THE SUPREME COURT

In the matter of Section 5 of the Illegal Immigrants (Trafficking) Act, 2000

Record No. 213/02
Record No. 266/02
Record No. 214/02
Keane, C.J.
Denham, J.
Murray, J.
McGuinness, J.
Hardiman, J.

BETWEEN

GEORGHE ADRIAN GONCESCU

Applicant/Appellant

- and –

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, MINISTER FOR ENTERPRISE, TRADE AND EMPLOYMENT, IRELAND AND THE ATTORNEY GENERAL

Respondents

BETWEEN

VASILE SAVA AND FLORINA SAVA

Applicants/Appellants

- and –

THE MINISTER FOR JUSTICE EQUALITY & LAW REFORM IRELAND & THE ATTORNEY GENERAL

Respondents

BETWEEN

RUZENA HRICKOVA
TIBOR HRICKO SENIOR
TIBOR HRICKO JUNIOR
(A MINOR SUING BY HIS MOTHER AND NEXT FRIEND RUZENA HRICKOVA)
RUDOLF HRICKO
(A MINOR SUING BY HIS MOTHER AND NEXT FRIEND RUZENA HRICKOVA)
ROMAN HRICKO
(A MINOR SUING BY HIS MOTHER AND NEXT FRIEND RUZENA HRICKOVA)
MIROSLAV HRICKO
(A MINOR SUING BY HIS MOTHER AND NEXT FRIEND RUZENA HRICKOVA)

AND
DENISA HRICKOVA
(A MINOR SUING BY HER MOTHER AND NEXT FRIEND
RUZENA HRICKOVA)

Applicants/Appellants

-and-

THE MINISTER FOR JUSTICE, EQUALITY & LAW REFORM
REFUGEE APPLICATIONS TRIBUNAL
REFUGEE APPLICATIONS COMMISSIONER
IRELAND
AND
THE ATTORNEY GENERAL

Respondents

Judgment of Murray, J. delivered on the 30th day of July, 2003.

The Appellants in these three cases were refused leave to apply for judicial review pursuant to section 5 (2)(b) of the Illegal Immigrants (Trafficking) Act, 2000. The High Court, for the purposes of this appeal against its decision, certified pursuant to section 5 (3) (a) of the Act that the decision involved points of law of exceptional public importance and that it was desirable in the public interest that an appeal should be taken to the Supreme Court.

This appeal is principally concerned with the questions of law so certified by the High Court.

These questions of law are as follows: -

(1) Where a Europe Agreement national enters the State for the purposes of seeking asylum and being unsuccessful and/or having no entitlement to make an asylum application in the State, is therefore required to leave a State and/or to be removed from the State, is it compatible with the provisions on establishment as set out in the Europe Agreement with Romania and the Europe Agreement with the Czech Republic for the State to require that person leave the State and make his application for permission to carry on a business within the State from his home state?

(2) Do the administrative arrangements for self-employed Europe Agreement nationals, for the time being in force in the State, nullify or impair the benefits accruing to the Applicant (s) under Article 45 of the Association Agreement made between the European Communities and their member states and Romania and the Czech Republic (The Association Agreements)?

(3) Did the Respondents apply the administrative arrangements for self-employed Europe Agreement nationals, for the time being in force in the State, to the Applicant(s) in such a manner as to nullify/impair the benefits

accruing to him contrary to Article 59 (1) of the Association Agreement.

Of course these questions are not posed in the abstract and fall to be decided in the factual circumstances arising in each of these cases. Counsel appearing for all of the Applicants/Appellants (hereafter Appellants) in each case have relied on legal arguments which are common to each case.

Other Issues
In the case concerning the Hrickova family, other issues of law were argued in the appeal relating to the validity of the deportation orders made for the purpose of transferring their applications for asylum to another country pursuant to the provisions of the Dublin Convention. I address these issues later in the judgment after first of all dealing with the issues raised by the points of law as certified by the High Court.

The facts in Mr Goncesu's case:

The facts as found by the learned High Court Judge included that Mr Goncesu is a Romanian National, born on 7th July, 1975 who arrived in this State on 2nd June, 1997. He has applied unsuccessfully for asylum within the State. He was interviewed in connection with that application in November, 1998 following which his application for refugee status was refused. He appealed this decision to the Refugee Appeals Authority. This appeal was refused and he was so notified of this fact by letter dated March 9th, 2000. By letter dated 30th March, 2000 the Refugee Legal Service applied on his behalf for leave to remain in the State on humanitarian grounds. The application for humanitarian leave to remain was refused and on January, 17th, 2002, the Minister for Justice Equality and Law Reform (hereafter the Minister) made a deportation order in respect of Mr Goncescu. The deportation was duly notified to him by letter dated January 25th, 2002. In the proceedings before the High Court Mr Goncescu sought to quash the deportation order on the grounds that he was entitled to exercise certain establishment rights arising from the agreement entered into between the European Communities and their Member States of the one part and Romania of the other part. (Hereafter the "Europe Agreement"). This Appellant, for the purposes of these proceedings, placed considerable reliance on his employment history in the State since his arrival. In November, 1999 he secured employment as a plasterer. At that time he was still pursuing his application for refugee status. The employment which he obtained in 1999 arose in circumstances where the Government had adopted a policy of allowing certain asylum seekers to seek employment in the State while their asylum claim was being processed. This policy was an exceptional measure at the time. It would appear that the policy was adopted

in ease of the situation of certain asylum seekers since it applied at the time to applicants for asylum who had made their application before a certain date, whose applications were over twelve months old but had not been finally determined and who at the same time had complied with their obligations as an asylum seeker. An employer wishing to employ an asylum seeker to whom the policy applied was required to apply to the Department of Enterprise, Trade and Employment for a work permit. The Appellant was an asylum seeker who came within the terms of the policy and his employer, Chesterside Ltd, applied for work permit on his behalf. The work permit was granted and was valid from 10th November, 1999 to 9th November, 2000 and sanctioned his employment by Chesterside Ltd as a "specialist plasterer". The document also contained a certificate and a note to the following effect: -

"Certificate: -

This is to certify that the Minister for Enterprise, Trade and Employment permits the employment of the above-named alien by this employer. This permit is valid only for the particular employment stated and not for any other kind of work or any other employer"

"Note: -

Should the employee concerned, for any reason, cease to be employed by the employer during the period of validity specified, this permit should be returned immediately to the Department of Enterprise, Trade and Employment."

His employment permit expired on 9th November 2000, some eight months after the refusal of a declaration for refugee status. From the date of refusal he was no longer an asylum seeker and therefore was not entitled to continue working. It appears that in practice the Department allowed such persons who had received permission to work to continue working until the expiry of their work permits. However, he continued working after November 9th, 2000 with Chesterside Ltd and with a subsequent employer even though he was no longer an asylum seeker and did not have a work permit.

The learned High Court Judge also found that prior to the making of the deportation order the Appellant's then legal advisors, the Refugee Legal Service, were in contact with the immigration division of the Department of the Minister, initially by telephone communication and later by a letter dated 30th April, 2001 purporting to give notice of the appellant's 'new employer'. The new employer was a company named Speedtech Interiors Ltd. At no stage had they sought or obtained a work permit in respect of the appellant. The Department were provided with a reference from that company dated 25th April, 2001 which stated as follows: -

"To whom it may concern,

Mr Adrian Goncescu is currently working for this company as a plasterer.

He has been in our employ for the past two months.
He has shown himself to be a diligent trustworthy worker and I see no reason why Mr Goncescu will not have a long relationship with this company. I have no hesitation in recommending him to you.

Lawerence McEvoy
Contracts Manager."

There was a question before the learned judge of the High Court as to whether the Appellant, at one period while he was working, was working as an employee or, as the Appellant himself asserted, as a self-employed person engaged by Speedtech Interiors Ltd as an independent contractor. It appears that the learned High Court Judge did not find it necessary to decide that matter because as a matter of law the appellant was not lawfully entitled to work either as an employee or as a self-employed person because of his status as an unsuccessful asylum seeker and the fact that he neither had a right to work letter or work permit on the one hand or a business permit on the other.

By letter dated 30th March, 2002 the appellant sought leave of the Minister to remain in the state on humanitarian grounds.

The learned High Court judge also found that other than the information contained in the letter dated 30th March, 2002 and the letter received from the Refugee Legal Service on 30th April, 2001, the Minister had no information concerning the appellant's work within the State (post-November 9th, 2000) until receipt of the letter dated 11th February, 2002 (the same date as these proceedings were issued). That letter states, *inter alia*: -

"*We are instructed that our client is an experienced plaster and has been self-employed for almost two years. Our client seeks to rely upon the directly effective right of establishment conferred upon by the European Association agreement between Romanian [sic] and the E.U. of 1993*"

The letter then makes reference to the Gloszcuk case decided by the Court of Justice of the European Communities (cited in detail later in this judgment) and goes on to state "*That judgment outlines, inter alia, that domestic immigration rules are not entitled to impair the right of establishment that is conferred upon our client.*

Our client was formerly an asylum seeker and made an application for leave to remain in the State on humanitarian grounds. He is, therefore, lawfully present within the State for the purposes of operating a business as a self-employed person engaging in the activities of a craftsman."

The case of Mr and Mrs Sava

Mr and Mrs Sava arrived in Ireland in September, 1998 with their daughter Adelina (born on the 13th December, 1993). They are nationals of Romania.

He avers that he is a core-drilling specialist and his wife is a qualified hairdresser. Both applicants sought asylum but they were refused refugee status. They then applied for leave to remain in the State on humanitarian grounds pursuant to Section 3 (6) of the Immigration Act, 1999. Leave to remain in the State on humanitarian grounds was refused and by letter dated 2nd May, 2002 from the repatriation division of the Minister's Department to the appellant's solicitors they were informed that "*A decision has been made to deport the applicants in this case. The deportation orders will not be made against your clients pending the determination of the High Court proceedings and a formal notification will issue to your clients if and when the deportation orders are made."*

The request for leave to remain on humanitarian ground was supported, *inter alia*, by a letter dated 3rd December, 2001 from the appellant's solicitors, Messrs Terrence Lyons and Company (who replaced earlier solicitors acting for them). This was the first intimation by them to the Department that they wished to exercise establishment rights. Of particular relevance to these proceedings was a passage in that letter, cited by the learned High Court Judge in his judgment, which reads as follows: -

"*Both Vasile and Florina Sava are eager to commence work and have the skills necessary to make an active and important contribution to any workplace here in Ireland. In this regard, we enclose herewith offers of employment conditional upon them obtaining leave to remain in the State and/or permission to work. In addition, we are instructed that our clients would be keen to exercise their right of establishment under the European Association agreement between Romania and the E.U. (1993).*" Reference is then made to the Gloszcuk judgment and continues "*we are instructed to request that the Department of Justice Equality and Law Reform to forward full details of the necessary documentation, if any, that would be required for our clients to exercise their right of establishment. It is clear that the family would, therefore, be in a position to support themselves without State assistance, if permitted to remain.*"

Enclosed with that letter (and exhibited in these proceedings) were two documents from prospective employers of Mr and Mrs Sava stating they would be willing to take them on as employees.

That letter was responded to by Mr Michael Gleeson on behalf of the Minister in a letter dated 2nd May, 2002 which states as follows: -

"*Re: Vasile, Florina & Adelina Sava*

Dear Sir,

I refer to your correspondence dated 3rd December 2001, on behalf of your above-named clients who wish to exercise their right of establishment under Article 45 of the European Association Agreement with Romania (paragraph 6 of the letter).

