

Passports for Irish-born children of non-EEA parents

An Investigation under Section 4 of the Ombudsman Act 1980



Oifig an Ombudsman
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Acronyms and Abbreviations used in this Report

DFAT	Department of Foreign Affairs and Trade
DJEI	Department of Jobs, Enterprise and Innovation
EEA	European Economic Area
GNIB	Garda National Immigration Bureau
INIS	Irish Naturalisation and Immigration Service
Justice	Department of Justice and Equality
NALA	National Adult Literacy Agency

Note: The names of the complainants have been altered in this report.

Executive Summary

Summary

This was an investigation by the Ombudsman of complaints about the difficulties faced by non-EEA workers in obtaining passports for their children born in Ireland. Such workers, to live and work in Ireland, must interact with two separate government agencies in maintaining their legal status here; the Department of Jobs, Enterprise and Innovation and the Department of Justice and Equality. The Department of Foreign Affairs and Trade has responsibility for processing passport applications. Following the investigation, the Ombudsman found that, while the laws in relation to both the processing of passport applications and employment permits were being correctly applied in the cases of complaint to his Office, the administrative processes of the three agencies were likely to cause difficulties for members of the public that could amount to unfairness and unnecessary delay in individual cases. The Ombudsman recommended closer co-operation between the agencies involved. His recommendations have been accepted and are in the process of implementation.

The work of the Department of Justice and Equality in these areas of administration does not come within the Ombudsman's jurisdiction so that Department could not be included in the investigation. It was necessary, however, to clarify certain issues with that Department during the investigation and officials of the Department of Justice and Equality met with staff from the Office of the Ombudsman to provide factual information about its systems.

The Investigation Report

The report concerns three men who came from their home country, Brazil, to work in Ireland. Two of them came in 2002 and the third came in 2006. They had arranged employment, and employment permits, prior to their arrival. They settled down here. The two that came in 2002 live and work in Donegal and have been with the same employer over the years. The more recent arrival lives and works in Waterford. They each had a child born in Ireland in the years between 2007 and 2010. All three applied for an Irish passport for their child and believed that their children would qualify for a passport based on the length of their own residence here.

They were surprised to discover that their children did not qualify for an Irish passport. It turned out that although they had lived and worked in Ireland for more than four years prior to the births, they did not, in fact, meet the legal requirement that they must have at least three years lawful residence in the State in the four years prior to the child's birth. The problem lay in the fact that some of their residence was recorded by the authorities here as unlawful and the total period of lawful residence recorded for them did not add up to three years. In order to qualify for an Irish passport, an Irish born child must meet the requirements for title to citizenship. The right to citizenship is solely determined by the Minister for Justice. The relevant legislation provides that if one of the child's parents has had lawful residence in Ireland for three of the four years prior to the child's birth, citizenship may be granted.

In the majority of the European Economic Area member states, there is a unified employment permit and visa application system. These arrangements are a consequence of what is known as the Schengen Agreement, which allowed for the abolition of certain border controls between countries. Ireland (along with the United Kingdom and Denmark) is not a party to the Agreement. Certain

immigrants who come to take up work in Ireland are obliged to register and maintain appropriate permissions from two State organisations. These are the Irish Naturalisation and Immigration Service in relation to the residence system and the Department of Jobs, Enterprise and Innovation for employment permits. They must keep those permissions up to date for all the time they are here. The three men with which this report is concerned had permission to work here for all the years involved. Their employment permits had no gaps and were kept up to date, which suggested, on the face of it, that they had been legally employed in Ireland since 2002 in the case of the Donegal men and since 2006 in the case of the man in Waterford. Their residency permissions, on the other hand, had not always been kept up to date (for a variety of reasons, not all of them the fault of the worker) and contained gaps which had the unfortunate consequence of rendering periods of residence in Ireland as officially unlawful. So, they were in the odd position of living here for many years, working (with permits from the State), paying income tax and social insurance to the State and yet not “lawfully resident” for certain periods of time during those years.

When they complained to the Ombudsman, the difficulties caused by the system for the people involved were noted. It is a complex system and there was little doubt that the people concerned had engaged with it to the best of their abilities. They had paid numerous fees for their residency permits over the years. Fees had also been paid by their employers for the employment permits. They were, in addition, engaged in full-time employment far from the capital, with little access to advice or services. The Ombudsman's Office commenced an investigation into the matter. While the investigation was underway, two of the cases were reviewed and passports issued for the children concerned, which was good news for the families involved. The third case was under review at the time of writing the investigation report.

The Department of Jobs, Enterprise and Innovation and the Department of Justice and Equality have recently established a working group to investigate the feasibility of introducing a unified employment permit and visa applications system as part of the Action Plan for Jobs 2014. This is a positive step which, if pursued to an effective conclusion, as the Ombudsman hopes it will be, will help overcome difficulties of the kind described in the investigation report and which are faced by workers coming to Ireland from outside the European Economic Area.

The Department of Jobs, Enterprise and Innovation and the Department of Foreign Affairs and Trade have also given the Ombudsman assurances about the introduction of improvements in their practices which all involved hope will assist such workers in the future.

Introduction

This report concerns three men who came from their home country, Brazil, to work in Ireland. Two of them came in 2002 and the third came in 2006. They had arranged employment, and employment permits, prior to their arrival. They settled down here. The two that came in 2002 live and work in Donegal and have been with the same employer over the years. The more recent arrival lives and works in Waterford. They each had a child born in Ireland in the years between 2007 and 2010. All three applied for an Irish passport for their child and believed that their children would qualify for a passport based on the length of their own residence here.

They were surprised to discover that their children did not qualify for an Irish passport. It turned out that although they had lived and worked in Ireland for more than four years prior to the births, they did not, in fact, meet the legal requirement that they must have at least three years lawful residence in the State in the four years prior to the child's birth. The problem lay in the fact that some of their residence was recorded by the authorities here as unlawful and the total period of lawful residence recorded for them did not add up to three years.

In the majority of the European Economic Area member states, there is a unified employment permit and visa application system. These arrangements are a consequence of what is known as the Schengen Agreement, which allowed for the abolition of certain border controls between countries. Ireland (along with the United Kingdom and Denmark) is not a party to the Agreement. Certain immigrants who come to take up work in Ireland are obliged to register and maintain appropriate permissions from two State organisations. These are the Irish Naturalisation and Immigration Service in relation to the residence system and the Department of Jobs, Enterprise and Innovation for employment permits. They must keep those permissions up to date for all the time they are here. The three men with which this report is concerned had permission to work here for all the years involved. Their employment permits had no gaps and were kept up to date, which suggested, on the face of it, that they had been legally employed in Ireland since 2002 in the case of the Donegal men and since 2006 in the case of the man in Waterford. Their residency permissions, on the other hand, contained gaps which had the unfortunate consequence of rendering periods of residence in Ireland as officially unlawful. So, they were in the odd position of living here for many years, working (with permits from the State), paying income tax and social insurance to the State and yet not "lawfully resident" for certain periods of time during those years.

When they complained to my Office, my predecessor, Emily O'Reilly noted the difficulties caused by the system for the people involved. It is a complex system and there was little doubt that the people concerned had engaged with it to the best of their abilities. They had paid numerous fees for their residency permits over the years. Fees had also been paid by their employers for the employment permits. They were, in addition, engaged in full-time employment far from the capital, with little access to advice or services. My Office commenced an investigation into the matter. While the investigation was underway, two of the cases were reviewed and passports issued for the children concerned, which was good news for the families involved. The third case was under review at the time of writing the report.

The Department of Jobs, Enterprise and Employment and the Department of Justice have recently established a working group to investigate the feasibility of introducing a unified employment permit and visa applications system as part of the Action Plan for Jobs 2014. This is a positive step which, if pursued to an effective conclusion, as I hope it will be, will help overcome difficulties of the kind described in this report and which are faced by workers coming to Ireland from outside the European Economic Area.

The Departments involved have also given assurances about the introduction of improvements in their practices which all involved hope will assist such workers in the future.

The work of the Department of Justice in these areas does not come within the Ombudsman's jurisdiction so that Department could not be included in the investigation.¹ It was necessary, however, to clarify certain issues with that Department. I thank the officials of the Department of Justice who met with staff from my Office and provided factual information about its systems.

The Department of Foreign Affairs and Trade and the Department of Jobs, Enterprise and Innovation were also generous with their time in assisting this investigation. I would like to record here my Office's appreciation of the high level of co-operation from these Departments.

Peter Tyndall

Ombudsman

May 2014

1. The Complaints

1.1 The legislation

The Passports Act 2008 is the legislation which governs the issue of passports. Under this Act, the Minister for Foreign Affairs may issue a passport only to a person who is an Irish citizen. The legislation on citizenship is the Irish Nationality and Citizenship Act 1956 (as amended). It was amended in 2004 by the Immigration Act 2004 to deal with, among other things, the situation of people born in Ireland to non-Irish nationals. While the implementation of this Act is overseen by the Department of Justice, the Minister for Foreign Affairs must have regard to citizenship legislation in dealing with passport applications.

Prior to the enactment of the 2004 Act, it was generally the case that every person born in the State was entitled to be an Irish citizen. The amendment of 2004 changed this situation for children of EU and non-EU nationals by introducing the following residence requirement;

“A person born in the island of Ireland shall not be entitled to be an Irish citizen unless a parent of that person has, during the period of 4 years immediately preceding the person’s birth, been resident in the island of Ireland for a period of not less than 3 years or periods the aggregate of which is not less than 3 years.”

Another amendment of the original legislation was the introduction of a limiting provision on the interpretation of “residence”. This says that when calculating the three years for residence purposes, no period of residence in the State may be counted if it is in contravention of section 5(1) of the Immigration Act 2004. Section 5(1) of the Immigration Act says,

“No non-national may be in the State other than in accordance with the terms of any permission given him or her ...by or on behalf of the Minister.”

The Minister in this case is the Minister for Justice.

So, a summary of the rules for establishing title to citizenship (and thereby, an Irish passport) as they apply to people born in the State to parents of non-EU nationality is;

- that one of the parents must have resided in the State for an aggregate of at least three out of the four years prior to the child’s birth and
- that any period of time in those four years which is not covered by a permission to be in the State given by the Minister for Justice may not be counted for this purpose.

1.2 The applications

The three complaints with which this report is concerned came from two Brazilian men working in Donegal, Bruno Martins and Lucas Silva and a third Brazilian man working in Waterford, Gabriel Santos. (The three names have been changed for this report). They complained to the Ombudsman (via a representative) about the handling of their children's applications for passports. The children were born in Ireland. In each case the father of the applicant child lived and worked in Ireland for a

period in excess of three years in the four years prior to the child's birth. Their employment in the State was approved and they held employment permits for their employment issued by the DJEI. They believed that they met the legal requirements for granting the passport applications, but the applications were not granted by the DFAT on the basis that their lawful residence fell short of the required three years.

1.3 Circumstances of each case

Bruno Martins

Mr Martins' son was born in Ireland on 16 October 2009. Consequently, the period of time taken into account in deciding the child's title to Irish citizenship is his father's residence in the State for the four years prior to (and including) the child's date of birth, that is, 16 October 2005 to 16 October 2009.

Mr Martins came to Ireland in 2002. He has worked for the same Donegal employer since then. The DJEI approved his employment by the issue of employment permits to him from 2002 onwards. When he made his application to the DFAT for an Irish passport for his son he supplied relevant documentary evidence among which was evidence that he worked the full 52 weeks (paying income tax, social insurance etc) for each of the four years in question.

The DFAT made a calculation of his "reckonable residence" in the four years prior to his son's birth. This calculation did not reckon up the amount of time he actually spent in the State during the four years but instead, in accordance with the legislative rules outlined earlier, the time for which he had been granted permission to stay in the State by the Minister for Justice. This turned out to be for a period much less than his actual time here and did not amount to three years, with the result that his application for a passport for his son was not granted as title to citizenship was not demonstrated.

