ILRM 113.

⁴ [2000] 2 IR 381.

justice is administered in courts established by law, if all persons within this jurisdiction, including non-nationals, did not, in principle, have a constitutionally protected right of access to the courts to enforce their legal rights.”

9. The authors of the leading text on Irish constitutional law state that the rights of non-citizens in the previous two cases “have been inferred from the court’s duty to administer justice.”⁵ This approach is coherent in regard to rights directly linked to the administration of justice but is perhaps not as persuasive for other personal rights. As I will discuss shortly, an alternative basis for inferring that non-citizens enjoy constitutional protections is the view expressed in *NHV v. the Minister for Justice and Equality*⁶ that rights are guaranteed by the Constitution not on the basis of an individual’s citizenship status but rather that rights are connected to the inherent value an individual has as a ‘human person’.

NHV v. the Minister for Justice and Equality

10. As I have noted previously, many of the core fundamental human rights protected by the Irish Constitution appear to be expressed as being conferred exclusively on citizens. The caselaw on this particular issue was, until recently, developed in an *ad hoc* and unsatisfactory manner. The Chief Justice of Ireland, Mr. Justice Donal O’Donnell, writing extra-judicially opined that “decisions which, however instinctively attractive, have been achieved almost by default”.⁷ The absence of a general principled approach to the rights of non-citizens meant that the jurisprudence lacked coherence.
11. In the 2017 case of *NHV v the Minister for Justice and Equality*, the Supreme Court sought to expressly determine if a non-citizen and in particular an

⁵ Gerard Hogan, Gerry Whyte, David Kenny, and Rachael Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury Professional 2018) para 7.3.291.

⁶ [2017] IESC 35, [2018] 1 IR 246.

⁷ Donal O’Donnell, ‘International Aspects of The Constitution: Skibbereen Eagle or a Shaft of Dawn for the Despairing and Wretched Everywhere?’ (2018) 59 Bar Review 1, 16.

asylum seeker without any other connection to the State, could rely on any right guaranteed by the Constitution.

12. The applicant in *NHV* was a Burmese native who arrived in Ireland in 2008 and applied for refugee status. As a result of series of administrative delays and appeals, the application for a declaration of refugee status remained undetermined by 2013. In that same year the applicant obtained a potential offer of employment and applied to the Minister for Justice for temporary permission to reside and work in the State. This application was refused by the Minister who indicated he was precluded from granting a permission to allow the applicant to take up this employment by virtue of s. 9(4) of the Refugee Act 1996. Section 9(4)(b) of the Act provides that an applicant may not “seek or enter employment or carry on any business, trade or profession during the period before the final determination of his or her application for a declaration”.
13. The applicant commenced proceedings in which he sought, *inter alia*, a declaration that s. 9(4) is repugnant to the Constitution on the basis that it violated, what can be broadly termed, his freedom to seek work as protected by Article 40.3. Having been unsuccessful in the High Court and the Court of Appeal, the applicant was granted leave to the Supreme Court of Ireland.
14. The Supreme Court (O'Donnell J.), as he then was, held that the applicant had the right to rely on the provisions of the Constitution despite the fact that he was not a citizen of Ireland.
15. The decision of O'Donnell J. noted that “the problem cannot be resolved solely by consideration of the constitutional text since it is difficult to perceive any consistent pattern of the use of the words ‘citizen’ or ‘person’ in the language of the Constitution.”

16. O'Donnell J. found that the obligation in Article 40.1 of the Irish Constitution, to hold persons equal before the law 'as human persons' means that non-citizens may rely on the constitutional rights, where those rights relate to their status as human persons. Thus, the Supreme Court of Ireland held that "a non-citizen, including an asylum seeker, may be entitled to invoke the unenumerated personal right including possibly the right to work which has been held guaranteed by Article 40.3 if it can be established that to do otherwise would fail to hold such a person equal as a human person." O'Donnell J. held that that the relevant enquiry as to whether a non-citizen could avail of a constitutional protection under Article 40.1 was whether "the essence of the guarantee relates to the essence of human personality and thus must be accorded to some or all non-citizens who in that regard are entitled to be held equal before the law".
17. The Court did note that differentiation between citizens and non-citizens may be legitimately made under Article 40.1 if such differentiation is justified by that difference in status, such as, the right of citizens to vote.
18. Applying this analysis to the particular issue in *NHV*, the Court found that the freedom to work was part of the human personality and by virtue of Article 40.1, that guarantee could not be "withheld absolutely from non-citizens". O'Donnell J. considered that the freedom to work was connected to human dignity and the freedom of the individual which the Constitution must protect regardless of citizenship status. The absolute exclusion of the applicant to work or seek employment violated his rights protected by Article 40.3 and thus, s. 9(4) was held to be unconstitutional.
19. As summarised by my colleague on the Supreme Court, Collins J. in a recent address to the Immigration, Asylum & Citizenship Bar Association of Ireland:

"The Supreme Court's decision in *NHV* does not settle all issues around the entitlement of non-citizens to invoke constitutional rights that are framed in terms of the rights of citizens. However, it provides

a coherent framework for the resolution of such issues, based on the guarantee of equality in Article 40.1 (which, while it guarantees the right to equality of citizens, founds that right on the essential equality of 'human persons'). Non-citizens may rely on Article 40.1 to access and enforce other rights (in *NHV*, the Article 40.3 right to work), provided that those rights being 'part of the human personality'.⁸

20. The decision in *NHV* means that non-citizens or stateless persons in Ireland can benefit from constitutional provisions, so long as the right or protection relates to an aspect of the human personality and human dignity. It is important to note that as with all rights, equal application of rights does not amount to unqualified rights. Difference in treatment can be legitimately justified by a difference in status as between citizens and non-citizens.

Lessons from *NHV*

21. Ms. Justice S  fra O  Leary of the European Court of Human Rights, who would go on to serve as the President of that Court, stated extra-judicially in regard to *NHV* that "perhaps the most important aspect of a case like that is if and how the law develops rather than whether one or other text ... was the genesis of the development."⁹ The importance of *NHV* outside of the Irish context is that it demonstrates a coherent approach for dealing with non-citizens seeking to vindicate their rights guaranteed by constitutional provisions. As observed by one academic commentator, the analysis in *NHV* "turned from a formalistic conception of a person's legal or immigration status to one concerning the nature of human persons."¹⁰ Regardless of the language employed in the constitutional text, an individual's constitutional rights are guaranteed on the basis of their status as human persons as opposed to their status as citizens. Prioritising human dignity recognises the

⁸ Mr. Justice Maurice Collins, *Citizenship, Sovereignty and the Limits of Equality* (Immigration, Asylum & Citizenship Bar Association, 24 November 2023) para 13.

⁹ S  fra O  Leary, 'Courts, Judges, Lawyers and Legal Principles: Ireland's Contribution to European Courts and European Case Law' (2018) 41(2) DULJ 103, 126.

¹⁰ D  ire McCormack-George, 'Asylum Seekers and the Right to Work in Irish Law: *NHV v Minister for Justice and Equality*' (2018) 61 The Irish Jurist 174, 182-183.

inherent value of all individuals regardless of citizenship status. That is not to say that, in regard to certain rights, legitimate distinctions may not be made between citizens and non-citizens so long as there is a rational link between the distinction in treatment and difference in citizenship status.

Conclusion

22. Access to the courts for non-citizens and stateless persons is a fundamental right. Access to justice can be conceived of as a 'gateway right', meaning that it serves as a prerequisite to the fulfilment of other substantive rights. If an individual is a beneficiary of rights and constitutional protections it logically follows from this that they must be able to vindicate these rights. Without proper access to the courts there cannot be proper protection of rights. As set out in the *McFadden* case, the right of non-citizen to access can be derived from the importance of 'due process in the administration of justice'. This principle is surely applicable to any courts system founded upon the rule of law. The Supreme Court in *NHV* sets out that non-citizens may benefit from constitutional protections as rights are derived, not from citizenship, but from every individual's status as a human being. This approach based on human dignity contains principles that may also be amenable to the constitutional architecture in other states which prioritise a respect for human rights.
23. The great Irish poet and Nobel Laureate Seamus Heaney gave a lecture in 2009 to the Irish Human Rights Commission.¹¹ During the course of his remarks, Mr. Heaney noted that the concept of human dignity appears not only in the 'great foundational texts' such as the UN Charter but can also be found in the 'mighty classics' such as the works of Shakespeare. Mr. Heaney proceeded to cite from the 36th Canto of *Dante's Inferno* where Ulysses urges his crew:

"Remember who you are, what you were made for;

¹¹ Seamus Heaney, *Writer and Righter* (Fourth Irish Human Rights Commission Annual Human Rights Lecture, 9 December 2009).

Not to live like brutes, but for the quest

Of knowledge and the good.”¹²

Mr. Heaney states that in this passage “[Ulysses] becomes one of the great voices speaking on behalf of human dignity and human spirit, a representative of the capacity of our species to transcend the boundaries of pettiness and self-interest.” Mr. Heaney opines that expressions of a concept such as human dignity are “fundamental to the evolution and maintenance of a more equitable and civilized world.” I believe that Mr. Heaney’s words can be echoed in relation to the importance of the link between human dignity and the rights of non-citizens. Recognising the existence of such rights must also mean recognising the right of all individuals regardless of citizenship status to access the courts.

¹² Ciarán Carson (trs), *The Inferno of Dante Alighieri* (Granta Books 2002) 184.