On 18th April, 2000, a notice in accordance with Section 3(3) (a) of the Immigration Act 1999 issued to Mr. & Mrs. Sava indicating that the Minister for Justice, Equality and Law Reform proposed to make Deportation Orders in respect of them following the refusal of their applications for refugee status in the State. On 13th November 2001, a further 3(3)(a) notice issued to Mr. & Mrs. Sava and their daughter Adelina, who arrived in the State on 1st September 2000 (according to records in the office of the Refugee Applications Commissioner). As the Sava family are no longer in the asylum process, they no longer have any legal basis to reside in the State. They are currently in the State at the discretion of the Minister. A decision has been taken to deport the Applicants. This issue is addressed in the separate accompanying letter.

It is not the practice of the Minister for Justice, Equality and Law Reform to consider applications for rights of establishment contained in the Europe Agreement between the European Communities and their Member States, of the one part, and Romania, of the other part (the Europe Agreement) from persons who are resident in the State and do not have permission of the Minister to remain in the State. The Minister has considered the position of your client and determined that an application under Article 45 of the European Association Agreement with Romania should be made from Romania.

In light of the above, therefore, the application will not be considered at this point in time. The persons concerned must return to Romania. I understand that a separate letter is issuing regarding the application under Section 3 of the Immigration Act 1999 for leave to remain in the State.

Yours sincerely

Michael Gleeson
Immigration & Citizenship Division."

In the High Court reliance was also placed on a memorandum of Mr Jonathan Costigan dated 29th April, 2002 which stated as follows: -
"*Section 3 (6) (f) – employment (<u>including self-employment</u>) prospects of the person.*

Mr. Sava and Mrs. Sava are not permitted by law to work in the State. Mr.Sava and Mrs Sava were not issued with right to work letters (Tab PP). If they were permitted to work, their prospects of obtaining employment would be reasonable in the current economic climate. Terence Lyons & Co. submitted a letter to this Department on 4th December, 2000, stating that

Mr. Sava had instructed them that he is skilled in a specialised form of drilling, was anxious to take up employment and was seeking a letter from this Department confirming that he was authorised to work (Tab QQ). This Department wrote to Terence Lyons & Co. on 8th December, 2002, informing them that Mr. Sava was not entitled to work letter (Tab RR). There is an offer of employment on file from Mr. Sava from Mr. Richard Hoyle (Tab SS), and an offer of employment for Ms. Sava from Derrycourt Company Ltd.
(Tab TT)."

Finally, reference was also made, in the case of Mr and Mrs Sava, to a letter dated 3rd December, 2001 which stated, *inter alia*: -
"*...it should be noted that reference is made that Mr. and Ms. Sava and Miss Adelina Sava would like to exercise their rights, if any, of establishment under the European Association Agreement between Romania and the EU (1993). This matter is subject to a separate decision but such applications are normally not considered from persons who are resident in the State and do not have permission of the Minister to remain in the State.*"

The case of the Hrickova family
Mr Tibor Hrickova and his wife Mrs Ruzena Hrickova, together with their children referred to in the title of these proceedings, arrived in the State on 2nd August, 2002. They are nationals of the Czech Republic. They claimed asylum. As found by the learned High Court Judge the information given by them to the authorities was that they had left their country of origin on 17th July, 2001. They stated they had travelled by air from Prague to Charleroi and then to Dublin. A notice pursuant to Article 3 (3) of the Dublin Convention (Implementation) Order 2000 was given to and acknowledged by Mr Hrickova. Article 3 (3) requires that where, before or during an interview under section 8 of the Refugee Act 1996 "*it appears to an immigration officer or authorised officer that the application may be one which could be transferred under the Dublin Convention to another convention country ... he or she shall send a notice to that effect to the applicant...*" That notice informed him of his right to make written representations about any possible decision to transfer his application for asylum to another country. The learned High Court Judge also found that inquiries were made under Article 15 of the Dublin Convention on 14th August, 2001 of the United Kingdom, Belgium and Germany. A positive response by all countries was received. On 22nd October, 2001 a request to take charge was made to Germany who had accepted pursuant to Article 10 (1) (e) of the Dublin Convention as being the country responsible for the examination of an application for asylum on behalf of the Hrickova family (22nd November, 2001). In accordance with the provisions of the Convention, the Commissioner determined that the applicant's cases should be transferred to Germany for examination under Article 8 of the

convention. The decision of the Commissioner was unsuccessfully appealed to the Tribunal.
Pursuant to section 9 (2)(a) of the Refugee Act 1996 an asylum seeker's permission to enter the state terminates on a determination that his application for asylum be transferred to another country in accordance with the Dublin Convention.
The learned High Court Judge concluded at page 21 of his judgment, that the appellants in this case, as and from the date of determination of their appeal on the 14th January, 2002, (as notified to them by letter dated 17th January, 2002) had no further legal entitlement to remain in the State.
The Minister made deportation orders in respect of the Appellants on 29th January, 2002 which were subsequently sent with letters of notification dated 12th February, 2002 indicating that the applicants should present themselves at Birr Garda Station on 19th February, 2002, in order to make arrangements for their removal from the State not later than 22nd February, 2002.
Since this was a case in which the application for asylum was being transferred to another country pursuant to the provisions of the Dublin Convention, the provisions of Section 3(3) of the Immigration Act 1999, whereby the Minister must take into account any representations in writing made by the proposed deportee, including representations on humanitarian grounds, before making the Order, did not apply. This is provided for in subsection 5 of Section 3 of the said Act.
Subsequent to the making of the deportation orders, but before the letter of notification was received, a newly instructed solicitor sent on their behalf a letter dated 7th February, 2002 addressed to the Repatriation Unit of the Minister's Department. This letter stated, *inter alia*: -
"*We are instructed that our client, Mr. Hricko, is an experienced brick-layer and is in a position to establish himself in business in Offaly, where he currently resides. Our client seeks to rely upon the directly effective right of establishment conferred upon him by Article 44 of the European Association Agreement between the Czech Republic and the EU of 1995.*

We would refer you to the recent judgment of the European Court of Justice in the cases of C6/99. C257/99 and C235/99, entitled ***The Queen –v- Secretary of State from*** *[sic]* ***Home Department Ex Parte Wieslaw Gloszcuk and Elzbieta Gloszcuk and Ors.*** *That judgment outlines, inter alia, that domestic immigration rules are not entitled to impair the right of establishment that is conferred upon our client.*

As nationals of the Czech Republic, our clients did not require a visa to enter Ireland and they are lawfully present with the State. Accordingly, our client seeks permission to remain in the State for the purposes of operating a business as a self-employed person engaging in the activities of a craftsman. We are instructed that our client has already received strong indications

that work will be immediately available to him and our client will furnish references in this regard, if required to do so."

The letter also requested that the applicants be issued with temporary residents certificates pending the resolution of any dispute as to whether Tibor Hrickova was entitled to remain in the State on foot of a right of establishment under the terms of the relevant European agreement.
The Minister replied in a letter dated 11th February, 2001 where he indicated that he was not prepared to give an undertaking, as requested, that no steps will be taken to effect a transfer of the appellants to Germany. The Minister further indicated in that letter that the appellants were free to make their applications to establish rights under the relevant provisions of the European agreement from outside the State and, if the said application was successful that he would consider revoking the deportation orders to allow the applicants to return to the State.
The Appellant's solicitor further wrote to the Minister by letter date 15th February, 2002 stating: -
"*We are instructed that our Roman Hricko has suffered an accident as a result of which he sustained a fracture to his left leg. We enclose herewith a letter from his medical attendant, Dr. Khan, confirming that our client requires hospitalisation for a period of at least six weeks.*

In addition to the above, please be advised that it is our intention to issue High Court proceedings on behalf of our clients and that these proceedings shall be served on the Department of Justice, Equality and Law Reform at the earliest opportunity next week.

In light of the above, we would request that the Department of Justice, Equality and Law Reform give an undertaking by return that no steps will be taken to effect the deportation of our clients whilst Roman Hricko is hospitalised and pending the determination of the proceedings herein."

The Europe Agreements

The European Communities and their Member States have entered into a number of Association Agreements also described as Europe Agreements with a number of countries with the mutual objective of promoting closer relations between those countries and the European Communities and with a view to the eventual integration of the former in the latter as new member states. The Czech Republic and Romania and each of them respectively entered into a Europe agreement with the European Communities and their Member States on 19th December, 1994.
The provisions of those agreements which are relevant to these proceedings are identical and therefore for present purposes it is sufficient make

reference to the provisions of one of those agreements, namely, that of the Czech Republic.
These agreements, and similar agreements made between the European Communities and other states, are variously referred to as Europe Agreements or Association Agreements with those states, in the opinions of the Advocate General and the judgments of the Court of Justice in the case law cited below. For convenience I will refer to them as Europe Agreements.
According to Article 1 (2) the aims of the Europe Agreement with the Czech Republic are, *inter alia*, to provide an appropriate framework for a political dialogue, allowing the development of close political relations between the parties, to promote the expansion of trade and harmonious economic relations, in order to foster dynamic, economic development and prosperity in the Czech Republic, and to provide an appropriate framework for the Czech Republic's gradual integration into the Community. The 18th recital in the preamble to the Europe Agreement states that the ultimate objective of that country is to accede to the Community.
The provisions of the Europe Agreement relevant to this case are to be found in Title IV entitled "*Movement of Workers, Establishment, Supply of Services*".
Article 45 (3) and (4) of the Europe Agreement, which forms part of Title IV, chapter II, entitled "Establishment", provides: -
"*3. Each Member State shall grant, from entry into force of this Agreement, a treatment no less favourable than that accorded to its own companies and nationals for the establishment of Czech Republic companies and nationals and shall grant in the operation of Czech Republic companies and nationals established in its territory a treatment no less favourable than that accorded to its own companies and nationals.*
4. For the purpose of this agreement:
(a) ***establishment*** *shall mean:*
(i) As regards nationals, the right to take up and pursue economic activities as self-employed persons to set-up and manage undertakings, in particular companies, which they effectively control. Self-employment and business undertakings by nationals shall not extend to seeking or taking employment in the labour market of another Party.

> *The provisions of this chapter do not apply to those who are not exclusively self-employed; (emphasis added).*
> *...*

(c) economic

> *Economic activities shall in particular include activities of an industrial character, activities of a commercial character, activities of craftsmen and activities of the professions."*

Article 59 (1) of the Europe Agreement, which appears in Title IV, chapter

IV entitled "General Provisions", provides:
"*For the purpose of title IV of this agreement, nothing in the agreement shall prevent the parties from applying their laws and regulations regarding entry and stay, work, labour conditions, and establishment of natural persons, and supply of services, provided that, in so doing, they do not apply to them in a manner as to nullify or impair the benefits accruing to any party under the terms of a specific provision of this agreement. ...*"

National measures for implementing the Europe Agreements
Persons who are not nationals of a state comprised in the European Economic Area who wish to come to Ireland for the purpose of becoming self-employed and establish a business require a 'Business Permission' from the Minister for Justice, Equality and Law Reform (hereafter the Minister). All of the Appellants in these cases are such non-nationals. Applications by such non-nationals for permission to establish a business are governed by the administrative practices of the Department of Justice, Equality and Law Reform set out in Information Leaflet Immigration Number 5 and exhibited in this case. Certain categories of non-EEA nationals are exempt from the requirements to obtain Business Permission but it is not in contention that none of these exemptions apply to the Appellants in these cases.
The document sets-out the substantive criteria which must be met in order to obtain a Business Permission, which are as follows:
"*(a) the proposed business must result in the transfer to the State of capital in the minimum sum of €300,000;*
(b) the proposed business must create employment for a least two EEA nationals for the new project or, at the very least, maintain employment in an existing business;
(c) the proposed business must add to the commercial activity and competitiveness of the State;
(e) the proposed business must be a viable trading concern and provide the applicant with sufficient income to support themselves and any dependants without resorting to social assistance or paid employment for which a work permit would be required;
(f) the applicant must be in possession of a valid passport or national identity document and be of good character."

