

The Right of Irregular Immigrants to Outstanding Remuneration under the EU Sanctions Directive: Rethinking Domestic Labour Policy in a Globalised World

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Introduction

By 20th July 2011, 24 EU Member States² must bring into force laws, regulations and administrative provisions to comply with Directive 2009/52/EC of the European Parliament and of the Council of the 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals³ (hereinafter referred to as the “Sanctions Directive”). One of the stated aims of the Sanctions Directive is to address the pull factors enticing irregular immigrants to the EU, in particular, the availability of informal employment,⁴ through the imposition of criminal and administrative sanctions on employers of irregular immigrants and through the provision of rights to irregular immigrants to claim against an employer for outstanding remuneration. The rationale behind this development would appear to be based on the principle that employers benefit a great deal financially from irregular immigrant labour and the obligation to pay outstanding remuneration could increase the cost and risk of hiring an irregular immigrant.

This article will analyse the provisions of the Sanctions Directive and the rationale behind its development. However, the Sanctions Directive has highlighted a significant divergence in treatment of irregular immigrants in EU Member States, in particular, in relation to the provision of outstanding remuneration.⁵ From an analysis of the legal responses of Member States to this issue, this article identifies the two general approaches currently existing in Member States: the “non-protection approach” and the “protection with consequences approach”. The article describes these two approaches and will also examine the Sanctions Directive to consider the type of approach that Member States will be required to adopt in July of this year.

However, Ireland, along with the UK and Denmark, will opt-out of the Sanctions Directive completely. This article will use Ireland as a case study to analyse some of the issues that states face in bringing domestic labour policy in line with globalisation. In particular, this article will address the phenomenon of irregular immigration to

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² Three States have opted out of the Sanctions Directive: Denmark, UK and Ireland. The opt-out provisions will be further examined later in this article.

³ Directive 2009/52 EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third country nationals (30.06.2009 Official Journal L168/24).

⁴ Directive 2009/52 EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third country nationals (30.06.2009 Official Journal L168/24), Recital paragraph (2).

⁵ Remuneration is defined in Article 2(j) of the Sanctions Directive as “the wage or salary and any other consideration, whether in cash or in kind, which a worker receives directly or indirectly in respect of his employment from his employer and which is equivalent to that which would have been enjoyed by comparable workers in a legal employment relationship”.

Ireland, the current approach to the provision of outstanding remuneration and the rationale behind this current approach. Finally, the article will address the reasons for the Irish opt-out and will conclude that the reasoning was based upon misinformed assumptions about the purpose of the provision of outstanding remuneration. These assumptions arise from a “disconnect” between immigration and labour policy at a domestic level.

The legal basis for the Sanctions Directive lies in Article 79⁶ of the Treaty on the Functioning of the European Union (hereinafter referred to the “TFEU”) which devolves competence to the EU in the area of immigration and illegal immigration and the proposal for the Sanctions Directive made it very clear that this was a directive that was concerned with immigration policy and “not with labour or social policy”.⁷ However, it is evident that the Sanctions Directive does have a clear labour agenda in ensuring the right of irregular immigrants to outstanding remuneration. The failure of the Irish Government to view labour and immigration policy as interconnected has had a major impact on their ability to adopt policies similar to those propounded by the Sanctions Directive.

The current approach adopted by the Sanctions Directive in relation to outstanding remuneration is commendable considering the potential for unjust enrichment in states which do not adopt this approach. This article will conclude that Ireland will have to re-examine the current disconnect that exists in domestic policy between immigration law and labour law and will analyse the potential reform mechanisms that would have to be put in place before Ireland would be able to opt-in to the Sanctions Directive. While the Sanctions Directive has finally attempted to connect immigration and labour agendas together, domestic policy still has much catching up to do.

1. The EU Sanctions Directive: Addressing a Pull Factor

The EU Sanctions Directive developed from an acknowledgment by the European Commission that, whilst criminal sanctions and increased levels of detection, detention and deportation are important weapons in the armoury against irregular immigration, these have not been entirely successful in reducing the estimated 4.5 – 8 million irregular immigrants in the EU.⁸ There are also a number of pull factors which entice irregular immigrants into the EU that are not currently addressed in EU legislation and which could, in conjunction with the more traditional approaches, seek to address this issue. One of these “pull” factors is the availability of “informal employment”^{9, 10}.

⁶ Ex Article 63(3) of the Treaty establishing the European Community.

⁷ Commission of the European Communities, Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals: Explanatory Memorandum, Brussels, 16.5.2007 COM(2007) 249 Final 2007/0094 (COD) at p.2.

⁸ “Figures provided by 21 Member states point to a total of around 893,000 to 923,000 illegal immigrants entering the EU each year.” See European Parliament Press Release “Parliament votes on “sanctions directive”” Immigration 29-01-2009 at 16.38 available at <http://www.europarl.europa.eu/sides/getDoc.do?language=en&type=IM-PRESS&reference=20090129BKG47408> [last accessed 04-05-2011].

⁹ Commission Staff Working Paper, *Accompanying Document to the Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third country nationals, Summary of the Impact Assessment* (Brussels: 16.05.2007, SEC(2007) 604).

While there may be some irregular immigrants who are enticed to the EU Member States by the availability of informal employment with high wage levels, the reality for many of these irregular immigrants is very different in practice, with employment characterised by low wages, poor working conditions and in some extreme cases, exploitation. Irregular immigrants are often very desirable employees from the perspective of an employer. As Inghammar recently stated, “[t]he very rationale for employing an undocumented migrant worker (or any worker in the shadow economy), can be spelled “*price*””.¹¹ The foundation of this analysis is based on the assumption that if the risk of hiring an irregular immigrant is less than the profit gained through their labour, an employer will be willing to take the risk in order to reap the competitive advantages bestowed upon them by hiring cheaper workers with no administrative or fiscal burdens. If the risk is greater than or equal to the profit, an employer may be less willing to engage in such practices. To date, most states have adopted the approach that it is better to increase the risk by increasing the sanctions on employers and by increasing their enforcement of these sanctions. However, this alone has not been successful. The Sanctions Directive recognises that addressing the availability of employment in host states is an additional tool in increasing the financial cost to the employer of an irregular immigrant.

While it is recognised that many industries and states rely heavily on irregular and undeclared labour to “bring down the cost of goods and services, making firms and sometimes entire industries more competitive”¹², the European Commission concluded that the significant costs of irregular labour offset these benefits including the “lack of payment of social security contributions, exploitation of many illegal migrants and the distortion of the labour market by downward pressure on wages and conditions”¹³.

The Sanctions Directive seeks to address the issue of irregular migration through the more usual channels such as the imposition of criminal¹⁴ and financial¹⁵ sanctions on employers who engage irregular immigrants, the imposition of responsibility on the employer to ensure that irregular employment does not occur in their workplace¹⁶ and

¹⁰ Carrera and Guild, “An EU Framework on Sanctions against Employers of Irregular Immigrants: Some Reflections on the Scope, Features and Added Value” (2007) 140 *CEPS Policy Brief* 1 at page 4 note that the “argument of illegal employment as a pull factor oversimplifies a phenomenon that is by its very nature complex and multifaceted”. In particular, the authors note that migration “follows a complex web of autonomous rationales and purposes, which are independent from any single determining factor”.

¹¹ Inghammar, “The Employment Contract Revisited. Undocumented Migrant Workers and the Intersection between International Standards, Immigration Policy and Employment Law” (2010) 12(2) *European Journal of Migration and Law* 193 at p. 212.

