

Access to the labour market for applicants for international protection

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Introduction

The Irish Human Rights and Equality Commission ('the Commission') is both the national human rights institution and the national equality body for Ireland, established under the Irish Human Rights and Equality Commission Act 2014. The Commission has a statutory mandate to keep under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights and equality, and to make recommendations to the Government to strengthen, protect and uphold human rights and equality in the State.

In December 2014, the Commission published a *Policy Statement on the System of Direct Provision in Ireland*.¹ The aim of this policy statement was to add the voice and authority of the Commission to the existing body of evidence around people living within the Direct Provision system for long periods of time, focusing on the particular human rights and equality implications of such lengthy stays, in addition to informing the deliberations of the Working Group to Report to Government on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers (the Working Group).² In this Policy Statement the Commission recommended, *inter alia*, that Ireland should opt into Directive 2013/33/EU of the European Parliament and Council (the recast Reception Conditions Directive), to ensure a minimum standard of provision for asylum seekers, leading to the practice that, after a period of 6–9 months, people seeking international protection should be able to leave Direct Provision, live independently, access appropriate social welfare payments and seek employment.³

¹ IHREC (2014) *Policy Statement on the System of Direct Provision in Ireland*. Available at https://www.ihrec.ie/app/uploads/download/pdf/ihrec_policy_statement_on_direct_provision_10dec14.pdf. For a more detailed outline of the Commission's positions on access to labour before the *N.H.V.* judgment, see the appendix.

² The report of the working group was published in June 2015 and is hereafter cited as 'The Working Group Report 2015'. Available at http://www.justice.ie/en/JELR/Pages/Working_Group_on_Improvements_to_the_Protection_Process.

³ IHREC (2014) *Policy Statement on the System of Direct Provision in Ireland*, pp. 18–19.

The report of the Working Group, published in June 2015, recommended ‘provision for access to the labour market for protection applicants who are awaiting a first instance decision for nine months or more’.⁴

In 2016 the Commission was granted liberty to appear in the Supreme Court as *amicus curiae* in the case of *N.H.V. v Minister for Justice & Equality and ors*. In the Commission’s legal submission to the Supreme Court, it argued that the absolute prohibition on asylum seekers accessing the labour market was unconstitutional, and that it also ran contrary to the State’s international legal obligations.⁵

In May 2017 the Supreme Court held⁶ that in circumstances where there is no time limit on the asylum process, the absolute prohibition on seeking employment is unconstitutional. On 9 February 2018 the Court made a declaration striking down the relevant legal provisions.⁷

In response to the Supreme Court judgment, the Government has indicated its intention to opt-in to the recast Reception Conditions Directive, which provides, *inter alia*, for access to the labour market for international protection applicants.⁸ The process for opt-in can take upwards of four months. A cross-departmental implementation group has been established to consider the extent of labour market access under the Directive, and the Minister for Justice and Equality has stated that he will present the details of this on completion of the implementation group’s work.⁹ In the interim period, as of 9 February 2018, asylum seekers are entitled to apply or have a prospective employer apply for a work permit under the Employment Permits Act 2003, as amended.¹⁰ An administrative scheme to allow applications for permission to engage in self-employment has also been launched.¹¹

This paper first sets out the Commission’s observations on the interim scheme, which has been in effect since 9 February 2018. It then outlines a number considerations which should

⁴ Working Group Report 2015, at para. 5.49.

⁵ IHREC (2016) *Legal Submission on Behalf of the Irish Human Rights and Equality Commission in N.H.V. v Minister for Justice and Equality*, at paras. 26 & 35. Hereafter ‘IHREC N.H.V. Amicus 2016’. Available at <https://www.ihrec.ie/documents/nhv-v-minister-justice-equality-july-2016/>

⁶ [2017] IESC 35, at para. 22.

⁷ Section 9(4) of the Refugee Act 1996, as re-enacted in s.16(3)(b) of the International Protection Act 2015.

⁸ Directive 2013/33/EU of the European Parliament and the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast). At Article 15.

⁹ Statement by the Minister for Justice and Equality on the right to work for asylum seekers, 9 February 2018. Available at <http://www.justice.ie/en/JELR/Pages/PR18000053>.

¹⁰ Statement by the Minister for Justice and Equality on the right to work for asylum seekers, 9 February 2018.

¹¹ Statement by the Minister for Justice and Equality on the right to work for asylum seekers, 9 February 2018.

inform the provision of effective access to the labour market for asylum seekers in the context of the State's intention to opt in to the recast Reception Conditions Directive.

Directive 2013/33/EU makes wide-ranging provisions for reception of asylum seekers that have significant human rights and equality implications beyond the area of access to employment addressed here and the Commission may provide further commentary on the transposition of the Directive in due course.

