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This is a follow-up letter of a previously published letter titled ‘Super-Citizens: Equal Powers comes with Greater Responsibilities’.

## Neither Here nor There: Residency as a Condition for Naturalisation

Bashir Otukoya

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Dear Editor,

Borders, physical or imaginary, are becoming less relevant in a world where cheap flights and international interdependency are prominent. As a result, there now exists a legal sorcery in the art of being here whilst at the same time, being somewhere else. In Irish immigration law, the conditions for becoming a citizen through the process of naturalisation demands that the immigrant acquires a reckonable residence of five out of nine years in the State. However, the determination of this residence period poses a problem in establishing which legal concept of residence is required. Legal terminology on residency can be found in different areas of law. You will find ‘lawful residency’ in immigration law and ‘actual residency’ in taxation law. ‘Normal’ and ‘habitual residency’ are both found in succession law and family law. Therefore, to put in context the term ‘neither here nor there’, to which this letter refers, different areas of law may classify you as having one form of residence, whilst having another at the same time.

For example, some people ‘temporarily reside’ in Belgium but are ‘habitually resident’ in Brazil. The difference of course is that the former has no real legal benefits, apart from a visa that lets you stay in the country for a limited period of time, whereas the latter comes with a range of legal benefits, including access to employment. Others may ‘lawfully reside’ in Germany whilst ‘normally residing’ in Denmark. ‘Ordinary residence’ is similar to ‘normal residence’ and can be distinguished by the terminology relied upon in each country.<sup>1</sup>

One’s residency will be considered their ‘normal residence’ when it can be determined that the individual has lived in the state for at least 185 days and has established a close and personal relationship with the state, in the presence or absence of occupational ties.<sup>2</sup> In *Keller v The*

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<sup>1</sup> Ireland uses the term ‘ordinary resident’. For example, in claiming health benefits, the Health Service Executive will require proof of ordinary residency for at least one year. See Health Service Executive, *Medical Card/GP Visit Card National Assessment Guidelines* (February 2015) <<http://www.hse.ie/eng/services/list/1/schemes/mc/forms/medicalcardguidelines2015.pdf>> accessed 27 October 2017.

<sup>2</sup> Council Directive 83/182/EEC of 28 March 1983 on tax exemptions within the Community for certain means of transport temporarily imported into one member state from another [1983] OJ L105/59, article 7: ‘the place

*Revenue Commissioner*,<sup>3</sup> it was noted that where the applicant lives in turn in two or more states, as a result of such person's occupational ties being in a different place from their personal ties, the normal residence of that person would be the place of their personal ties, once it can be proven that they return frequently.<sup>4</sup> According to this definition, normal residency will be recognised by law if the condition of 185 days has been met and personal ties with the State have been established, even if the immigrant resides there illegally. It is important to note that 'lawful residence', is not required in order to satisfy the normal residency test since 'actual residence' will suffice.<sup>5</sup>

A situation which often arises is one in which an individual might, for example, be a 'citizen' of Ireland and a 'national' of Nigeria, but 'actually reside' in the UK. It is well established from cases and legislation in taxation law that 'actual residence' connotes physical presence.<sup>6</sup> The earliest case that referred to the concept was in 1929, where in seeking to determine whether the appellant was domiciled in Saorstát Eireann or in England for the purpose of income tax assessments, a literal interpretation of the term 'actual residence' was applied.<sup>7</sup> The appellant claimed that he had not been a resident nor a citizen of Saorstát Eireann for the years of tax assessment and was therefore exempt from tax payments. In defining residence, the court took their interpretation from 'ordinary educated speech':

These latter words, ie residing, being a resident, imply something more than an intention to settle down or than having settled down, and to my mind, import a measure of physical presence. It may well be that in their primary literal sense these words connoted meanings that would be expressed at present by some such phrases as "actually residing" or "in actual residence".<sup>8</sup>

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where a person usually lives, that is for at least 185 days in each calendar year, because of personal and occupational ties, or, in the case of a person with no occupational ties because of personal ties which show close links between that person and the place where he is living'.

<sup>3</sup> *Karl Keller v The Revenue Commissioners and Others* [1993] 4 ITR 512.

<sup>4</sup> European Communities (Exemption from Import Charges of Certain Vehicles etc Temporarily Imported) Regulations 1983, SI 1983/422. Para 9(1) defines 'normal residence' in the same manner.

<sup>5</sup> *Sulaimon v Minister for Justice, Equality and Law Reform* [2012] IESC 63.

<sup>6</sup> *Hogan v Davis* 422 SW 2d 412 (Ark 1967) where the Arkansas Supreme Court interpreted the term 'resident' as meaning one who 'actually lived' in the state for the required period of time. In reaching this interpretation, the Court determined that it was the intentions of the legislature to ensure that the Director of the State Police would have an intimate knowledge of the problems of the state: first-hand knowledge that could only be acquired through physical presence in the State. In South Africa, the South Africa Income Tax Act 1962 defines tax resident as one who is either ordinarily resident in the state or meets the 'physical presence' test.

<sup>7</sup> *The Right Hon the Earl of Iveagh v The Revenue Commissioners* [1993] 1 ITR 259.

<sup>8</sup> *ibid* 148.

Of course, one does not need to be ‘actually resident’ in the state of one’s citizenship or nationality, as evidenced by high levels of global migration. Yet, being physically present is an absolute necessity in many of the legal residency terms already discussed.

