



Living with Dignity: Right to Work

Submission on Extending a Right to Work to Persons
Seeking Protection in Ireland

Working Paper

Jesuit Refugee Service Ireland

July 2017

Index

1. Right to Work: Framework of Paper

- 1.1 Approach
- 1.2 Scope
- 1.3 Guiding Principles

2. Impact of the Ban on Seeking Employment on Asylum Seekers Lives

- 2.1 Human Costs of Employment Ban
- 2.2 Direct Impact
- 2.3 Indirect Impact

3. Case for the Right to Work

- 3.1 The Experience of JRS Ireland
- 3.2 McMahon Report
- 3.3 Supreme Court Ruling
- 3.4 Benefits of a Right to Work
- 3.5 Risks arising from a Right to Work
- 3.6 Conclusions

4. Right to Work and Length of Time

- 4.1 Interaction with Length of Time
- 4.2 Conclusions

5. Labour Market Access for Protection Applicants in the EU

- 5.1 Time Limits
- 5.2 Restrictions
- 5.3 Impacts on Rights and Entitlements
- 5.4 Supports
- 5.5 Administration
- 5.6 Equitable Labour Market Access between Migrant Categories
- 5.7 Conclusions

6. Conclusions and Recommendations

- 6.1 Conclusions
- 6.2 Recommendations

1. Right to Work: Framework of Paper

Work offers dignity and the best means of integration and reduces the cost to the State.¹

1.1 Approach

In this policy submission, JRS Ireland outlines how a right to seek employment may be extended to persons seeking protection in Ireland in light of the Supreme Court ruling in *N.V.H -v- Minister for Justice & Equality*.² The Supreme Court found the absolute ban on a right to work for asylum seekers was “in principle” unconstitutional. It adjourned making any formal order for 6 months to allow the legislature consider how to address the situation.

This paper analyses the scope and application of a right to work for asylum seekers, taking into consideration the practice in other EU Member States, the operational implications and constraints. It offers a number of practical and implementable recommendations to introduce a right to work and also address linked concerns relating to length of time in the system.

1.2 Scope

The scope of this discussion extends to individuals, children and families residing both in and outside Direct Provision, as well as future applicants for protection in Ireland.

The focus of JRS Ireland’s concern is the right to work for the 4,692 persons residing in Direct Provision at the end of May 2017.³ It is estimated that around 500 persons have status so already have a right to work. If we assume a consistent number of children between those residing in Direct Provision accommodation who have status and those who do not, this would provide a breakdown of 4,152 persons, 3,085 adults and 1,067 children.

1.3 Guiding Principles

- The 2015 McMahon Report⁴ recommended that once the single procedure was operating efficiently, access to the labour market should be facilitated for protection applicants awaiting a first instance decision for nine months or more.
- Extending the right to work to protection applicants would harmonize the position of Ireland within the Common European Asylum System.
- There is emerging consensus that facilitating quick access to the labour market is a critical component of an effective response to the EU Refugee Crisis.⁵
- Effective integration into EU Member State labour markets is facilitated by well-functioning asylum systems capable of processing cases as quickly as possible.⁶

¹ Sample of testimony from written consultation conducted by Working Group on Protection Process (Working Group to Report to Government on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers (2015) ‘Final Report’, Dublin: Department of Justice and Equality).

² [2017] IESC 35.

³ Reception and Integration Agency (2017) ‘Monthly Statistics Report – May 2017’, available at <http://www.ria.gov.ie/en/RIA/RMR%20Monthly%20Report%2005-2017.pdf/Files/RMR%20Monthly%20Report%2005-2017.pdf> [accessed on 14th July 2017].

⁴ Working Group to Report to Government on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers (2015) ‘Final Report’, Dublin: Department of Justice and Equality.

⁵ Eurofound (2016) ‘Approaches to the labour market integration of refugees and asylum seekers’, Publications Office of the European Union, Luxembourg.

⁶ Martin, I. et al (2016) ‘From Refugees to Workers: Mapping Labour-Market Integration Support Measures for Asylum Seekers and Refugees in EU Member State’, Bertelsmann Stiftung.

2. Impact of the Ban on Seeking Employment on Asylum Seekers Lives

2.1. Human Costs of Employment Ban

Direct Provision residents articulated the impact and the human costs of being denied a right to work in the McMahon Working Group consultation process:

*The longer the time we are not allowed to work, the more we rot and waste away. Our mental and physical health is greatly disturbed and completely demoralized.*⁷

*These effects include dependency syndrome and laziness coming from the fact it is illegal... to seek work.*⁸

In general, many of the human costs associated with the ban on employment are synonymous with the negative impacts of living long term in Direct Provision:

- Boredom, isolation and social exclusion.
- Obsolescence of skills and creation of dependency.
- Negative impacts on physical, emotional and mental health.