Temporary interim measures for access to employment

In the interim period, as of 9 February 2018, asylum seekers are entitled to apply or have a prospective employer apply for a work permit under the Employment Permits Act 2003, as amended.¹² An administrative scheme to allow applications for permission to engage in self-employment has also been launched.¹³ Guidance for eligible international protection applicants is now available on the website of the Irish Naturalisation and Immigration Service (INIS).¹⁴

Applicants must satisfy four criteria to be eligible for an **employment permit**:

- *There must be a job offer from an employer.*

Applicants must receive a job offer from an employer based in Ireland and registered with the Office of the Revenue Commissioners.¹⁵ It is to be noted that the job offered is required to have been subject to a labour market needs test, 'to ensure that the employer has made every effort to recruit an Irish/EEA national for the employment concerned'.¹⁶ In addition at time of application 50% or more of the employees of the employer must be EEA nationals.¹⁷

- *Fees attaching to the employment permit application must be paid.*

The first application fee for general employment permits is €1,000 up to 24 months and €500 for six months or less. The renewal fees are €750 for six months or less and €1,500 up to 36 months.¹⁸ These fees can be paid by the person seeking the employment permit or

¹² Statement by the Minister for Justice and Equality on the right to work for asylum seekers, 9 February 2018.

¹³ Statement by the Minister for Justice and Equality on the right to work for asylum seekers, 9 February 2018.

¹⁴ INIS (9 February 2018), *Information Booklet: Access to the Labour Market for Eligible International Protection Applicants*.

¹⁵ Department of Business Enterprise and Innovation, *Employment Permits Frequently Asked Questions*. Available at

<https://dbei.gov.ie/en/What-We-Do/Workplace-and-Skills/Employment-Permits/FAQs/Employment-Permits-FAQs-2018.pdf>.

¹⁶ Department of Business Enterprise and Innovation, *Employment Permits Frequently Asked Questions*, section 5. The Labour Market Needs Test obliges the employer to advertise the post in with the Department of Employment Affairs and Social Protection Employment Services/EURES employment network, and in national and local newspapers and online.

¹⁷ Department of Business Enterprise and Innovation, *Employment Permits Frequently Asked Questions*, section 5.

¹⁸ Department of Business, Enterprise and Innovation (23 February 2018), *Fees for Employment Permits*. Available at <https://dbei.gov.ie/en/What-We-Do/Workplace-and-Skills/Employment-Permits/Fees/>.

the organization providing the employment. There is no fee for an employment permit for a dependent spouse or partner.¹⁹

- *The job must be in an eligible sector of employment.*

The categories of employment for which an employment permit will not be granted comprise 62 overarching occupations²⁰ – under which are over 200 specific employment positions – covering a significant range of standard fields of employment in Ireland, including: health and care service managers; administrative, secretarial and related occupations; gardening and grounds keeping; construction and related trades; hospitality; childcare; housekeeping; hair and beauty; retail; factory assembly; farm labour; cleaning; security; and work in private homes.²¹

- *The job must attract a minimum salary*

The legislation states that an annual salary of €30,000 must be paid for an employment permit; this is based on working 52 weeks at 39 hours per week. This equates to an hourly rate of €14.79.²² This represents a salary level significantly higher than the current national minimum wage, which is €9.55 per hour.²³

Applications for **self-employment** under the new administrative scheme are eligible if on the date of application the applicant is waiting on a first instance recommendation for 9 months or more. Applicants are expected to have made “reasonable efforts” to establish their identity as well as cooperated with the protection process, including returning a completed Application for International Protection Questionnaire (IP02). Applicants must register with the Revenue Commissioners to be tax compliant.²⁴ On approval of an application, applicants

¹⁹ Department of Business, Enterprise and Innovation (23 February 2018), *Fees for Employment Permits*. Available at <https://dbei.gov.ie/en/What-We-Do/Workplace-and-Skills/Employment-Permits/Fees/>.

²⁰ Categorised using the Standard Occupational Classification system (SOC 2010)

²¹ Department of Business, Enterprise and Innovation (23 February 2018), *Ineligible Categories of Employment for Employment Permits* <https://dbei.gov.ie/en/What-We-Do/Workplace-and-Skills/Employment-Permits/Employment-Permit-Eligibility/Ineligible-Categories-of-Employment/>.

²² Department of Business Enterprise and Innovation (23 February 2018), *Employment Permits Frequently Asked Questions*. Available at <https://dbei.gov.ie/en/What-We-Do/Workplace-and-Skills/Employment-Permits/FAQs/Employment-Permits-FAQs-2018.pdf> p20

²³ *National Minimum Wage Order 2017*, S.I. No. 440/2017, <http://www.irishstatutebook.ie/eli/2017/si/440/made/en/print>

²⁴ Irish Naturalisation and Immigration Services (INIS), guidance on Self-Employment Permission <http://www.inis.gov.ie/en/INIS/Pages/self-employment-permission#1st>

will be granted a six-month permission to be self-employed, which is subject to renewal on further application to the Minister.²⁵

The Commission recalls the commentary of Hogan J in his dissenting Appeal Court judgment in *N.H.V.*:

‘employment is not just simply a means of earning a living. Employment gives dignity to what otherwise would be for many a soulless existence and for those of us those fortunate to have an occupation, trade or employment, this may be said to be one of the key defining features of our lives. The protection of the dignity of the individual (and not simply citizens) is, of course, one of the objectives which the Preamble to the Constitution seeks to secure.’²⁶

In the same judgment, Hogan J. further remarked:

‘It was never the intention of the drafters of the Constitution that these fundamental right guarantees would be reduced to pure platitudinous statements of benevolent good will which could readily be overborne once any attempt to take these rights seriously was likely to prove inconvenient or might thwart policy choices made by the Oireachtas or the Government.’²⁷

Reception and Integration Agency data indicates that, as at December 2017, there is a total of 3,897 direct provision residents of working age.²⁸ The number of applications for declaration as a refugee made in 2017 was 2,972 applications.²⁹ The provisions of the Employment Permits Act 2003, as amended, as outlined above, were not drafted to meet

²⁵ INIS (9 February 2018), *Information Booklet: Access to the Labour Market for Eligible International Protection Applicants*, p. 10.