¹² *Supra* n. 9 at pp. 3-4.

¹³ *Supra* n. 9 at p. 4.

¹⁴ See Articles 9 and 10 of the Sanctions Directive which impose criminal sanctions on employers for hiring an irregular immigrant where this is committed intentionally, and is continuous or persistently repeated (Article 9(1)(a)), the employer hires a significant number of irregular immigrants simultaneously (Article 9(1)(b)), the infringement is accompanied by particularly exploitative working conditions (Article 9(1)(c)), the irregular immigrant is a victim of human trafficking (Article 9(1)(d)) or where the irregular immigrant is a minor (Article 9(1)(e)).

¹⁵ Financial sanctions may include fines (Article 5(2)(a)) and the cost of return of the irregular immigrant (Article 5(2)(b)).

¹⁶ Employers are obliged to require that a third-country national has a valid residence permit before taking up employment (Article 4(1)(a)), to keep a copy of this permit so that it is available for

other financial measures.¹⁷ The Sanctions Directive also includes the more unusual measure of providing a right to claim outstanding remuneration.¹⁸

2. The Current Legal Response of EU Member States to Outstanding Remuneration

The provision of “outstanding remuneration” to irregular immigrants, as proposed by Article 6 of the Sanctions Directive, is a highly controversial issue in many EU Member States and is linked, more generally, to the provision of labour rights to irregular immigrants. There appear to be two very distinct approaches to this issue in the practices of EU Member States.

2.1. The “Non-Protection Approach”

The first approach can be described as the “non-protection” approach. This legal approach provides that as irregular immigrants are not legally resident in the State, they are not entitled to the protection for the right to claim outstanding remuneration¹⁹ under any circumstances and are left without a remedy at law. Ireland and the UK are good examples of Member States who adopt this “non-protection approach” and faithfulness to this approach has been an influencing factor in the decision of these two Member States to opt-out of the Sanctions Directive.²⁰

2.2. The “Protection with Consequences Approach”

The second approach can be described as the “protection with consequences” approach. This approach does provide protection for the right to claim outstanding remuneration²¹ but does not protect the immigrant from the consequences of making a claim in the state for back pay i.e. detection, detention and/or criminalisation and return to the country of origin. In Germany and the Netherlands, for example, irregular immigrants can institute a claim in the State for back pay,²² and in some

inspection by the relevant authorities (Article 4(1)(b)) and to notify the authorities of the employment of a third-country national (Article 4(1)(c)). The Sanctions Directive also provides for a defence for employers in cases where the documentation presented by the third-country national is a forgery (Article 4(3)).

¹⁷ Other measures that may be imposed on employers who hire an irregular immigrant include: exclusion from entitlement to some or all public benefits, aids or subsidies for up to five years (Article 7(1)(a)), exclusion from participation in a public contract for up to five years (Article 7(1)(b)), recovery of some or all public benefits, aids or subsidies granted to the employer for up to 12 months preceding the detection of the illegal employment (Article 7(1)(c)) or the temporary or permanent closure of the establishments that have been used to commit the infringement of the Sanctions Directive or temporary or permanent withdrawal of a licence to conduct the business activity in question (Article 7(1)(d)).

¹⁸ Article 6(1).

¹⁹ Often this also includes a denial of other employment rights.

²⁰ In response to the European Migration Network Ad Hoc Query on the payment of back wages to foreign illegal workers (*supra* n. 22), the UK reiterated the position that the introduction of provision for back pay of any outstanding remuneration to illegally employed foreign nationals “could encourage some illegal workers to work in the knowledge that even if they are identified and removed from the UK they will still be paid in full”.

²¹ Often this includes other employment rights also.

²² European Migration Network, “Ad-Hoc Query on the payment of back wages to foreign illegal workers returned to their country of origin” (18th January 2010) available at http://www.emn.fi/files/193/Compilation_AHQ_on_the_payment_of_back_wages_wider_dissemination_revised.pdf [last accessed 05.05.2011].

cases, states also make provision for irregular immigrants to make claims once they have left the jurisdiction.²³

2.3 The “Sanctions Directive Approach”

The Sanctions Directive advocates an approach that is very close to the “protection with consequences” approach. The Sanctions Directive provides for a right to outstanding remuneration but reiterates the fundamental foundation of EU migration policy that irregular immigrants should be returned to the country from which they originate.²⁴

Article 6 of the Sanctions Directive provides that Member States should ensure that employers are liable to pay any outstanding remuneration,²⁵ an amount equal to any taxes and social security contributions that the employer would have paid had the irregular immigrant been legally employed, including penalty payments for delays and administrative fines²⁶ and where appropriate, any cost arising from sending back payments to the country to which the irregular immigrant has returned or has been returned²⁷. The level of remuneration to which the irregular immigrant is entitled is at least as high as the relevant laws relating to minimum wage, by collective agreement or in accordance with established practice in a particular industry unless either the employer or the employee can prove differently.²⁸

The Sanctions Directive also ensures that the right is practically enforceable by requiring Member States to put in place specific mechanisms such that an irregular immigrant can institute and enforce a legal claim against their employer (even if they are no longer present in the state)²⁹ or such that a national authority can institute procedures to recover a claim without the need for the irregular immigrant to take a legal case.³⁰ Whichever approach is adopted by the Member State, there is an obligation on all Member States to inform all irregular immigrants of the right to claim for outstanding remuneration before the enforcement of any return decision.³¹

Research conducted by the European Migration Network has revealed that most EU Member States allow for irregular immigrants to take claims before national courts for outstanding remuneration³² but few have a national authority in place that can institute

²³ Latvia, Slovak Republic and the Netherlands are examples of jurisdictions where an irregular immigrant can take a claim even though they may no longer be in the state. *Supra* n. 22.

²⁴ See Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (hereinafter referred to as the Returns Directive) which is based on the recognition that it is “legitimate for Member States to return illegally staying third-country nationals” (Recital at paragraph 7).

²⁵ Article 6(1)(a).

²⁶ Article 6(1)(b).

²⁷ Article 6(1)(c).

²⁸ Article 6(1)(a).

²⁹ Article 6(2)(a).

³⁰ Article 6(2)(b).

³¹ Article 6(3).

³² See for example, Finland, Germany, Latvia, Netherlands and the Slovak Republic. See European Migration Network, “Ad-Hoc Query on the payment of back wages to foreign illegal workers returned to their country of origin” (18th January 2010) available at

procedures to recover a claim automatically for an irregular immigrant.³³ This lack of a national authority can, in practice, exclude the possibility of an irregular immigrant accessing the court process, even where the access is guaranteed by law. Butter & Verhagen specifically identify certain obstacles to court access in the Netherlands, where irregular immigrants do have a legal right to make a claim in theory. They discovered that the difficulties in obtaining legal assistance,³⁴ the unavailability of the irregular immigrant to clarify the claim or provide security for legal costs due to expulsion or voluntary return³⁵ and the difficulty of proving the employment relationship existed³⁶ all contribute to a weak enforcement structure in practice. This trend appears to be repeated in many jurisdictions that provide for a similar right of access to the courts. For example, in the case of France, despite the existence of the theoretical legal possibility of making a claim, a recent report on irregular immigrants in France found that the informal status of irregular immigrants “implies the absence of any social coverage, a precarious status, and the impossibility to make any demands or to turn against his/her employer if one were not to be paid”³⁷.