The DFAT examined Mr Martins' passport to ascertain the duration of the permissions to remain in the State which had been granted to him by the immigration authorities. The dates of the permissions do not match the (seamless) dates of the employment permits, nor do they coincide with his residence in the State. There are periods of time which are not covered by permissions to remain in the State and which, consequently, cannot be counted as lawful residence.

Lucas Costa Silva

The case of Mr Silva mirrors, to a large extent, that of Mr Martins. His son was born in Ireland on 19 July 2007. The period of time taken into account in deciding the child's title to Irish citizenship was his father's residence in the State for the four years 19 July 2003 to 19 July 2007.

Mr Silva also came to Ireland in 2002 and has worked for the same Donegal employer since then. The DJEI approved his employment by the issue of employment permits from 2002 onwards. When he made his application for an Irish passport for his son he supplied documentary evidence showing that he worked the full 52 weeks (paying income tax, social insurance etc) for each of the four years in question.

The DFAT calculated his residence in the four years prior to his son's birth. As with Mr Martins, the calculation of his "reckonable residence" did not reckon up the amount of time he actually spent or was employed in the State during the four years but, in accordance with the rules, the times for which he had been granted permission to stay in the State by the Minister for Justice. Again, this turned out to be for a period much less than his actual time here and did not amount to three years, with the result that his application for a passport for his son was not granted.

Gabriel Santos

Mr Santos is a Brazilian national who came to Ireland to work in April 2006. He has employment permits dating from 2006 to cover all his time here. His daughter was born on 19 May 2010. The calculation of his lawful residence by the DFAT showed him to have less than the required amount in the four years prior to her birth and the passport application did not succeed. The final calculation of his periods of lawful residence was that it was one day short of the required 1,095 days.

This case was the first of the three complaints to be made to the Ombudsman. In addition to corresponding with the DFAT, the Office also examined the DJEI files on the employment permits granted to Mr Santos. These files showed that employment permits had been applied for and were issued to his employer for him from 2006 onward without any gaps in the periods of time covered by the permits.

There were a number of delays in issuing the permits over the years, some of which appear to have been caused by his employer (see Appendix 3). However, when his employer applied for an employment permit for him in May 2009 (his previous one being due to expire 15 June 2009) the permit dating from June 2009 did not issue from the Department until 16 September 2009. A checklist completed by a member of staff on 28 May 2009 indicated that all was in order. This was a significant delay given the fact that the complainant was deemed to be (in the end) one day short of meeting the requirement for an Irish passport for his daughter. The Department's delay in issuing the permit was not taken into account by the immigration authorities when it subsequently gave him permission to remain in the State from 24 September 2009, the date Mr Santos presented himself to the Immigration Officer with the employment permit. This created a gap of three months in his permissions to remain in the State. This gap did not represent an absence from the State but rather the period of time he was awaiting the issue of the employment permit. As the time in question is not covered by a permission to be in the State, residence during that time is unlawful residence in accordance with Section 5(1) of the Immigration Act 2004 (cited earlier).

In an effort to resolve this particular case, the Ombudsman's Office asked the DJEI to contact the Department of Justice to confirm these details and to suggest that the permission to reside might be amended to reflect the reality of Mr Santos' situation, that is, that he had permission to continue his employment in the State between June and September 2009. It was noted that immigration law does allow for a permission to be varied.² It was clear that such a request was best made by the DJEI; it could verify the dates of application and issue of the permit and also, it could confirm that the employee/employer did not cause the delay. The DJEI then contacted Justice. The Department of Justice reviewed the case and, noting the fact that the time involved was marginal and that there was a quantity of supporting evidence in the case, the Minister's discretionary power was used to

grant a certificate of nationality to Mr Santos' daughter. The DFAT, on receipt of this proof of her Irish citizenship, issued her with a passport.

2. Investigation

2.1 Decision to investigate

The complaints of Mr Martins and Mr Silva were made to the Ombudsman some six months after that of Mr Santos. By this time, the Ombudsman's Office had conducted a preliminary examination and had corresponded with both the DFAT and DJEI about the case of Mr Santos. The DFAT, in particular, supplied a considerable amount of information and documentation on the case itself and the issues involved. The picture emerging from this work suggested that the passport applications in question were not succeeding because, among other reasons, the administrative systems involved are complex and require the members of the public who engage with them to be cognisant of the various rules and requirements of three different systems, that is, the employment permit process, the registration for lawful residence and the passport application system. The Ombudsman was concerned that there was a possibility that the agencies involved were not supplying sufficient assistance to their service users in these areas.

In addition, the case of Mr Santos (as described in the last chapter) raised the concern that, while there were probably occasions when his employer (and he too) delayed in ensuring his residence status was regularised, delays on the part of the State might also militate against the non-EEA worker in his interaction with the various processes.

The DFAT also supplied figures to the Ombudsman's Office which indicated that these cases are only a few of a large number of similar ones and this also suggested a situation which warranted the closer analysis provided by an investigation process .

The Ombudsman Act 1980 as amended provides that all Departments of State are reviewable agencies whose actions are open to examination by the Ombudsman. The Act, however, provides that an action of the Department of Justice "taken in the administration of the law relating to immigration or naturalisation" is excluded from the Ombudsman's remit. Therefore, the actions of the Department of Justice in these particular cases are excluded from examination.

This meant that the Ombudsman's investigation was confined to the Department of Foreign Affairs and Trade and the Department of Jobs, Enterprise and Innovation.

Investigation

The investigation focused on the three cases of complaint to establish:

- The administration by DFAT of the passport applications in question, the application of the relevant legislation by DFAT and whether it is meeting its obligations to users of its service in this matter.
- The administration by DJEI of the employment permit applications for the complainants insofar as it affected their residence status.
- The liaison arrangements of both Departments with the Department of Justice. One of the principal concerns in this investigation was to establish whether there are arrangements in place to ensure gaps in lawful residence of non-national workers are not caused by State organisations.

2.2 Statement of Complaint

The former Ombudsman said in letters sent in June 2013 to the Secretaries General of the DFAT and DJEI that she had conducted a preliminary examination of the complaints as outlined in a Statement of Complaint. She said she was satisfied that the complainants had been adversely affected by the actions of the Departments and that these actions may have been taken on the basis of one or more of the grounds identified at section 4(2)(b) of the Ombudsman Act 1980 as amended (see endnote 14). The letters went on to say that the Ombudsman had decided to carry out an investigation of the complaints under section 4 of the Ombudsman Act 1980 as amended.

The Statement of Complaint sent to both Departments with the notification of the investigation supplied details of the complainants and their children and set out their complaint as follows:

“The persons named ...complained to the Ombudsman about the handling of their children's applications for passports. The children in question were born in Ireland to parents of non-EU nationality. In each case the father of the applicant child worked in Ireland on foot of employment permits issued by the Department of Enterprise... for a period in excess of 3 years in the four years prior to the child's birth. They contend that the circumstances of their residence in Ireland should have resulted in the granting of the passport applications, but that the administrative processes of the various State agencies involved are inequitable and unreasonable. They contend that the failure to issue passports to their children is a consequence of unfair processes and has adversely affected the children concerned.”

2.3 Responses

Both Departments were invited to make a written submission in response to the Statement of Complaint. The submissions subsequently received are at Appendix 1. Detail from them has been incorporated into this report as has information supplied in a letter of 4 March 2013 (also at Appendix 1) from the DJEI outlining its position both in general terms and in relation to the Santos case.

The DFAT summarised its submission with the following points:

- The Minister for Foreign Affairs is responsible for the implementation of the Passport Act 2008. Section 7 of the Act provides that a person must be an Irish citizen before/he can be issued with a passport.
- The citizenship entitlement of the children in question is governed by the 2004 amendment of the Irish Nationality and Citizenship Act 1956, the implementation of which is the responsibility of the Minister for Justice. That Department has advised on the required evidence needed in the context of a passport application that would demonstrate a child's entitlement to Irish citizenship.
- The submitted evidence for the children in question did not demonstrate their entitlement to Irish citizenship and accordingly, the DFAT had to refuse their passport applications.

- There have been important recent developments in this area. One is a Supreme Court Judgement³ and the other is the decision of the Department of Justice to certify the daughter of Mr Santos as an Irish citizen.
- The Department of Foreign Affairs sought clarification from the Department of Justice on these matters for the purpose of reviewing, and, if necessary changing, its passport entitlement process for this category of passport applicant. This correspondence was ongoing at the time of commencement of this investigation. It appears however, that the Minister for Justice utilised his discretion to resolve the matter.

The submission from the DJEI provided details of the employment permits issued to each of the complainants and gave information as to whether there had been delays in processing the applications for the permits. The Department said that “Each application was processed within the current timeframe for processing applications at that point in time”. It noted that the onus was on the proposed employee “to maintain their immigration status during all periods of time in the State”. An earlier letter from the DJEI (4 March 2013- at Appendix 1) outlined the application process in detail. A significant point for the complainants in these cases is the Department’s statement,

“The EP [Employment Permit] system is a distinct and separate process that operates apart from the immigration system. There are of course linkages where the status of having an EP can affect the granting of residency and vice-versa.”

3. The System

This chapter outlines the main facets of a complex system operated by three distinct agencies. The complainants in these cases all came to Ireland to work and held employment permits for this purpose so it is only the administrative processes as they apply to employment permit holders from non-EEA countries with which we are concerned. The system described in the following paragraphs is from the point of view of the agencies involved (that is, it is how the system should work). It does not describe what actually happened in the cases in question; this is described in Chapter 4.

The system in Ireland involves three separate agencies because this country does not have a single application procedure for non-EEA nationals to reside and work here. There is such a single application system in most of the EEA countries. However, Ireland, along with the United Kingdom and Denmark, were not party to the relevant EU Directive which directed Member States to establish “a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State.”⁴

3.1 Employment Permits

The legislation on employment permits provides that it is illegal for certain categories of foreign nationals to be employed in the State unless authorised to do so by the Minister for Jobs, Enterprise and Innovation. It is an offence for both an employer and an employee to be party to the employment of a foreign national without a valid employment permit, where one is required. An employer who employs a non-national who does not hold an employment permit is in contravention of the law and risks being prosecuted and fined for the offence.⁶⁵ The Department is obliged to take labour-market considerations into account before a permit may be issued. A fee is payable and there are rules involved for both employer and employee.

A prospective employer of a non-EEA national makes the first application for a permit while the proposed employee is living outside the State. After the appropriate checks by the Department, a permit issues to the employee and a copy goes to the employer. (Before 2007, the system was to send the permit to the employer only. The permit, as it says on the document, “must be produced at Immigration Control”).

After obtaining the first employment permit, the permit holder must seek permission from the Department of Justice to enter the State, either from a local Irish embassy or from the Department itself (the Irish Naturalisation and Immigration Service, INIS, handles these applications). When the prospective employee arrives here s/he will be assessed by immigration control which will take a number of matters into account and will, if all is in order⁶, give permission to enter the State for a maximum period of three months. There is usually a proviso to the permission which requires the person to attend the immigration authorities to obtain permission to reside here.

When the person attends INIS, (either the Garda National Immigration Bureau (GNIB) in Dublin or the person’s local garda station), the immigration officer will generally authorise residency for a year or less, having regard to the duration of the employment permit. The period of time which has

elapsed between the employment permit's commencement date and the date of attendance at the immigration office is excluded from the permission to remain.

It must be noted that while the employment permit (among other factors) is taken into account by the immigration officer when deciding whether to grant the permit holder permission to remain in the State, the award of an employment permit by the Minister for Enterprise is not equivalent to, or a substitute for, the permission to remain in the State, which, legally, may only be given by the Minister for Justice (or his representative).

If an employment permit application (new or renewal) relates to a non-EEA national already living in the State, h/she must have an appropriate immigration permission status which allows such an application.

New (first time) permits may issue for periods of six months, one, or two years (two years being the most usual). If the employer wishes to continue to employ a person after the first permit has expired an application must be made to the DJEI to renew the permit and certain conditions must be met. Renewal permits may issue for periods of up to three years. Permits are not usually renewed to cover a total employment period beyond five years due to the holder having (in theory at least) earned eligibility to apply for long-term residency.