²⁶ [2016] IECA 86. Para. 110.

²⁷ [2016] IECA 86. Para. 121.

²⁸ Aged between 18 and 65 years old. This represents 73% of the total of 5344 residents of direct provision as at December 2017. Reception and Integration Agency, *Monthly Statistics Report December 2017*, p. 5. Available at

<http://www.ria.gov.ie/en/RIA/RIA%20Monthly%20Report%20December%202017.pdf/Files/RIA%20Monthly%20Report%20December%202017.pdf>

²⁹ This represents an increase as compared to applications made in 2016 (2,244), but is lower than the 2015 figure of 3,276 applications. Data from the Office of the Refugee Applications Commissioner/ International Protection Office, as presented in Reception and Integration Agency, *Monthly Statistics Report December 2017*, p. 2. Available at

<http://www.ria.gov.ie/en/RIA/RIA%20Monthly%20Report%20December%202017.pdf/Files/RIA%20Monthly%20Report%20December%202017.pdf>

the particular circumstances of asylum seekers. While precise data on the skill set and qualifications of asylum seekers are not available,³⁰ it is clear that the combination of salary restrictions and ineligible sectors of employment pose a significant barrier to entry-level employment. The most realistic means for asylum seekers of accessing employment under the interim scheme will therefore likely be through its self-employment provisions, which, in principle, permit access to non-salaried employment at rates of pay lower than, and in sectors excluded by, the provisions of the Employment Permit Acts 2003, as amended.

Labour exploitation of vulnerable groups, in particular migrants, is not an uncommon phenomenon in Ireland.³¹ In discussions with direct provision residents, the Commission has noted the vulnerable financial and social position in which asylum seekers can be placed by their exclusion from the labour market.³² The 2015 Working Group report raised concerns about the participation of some international protection applicants in the informal economy, and the risk of exploitation arising from this.³³ Labour exploitation of vulnerable migrants also has a significant gender dimension. Migrant women are, for example, over-represented in the domestic and care work sector, as well as subject to labour exploitation as au pairs and child minders.³⁴

Excluding asylum seekers from access to legitimate entry-level or minimum wage employment, would seem not to address these concerns. While permitting asylum seekers access to self-employment is a welcome measure, providing access to entry level and lower

³⁰ Officials indicated this in response to questions posed at an information session on the right to work for international protection applicants held by the Department of Justice, Department of Business, Enterprise and Innovation, and the Department of Employment Affairs and Social Protection in Dublin on 31 January 2018.

³¹ See, for example, MRCI (2015), *All Work and Low Pay: The Experience of Migrant Workers in Ireland*. Available at <http://www.mrci.ie/wp-content/uploads/2015/11/MRCI-All-Work-and-Low-Pay.pdf>. See also IHREC (2015), *Statement on human trafficking and exploitation of migrant workers in the fishing industry*, <https://www.ihrec.ie/statement-on-human-trafficking-and-exploitation-of-migrant-workers-in-the-fishing-industry/>.

³² For example, in discussions with women in direct provision centres in Kerry and Galway in 2016 as part of the Commission's research on Ireland's implementation of the Convention on the Elimination of all forms of Discrimination against Women (CEDAW), respondents drew a clear link between the common public knowledge that applicants cannot work and 'have no money', and their vulnerability to stigma, harassment and labour market exploitation in the community.

³³ Working Group Report 2015, at para. 5.40.

³⁴ See MRCI (2013) *Workers in the Home Care Sector: Preparing for the Elder Boom in Ireland* <https://www.mrci.ie/wp-content/uploads/2015/09/Migrant-Workers-in-the-Home-Care-Sector-Preparing-for-the-Elder-Boom-in-Ireland.pdf>; MRCI (2012) *Exploitation of Au Pair Workers in Ireland: Briefing Paper and MRCI Recommendations*. http://www.mrci.ie/wp-content/uploads/2012/10/Au_Pair_Worker_Brief_and_Recommendations_.pdf.

paid employment solely via non-salaried self-employment arrangements may serve to further perpetuate asylum seekers' vulnerability to labour exploitation.

The Commission is of the view that the interim measures are insufficient in their scope to provide effective or meaningful access to employment, or to safeguard against potential exploitation and discrimination in the work place.

The Commission is concerned that, while moving away from the absolute prohibition struck down by the Supreme Court in *N.H.V.*, the interim measures continue to represent a significant barrier to the right to work and earn a livelihood guaranteed by Article 40.3.1 and the right to work enshrined in Article 6(1) ICESCR.

