

# Strategic Litigation to Vindicate the Rights of Refugees and Migrants: Pyrrhic Perils and Painstaking Progress



*Cathryn Costello,  
Professor of Fundamental  
Rights  
Co-Director, Centre for  
Fundamental Rights, Hertie  
School, Berlin &*

*Professor of Refugee and  
Migration Law, University of  
Oxford*

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## Overview

1. Strategic Litigation Scholarship
2. Examples
  1. Access to Asylum
  2. Family Reunification
  3. Right to Work



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Two large, solid gold geometric shapes are positioned in the upper right quadrant of the slide. One is a long, thin parallelogram tilted at an angle, and the other is a vertical rectangle. They overlap each other and the text below.

*Strategic* Litigation

## Strategic Litigation Literature

'Strategic Litigation to Vindicate the Rights of Refugees and Migrants: Pyrrhic Perils and Painstaking Progress' in I Bacik and M Rogan (eds) *Legal cases that changed Ireland* (Clarus, 2016).

Moritz Baumgartel  
*Demanding Rights: Europe's Supranational Courts and the Dilemma of Migrant Rights*  
(CUP 2019)

## Law

### Multilevel Account

International and regional  
human rights

EU law – fundamental rights

National Constitutional /  
administrative law

Others?

Basak Çali, Cathryn Costello &  
Stewart Cunningham 'Hard  
Protection through Soft  
Courts? Non-refoulement  
before the United Nations  
Treaty Bodies' (2020) 21  
*German Law Journal*

## Law

Nikolas Feith Tan and Thomas  
Gammeltoft-Hansen  
'A Topographical Approach to  
Accountability for Human  
Rights Violations in Migration  
Control'  
*2020 German Law Journal*



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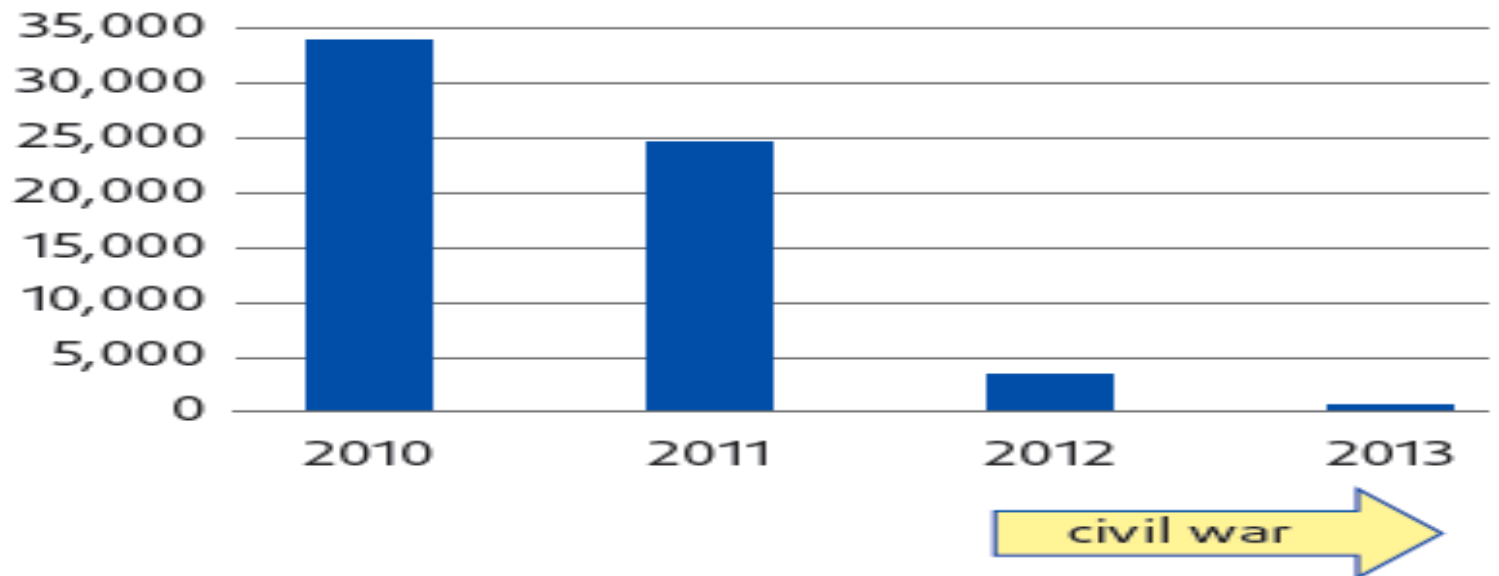
# 1. Access to Protection

# Visa Listing - by Nationalities

Maarten den Heijer  
'Visas and Non-  
discrimination' (2018)  
European Journal of  
Migration and Law