In addition - if human dignity is understood as the affirmation of a person's sense of value or worth and demands the realisation of physical, emotional and mental integrity so that a person has autonomy and effective control over their lives – then the prohibition on the right to seek employment is a barrier to living with dignity.

Finally, in *N.V.H -v- Minister for Justice & Equality*, Justice O'Donnell specifically noted the evidence “*of depression, frustration and lack of self-belief*” that manifested in the appellant as a result of the prohibition.

2.2. Direct Impact

- Previously acquired skills and competencies made redundant.
- Effective integration of adults inhibited through the denial of a network of colleagues and the accompanying lack of resources necessary for participation in the community.
- Effective integration of children inhibited through the accompanying lack of resources necessary for participation in extra-curricular activities.
- Creation of dependency on State or other sources of support (e.g. philanthropic).
- Increased vulnerability as a result of negative impacts on mental health.
- Corrosion of family life due to the undermining of parent's ability to act as role model; make decisions to improve the welfare of their children; or assume position of household provider.

2.3 Indirect Impact

- Recourse to accessing labour on the “black market”.
- Recourse to inappropriate or dangerous behaviour as a result of boredom and/or loss of opportunity.
- Ability of Direct Provision residents to transition to independent living undermined.
- Potential loss of taxable earnings for the Irish State.
- Potential loss of skilled labour force by the Irish State.

⁷ See supra note 1.

⁸ See supra note 1.

3. Case for the Right to Work

*These wasted years doing nothing – after leaving the system you are faced with a dilemma of where to start from and where to go from here – what would I put on my resume for these years?*⁹

3.1 The Experience of JRS Ireland

In the experience of JRS Ireland delivering services in 11 Direct Provision centres, the length of time in the system and the prohibition on work are the issues of greatest concern to asylum seekers. The ban on a right to work prevents a person seeking asylum from living with dignity and undermines their sense of value and self-worth. It also denies autonomy and effective control over their lives.

In response, the JRS Ireland *Transition Project* was designed to combat the negative effects of institutionalisation and to foster the skills necessary for independent living outside the Direct Provision system. In Phase II of the project, which commenced in September 2016, JRS Ireland has prioritised increasing the employability of asylum seekers in order to facilitate their successful transition from Direct Provision and to assist their long term integration and active participation in Irish society.

Some of the challenges identified by the employment consultant tasked with designing and delivering the ‘back to work’ training modules were the:

- Significant employment history gaps in the CVs of former asylum seekers.
- Perceived obsolescence of previously acquired skills and qualifications.
- Lack of motivation and self-confidence among former asylum seekers.

3.2 McMahan Report

In June 2015 a Government appointed Working Group, under the chairmanship of retired High Court Judge, Dr Bryan McMahan, published a *Report to Government on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers*. In developing the report, a Sub Group on Improvements to Asylum Seeker Supports dealt in detail with the right to work issue.

The Working Group found the prohibition on access to the labour market is a barrier to living with dignity as it has the potential to undermine a person’s sense of value and worth. It can also prevent the realisation of physical, emotional and mental integrity and denies a person autonomy and effective control over their lives. It recommended¹⁰:

- *Provision for access to the labour market for protection applicants who are awaiting a first instance decision for nine months or more and who have co-operated with the protection process (under the relevant statutory provisions), should be included in the International Protection Bill and should be commenced when the single procedure is operating efficiently. This recommendation takes account of the fact that, under the current statutory arrangements, first instance decisions in respect of refugee status and subsidiary protection do not (in the normal course) issue within nine months at present.*
- *Any permission given to access the labour market should continue until the final determination of the protection claim.*
- *A protection applicant who has the right to access the labour market and is successful in finding employment, and who wishes to remain in Direct Provision, should be subject to a means test to determine an appropriate contribution to his/her accommodation and the other services provided to him/her.*

⁹ See supra note 1.

¹⁰ See supra note 4.

The implementation of this recommendation would benefit those in the system who have not received a first instance decision under the single procedure within nine months through no fault of their own. It would also bring the State into line with most other EU Member States.

The Working Group highlighted that the employment ban also affects access to further education and training, as admissibility for many courses is linked to eligibility to enter the workforce. Asylum seekers are not deemed unemployed, so are ineligible for labour activation courses.