Access to employment on opt-in to the recast Directive

The case for wider access to employment for asylum seekers

The Commission has argued that prohibition on access to employment runs contrary to the obligations of the State under international law, in particular Article 6 of the International Covenant on Social, Economic and Cultural Rights (ICESCR), understood alongside the Covenant's anti-discrimination provisions in Article 2(2).³⁵

In General Comment 18, the Committee on Social, Economic and Cultural Rights (CESCR) describes the right to work as 'a fundamental right ... essential for realizing other human rights and [forming] an inseparable and inherent part of human dignity'.³⁶ In the Supreme Court judgment in *N.H.V. O'Donnell J.* observed that the CESCR's thinking in this General Comment is 'broadly consistent with that which was the background to the Constitution'.³⁷

As at December 2017, the mean length of time spent by a resident of direct provision in the asylum process was twenty-six months.³⁸ The negative effects of excluding asylum seekers from access to employment, particularly in circumstances where there are significant waiting times associated with applications for international protection, have been well documented. The Commission, in its 2014 Policy Statement on Direct Provision, concluded that reception conditions in Ireland, including prohibition of access to employment, have a significant impact on the right to family life, are not in the best interests of children, and have failed to adequately protect the rights of those seeking protection in Ireland.³⁹ In its

³⁵ IHREC *N.H.V. Amicus* 2016, at para. 36. The submission also makes reference to Article 23(1) UDHR; Article 15 of the Charter of Fundamental Rights of the European Union, Article 1 Revised European Social Charter; Article 11 CEDAW; Article 5 CERD and Article 27 CRPD – see para. 35.

³⁶ Committee on Social, Economic and Cultural Rights (2006), *General Comment No. 18 on the Right to Work*, E/C.12/GC/18, para. 1.

³⁷ [2017] IESC 35, para. 16.

³⁸ Reception and Integration Agency (December 2017), *Monthly Statistics Report*, p. 17. Available at <http://www.ria.gov.ie/en/RIA/RIA%20Monthly%20Report%20December%202017.pdf/Files/RIA%20Monthly%20Report%20December%202017.pdf>. Figures suggest a reduction in the mean duration of stay since the single application procedure was put into effect in January 2017. For example, the statistics for December 2016 show a mean duration of thirty-two months, and the statistics for December 2015 show a mean duration of thirty-eight months. See RIA (December 2016), *Monthly Statistics Report*, p. 19, at <http://www.ria.gov.ie/en/RIA/RIA%20Monthly%20Report%2012%20December-2016.pdf/Files/RIA%20Monthly%20Report%2012%20December-2016.pdf>, and RIA (December 2015), *Monthly Statistics Report*, p. 19, at <http://www.ria.gov.ie/en/RIA/RMR2015December.pdf/Files/RMR2015December.pdf>.

³⁹ IHREC (2014) *Policy Statement on the System of Direct Provision in Ireland*, p.18.

meetings with a number of people living in Direct Provision centres across the country, including in counties Galway, Kerry, Cork, Westmeath, Limerick and Dublin, access to the labour market was consistently raised with the Commission. The Working Group report illustrated the significant effect the blanket prohibition on accessing the labour market has on applicants' dignity and self-worth. It highlighted the effect the inability to work has on applicants' ability to integrate into society, their capacity to lead a normal family life, and their ability to ensure that their children have access to the same educational and social opportunities as their peers.⁴⁰

The Working Group raised concerns about the potential future ill-effects of policy for applicants who eventually receive refugee status or subsidiary protection. Lack of access to the labour market while waiting in the application system can result in the loss of skills and competencies, and has the potentially 'indirect result' of creating, through 'enforced idleness', a dependent cohort of people who would continue to rely on State support.⁴¹ These concerns echo those of the UNHCR, who have observed that isolation from the community and from working life can cause applicants 'to conduct their lives on the margins of society'.⁴² Once refugee status is attained, the UNHCR has warned that 'it may be difficult for both the refugee and the host community to begin anew'.⁴³

The UNHCR has therefore placed particular emphasis on the importance of adopting policies towards applicants for international protection that 'are guided by the potential longer-term outcomes of the process'⁴⁴, in the wider context of State obligations under the Chapter III of the 1951 Refugee Convention to ensure that refugees have access to employment in their host countries.⁴⁵

Access to employment 'offers extremely important opportunities for positive socialization', providing individuals 'not only with an income, but also with independence, social status and

⁴⁰ Working Group Report 2015, paras. 5.37–5.39.

⁴¹ Working Group Report 2015, paras. 5.38 & 5.39.

⁴² UNHCR (May 2007), *Note on the Integration of Refugees in the European Union*, p. 3. Available at <http://www.unhcr.org/463b462c4.pdf>.

⁴³ UNHCR (May 2007), *Note on the Integration of Refugees in the European Union*, p. 3.

⁴⁴ UNHCR (May 2007), *Note on the Integration of Refugees in the European Union*, p. 3.