Prior to 2007 only the employer could apply for a new or renewal permit. Since 2007 it is possible for the employee to make such an application and (also since 2007) the fee may be paid by employer or employee.⁷ Prior to 2007 all permits issued to the employer for a maximum period of one year.

3.2 Permission to remain in the State

There are various forms of residence rights that allow the nationals of non-EEA countries to live in the State. When a person attends the immigration office to obtain permission to remain in the State s/he is also registered with INIS as a non-national in the State. If a person is granted permission to remain here an immigration stamp is placed in their passport and a Certificate of Registration (also known as a GNIB card) is issued to them. A fee is payable for each "permission" granted and this is generally done on an annual basis. The stamps placed on the passport vary in accordance with the type of permission which has been granted. In the cases we are examining in this report, a "stamp 1" was the principal type of permission granted (following the initial permission granted at point of entry to the State as described above). Stamp 1 is issued to people who have an employment permit and it gives permission to the holder to remain in the State for the purpose of employment with that employer. The date the permission ends is recorded on the stamp.⁸ The date the permission begins is the same date as the date the permission is granted.

The Department of Justice advised the Ombudsman's Office that the GNIB database on which the registration is recorded does not allow for a registration to be entered for a date prior to the date the entry is made, that is, no retrospection of registration is allowed at that point.

So, a non-national wishing to apply for permission to remain in the form of a "Stamp 1" must have a current employment permit in order to succeed. His permission to remain will not commence on a date earlier than the date he attends the immigration office.

3.3 Long-Term Residence and Naturalisation

It is also of relevance to note that there is an administrative scheme under which persons may apply for long-term residence status.⁹ A person who has been legally resident in the State for over five years on the basis of employment permits (or similar employment arrangements) may apply for a five-year residency extension. They may then be exempt from employment permit requirements. This status largely gives foreign nationals the same rights (to work, travel, health-care etc) as Irish citizens. A fee is payable for such applications.

A foreign national may also apply to become an Irish citizen through a “naturalisation” process. There are a number of requirements which must be met, among which is that an applicant must have a period of one year’s continuous reckonable residence in the State immediately before the date of the application and, during the eight years preceding that, have had a total reckonable residence in the State amounting to four years. Again, there is a fee for such applications. An application for a certificate of naturalisation may be made on behalf of a minor who is born in the State without an entitlement to citizenship; the conditions include having 5 years reckonable residence in the State. In addition, parents who are granted a certificate of naturalisation in their own right may make an application on behalf of their child.

These two processes are relevant to the issues under consideration in this investigation as only lawful residence may be reckoned in establishing whether the applicant meets the length of residency required for both long-term residence status and for naturalisation. Lawful residence is only that residence for which the Minister for Justice has given permission. To repeat the legislation quoted earlier:

“No non-national may be in the State other than in accordance with the terms of any permission given him or her ...by or on behalf of the Minister.” (Section 5(1), Immigration Act 2004).

It is clear that to have periods of unlawful residence is a serious matter for the people concerned. Such periods of time will negatively affect any future applications, not only for passports for Irish born children, but also applications for long-term residency status and citizenship. Although they may have been living and working in the State for a considerable number of years, the periods of unlawful residence will be subtracted from the years which are being reckoned for the purposes of any such applications. There is no independent appeals process for these matters. The relevant legislation provides only that,

“A permission under this section may be renewed or varied by the Minister, or by an immigration officer on his or her behalf, on application therefor by the non-national concerned”. (Section 4 (7), Immigration Act 2004). (sic)

This is given effect by the immigration authorities to allow applicants to apply for the renewal of their permissions to remain in the State. It is not generally used to alter permissions already given. The Department of Justice told the Ombudsman’s Office that the Minister, or an official acting on his behalf, does have the authority to review or vary a permission but this power is used only in the most exceptional of cases (the cases of children in the care of the State was cited).

Mention must also be made here of the fact that the Minister for Justice has absolute discretion in granting citizenship. The Courts have found in a number of cases that the conferral of citizenship is a function of the sovereignty of the State and that no non-national has any right to Irish citizenship. Under the Irish Nationality and Citizenship Act, 1956 (as amended) the Minister has ‘absolute discretion’ in granting citizenship to non-nationals. The Courts have found that ‘absolute discretion’ means exactly what it says and that even where all of the conditions stipulated the 1956 Act are met, the Minister may refuse to issue a certificate of nationality to an applicant. The converse is also true; the Minister may grant an application for citizenship in cases where he sees fit to do so, by the exercise of his discretionary power.

3.4 Passport Application process

The DFAT requires a relatively large amount of documentation in support of passport applications. Among the documents which must be supplied are documents which are evidence of residency status and the period for which each residency status applies. Generally, the DFAT will examine the applicant’s passport to record, on its own database, the evidence of permissions to remain in the State which have been issued by an immigration officer. The Department notes the date on which the immigration officer signed the permission. This date is the commencement date of the permission to reside in the State. The date the permission ends has been recorded as such by the officer. In this way the Department will compile the total number of days lawful residence for the purpose of deciding whether the passport applicant satisfies the legal requirement that one of the parents must have resided in the State for an aggregate of at least three out of the four years prior to the child’s birth. Any time in those four years which is not covered by a permission to be in the State given by the Minister for Justice may not be counted for this purpose.

The DFAT, in correspondence with the Ombudsman’s Office, said that in addition to issued permissions, it also accepts as proofs of lawful residence registration cards and/or letters which are issued from the GNIB and/or the Minister for Justice. It is also that Department’s understanding that work permits are issued by the DJEI to permit a non-national to work in Ireland under certain conditions that apply to the employer and which provide certain protection to the worker. As such the evidence of work permits are not accepted as evidence of lawful residence.

The Department said it was aware of applications where the associated documentation showed,

“...differences between the validity dates of submitted proofs of resident and employment permits.”

and went on to say that,

“Of particular concern to this Department has been the gap periods created in the issue of resident permits”

The DFAT suggested that it is a matter of the DJEI and Justice to take steps to correct any anomalies which may arise between the operation of their systems and also that it had “considerable correspondence” on the matter with the Department of Justice.

A further issue of note is that the DFAT's appeal process is not open to applicants whose passport applications have been refused on the ground that the Minister for Foreign Affairs is not satisfied that the person is an Irish citizen. There are another seven grounds on which a person may be refused a passport. With all of these comes a right of appeal to a statutorily appointed appeals officer. A person who has been refused a passport on the ground that s/he is not an Irish citizen is specifically excluded from the appeals process, (Section 19(2) of Passports Act 2008). As citizenship is a matter for the Department of Justice, the matter may only be pursued by the applicant with that Department.

4. The complainants & the system

4.1 Commentary

A table at Appendix 3 of this report shows the duration of residency permissions granted to each of the three complainants and the date on which each of these permissions was obtained. The table shows only those permissions which are reckonable for their children to obtain passports, that is, those permissions given in the four years prior to the complainant's child's birth. So, although both Mr Martins and Mr Silva were resident (and legally employed) here from 2002, only residence from 16 October 2005 (Martins) and 19 July 2003 (Silva) may be reckoned towards the residence requirement.

The duration of employment permits is also shown and the date on which the employer applied for the employment permit and its date of issue. In some cases the date on which the employer made the application is approximate and is based on the date the fee for the permit was paid.

Permissions to remain

It can be seen from the relevant entries that there are no instances where the immigration officer gave permission to reside for a period of time pre-dating his date of stamping the passport. In other words, although the non-national presented himself at the immigration office with an employment permit which pre-dated his attendance, the "permission to remain" was not granted from that earlier date. The Department of Justice confirmed that this was the usual practice. Permissions to remain are not granted in retrospect by the immigration officer.

The dates of the residency permissions (column 2 of the table) were compiled from the dates of the stamps in the copies of the passports supplied by the DFAT. The DFAT, when notifying the complainants of its decisions in their cases, gave them details of these permissions and the reckonable periods which were counted towards "lawful residence" as part of the passport process. Each of them had less than the required total of 1095 days (three years) in the four years prior to their child's birth.

When examining the details of the passports and the information supplied by the DFAT in its decisions on these cases this Office noted a number of issues:

In some of the original decisions notified by the Department in cases, there were errors made in the calculation of the amount of reckonable residence; these errors were noticed and rectified by the Department when dealing with subsequent correspondence after the initial decision. There were three calculations made in the Santos case: he was told, at different times, that his lawful residence amounted to 1042, 1069 and 1094 days. Eventually, the application was finalised by the issue of a Certificate of Nationality by the Minister for Justice (issued under section 29 of the Irish Nationality and Citizenship Act as amended). Mr Silva was originally told he had 920 days; the final calculation was that he had 989 days lawful residence).

Another point of interest is that in the case of Mr Silva, the DFAT was able to include as reckonable the period from 19 July 2003 to 8 January 2004 despite the fact that a gap from 1 November 2003 to

8 January 2004 occurred between his “permissions to remain”. According to the Department it could do this because the Immigration Act 2004 did not come into law until March of that year.

Up to late 2012 the DFAT did not include the date of the child’s birth when calculating reckonable periods of residence. The Supreme Court ruling, given in December 2012 in *Sulaimon -v- Minister for Justice Equality & Law Reform* (endnote 4), said that the child’s date of birth should be included in the calculation. An amended calculation was made in all three cases here to add in the extra day.

Employment Permits

The table at Appendix 3 also shows the periods covered by employment permits (column 4), the date on which the permit application was made to the DJEI (5), the date the permit issued to the employer/employee (6) and some notes on delays in the process (7). The information shows that significant delays occurred in all three cases, but particularly in the case of Mr Martins. A few of the delays occurred because the DJEI raised issues to do with the employment in question. These were queries raised about the factual situation to ensure that the legislative requirements for the employment of a non-EEA national were being met. Although these queries were necessary in the circumstances, once they were resolved, the DJEI issued a permit for the employee which commenced from the date of expiry of the employee’s previous permit. The DJEI explained (in its letter of 4 March 2013 at Appendix 1) that permits are generally issued on the basis that an employee will be continuously employed over the period of the permit. Even in situations where the Department notes that there has been a break (for example, where the employee left the State for a period) the Department “will generally take a benevolent consideration of this in recognition that sometimes family or other circumstances will require an employee’s absence and also that to deny the [permit] at renewal will have a detrimental impact on the employer”.

Employer’s actions

In the majority of the years with which we are concerned, it was the employer’s responsibility to make the application for the employment permit and they were advised by the DJEI to do so in good time. However, the employers in these cases did not always make the applications sufficiently early. For example, in 2007 in Mr Martins’ case, his employer applied for an employment permit for him on 27 March 2007, despite the fact that the previous permit for him had expired on 1 November 2006. Added to this delay was a further period of 4 months as the DJEI did not issue the permit (for the period 2 November 2006 to 1 May 2007) until 19 July 2007. Mr Martins obtained a short-term permission to remain for the period 9 May to 1 August 2007 (which nonetheless left a gap in permissions of almost 6 months from late 2006 to mid 2007). He advised the Ombudsman’s Office that he obtained this in order to travel to Brazil for a holiday in May 2007 at a time when his GNIB card had expired. He was still in full-time employment and did not seem to be aware that, in fact, his residence status in Ireland at that time was not lawful.

Another significant delay occurred in 2005. The employer made applications for 12 different employees to renew their employment permits, sending them all at the same time to the Department, apologising in its covering letter for delay and saying that “The fault is not that of the employees who should not be at a disadvantage due to this unintended mistake”.

