

Submission to the Implementation Group on access to the labour market for protection applicants

i. Introduction

Nasc, the Migrant and Refugee Rights Centre, is a non-governmental organisation working for an integrated society based on the principles of human rights, social justice and equality. Nasc (which is the Irish word for link) works to link migrants to their rights through protecting human rights, promoting integration and campaigning for change. Nasc's legal team assist some 1,000 immigrants annually in navigating Ireland's protection, immigration and naturalisation systems. Our policy and campaigning work is directly informed by our day-to-day experiences working with migrants, refugees, asylum seekers and ethnic minorities living in Ireland.

Nasc was founded in 2000 in response to the rapid rise in the number of migrants moving to Cork. This rise was due in part to the introduction of the Government's policy on dispersal and the establishment of the 'direct provision' asylum reception system in 1999. There are currently five direct provision centres in Cork City and County, placing Cork as one of the counties with the highest asylum-seeking populations in the country. We have over eighteen years' experience working in the immigration and protection systems and our submission is directly informed by the issues that present in our legal clinics and through our direct work with asylum seekers at all stages of the process.

We welcome the opportunity to make a submission to the Implementation Group and we hope this will inform how access to the labour market will be realised once the EU (recast) Reception Conditions Directive (RCD) is transposed into Irish law. We support submissions already made on this issue by the Irish Refugee Council and the Irish Human Rights and Equality Commission, and would echo their recommendations, particularly in the context of Ireland's constitutional and international human rights obligations to provide meaningful access to employment.¹ This submission does not seek to reiterate the points made by those organisations, but offer our unique perspective based on our experience providing advice and support to people seeking to access employment under the current 'interim' provisions, and our recommendations on how to ensure that the permanent right to work provisions introduced by the Government in the context of transposing the Directive into law are accessible, effective and substantive rights.

¹ Irish Refugee Council, *Policy Paper: The Right to Work for International Protection Applicants*, July 2017, available at: <http://www.irishrefugeecouncil.ie/wp-content/uploads/2017/07/IRC-Right-to-Work-Policy-Paper-30.06.17.pdf>; Irish Human Rights and Equality Commission, *Access to the Labour Market for Applicants for International Protection*, March 2018, available at: <https://www.ihrec.ie/app/uploads/2018/05/Access-to-the-labour-market-for-applicants-for-international-protection.pdf>.

ii. **Nasc 's experience working with protection applicants seeking to avail of the interim measure for access to the labour market**

Following the Supreme Court ruling that the current ban was unconstitutional,² Nasc welcomed the announcement from the Minister for Justice and Equality that the Government would be taking this opportunity to opt in to the EU (recast) Reception Conditions Directive, as this is something we have long called for. This is because the Directive includes a range of provisions beyond access to the labour market which we believe will streamline Ireland's asylum system with the rest of Europe and will significantly improve conditions for people seeking international protection in Ireland.³

On foot of the Department's release of the interim right to work provisions in February 2018, Nasc delivered information and advice sessions for asylum seekers both in the office and across all five direct provision centres in Cork city and county. We also invited local SICAP and LEADER funded organisations – namely Cork City Partnership and the South and East Cork Area Development Partnership (SECAD) – to deliver targeted information sessions on self-employment supports. Overall, we have delivered at least 90 individual consultations with people currently in the asylum system in relation to accessing the interim right to work provisions.

Working as an Employee

Under the interim measures issued by the Department of Justice, access to employment as an employee is through the employment permit system administered by the Department of Business, Enterprise and Innovation (DBEI). While eligibility for access to employment through a work permit is less restrictive than access to self-employment in terms of who can apply (i.e. no minimum time in the protection system, applicants with applications in process of appeals and judicial review can apply), the other terms that govern the employment permit system have meant that very few asylum applicants can effectively avail of the right to work as an employee.

Current conditions in the employment permit system, among them the high-income threshold of €30,000 p.a. and the 62 categories covering 200 specific professions that are excluded from the system,⁴ as well as the

²N.V.H v Minister for Justice & Equality and Ors, 30 May 2017, available here: <http://www.asylumlawdatabase.eu/en/case-law/ireland-nvh-v-minister-justice-equality-and-ors-30-may-2017>

³ Nasc welcomes announcement from Minister on right to work for asylum seekers, 22 November 2017, available here: <http://www.nascireland.org/campaign-for-change/direct-provision/nasc-welcomes-announcement-minister-right-work-asylum-seekers/>.