3. Denying Outstanding Remuneration: An Irish Case Study

The consequence of the divergence of approaches among EU Member States is that in some jurisdictions, irregular immigrants have no protection, while in others they do have limited protection. This may raise concerns as to whether those that provide no protection are in fact at a competitive advantage to those states that do protect workers as irregular immigrants may, arguably, be more likely to travel to work in a state where no protection exists as employers will view them as low risk and low cost workers.³⁸

This divergence should, theoretically at least, not be problematic once the Directive is implemented in the EU Member States, as all states will be obliged to implement

http://www.emn.fi/files/193/Compilation_AHQ_on_the_payment_of_back_wages_wider_dissemination_revised.pdf [last accessed 05.05.2011].

³³ One country that has brought in a limited measure for the purposes of the Sanctions Directive is Spain. The Sanctions Directive has been transposed into national law by means of the Organic Law 2/2009 of 11 December which amended Organic Law 4/2000 of 11 January, on the rights and freedoms of foreigners in Spain and their social integration (henceforth Organic Law 4/2000). Irregular migrants are entitled to claim for outstanding remuneration, similar to any legal employee. There is also a Guaranteed Salary Fund, administered by the Ministry of Labour and Immigration, which protects all workers, including irregular immigrants, in the event of employer insolvency. However, this mechanism is limited to situations of insolvency and so does not cover the broader range of circumstances in which an irregular immigrant may seek outstanding remuneration. See European Migration Network, “Ad-Hoc Query on the payment of back wages to foreign illegal workers returned to their country of origin” (3rd March 2010) available at emn.intrasoftintl.com/Downloads/download.do;jsessionid...?fileID=1242 [last accessed 05.05.2011].

³⁴ Butter & Verhagen, *Exploitative Labour Relations and Legal Consciousness of Irregular Migrant Workers in the Netherlands* (Amsterdam: University of Amsterdam, 2011) at p. 30 available at http://lastradainternational.org/lisidocs/Exploitative_Labour_Relations.pdf [last accessed 19.07.2011].

³⁵ *Ibid*, at p. 31.

³⁶ *Ibid*, at p. 32.

³⁷ Clandestino, *Undocumented Migration: Counting the Uncountable. Data and Trends Across Europe: Country Report France* (6th Framework Programme for Research and Technological Development under Priority 7 ‘Citizens and Governance in a Knowledge-Based Society’, Research DG, European Commission, 2009) at p. 19 available at http://clandestino.eliamep.gr/wp-content/uploads/2009/10/clandestino_report_france_final_2.pdf [last accessed 19.07.2011].

³⁸ Whether this argument is sustainable will be examined further in the article.

measures that will allow for the “protection with consequences” approach, thus notionally creating an even-playing field in the EU. However, whether this will convert into practical benefit for irregular immigrants (who will be under the same pressures to remain invisible to the authorities as previously existed prior to the Directive) will have to be carefully monitored, at least in the short term. There are also three Member States that will not be adopting the Sanctions Directive. Denmark, by virtue of Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community, is not taking part in the adoption of the Directive and is therefore not bound by it or subject to its application.³⁹ Similarly, the UK and Ireland have decided to opt-out of the Directive.⁴⁰

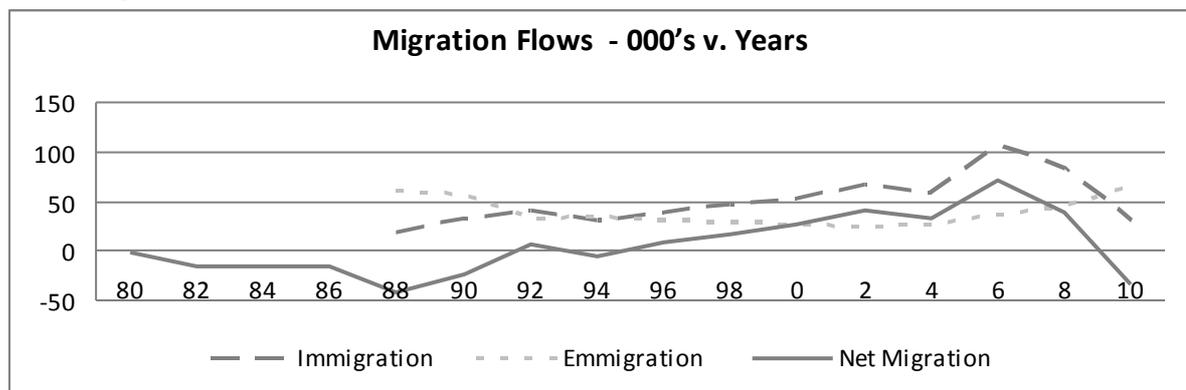
3.1. Irregular Immigration in Ireland

Traditionally a country of emigration, Ireland experienced an immigration boom in the late 1990’s as a result of the economic success of the State and the infamous Celtic Tiger.⁴¹ This boom also brought with it a very new phenomenon for Ireland: the irregular immigrant. In Ireland, there are two very distinct ways of being classified as an irregular immigrant. Firstly, irregular immigrants can be defined as those that enter the State in an irregular or unlawful manner and these immigrants can be referred to as “irregular entrants”⁴². Secondly, there are also irregular immigrants that enter the State in a regular or lawful manner, but who, as a result of some intervening event, such as the termination of an employment permit, become irregular. These can

³⁹ Recital to the Directive at paragraph 39, *supra* n. 3.

⁴⁰ Recital to the Directive at paragraph 38, *supra* n. 3.

⁴¹ This graph represents the number of immigrants coming to Ireland over the past 30 years. This information was collated from statistics collected from the Central Statistics Office of the levels of immigration and emigration between the years 1980 and 2010. As yet there are no definitive figures available for 2011 but the trends would indicate that emigration will remain high. As noted from the graph the year 2006 recorded the highest level of immigration with over 100,000 immigrants arriving in Ireland. Central Statistics Office, Annual Population and Migration Estimates, April 2010 available at <http://www.cso.ie/releasespublications/documents/population/current/popmig.pdf> [last accessed 13.05.2011].



⁴² Irregular entry can occur by entering the State clandestinely through an unapproved port (section 6, Immigration Act 2004) or without a valid passport or travel documentation either with or without the knowledge of the immigrant concerned (section 11, Immigration Act 2004). The new Immigration, Residence and Protection Bill 2010 will maintain this class of irregular immigrants. (See sections 24 and 26, Immigration, Residence and Protection Bill 2010 which class unlawful entry through an unapproved port and the use of false travel documentation as criminal offences, respectively.).

be referred to as “irregular residents”⁴³. Whether the immigrant is an irregular entrant or resident, the result of irregularity is the same: the immigrant is unlawfully within the State and is under a continuing obligation to leave.

While the Sanctions Directive does not distinguish between the two categories of irregular immigrant, the definition of irregular immigrant within the Directive encompasses both irregular entrants and irregular residents. The Sanctions Directive defines an irregular immigrant as an “third country national present on the territory of a Member State, who does not fulfil, or no longer fulfils, the conditions for stay or residence in that Member State”.⁴⁴ Therefore, the definition of “irregular immigrant” in Ireland mirrors the approach in the Directive and in other EU Member States.