One of the employees concerned was Mr Silva, whose permit expired on the date of his employer's letter; 1 November 2005. The DJEI issued his permit promptly on 19 November 2005. It issued to his employer rather than to himself as this was the practise at the time. It was not until 2007 that the legislation changed to allow for the issue of the employment permit directly to the employee with a copy going to the employer. The employee was consequently reliant on his employer to give him his permit without delay so that he could then register with the immigration authorities. In Mr Silva's case, although his renewed permit issued in November 2005, he did not register with the immigration authorities until March 2006 (thus creating a four month gap in lawful residence). There is no evidence available to show that his employer handed the permit over to him without delay. In providing information to this Office (see next section) Mr Silva said that he was consistently obliged to ask his employer for his permit. This four month gap is in excess of the number of days lawful residence which he was short in order for his son to be eligible for citizenship in 2007.

4.3 Complainants' point of view

It is probable that in addition to delays on the part of employers and the State, delays were also caused by the complainants themselves. In all three cases in question here, the complainants were obliged to go to the immigration authorities (in the Donegal cases, their local garda station and in the Waterford case to the GNIB in Dublin) to have their passports updated with permission stamps. It is clear that there were occasions when, having obtained an employment permit, they did not go to the garda station straightaway. As the immigration authorities do not grant permissions from any date earlier than the date the applicant presents himself, any delay inevitably gave rise to a period of unlawful residence.

The INIS website (in place since 2007) says that it is the responsibility of the applicant to ensure that he has no periods of time in the State which are not covered by a permission to remain in the State. At the same time, it is also clear that an applicant whose permission to be in the State is on the basis of an employment permit (a "stamp 1") will need to have a valid employment permit when the time comes for him to register again if he expects to obtain a "stamp 1". The INIS website says:

*"Your Permission to Remain in the State should never be allowed to lapse and the onus is on you to ensure that this does not happen. You should apply to the Registration Officer responsible for the area in which you reside in good time to have your Permission to Remain in the State extended. You will be required to submit documentation relating to your reasons for seeking further Permission to Remain i.e. employment permit holder **must** submit a new employment permit, and evidence of employment."*

This is followed by a notice that in the absence of permission to remain, a person may be deported. Neither the information on the website nor any information leaflets are available in any languages other than English and Irish.

It is not clear if the people involved were aware that the delay on their part in registering with the immigration authorities had the effect of rendering periods of their time here as unlawful and how those unlawful periods would have a negative effect on their own and their children's citizenship

status. Mr Silva and Mr Martins responded to questions from this Office through a translator and apparently, have poor English. Both stressed their reliance on their employer in relation to the obtaining of employment permits. Mr Silva said, "The fact was that I always had to go to the HR office to ask for my employment permit before it expires and after it expires, and they always said 'didn't come yet'. This was the same answer for many consecutive weeks."

Both men said that their employer also made the appointments with the garda station for employees to register with the immigration authorities. This appears to have occurred in the early years of their employment, after which they were expected to make the arrangements themselves. As the employer (rather than the employee) was sent the employment permit by the DJEI in the years up to 2007, this seems to have been a likely arrangement. The Department of Justice said, in relation to this, that the onus was on the employee to ensure he made the time to renew his permission to remain, that the Letterkenny immigration office would have been open at least once a week at that time and it would have been open to the employee to make an appointment.

Bruno Martins

In Mr Martins' case there are a number of periods of quite long duration where he was not lawfully resident in the State. He said that he had always tried to maintain his registration with the immigration authorities. In the early years of his employment here, he told this Office, it was very difficult as he did not speak English and depended on someone to make the appointment and accompany him to the garda station which was not open every day. He also said that he was not aware that employment permits had been sent to his home address at any stage, "All my employment permits were always delivered by [his employer], and whenever they handed me the employment permit, immediately an appointment with the immigration officer was arranged".

There are a number of gaps in Mr Martins' permissions to remain, one of the longest being between December 2006 and May 2007. He returned to Brazil for a month in May 2007. He told the Ombudsman's Office that his GNIB card had expired and he was awaiting the renewal of his employment permit so he went to the immigration officer who provided him with a provisional 90 day stamp. Before he did this he had asked his employer about the situation, "...and they answered me that the request for the renewal of the employment permit had already been sent and they could not do anything to help me, I would have to wait." According to the DJEI records examined by Ombudsman staff, his previous employment permit had expired in November 2006 but an application for a renewal of the permit was not made by his employer until 27 March 2007. This long delay may have caused confusion as, when the employment permit issued, it did so for a period already in the past; the permit which issued on 19 July 2007 covered the period 2 November 2006 to 1 May 2007. The DJEI said that, while it cannot be sure of events in the past (for which there is little documentation available now) the employment permit would not have issued in circumstances where the applicant did not have a current GNIB card.

A further gap in Mr Martins' permissions to remain then followed with his employer not making an application for a renewal of his permit until 12 February 2008, 10 months after the previous one expired.

A notable fact is that both men have a full insurance record of 52 weeks for each year of their employment for the 4 years prior to and including the year of their child's birth. This has been

confirmed by the Ombudsman's Office with the Department of Social Protection. Their employer also confirmed that they have full attendance records for these years at their place of work.

A further point of note is that there is no documentary evidence to indicate that, prior to 2007, the employment permits had issued to the men's home addresses. It was in 2007 that the legislation changed to allow for the permit to issue to the employee rather than the employer.¹⁰ This is significant for Mr Silva's case in particular, as his child was born in 2007, so his lawful residence is reckoned up to and including 2007 in the calculation used to decide his son's eligibility for citizenship and a passport. The original files were not available but those documents which were provided to this Office indicated that the original employment permits for the years 2002-2006 were, in fact, sent to the employer and not the employee. It was only from 2007 that the original employment permits were sent to the employee as it is from this year that the covering letter to the employer makes reference to the fact that the employer is being sent a copy while the employee has been sent the original permit.

5. Analysis

5.1 Interdependent processes

The most striking aspect of the administrative processes involved in these cases is the interdependent nature of the agencies involved. The DFAT is responsible for the issue of passports, which may only be issued to Irish citizens. Justice provides advice to the DFAT on the “acceptable proofs” for establishing citizenship so that the latter may implement passport legislation. Justice also grants “permissions to remain” in the State to immigrants and, in the case of people who hold employment permits from DJEI, uses the permit period to establish end-points to permissions (but not start-points where that date has already passed). The dates of the permissions to remain are used by DFAT in establishing title to citizenship for passport purposes.

The fact that these agencies are interdependent in terms of the supply of information for each other’s separate legal purposes suggests that, despite the absence of a single application system for residency and employment, they should work closely with each other to ensure a satisfactory level of service to the common point in their operations - the recipient of their services.

5.2 Department of Foreign Affairs and Trade

The DFAT’s contact with Justice is on two levels: it obtains direction and advice from Justice in relation to the interpretation of citizenship law and it uses the “permissions to remain” granted by Justice to calculate the passport applicant’s potential title to citizenship and an Irish passport.

The procedures followed by the DFAT in these cases show that the Department is concerned to correctly apply the relevant law. The DFAT has a responsibility to act as quickly and as efficiently as possible in relation to the processing of passport applications from members of the public – and it meets this responsibility in the majority of cases. Where those members of the public are non-EEA nationals any questions of title to citizenship which may arise are dealt with by the Department of Justice as the Minister for Justice has absolute discretion in determining whether a person is granted citizenship. This means that despite the Minister for Foreign Affairs’ power to make decisions on the granting of passports, a power for which he has sole authority, his Department must seek direction from the Department of Justice in citizenship matters. It does this by way of correspondence with the immigration authorities, both in relation to general policy matters and where necessary, in relation to individual cases, with all the delays and room for difficulty which correspondence may involve.

The DFAT has pointed to the large number of people who are waiting for it to decide their passport applications in the light of the Sulaimon judgement (delivered by the Supreme Court in December 2012) as an instance of the problems which arise with the current system. In view of the Minister for Foreign Affairs’ authority in law in relation to the issuing of passports the arrangements seem somewhat anomalous. It is clearly not an ideal situation and, in terms of both delay in processing times and lack of clarity on entitlements, the current arrangements negatively impact on applicants for passports in some cases.

In relation to the particular cases considered in this report, the case of Mr Santos is resolved. His daughter now holds an Irish passport. However, at the time of writing this report the DFAT was still seeking clarification from the Department of Justice on the criteria for the decision to award a certificate of nationality to the child concerned.

The cases of Mr Silva and Mr Martins were unresolved at the time this investigation was undertaken in that their children had not been given Irish passports. While the case of Mr Santos involved a shortfall of only a day's lawful residence, the shortfall in the other cases is a period of three to four months. This is countered by the fact that, as with Mr Santos, they both provided a large amount of documentation to the DFAT in support of their case for lawful residence. In addition, Mr Silva was granted long-term residency status by the Minister for Justice in April 2011. He was also able to demonstrate acceptable proofs of residence in the period prior to the introduction of the Immigration Act 2004, when a less onerous system was in place. The employer involved can confirm their attendance records at work, if necessary. The DFAT is unable to take into account any of this evidence in deciding the issue of their childrens' title to passports. The current arrangements, whereby only the Minister for Justice may make such decisions means that the DFAT has little input into the resolution of cases no matter how meritorious they may appear.

Conclusion: In order to ensure that requests to Justice for advice and direction on citizenship matters do not cause delay to passport applicants the DFAT would have to come to an agreement on the matter with Justice, an agreement which would put deadlines in place both for individual queries and general policy matters.

As far as the mechanics of the process are concerned, it is noted that the DFAT does not have access to the GNIB database on which applicants "permissions to remain" in the State are recorded. For the DFAT, whose legal responsibility it is to grant passports, this means that, in order to determine the duration of permissions to remain which have been granted in any particular case, its staff must obtain the relevant passport and must read the *manuscript* versions of the permission dates as recorded on the passport. While this may seem a minor point in relation to the process and while the DFAT has staff well-versed in reading passport stamps, the exclusion of the DFAT from the GNIB database does not seem to be the best use of resources and is not in the interest of applicants. The DFAT could have, at least, reader-only access to the GNIB database. The DJEI has made arrangements for such access in recent times to speed up the application process for employment permits. Legislation may provide for the sharing of information among State bodies in the interests of their common clients and the efficient operation of services while at the same time safeguarding against breach of privacy legislation.

5.3 Department of Jobs, Enterprise and Innovation

In its submission to the Ombudsman following the notification of the investigation of these cases the DJEI said,

“The EP [Employment Permit] system is a distinct and separate process that operates apart from the immigration system. There are of course linkages where the status of having an EP can affect the granting of residency and vice-versa.”

The DJEI is correctly implementing the law on employment permits. However, there are a number of aspects of the procedures followed which gave rise to difficulties for the complainants in these cases. The “linkages” between the residency and employment permit system are where these difficulties occur.

Delays by the Department

The Department considers itself to be operating a system completely independent of the Justice system of granting residency. In fact, the two systems are dependent on each other. Stamp 1 (permission to remain) is only given to people with current employment permits. In relation to delays in its own processes, some of the years with which these cases are concerned saw a large increase in applications which resulted in a heavy demand on the Department’s resources and, consequently, delays in issuing permits. Processing times were undoubtedly longer in the past than in more recent times but it is evident from the facts of these cases that even a short delay may cause a worker to have a gap in his permissions to remain in the State in view of the Justice/GNIB policy not to grant retrospective permission to remain.

This Office asked the DJEI in May 2013 if the Department would consider notifying INIS where delays have occurred in its own office which give rise to the late issue of an employment permit. The objective of such a course of action would be to prevent gaps in lawful residence at least in those cases where delay had been caused by the State. While the DJEI recently sought to engage with the immigration authorities on this point no decisions were made to change the systems in place. However, the Department of Justice referred this Office to a proposal for a closer working relationship with the DJEI as envisaged in the Government’s “Action plan for Jobs 2013” (since overtaken by the 2014 plan). This may present a possible way forward.¹⁰

Conclusion: A fair administrative system on the part of the DJEI would ensure that any delays on its part would not have negative repercussions for the permit holder in obtaining a Stamp 1. In order to ensure that there were no such repercussions it would have to come to an agreement with the Department of Justice in relation to the administrative arrangements for dealing with these cases.