⁴ See DBEI, Ineligible Categories of Employment for Employment Permits available at <https://dbei.gov.ie/en/What-We-Do/Workplace-and-Skills/Employment-Permits/Employment-Permit-Eligibility/Ineligible-Categories-of-Employment/>

temporary nature of the permission and the expectations placed on potential employers, have effectively rendered access to the employee work scheme ineffective.

In *NVH*, the Supreme Court stated that the State may limit and regulate access to employment on the basis of societal and economic reasons.⁵ The list of job categories excluded from the employment permits system as set out by the DBEI is an example of this. The employment permit system is one designed for recruitment from outside the EEA, and the restrictions on certain jobs are based on the assertion that there are enough workers in the State to fill such vacancies.⁶ It should be noted that not all non-EU nationals are required to obtain an employment permit, only those whose main purpose in Ireland is to work are required to do so be it that they are coming from outside the State or are resident in the State on stamp 2 or 3 basis.⁷

The criteria for the employment permit system are not necessarily applicable to the experience of people who are seeking international protection, and considering the large number of excluded job categories the scheme is overly prohibitive for those seeking entry level positions in the labour market. In addition, the temporary nature of the permission – lasting only until a final decision is made on a protection application – places an undue burden on potential employers, who would be expected to undergo a Labour Market Needs Test, make a job offer and pay the work permit application fee for an employee who could potentially have to end their employment at any time if they receive a negative final decision.

As far as we are aware, only one work permit application has been submitted since the interim scheme commenced in February, and this application is still pending.⁸ Of the over 90 people we have provided information and support to around the interim measures, we have as yet not supported a single individual in applying for a work permit on foot of getting a job offer.

⁵ NHV, para 14.

⁶ See DBEI, Minister Humphreys announces changes to Employment Permits Regulations to alleviate pressure on Hospitality and Animation Sectors, 05/03/2018 available at <https://dbei.gov.ie/en/News-And-Events/Department-News/2018/March/15032018.html>

⁷ Non-EU nationals who are refugees, family members of refugees or Irish and EU nationals, and those with leave to remain are not required to hold employment permits to access the labour market.

⁸ Data provided by way of Parliamentary Question from Deputy Donnchadh Ó Laoghaire on 1 May 2018: <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2018050100083?opendocument#WRO03800>

Working as Self Employed

The self-employment component of the interim scheme has been markedly more accessible for applicants. The application process is an accessible and affordable one and, in our clients' experience, decision making has been remarkably efficient.

That being said, we have found some issues emerging – in particular relating to the temporary nature of the permission, and the risk that asylum seekers will end up – unbeknownst to themselves – in situations of 'fake or bogus self-employment', where a person is effectively working as an employee but being defined as 'self-employed' by the employer.⁹ The risk that asylum seekers may fall into this type of situation is exacerbated by the temporary nature of the self-employment permission, which requires renewal every six months until a final decision is made on an asylum application. The temporariness and insecurity of this permission means that the majority of asylum seekers who are eligible for a self-employment permit will not be setting up their own business on any large scale; they will be seeking to hire themselves out as a contractor, increasing their vulnerability to labour exploitation, or setting up as a sole trader for the duration of their asylum application.

Asylum seekers have many unique skills and innovative ideas for new businesses which are being hampered by the insecurity of this permission. Even if someone did successfully set up a small business, they must include a risk management strategy if they end up with a negative final decision on their asylum application, and their successful business venture in the State would potentially be lost.

In addition, there remains a lack of coordination amongst the various government departments and bodies involved in ensuring real and substantive access to self-employment, in particular Revenue (lack of clarity on registration and submission of income tax processes), the Department of Social Protection (lack of clarity on access to Intreo courses and supports), the Department of Transport (in relation to access to driver's licenses) and the Central Bank and banking sector (in relation to setting up bank accounts). This lack of coordination is resulting in the creation of additional barriers that asylum seekers have to overcome when seeking to become self-employed.

Access to training and employment supports

One of the key areas highlighted by the Department of Justice on the introduction of the interim provisions was that it allowed for access to further education and vocational training courses which asylum seekers have previously been prohibited from accessing as they were not in receipt of a qualifying social welfare payment.