However, unlike other EU Member States, there has been no research conducted in Ireland on the levels of irregular entry or residence and no official statistics are available.⁴⁵ A report⁴⁶ carried out by the Migrant Rights Centre Ireland, an NGO that provides an information and advice service to immigrant workers in Ireland,⁴⁷ found that no “comprehensive research has been carried out on the subject in Ireland and to date no official source has estimated the number of migrants with an irregular status”⁴⁸.

Some statistics can be gleaned from various sources. Firstly, a possible source of information relating to irregular entrants could come from the number of persons refused leave to land⁴⁹ in Ireland as it provides some indication of the number of people attempting to enter Ireland illegally.⁵⁰ These figures are noticeably large and would indicate that at least 5,000 irregular immigrants a year attempt to enter Ireland illegally.

Secondly, in terms of irregular immigrants residing in Ireland, an examination of the number of deportations effected by the State or the number of voluntary returns, provides some indication of the number of persons who are not entitled to be present in the State and who have come to the attention of the authorities. This includes failed

⁴³ Section 5, Immigration Act 2004. Section 6 of the Immigration, Residence and Protection Bill 2010 will replicate this provision.

⁴⁴ Article 2(b).

⁴⁵ Irish Naturalisation and Immigration Service, *European Return Fund Multi-Annual Programme: Annex II* (Dublin: Irish Naturalisation and Immigration Service, 2008) at p. 3 available at <http://www.inis.gov.ie/en/INIS/Multi-Annual%20Programme%20-%20Return%20Fund.pdf/Files/Multi-Annual%20Programme%20-%20Return%20Fund.pdf> [last accessed 18.05.2011].

⁴⁶ Migrant Rights Centre Ireland, *Life in the Shadows: An Exploration of Irregular Migration in Ireland* (Dublin: MCRI, 2007).

⁴⁷ Migrant Rights Centre Ireland – www.mrci.ie.

⁴⁸ *Supra* n. 46 at p. 13.

⁴⁹ The concept of “leave to land” means that an individual has permission to land in the State and present themselves to an immigration officer for entry into the State. See Article 5(2) Aliens Order 1946 (S.I. 395/1946).

⁵⁰ These figures are taken from the European Migration Network, *Annual Policy Report on Migration and Asylum* (2009 at p. 34) and (2008 at p. 40).

Year	Number
2009	4,899
2008	5,394

asylum seekers, persons who have overstayed their permission to remain in the State and those with no permission to remain in the State.⁵¹ An analysis of these figures would appear to suggest that the number of deportations as reflective of the number of irregular immigrants is relatively low. These figures would imply that the number of irregular immigrants in Ireland does not exceed 500 persons per year which is not reflective of the reality as experienced by the NGO sector⁵² or by the statistics relating to refusal of leave to land in Ireland. It is important to note that there are no official statistics available on outstanding deportation notices which would offer some interesting information on how many deportation notices were issued but which were not effected.⁵³

Finally, information from the uptake of the Irish Naturalisation and Immigration Service Scheme for foreign nationals, formerly holding employment permits, who became undocumented through no fault of their own, also sheds light on the level of irregular immigration in Ireland. The scheme operated from 1st October to the 31st December 2009⁵⁴ and 185 applications were received.⁵⁵ However, whether this statistic is reflective of the number of irregular immigrants in Ireland is doubtful. The scheme allowed irregular immigrants the opportunity to secure legal employment in Ireland. This required the irregular immigrant to make themselves known to the Irish Naturalisation and Immigration Service and to apply for a four-month temporary residence permission during which time they could seek legal employment in Ireland. However, failure to secure this permit, or failure to qualify for the scheme, would result in the irregular immigrant being under an obligation to leave the State. The

⁵¹ These figures are taken from the Department of Justice, Equality and Law Reform, *Annual Report* (2009 at p. 26), (2008 at p. 30), (2007 at p. 28), (2006 at pp. 46, 47), (2005 at pp. 33, 39), (2004 at p. 59), (2003 at p. 59), (2002 at p. 51), (2001 at p. 55) and (2000 at p. 49). The 2010 Annual Report is not yet available.

Year	Effected Deportations	Voluntary Returns
2009	291	539
2008	162	561
2007	135	417
2006	302	207
2005	396	335
2004	599	611
2003	591	762
2002	521	506
2001	365	356
2000	187	248
1999	6	37

⁵² See the report of the Migrant Rights Centre Ireland, *Life in the Shadows: An Exploration of Irregular Migration in Ireland* (Dublin: MCRI, 2007) at p. 13.

⁵³ The report of the Migrant Rights Centre Ireland notes that in 2005 there were 8,902 deportation notices issued, yet the official statistics from 2005 reveal that only 396 persons were actually deported and 335 were voluntarily deported. This leaves over 8,000 people unaccounted for. *Supra* n. 52 at p.13. See also Quinn and Hughes, *Illegally resident third country nationals in Ireland: State Approaches towards their Situation* (Dublin: ESRI, 2005) at p. 8.

⁵⁴ Administered by the Irish Naturalisation and Immigration Service, available at http://www.inis.gov.ie/en/INIS/Pages/Undocumented_Workers_Scheme [last accessed 18.05.2011].

⁵⁵ Department of Justice, Equality and Law Reform, *Annual Report 2009* at p. 25 available at <http://www.justice.ie/en/JELR/DJELR-%20ANNUAL%20REPORT%202009v2.pdf/Files/DJELR-%20ANNUAL%20REPORT%202009v2.pdf> [last accessed 18.05.2009].

Scheme therefore, was possibly very unattractive to many irregular immigrants who were fearful of the possibility of deportation.

Perhaps more reliable information on the level of irregular immigration in Ireland can be gleaned from the interaction of NGO's with the irregular immigrant community. The Immigrant Council of Ireland, an independent law centre for immigrants has reported that based on immigrants using their Information and Referral Services, "undocumented migrants are present in all sectors of the economy, formal and informal, and include people who had many different types of immigration statuses, including green cards, work permits, former asylum seekers, international students and people who entered Ireland on visitors visas or as family members of migrant workers or Irish citizens"⁵⁶. Statistics from the Immigrant Council of Ireland also reveal that in 2010, 6% of their service users were irregular immigrants who were formerly legally resident in Ireland.⁵⁷ The Migrant Rights Centre Ireland estimates that the reality is that there are in the region of 50,000 irregular immigrants working in Ireland.⁵⁸

3.2. The Current Approach to Outstanding Remuneration for Irregular Immigrants in Ireland

The "non-protection approach" operates in Ireland so as to deny irregular immigrants the right to claim for outstanding remuneration. This is due to the fact that employment rights (including the right to remuneration and minimum wage) in Ireland are granted by Statute to all employees, usually defined as persons working under a contract of employment.⁵⁹ Therefore, the existence of a valid contract of employment is essential to the provision of rights. Where there is an illegality found in the contract, the worker will not be defined as an employee and may not be entitled to the full range of employment rights usually reserved for employees.

Whether the employee will be allowed to rely on the contract of employment will depend on whether the contract is illegal from formation or whether it is merely illegal by virtue of its performance (e.g. by virtue of a fraud on the Revenue⁶⁰). A

⁵⁶ Immigrant Council of Ireland, "Undocumented Migrants" (2010) available at <http://www.immigrantcouncil.ie/campaigns/undocumented-migrants> [last accessed 18.05.2011].

⁵⁷ See Immigrant Council of Ireland, "Government must improve immigration processes in response to massive budget cuts" (2010) available at <http://www.immigrantcouncil.ie/media/press-releases/press-releases-2010/437-government-must-improve-immigration-processes-in-response-to-massive-budget-cuts-immigrant-council-of-ireland> [last accessed 18.05.2011].