⁴⁵ Chapter III (gainful employment of refugees) of the 1951 Refugee Convention encompasses Articles 17–19, which deal with, respectively, wage earning employment, self-employment and 'liberal professions'. The Commission has argued before the Supreme Court that the prohibition on access to the labour for asylum seekers undermines the rights conferred on refugees under Articles 17–19 of the 1951 Refugee Convention. See IHREC N.H.V. *Amicus* 2016, at para. 40.

recognition’.⁴⁶ A pro-active approach to integrating asylum seekers, including through access to employment, can therefore

‘empower asylum seekers and refugees to become active members of society, thus increasing their chances of successful integration in the host state or re-integration in their own country upon return’.⁴⁷

The Commission is of the view that prohibition of access to the labour market for asylum seekers, or the imposition of restrictions that unduly impede future integration, may undermine the rights conferred on refugees under Article 6 ICESCR and Articles 17–19 of the 1951 Refugee Convention.

The Commission is of the view that provision of effective access to the labour market for applicants for international protection will promote positive integration, reduce reliance on state supports, and positively contribute to health, well-being and family life.

Such provision would ensure that the State’s obligations under the Constitution, the recast Reception Conditions Directive, international human rights law, and the 1951 Refugee Convention are met.

Provisions under the recast Directive for access to the labour market

Article 15.2 of the recast Reception Conditions Directive provides that Member States ‘shall decide the conditions for granting access to the labour market for the applicant’, but that it must do so ‘while ensuring that applicants have effective access to the labour market’.

The same article also provides that ‘for reasons of labour market policies’, States are entitled to ‘give priority’ to EU and EEA citizens and nationals, and to legally-resident third country nationals.

⁴⁶ UNHCR (May 2007), *Note on the Integration of Refugees in the European Union*, p. 4.

⁴⁷ UNHCR (May 2007), *Note on the Integration of Refugees in the European Union*, p. 4.

The recitals of the recast Reception Directive emphasize the importance of permitting clear rules for access to the labour market ‘in order to promote the self-sufficiency’ of applicants’.⁴⁸ The recitals also underscore the obligation of States to apply the Directive in keeping with the principles of the best interests of the child and of family unity, in accordance with EU and international human rights standards.⁴⁹ The recitals also confirm that with respect to treatment of persons falling within its scope, States ‘are bound by obligations under instruments of international law to which they are party’.⁵⁰

Article 4 of the recast Reception Directive also gives scope to Member States to ‘introduce or retain more favourable provisions’ for applicants and their close relatives, provided that such provisions ‘are compatible with the Directive’.

The Commission notes Ireland’s obligation to transpose the recast Reception Directive in a manner that is in keeping with its international human rights obligations and the 1951 Refugee Convention.

The Commission encourages the State to make full use of the opportunity under Article 4 of the recast Reception Directive to introduce ‘more favourable conditions’ for access to employment, as a means to ensure compliance with international standards.

Current proposals for access to the labour market

As outlined above, the Commission is of the view that the interim measures in place since 9 February 2018 are insufficient in their scope to provide effective or meaningful access to employment for asylum seekers, and continue to represent a significant barrier to the right to work and earn a livelihood as guaranteed by Article 40.3.1 and the right to work enshrined in Article 6(1) ICESCR.

A cross-departmental implementation group has been established to consider the extent of labour market access for asylum seekers once the process for opt-in to the recast Reception Conditions Directive is complete.⁵¹ The Minister has indicated that under the provisions for

⁴⁸ Recitals, para. (23).

⁴⁹ Recitals, para. (9). The paragraph makes specific reference to the standards laid out in the Charter of Fundamental Rights of the European Union, the United Nations Convention on the Rights of the Child, and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

⁵⁰ Recitals, para. (10).

⁵¹ Statement by the Minister for Justice and Equality on the right to work for asylum seekers, 9 February 2018.

labour market access envisaged on the completion of the opt-in process, ‘access to the labour market for eligible applicants will be on more generous terms’.⁵² He has also indicated that the new provisions will include access to ‘some sectors of employment that are currently restricted’, and that access ‘will not be dependent on the issuing of an employment permit and its associated fees and conditions’.⁵³ The minister has also indicated the current administrative scheme for self-employment will mirror the provisions to be put in place once opt-in to the recast Reception Conditions Directive is complete.

The Commission welcomes the Minister’s indication that access to the labour market will be wider than under the current scheme, and also welcomes indications that such access will not be subject to an employment permit regime.

The Commission is concerned, however, at the suggestion that significant sectoral restrictions on employment may be retained, or subject to minimal change.

Achieving ‘Effective access’ under Article 15.2

While States are entitled under Article 15.2 of the Directive to ‘decide the conditions for granting access to the labour market’,⁵⁴ it also provides that States ensure ‘effective access’ to the labour market for asylum seekers. This obligation should be interpreted in line with the general principle of effectiveness in EU law.

Studies of application of Article 15 of the Directive,⁵⁵ and the employment provisions in the preceding 2003 Directive,⁵⁶ indicate that limitations imposed on access by asylum seekers to the labour market have formed a significant barrier to achieving effective access. These include the imposition of administrative barriers such as employment permit requirements;

⁵² Minister for Justice (23 January 2018), *Briefing Note for Oireachtas Members on Directive 2013/33/EU*. Sourced via Dr. Liam Thornton at <https://liamthornton.ie/tag/briefing-note-for-oireachtas-members-reception-conditions-directive-11-1-2018/>.