3.3 Supreme Court Ruling

In an historic ruling the Supreme Court has found the prohibition on a right to work for asylum seekers, irrespective of the length of time spent in the system, is unconstitutional. A Burmese national who had spent 8 years in Direct Provision was successful in his challenge to the legal ban which prevented him seeking work as an asylum seeker.

In the judgement, Mr Justice O'Donnell outlined that while the State can legitimately have a policy of restricting employment of asylum seekers, Section 9.4 of the Refugee Act does “*not just severely limit*” their right to seek work, it “*removes it altogether*”. As there is no limit on the time for processing an asylum application, that is tantamount to an absolute prohibition on employment. While the Court accepted that there could be differentiation between a right to work for citizens and non-citizens, and in particular between citizens and asylum seekers, it was not acceptable to remove the right “*for all time*” for asylum seekers:

*The point has been reached when it cannot be said the legitimate differences between an asylum seeker and a citizen can continue to justify the exclusion of an asylum seeker from the possibility of employment.*¹¹

*This damage to the individual's self-worth and sense of themselves, is exactly the damage which the constitutional right [to seek employment] seeks to guard against.*¹²

3.4 Benefits of a Right to Work

- Extending the right to work to protection applicants would place persons seeking protection in Ireland in comparably the same situation as the majority of other EU Member States.
- Employment is an internationally recognised indicator of health and wellbeing.
- Employment facilitates the integration of migrant populations within host communities.
- The right to work promotes self-sufficiency and independence; qualities that deteriorate as a result of residence in an institutional environment such as Direct Provision.
- The right to work offers greater dignity, decision making ability and control over the welfare of children to protection applicants.
- Employment can increase the ability of asylum seekers to transition from Direct Provision.

Recent research in the EU has found that long term integration prospects of international protection applicants are greatly enhanced by enabling access to the labour market at the earliest opportunity. Chapter 5 explores in more detail this trend among EU Member State to provide a right to seek employment for protection seekers within a few months of arrival.

For example, in Ireland as we approach full employment again there is a strong pragmatic argument to facilitate early access to seek employment. It is essentially win-win. For those asylum seekers who find work the State benefits in terms of increased tax revenues and potentially from contributions to meet reception supports. Individual asylum seekers have enhanced quality of life and future prospects.

¹¹ See supra note 2.

¹² See supra note 2.

3.5 Risks arising from a Right to Work

3.5.1 Costs of a Right to Work

It is acknowledged that there are inherent costs associated with extending the right to work to protection applicants including:

- Potential for increased applicant numbers if system perceived to be more attractive than other EU Member States, that is, the “pull factor” argument.
- Increased entitlements to social welfare, labour activation and education supports.
- Labour market capacity and displacement of domestic workers.
- Greater complexity in administering the Direct Provision system and the creation of two tiers of beneficiaries.

3.5.2 Factors Mitigating Costs

3.5.2.1 *The Pull Factor*

Introducing a right to work for protection applicants would simply harmonize the system in Ireland with every other EU Member State apart from Lithuania. It is difficult to argue there is a ‘pull factor’ when the Irish system is in line with or more restrictive than other EU Member States. It is unlikely that a right to seek work will be provided in Ireland earlier than the EU average of 5.44 months.

3.5.2.2 *Increased Social Welfare or Other Entitlements*

The Habitual Residence Condition prevents eligibility for jobseekers’ allowance. In addition, eligibility for jobseekers’ benefit requires at least 2 years of contributions within a certain timeframe, which protection applicants would not have made. Furthermore, many labour market focused educational courses require a recognised period of unemployment, which protection applicants cannot accrue. However, JRS Ireland contends (in line with the McMahon report recommendation) that asylum seekers should be “deemed unemployed” to enable access to further education opportunities.

3.5.2.3 *Labour Market Capacity and Displacement*

The Irish economy is demonstrating strong signs of recovery and this is evidenced by strengthening employment figures.¹³ The number of asylum seekers eligible for a right to work will be small relative to the total workforce and even fewer will be in a position to get employment. The risk of displacement in a macro context would be considered small, or even negligible.

3.5.2.4 *Administrative Complexity*

Granting a right to work will add a layer of administrative complexity, the level of which will be determined by the extent of restrictions and conditions imposed by policy makers. Additional costs could be defrayed from additional tax revenues and saving in Direct Provision financial supports. Also, a number of EU Member States operate administrative systems that enable protection applicants in work to make financial contributions to reception and other material costs.

A further mitigating factor is that ‘work ready’ asylum seekers who are granted their status will be in a much better position to secure accommodation outside Direct Provision. This is becoming an ever greater issue, especially in and around Dublin, with residents with status in these centres unable to find suitable housing and exit Direct Provision as a result.