Legal terminology aside, let us revive the conversation on Irish citizenship post-Brexit. The upsurge in Irish citizenship applications as a result of the fear of losing access to EU member states has shown the importance of free movement in a globalised and interconnected world. British ‘nationals’ acquire Irish ‘citizenship’, mainly to continue the free movement rights they enjoyed when previously in the EU.<sup>9</sup> But is that all Irish citizenship is worth, a ticket? Feelings of Irish identity and national pride resurrected by international events like Euro16, Eurovision, the Olympics, or in recent times, Conor McGregor, reveal themselves to be just that - feelings. Do those feelings not amount to an accession of Irish citizenship to those who, if not *feel*, at least *earn* citizenship? Only when it comes to naturalising migrants do we see those feelings come into play. British nationals who may not even *feel* Irish obtain Irish citizenship, even though the Minister for Justice has often stated at naturalisation ceremonies that citizenship is a privilege that is earned.<sup>10</sup> Thousands of British nationals are gaining ‘citizenship by right’<sup>11</sup> - by virtue of their affinity to the Irish nation - ahead of those immigrants who have truly earned and/or feel it.<sup>12</sup> Their ‘nationality’ is British, their ‘citizenship’ is Irish-British (or British-Irish), and their ‘actual residence’ may perhaps be somewhere else.

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<sup>9</sup> Esther Addley, ‘Rush for Irish Passports Brought on by Brexit Fears’ (4 March 2016) <<http://www.theguardian.com/world/2016/mar/04/rush-for-irish-passports-brought-on-by-brexit-fears>> accessed 22 March 2016.

<sup>10</sup> Irish Government News Service, ‘Speech by Frances Fitzgerald TD, Minister for Justice and Equality’ (Convention Centre, Dublin, 4 July 2014) <<https://merrionstreet.ie/en/News-Room/Releases/speech-by-frances-fitzgerald-td-minister-for-justice-and-equality-4th-july-2014-citizenship-ceremony-convention-centre-dublin.html>> accessed 13 July 2014.

<sup>11</sup> May Bulman, ‘Brexit Blamed as Number of Britons Applying for Irish Passports Rises by Two Thirds’ *The Independent* (16 April 2017) <<http://www.independent.co.uk/news/uk/home-news/irish-passport-british-brexit-people-applying-charlie-flanagan-a7685981.html>> accessed 27 October 2017.

<sup>12</sup> Citizenship can be acquired through a simple application by Brits who are entitled Irish citizenship in accordance with the Irish Nationality and Citizenship Act 1956, s 6. Whereas, other immigrant nationalities must endure a number of hardships which stem from the ‘conditions of citizenship’. Irish Nationality and Citizenship Act 1956, s 15. One of these conditions have already been briefly explained in a previous letter to this journal, see Bashir Otukoya, ‘Super-Citizens: Equal Powers comes with Greater Responsibilities’ [2017] *Cork Online Law Review* ([corkonlinelawreview.com](http://corkonlinelawreview.com), 18 Jan 2017) <<https://www.corkonlinelawreview.com/single-post/2017/01/18/Super-Citizens-Equal-Powers-comes-with-Greater-Responsibilities>> accessed 27 October 2017. It is the simplicity of citizenship acquisition process for the British which puts them ahead of all other nationalities.

Immigrants, however, are required to reside in Ireland for a reckonable period of five out of nine years before being *eligible* for citizenship.<sup>13</sup> This does not necessarily mean that the applicant be physically resident in the state during those periods. In theory, an applicant will have satisfied the residency condition even if, over a period of eight years, the applicant resides in another state and only comes to Ireland when the visa permitting his/her residency in Ireland is due for renewal.<sup>14</sup> Though 'lawfully resident' in the State for the requisite five years, the applicant only needs to have spent 365 days of consecutive 'actual' physical residence in the State prior to the application.<sup>15</sup>

Even if lawfully resident in the State, the periods of residency for asylum or study are not reckonable for the purposes of satisfying the naturalisation condition.<sup>16</sup> If the logic for not counting the period of asylum and study as reckonable is that the visa is granted in order of fulfilling a sole purpose, what then about those with permission to remain on the sole basis of work? Immigrants who remain in the State on the basis of a Stamp 1 or a Green Card are eligible for citizenship after five years of reckonable residence. What differences are there between the international student and the immigrant worker that disadvantages the former by a period of five years? One answer might suggest that the immigrant worker does not pose a burden to the state. They are usually financially stable before being granted a visa and have documentary evidence of guaranteed employment before arriving to the state. The international student, however, is presumed financially dependent on guardians, and upon completion of their course, if permitted to remain, will presumably seek state welfare before attaining employment. Thus it seems, evidenced from the high price of naturalisation,<sup>17</sup> Irish citizenship is not something which is acquired as an award after a long period of undefined residency. It is neither here nor there.

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<sup>13</sup> Irish Nationality and Citizenship Act 1956, s 15(c).

<sup>14</sup> The naturalisation application form (Form 8) does however explicitly demand a physical presence, though not statutorily required. Irish Nationality and Citizenship Act 1956, Form 8, Application by a Person of Full Age for Naturalisation as an Irish Citizen (Version 5.5, August 2016) 2.

<sup>15</sup> *ibid* (n 13) s 15(c) 'has had a period of one year's continuous residence in the State immediately before the date of the application and, during the eight years immediately preceding that period, has had a total residence in the State amounting to four years'. Thus, actual residence is only required for the year prior to application. The reckonable four years required only specifies 'residence' without providing a legal definition, which forms the basis of this letter.

<sup>16</sup> *ibid* (n 13) s 16(a).

<sup>17</sup> Including the cost of the application itself (the most expensive in Europe - €175 for the application, €950 for the naturalisation certificate, and any other fees incurred during the completion of the application, for example, legal fees and postage charges), the hardship of satisfying the naturalisation conditions, and the demand for financial stability through restricting those of limited means (ie asylum seekers and international students).

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