⁹ Code of Practice for Determining Employment or Self-Employment Status of Individuals; available at: <https://www.revenue.ie/en/self-assessment-and-self-employment/documents/code-of-practice-on-employment-status.pdf>

However, under the guidelines provided by the Department of Justice, there is a lack of clarity around access to these courses. In the INIS guidelines, it states:

Access to the labour market may allow for access to further education or training (FET) or third level courses that have an employment, vocational or workplace-training component. Your letter of permission from the Minister to engage in self-employment can be used as proof of your eligibility to work.¹⁰

Firstly this statement suggests that labour market access *may allow* access to FET courses, but does not provide details for the conditions of this permission. Secondly, it suggests that access to FET courses is only open to those who have received a permission to work as self employed, so even if an asylum seeker has no intention of working as self employed, they must apply in order to access courses through Intreo or through their local Education and Training Board (ETB). Also, since only those eligible for self employment are mentioned, it is unclear whether asylum seekers who are currently actively seeking employment are eligible of availing of the employment services offered at Intreo offices.

Furthermore, it should be noted that asylum seekers currently have limited access to vocational training and further education courses not linked to labour activation – namely Post Leaving Certificate (PLC) courses, primarily due to the non-EU fees, and the very few courses available to asylum seekers are often related to the restricted categories under the employment permit system. A significant number of our clients have expressed this concern, particularly those undertaking courses related to care work.

Our experience has led us to conclude that access to the labour market under the interim measures is ineffective in practice and there is an overall lack of coherence and internal contradictions within the scheme. For example, a qualifying asylum seeker who is ineligible to apply for an employment permit as a carer or construction worker, could potentially take on those exact same occupations with a permission to be self-employed.

Facilitating workers' access and contributions to the Irish social protection and revenue systems should be key in considerations of the right to work. The decision to work as an employee or self-employed should be one taken by the worker after carefully considering their skills and market needs. We are concerned that by making access to the labour market as an employee near impossible, protection applicants will be driven to take up work as self-employed or contractors even when this is not in their or the Government's best interest.

¹⁰ INIS, *Information Booklet for Access to the Labour Market for Eligible International Protection Applicants*, February 2018, available at: <http://www.inis.gov.ie/en/INIS/Information%20Booklet%20for%20Applicants%20on%20Access%20to%20Labour%20Market.pdf/Files/Information%20Booklet%20for%20Applicants%20on%20Access%20to%20Labour%20Market.pdf>, p. 13

iii. **A right that counts: Our proposal for an effective right to work**

Once the EU (recast) Reception Conditions Directive enters into force in Ireland, under Article 15 Ireland will be obliged to ensure that asylum seekers must be granted access to the labour market within 9 months of lodging their original application if a first instance decision has not been issued. The Article further provides that access to the labour market must be *effective*. It should be noted that this Directive, like all EU Directives, sets down minimum standards and Member States can, if they wish, introduce more favourable standards; this is provided for under Article 4. We believe that ensuring that access to the labour market for protection applicants is effective will benefit both applicants and the Irish economy.

We recommend that the right to work should be available to all asylum seekers who have been waiting for a first instance decision on their application for a minimum period of 6 months. This would bring a level of parity to the qualifying conditions for both the self-employment and general employment schemes and increase the effectiveness of the right. Access after 6 months will bring us in line with international best practice; it is the timeframe suggested for the revisions currently being negotiated to the Common European Asylum System, and it is the recommendation made by the UNHCR and by IHREC in their recent submission to the Justice Committee.

- **The application process and terms of permission to work:**

- All restricted categories of employment should be lifted to give proper effect to the right to work.
- The application form and process (including fee exemption) should be based on the administrative scheme for self-employment.
- A 12-month renewable permission to work, covering both employment and self-employment, be issued to eligible applicants, and that this permission be renewable up and until a final decision is reached on their protection application.¹¹
- Similar to the current provisions, the permission should be available to all protection applicants, regardless of whether or not they reside in Direct Provision accommodation.
- Similar to the interim administrative scheme for self-employment, applicants would be required to cooperate with the protection process and to have made reasonable efforts to establish their identity. In relation to the requirement of establishing the applicant's identity, due consideration should be given to the fact that persons seeking international protection do not always have a valid passport.