¹³ Department of Finance (2017) ‘Summer Economic Statement’, available at <http://www.finance.gov.ie/sites/default/files/170712%20Summer%20Economic%20Statement%202017.pdf> [accessed on 14th July 2017].

3.6 Conclusions

The Supreme Court ruling, N.V.H -v- Minister for Justice & Equality, re-affirmed the experiences of organisations who have worked on the ground for many years with asylum seekers; is consistent with the recommendations of the Working Group on the Protection Process pertaining to access to the labour market; and validated the voices of asylum seekers which have articulated the human costs and impact on their dignity and self-esteem arising from the ban on the right to seek employment at any time while in the Irish asylum system.

The benefits of a right to work are not limited to an individual asylum applicant's sense of self-worth. EU research demonstrates it is in EU Member States' interest to grant access to protection applicants as soon as possible after arrival to facilitate their long-term integration and to enable them become net economic contributors rather than dependents.

Undoubtedly, there exist costs and risks associated with introducing a right to work for asylum seekers, but, in all instances there are significant mitigating factors to ameliorate potential costs.

An additional issue JRS Ireland has highlighted relates to extending access to further education, in line with the McMahon Report recommendations, by deeming asylum seekers as unemployed. There is capacity within existing provision so additional costs would not arise but it would be extremely valuable to asylum seeking beneficiaries.

4. Right to Work and Length of Time

4.1 Interaction with Length of Time

The Supreme Court in its judgement found that in the absence of a time limit on the processing of an asylum claim, the prohibition on a right to seek employment amounted to a total ban. It is worth noting that the length of time in case processing is increasingly becoming a factor in court judgements, for example, the Danqua judgement¹⁴ and the judgment of Mr. Justice White in DN -v- The Chief Appeals Officer.¹⁵ The interaction between a right to work and length of time in the system needs to be considered as part of any recommendations.

The right to work recommendation in the McMahon Report was framed in the understanding that once the single procedure is operating efficiently, the authorities expect that the majority of applicants will receive a first instance decision well within nine months. This was consistent with the stated aim by Government to produce full and final case determinations in under 12 months. The existence of a nine month time limit for first instance decisions the Report argued, would also act as an additional incentive to the authorities to ensure that the process is operating as efficiently as possible.¹⁶

The new single International Protection Procedure commenced at the start of 2017. The most recent RIA Monthly Report in May 2017 stated the average duration of Direct Provision residents is 29 months.¹⁷ It is clear that it will be some time before the benefits of this new Single Protection Procedure, in terms of reduced waiting times for decisions, are experienced by asylum seekers on the ground. The failure to eliminate outstanding backlogs in advance of the introduction of the new procedure as recommended in McMahon Report resulted in the transfer of 3,500 existing cases to the International Protection Office (IPO).

The transfer of this large cohort of existing cases has acted like ‘a handbrake’ on the new procedure. At the IPO Customer Liaison Panel meeting on the 23 June 2017, it was reported that at the present time there are more than 4,500 outstanding cases composed of:

- 1,400 former ORAC cases open.
- 1,900 former RAT cases open.
- 75 former SP cases open.
- 1,157 new cases open.

The consequence of the lengthy backlogs on case processing times was laid out in stark terms:

- New applicants for protection (unless they fall within a prioritised category) are currently estimated to have to wait 18 months for an interview.
- Persons arriving under EU relocation scheme will have their cases concluded in 10-12 weeks.

Subject to verification it is likely that the majority of 3,400 open legacy cases transferred and the 1,100 new cases opened since the start of the year will have not received a first instance decision within 9 months from the date of asylum application.

Any right to work introduced will almost certainly be linked to a temporal limit in first instance case processing. A failure to deal quickly and systemically with legacy cases will ensure that the ‘handbrake’ will continue to be on and the single procedure will not operate efficiently for the foreseeable future.

¹⁴ Evelyn Danqua v Minister for Justice and Equality Ireland and the Attorney General, C-429/15.

¹⁵ [2017] IEHC 52.

¹⁶ See supra note 2.

¹⁷ See supra note 3.

JRS Ireland believes there needs to be a two pronged approach to addressing the length of time aspects arising from the Supreme Court Judgement:

- (i) *Timely Case Processing*: Sufficient resources need to be in place to ensure that cases receive a full and final determination in a reasonable timeframe (Government committed to 12 months or less). In such a context the number eligible for a right to work will be small.
- (ii) *Resolving Legacy Cases*: The McMahon Report identified mechanisms to resolve long stay cases. While putting in place additional case processing resources, consideration should be given to applying these solutions for those longest in the system starting with those more than 5 years, then 4 years and so on. The resolution of these cases will eliminate backlogs and provide beneficiaries with an automatic right to work.