Delays by the employer

Pre- 2007 delays by employer

In the majority of the years with which these cases are concerned the onus was on the employer to make the application to renew the permit if he wished to retain the employee in question. In addition, prior to 2007, the employer was sent the permit by the Department and this would have resulted in a further delay if the employer did not hand it over promptly. Though the employees suffered disadvantage if the employer did not act without delay they had no control over the situation.

Conclusion: While the legislation has changed to remedy these matters, the pre-2007 procedures impacted negatively on the cases of Mr Silva and Mr Martins as those years form part of the

reckonable period for their children's (and their own) subsequent entitlements under citizenship law. This aspect of their cases has not been addressed by contact between the DJEI and Justice.

Delay by employer-procedural checks

The DJEI confirmed to this Office that it was not the practise at the time to take any punitive action in relation to an employer who delayed in making a renewal application for his employee (that is, by fining him or threatening to raise a fine). Before the 2006 Act the inspectors of the National Employment Rights Agency (NERA) were not authorised officers under the Employment Permits Act. Post-2006 NERA inspectors have powers of investigation and inspection in relation to employers.

It is significant that the DJEI overcame delays on the part of the employer in these cases by issuing employment permits to fully cover all the periods of employment. This ensured that there was no breach of employment permit legislation by the employer. In other words, the employer was facilitated by the State in that s/he suffered no adverse affect as a result of his/her delay in making applications for the renewal of employment permits. Any adverse affect was suffered by the employee.

It appears that employers do not, as a rule, suffer penalties for delay in making applications to renew employment permits. Although there is legislation in place to do this, the approach of the two agencies involved ¹¹ is to ensure that the employment in question is regularised for the employees by the issue of permits with back-dated dates to cover employments by non-nationals whose employers have been remiss in making timely applications. There are reasons for this, of course, and the protection of the employee under employment legislation is among them, but when it comes to reckoning periods of lawful residence for such matters as passports for Irish-born children or in deciding applications for long-term residence and citizenship, the employee suffers as a result of the approach taken by the employer and the agencies involved in the matter. So, even where gaps in lawful residence are not caused by the DJEI by virtue of delays in processing applications, the systems in place are such that there are insufficient checks to prevent them from occurring, or, where the checks exist, that the procedures followed dilute their force.

Conclusion: The DJEI should examine its systems to seek ways to strengthen compliance by employers with employment permit legislation and specifically, to seek ways to prevent delay by an employer (or itself) impacting negatively on an employee's residency status.

5.4 Fair administration and the provision of information/assistance

The Ombudsman Act 1980, as amended, provides at Section 4, that the Ombudsman may investigate any action taken by a reviewable agency where it appears that the action may have adversely affected an eligible person and was contrary to fair or sound administration.

A new addition to Section 4, since the amendment of the Act in October 2012, is that a failure to comply with Section 4A of the Act is also a matter which the Ombudsman may investigate. Section 4A provides:

“This section applies when an action taken by or on behalf of a reviewable agency...affects-

(a) a right, privilege or other benefit to which an eligible person is or may be entitled...

(2) The agency shall, consistent with the resources available to the agency-

(a) give reasonable assistance and guidance to that person in any dealings of the person with the agency in relation to the action taken by the agency...

(b) ensure that the business of the person with the agency in relation to that action is dealt with properly, fairly, impartially and in a timely manner, and

(c) provide information to the person on any rights of appeal or review ...”

The Ombudsman (Amendment) Act 2012 was not law when the majority of the actions of the Departments concerned in these cases took place. However, “fair or sound administration” may be considered to encompass the provision of appropriate information and reasonable assistance to the users of public services.

There is no doubt that there were occasions when the complainants themselves contributed to the delays which led to the gaps in their status as lawful residents. It seems possible, given the complexity of the systems, that the distinction between the two systems for registration of residence and employment may not have been entirely clear to the people concerned.

Department of Jobs, Enterprise and Innovation

In considering whether the DJEI’s administrative systems are fair in the way in which it interacted and gave guidance to the employees involved in these cases, it is noted that none of the information available on its website is given in languages other than Irish or English, which puts those whose first language is neither at a disadvantage. In addition, the information on the website is given in a form which reflects the law but is not easy for a layperson to understand. It is noted that the Department intends to improve the website’s accessibility (there is a recommendation on the subject in the Government’s “Action plan for Jobs 2013”).

The Department pointed to the fact that it advises employment permit holders to regularise their status with Justice. The language in which it does this is not, perhaps, sufficiently direct and plain enough for a reader to understand what is expected of him/her. For example, the following is quoted from the relevant part of a letter sent to Mr Silva by the DJEI in 2009;

“NB. This permit relates to employment only. It is not a residence permit.

You must have at all times:

(a) current permission from the immigration authorities to be present in the State, and (b) an up to date passport.”

While this is accurate, its significance for the recipient may not be sufficiently clear. It could, perhaps, say that the permit holder should go to the immigration authorities without delay, as failure to do so could mean a gap in lawful residence. It could also give information on the location of the immigration office. These are essential points of information which, as with all communications of this kind, are best conveyed in as clear and simple language as possible.

The Department has also suggested that the people involved could have regularised their residence status for the periods for which they were awaiting employment permits, by obtaining temporary

permissions to remain. However, this may not be a satisfactory solution. The Department of Justice (according to information given to staff of this Office) pointed to the fact that granting a temporary permission would not encourage employers to comply with the employment permit legislation and could be seen as a disincentive for employers to make timely applications for renewals of permits. There is clearly merit in this argument; it is important from the point of view of the protection of employee rights and adherence to employment permit legislation that employers do not delay in making applications for the renewal of permits. The State should not provide the means to encourage such delay.

However, in commenting on the draft of this report, the DJEI relayed the information to this Office that the Department of Justice had confirmed to it that where cases are brought to its attention concerning individuals who had already applied for a work permit but had not received it yet from the DJEI and their residence permission had recently or was about to expire, Justice would usually grant them permission for four months to allow them to remain in permission while the work permit application process runs its course. (This is an informal arrangement. Information about it does not appear on the INIS website).

Department of Foreign Affairs and Trade

In considering the DFAT's administrative interaction with the passport applicants involved it is clear that the passport application process itself presented little or no difficulty for the applicants (although the information about it is only given in Irish and English). However, the DFAT is unable to act independently of the Department of Justice where there is doubt about title to citizenship, even though the latter Department has no explicit function in relation to the issue of passports.

When each of the three applications failed, the DFAT suggested to the applicants that they should contact Justice in relation to their residency status. However, the advice to contact Justice did not prove useful in that no revision of the durations of permissions to remain were made as a result of subsequent contact with Justice by the people concerned.

In the Santos case, it was only after the Ombudsman's Office had become involved that Justice advised the DFAT that the applicant's daughter had been issued with a certificate of nationality. If it is possible for Justice to exercise its discretionary power in relation to certain periods of unlawful residence (as it would appear to have done in this case) and to take into account the documentary evidence which was available in support of the case for lawful residence for that time, it should be possible for the DFAT to agree a similar approach with Justice – to be taken by the DFAT in relation to such evidence- for the resolution of similar cases.

Conclusion: In order that it may meet the requirement under the Ombudsman Amendment Act 1980, as amended, to provide “...*reasonable assistance and guidance to ... [its service users] in relation to the action taken by the agency*”, the DFAT will need to work with the Department of Justice to avoid delay and unfairness in processing passport applications from people with potential title to citizenship.

5.5 Conclusion

The problem for these complainants is clear-cut. While they are holders of employment permits, and have lived and worked in the State for many years, obliged by law to pay income tax and social insurance, yet for specific periods of time over these same years, their residence was unlawful.

In these cases, there were times when an employer delayed submitting an application to renew a permit as documentary evidence on DJEI files shows. There may, in addition, have been occasions, particularly in the years prior to 2007, when an employer failed to hand over the permit to the employee without delay. Although this cannot be proven, the fact that the system provided that the permits be issued to employers, rather than employees, in those years, would certainly have made this possible, if not probable. There were also times when the DJEI delayed in issuing permits. Yet the responsibility for the renewal of a permission to remain in the State nonetheless lay with the applicant, despite his lack of control over the other parties concerned and the fact that his application for a Stamp 1 could not succeed without a valid permit. He could, it seems, have applied for temporary permission to remain in the meantime but, in these cases at least, this seems not to have been realised (although something on these lines occurred in Mr Martins' case in 2007). Given that this is an informal, unpublicised arrangement and considering also, the wording of the immigration authority's message (Appendix 2), with its threat of deportation, it is perhaps not surprising that applicants waited for the issue of a new employment permit before presenting themselves to obtain a new "permission to remain".

The immigration authorities follow a policy of not back-dating permissions to remain in the State even where the applicant presents for registration with a back-dated employment permit. The periods of unlawful residence which then arise are, it seems, allowed to stand without any review mechanism coming into operation following a negative decision whether it is by the DFAT on a passport application or Justice itself on a citizenship/long-term residency application. The relevant legislation, Sect 4 (7) of the Immigration Act, 2004 does appear to allow for such reviews of the permissions in that it provides;

"A permission under this section may be renewed or varied by the Minister, or by an immigration officer on his or her behalf, on application therefor by the non-national concerned."

However, as mentioned earlier, the Department of Justice advised my Office that the authority to review or vary a permission is rarely used and then only in the most exceptional of cases (the cases of children in the care of the State was cited).

The actions of the immigration authorities in these matters are not under scrutiny in this investigation. They cannot be examined by this Office, for the reasons outlined in Chapter 1. It follows that this Office cannot make any findings or recommendations to the Department of Justice in relation to its administrative systems. As has been noted many times since the Office of the Ombudsman was established in 1984, Ireland is almost unique among countries with a public service Ombudsman in having the State's interactions with its immigrant non-EEA workers and asylum-seekers excluded from jurisdiction. This is exacerbated in these particular cases by the fact that the passport legislation allows for a right of appeal against decisions made on other grounds but does not allow for a right of appeal where the basis for the refusal relates to citizenship. Furthermore,

there is no legal right to appeal decisions on citizenship made under the Immigration Act, 2004 either. Effectively, there is no independent oversight (other than by way of recourse to judicial review) of public administration in this area.

In the absence of rights of appeal in any of these areas, it is important that the DJEI and DFAT work more closely with Justice to ensure that non-national workers in the State are treated fairly and are not disadvantaged or treated in a discriminatory manner by the agencies with which they interact.

The Principle of Proportionality

In any interaction between a public body and a member of the public the principle of proportionality requires that there must be a reasonable relationship between the objective which a public body seeks to achieve and the means used by the public body to attain that objective. It is an issue which arises most frequently when a public body decides to apply some form of penalty for a breach of rules or procedures. As far back as 1995, the Ombudsman has advocated an awareness of the principle of proportionality as an essential element of good administration. In his 1995 Annual Report, the former Ombudsman, Kevin Murphy, said,

"public bodies must ensure that an appropriate balance is achieved particularly in relation to any penalties or adverse effectthis may be of particular interest where a body must decide between the needs of the common good and the rights of a particular individual;"

It may be considered that the concept of proportionality is relevant to these cases. While some of the delay may have been on the part of the complainants themselves, the detriment that they and their families suffered as a result (loss of citizenship rights to which their child would otherwise have title, additional costs, compromise of their own residence status) seems disproportionate to any failures on their parts.

It is important to note at this point that the State is not without responsibility to immigrant workers whose employers have successfully applied for employment permits for them. They have children born in the State and will, in time; have the right to apply for citizenship. In fact, in all of these cases, the men involved have amassed a sufficient period of lawful residence time to apply for citizenship.¹² They had reasonable grounds to suppose their Irish-born children would have title to citizenship without the need – and cost- of a formal application process. They are employees and taxpayers and have various rights and obligations under, at a minimum, employment, social welfare, education and health legislation. They and their employers have paid fees for every “permission to remain” and every employment permit. The fact that they do not have permission to be in the State for periods ranging in duration from a few days to a number of months for the same time as their presence here in State-approved employment appears to be an anomaly in our administration. The question arises; what purpose is served by allowing these gaps to appear in a person’s lawful residence in the State and no answer is immediately apparent.