The document then goes onto state that the criteria of €300,000 minimum capital does not apply to persons exercising a right of establishment under one of the Europe Agreements and thus this is not a requirement with which the Appellants in this case would have to comply. This exception was made in order to comply with the requirements as to non-discrimination in the provisions of the Europe Agreement.
The document also specifies that there should be submitted with an application for a business permission the following documents: -

"*(i) your valid passport or national identity document;*
(ii) your registration certificate if you are already residing in the State;
(iii) a statement of character from the police authorities of each country in which you have resided for more than six months during the 10 year period prior to your making an application;
(iv) a business plan which addresses points (a) to (f) above. It is preferable if this business plan is endorsed by a firm of accountants or a financial institution involved in venture capital."

Prior Control

The uncontroverted evidence of Mr Michael Gleeson in paragraph 15 of his affidavit is that the policy followed by the Department in the application of the aforementioned practice is to require Europe Agreement nationals to make their application from their home state. Prior approval of the application is necessary before leave to enter and reside in the State as a self-employed person can be granted. In exceptional circumstances the Department will consider an application from a person within the State who already has legal entitlement to reside in the State. Hence the reference above to the registration certificate of non-nationals registered as residents in the State. Absence such entitlement, the Department's policy in cases such as the Appellants who are not, it is contended, entitled to remain in the State for the purpose of making an application for business permission on the basis of the Europe agreement, is that they must make their application from outside the State.
Persons who have no legal entitlement to remain and reside in the State are required to leave the State and make their application from their home country.

Arguments of the Appellants

The arguments of the Appellants can be summed up as being essentially as follows:
(i) The appellants are lawfully within the State. They were permitted to enter or permitted to stay for the purpose of applying for asylum and that permission to stay continued after their applications for asylum had been refused and while their applications to be allowed to stay on humanitarian grounds was being considered or, in the Hrickova case, pending the making of a deportation order. Accordingly, they are not unlawfully but lawfully resident in the State. In these circumstances to require them to return to their home countries for the purposes of making an application for establishment pursuant to the relevant agreements would be to treat them less favourably than nationals contrary to Article 45 (3), would be unduly restrictive so as to nullify or impair the benefits of the relevant agreements contrary to

Article 59 (1)
Moreover, it would be contrary to the principle of proportionality in the application of the said Agreements to require such foreign nationals, otherwise lawfully resident in the State, to return to their home countries for the purpose of making an application for the right to enter and stay for the purpose of becoming self- employed. Mr Goncescu was already self-employed.
(ii) Alternatively, as the UK Government did in Barkoci case, their applications for establishment should be treated as an application for leave to enter and stay (thus obviating the necessity for them to return to their home countries before making an application to become established within the State).
In support of their arguments the appellants relied on the case law of the Court of Justice in the three cases which I cite and refer to in more detail below. It was submitted that the judgments of the Court of Justice in those cases confirmed that any system of control or practices governing applications for establishment under the agreements must not be discriminatory by treating non-nationals less favourably than nationals and must not be so restrictive as to either nullify or impair the benefits of establishment rights conferred by the European Agreements. The refusal of the Minister to entertain the applications for establishment offended against these requirements.

Decision
It was common case that Article 45 (3) of the Europe Agreements relied upon by the Appellants has direct effect and may be relied upon by the Appellants before the courts in this jurisdiction. This follows from judgments of the
Court of Justice of the European Communities in C-257/99 R.V. Secretary of State for the Home Department, ex-parte, Barkoci and Malik [2001] ECR I–6557, C-235/99, R.V. Secretary of State for the Home Department, ex-parte, Kondova
[2001] ECR I–6431, and C-63/99 R.V. Secretary of State for the Home Department, ex-parte, Gloszczuk [2001] ECR I-6369.
In each of those cases the Court of Justice ruled that the corresponding provision in agreements of the same nature as those arising in this case had direct effect and could be invoked before national courts by individuals relying upon it.
For ease of reference and convenience I would point out that each of those cases were concerned with the application in the United Kingdom of the respective Europe Agreements between the European Communities and the Member States of the one part, and Poland, Bulgaria and the Czech Republic of the other. The Articles of the Agreements in issue in each of those cases correspond to the Articles in issue in this case. In particular Articles 44 (3) and 58 (1) of the Polish Agreement, Articles 45 (1) and 59 (1) of the

Agreement with Bulgaria correspond with Articles 45 (3) and 59 (1) in issue in the present case. The Agreement with the Czech Republic considered in the Barkoci case is the same as that under consideration in this case. Accordingly, as the parties acknowledged in the course of their arguments, there is no need to make any differentiation between the articles considered in each of those cases by the judgments of the Court of Justice and those in this case.

The Court of Justice Cases.
I propose at this stage to refer to the salient facts of those cases since both parties rely upon them.

The Barkoci case
Mr Barkoci arrived in the United Kingdom in October 1997 and sought asylum status. His application for asylum was rejected in November 1997 and he appealed from this decision. When that appeal was dismissed Mr Barkoci was informed that arrangements for his removal from the United Kingdom would not be proceeded with pending a ruling on his application to remain in the United Kingdom as a self-employed person pursuant to the provisions of the Europe Agreement with the Czech Republic, his place of origin. In the same case Mr Malik, a Czech citizen, also arrived in the United Kingdom in October, 1997 and applied for asylum. His application for asylum was rejected and his appeal against the decision was dismissed. On the day before the decision dismissing his appeal Mr Malik submitted an application under the Europe Agreement with the Czech Republic to become established in the United Kingdom. He was granted temporary admission by the immigration authorities.
Since neither Mr Barkoci nor Mr Malik had been granted leave to enter the United Kingdom, whether in the form of prior entry clearance or of any entry certificate they were deemed in accordance with U.K. law not to have entered the United Kingdom. Their applications for leave to remain for establishment purposes were treated as applications for initial leave to enter the United Kingdom under the Association Agreement.
In those circumstances, the Immigration Officer who examined the applications submitted by Mr Barkoci and Mr Malik "… *merely verified whether they clearly and manifestly satisfied the other conditions laid down in paragraph 212 of the Immigration Rules so that the requirement of entry clearance under paragraph 212 (vi) would be waved by a discretionary administrative act and leave to enter the United Kingdom granted outside Immigration Rules." (para. 23).*
Paragraph 212 of the immigration rules in the United Kingdom are the rules which set out the substantive criteria which an applicant for establishment pursuant to a Europe Agreement must satisfy before he is granted leave to enter and stay for that purpose.
Paragraph (vi) is a rule which requires the applicant to hold a valid United

Kingdom entry clearance for entry in his capacity as a person authorised to establish himself in business. Those U.K. rules pursue the objective of allowing the competent authorities to verify that a non-national wishing to become established in the U.K. genuinely intends to take up an activity in a self-employed capacity without at the same time entering into employment or having recourse to public funds, and that he possesses, from the outset, sufficient financial resources and has reasonable chance of success. (See in this respect paragraph 63 of the Barkoci judgment cited below).

The rules and practice set out in the Department's Immigration leaflet No. 5, referred to and quoted from above although not in identical terms pursue the same objective of verifying the genuine nature of the application and that the Applicant possesses, from the outset, sufficient financial resources and has a reasonable chance of success in his proposed activity as a self-employed person in the State.

Since it is the applicability of the system of prior control rather than the content of the criteria as such which is in issue, for the purposes of these proceedings and consideration of the decisions of the Court of Justice, the U.K. rules and the rules in Ireland may be treated as analogous.

Having found that neither Mr Barkoci nor Mr Malik had clearly and manifestly satisfied the substantive criteria for establishment set out in paragraph 212 of the rules, they were refused leave to enter the United Kingdom on the grounds they were not in possession of entry clearance. The consequence was that they should return to their home country, the Czech Republic, from which an application for establishment could be submitted for consideration with the benefit of a full examination on its merits. Temporary admission was however granted to Mr Barkoci and Mr Malik pending their ultimate removal from the United Kingdom. Their removal was deferred pending the outcome of judicial review proceedings initiated by them. These were the proceedings which led to a reference from the English court to the Court of Justice.

The U.K. authorities have in place a system of prior control of applications for establishment under the Europe Agreements essentially the same as that in operation in this country, that is to say, that applicants must submit their applications from their home country and are only granted leave to enter and stay in the United Kingdom for that purpose once such applications are found to satisfy the substantive requirements for establishment as self-employed persons.

A number of issues were considered by the Court of Justice which included the direct effect of the agreement, the legitimacy and non-discriminatory nature of a system of prior control and whether the United Kingdom were entitled to deport Mr Barkoci and Mr Malik because they had never received prior leave to enter and stay in the United Kingdom for establishment purposes. The Court of Justice upheld the decision of the United Kingdom authorities and stated that each applicant remained be entitled to submit a

further application for establishment under the Europe Agreement from their home country after deportation. I will refer to the relevant parts of the Judgment of the Court of Justice subsequently.

The Kondova case

In this case Ms Kondova, a veterinary student, obtained entry clearance for the United Kingdom in June 1993 on the basis that she intended working at an international farm camp for a period of three weeks in July and August of that year. On this basis she was given leave to enter the United Kingdom and reside there as an agricultural worker for a period of three months. About one week after her entry she made a claim for political asylum. This claim was refused and subsequently dismissed on appeal on 14th March, 1995. She was then informed that she would have to leave the United Kingdom immediately. She did not comply with that instruction. Subsequently, an issue arose between her and the United Kingdom authorities concerning the status of a marriage which she had entered into in the United Kingdom which she claimed entitled her to remain there. That claim to remain was rejected and is not relevant to those proceedings.

It was established that her true intention on arrival to the United Kingdom had been to seek asylum and that she knowingly misled the relevant immigration authorities in this regard. Having been served with an 'illegal entrance' notice she was granted temporary admission as an alternative to immediate detention. In January, 1996 she commenced working as self-employed cleaner. In July, 1996 she applied for leave to remain in the United Kingdom pursuant to the Europe Agreement with Bulgaria, her home country. She stated she wished to establish herself in a business offering general household care services. There followed what appeared to have been negotiations or discussions between Ms Kondova's solicitors and the Home Secretary concerning the viability of her proposal for self-employment but these did not arrive at a consensus and she proceeded with her judicial review proceedings challenging the decision of the Home Secretary to deport her. Those discretionary discussions did not affect the issues in the subsequent proceedings. As appears from paragraph 67 of the judgment, the decision of the Secretary of State was reviewed on the basis that his refusal was grounded on the fact that Ms Kondova had made false representations to the immigration authorities and thus her immigration status in the United Kingdom was irregular. Ms Kondova contended, *inter alia*, that the Europe Agreement contained no prior conditions about legality of residence. Therefore, there was nothing, it was submitted, in Article 45 (1) of the Europe Agreement to suggest that a right of establishment cannot be conferred on a Bulgarian national on the ground that the immigration legislation of the Member State concerned had been infringed.