While the Single Procedure works towards operational effectiveness, the impact of legacy backlogs and time required to recruit and train additional resources means that for the foreseeable future all new applicants will be eligible for a right to work.

Delays to the first instance decision is not the only pertinent duration related consideration. Also the length of time between First Instance Decision and Final Determination must be reasonable. Historically, protection appeals before the Refugee Appeals Tribunal encountered substantial delays in processing. Inevitably, the locus of current backlogs under the Single Procedure before the IPO - some 4,500 cases - will for unsuccessful applicants move to the International Protection Appeals Tribunal (IPAT).

Unless the IPAT is significantly resourced it will take significant time to produce appeal decisions. In the past its processing capacity was much less than the first instance body and it has not been allocated similar resources. Although steps have been taken by hiring fulltime members, it is unlikely to be sufficient to match the output from IPO, even discounting positive decisions. JRS Ireland would make the case for there being a secondary point of access to a right to work if significant delays occur at second instance decision making. Thus if an appeal decision is not received within 9 months from the first instance decision then the applicant should be granted a right to work.

Due to capacity issues in EROCs and the ability to move on relocated persons, there is a backlog in relocated persons arriving in Ireland. Approximately 600 persons in Greece have been identified for relocation but have not moved yet. This is essentially another backlog in case processing as these are a prioritised group that will go to the top of the queue, with a knock-on impact on waiting times.

4.2 Conclusions

The Supreme Court judgement found the fact that there is no limit on the length of time in the system amounted to a *de-facto* total denial of a right to seek employment for asylum seekers. The excessive length of time in case processing has also been increasingly the subject of emerging jurisprudence in recent asylum related judgements from the High Court.

JRS Ireland recommends the following actions to address the length of time issue:

- i. ***Legacy Backlogs***: Availing of the long stayer solutions to address the situation of persons long term in the system, starting with those more than 5 years, then 4 years and so on.
- ii. ***Case Processing***: Ensuring sufficient resources are allocated to the IPO and IPAT to enable the Single Procedure to operate efficiently as soon as possible.
- iii. ***Prioritisation***: Securing additional resources to ensure IRPP commitments do not negatively impact on the processing of existing applications.
- iv. ***Second Instance Determinations***: Providing a right to work for asylum seekers if second instance decisions not concluded within 18 months of initial asylum application.

A right to work within a specified time limit will act as an incentive to ensure the international protection procedure is adequately resourced and excessive delays are eliminated at all stages.

5. Labour Market Access for Protection Applications in the EU

The emerging political consensus among EU Member States and European Institutions is that the effective integration of refugees and asylum seekers necessitates access to the labour market at the earliest possible stage.

While approaches may vary in other aspects, the common underlining trend¹⁸ is the reduction of the time that protection applicants must wait before accessing employment. For example, in response to the 2015 EU Refugee and Migrant Crisis, four EU Member States took additional steps to reduce the length of time protection applicants were required to wait.¹⁹

5.1 Time Limits

The majority of EU Member States abide by the minimum standards set out in the Recast Reception Conditions Directive²⁰, requiring access to the labour market for protection applicants where they have not received a first instance decision within nine months and the delay cannot be attributed to the applicant. As can be seen in Table 1, 19 Member States actually provide more timely access than is prescribed by EU law and 4 countries place no temporal restrictions on applicants.

<i>Duration</i>	<i>Member States</i>
No time restriction	Greece, Norway, Portugal ²² , Sweden
2 months	Italy
3 months	Austria, Bulgaria, Germany, Romania
4 months	Belgium
6 months	Czech Republic, Cyprus, Denmark, Estonia, Spain, Luxembourg, Netherlands, Poland, Finland
9 months	France, Croatia, Latvia, Hungary, Malta, Slovenia, Slovakia
12 months	United Kingdom
No access	Ireland, Lithuania

The average time in months before access to the labour market is granted to asylum seekers among the 27 EU Member States who provide a right to work is:

$$= ((4 * 0) + (1 * 2) + (4 * 3) + (1 * 4) + (9 * 6) + (7 * 9) + (1 * 12)) / 27 = 5.44 \text{ months}$$

In the vast majority of national contexts, once the right is vested it will not extinguish until the final determination of an applicant's claim for protection.