6. Responses to draft report

A copy of this report, in draft form, was sent to both the DJEI and DFAT. In accordance with section 6(6) of the Ombudsman Act 1980 as amended, both Departments were afforded the opportunity to make representations in relation to the draft findings and also to draw attention to any factual errors in the report.

Department of Foreign Affairs and Trade

The DFAT found the draft report to be fair in terms of representing the Department's position. The findings were also accepted in principle. In his response on behalf of the Department, the Secretary General gave an undertaking to write to his counterpart in the Department of Justice and Equality with a view to obtaining clarification on certain matters to do with citizenship policy. He also undertook to request that both Departments appoint liaison officers who will be responsible for dealing with cases/correspondence and passport policy matters within a period of six weeks.

Department of Jobs, Enterprise and Innovation

The DJEI's response stressed the fact that their systems are much improved in the past few years and also pointed to changes in the legislation which sought to address potential abuse of the employment permit system to the detriment of the employee. These and other improvements have minimised the risk of delays in the period since these cases arose. In addition, the DJEI and the Department of Justice have recently established a working group to investigate the feasibility of introducing a unified employment permit and visa applications system as part of the Action Plan for Jobs 2014.

The Department said it was unable to offer any remedy to Mr Martins and Mr Silva as responsibility for issues relating to their immigration status lies with the immigration authorities. However, it subsequently supplied information on a number of points relating to its response. Among these points were;

- the DJEI and Justice have, since the end of 2013, a Memorandum of Understanding on the sharing of information using an electronic data sharing facility. The two Departments also exchange information about individual cases on an informal basis.
- The DJEI proposes to seek approval from the National Adult Literacy Agency (NALA) for the Employment Permit Section's documentation. This may take place following the enactment of new Employment Permits legislation. In the interim, every effort will be made to ensure that all written information supplied is clear and account is taken of the fact that English may not be the first language of the reader.
- The Department of Justice supplied additional information to the DJEI about its processes (which have since been incorporated into the body of this report). It also confirmed that a review of the case of Lucas Silva had been completed and that, having considered the position regarding the applications for and issuing of work permits and residency permissions, it has been determined that his son is deemed to have an entitlement to Irish citizenship and it is proposed to issue a certificate of nationality to Lucas Silva for his son

shortly. A review of the case of Mr Martins' son is ongoing and should be finalised in the near future.

Comment on responses

In the draft of this report only one finding against the Department of Foreign Affairs and Trade was made and that was to the effect that the Department's contacts with the Department of Justice whereby it seeks advice and direction are, in the absence of a protocol with agreed deadlines for responses, the cause of delays and uncertainty for passport applicants. The lack of such a protocol was found to be contrary to fair or sound administration.

The Secretary General's response to this proposed finding was to advise this Office that he will write to his counterpart in the Department of Justice and Equality to obtain clarification on certain matters to do with citizenship policy and he will also request that both Departments appoint liaison officers who will be responsible for dealing with cases/correspondence and passport policy matters within a period of six weeks. This is a progressive step and the Ombudsman has taken it into account in making his findings and recommendations in this final report.

The DJEI has also reported progress on various issues relevant to this investigation. The faster employment permit processing times in particular and in addition, the closer working relationship between it and the Department of Justice should lead to fewer cases of the sort investigated here.

There will, however, very likely still be individuals affected by the pre-2007 employment permit legislation which effectively excluded employees from any control over the arrangements for the renewal of their employment permits. There are also likely to be people adversely affected by the Department's own delays in processing applications, even where those delays are in the past. This is because, as shown earlier in this report, those years will, depending on the child's date of birth, have a bearing on the calculation made of the parent's residence in the four years prior to that date.

In his draft report, the Ombudsman found that the adverse affect suffered by Mr Martins and Mr Silva as a result of the failures in the administrative systems was disproportionate to failures on their part. While this has clearly been the case for these complainants (and, probably, others in similar positions) this finding is not included in this final report in view of recent action on the part of the DJEI and Justice.

It is encouraging to note that despite its initial response to this report, the DJEI did find it possible to engage in recent times with the Department of Justice in relation to the individual cases of Mr Silva and Mr Martins with details of their employment permit application histories and that, as a result of this contact, Justice is considering the cases afresh. The limitations of the Ombudsman's jurisdiction prevent the Ombudsman from engaging directly with Justice in relation to them.

While the Department may make informal contact with the immigration authorities in individual cases to seek to mitigate the adverse affect caused by delays which are not the fault of the permit holders, these arrangements are inadequate, in that they are provisional and respond only to the individual cases presented. It is acknowledged that the Minister for Justice is the sole arbiter in matters of citizenship. However, the Department of Jobs, Enterprise and Innovation will have, in many cases, information which is useful and pertinent to the decisions made by the immigration

authorities and as this is the case, it would be sensible to have a formal arrangement in place for the transfer of such information.

It is acknowledged that it is also a step toward improved administrative processes that the DJEI proposes to involve NALA in drawing up its documentation in future.

7. Findings

Arising from this investigation the Ombudsman makes the following findings¹³

- in relation to the actions of the Department of Foreign Affairs and Trade;

1. That the Department is correctly applying the law in relation to the processing of passport applications from non- EU/EEA or Swiss applicants.
2. That the Department's proposal to improve its processes for contact with the Department of Justice, and in particular, to ensure that communications are responded to within a specified time limit is a reasonable remedy to the delays which arose for passport applicants whose cases required advice from the Department of Justice. The lack of such an arrangement was found to be an undesirable administrative practice and contrary to fair or sound administration.

- in relation to the actions of the Department of Jobs, Enterprise and Innovation;

3. That the Department is correctly applying the law in relation to the processing of employment permit applications for non- EU/EEA or Swiss workers.
4. That delays in processing employment permit applications on the part of the Department and/or delays in issuing permits due to the procedures in place prior to 2007 cause adverse affect to the workers concerned, which may persist to the present day in their continuing effect on their own and their childrens' residency status.

The lack of a considered, formal, procedure to mitigate the adverse affect of such delays, to apply to all such cases, is improperly discriminatory and contrary to fair administration.

8. Recommendations

I recommend that the Department of Foreign Affairs and Trade undertake the actions proposed by its Secretary General on 4 March 2014 and that the Department advise me of the result of those actions by the end of July 2014.

In view of the proposal by Government that the Departments of Jobs, Enterprise and Innovation and the Department of Justice and Equality investigate the potential for introducing a unified employment permit and visa applications system, and in view also of the fact that the individual cases examined in this report have been reviewed by the authorities, I am not making any recommendations to the Department of Jobs, Enterprise and Innovation other than it should give consideration to putting its informal arrangements for the review of individual cases by the immigration authorities on a more formal and open footing.

Peter Tyndall

Ombudsman

Appendix 1 Selected Correspondence

Submissions from Department of Jobs, Enterprise & Innovation and Department of Foreign Affairs and Trade to the notification of the investigation. Also included is a letter from DJEI of 4 March 2013.

Letter from DJEI to Office of the Ombudsman 4 March 2013

4 March 2013

Dear Ms Doyle,

I refer to your letter of 22nd January 2013 concerning Mr Santos in which you sought information concerning the relevance of an Employment Permit (EP) in determining residency.

The EP system is a distinct and separate process that operates apart from the immigration system. There are of course linkages where the status of having an EP can affect the granting of residency and vice-versa. The EP system stems from the Employment Permits Acts of 2003 and 2006 which provides that it is illegal for certain categories of foreign nationals to be employed in Ireland unless authorised to do so by the Minister of Jobs, Enterprise and Innovation in the form of an Employment Permit. In determining applications, the Department considers the bona-fides of the employer, the skills and experience of the prospective employee and the conditions at play in the labour market.

In the normal course of events, an application is made to the Department while the prospective employee is residing outside of the State. If an application is successful an EP will issue. After this point, this Department is unlikely have any further interaction with the prospective employee until such time the EP is renewed or a further EP is applied for e.g. where the employee wishes to move from one employer to another.

Further actions are required by the employee before they can take up employment. These requirements relate to immigration controls and residency permissions and as such are matters for the Department of Justice and Equality. While I am reluctant to comment further on the process as it does not fall within my remit, in the interests of information I understand that the common sequence of events after an applicant receives an EP is that the prospective employee will seek permission to enter the State. This may be via a local Irish Embassy or directly from the Department of Justice and Equality's INIS. When the prospective employee lands in Ireland they will be assessed by immigration control. The assessment may take into account all relevant documentation including the EP in order to satisfy immigration control of the legitimacy of the arrival. Immigration control may stamp the passport and provide permission to enter the State subject to the prospective employee presenting themselves to INIS in order to obtain the appropriate residency permission. INIS will generally provide residency for a duration in line with the EP. There may be a difference in

periods between residency and the EP reflecting the time that has elapsed since the issue of the EP and presentation at INIS.

Therefore, situations can arise where an EP holder does not land in the State (e.g. after changing their mind), or is denied permission to land in the State (e.g. if information came to light about the prospective employee which made it undesirable for them to be permitted to enter the State). Also, sometimes an EP holder can be employed in the State without having an EP e.g. generally EPs are not renewed past five years due to the holder having earned eligibility to apply for long term residency. Of course, situations also arise where someone may have permission to reside but not permission to be employed (e.g. a self-employed person with suitable residency permission).

EPs are generally issued on the basis that the employee will be continuously employed over the period of the EP. It can arise at renewal of an EP that a break in employment is observed e.g. in cases where the employee left the State for a period of time. Generally, the Department will take a benevolent consideration of this in recognition that sometime family or other circumstances will require an employee's absence and also that to deny the EP at renewal will have a detrimental impact on the employer. However, it may be the case that a break in residency could have a bearing by INIS on future residency permission. Finally, I have observed from time to time that sometimes employees or employers forget to renew their EP and also that employees forget to renew their residency permission.

Therefore, in relation to your case, and in answer to your questions this Department does **not** seek evidence of permission to remain in the State at the time of the **initial** application. It does seek copies of passport information in order to ensure that the person was not unlawfully in the State. Otherwise, there would be an attraction for people to unlawfully enter the State prior to regularising employment. At **renewal**, copies of passports are sought to ensure that the person still has permission to reside in the State as the residency permission may have changed over the course of the original EP's duration e.g. on foot of a criminal conviction.

The Department does not consider a person supplied with an EP to have permission to remain in the State for the full period of employment for which the EP was given. It would be inappropriate for the Department to take a view on such matters as they do not fall within our remit. As illustrated above, the two processes are distinct and serve different objectives.

Finally, the legislative basis for Employment permits are the Employment Permits Act 2003, and the Employment Permits Act 2006. The Department is currently in the process of drafting new legislation in order to update the EP system to reflect current labour market requirements and to make necessary corrections to the legislation e.g. the recent High Court case concerning the impact on an employee's employment rights by virtue of not having a valid EP.

As requested, please find enclosed copy of the EP file for this case. I enclose the file with a level of respectful reluctance because the file contains personal and commercial data and in light of the points made above, is in my opinion not pertinent to the complaint. It is provided in recognition that this is a matter for the Ombudsman to determine.

As noted above, the foregoing is not an authoritative account of the immigration and residency process and any consideration of that process should be on the basis of formal information provided by the Department of Justice and Equality.

I trust this is of assistance to you.

Yours sincerely,

John Newham

Principal Officer

*Chemicals Regulations,
Workplace Health & Safety Policy,
Economic Migration Policy & Employment Permits*

Department of Jobs, Enterprise and Innovation
Davitt House,
65A Adelaide Road
Dublin 2

Response of DJEI to notification of investigation

5 July 2013

Mr Tom Morgan
Office of the Ombudsman
18 Lower Leeson Street
Dublin 2

Dear Tom

I refer to your recent correspondence in connection with a Statement of Complaint in respect of passport applications for children of Messrs Martins, Silva and Santos and the processing of their respective employment permits that preceded this complaint.