In that case the Court of Justice also considered the question of direct applicability and the legitimacy in principle of a system of prior control having regard to the terms of the Europe Agreement. It reached the same

decision on those points as in the Barkoci case.
With regard to the particular situation of Ms Kondova, the Court of Justice stated, at paragraph 4 of the answers which it gave to the national court: - "*Article 59 (1) of the above Association Agreement must be construed as meaning that the competent authorities of the host member state may reject an application made pursuant to Article 45 (1) of that Agreement on the sole ground that when that application was submitted, the Bulgarian national was residing illegally within the territory of the State because of false representations made to those authorities or non-disclosure of material/facts for the purpose of obtaining initial leave to enter that Member State on a different basis. Consequently, those authorities may require that national to submit, in due and proper form, a new application for establishment on the basis of that Agreement by applying for an entry visa to the competent authorities in his state of origin or, as the case may be, in another country, provided that such measures do not have the effect of preventing such a national from having his situation reviewed at a later state when he submits that new application.*"
The latter ruling was related to the particular circumstances of Ms Kondova. In its reasoning supporting the conclusion it came to, the Court stated (at paragraph 88) *"... the interpretation of the Association Agreement advocated by Ms Kondova, which would allow any illegalities to be regularised in consideration of the fact that the substantive conditions governing establishment imposed by the immigration legislation of the host member state would then be satisfied, would compromise the effectiveness and reliability of the national system of prior control.*"
Earlier in its judgment the Court of Justice also stated, at paragraph 75 and 76: "*However, should it turn out that, as in the case in the main proceedings, the requirement concerning submission of a prior request for leave to remain for purposes of establishment has not been met, the competent immigration authorities of the host Member States may in principle refuse that leave to a Bulgarian national invoking Article 45 (1) of the Association Agreement, irrespective of whether the other substantive conditions laid down by the national legislation have been satisfied. Furthermore, as the Commission has correctly pointed out, the effectiveness of such a system of prior control rests in very large measure on the correctness of the representations made by the persons concerned at the time when they apply for an entry visa from the competent authorities in their state of origin or when they arrive in the host Member State.*"
While the particular ruling in Ms Kondova's case is not transposable to this case, because the facts are different, it does seem quite clear that Member States are entitled to protect the effectiveness of the system of prior control from abuse by persons who have not obtained prior leave to enter and remain the host state. On that ground alone leave to remain may be refused by a Member State without examining the substance of the application for

establishment. On the other hand where a person has been granted leave to enter and remain for other purposes but this leave to remain has been obtained on false representation such persons may not rely on that leave for the purposes of seeking establishment pursuant to Article 45 (1) as this would be an abuse which rendered ineffective the system of prior control.
It seems to me that the manner in which the Respondents have dealt with the applications for establishment of the appellants in this case is not in any respect inconsistent with the principles and rulings of the Court of Justice in the Kondova case.
More generally the Court of Justice in this case also held that Article 45 (1) was directly applicable, that a system of prior control whereby non-nationals are required to submit their applications for establishment from their home country, is in principle legitimate and not discriminatory.
Perhaps, more significantly, there is no ruling or statement of law in the Kondova case which supports the appellant's contention that persons whose application for asylum have been rejected and are the subject of deportation orders are entitled to have their applications for establishment examined without requirement of prior leave to enter and remain in the State as required by national law.

The Gloszczuk case
Mr and Mrs Gloszczuk, Polish Nationals, were granted leave, in October 1989 and January, 1991 respectively to enter the United Kingdom as tourists for a period of six months. Mr Gloszczuk had told immigration authorities that he was on a four day visit to the United Kingdom and that he had no intention of staying or working there. When Mrs Gloszczuk arrived in the United Kingdom she stated she wished to spend seven days visiting and that her husband was in Poland. Their respective entry visas contained an express condition prohibiting them from entering employment or engaging in any business or profession in a self-employed capacity. When their visas expired they did not leave the United Kingdom and were in breach of the immigration law of that country. Mr Gloszczuk took up work in the building industry and claimed to have become established as a self-employed building contractor. In January, 1996 Mr and Mrs Gloszczuk sought to regularise their stay in the United Kingdom by applying to the Secretary of State for establishment rights under the Europe Agreement with Poland. These applications were rejected on the grounds that they had failed to comply with conditions attached to the grant of leave to enter or remain.
In that case it was acknowledged that Article 58 (1) of the Polish Agreement permitted Member States to apply national laws and regulations regarding leave to enter and stay provided these do not restrict the rights of establishment in any unreasonable or excessive way.
At paragraph 51 of its judgment, the Court of Justice stated "*It also follows from the working of Article 58 (1) of the Association Agreement that rights of entry and residence conferred on Polish Nationals as corollaries of the*

right of establishment are not absolute privileges in as much as their exercise may, where appropriate, be limited by the rules of the host Member State concerning entry, stay and establishment of Polish Nationals." It then when on to hold *"The argument put forward by Mr and Mrs Gloszczuk to the effect that application by the competent authorities of a Member State of national immigration rules requiring Polish Nationals to obtain leave to enter is in itself liable to render ineffective the rights granted to such persons by Article 44 (3) of the Association Agreement, cannot therefore be accepted.*"

In that case Mr and Mrs Gloszczuk had argued that a Member State may reject an application submitted under Article 44 (3) of the Association Agreement by a person whose presence within its territory is otherwise unlawful only after it has taken into account the substantive requirements established by that agreement. (Paragraph 67 of Judgment)

The Court went on to rule first of all that such a system of prior control is in principle compatible with Article 44 (3) read in conjunction with Article 58 (1). (Paragraph 68). That is to say that a requirement of prior leave to enter and stay in a Member State by the submission of an application for establishment in due and proper form is not discriminatory and in principle not unduly restrictive.

On the merits of the facts in the Gloszczuk case the court decided, in the third paragraph of its answers to the questions posed by the national court: - "*Article 58 (1) of the Association Agreement must be construed as meaning that the competent authorities of the host Member States may reject an application made pursuant to Article 44 (3) of that Agreement on the sole ground that, when that application was submitted, the Polish national was residing illegally within the territory of that State because of false representations made to those authorities for the purpose of obtaining initial leave to enter that Member State on a different basis or of non-compliance with the express condition attached to that entry and relating to the authorised duration of his stay in that Member State. Consequently, those authorities may require the national to submit, in due and proper form, a new application for establishment on the basis of the agreement by applying for an entry visa to the competent authorities in his state of origin or, as the case may be, in another country, provided that such measures do not have the effect of preventing such a national from having his situation reviewed at a later date when he submits that new application*."

That particular finding is based substantially on the facts of the Gloszczuk case and is not exactly applicable to the present case before the court.

One of the grounds upon which the Court rejected the contention that the United Kingdom authorities were bound to consider the substantive application for Mr and Mrs Gloszczuk rather than deporting them to their home country from which a renewed application could be made was stated in paragraph 74: -

"*Such an interpretation would risk depriving Article 58(1) of the Association Agreement of its effectiveness and opening the way to abuse through endorsement of infringements of national legislation on admission and residence of foreigners*."

Although the facts are different, it appears to me to follow that the Court here was recognising the right of Member States to apply a system of prior control to Applicants for establishment in accordance with their own national laws and regulations and this right should not be compromised by the actions of applicants which might be an abuse of national legislation on admission and residence of foreigners including a legitimate requirement to submit applications prior to seeking entry to the State.

Again in this case the Court of Justice also held that Article 44 (3) was directly applicable, upheld in principle the legitimacy of a system of prior control which was not in itself discriminatory or unduly restrictive of rights of establishment. Neither, in my view, is there to be found any statement of law in the judgment of the Court of Justice which supports the contention of the appellants that persons whose application for asylum has been refused and who have been made the subject of a deportation order are entitled to have their applications for establishment pursuant to the European Agreements examined on their merits notwithstanding that they have not otherwise received prior leave to enter and remain in the State as required by national law.

National Rules and Prior Control

Before addressing specifically the two lines of argument relied upon by the Appellants it is necessary first of all to examine the nature and legitimacy of national rules of a Member State which require applicants who seek to exercise their rights of establishment to submit their applications from their home state before being granted to leave and enter and stay in the host country. Such rules have been described as a system of prior control and were considered in each of the ECJ cases which I have just cited referred to. The administrative procedures applied by the Minister for the examination of applicants for a Business Permit who wish to engage in self-employment within the State is a system of prior control whereby such applicants are required to submit their applications from outside the State, usually their home country, before they are granted any leave to enter and stay in this country for the purposes of establishment. Exceptionally, immigrants who are already authorised to reside in the State and who require a Business Permit may have their applications examined while they are so resident in the State but this is an aspect of the matter which I will address later.

The purpose of a system of prior control is clear and indeed self-evident. It permits the relevant State authorities to verify the genuine nature of the

application, ensure that the establishment provisions of the relevant agreement are not invoked by persons who actually intend to gain access to the labour market by that route as employed workers or have recourse to or become dependant on public funds after entry for that ostensible purpose. It also permits a State to verify the efficacy of an applicant's business plan and clarify any aspect of the application before permission to enter and reside is granted.

Moreover, States are allowed take into account public policy and public order considerations when considering applications for establishment pursuant to the Agreements. In pointing out that a requirement of prior leave to enter and remain in the State is not a mere formality, Advocate General Mischo, at paragraph 101 of his opinion in the Barkoci case stated:-

"…applications for establishment require detailed examination which can take a certain amount of time. The authorities must be in a position to check whether the person in question has acquired the financial resources he claims to have as a result of drug-trafficking or other criminal activities, or whether he finds himself in one of the circumstances in which even a Community national could be refused establishment in another Member State (for example, drug addiction or affliction by certain deceases)."

A fundamental issue in this case is the complaint by the appellants that they are required to submit to the deportation orders already made in respect of them and make such applications as they have for establishment from their home countries

The application of a system of prior control in regulating the manner in which applications for a Business Permit may be submitted necessarily in turn imposes some obligations on applicants as to the manner in which their applications are made and when they should be made.

Article 45 (3) of the Agreement with the Czech Republic requires that Member States shall not treat applicants for establishment less favourable than its own nationals. Article 59 (1) permits Member States to apply their national laws and regulations on leave of non-nations to enter and reside provided they shall not do so in a manner as to nullify or impair the benefits accruing under the Agreement. These considerations were addressed in each of the cases of the Court of Justice cited above.

In the Barkoci case the Court of Justice considered the compatibility of a system of prior control applied by the United Kingdom to Czech nationals with provisions of an agreement identical to those in issue here. In paragraphs 60 – 65 the Court stated: -

"60 Mr Barkoci and Mr Malik, together with the Commission, argue that the fact of refusing admission to a Czech national seeking to become established in a Member State on the purely formal ground that, prior to his departure to that State, he did not obtain entry clearance, manifestly goes beyond the limits which the Association Agreement imposes on the competent authorities of that State in regard to the desired objective where

that national satisfies the other substantive conditions which national immigration rules impose with regard to the exclusive and viable nature of the activity which he contemplates exercising in a self-employed capacity.

61 In order to rule on whether that argument is well founded, it should first be noted that, since Article 45(3) of the Association Agreement applies only to those person who are exclusively self-employed, in accordance with the final sentence of Article 45(4)(a)(i) of that Agreement, it is necessary to determine whether the activity contemplated in the host Member State by persons covered by that provision is an activity performed by an employed or a self-employed person.
62 Application of a national system of prior control to check the exact nature of the activity envisaged by the applicant has a legitimate aim in so far as it makes it possible to restrict the exercise of rights of entry and stay by Czech nationals invoking Article 45(3) of the Association Agreement to person to whom the provision applies.

63 With particular regard to the substantive requirements, such as those set out in paragraph 212 of the Immigration Rules, these, as the U.K. Government and the Commission have pointed out, pursue exclusively the objective of allowing the competent authorities to verify that a Czech national wishing to become established in the United Kingdom genuinely intends to take up an activity in a self-employed capacity without at the same time entering into employment or having resource to public funds, and that he possesses, from the outset, sufficient financial resources and has reasonable chances of success. Further, substantive requirements such as those set out in paragraph 212 of the Immigration Rules are appropriate to ensure that such an objective is activated.
64 Within the context of such a system of prior control, should it turn out that a Czech national who has submitted in due and proper form an application for leave to enter for the purpose of becoming established satisfies the substantive requirements laid down for that purpose by the immigration legislation of the host Member State, compliance with the express condition set out in Article 59 (1) of the Association Agreement will oblige the competent national authorities to accord him the right to become established as a self-employed worker and to grant him, for that purpose, leave to enter and stay.