⁵⁸ *Supra* n. 46 at p. 26.

⁵⁹ See for example the Unfair Dismissals Act 1977 (Ireland), section 1; the Employment Equality Act 1998 (Ireland) as amended by the Equality Act 2004 (Ireland), section 2; the Carers Leave Act 2001 (Ireland), section 2; the Parental Leave Act 1998 (Ireland), section 2; the Maternity Protection Act 1994 (Ireland), section 2; the Terms of Employment (Information) Act 1994 (Ireland), section 1; National Minimum Wage Act 2000 (Ireland), section 2.

⁶⁰ Prior to the decision in *Lewis v. Squash* [1983] ILRM 363 and the subsequent amendment of the Unfair Dismissals Act 1977 to allow for recovery in cases of employment contracts which were illegal by virtue of fraud on the Revenue or social services, a number of decisions of the Employment Appeals Tribunal highlighted the reluctance of the Tribunal to allow recovery in cases where the contracts of employment were tainted with illegality e.g. *Fox v. Inchicore United Workingmans Club* (UD 624/82); *Magee v. Cambell* (UD 449/83); *Costello v. Fleming Haulage Ltd* (UD 1146/83); *Morris v. Peter*

contract is formed illegally where the “*mere making of [the contract] is a legal wrong*”⁶¹, where, for example, it is contrary to the terms of a Statute.⁶² The result of a contract that is illegal from formation is that the contract will be declared to be illegal as formed,⁶³ void *ab initio*⁶⁴ and, as such, unenforceable.⁶⁵ Where immigrants are found to be working in violation of immigration laws,⁶⁶ both the employer and the worker are operating in contravention of a statute.⁶⁷ As such, the contract of employment is illegal and therefore unenforceable at law.

As Ireland has traditionally been a country of emigration, the issue of the employment rights of irregular immigrants has been given little attention and has never been judicially considered.⁶⁸ In the case of *Lewis v. Squash Ireland Ltd.*⁶⁹, the Irish Employment Appeals Tribunal considered the illegality doctrine and the impact of the doctrine on employment rights, in the context of a case involving fraud on the Revenue. The employee asserted that “statutory rights can be asserted irrespective of the illegality of the contract from which they arise or upon which they depend because the result of the employment legislation is to give the employee a protected status”⁷⁰ and that any other construction of the law would provide “an easy way for employers to circumvent the statutory provisions for the protection of employment rights”⁷¹. The Employment Appeals Tribunal held that unless the employee was a “party to the contract of employment, the statute cannot and does not give him a right” to claim certain statutory employment rights. However, the Employment Appeals Tribunal did threaten to report rogue employers to the Revenue Commissioners where fraud came to their notice.⁷²

In response to this case, the legislature began to row back on the absolute bar to recovery in cases where the illegality arises during the *performance* of the contract and will not preclude the worker from obtaining redress for unfair dismissal claims,

Keogh (Upholsters) Ltd. (UD 1146/83). See Madden, “Illegality and Public Policy” (1985) 3 *Irish Law Times* 178.

⁶¹ Treitel, *The Law of Contract* (London: Thomson Sweet & Maxwell, 11th ed., 2003) at p. 393. *Mogul Steamship Co. v. McGregor, Gower & Co.* [1982] AC 25 at p. 39 (*per* Lord Halsbury). *Cf.* Cheshire and Fifoot, *Law of Contract* (London: Lexis-Nexis UK, 14th ed., 2001) at p. 425.

⁶² See the England and Wales Employment Appeals Tribunal decision in *Vakante v. Addey & Stanhope School and Others* EAT 10565/03/RN. See also the Irish decision of *Lewis v. Squash Ireland Ltd.* [1983] ILRM 363.

⁶³ Cheshire and Fifoot *supra* n. 61 at p. 425.

⁶⁴ *Mogul Steamship Co. v. McGregor, Gower & Co.* [1982] AC 25 at p. 39 (*per* Lord Halsbury).

⁶⁵ As Cheshire and Fifoot *supra* n. 61 contend at p. 424 “no person can claim a right or remedy whatsoever under an illegal transaction”.

⁶⁶ As Collins, Ewing and McColgan, *Labour Law: Text and Materials* (Oxford: Hart, 2001) note at p. 70, contracts entered into in contravention of immigration legislation are void *ab initio*.

⁶⁷ In Ireland, the Employment Permits Act 2003 (Ireland), section 2 (as amended by the Employment Permits Act 2006 (Ireland), section 2) makes it a criminal offence for a migrant worker to be employed without an employment permit and for an employer to employ a migrant worker without the requisite employment permit.

⁶⁸ The most recent immigration related Bill, the Immigration, Residence and Protection Bill 2010, section 9 refers to the rights of “unlawfully resident” foreign nationals to certain services e.g. medical services but makes no mention of employment law protection.

⁶⁹ [1983] ILRM 363.

⁷⁰ [1983] ILRM 363 at paragraph 4.03.

⁷¹ [1983] ILRM 363 at paragraph 6.01.

⁷² [1983] ILRM 363 at paragraph 6.02.

regardless of the knowledge of the parties to the illegality.⁷³ However, the Rights Commissioner, the Tribunal or the Circuit Court have an obligation to inform the Revenue Commissioners or the Minister for Social Welfare and Family Affairs of any contraventions of the Income Tax Acts or Social Welfare Acts⁷⁴ which occurred during the operation of the contract of employment.⁷⁵ The Minister for Social Welfare and Family Affairs or the Revenue Commissioners may in their discretion decide to pursue the claim against the parties to the contract. Similar provisions now exist under the National Minimum Wage Act 2000 (Ireland).⁷⁶ However, these legislative developments have not been extended to cases where the illegality arises at the *formation* of the contract and therefore the old common law position, that such a contract is unenforceable, remains.

Ireland has signed and ratified the International Covenant on Economic, Social and Cultural Rights⁷⁷ and this Convention, and the rights contained therein⁷⁸, are applicable to all persons regardless of their migratory status.⁷⁹ Accordingly, the current Irish position denying recovery to irregular migrants on the basis of migratory status could be considered incompatible with the ICESCR. However, Ireland is a dualist state and requires that all international agreements be incorporated into domestic legislation before they are enforceable in Ireland⁸⁰. Where this incorporation does not occur, the State is considered bound by the treaty but the provisions are not enforceable before the Irish courts. Unfortunately, in the case of the ICESCR, this necessary incorporation has not occurred and this practicality may prevent the development of any legal argument by an irregular immigrant before an Irish court.⁸¹

The policy justifications underlying this current absolute bar to recovery in Ireland in the case of contracts that are formed illegally would appear to be four-fold: (a) upholding the dignity of the court, (b) the fact that a plaintiff should never profit from

⁷³ Unfair Dismissals Act 1977 (Ireland), section 8(11) as substituted by Unfair Dismissal (Amendment) Act 1993 (Ireland), section 7.

⁷⁴ 1981-1993.

⁷⁵ Unfair Dismissals Act 1977 (Ireland), section 8(12) as substituted by Unfair Dismissal (Amendment) Act 1993 (Ireland), section 7.

⁷⁶ Section 40, National Minimum Wage Act 2000. See Forde, *Employment Law* (Dublin: Round Hall Ltd., 2nd ed., 2001) at p. 38.