Interview

In the first instance I would like to advise you that Mr Anthony Morrissey (Anthony.morrissey@djei.ie), 016313378, and Joan Kehoe (Joan.kehoe@djei.ie), 016312766, of this office will be available to discuss these and related matters with representatives of the Office of the Ombudsman.

Outline of individual cases

In order to facilitate your request I set out details of each case hereunder in terms of the respective cases' processing times. I hope that this will clarify the position in terms of how each of these individuals' permit applications was processed.

Bruno Martins

Mr. Martins has held seven permits for Donegal Co.. from October 2002. A table setting out Mr Martin's permit history is set out hereunder.

Permit History

Permit period	Date Received	Date issued
2/11/2002 -1/11/2003	9/10/2002	2/11/2002
2/11/2003-1/11/2004	3/11/2003	11/11/2003
2/11/2004 – 1/11/2005	29/10/2004	22/11/2004
2/11/2005-1/11/2006	11/11/2005	15/11/2005
2/11/2006-1/5/2007	27/3/2007	19/07/2007
2/5/2007 -1/5/2009	12/2/2008	28/2/2008
02/05/2009 -unlimited	23/2/2009	17/4/2009

Processing Details

Each application was processed within the timeframe for processing applications that pertained at that point in time.

Four late applications were submitted to the Department during this period. Renewal applications should have been submitted at least eight weeks before the expiry date of the existing employment permit. During this time the individual should have ensured that their residency status was kept up to date.

While two of these were late only by a matter of days the other two applications were late by (1) four and a half months (previous permit expired 01 November 2006, next application received 27 March 2007) and (2) nine and a half months (previous permit expired 01 May 2007, next application received 12 February 2008) respectively.

Lucas Silva

Permit History

Permit periods	Date of receipt	Date of issue
2/11/2002-1/11/2003	9/10/2002	2/11/2002
2/11/2003 – 1/11/2004	3/11/2003	10/11/2003
2/11/2004-1/11/2005	8/11/2004	24/11/2004
2/11/2005-2/4/2006	11/11/2005	19/11/2005
2/4/2006-1/4/2007	2/6/2006	29//6/2006
2/4/2007-1/4/2009	27/3/2007	20/7/2007
2/4/2009- unlimited	22/1/2009	9/2/2009

Processing Details

Mr. Silva has held seven permits for Donegal Co.. from October 2002. Each application was processed within the timeframe that pertained for processing applications at that point in time.

Three applications were submitted late to the Department during this period. While two of these were late only by a matter of days the other application was late by two months (previous permit expired 02 April 2006, next application received 02 June 2006).

It is noted, in the cases of both Mr Martins and Mr Silva, that applications that were submitted on 27 March 2007 issued on 19 July 2007. This was within the timeframe for processing applications that pertained at that time.

However, the onus is on the proposed employee to maintain their immigration status during all periods of time in the State.

Gabriel Santos

Permit History

Permit Period	Date of receipt	Date of issue
16/6/2006 -15/6/2007	22/5/2006	13/6/2006
16/6/2007 -15/6/2009	18/10/2007	6/12/2007
16/6/2009 -15/6/2011	28/5/2009	16/9/2009

Processing Details

Mr. Santos has held three permits for Waterford employer from June 2006. Each application was processed within the timeframe for processing applications at that point in time.

One of the applications was submitted to the Department late during this period (his previous permit expired on 15 June 2007 and the next application was received on 18 October 2007).

Renewal applications should be submitted at least eight weeks before the expiry date of the current employment permit. During this time the individual must ensure that their immigration status is kept up to date.

It is noted that Mr. Santos' application submitted on 28 May 2009 was issued on 16 September 2009. This was in line with the current processing times. As Mr. Santos application was received prior to the expiry of his previous permit he would have been permitted to remain in employment while awaiting a decision on his application.

Documentation

Documentation in respect of the applications of Mr Martins and Mr Silva has already been sent to the Office of the Ombudsman. In the cases where files could not be located a computer generated version of the application was supplied. Despite renewed and extensive searches of the Department's archival facilities the outstanding application papers could not be located.

Departmental obligations under terms of Section 4(2) (b) of the 1980 Ombudsman Act

The procedures that took place in respect of all of the above Employment Permit actions have been re-examined in detail. This Department contends that in its dealing with the individuals named

- **That this Department took no action that has or may have adversely affected the named persons that form the subject of this complaint**
- **that any action in respect of these individuals' cases did or may not have been—**
 - (i) without proper authority,**
 - (ii) on irrelevant grounds,**
 - (iii) the result of negligence or carelessness,**
 - (iv) based on erroneous or incomplete information,**
 - (v) improperly discriminatory,**
 - (vi) based on an undesirable administrative practice,**
 - (vii) a failure to comply with section 4A of the Ombudsman's Act**
 - (viii) other wise contrary to fair or sound administration.**

I would like to conclude that the above named officers of this Section will be available to

discuss any matters that may arise in this instance. In addition I would stress that this Section will take all steps in its power to cooperate with the Office of the Ombudsman to ensure a satisfactory conclusion to this matter.

I hope that the above is of assistance to you.

Yours sincerely

Maureen O'Sullivan
Personnel Officer

Response of DFAT to notification of investigation



An Roinn Gnóthaí Eachtracha agus Trádála
Baile Átha Cliath 2

Department of Foreign Affairs and Trade
Dublin 2

5 July 2013

Mr. Tom Morgan
Senior Investigator
Office of the Ombudsman
18 Lower Leeson Street
Dublin 2

Dear Mr. Morgan,

I refer to your letter of 14 June, 2013 (ref. C11/12/1704) concerning the notification by your Office of an investigation under section 4 of the Ombudsman Act, 1980 (as amended) into complaints about this Department's decisions to refuse passports to a number of children.

As you are aware the Department has cooperated fully with the Office of Ombudsman in this matter and will continue to do so during the course of this investigation. There has already been detailed correspondence in this matter from the Passport Service. Nonetheless, the Department has accepted the invitation to present a submission in this matter as part of the investigation process. I am pleased to enclose this with my letter.

The main points from the submission can be broadly summarized as follows:

- The Minister for Foreign Affairs and Trade is responsible for the implementation of the Passport Act, 2008. Section 7 of this Act provides that a person must be an Irish citizen before s/he can be issued with a passport;
- Citizenship entitlement of the children in question is governed by the 2004 amendment of the Irish Nationality and Citizenship Act, 1956 (the Act). The Minister for Justice, Equality and Defence is responsible for the implementation of this Act. That Department has advised on the required evidence needed in the context of a passport application that would demonstrate a child's entitlement to Irish citizenship;
- The submitted evidence for the children in question did not demonstrate their entitlement to Irish citizenship. By law therefore, their applications for passports had to be refused by the Department;
- There have been two important and recent developments. The first of these relate to the Supreme Court judgement in *Faisol Oluwanifemi Sulaimon (a minor) vs. Minister for Justice and Equality* which dealt with the issue of acceptable proofs of lawful residence. The second concerns the certification by the Department of Justice and Equality that [REDACTED]

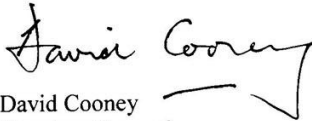
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██████████ is an Irish citizen. (Her father, ██████████ is one of the complainants.)

- This Department has correctly sought clarification from the Department of Justice, Equality and Defence in these matters for the purpose of reviewing and, if required, changing its passport entitlement process for this category of passport applicant.

You may already be aware that two officials in the Passport Service – Mr. Joseph Nugent, Director of Passports Services and Mr. Kevin Walzer, Passport Office, Balbriggan - have been handling the Department's end of this case. Both officials are available to meet you during the course of your investigation.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'David Cooney', with a stylized flourish at the end.

David Cooney
Secretary General

Submission by the Department of Foreign Affairs and Trade regarding complaint C11/12/1704

1. The Minister for Foreign Affairs and Trade is responsible for the implementation of the terms of the Passports Act, 2008 (the Act). This Act provides the legal framework for the issue of passports to Irish citizens.
 2. The Minister for Justice, Equality and Defense (D/JED) is responsible for all matters relating to the grant of and entitlement requirements for Irish citizenship. His Department presides over the legislation in this area which is embodied under the provisions of the Irish Nationality and Citizenship Act 1956 (the 1956 Act) as amended.
 3. The complaints in these cases relate to the process applied to the submitted applications which resulted in the refusal of passports to the applicants.
 4. Section 7(1) of the Act is unambiguous in terms of the requirement that the Minister must be satisfied that each applicant is an Irish citizen before a passport can issue to him/her.
 5. All of the applicants were born in Ireland after 1 January, 2005. Their entitlement to Irish citizenship is, therefore, governed by section 6A of the 1956 Act. This provides that a person born in the State after 1 January 2005, where neither parent is an Irish or British citizen or otherwise entitled to reside in the State or Northern Ireland without restriction, may claim citizenship by birth in the State (and thereby establish eligibility for a passport) only where a parent has been lawfully resident in the State for 3 of the 4 years preceding his/her birth.
 6. It follows from this that the amount of lawful residence of the applicants' parents is key. Section 7(2) of the Act provides for the submission documents/proofs, as required, to show a person's entitlement to Irish citizenship and thereby a passport. It states that –

“7.(2) The Minister may require an applicant for a passport to provide such information as the Minister may require for the purposes of the application and to produce to him or her such documents as he or she considers necessary or expedient to enable him or her perform the functions of the Minister under this Part (of the Act).”
 7. The parents of the applicants are all non-EU/EEA/Swiss nationals. The Department provides information on this specific category of citizenship entitlement on the Passport Application Form Notes that accompany each application form. The standard documentary evidence required under section 7(2) of the Act are:
 - (i) applicant's long form birth certificate;
 - (ii) a statement from the parent's claiming the required amount of lawful residence;
 - (iii) that parent's passport(s) containing the relevant issued permissions from the Garda National Immigration Bureau (GNIB) and/or his/her residence registration card.
- The Department is satisfied that the requirement for these documents is lawful under the Act.
8. As the D/JED has sole responsibility for legislative and policy matters pertaining to Irish citizenship it has been (and continues to be) necessary for this Department to consult and/or

seek clarification from them, as the lead Department, in regard to the implementation of the 1956 Act to ensure that the issue of passports is only made to Irish citizens.

9. The Department in its letter of 18 February, 2013 to the Office of the Ombudsman (OM) stated that on the advice of the D/JED, the only acceptable evidence of lawful residence for parents, who are non-EU/EEA/Swiss national, for the purposes of a passport application, are issued permissions to remain in the State, GNIB registration cards and/or letters from GNIB, which outline the registered presence in the State of a person.

10. The manner in which this Department calculates reckonable evidence from this evidence is important. As stated in the Department letter of 30 January, 2013, Section 6B(4) of the amended 1956 Act defines what the residence on the part of the parent is not reckonable for the purposes of section 6A. Given its importance, this provision is re-stated below –

“(4) A period of residence in the State shall not be reckonable for the purposes of calculating a period of residence under section 6A if –

(a) it is in contravention of section 5(1) of the Act of 2004, ... “

The Act of 2004 referred to above is the Immigration Act, 2004. Section 5(1) states that –

“(1) No non-national may be in the State other than in accordance with the terms of any permission given to him or her before the passing of this Act, or a permission given under this Act after such passing, by or on behalf of the Minister.”

11. This provision makes clear that the lawful presence/residence in the State of a non-EU national is subject to issued permissions to remain in the State from GNIB. Each permission states the lawful commencement and end of a period of residence in the State for a person.

12. It often arises that there are “gaps” between validity dates of permissions which have been issued to a person. The question, therefore, arises if the residence within these “gaps” is lawful and thus reckonable for the purposes of section 6A of the 1956 Act. The basis for dealing with such residence is centered on the watershed date of 13 February, 2004 when the Immigration Act, 2004 was enacted.