65 In addition such a system of control involves carrying out detailed investigations which, particularly on grounds of language, it would be difficult for an immigration officer to conduct at the point of entry into the United Kingdom. Consequently, the requirement that verification of the substantive conditions be carried out in the Czech Republic allows easier access to information concerning the situation of Czech nationals wishing to become established in the United Kingdom.

66 It follows that national rules requiring a Czech national, prior to his departure to the host Member State, to obtain entry clearance, grant of which is subject to verification of substantive requirements such as those laid down in paragraph 212 of the Immigration Rules, must be regarded as being compatible with the Association Agreement."

In the Kondova case the Court of Justice considered identical provisions in an agreement applicable to Bulgarian nationals and at paragraph 61 stated "A*pplication of a national system of prior control to check the exact nature of the activity envisaged by the Applicant has a legitimate aim insofar as it makes it possible to restrict the exercise of rights of entry and stay by Bulgarian nationals invoking Article 45 (1) of the Association Agreement to persons to whom that provision applies."* At paragraph 3 of the answers which it gave to the national court it stated "*Article 45 (1) and 59 (1) of the above association agreement read together, do not in principle preclude a system of prior control which makes the issue by the competent immigration authorities of leave to enter and remain subject to the condition that the applicant must show that he genuinely intends to take up an activity as a self-employed person without at the same time entering employment or having recourse to public funds and that he possesses, from the outset, sufficient financial resources and has reasonable chances of success. ...*"

A similar approach was adopted by the Court of Justice in the Gloszczuk where it stated at paragraph 2 of its ruling in response to the questions posed by the national court: -

"*2. The right of establishment, as defined by Article 44 (3) of the above Association Agreement, means that rights of entry and residence as corollaries of the right of establishment are conferred on Polish nationals wishing to pursue activities of an industrial or commercial character, activities of craftsmen, or activities of the professions in a member state. However, it follows from Article 58 (1) of that agreement that those rights of entry and residence are not absolute privileges, in as much as their exercise may, in some circumstances, be limited by the rules of the host member state governing the entry, stay and establishment of polish nations.*

3. Articles 44 (3) and 58 (1) of the above association agreement read together, do not in principle preclude a system of prior control which makes the issue by the competent immigration authorities of leave to enter and remain subject to the condition that the Applicant must show that he genuinely intends to take up an activity as a self-employed person without at the same time enter into employment or having recourse to public funds, and that he possess, from the outset, sufficient financial resources and has reasonable chances of success. ..."

While the Appellants have not put in issue the legitimacy of a system of prior control as such I think it is important, before going on to consider specific issues raised by the Appellants, to emphasise that the Court of

Justice has expressly recognised the legitimate function of such a system in the regulation and examination of applications from applicants seeking to exercise their right of establishment.
It emerges clearly from the case-law of the Court of Justice that the right of establishment arising under the agreements applies only to those who are exclusively self-employed. The application of a system of prior control, i.e. a requirement that applications be made from a persons home country, has a legitimate aim in so far as it makes it possible to restrict the ancillary rights of entry and stay to applicants to whom the relevant provisions properly apply. It is only when an applicant has satisfied the substantive requirements, on foot of an application in due and proper form, as to a right of establishment that the Member State is obliged to grant them leave to enter and stay.
In short, and I think this is particularly important to emphasise, the case law of the Court of Justice makes it quite clear that the Europe Agreements in the terms referred to do not confer on a non-national a right to enter and stay in a Member State for the purpose of making an application for establishment. They confer no autonomous right of residence. The right to enter and stay is ancillary not absolute. Under a system of prior control, it is only when an applicant has satisfied the substantive requirements concerning the right to establishment, that the Member State concerned is obliged to grant leave to enter and stay for that purpose. In principle Member State are entitled to require that applications demonstrating that the person concerned fulfils the substantive requirements for establishment be submitted from their home state.

First Argument
As regards the first line of argument of the Appellants there is a preliminary distinction to be made between non-nationals and those of nationals. In the Gloszczuk case the Court of Justice examined the question whether the requirement that a Polish national (whose presence within the host State's territory was irregular) must leave the State and submit a new establishment application in due and proper form from his state of origin was incompatible with the rule of equal treatment laid down in Article 44 (3) of the Polish Association Agreement, since such a requirement could not be imposed on the host member state's own nationals. The Court there pointed out that Member States of the European Communities may in certain circumstances be justified in taking measures against nationals of other member states which they could not apply to own nationals, in as much as they have no authority to expel the latter from the national territory or deny them access to it.
It then went on to add (at paragraph 79 – 81):
"79. *This difference in treatment between a Member State's own nationals and those of other Member States derives from a principle of international law which precludes a Member State from refusing its own nationals the*

right to enter its territory and remain there for any reason, and which the Treaty cannot be assumed to disregard in the context of relations between Member States. (Van Duyn cited above, paragraph 22, and Pereira Roque, cited above, paragraph 38).
80. For the same reason, such a difference in treatment in favour of nationals of the host member state cannot be considered to be incompatible with Article 44 (3) of the Association Agreement"
A similar approach was adopted by the Court of Justice in the Kondova and Barkoci cases. It is manifestly clear from this case law that the application of a system of prior control does not in itself amount to discrimination contrary to the provisions of such Europe Agreements even if, in certain circumstances, this requires that a person physically present in the host state be returned to his or her home state when an application for establishment can then be made in due and proper form.
Of course the prohibition on discrimination in the Europe Agreement is binding on Member States and the Court of Justice was careful to point this out at paragraph 62 in the Kondova case when it stated: -
"*However, as follows from Articles 45 (1) and 59 (1) of the Association Agreement, the host Member State cannot refuse to a Bulgarian national admission and residence for the purpose of establishment in the territory of that Member State, for instance, on the grounds of the nationality of the person concerned or his country of residence, or because the national legal system provides for a general limitation on immigration, or make the right to take up an activity as a self-employed person in that state subject to confirmation of a proven need in the light of economic or labour market considerations.*"
None of those issues arise in this case, there being no allegation that there was any discrimination based on any of those grounds.
However, I would agree with Counsel for the Appellants that if the Appellants could be considered as lawfully resident in the State, that is to say persons who had been granted leave to enter and reside as immigrants in the State, then the manner in which their applications for establishment were examined would have to be viewed from a different perspective. Persons who are given permission by the State to enter and reside as immigrants, which includes those granted refugee status or allowed to remain for humanitarian reasons, are lawfully resident in the State as of right. They are usually if not invariably allowed to become employed. It could certainly be forcefully argued that a Czech or Romanian national who was thus lawfully resident in the State but who, for the purpose of making an application for establishment, was required to abandon their lawful residence and associated activities such as their jobs, so as to return to their home state to make such an application would be subject to purely formalistic requirements which treated them differently solely on the grounds of nationality or which unduly impaired the benefits conferred by the Europe Agreements. Recognition of

this approach is perhaps inherent in the exception which exists in the practice of the Department of Justice to consider applications for establishment from such non-nationals who have legal entitlement to reside in the State without requiring them to return to their home state.
It is self-evident that the reference by the Department of Justice in its practice to accepting applications for establishments from persons who have "legal entitlement" to reside in the State is a reference to those who have been authorised to enter as immigrants and stay for the purpose of residing in the State. As I have already pointed out the case law the Court of Justice makes clear, a right to establishment, does not give rise to a right to enter and stay in a Member State unless the applicant first satisfies the host country that the substantive requirements for establishment can be met. However, where a person, for other reasons under the immigration rules of a State, being authorised to enter and stay or reside in a Member State then a system of prior control may not apply because entry and residence have already been authorised albeit for another purpose. That would be the situation of a Czech national who is authorised to enter and reside, with appropriate work permits, as for example a chef for a period of three years. It might well be considered formalistic and an impermissible or disproportionate restriction on the right of establishment if an application from such person for establishment was refused solely on the ground that he or she did not return to the Czech Republic for the purpose of making such an application.

Status of the appellants

A fundamental argument of the appellants is that they are in the same position as any other person who has been authorised as immigrants to enter and stay in the State. They too, it is claimed are lawfully in the State. It is important, therefore, to consider their status as persons so permitted to be physically present in the State.
Although there are particular facts and circumstances which differentiate each of the appellants from the others, they all have certain common elements. All were permitted to enter and/or stay for the purpose of pursuing an application for asylum in the State which they had expressly stated they wished to do. All have had their applications for asylum refused (Mr Hrickova's in the sense of it being transferred) and been made the subject of deportation orders.
Entry to the State by the Appellants for the purposes of making an application for asylum was the consequence of the exercise by the State of its inherent power to determine for what purposes and subject to which limitations non-nationals may be allowed to physically enter the State. Persons seeking asylum status are permitted pursuant to section 9 of the 1996 Act, to enter the State solely for the purpose of having their application for asylum examined by a fairly elaborate independent procedure so that those genuinely entitled to asylum may be granted permission to enter and

stay in the State on those grounds.
Persons allowed to enter the State for such a limited purpose are subject to a variety of restrictions. In an exceptional departure from general policy Mr Goncescu was at one point permitted to become employed and this permission ceased on 9th November, 2002. After that date it was illegal for him to work in the State as an employee or as a self-employed person. As and from the coming into force of the Refugee Act 1996 in October 2000 the status of each of the Appellants has been governed by the provisions of the 1996 Act. That is what is material for the purposes of these proceedings. Section 9, subsection 4 of the 1996 Act provides that applicants for asylum shall not leave or attempt to leave the State without the consent of the Minister or seek or enter employment or become self-employed in any form before the final determination of their application for a declaration as to refugee status. Subsection 5 of the same Act permits an immigration officer to require such persons to reside or remain in particular district or places in the State or to report at specified intervals to an immigration officer or a member of the Garda Siochana. Persons who contravene subsection 4 or subsection 5 of that Act shall be guilty of an offence which may lead to a fine or a term of imprisonment not exceeding one month. Such persons are granted only a "*temporary* residence certificate" pursuant to Section 9 (3) which is governed by the foregoing restrictions. That temporary certificate ceases to be in force and must be surrendered as required by the Refugee Act, 1996 Regulations S.I. No. 346 of 2000 once notification is given to an applicant for asylum that the application has been refused or is being transferred to another country. Accordingly, at the time when they purported to make applications for establishment to the Minister none of the Appellants possessed a temporary residence certificate.
It seems to me quite clear that the foregoing restrictions highlight and confirm that persons who are allowed enter the State for the purpose of making an application for asylum fall into a particular category and never enjoy the status of residents as such who have been granted permission to enter and reside in the State as immigrants. Even though such immigrants may be subject to certain limitations as to time and requirements as to renewal of work permits, they nonetheless enjoy legitimate residence status. In fact the very purpose of an application for refugee status is to seek permission to be allowed to enter and reside in the State as immigrants and benefit from such a status.
If the Appellants are correct in their contentions then it would mean that persons who are allowed to enter for no other purpose that having their application for asylum examined could seek to do so when their real purpose was to apply for establishment rights. In those circumstances any legitimate system of prior control could be circumvented. As the learned High Court judge found in the case of Mr Goncescu, he continued to work illegally after his work permit expired. This demonstrates how the non-application of a

system of prior control in such cases could be abused by persons relying on cliental or business assets which he or she might build up while unlawfully working in the State, something which was expressly disapproved of by the Court of Justice in the Kondova case when it stated:

"*77 ... If Bulgarian nationals were allowed at any time to apply for establishment in the host member state notwithstanding a previous infringement of its national immigration legislation, such nationals might be encouraged to remain illegally within the territory of that State and submit to the national system of control only once the substantive requirements set out in that legislation had been satisfied.*

78. An applicant might then rely on the cliental and business assets which he may have built up during his unlawful stay in the host member state, or on the funds accrued there, perhaps through taking employment, and so present himself to the national authorities as a self-employed person now engaged in, or likely to be engaged in, a viable activity, whose rights ought to be recognised pursuant to the association agreement.