¹⁸ Fric, K. & Aumayr-Pintar, C. (2016) 'Approaches towards the labour market integration of refugees in the EU', available at <https://www.eurofound.europa.eu/observatories/eurwork/articles/industrial-relations/approaches-towards-the-labour-market-integration-of-refugees-in-the-eu> [accessed on 14th July 2017]

¹⁹ Fóti, K. & Fromm, A. (2016), 'Approaches to the labour market integration of refugees and asylum seekers', Publications Office of the European Union, Luxembourg.

²⁰ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, Official Journal of the European Union, L 180/96.

²¹ European Commission (2016) 'Challenges in the Labour Market Integration of Asylum Seekers and Refugees', available at <https://www.google.ie/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwicq8zY8MnUAhXFK8AKHRehBpQQFggjMAA&url=http%3A%2F%2Fec.europa.eu%2Fsocial%2FblobServlet%3FdocId%3D15894%26langId%3Den&usq=AFQjCNFlwUrKQ4RcIo1PUQVbeKuDJ2LuyQ&sig2=zvkXTS5uQTSjeAkmFjcgFQ> [accessed on 14th July 2017].

²² In practice, access may only be realised after 2 months.

5.2 Restrictions

The entitlement to attach conditions to the right of access, under Article 15 of the Recast Reception Conditions Directive, has been interpreted by Member States in a variety of ways.

5.2.1 Labour Market Test

A number of EU Member States, including Luxembourg, Germany, France, Hungary and Austria, apply a market test. In essence, this means that the “*availability and suitability of national or EU citizens and beneficiaries of international protection will be checked before the asylum seeker is allowed to take up the advertised job*”.²³

Practice varies and can include both mandatory and discretionary elements. For example in the United Kingdom, eligible protection applicants can only compete for jobs appearing on the *Shortage Occupations List*, which is published annually by the UK Border Agency and lists positions that employers struggle to fill. By contrast, in Germany a review will be initiated by officials in some Labour Office districts to assess whether another job-seeker is better suited²⁴ for the position sought by the protection applicant. Other Member States, such as Austria and Romania, demand evidence that the position cannot be filled by a national, EU citizen or permanent resident before an employment permit is issued.

5.2.2 Eligible Fields of Employment

Another method by which EU Member States have restricted access to the labour market is to limit the fields of employment that protection applicants may enter into.

This practice can include prescribing the sectors, at national level, where employment is allowed (Cyprus and Austria) or granting discretion to local municipalities (Switzerland) to do so. Alternatively, protection applicants may be prohibited, as is the case in the United Kingdom and Germany, from working on a self-employed basis.

5.2.3 Duration of Employment

An additional restriction that may be applied is the attachment of limits to the length of time that an eligible protection applicant can be gainfully employed.

The Netherlands permits employment for a maximum of 24 weeks during a 12 month period and Austria limits seasonal work to 6 month durations. Meanwhile, protection applicants in Germany are subject to a market test review for 15 months following departure from an initial reception centre.

Finally, some Member States (Belgium and Malta) require protection applications to seek a renewal of their work permits after certain time periods, which can act as a de facto limit on the length of time they are entitled to work.

5.2.4 Case for an Absence of Restrictions

JRS Ireland would argue that significant restrictions would be against the spirit of the Supreme Court judgement. Section 5.6 addresses in more detail equity concerns between different migrant categories regarding labour market access. In reality only a small number will have a right to seek work if cases are processed in a timely manner. Of those, very few will actually find employment. Thus, there is a strong argument for an administratively simple system that places no restrictions on a right to work.

²³ See supra note 21.

²⁴ This includes persons with a more “secure” residence status.

5.3 Impact on Rights and Entitlements

Protection applicants who gain the right to access the labour market in an EU Member State and successfully secure employment may subsequently face the withdrawal or deterioration in the level of reception and other supports they are entitled to receive. Alternatively, they may be required to contribute to the cost of the material supports provided.

5.3.1 Reception Supports

In Belgium, employed protection applicants must make a financial contribution to the reception facility they are resident in. This is calculated as a percentage of income (from 35% on an €80 monthly income to 75% on a monthly income of more than €500)²⁵. In addition, protection applicants can be excluded from material reception supports if their income surpasses social welfare thresholds.

Similarly, prior to recent legislative changes in December 2016, a special charge (10% of monthly income) was deducted by employers in Switzerland and transferred to the State to cover costs associated with the system. This charge was additional to regular taxation and was non-refundable.

Protection applicants who secure employment in the Netherlands are also required to make a financial contribution towards reception accommodation costs.