13. Residence in gaps periods that arose from permissions which were issued prior to 13 February, 2004 is considered lawful as the terms of the Immigration Act, 2004 were not in force at the time these particular permissions were issued. (The inclusion of such residence in the Department’s calculation was made in the Bastos application - ref. the Department’s letter of 30 May, 2013.)

14. However, the situation changes thereafter. Residence that is not covered by a permission, which has been issued under the Immigration Act, 2004, has not been considered lawful and thus reckonable for the purposes of section 6A of the 1956 Act. Accordingly, such residence has not, heretofore, been included in the Department’s calculation of reckonable residence. (This has been the case for the complainants.)

15. There have been two important and recent developments both of which were mentioned in the Department’s most recent letter of 30 May, 2013. The first of these relate to the Supreme Court judgement in *Faisol Oluwanifemi Sulaimon (a minor) vs. Minister for Justice*

and Equality which dealt with the issue of acceptable proofs of lawful residence. The second concerns the certification by the Department of Justice and Equality that [REDACTED] is an Irish citizen.

16. In line with previous practice, the Department wrote to the D/JE on 17 June, 2013 in regard to the [REDACTED] certification of Irish citizenship and guidelines for the implementation of the Sulaimon decision. A copy of this is attached. Their clarification in this matter is needed to review (and change if required) the manner in which the Passport Service assesses evidence of lawful residence. The Department believes that this is the proper and only way to do this.

17. The Statement of Complaint (SC) indicates that the complaints, received by the OM, relate to the “handling” of the submitted applications. Yet there is nothing in the SC that specifically shows or proves where the Passport Service has failed in its implementation of the Act.

18. The complainants place much value in their issued work permits in terms of establishing the lawfulness of their residence in the State. However as stated in the Department’s letter of 30 January, 2013, there is no provision within the Immigration Act, 2004 that shows that work permits may be used to take up lawful residence in the State. Work permits are issued by the Department of Jobs, Enterprise and Innovation (D/JEI) under Irish law to permit a non-national to work in Ireland under certain conditions that apply to the employer and which provides certain protection to the worker.

19. The OM in its email of 1 February, 2013 informed this Department that it had accepted “that work permits are not ‘permissions to reside’ in the State as defined by the Immigration Act, 2004.” Therefore, it is a matter of law for the Passport Service not to accept such evidence as lawful residence. This passport entitlement practice cannot therefore be viewed as “inequitable and unreasonable”.

20. As the Passport Service is not responsible for the issue of permissions to stay in the State, it is not privy to the legal and regulatory criteria applied to the grant and issue of these permissions nor is it accountable for the systems that produce these items of evidence relating to residence. In view of this, the reason for this investigation of the Passport Service in this area is not clear.

21. The Passport Service has no responsibility whatsoever for the administration of the aforementioned permits systems and the implementation of the relevant regulations and legislation. The Department, as shown in this submission, can only highlight anomalies that arise in the quality and content value of submitted evidence and correspond with the relevant Departments on how these create difficulties in the implementation of the Passports Act.

Passport Service
5 July, 2013

Appendix 2 Permission to Remain for Non-E.E.A. Nationals

The following is an excerpt from the INIS website at the time of writing this report:

Permission to Remain for Non-E.E.A. Nationals

E.E.A. (European Economic Area) is comprised of the 27 Member States of the European Union plus Iceland, Liechtenstein, Norway and Switzerland.

1. What is Permission to Remain?

Permission to Remain in Ireland is a statement of the conditions on which a non-EEA national is permitted to remain in the State and the duration of that permission. It is given on behalf of the Minister for Justice and Equality in the form of a stamp (endorsement) in your passport. A residency document – Certificate of Registration - may also be issued for the same period of time as the stamp (endorsement) placed in your passport.

2. How do I obtain Permission to Remain?

On arrival in the State you will be given leave to enter the State and Permission to Remain for a particular purpose and allowed to remain for a period (which may be up to three months). If you wish to remain in the State beyond the period granted by an Immigration Officer on your arrival in the State, you will be required to obtain the permission of the Minister for Justice and Equality. This can be done by reporting to your local Superintendent's Office, An Garda Síochána (Police) in the District in which you reside. In the Dublin area you must report to the Garda National Immigration Bureau, 13/14 Burgh Quay, Dublin 2.

Visa Required nationals who enter the State on foot of a C Visit Visa cannot have their Permission to Remain in the State extended. They must leave and reapply from outside the State should they wish to return.

3. Who requires Permission to Remain ?

All non-EEA nationals need Permission to Remain in the State. Permission to Remain will be in the form of an endorsement in your passport confirming the conditions and period of time for which you have Permission to Remain in the State.

4. What Documentation is required to obtain Permission to Remain?

You will need to provide the following in connection with your application for Permission to Remain: (a) valid passport; (b) evidence that you have sufficient funds with which to support yourself and any dependants; (c) any information requested in connection with the purpose of your arrival in the State;

.....

Permission to Remain will be granted by way of a Stamp (endorsement) in your Passport and a Residence document - Certificate of Registration - may also be issued. Under no circumstances may you engage in activity in the State for which you do not have the appropriate permission. For example, a person with Permission to Remain as a visitor shall not work. Visa required nationals should ensure when applying for an Irish entry visa that they state the true and precise reasons for their seeking entry to the State.

5. For what duration can I get Permission to Remain? You will normally be given Permission to Remain for the duration of your stated purpose in the State. Persons who have been issued with a Employment permit or Green Card Permit will be granted residency up to the expiry date of that permit.

6. EEA Nationals - If their spouses and dependants are non-EEA nationals, do they need Permission to Remain?:

Yes. They will require permission to reside here also.

7. How can I obtain Long Term Residence in Ireland?:

The following categories of persons may apply for long-term residence permission.

Persons who have completed 5 years (60 months) legal residence in the State on the basis of employment permit conditions (i.e. 60 months Stamp 1 endorsement in passport) may apply to the General Immigration Division, 3rd Floor, Department of Justice and Equality, 13-14 Burgh Quay, Dublin 2 for a 5 year residency extension. If applications are successful persons will be granted an exemption from employment permit requirements.

Periods of residence in the State for the purpose of study; as a temporary registered doctor, intra-company transfer or holiday working visa do not count for this purpose.

The following documents together with a covering letter of application clearly indicating the passport endorsements (totalling 60 months) relating to each employment permit are required:

- Copy employment permits.
- Copy Certificate of Registration (GNIB Card)
- Clear and legible copy passport including all endorsements (If your passport has expired since arrival in the State, please submit copies of both passports)

Applicants are also advised to keep their Permission to Remain up to date at all times (including while their application is being processed.)

8. How can I Renew my Permission to Remain?

Your Permission to Remain in the State should never be allowed to lapse and the onus is on you to ensure that this does not happen. You should apply to the Registration Officer responsible for the area in which you reside in good time to have your Permission to Remain in the State extended. **You will be required to submit documentation relating to your reasons for seeking further Permission to Remain i.e. employment permit holder must submit a new employment permit,** and evidence of employment.

9. What if I am refused Permission to Remain?

If you are refused Permission to Remain in the State you will be informed of the reasons for this and given the opportunity to leave the State voluntarily within a specified period. Failure to depart voluntarily may result in you being subject to deportation.

Appendix 3 Table of relevant dates

Complainant	Residency Permissions	Date of Permission	Work permit	Date work permit Application	Work permit issued	Delays
1	2	3	4	5	6	7
Gabriel Santos – Child, 19/05/10	20/04/06 - 12/06/06 Counted in amended decision	21/04/06	16/06/06-15/06/07	03/05/06	13/06/06	
	28/06/06 - 15/06/07	28/06/06				
	16/08/07 - 15/09/07	20/07/07	16/06/07-15/06/09	15/10/07	6/12/07	
	22/04/08 - 15/06/09	22/04/08	WP covered this period			
	24/09/09 - 24/09/10	24/09/09	16/06/09-15/06/11	28/05/09	16/09/09	No apparent reason for delay on part of DJEI
Bruno Martins – Child, 16/10/09	2004?- 01/11/05	01/11/2005	02/11/04-01/11/05	29/10/04	22/11/04	
	09/01/06-01/11/06	09/01/06	02/11/05-01/11/06	11/11/05	15/11/05	
	09/05/07-01/08/07	09/05/07	02/11/06-01/05/07	27/03/07	19/07/07	Employer-delay;5 months DJEI; 4 months
	10/03/08-09/03/09	10/03/08	02/05/07-01/05/09	12/02/08	28/02/08	Employer;10 months
	06/05/09-06/11/10	06/05/09	02/05/09- Unlimited	23/02/09	17/04/09	EP issued prior to expiry of previous one; no explanation for gap

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Lucas Silva- Child born 19/07/07	16/11/02- 01/11/03	16/11/02	02/11/02- 01/11/03	09/10/02	02/11/02	
	09/01/04- 01/11/04	09/01/04	02/11/03- 01/11/04	03/11/03	10/11/03	
	11/12/04- 01/11/05	01/11/04 ? + 11/12/04	02/11/04- 01/11/05	08/11/04	24/11/04?	
	16/03/06- 02/04/06	16/03/06	02/11/05- 02/04/06	01/11/05	19/11/05	
New passport Brazilian Embassy 10/04/06	27/10/06- 01/04/07	27/10/06	02/04/06- 01/04/07	02/06/06?	29/06/06	Employer; 2 months DJEI; 1 month
	04/07/07- 10/04/08	04/07/07	02/04/07- 01/04/09	27/03/07	20/07/07	

Endnotes

¹ The jurisdiction of the Ombudsman includes the actions of the Department of Justice but excludes any action “taken in the administration of the law relating to immigration or naturalisation” (Part 11 of first schedule of the Ombudsman (Amendment) Act 2012.)

² Section 4(7) of the Immigration Act 2004 says, “permission under this section may be renewed or varied by the Minister, or by an immigration officer on his or her behalf, on application therefor by the non-national concerned.”

³ Sulaimon -v- Minister for Justice Equality & Law Reform, **Neutral Citation:** [2012] IESC 63, **Supreme Court Record Number:** 323/10

⁴ Directive 2011/98/EU of the **European Parliament and of the Council; to be transposed into law by those Member States which it covers, by end December 2013**

⁵ Section 2(3) of the Employment Permits Act 2003

⁶ We are not concerned here with the various checks which are made by the Immigration Officer; there are a number which include such matters as whether the person has sufficient funds; has been convicted of an offence; has the requisite visa etc

⁷ Section 9 of Employment Permits Act 2006

⁸ A typical stamp 1 gives permission to the passport holder to remain in the State; “...on condition that the holder does not enter employment unless the Employer has obtained a permit, does not engage in any business or profession without the permission of the Minister for Justice... and does not remain later than [the Immigration Officer inserts a date in manuscript here] for Minister for Justice...Date ” [here the Officer inserts another date in manuscript which is the date on which he is granting the permission].

⁹ <http://www.inis.gov.ie>

¹⁰ “ Action 148: Develop and strengthen coherence between the employment permit regime and visa regime”. Action 113 in the **2014** Action Plan for Jobs commits the DJEI and Justice to “investigate the potential for introducing a unified employment permit and visa applications system”. At the time of finalising this report a working group had been established by both Departments to examine the options for a unified system.

¹¹ DJEI and NERA. See <http://www.employmentrights.ie/en/media/NERA%20Review%202012.pdf>

¹² There has been some discussion about the relatively poor take-up of Irish citizenship; see http://www.immigrantcouncil.ie/images/stories/ACIT_Handbook_IEIreland_ENGLISH.pdf

¹³ These findings reflect the language of section 4(2) (b) of the Ombudsman Act 1980 as amended which identifies eight categories of maladministration. These apply where an action was or may have been (1) taken without proper authority, (2) taken on irrelevant grounds, (3) the result of negligence or carelessness, (4) based on erroneous or incomplete information, (5) improperly discriminatory, (6) based on an undesirable administrative practice, (7) a failure to comply with section 4A or (8) otherwise contrary to fair or sound administration.