79. Such an interpretation would risk depriving Article 59(1) of the Association Agreement of its effectiveness and opening the way to abuse to endorsement of infringements of national legislation on admission and residence of foreigners."

I would recall that Article 59 (1) is the provision of the Agreement which expressly recognises that States may apply their own laws and regulations regarding entry and stay. It is national laws which determine the status of a person allowed to physically enter a member state and that provision which the Court of Justice also held is a legitimate basis for a system of prior control.

It is true that in the Kondova case the Bulgarian national concerned sought to get around the relevant national controls by falsely declaring that she entered the Member State for the purpose of seasonal work.

Although the particular facts are different the Court clearly recognised that Member States were entitled to protect the integrity of the prior control measures from persons who obtained initial leave to enter for one purpose but sought to abuse that leave to establish a basis on which they might apply for establishment without being subject to the prior control procedures compatible with Article 59 (1) of the Europe Agreement.

In the Gloszczuk case initial leave to enter was obtained by reason of false representations. In that case the Court of Justice expressed similar disapproval of persons who having thus entered exploit and abuse their status for the purpose of avoiding prior control measures and seeking to establish a basis on which they might apply for establishment.

It is in this context that the current status of the Appellants falls to be considered having regard to the provisions of the Refugee Act 1996 which was applicable to them when they purported to apply to the Minister for establishment rights

The learned High Court Judge found in his judgment that each of the Appellants had been allowed to enter and/or to remain in the State solely for the purpose of having their applications for asylum examined. Each of them were refused a declaration entitling them to refugee status. These findings are not contested in the appeal.
Section 9 (2)(c) of the Refugee Act 1996 provides that this limited entitlement to remain in the State shall terminate on the date on which notice is sent to them that the Minister had refused to give such a declaration.
In the case of the Hrikova family their limited entitlement to remain in the State terminated pursuant to Section 9 (2) (a) of the Act when a decision was made that they should be transferred to another convention country pursuant to the Dublin Convention. Thus all Appellants were in the same position, their limited rights to stay having terminated before they expressed a wish to exercise establishment rights. And of course they are all subject to otherwise lawful deportation orders.
Consequently upon a refusal of refugee status the appellants had no entitlement to remain in the State for any purpose and the Minister was entitled to make a deportation order pursuant to section 3 of the Immigration Act, 1999. Section 3 of the 1996 Act provides, *inter alia*, for certain procedures to be followed before the Minister makes a deportation order and in particular it provides that where the Minister proposes to make a deportation order that he shall notify the person concerned in writing of his proposal and the reasons for it. A person on being so notified may within fifteen days make representations in writing to the Minister who is required to give consideration to those representations. The Minister then in determining whether to make a deportation shall have regard to various matters set out in subsection 6 of section 3, including humanitarian considerations. However, the making of a deportation order in these circumstances rests entirely at the discretion of the Minister. These are the provisions which applied in the Goncescu and Sava cases. Once an applicant's application for a declaration of refugee status has been refused even that persons limited authority to remain in the State ceases.
In the Hrickova case the same position arose once the decision of the Commissioner that their application for asylum be transferred to Germany under the Dublin Convention was affirmed by the Appeals Tribunal and they were duly notified. Then their limited right to remain in the State ceased and all that remained was for the Minister to make a deportation order, which he did, for the purpose of their removal to Germany in accordance with Article 7 (11) of the Dublin Convention (Implementation) Order 2000.
The only option available to such a person is either to consent to a deportation order being made by the Minister as provided for in Section 3(5)(a) of the 1999 Act or submit to the aforesaid procedures according to which the Minister, may in his discretion, make the deportation order. The

fact that a person physically remains in the State pending the making of a deportation order, including the procedures followed for that purpose, does not confer any authority to remain as of right in the State.

In **P.L. and B. –v- Minster for Justice Equality and Law Reform [2002] 1 I.L.R.M. 16** Hardiman J. in delivering the judgment of this Court, stated that persons whose applications for asylum had been rejected *"... lacked any entitlement to remain in the country save that deriving from the procedure they were operating i.e. a right to await a decision on a request not to be deported*." In so stating I do not think that Hardiman J. was in any sense suggesting that the continued presence of such a person in the State derived from any right vested in them to remain but rather from an obligation to submit to those administrative procedures which were necessary before a deportation order was actually made. This is confirmed by the subsequent statement in his judgment when it was held that persons whose application for asylum had been rejected and who had made representations to the Minister after notification that he was proposing to deport them, were persons "*without title to remain in the State*."

Such then is the status of the Appellants. They were never granted leave to enter and reside in the State as immigrants. They were permitted to enter solely for the purpose of having their application for asylum examined and subject to strict statutory restrictions. When that application was refused they ceased to have even that limited authority to remain in the State. They are not, as was contended on their behalf, in the same position as those granted leave to enter and reside. This is in fact what was denied to them. Their position is analogous to that under United Kingdom provisions considered in the Barkoci case where Mr Barkoci and Mr Malik were allowed to physically enter the United Kingdom while their applications for asylum, subsequently rejected, were examined. They were deemed by the United Kingdom authorities "not to have entered the United Kingdom". The Appellants, since the refusal of their application for asylum, although physically present in the State have no right or title to remain or reside in the State and even prior to that were only entitled to remain for the purpose of having that application examined. This was their status when they sought to assert establishment rights.

I would recall again that Article 59(1) of the Europe Agreement expressly provides that nothing in that agreement shall prevent a State from applying its own laws and regulations with regard to entry and stay. In the exercise of their rights to apply such laws and regulations, the Court of Justice, as I have outlined above, acknowledges, that Member State are entitled to require applicants for establishment to make their application from their home country in order to ensure those entitled to be granted establishment rights, but only those, are permitted to enter and reside in the State for that purpose and that this can be best achieved by such prior examination. This was not considered unduly restrictive of rights under the European Agreements.

The situation of the Appellants therefore is in no respect comparable or equal to that of persons who have been granted permitted to enter and reside in the State. To borrow a phrase from the opinion of the Advocate General in the Barkoci case (paragraph 108) the appellants are persons "*in respect of whom it* [the State] *has never recognised a right of residence, nor was it obliged to do so, … ,otherwise, a veritable bonus for illegal immigration would be established.*"

It was at all times open to the appellants, prior to their departure from their home countries to submit to the Minister, through the relevant diplomatic representation of Ireland to their country, or directly, an application for establishment under the Europe Agreements. As the Respondents have freely acknowledged in this case, they may still submit an application for establishment from outside the State. Such applications, if made, will be examined entirely on their merits having regard to the substantive criteria laid down in the Department's guidelines.

If persons in the position of the appellants were entitled as of right to remain and reside in the State for the purpose of seeking to make an application for establishment rights, it would be a negation of the legitimate system of control envisaged by the Europe agreement and in particular Article 59 (1). It would also encourage abuse and undermine the integrity of the system by which asylum seekers are permitted to enter the State for the purpose of having their applications examined and granted or refused on their merits.

In the Barkoci case the Court of Justice at paragraph 77 stated:

"*It should be borne in mind, as pointed out in paragraph 22 above, that Mr Barkoci and Mr Malik were deemed, in accordance with Section 11 (1) of the Immigration Act, not to have entered the United Kingdom and that their applications for leave to remain were for that reason treated as applications for initial leave to enter. <u>It must be noted in this regard that, contrary to what Mr Barkoci and Mr Malik contend, in the context of a national system based on appropriate verification measures prior to a Czech national's departure to the host Member State, temporary physical admission of that person, where he does not have entry clearance for the territory of that State, is in no way equivalent of actual leave to enter that State</u>.*" (emphasis added).

In that passage the Court clearly confirms that independent of the specific U.K. statutory provision, that in the context of a system of prior control, temporary physical admission of a person to a State is neither in substance nor in principle equivalent to actual leave to enter that State. This position was not affected even if the person temporarily admitted was allowed, for policy reasons, to work, the Court declaring in the ensuing paragraphs: -

"78. *The analysis of the compatibility with the Association Agreement of a national system for monitoring immigration that is based on the obligation to apply for prior leave to enter cannot be affected by the fact that, while awaiting the outcome of an appeal against a previous decision which, on a*

separate basis, refused a Czech national entry to the Member State concerned, that person was admitted on a temporary basis to that State, prior to submission of an application to become established, and authorised to work or receive public funds with a view to respecting human dignity and demonstrating solidarity.
79. Consequently, Mr Barkoci and Mr Malik cannot effectively rely on the mere fact that they were admitted temporarily to the United Kingdom in order to contend that they had required the right to become established in that Member State as self-employed workers, that being a right liable to be adversely affected by the requirement that they submit, in due and proper form, a new application for entry clearance in their state of origin or, as the case may be in another country."
It seems to me quite clear from the principles stated by the Court of Justice, particularly in the Barkoci case, that persons who temporarily have been allowed to enter and/or to remain the State for the purpose of having their applications for asylum examined and whose applications have been refused derive no right from the Europe Agreements to remain in the State for the purpose of seeking to establish a right of establishment but on the contrary may have applied to them the general system of prior control which requires that they make their applications for establishment in due and proper form from their home state. The Court, like the Advocate General, did not accept that this was unduly restrictive or involved any breach of a principle of proportionality. As I have already pointed out since such persons have no leave to enter and remain in the State, they are not therefore in the same position nor have the same status as nationals or authorised immigrants, and the Court of Justice also held, the application of such a system of prior control in those circumstances does not offend the prohibition on discrimination in Article 45 (3) of the Agreement.
In the circumstances having regard to the matters already outlined in my judgment it is in my view abundantly clear that the Europe Agreement while entitling the appellants to apply for establishment rights from their own country does not in any sense grant them a right to remain in the State, in the face of a lawful deportation order, for the purpose of pursuing an application for establishment rights. This they were always entitled and still remain entitled to do so from their home country through normal channels. In the circumstances the first line of argument of the Appellants cannot, in my view, be accepted.