⁵³ Minister for Justice (23 January 2018), *Briefing Note for Oireachtas Members on Directive 2013/33/EU*.

⁵⁴ Recast Directive Article 15.2.

⁵⁵ Aida, the Asylum Information Database (2016), comparative data on access to employment for asylum seekers in the EU. Available at <http://www.asylumineurope.org/comparator/reception>.

⁵⁶ European Commission (26 November 2007), *Report from the Commission to the Council and the European Parliament on the application of Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers*, COM(2007) 745 final, available at <http://www.refworld.org/docid/48abd56cd.html>.

the imposition of restrictions on access to certain sectors of employment; working time restrictions; and failure to recognize qualifications or degrees.⁵⁷

Concerns regarding the potential impact of restrictions on effective access have been raised by the UN High Commission for Refugees (UNHCR) in its guidance notes on transposition and implementation of the Directive.⁵⁸ In particular, the UNHCR has pointed to the risk that the provision in paragraph 2 of Article 15.2, which permits States to prioritize EU and EEA citizens and legally-resident third country nationals:

‘may result in a *de facto* discriminatory practices hampering effective access in practice, especially where such reasons are not specified in national law or policy.’⁵⁹

In this connection, the UNHCR raises concerns that such discriminatory practices may not be in keeping with States’ obligations under the 1951 Refugee Convention.⁶⁰

The Commission has also emphasised the obligation under Article 6 ICESCR, read alongside Article 2 ICESCR, to ensure non-discrimination in employment.⁶¹ In light of the particular vulnerabilities in the workplace faced by migrants, effective safeguards against discrimination will be important in ensuring ‘effective access’ to the labour market for asylum seekers.⁶²

Effective access has also been the focus of concern in the European Commission in the context of its 2016 proposals for a new recast Reception Conditions Directive.⁶³ In these Proposals, the European Commission emphasises that:

⁵⁷ Aida, the Asylum Information Database (2016), comparative data on access to employment for asylum seekers in the EU. Available at <http://www.asylumineurope.org/comparator/reception>.

⁵⁸ UNHCR Bureau for Europe (2015) *Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, p.38. Hereafter cited as ‘UNHCR Comments on Recast Directive 2015’.

⁵⁹ UNHCR Comments on Recast Directive 2015, p.39.

⁶⁰ UNHCR Comments on Recast Directive 2015, p.39.

⁶¹ IHREC N.H.V. *Amicus* 2016, para. 36.

⁶² Recent research drawing from the Central Statistics Office QNIS Equality Module data indicates that Black respondents were over three times more likely to report discrimination in the workplace, and twice as likely to report recruitment discrimination. See McGinnity, Grotti, Kenny and Russell, (2017), *Who experiences discrimination in the workplace? Evidence from the QNHS Equality Modules*, ESRI/IHREC, pp. 33-35. Available at <https://www.ihrec.ie/app/uploads/2017/11/Who-experiences-discrimination-in-Ireland-Report.pdf>.

⁶³ European Commission (2016), *Proposal for a Directive of the European Parliament and Council laying down standards for the reception of applicants for international protection (recast)*, COM(2016) 465 final.

‘access to the labour market, once granted, needs to be effective. If conditions effectively hinder an applicant from seeking employment, the access should not be considered effective’.⁶⁴

The European Commission has also emphasised that measures to prioritise EU and EEA citizens and legally resident third-country nationals, through, for example, labour market tests, ‘should not hinder effective access for applicants to the labour market’, and has suggested the inclusion of this point in a revision of recital 23 of the Directive.⁶⁵

The Commission is of the view that, to ensure that access to employment for asylum seekers is effective in practice:

- **sectoral restrictions on accessing the labour market for asylum seekers should be limited to the greatest possible degree,**
- **access should not be contingent on wage, salary or working time restrictions which are not generally applicable.**

Any limitations on asylum seekers’ access to the labour market:

- **should be devised with the principle of ‘effective access’ as the primary consideration,**
- **must be underpinned by clearly articulated and publicly available policy criteria that are subject to regular review,**
- **must be accompanied by effective safeguards against discrimination on grounds of ‘race’, ethnicity or migration status.**

Data on asylum seekers’ skill profiles

Officials have indicated that there are no studies available on the skillset of persons currently in the protection system, and have been unable to provide an estimate of the

⁶⁴ European Commission (2016), *Proposal for a Directive of the European Parliament and Council laying down standards for the reception of applicants for international protection (recast)*, COM(2016) 465 final, p. 15. The Proposal foresees that the relevant paragraph in Article 15.2 is amended to focus solely on the obligation to provide effective access, deleting the formula providing for States to ‘decide the conditions for granting access to the labour market for the applicant, in accordance with their national law’, at p. 47.

⁶⁵ European Commission (2016), *Proposal for a Directive of the European Parliament and Council laying down standards for the reception of applicants for international protection (recast)*, COM(2016) 465 final, pp. 15, 26.

likely scale of access to the labour market that may be achieved through the interim scheme.⁶⁶

Without adequate data or information on the profile, qualifications and skill sets of the current cohort of international protection applicants, it is more difficult to design a process that ensures 'effective access' to the labour market under the recast Directive. Provisions for access to employment must therefore be underpinned and informed by clear analysis of the likely labour market prospects of the current cohort of asylum seekers resident in the State, to ensure that effective access is not undermined by any limitations imposed.