⁷⁷ Hereinafter referred to as the ICESCR.

⁷⁸ These include the right to non-discrimination (Article 2, ICESCR) and the right to just and favourable conditions of work (Article 7, ICESCR).

⁷⁹ Butter & Verhagen refer to the decision of the Committee on Economic, Social and Cultural Rights (CESCR) to the effect that “the rights apply to everyone, including migrant workers, regardless of legal status and documentation” *supra* n. 34 at p. 11. See the decision of the Committee on Economic, Social and Cultural Rights, General Comment No. 20, on Article 2 paragraph 2 (2009) UN doc. E/C.12/GC/20, at para. 30.

⁸⁰ Article 15.2.1. Irish Constitution.

⁸¹ Signature and ratification of the International Covenant on the Rights of Migrant Workers and Members of their Families (hereinafter referred to as the UNCMW) GA Resolution 45/158, annex, 45 UNGAOR Supp. (No. 49A) at 262, UN Doc. A/45/49 (1990); entered into force 1 July 2003 by Resolution 2003/48 (Commission on Human Rights) would also add to the argument that discrimination on the basis of migratory status is no longer compatible with international developments. The most important aspect of the Convention is that it regards all workers, regardless of their migratory status, as a necessary part of the labour market who are deserving of respect and encouragement. This shift in the manner in which migration is viewed will have, once ratified, a significant impact on the protection of migrant workers and has the potential to remedy some of the problems raised by globalisation such as the growth in irregular immigration, the denial of rights to such workers and the prevention of exploitation.

his or her own illegal actions, (c) deterrence and (d) punishment.⁸² However, it should be noted that these four justifications are relate more generally to illegal contracts and are not specifically referring to irregular immigrants.

(a). Upholding the dignity of the court

The courts believe that by depriving illegally formed agreements, and, in particular, contracts of employment, of their legal effect, they are in fact protecting the sanctity of the judicial process, as well as protecting legal employed workers and the State from a lowering of standards in the terms and conditions of employment. In relation to the protection of the sanctity of the judicial process, courts have been known to dismiss claims brought on the basis of illegal contracts merely to reflect the “indignity of the court”.⁸³ Indeed courts will not award satisfaction to the plaintiff in cases where to do so would not be proper or decent⁸⁴. The Law Commission in the UK, in reviewing the decisions of the courts in relation to illegal transactions in general, was of the opinion that this justification had merit.⁸⁵ The Commission noted that the “proper role of the court is not to provide an arena in which wrongdoers may fight over their spoils”⁸⁶. However, the Commission did seem to suggest that the justification would only be relevant in relation to transactions which are “morally very shocking” or where the plaintiff’s behaviour is “particularly heinous”,⁸⁷ words which this author contends are completely unsuitable to the description of irregular employment. The Commission suggested a less strict application of the rule where the illegality is merely a “trivial breach of some technical statutory regulation”.⁸⁸ Therefore, there appears to be some substance to the claim that this public policy justification is not entirely appropriate in the context of irregular immigration. While the breach of the statutory rules relating to immigration could hardly be described as “trivial”, they are not “particularly heinous” either so there is room for an argument based on a more proportionate application of the rule in cases where there is clear evidence of unjust enrichment on the part of the employer at the expense of the irregular immigrant.

(b). The Plaintiff should not profit from their own actions

In one of the earliest Irish cases dealing with this issue of illegality the court held that the rationale for the illegality doctrine was based on the principle of *ex turpi causa*

⁸² UK Law Commission, *Illegal Transactions: The Effect of Illegality on Contracts and Trusts*, 30-188-01 at p. 86 available at http://www.justice.gov.uk/lawcommission/docs/cp154_Illegal_Transactions_Consultation.pdf [last accessed 18.05.2011].

⁸³ *Everet v Williams* (1725) reported at (1893) 9 LQR 197 cited in *Lindley on Partnership*, (1979, Sweet & Maxwell, 14th ed.) at p. 137. See also the Irish decision of *Morris v. Peter Keogh (Upholsterers) Ltd.* where the Employment Appeals Tribunal held that a contract for employment was unenforceable as the employee had been claiming unemployment benefit for the final 12 months of the contract. There was no suggestion that the contract was illegal or unenforceable. However, the Tribunal refused redress of the employee on the basis that “it disapproved of the fact that he had illegally obtained unemployment benefit during a period of employment”, quoted in Madden, “Illegality and Public Policy” (1985) 3 *Irish Law Times* 178 at p. 179.

⁸⁴ *Parkinson v. College of Ambulance Ltd. and Harrison* [1925] 2 K.B. 1.

⁸⁵ *Supra* n. 82 at p. 87.

⁸⁶ *Supra* n. 82 at p. 87.

⁸⁷ *Supra* n. 82 at p. 87.

⁸⁸ *Supra* n. 82 at p. 87.

non oritur action i.e. that “justice must be drawn from a pure fountain” and a court “ought not to enforce an illegal contract if the person invoking its aid was himself implicated in the illegality, for the illegal contract conferred no rights on him”⁸⁹. The Law Commission in the UK evaluated this policy justification and did recognise that there was value in the justification⁹⁰. However, once again they stressed the importance of limiting the policy to cases where the plaintiff knows and intends to commit an illegality.⁹¹ Therefore, knowledge of the illegality would appear to be a very important concept. In most cases of irregular immigration, the irregular immigrant would be party to the illegality but this may not always be the case.⁹²

(c). Deterrence

Both the courts and the legislature feel that the illegality doctrine is one way in which to deter irregular immigrants from taking up employment and threatening the security, both economic and national, of the state. However, the Sanctions Directive has now challenged this conventional view of irregular immigration. Indeed, the lack of employment rights in general in the US, UK and Ireland has had little if any effect on the numbers of irregular immigrants entering these states. As Batog has commented, it is “unlikely that the undocumented workers know that they will be denied protections under domestic labor laws because of their immigration status. If they do not know that they are being denied these labor law protections, denial will have no effect on whether they stay or leave. Even if they were aware, undocumented workers do not come into the United States or the UK for the protection of the respective country’s labor laws”⁹³. Batog refers to the federal court decision in the United States of, *Patel v. Quality Inn*⁹⁴ where it was held that “rather it is the hope of getting a job – at any wage – that prompts most illegal aliens to cross our borders”⁹⁵.

In a case involving an illegal transaction in competition law before the European Court of Justice (hereinafter referred to as the “ECJ”), *Courage v. Crehan*⁹⁶, Advocate

⁸⁹ *Sumner v. Sumner* (1936) 70 ILRT 9 at p. 11. The court referred to the cases of *Karley v. Thomson* 24 QBD 742 where at p. 745 Fry LJ briefly stated the law in these terms: “As a general rule, where the plaintiff cannot get at the money which he seeks to recover without showing the illegal contract, he cannot succeed.” The court in *Sumner* also referred to the case of *Farmers Mart Ltd. v. Milne* [1915] AC 106 in which Lord Dunedin (at p. 113) said that the test laid down so long ago as 1816 in the case of *Simpson v. Bloss* 7 Taunt 246 was “whether the plaintiff requires any aid from the illegal transaction to establish his case”. Lord Dunedin went on to hold that if the plaintiff did require aid from the illegal transaction, the court would not aid him.

⁹⁰ *Supra* n. 82 at p. 88.