5.3.2 Social Protection

The level of social benefits payable to protection applicants in Spain and Portugal diminishes following engagement in any income generating activity. Similarly, financial supports can be withdrawn in the Netherlands, Sweden and Austria upon commencement of employment.

However, it should be noted that a number of Member States, including Spain and Bulgaria also grant unemployment assistance and Sweden even facilitates conversion from asylum seeking status to labour market migrant in certain circumstances.

5.4 Supports

Although the provision of employment services for protection applicants is often inadequately funded²⁶, a number of Member States deliver dedicated programmes to aid labour market access.

Among services provided by Member States that grant access to the labour market within 6 months:

- Language and Orientation courses (*Austria, Belgium, Denmark, Germany, Norway*).
- Guidance counselling (*Austria, Belgium, Denmark, Germany, Netherlands, Norway*).
- Skills Assessment (*Belgium, Denmark, Germany, Estonia, Italy, Luxembourg, Norway*).
- Assistance to have qualifications recognised (*Belgium, Denmark, Germany, Luxembourg, Netherlands, Spain*).
- Job mediation and placement (*Belgium, Netherlands*).
- Vocational training (*Austria, Belgium*).
- Professional training (*Italy, Luxembourg*).²⁷

Examples of comparable services provided by Member States which grant access after 6 months:

- Language training (*Latvia, Slovenia, France, Slovakia*).
- Traineeship (*Malta*).

²⁵ Statistics courtesy of Asylum Information Database (aida), available at <http://www.asylumineurope.org/reports/country/belgium/reception-conditions/access-and-forms-reception-conditions/reduction-or> [accessed on 14th July 2017].

²⁶ See supra note 19.

²⁷ See supra note 19.

5.5 Administration

In the majority of Member States, protection applicants are required to secure certain administrative documents, such as work permits or employment licenses, prior to permission to work being granted.

Proof that a specific job opportunity exists is required in France before any such permit will be issued and other Member States, such as Malta and Belgium, attach renewal conditions and fees to licences. In some contexts (Netherlands and Austria), it is the prospective employer who must apply for a permit rather than the individual job-seeker.

The excessive administrative burden generated by Member State systems can undermine the exercise of a right to work as employers are often deterred from hiring protection applicants as a result.²⁸ This is compounded by the often sporadic nature of State incentives offered to employers.²⁹

5.6 Equitable Labour Market Access between Migrant Categories

The EU experience of providing the right to work has, on occasion, resulted in inequities of access to the labour market arising between protection applicants and other third country nationals. In some cases (Portugal, Belgium and Spain), more favourable conditions of access are technically provided to protection applications. However, a direct comparison between protection applicants and third country nationals in this manner is in danger of attracting specious reasoning.

There is also anecdotal evidence to show, in reality, low numbers of asylum seekers³⁰ and refugees³¹ are actually accessing national labour markets. In addition, integration into the labour market is a slow process and refugees lag behind other migrant groups³² so it would be reasonable to conclude protection applicants will face even greater delays.

In examining this issue the Direct Provision system must be considered as a whole, taking into account all the restrictions on attendant rights and supports for asylum seekers. It is worth remembering that Direct Provision was introduced as a short term secure form of accommodation for asylum seekers, originally envisaged for between 6 to 12 months. The denial of a right to work, the limited access to education and the low level of Direct Provision allowances were consistent with an expectation people would not be long in the system.

JRS Ireland would contend that it is unfair to disaggregate the element relating to right to work alone when considering equity issues, between asylum seekers and other categories of migrant workers. This is especially so when it is within the State's gift to minimise access to a right to work by putting in place sufficient case processing resources to produce first instance decisions within a specified time limit.

²⁸ See supra note 19.

²⁹ See supra note 19.

³⁰ The Local (2016) 'Fewer than 500 of 163,000 asylum seekers found jobs', available at <https://www.thelocal.se/20160531/fewer-than-500-of-163000-asylum-seekers-found-jobs> [accessed on 14th July 2017].

³¹ The Local (2016) 'So far, only 34,000 refugees have found jobs in Germany', available at <https://www.thelocal.de/20161219/so-far-only-34000-refugees-have-found-jobs> [accessed on 14th July 2017].

³² Konle-Seidl, R. & Bolits, G. (2016) 'Labour Market Integration of Refugees: Strategies and Good Practices' IP/A/EMPL/2016-08, Brussels: European Parliament.

5.7 Conclusions

There is a clear trend among EU Member States to actively reduce the time that protection applicants are required to wait before being granted the right to work.