The Commission recommends that a detailed survey of the skills, qualifications and labour market profile of the current cohort of international protection applicants be carried out in order to inform the work of the inter-departmental group, and to ensure that the scheme it recommends is compliant with the recast Directive's standard of 'effective access'.

Administrative barriers to effective access

Asylum seekers face numerous administrative barriers in dealing with state agencies. In its discussions with asylum seeking women in 2016, the Commission heard concerns about the delays and difficulties experienced in obtaining PPS numbers and medical cards.⁶⁷

Respondents also raised the concern that they did not have access to appropriate identification documents, leading to difficulties in opening bank accounts,⁶⁸ accessing services and conducting other business for which identification is required. Asylum seekers

⁶⁶ Officials indicated this in response to questions posed at an information session on the right to work for international protection applicants held by the Department of Justice, Department of Business, Enterprise and Innovation, and the Department of Employment Affairs and Social Protection in Dublin on 31 January 2018.

⁶⁷ Interviews conducted by the Commission with women in direct provision centres in Kerry and Galway in 2016 during its consultation on implementation of the Convention on the Elimination of all forms of Discrimination against Women (CEDAW).

⁶⁸ INIS has provided information to Asylum Seekers confirming their entitlement to open a bank account, subject to provision of appropriate identity documentation. Respondents during IHREC consultations in 2016, however, raised concerns about barriers to this in practice. See <http://www.inis.gov.ie/en/INIS/Pages/self-employment-permission#1st>

are also unable to apply for a driving licence, which further restricts the potential for independence and access to employment, including self-employment opportunities.⁶⁹

The Commission notes that the relevant guidance documentation on the interim scheme requires that applicants furnish a valid passport as identification, are registered with Revenue, and have extensive documentation in order.⁷⁰

The Commission is of the view that in order to ensure ‘effective access’, the scheme for access to employment, in particular self-employment, must incorporate a process to assist applicants to overcome administrative barriers. This should include the dissemination of accessible information to asylum seekers on their right to access employment, and the provision of clear guidance and assistance on meeting the relevant administrative requirements.

The Commission recommends that requirements for photo identification for employment permits, self-employment and other relevant processes take into account the particular circumstances of asylum seekers, many of whom will not possess valid passports or similar identification.

The Commission recommends that a scheme be put in place to permit asylum seekers to apply for driving licenses, or, where in line with current regulations, to transfer driving qualifications from their country of origin.

⁶⁹ In order to apply for a driving license, the National Driver Licence Service (NDLS) requires applicants to furnish proof of residency entitlement. For non-EU/EEA/Swiss citizens, this would require the production of a Garda National Immigration Bureau/GNIB Card along with a current passport. Asylum Seekers are furnished with a temporary residence certificate, which does not meet the requirements of the NDLS. See <https://www.ndls.ie/identity-validation.html#evidence-of-residency-entitlement>.

⁷⁰ INIS (9 February 2018) *Information Booklet: Access to the Labour Market for Eligible International Protection Applicants*, pages 8–10.

Timing of access to labour market

According to the provisions of Article 15 of the recast Reception Conditions Directive, Member States are required to ensure that applicants for international protection have access to the labour market ‘no later than 9 months from the date when the application for international protection was lodged if a first instance decision by the competent authority has not been taken’.⁷¹

The 2015 Working Group report mirrored this standard in recommending access to employment for ‘applicants who are awaiting a first instance decision for nine months or more’.⁷² In its 2014 *Policy Statement* on direct provision, the Commission recommended a time period of between 6 and 9 months after which an applicant who has not yet received a decision could, *inter alia*, access employment.⁷³

The temporary interim measure for access to the labour market, in effect since 9 February 2018, includes an administrative scheme to allow asylum seekers who have been waiting on a first instance decision for 9 months or more to apply for permission to be self-employed.⁷⁴

The UNHCR, in line with its focus on the longer term benefits of access to employment, has emphasised that:

‘Earlier access to the labour market promotes the social inclusion and self-reliance of asylum-seekers, and avoids the loss of existing skills and dependency. For the host State, it brings increased tax revenues and savings in accommodation and other support and reduces illegal working’.⁷⁵

The UNHCR recommended that access to the labour market therefore be granted no later than 6 months after the date of lodging of an application for international protection. It noted⁷⁶ that such a limit would align with the standards set out in the recast Asylum

⁷¹ Recast Reception Conditions Directive, Article 15.1. The article specifies that the delay in first instance decision cannot be attributed to the applicant.

⁷² The Working Group Report 2015, para. 5.49.

⁷³ IHREC (2014) *Policy Statement on the System of Direct Provision in Ireland*, p. 18.

⁷⁴ INIS (9 February 2018), *Information Booklet: Access to the Labour Market for Eligible International Protection Applicants*. Available at <http://www.inis.gov.ie/en/INIS/Pages/labour-market-access>.

⁷⁵ UNHCR Comments on Recast Directive 2015, p. 38.

⁷⁶ UNHCR Comments on Recast Directive 2015, p. 38.