# EU Visa Practices

**Figure 1: Number of Schengen visas issued to Syrians, trend 2010–2013**



Source: European Commission, DG Home, Visa statistics, 2014

Source: FRA Focus

Legal entry channels to the EU for persons  
in need of international protection: a toolbox (2015)

# Access to Asylum – ‘humanitarian visas’

## CJEU

Case C-638/16 PPU  
*X and X v Belgium*,  
7 March 2017

## ECtHR

Application No  
3599/18  
*M.N. and Others v.*  
*Belgium*,  
Grand Chamber  
5 May 2020

## Spain

Constitutional Court  
(Nov 2020)  
ELENA Update

# 'Humanitarian Admissions'

Luc Leboeuf and Marie-Claire  
Foblets

*Humanitarian Admission to  
Europe. From Policy  
Developments to Legal  
Controversies and Litigation  
(2020)*

# 'Humanitarian Admissions'

Tom de Boer & Marjoleine  
Zieck 'The Legal Abyss of  
Discretion in the  
Resettlement of Refugees:  
Cherry-Picking and the Lack  
of Due Process in the EU'  
(2020) *International Journal of  
Refugee Law*

Audrey Macklin & Susan  
Kneebone 'Resettlement' in  
Costello, McAdam, Foster  
*Oxford Handbook of  
International Refugee Law*  
(2021)



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## 2. Family Reunification

# Family Reunification

## ECtHR

Article 8, but  
'elsewhere'  
approach

*Realising the Right to  
Family Reunification of  
Refugees in Europe* (co-  
authored with Kees  
Groenendijk and Louise  
Halleskov Storgaard)  
Council of Europe:  
Commissioner for Human  
Rights, June 2017,

## CJEU

Right, but limited by  
scope of EU law,  
esp.  
link to EU Citizens  
(C-127/08 *Metock*)

## National

*MAM & KN*  
[2020] IESC 32  
  
C Costello 'Child  
Citizens & *De Facto*  
Deportation: Tender  
Years, Fragile Ties &  
Security of  
Residence' in *Of  
Courts and  
Constitutions: Liber  
Amicorum in Honour  
of Nial Fennelly*  
(2014)

## ZAT (UK)

Gina Starfield 'Forging Strategic Partnerships: How civil organisers and lawyers helped unaccompanied children cross the English Channel and reunite with family members' *RSC Working Paper* (2020)  
<https://www.rsc.ox.ac.uk/publications/forging-strategic-partnerships-how-civil-organisers-and-lawyers-helped-unaccompanied-children>



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## 3. Right to Work

Cathryn Costello & Colm  
O'Cinnéide 'The Right to  
Work' in Costello, Foster &  
McAdam *The Oxford  
Handbook of International  
Refugee Law* (OUP 2021)

## Multiple Sources

### International

#### *Direct Protection*

- ICESCR Article 6
- Article 15 of the African Charter of Human and Peoples' Rights - right to work

- Refugee Convention
- Article 1 ESC

#### *Indirect Protection*

- Article 8 ECHR
- Article 3 ACHR, the right to juridical personality

## European Protection

*MSS v Belgium and Greece*  
(Article 3 ECHR)

*Chowdury and Others v*  
*Greece* (Article 4 ECHR) (2017)

See Vladislava Stoyanova  
'Sweet Taste with Bitter  
Roots: Forced Labour and  
*Chowdury and Others v*  
*Greece* (2018) European  
Human Rights Law Review

## EU Law

### Article 15 EUCFR

Advocate General Jean  
Richard de la Tour's Opinion  
of 3 September 2020 in *KS &  
MHK*

dual value of the right to  
work

citing

- ICESCR General Comment  
No 18,
- Supreme Court of Ireland
- Application No 63542/11  
*ALK v Greece* 11 December  
2014.

## National Constitutions

### South Africa

s 10 of the Bill of Rights:

'Everyone has inherent dignity and the right to have their dignity respected and protected'. *Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 (SCA) (right to work); *Somali Association of South Africa v Limpopo Department of Economic Development, Environment and Tourism* (48/2014) ZASCA 143 (26 September 2014) (self-employment).

Ruvi Ziegler, 'Access to  
Effective Refugee Protection  
in South Africa: Legislative  
Commitment, Policy  
Realities, Judicial  
Rectifications' (2020)  
Constitutional Court Review  
(forthcoming)

## Ireland

*N.V.H. v Minister for Justice &  
Equality and ors*, 30 May 2017  
[2017] IESC 35

Liam Thornton, 'Clashing  
Interpretations of EU Rights  
in Domestic Courts' (2020)  
26(2) European Public Law  
(forthcoming).

# Conclusions



Hertie School | Centre for Fundamental Rights

Friedrichstraße 194

10117 Berlin, Germany

T +49 (0)30 259219-0

F +49 (0)30 259219-11

[fundamentalrights@hertie-school.org](mailto:fundamentalrights@hertie-school.org)

[www.hertie-school.org](http://www.hertie-school.org)