⁹¹ The Commission (*supra* n. 82 at p. 88) referred to the case of *Strongman (1945) Ltd. v. Sincock* [1955] 2 Q.B. 525 where Lord Denning stated: “It is, of course, a settled principle that a man cannot recover for the consequences of his own unlawful act, but this has always been confined to cases where the doer of the act knows it to be unlawful or is himself in some way morally culpable. It does not apply when he is an entirely innocent party” at p. 535.

⁹² For example, it may be that an employer may not renew a work permit leaving the immigrant in a situation of irregularity without their knowledge.

⁹³ Batog, *infra* n. 101 at p. 124.

⁹⁴ (1988) 11th circuit 846 F.2d 700 at pp. 704-705.

⁹⁵ Batog, *infra* n. 101 at p. 124.

⁹⁶ Case C-453/99 *Courage v. Crehan* [2001] ECR I-06297. In this case the ECJ allowed a pub owner to lodge a counterclaim for damages against a brewery who had forced the pub-owner to enter into an anti-competitive exclusive purchase agreement. See Elhaugh and Geradin, *Global Competition Law and Economics* (UK: Hart Publishing, 2007) at p. 46.

General Misho opined,⁹⁷ that the prospect of recovery for a party to an illegal contract would act as an incentive to weaker parties to denounce unlawful agreements and, perhaps more importantly, it would be an effective means of deterring the party in the position of strength from taking part in the conduct in question.⁹⁸ It was his firm belief that the provision of the right to enforce the contract would in fact reduce the level of illegal agreements.

However, the Law Commission in the UK were strong in their endorsement of the deterrence principle in the context of illegal contracts in general and, although they acknowledged that normally deterrence is a policy of the criminal law and may not be effective in a civil context, they felt that it should be used to discourage and deter such conduct. Reference was made to Professor Atiyah's assertion that there may be instances where denying civil law remedies can prove more successful than a criminal penalty.⁹⁹ In cases where the wrong is a criminal offence and where risk of enforcement is low, civil law deterrents, such as the illegality doctrine, can be useful.

(d). Punishment

The final justification for the absolute ban on recovery in cases of illegal contracts is that the rule ensures that the parties to an illegal agreement will never profit from their actions.¹⁰⁰ As Batog has concluded, the rationale for the illegality doctrine appears to be based on the notion that the plaintiff should not be granted relief where it would enable him to benefit from his own criminal conduct.¹⁰¹ Once again this justification is normally associated with criminal law and not with the civil law. However, the Law Commission in the UK did not see any reason in principle "why punishment should not also be regarded as an aim of the civil law"¹⁰². However, they did caution against frivolous application of the rule and suggested a proportionality test to balance the penal effect against the illegality involved.

The effect on the irregular immigrant of the "non-protection approach" is evident. There is no protection from the low wages and exploitative conditions which they may be subjected to, there is no right to compensation and the right to equality in terms of national minimum wage requirements is denied. The "non-protection approach" relies on a number of justifications based on the common law rule of illegality which was formulated at a time when the concept of irregular immigration was not contemplated. While the rule still has pertinence to illegal transactions in general, its use in the context of irregular immigration should be challenged. The approach of the Sanctions Directive recognises that the granting of limited rights to irregular immigrants increases the cost of such workers from an employer perspective, particularly in conjunction with the risk of the imposition of harsh penalties by both civil and criminal law. This theory has also received support from the Economic and Social Committee who have found that the less difference there is in financial terms

⁹⁷ His opinion was shared by that of the UK and the European Commission, *supra* n.96.

⁹⁸ *Supra* n. 96 at paragraph 57.

⁹⁹ P S Atiyah, *An Introduction to the Law of Contract* (5th ed 1995) pp 342-343.

¹⁰⁰ *Holman v. Johnson* [1775] 1 Cowp. 341. See the discussion in Treitel *supra* n. 61, Cheshire & Fifoot *supra* n. 61.

¹⁰¹ Batog, "Immigration Policy v Labor Policy: An Analysis of the Application of Domestic Labor Laws to Unauthorised Foreign Workers" (2006) 3 (1) *Loyola University Chicago International Law Review* 117 at p. 124.

¹⁰² *Supra* n. 82 at p. 88.

between declared and undeclared work, the less attractive undeclared work will become.¹⁰³

4. Reforming and Adapting Domestic Policy in Recognition of Globalisation

4.1. The Decision to Opt-Out and Misinformed Assumptions

The decision of the Irish Government to opt-out of the Sanctions Directive, seems to have some foundation in their conceptual approach to illegal contracts in general i.e. that denying rights of enforcement and provision for outstanding remuneration is of punitive and deterrent value. The stated reason for the decision to opt-out of the Sanctions Directive was also closely linked with the UK opt-out with concerns being raised by the Irish Government that “one would run the risk of displacement of people if one had a much more liberal regime”¹⁰⁴. This statement is based upon a misunderstanding of the purpose of the Sanctions Directive, the assumption being that the right to back pay, is a liberal measure and would, in fact, lead to a mass movement of irregular immigrants from the UK to Ireland. This seems to have missed the main focus of the provision on back pay which has a dual function of punishing the employer for hiring an irregular immigrant and allowing the irregular immigrant some measure of compensation when they are leaving the State. Awarding back pay not only compensates the employee but also “admonishes the employer who violated the law”.¹⁰⁵ This assumption then, that the regime would be more liberal, is not an accurate one.

In fact, the main purpose of the Sanctions Directive is to harmonise the law relating to irregular immigrants in the Member States because of the fear that “significantly different levels of sanctions and enforcement in different Member States” could “lead to distortions of competition within the single market and to secondary movements of illegally staying third-country nationals to Member States to lower levels of sanctions and enforcement”¹⁰⁶. On this logic, both Ireland and the UK now stand to be viewed as more “liberal” than their EU counterparts and may now attract more irregular immigrants because of the high levels of sanctions in other EU Member States. However, it should be noted that Carrera and Guild argue convincingly that the idea that irregularly staying third country nationals seek out more lenient legal systems “is difficult to substantiate”¹⁰⁷ and the Directive may have a greater impact on employers than irregular immigrants as it may encourage those employers who operate in states with back pay provisions to move to Member States, who do not have such provisions, to seek out the more “liberal” regimes.

4.2. Re-thinking the Disconnect between Immigration and Labour Law and Policy

¹⁰³ Opinion of the Economic and Social Committee on the Communication from the Commission on Undeclared Work, Official Journal 101 12/04/1999 at p. 0030-0037 at paragraph 2.2.1.2.

¹⁰⁴ Meeting of the Joint Committee on Justice, Equality, Defence and Women’s Rights, 6th February 2008 at 2.35pm, Scrutiny of EU Proposals, Mr. Kevin O’ Sullivan available at <http://debates.oireachtas.ie/JUJ/2008/02/06/00003.asp> [last accessed 18.05.2011].

¹⁰⁵ Batog *supra* n. 101 at p. 125.

¹⁰⁶ *Supra* n. 7 at p. 6.

¹⁰⁷ Carrera and Guild, *supra* n. 10 at p. 5.

The Irish decision to opt-out was based on a misinformed assumption about the nature of irregular migration and irregular employment. The reason behind this may stem from the illegality doctrine and the conception in Irish law that irregular workers should be deterred and punished. However, this conception fails to recognise that irregular immigration does not fit within the traditional and conventional common laws relating to illegality.