Procedures Directive, which imposes a maximum timeline of six months on processing an asylum claim.⁷⁷

While Ireland has not yet opted-in to the recast Asylum Procedures Directive, the International Protection Act 2015 places a particular importance on the elapsing of six months in the consideration of an asylum claim. Section 39(5) of the Act provides that an asylum seeker is entitled to seek information from the International Protection Office on the likely timing of a recommendation on their application in the event that such a recommendation cannot be made within six months.⁷⁸

Reflecting the approach of the UNHCR and the Asylum Procedures Directive, a new six-month timeline for labour market access is currently being proposed by the European Commission.⁷⁹

The Commission recommends that, in line with emerging standards and UNHCR guidance, applicants for international protection be granted access to the labour market not later than 6 months after the date of lodging an application.

Self-employment

The Commission notes the Minister's recent statements indicating that the administrative scheme to allow applications for permission to engage in self-employment launched in February 2018 will 'mirror the legislative provision to be put in place to regulate self-employment for applicants once the State opts into the EU (recast) Reception Conditions

⁷⁷ Directive 2013/32/EU of the European Parliament and the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), Article 31(3). Ireland has not opted in to this Directive and is therefore not bound by it.

⁷⁸ International Protection Act 2015 s39(5): 'Where a recommendation referred to in subsection (2)(b) cannot be made within 6 months of the date of application, the Minister shall, upon request from the applicant, provide the applicant with information on the estimated time within which a recommendation may be made.'

⁷⁹ European Commission (2016), *Proposal for a Directive of the European Parliament and Council laying down standards for the reception of applicants for international protection (recast)*, COM(2016) 465 final, pages. 14–15, 47. The relevant text of the revised Article 15 would read: 'Member States shall ensure that applicants have access to the labour market no later than 6 months from the date when the application for international protection was lodged if an administrative decision by the competent authority has not been taken and the delay cannot be attributed to the applicant.'

Directive’.⁸⁰ The Commission therefore recalls the concerns outlined above regarding the risks of labour exploitation that may attach to this scheme.

Vocational training

Article 16 of the recast Reception Conditions Directive provides that Member States ‘may allow applicants access to vocational training irrespective of whether they have access to the labour market’. The Article also provides that access to vocational training relating to an employment contract ‘shall depend on the extent to which the applicant has access to the labour market’.

As outlined above, the UNHCR has stressed the importance of states focussing on the long-term outcomes of reception policies.⁸¹ On the subject of vocational education, it has recommended that access to vocational training be granted within six months of the lodging of an asylum application, and that states permit ‘access to vocational training relating to an employment contract even before they have access to the labour market, as a necessary step in maximising the prospects of future employment in the host society’.⁸²

The Commission has highlighted the importance of access to vocational training and education for asylum seekers, and has recommended that access be permitted to ‘education and training in preparation for seeking employment’.⁸³ The Commission is of the view that access to such training is of particular importance in the current context, where protracted periods in direct provision have resulted in the loss of skills and competencies, and may place asylum seekers, in addition to those recently granted refugee status or subsidiary protection, in a position of disadvantage as compared to others in the job market. In this regard, language competency is of particular importance, given the significant role the language barrier can have on effective access to employment for asylum seekers.⁸⁴ In light

⁸⁰ Minister for Justice (23 January 2018), *Briefing Note for Oireachtas Members on Directive 2013/33/EU*. Sourced via Dr. Liam Thornton at <https://liamthornton.ie/tag/briefing-note-for-oireachtas-members-reception-conditions-directive-11-1-2018/>.

⁸¹ UNHCR (May 2007) *Note on the Integration of Refugees in the European Union*, p. 3.

⁸² UNHCR Comments on Recast Directive 2015, p. 40.

⁸³ IHREC (2014) *Policy Statement on the System of Direct Provision in Ireland*, p. 19.

⁸⁴ Aida, the Asylum Information Database (2016), comparative data on access to employment for asylum seekers in the EU. Available at <http://www.asylumineurope.org/comparator/reception>. AIDA highlights the language barrier as a significant obstacle to accessing employment, particularly in non-Anglophone countries, such as Belgium, Bulgaria, Cyprus, Spain, Croatia, Hungary, Italy, Malta, Poland, Switzerland and Serbia.

of the state's intention to open up access to the labour market for asylum seekers, appropriate revisions and additions may be necessary to the Further Education and Training Authority's (SOLAS) 2014–2019 strategy,⁸⁵ and to its annual further education and training service plans,⁸⁶ to ensure that appropriate training is provided.

The Commission recommends that access to vocational education be provided to asylum seekers in line with UNHCR recommendations.

The Commission recommends that training, including expanded English language training and tuition support, be provided to assist asylum seekers and those recently granted refugee status or subsidiary protection to transition into the labour market, and that appropriate revisions of current further education plans and strategies be made to facilitate this.

⁸⁵ Available at <https://www.education.ie/en/Publications/Policy-Reports/Further-Education-and-Training-Strategy-2014-2019.pdf>

⁸⁶ See, for example, SOLAS (2017) *The 2017 Further Education and Training (FET) Services Plan*. Available at <http://www.solas.ie/SolasPdfLibrary/FET%20Services%20Plan%202017.pdf>.



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