Second Argument
There is a second and subsidiary argument which was advanced on behalf of the Appellants, namely, that the State authorities here ought to treat the correspondence written on behalf of each of the appellants seeking to assert establishment rights as an application for leave to enter just as the U.K. authorities treated applications for establishment rights made by Messrs Barkoci and Malik as leave to enter, as outlined in the judgment of the Court

of Justice in Barkoci case. (See paragraph 60)
I do not consider there is any foundation to this argument. In the first place it is quite evident from the judgment in the Barkoci case that the decision of the U.K. authorities to treat the application for establishment rights as an application for leave to enter the United Kingdom was a discretionary concession made by the United Kingdom authorities and not a step that they were obliged to take under the Europe Agreement. This discretionary concession was acknowledged in the judgment of the Court of Justice which I cite below and was highlighted by the Advocate General in that case when he stated at paragraphs 111 and 113 of his opinion: -
"*If a Member State, in the exercise of a discretion which belonged to it in its own right, vouchsafes, as the U.K. Government does, a fact confirmed during the hearing, to contemplate the possibility of granting a right of entry and residence to a Czech national who intends to avail himself of the non-discrimination rule laid down in the Agreement, despite the fact that he has not fulfilled the obligation laid down in the immigration legislation to apply for entry clearance prior to arrival at the border, and although there is nothing that would prevent the competent authorities from deciding to turn him back, it is perfectly entitled to make any decision to admit him conditional upon the clear and manifest fulfilment of the substantive requirements for the grant of a right of access and residence for the purposes of establishment*. (emphasis added)
...
Examination of such an application is in itself a privilege, not to say a consent to queue jumping, granted by the U.K. authorities to the person concerned. ..."
It is for each Member State to lay down its own national rules and regulations which govern applications for leave to enter and remain in a state. It is a matter for each state to determine what those rules and regulations may be provided that they are not applied in a manner as to nullify or impair the benefits of the agreement. States therefore may apply more flexible rules in their discretion even if a less flexible approach would still be consistent with the Europe Agreement. As the Court of Justice pointed out in paragraph 67 of its decision in that case "*... the competent national immigration authorities had nonetheless, pursuant to their discretionary powers, carried out an individual examination of their admission applications submitted five months and three months respectively after they had been physically admitted to the United Kingdom, in order to determine whether leave to enter could be granted them on a basis other than that of the immigration rules on the ground that the other conditions set out in paragraph 212 of the immigration rules had been clearly and manifestly satisfied*." The court went on refer to "*the flexible practice demonstrated by the U.K. authorities in this area*". What the U.K. authorities did in that instance was to set aside the prior requirement of entry

clearance from the home state as a matter of discretion in respect of Mr Barkoci and Mr Malik. The Court of Justice then went on to consider whether the decision taken by the U.K. authorities, *in that context*, on the basis of a restrictive examination of the application, was compatible with the Europe Agreement but at no stage did the Court find that a State was obliged to adopt such a flexible practice in order to conform with the Europe Agreement.

In any event, the U.K. authorities having adopted such a flexible approach in the case of Mr Barkoci and Mr Malik, refused their application for establishment because their respective applications did not "*clearly and manifestly*" satisfy the substantive requirements for a right to establishment. In other words the U.K. authorities carried a more limited and restricted examination of the applications for establishment considered under this more flexible arrangement than they would have done (and would have been obliged to do) if the applications fell to be examined under the system of prior control from the home states of the applicants. The Court of Justice examined the manner in which less extensive scrutiny was given to those applications and approved of it stating, at paragraph 72 of its judgment: - "*To the extent to which the competent immigration authorities in the host Member State adopt a policy of setting aside the mandatory requirement of entry clearance, it appears to be in line with the logic of the system of prior control as well as being justified in regard with the Association Agreement that, in the exercise of their discretion as to an applicant's individual position, those authorities carry out an examination into the soundness of the application to become established submitted pursuant to that agreement at the point of entry into that Member State which is less extensive than that carried out in the case of an application for entry clearance submitted by the Czech national in his country of residence."* (emphasis added).

Having being subjected to that less extensive scrutiny the applications of Barkoci and Mr Malik were rejected by the U.K. because it was not clear and manifest that they fulfilled the substantive requirements for a right to establishment. The U.K. authorities had decided that each of them should be deported although they could make further applications for establishment from their home countries and those applications would be examined more comprehensively on their merits in the normal way.

The Court of Justice in upholding the decision of the U.K. authorities rejected an argument that requiring them to make their applications in those circumstances from their home countries was formalistic and upheld the decision of the U.K. authorities as being in conformity with the Europe Agreements.

Even if the appellants in this case were correct in their argument that the State is for some reason bound to treat their claims for rights of establishment, in the same way as the U.K. authorities treated the applications in the Barkoci case, (that is to say, adopt the same

concessionary approach), as applications for leave to enter the State, which I do not consider to be the case, the appellants are not in any event in a position to claim such a right. The reason I come to this particular conclusion is that there is no rational basis for considering the correspondence from any of the appellants in this case as capable of amounting to an application for establishment which either clearly or manifestly, or indeed in any sense, satisfy the substantive criteria or requirements for establishment set out in the circular of the Department referred to earlier in this judgment.

In the case of Mr Goncescu when he sought, through his solicitors, to seek establishment rights he submitted or had submitted conflicting material to the Minister which on the one hand stated that he had been engaged as an employee and on the other hand asserted that he had been self-employed in the two years prior to 11th February, 2002. Apart from the fact that it was illegal for Mr Goncescu to work either as an employee or as self-employed person since November, 7th 2000 and the fact that he had so worked did not affect the application for establishment as the court held in the Barkoci case (paragraph 78), no attempt was made to satisfy the substantive criteria contained in the department's circular concerning rights of establishment (and which could have been ascertained by Mr Goncescu at any time before he left Romania let alone since). There was no attempt to satisfy the criteria for establishment which applied to him including, just for example, any attempt to provide information or business plan from which it could be assessed whether some proposed business venture could be a viable trading concern or whether it could provide him with sufficient income to support himself and any dependants without resorting to social assistance or paid employment. Although Mr Goncescu relied heavily on his previous work record in this country, neither the concessionary period during which he was permitted to work nor, in particular, the period during which he was illegally working are an appropriate basis for making a claim for establishment. See paragraphs 78 and 79 in the Kondova case and paragraphs 78 and 79 in the Barkoci case, cited above. No intimation of his wish to rely on the Europe Agreement was given until his application for asylum was refused. Accordingly, in no sense could Mr Goncescu's intimation of a wish to rely on the Europe Agreement, and it really cannot be described as more than that, be considered as an application for establishment which either clearly or manifestly satisfied the substantive requirements as to establishment.

Again in the case of Mr and Mrs Sava all that was done on their behalf was that their solicitor, by letter dated 3rd December, 2001 intimated that they were eager to commence work and had the skills necessary to make an active and important contribution to any work place in Ireland. The letter enclosed offers of employment and asserted that they would be keen to exercise their rights of establishment under the Europe Agreement. Their assertion that they were keen to take up offers of employment was entirely

incompatible with an intimation that they wished to rely on their rights of establishment under the Europe Agreement since that Agreement applies exclusively to persons who demonstrate that they intend to become self-employed and, *inter alia*, are capable of establishing a viable business to that end. Clearly, Mr and Mrs Sava are in no position even to suggest that their communications to the Minister could be considered as ones which either clearly or manifestly satisfied the substantive requirements for establishment.

Similarly, in the case of Mr and Mrs Hrickova, their solicitor wrote to the Department by letter dated 7th February, 2002, after deportation orders had been made in respect of them, asserting that Mr Hrickova was an experienced brick layer and in a position to establish himself in business in Offaly. Apart from that mere assertion there was no attempt to satisfy the substantive requirements which might entitle him to rights of establishment.

Accordingly, in none of these cases have the Appellants shown that they are in a position to claim that they have submitted applications to the Minister which could be capable of being treated as clearly or manifestly satisfying the requirements as to establishment laid down in conformity with the Europe Agreements, even if the Minister could be considered as being obliged to consider their applications as leave to remain in the State, which I have stated I do not consider he was. While they never submitted applications 'in due and proper form', in the sense referred to in paragraph 64 of Barkoci (cited above), the purported applications of the appellants for establishment are not simply ones which do not manifestly and clearly fulfil the substantive requirements but they are manifestly and clearly incapable of being considered to have done so.

Conclusion

Having regard to the provisions of the Europe Agreements, the case law of the Court of Justice and the considerations which I have set out in my judgment I am satisfied that the system of prior control of applications for establishment by non-nationals is compatible with the Europe Agreements relating to such non-nationals and that the appellants have no right to remain in the state, having been made the subject of deportation orders, for the purpose of seeking to make an application for establishment under those agreements. They are entitled, as they always were, to make such applications from their home states. Their rights and benefits to establishment under the Agreements remain extant.

There are a number of factors fundamental to all three cases. At the time when all the Appellants intimated to the Minister their wish to exercise establishment rights under the European Agreements their applications for asylum had been terminated. At that point they had no lawful entitlement to remain physically in the State. Their applications for establishment, rights such as they were, were manifestly incapable on their face of satisfying the substantive requirements for establishment. No prior leave to enter and

remain in the State then existed in respect of them. Having regard to these factors alone I do not consider that there is any room for doubt having regard to the terms of the Europe Agreements, the principles considered by the Court of Justice and its decisions, particularly in the Barkoci case, that the State are entitled to apply its rules concerning prior application from outside the State for leave to enter and remain for establishment purposes. In these circumstances and in the light of the jurisprudence of the Court of Justice, in particular the Cilfit case [1982] ECR 3415, I do not consider that a reference to the Court of Justice on a point of law is required.

In my view, the first question of law certified by the High Court should be answered in the affirmative. It follows that the administrative arrangements for the time being in force as applied to self-employed Europe Agreement nationals do not nullify or impair the benefits accruing to the appellants under the relevant agreements and the answer to the second question certified by the High Court should be in the negative. It also follows that the Respondents did not apply those administrative arrangements in a manner as to nullify or impair the benefits accruing under the Agreements and the response to the third question of law so certified should also be in the negative.

Accordingly the appeal on the foregoing issues should be disallowed.

Hrickova case – Supplementary arguments

Apart from the issues dealt with above, Counsel in the Hrickova case advanced a number of additional grounds upon which, it was argued, the deportation orders(s) in the Hrickova case should be considered invalid.

I would recall first of all that the uncontradicted evidence before the learned High Court Judge was that the Hrickova family, on arrival in the State, stated that they had travelled from Prague to Charleroi, Belgium and then to Ireland. They gave information that they had travelled, *inter alia*, through Germany. Mr Hrickova did not state that they had made an application for asylum in Germany. This fact was later ascertained by the Irish authorities, as was the fact that their applications for asylum had not been finally determined but were still pending before the German authorities. It was essentially these facts which ultimately led to a decision that the application for asylum made in this country should be transferred to Germany, the responsible State, pursuant to the provisions of the Dublin Convention.

As regards the Dublin Convention generally I made these observations in my judgment in the case of Lobe –v- Minister for Justice, Equality and Law Reform

[Supreme Court, unreported, 23 January, 2003]:

"*The Dublin convention is an inter-governmental agreement between states who have shared objectives and shared interests in the orderly and fair regulation of applications for asylum from persons outside those states who are contracting parties to the agreement.*

The preamble to the agreement includes the following recitals:

*"*CONSIDERING the joint objective of an area without internal frontiers in which the free movement of persons shall, in particular, be ensured, in accordance with the provisions of the Treaty establishing the European Economic Community, as amended by the Single European Act;
AWARE of the need, in pursuit of this objective, to take measures to avoid any situations arising, with the result that applicants for asylum are left in no doubt for too long as regards the likely outcome of their applications and concerned to provide all applicants for asylum with a guarantee that their applications will be examined by one of the Member States and to ensure that applicants for asylum are not referred successively from one Member State to another without any of these states acknowledging itself to be competent to examine the application for asylum;
…
DETERMINED to co-operate closely in the application of this Convention through various means …"
One of the objectives of the convention is to facilitate the effective achievement of an area without internal frontiers in which the free movement of person can be effectively ensured. This is an objective common to the states concerned and it is an objective which Ireland is bound to pursue in common with other states, pursuant to the provisions of the Treaty referred to as amended by the Single European Act. A further objective of the Convention, mutually undertaken by the states, is to ensure the orderly treatment of applications for asylum so that applicants are guaranteed that their applications would be examined by one of the member states and that they are not referred successively from one member state to another. The states have a duty to co-operate in the application of the convention.
To these ends the Minister has power to make such orders as are necessary or expedient to give effect to the convention.
Exercising its constitutional powers the State became a party to the Dublin Convention and the Oireachtas conferred powers on the Minister by virtue of the Refugee Act 1966 to give effect to the Convention. It is clearly in the interests of the common good that the State fulfil its obligations to ensure that the convention is applied with a view to achieving its objectives. That is a task and duty which falls upon the Minister. Even where he has a discretion to permit an application for asylum to be examined in this country where the Convention otherwise envisages that it be examined in another state party to the Convention, he still has the task and duty of exercising that discretion in the light of the objectives of the convention and so as to ensure its effective application. That is a decision for him to make in the interests of the common good in order to ensure that the State fulfils its obligations."