While the Sanctions Directive is concerned mostly by immigration law concerns,¹⁰⁸ there are some elements of the Directive, particularly the provisions relating to back pay, which stray into the domain of labour or social policy. There is a “strong employment dimension embracing the content and aims of the initiative, which may call for a need to reconsider the treatment of this issue from an exclusive immigration control perspective”.¹⁰⁹ Indeed, the Directive complements the existing work of the European Union in the area of undeclared work and its potential transformation into regular employment.¹¹⁰ The Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on stepping up the fight against undeclared work¹¹¹ recognised that one of the policies behind reducing undeclared work was to reduce the pull factor for irregular immigration. Therefore, there is a strong recognition that both labour law and immigration law need to be developed together in order to tackle the issue of irregular immigration.

It is this author’s contention that this failure to enter into a debate as to the interaction between labour immigration law and policy is one of the reasons behind the decision of Ireland to opt-out of the Directive. Ireland, to date, has not developed immigration laws in line with labour policy. In fact, it was not until 2003¹¹² that the first piece of immigration legislation relating to immigrant labour was introduced in Ireland despite the growing needs of the labour market in the preceding years. The “non-protection approach” is a classic reflection of this disconnect and identifies a failure by the State to analyse more closely the traditional private law doctrine of illegality and its potential impact on migrant workers in general and irregular immigrants in particular.

¹⁰⁸ Kyieri “European Policy Options for Fighting the Illegal Employment of Migrant Workers”, (EIPASCOPE 2008/3) where, in describing the purpose of the Directive she comments that “this proposal is mostly concerned with immigration policy and not with labour or social policy per se”.

¹⁰⁹ Carrera and Guild, “An EU Framework on Sanctions against Employers of Irregular Immigrants” (2007) *CEPS Policy Brief* No. 140 at p. 1.

¹¹⁰ Commission Staff Working Paper, “Accompanying document to Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals - Measures to prevent and reduce the employment of third country nationals who are illegally staying or working in breach of their residence status” (Brussels 16.5.2007 SEC(2007) 596) at pp. 2-3.

¹¹¹ COM(2007) 628 Final.

¹¹² In 2003, the Irish Government introduced the Employment Permits Act 2003, to put the employment permit on a statutory footing. There has been a range of immigration legislation in Ireland in the past 30 years. These Acts are: Refugee Act 1996 (deals specifically with the situation and legal rights of asylum seekers in Ireland), Immigration Act 1999 (deals specifically with deportation procedures), Illegal Immigrants (Anti-Human Trafficking) Act 2000 (deals specifically with human trafficking adopting mainly a criminal model), Immigration Act 2003 (deals specifically with entry and residence of immigrants in Ireland), Employment Permits Act 2003 (deals with economic migration for the first time), Immigration Act 2004 (deals with control of foreign nationals in Ireland), Employment Permits Act 2006 (deals with conditions for allocation and termination of employment permits) and Immigration, Residence and Protection Bill 2010 (will deal with, once enacted, all aspects of immigration and refugee law in one Act).

In the United States, this disconnect between immigration and labour law has been the subject of both academic and judicial debate. The US Supreme Court in the case of *Hoffmann Plastic Compound, Inc v. NLRB*¹¹³ held that irregular immigrants could not collect back pay as it would entrench upon the employer sanctions regime that was established in immigration law, failing to recognise the interaction between immigration law as a global phenomenon and labour law as a domestic issue and highlighting very significantly the “disconnect” between labour law and immigration law in the US.¹¹⁴ Garcia identifies the *Hoffmann* case as a prime example of the need for a change in this perception of immigration and labour law as distinct units of law that do not integrate with one another.¹¹⁵ The reality of immigration is that labour law and immigration law are clearly and inextricably bound up in practice but “paradoxically, the law treats these issues independently, with separate and conflicting bodies of law addressing immigration, labour organising and other aspects of employment law”.¹¹⁶ In an era of globalisation, it is no longer sufficient to treat these two bodies of law as unconnected.

Adoption of the Sanctions Directive into Irish law would require an amendment to the current common law position that a contract of employment that is tainted with illegality is an absolute bar to recovery of back pay and outstanding remuneration for irregular immigrants. This would require a legislative change of the sort adopted into the Unfair Dismissals Acts 1977-1993 and the National Minimum Wage Act 2000 to allow for recovery in cases of illegality arising due to fraud on the Revenue. The terms could provide that where it is proven that under normal circumstances the employee would be entitled to outstanding remuneration and the contract contravenes any provision of the Immigration Acts, the employee shall, notwithstanding the contravention, be entitled to redress in the form of the remuneration which is outstanding at the time of the application.¹¹⁷ This simple addition to the labour legislation would meet the requirements of the Sanctions Directive and would finally demonstrate recognition of the connection between labour and immigration law and its importance in the protection of the rights of irregular immigrants and the fight against irregular immigration.

Conclusion

“I have no contract of employment, no pay slips. I feel I can’t complain about anything. I am still a little confident as long as I work hard and do good. But I am afraid of losing the job that supports my needs here”¹¹⁸.

In Ireland, as in other EU countries, irregular immigrants provide significant amounts of labour, time and capital to employers. However, due to the fact that they work in a

¹¹³ (2002) 535 US 137.

¹¹⁴ Garcia, “Ghost Workers in an Interconnected World: Going Beyond the Dichotomies of Domestic Immigration and Labour Laws” (2002-2003) 36 *University of Michigan Journal of Law Reform* 737 at p. 737.

¹¹⁵ Garcia, *supra* n. 114 at p. 740.

¹¹⁶ Garcia, *supra* n. 114 at p. 743.

¹¹⁷ This is modelled on the provisions of the Unfair Dismissals Act 1977 (Ireland), section 8(12) as substituted by Unfair Dismissal (Amendment) Act 1993 (Ireland), section 7 and the National Minimum Wage Act 2000, section 40(1).

¹¹⁸ Quote from a participant in the study of the Migrant Rights Centre Ireland *supra* n. 46 at p. 44.

state, like Ireland, which adopts the “non-protection approach”, this work is completed under an illegal contractual agreement and the employer may be relieved of any obligation to the irregular immigrant, including any obligation to pay that worker at a just and equal rate or even pay them at all. While some employers do fulfil their obligations to irregular workers, in Ireland they are under no legal duty to do so and employers are able to circumvent employment statutes guaranteeing workers a minimum wage and maximum hours of work. The effect of this is that the employer is unjustly enriched at the expense of the irregular immigrant.

The Sanctions Directive will not change this situation as it provides no temporal protection for the irregular immigrant and will not prevent the high levels of exploitation experienced by irregular immigrants across the EU Member States. However, it does provide a limited measure of compensation in the form of a right to outstanding remuneration, even if this right comes with inevitable consequences – detection, possible detention and eventual deportation or voluntary return. The provision of this right to outstanding remuneration has a dual goal: compensating the irregular immigrant but also increasing the risk, both financial and criminal, of the employer in hiring an irregular immigrant, thereby reducing the pull factor of available employment in EU Member States.

Current domestic immigration and labour policy in Ireland provides no protection to the irregular immigrant, based on the assumption that to provide such protection would be a liberal measure which would entice, rather than deter, irregular immigration. This assumption would appear to stem from the culture that denying illegal contracts of employment of effect deters and punishes the irregular immigrant and upholds the dignity of the courts and the sanctity of the judicial process. However, the adoption of the Sanctions Directive should provide an opportunity to reconsider these assumptions and the current disconnect between domestic immigration and labour law in an era of globalisation.