¹¹ A final decision is made when all appeals procedures, including any judicial review proceedings are concluded.

- If a negative final decision is reached, the permission to work is not rendered invalid immediately and individuals are given 4 weeks after the date they are notified of the final decision to allow them to get their affairs in order. This 4-week period would allow applicants that were employees to give sufficient notice to their employers and finish their duties and would give those who are self-employed or started their own business time to transfer ownership or bring their business to an end in compliance with their contractual and legal obligations.
- **Direct Provision, Social Welfare and Employment Supports:**
 - Under our proposal no deductions or mandatory contributions be made to applicants who are in employment. This is in line with current government practice in other areas, for example in cases of homeless families residing in family hubs, where an adult in the family is working or in cases of persons who are self-employed under the *Back to Work Enterprise Allowance*, (who for up to two-years after setting up their business are allowed to keep a percentage of their social welfare payments).¹² These practices take into consideration the vulnerability of families who do not have stable accommodation and the risk and instability of individuals who are starting their own businesses.
 - Access to further and vocational education and training courses linked to labour activation measures and any other employment supports should be open to anyone who fits the eligibility criteria to apply for the right to work (i.e. has been waiting 6 months or more for a first instance decision on their protection application).

Additional recommendations:

We would also like to stress the importance of addressing issues that are related to the effective access to the labour market, namely access to bank accounts and the ability to obtain a driving licence.

- **Bank Accounts:** On the INIS website, it notes that under the EU Payment Accounts Directive¹³, which was transposed into Irish law in 2016¹⁴, any “consumer who is legally resident in the European Union”, which includes people seeking asylum, has the right to open and use a bank account.¹⁵ However a number of our clients have been unable to open bank accounts as banks require them to provide identity documents, which applicants do not have because their passports have been retained

¹² See Department of Affairs and Social Protection, *Back to Work Enterprise Allowance*, available at <http://www.welfare.ie/en/Pages/Enterprise-Allowance-Self-Employed.aspx>

¹³ Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014

¹⁴ S.I. No. 482 of 2016, <http://www.irishstatutebook.ie/eli/2016/si/482/made/en/print>

¹⁵ See <http://www.inis.gov.ie/en/INIS/Pages/self-employment-permission#FAQ>; also

by the International Protection Office or because they did not have a passport on the first place. **We recommend that the International Protection Office implements a clear protocol to either return passports for a limited time to protection applicants so that they can open bank accounts, or provide them with certified copies when these are accepted by banks. We also recommend that the permission to work issued can be used as a temporary form of identification by applicants; this may require engaging with the Central Bank to ensure that this form of identification is deemed acceptable by banks throughout the State.**

- **Driver's License:** Currently, the National Driving Licence Service (NDLS) refuses to issue learners' permits and driving licences to protection applicants stating that they need to verify the applicant's residency entitlement. While we recognise that the verification of a potential driver's identity is important, the documents currently listed by NDLS as acceptable evidence of residency entitlement only accept GNIB/IRP certificates of registration. Persons who are in the protection system are legally residing in the country while their applications are being considered. As such, protection applicants are issued with Temporary Residence Certificates in line with s. 17 of the International Protection Act, 2015 (IPA). S. 17(4) of the Act, which states that: "A certificate shall be deemed to be a registration certificate for the purposes of section 12 of the Act of 2004". We fail to see any compelling reason to refuse to issue learners' permits or driving licences to protection applicants who have satisfactory evidence of their identity, who have a permission to reside in the country while their protection application is being examined, and have passed the necessary theory and practical tests. Depriving protection applicants from being able to drive legally affects their access to the labour market and further isolates those who reside in centres that are outside urban areas. **We recommend that the Department of Justice engages with the National Driving Licence Service and the Department of Transport to clarify that protection applicants do have a legal right to reside in the State while their applications are pending.**

iv. Further Information

If the Implementation Group would like further information, a representative of Nasc is willing to appear before the Group to present on this submission and our experience providing advice and support on accessing the labour market in more detail. For further information, please contact Fiona Finn, CEO, Nasc, the Migrant and Refugee Rights Centre – email: fiona@nascireland.org or ring (021) 450 3462.