The first argument advanced by Counsel is that no notice was given to Mr Hrickova of the Minister's decision to make a deportation order after he had been notified of the rejection of his appeal to the Appeals Tribunal. It was acknowledged that this was because the Immigration Act 1999 does not

require such a notice to be given. Section 3 (3)(a) of the 1999 Act provides: -

"*Subject to subsection (5), where the Minster proposes to make a deportation order, he or she shall notify the persons concerned in writing of his or her proposal and of the reasons for it and, where necessary and possible, the person shall be given a copy of the notification in a language that he or she understands*."

Subsection (5) excludes from that requirement a person whose application for asylum is to be transferred to another country pursuant to the Dublin Convention. It was first of all submitted that the appellants were discriminated against as compared to other persons whose application for asylum had simply been refused rather than transferred to another convention country.

Insofar as this submission implies that there was an unlawful discrimination it is misconceived. A question of unlawful or unconstitutional discrimination only arises for consideration when persons in the same or similar situation are treated differently, without objective justification. Mr Hrickova is in an entirely different position than persons whose applications for asylum have been definitively determined on their merits in this country and refused and face deportation to their home state outside the European Union. Under the terms of the Dublin Convention Mr Hrickova's application for asylum is being transferred to Germany so that his application for asylum and refugee status can be determined there. There is a clear distinction between the two categories of persons. In my view no question of unlawful discrimination arises.

On this ground of appeal there was a more general submission that "*as a matter of constitutional right, as an aspect of the right to natural and or/constitutional justice and/or fairness of procedures*" Mr Hrickova was entitled to advance notice of any proposed action that *"would have the major effect of deportation on their life liberty or interests"*. Therefore, there was a breach of a right to be notified by the Minister that he proposed to make a deportation order.

The right as such of the State to transfer an application for asylum to another Member State when the appropriate provisions of the Dublin Convention apply is not in issue in this appeal. When Mr Hrickova arrived in the State that was the law and he was at all times liable to have his application transferred to another country. Where it has been determined by a Commissioner pursuant to the Dublin Convention (Implementation) Order 2000 that an application should be transferred to another Convention country and where there is no appeal from that determination, or where there is an appeal and the Tribunal affirms the determination, Regulation 11 of the said Order provides that *"... the Minister shall inform the applicant, where necessary and possible in a language that the applicant understands, of the determination or decision and reasons therefore, and the Minster shall*

arrange for the removal of the applicant to the convention country concerned."

As can be seen from the foregoing, the removal of the applicant to a Convention country is a consequence of the determination of the Commissioner in the first instance and, if there has been an appeal, also of a confirmation of the Commissioner's determination. A deportation order made by the Minister pursuant to Section 3 (2)(e) concerning "*a person whose application for asylum has been transferred to a convention country for examination ..."* is simply the means by which effect is given to that consequence. That was the law and the legal consequence which an applicant for asylum faces if he or she has already made an application for asylum in another Convention country.

As I recited at the beginning of this judgment in relation to the facts concerning the case of the Hrickova family, a notice pursuant to Article 3 (3) of the aforesaid Order was given to and acknowledged by Mr Hrickova. That notice informed him that his application appeared to be one which could be transferred under the Dublin Convention to another country. It also informed him that he had a right to make written representations about any possible decision to transfer his application for asylum to another country. From the outset, therefore, Mr Hrickova was given notice that his case appeared to be one which could result in a transfer of his application to another country. At all material times the law permitted that transfer to be affected by a deportation order. He was, therefore, from the outset, fully informed and fully on notice that he faced a deportation order should it be determined that his was a case for such transfer.

Having been so notified he had an opportunity to make full submissions to the Commissioner. The Commissioner determined pursuant to Article 3 of the Convention that the applicant should be transferred to a Convention country. Mr Hrickova was given notice in writing of that determination and the reasons for it.

He was also notified of his right of appeal to the Tribunal, which he exercised, and had a full opportunity to make submissions to the Tribunal. In the event of the Tribunal affirmed the decision of the Commissioner and again the decision of the Tribunal and the reasons therefore were communicated to him.

In the light of the foregoing circumstances it is clear that Mr Hrickova at all material times was made aware that the faced the prospect of deportation to another convention country and, on being informed of the affirmation by the Tribunal of the Commissioner's determination, it was patent that his transfer to Germany would be implemented by means of a deportation order. In the foregoing circumstances, having been at all times given an opportunity to make submissions at each stage of the process in the knowledge that an adverse outcome would have as its consequence his transfer to another Convention country by means of a deportation order, I do not find that there

is any basis whatsoever for the alleged procedural defect in not giving to the Appellant, once more, a notice that a deportation order would be made by the Minister.

In addition to relying on that alleged procedural defect, there was a submission made on behalf of the Appellant that the Minister, in making the deportation order, was engaged in some sort of distinct adjudicative process in the exercise of a ministerial discretion. Accordingly, it was submitted that the appellant should have been entitled to make representations to the Minister before he made a deportation order.

The basis for this submission seems to have been firstly that the jurisdiction of the Appeals Tribunal was limited by Article 7 (7) of the 2000 Regulations which confined the Tribunal to deciding the appeal in accordance with the criteria set out in Articles 4 to 8 of the Dublin Convention. The Minister on the other hand was at liberty to take account of Article 3 considerations and in particular Article 3 (4) (which permits any Member State to examine an application for asylum submitted to it even if such an examination is not its responsibility under the criteria of the Dublin Convention) and Article 9 which permits a Member State, even when it is not responsible for the application under the criteria set out in the Convention to examine it for humanitarian reasons "*at the request of another Member State*".

Ground 3 of the Appeal was also relied upon according to which it was submitted that the Minister had a discretion not to apply the Dublin Convention pursuant to Articles 3 and 9 and these were matters which were excluded from the remit of the Tribunal when considering the Appellant's appeal by virtue of Article 7 (7) of the 2000 Regulations which confined the Tribunal to considering the criteria set out in Articles 4 to 8 of the Convention.

It was further submitted that the fact that the Minister could have regard to Article 3 and Article 9 of the Convention which, being excluded from consideration by the Tribunal, meant that he had a wider jurisdiction to decide not to return a person under the Dublin Convention particularly having regard to Article 3 (4) of the Convention.

First of all, as regards Article 9 of the Convention in my view the learned High Court Judge was entirely correct in stating that it has no application to this case because there was no request from any other State for its invocation, a necessary precondition to its applicability to any particular case.

I leave aside for the moment the right of each Member State pursuant to Article 3 (4) of the Convention to examine an application for asylum submitted to it by an alien even if such an examination is not its responsibility under the criteria defined in the Convention. As regards the other aspects of the Appellant's submissions in this regard I would first of all note, as the learned High Court Judge correctly pointed out, that power to make a determination in first instance as to whether an applicant for asylum

should have his application transferred to another convention country is delegated to the Commissioner pursuant to Section 22 of the Refugee Act, 1996 and the Dublin Convention (Implementation) Order 2000. Article 3 (2) of the Convention provides that the application *"... shall be examined by a single Member State, which shall be determined in accordance with the criteria defined in this convention. The criteria set out in Article 4 to 8 shall apply in the order in which they appear*." In exercising his jurisdiction the Commissioner was entitled to take into account all relevant matters (including, so far as relevant at all, matters referred to in Article 3). Mr Hrickova had an opportunity to make submissions concerning all relevant matters. The Commissioner made his determination that the application should be transferred to Germany. That was the first pre-requisite to the Minister being required pursuant to regulation 7 (11) of the 2000 Regulations to arrange for the removal of the applicant to the Convention country concerned. The Appellant complains that the requirement that the Appeals Tribunal determine his appeal by reference to the criteria set out in Articles 4 to 8 of the Convention in some way has the effect of giving an autonomous adjudicative jurisdiction to the Minister before he makes a deportation order. I confess that I have difficulty in following this argument. Article 7 (7) of the Regulations simply determines the scope of the appeal. The Minister is not authorised to make a deportation order in this context unless there has been firstly a determination of the Commissioner, and at that point all relevant issues had been determined after hearing the Appellant. Whatever the scope of the appeal, the next prerequisite was that the Tribunal must have affirmed the determination of the Commissioners. At that point there is nothing left for the Minister to decide. His function at that stage is governed by the aforesaid Article 7 (11) of the Regulation which provides that "*...he shall arrange for the removal of the Applicant to the convention country concerned*."

I would add in passing that it was not argued that any limitation in the scope of the appeal denied the Appellant in this case any rights nor do I consider there would have been any basis for such an argument.

In the circumstances in my view the learned High Court Judge was entirely correct in concluding that during the entire process of adjudication on his application for asylum full procedural rights of the Appellant were respected. The learned High Court Judge was also correct that at the point when the Minister made the order for deportation that did not involve any determination of an extant right of the Appellant.

His rights had been determined and addressed at each stage of the extensive process of examination of his case, which he fully availed of.

As regards Article 3 (4) of the Convention and as indicated in the extract from my judgment in the Lobe case cited above, the discretion of the State to examine an application for asylum in this country even though it might

otherwise be transferred to another convention country is one which falls to be exercised by the Minister. That delegation arises by virtue of the powers conferred upon him pursuant to Section 22 of the 1996 Act. The learned High Court Judge was entirely correct in holding that Article 3 (4) of the Convention does not confer any rights on individuals. It is a discretion which the State, in this case the Minister, may exercise to ensure that the Convention is applied with the view to achieving its objectives and to ensure its effective application and in the interests of the common good. No right is conferred on an individual to have that discretion exercised on his or her behalf or in his or her personal interests. Whether the Minister exercises his discretion generally, for a particular class of cases or in a particular instance, is uniquely his discretion having regard to the broader considerations to which I have referred.

Finally, it was submitted in this part of the appeal, that the learned High Court Judge erred in law in holding that such deficiencies as there were in the translation of the questionnaire filled out by Mr Hrickova at the commencement of his application process did not affect the validity of the deportation order.

In my view it is sufficient to cite one ground upon which the learned High Court Judge rejected this argument.

"*I note that there is no averment on affidavit as to what is, as alleged, not translated or properly translated, or as to its materiality (if any). Furthermore, it is in fact irrelevant to the Dublin Convention transfer – even if I had a doubt on this issue, which I have not, it does not go to the issue as to which or what country ought to accept responsibility under the Convention. The information intended to be elicited by Q.84 relates to the substantive basis of the processing of the asylum claim, which is something upon which the Minister has not adjudicated. Therefore, it cannot be advanced as a reason for impugning a decision to which it does not relate*."

These findings of fact are entirely supported by the evidence which was before the learned High Court Judge. As a matter of law, I agree with him that they provide no basis upon which the Minister's decision could be impugned.

I would like to add that insofar as it was submitted on behalf of the Appellant that Section 3(5)(b) might be considered as unconstitutional, this was based on the premises that it gave rise to an unconstitutional discrimination or denied a constitutional right to notice of the deportation order. Since the basic premises on foot of which it was sought to raise a constitutional issue have been rejected, no issue arises as to the constitutionality of that provision (see my judgment in the **Criminal Assets Bureau –v- Kelly [2002] 3IR. 421**.)

For the foregoing reasons I would dismiss this aspect of the appeal in Hrickova case. As acknowledged at the hearing, the decision of this court

with regard to the application of Mr Hrickova governs those of the other Hrickova Appellants.