The majority of EU Member States applying such labour market tests grant the right to work within 6 months³³. The average time limit for eligibility to a right to seek work among 27 EU Member States is 5.44 months. JRS Ireland recommend that Ireland should introduce a time limit of no greater than 9 months and to give consideration to shorter periods in light of emerging EU research and the longer term benefits in respect of integration.

In considering equity issues, between asylum seekers and other categories of migrant workers, JRS Ireland argues it is unfair to disaggregate the element relating to right to work alone from other attendant rights and restrictions placed on asylum seeker lives. This is especially so when it is within the State's gift to minimise access to a right to work by putting in place sufficient case processing resources to produce first instance decisions within a specified time limit.

JRS Ireland recommend that no restrictions should be placed on the right to seek work. In reality, if the system is operating efficiently very few will have a right to seek employment and even fewer will actually get a job. This would be simpler and administratively easier to operate.

Learning from other EU Member States, Ireland should put in place proportionate supports to assist labour market access. Also, in relation to the interaction between the right to work and the welfare and reception systems in EU Member States, different models are available which offer varying degrees of administrative complexity and capacity to defray costs.

³³ Statistics courtesy of aida (Asylum Information Database), available at <http://www.asylumineurope.org/comparator/asylum-procedure>.

6. Conclusions and Recommendations

6.1 Conclusions

There are several components common to all EU Member State systems, including:

- *Time Limit*: A defined period of time before the right vests.
- *Duration*: An identified event or period of time when the right ceases or must be renewed.
- *Conditionality*: Prescribed access to the labour market.
- *Supports*: Provision of incentives, training and other forms of assistance to facilitate access.
- *Reciprocity*: A requirement for persons in employment to contribute to their reception costs or to the Exchequer by way of general taxation.

In addition, the length of time in the system has long been recognised as the single biggest issue facing asylum seekers in Ireland and the interaction between this factor and a right to work needs to be reflected in any recommendations. In his judgement in the case of *N.V.H -v- Minister for Justice & Equality*, Mr. Justice O'Donnell noted:

“If there is no limitation on the time during which an application must be processed, then s.9(4) could amount to an absolute prohibition on employment, no matter how long a person was within the system”.

Mr. Justice O'Donnell also recognised the broadly consistent thinking around the right to work which has informed General Comment No.18 and the Irish Constitution:

“The right to work is essential for realizing other human rights and forms an inseparable and inherent part of human dignity. Every individual has the right to be able to work, allowing him/her to live in dignity. The right to work contributes at the same time to the survival of the individual and to that of his/her family, and insofar as work is freely chosen or accepted, to his /her development and recognition within the community.”³⁴

The ability of non-citizens to live in dignity poses a challenge for Ireland and all EU Member States. It is a question of integration: how to ensure the full participation of all persons in the life of their community, irrespective of their colour, creed, culture or status.

6.2 Recommendations

JRS Ireland is calling for the immediate introduction of practical and implementable recommendations that effectively provide a right to work for protection applicants. The model outlined below details two sets of interrelated recommendations, in order to reflect the interaction between a right to work and length of time in the protection process:

Recommendations Set 1: The right to work is granted at the earliest possible juncture and with minimal conditions attached to enable protection applicants live with greater dignity and participate fully in the life of their community.

Recommendations Set 2: The existence of a fair and transparent protection process providing final determinations within 12 months, delimits the number of persons realising the right to work as protection applicants.

³⁴ UN Committee on Economic, Social and Cultural Rights (CESCR), ‘General Comment No. 18: The Right to Work (Art. 6 of the Covenant)’, 6 February 2006, E/C.12/GC/18, available at <http://www.refworld.org/docid/4415453b4.html> [accessed on 14th July 2017].

JRS Ireland Model: Living with Dignity – Right to Work

Recommendation Set 1 – Right to Work

The right to work is granted at the earliest possible juncture and with minimal conditions attached to enable protection applicants live with greater dignity and participate fully in the life of their community.

Component	Statutory Interaction	Recommendation	Rationale
Time Limit	Protection Process – First Instance Decision	<p>The right to work should be granted to protection applicants who have not received a first instance decision within a maximum of 9 months of their application.</p> <p><i>Serious consideration should be given to granting the right at a shorter time limit in line with emerging EU Member State practice.</i></p>	<ul style="list-style-type: none"> • CEAS harmonisation and alignment with practice of EU Member States. • 65% of EU Member States grant right to work within 6 months. • Recent trend among EU Member States is to reduce waiting times (average is 5.4 months). • Employment has long been recognised as a key indicator³⁵ of migrant integration in Europe and the effective integration of refugees and asylum seekers necessitates access to the labour market at the earliest possible stage. • This period exceeds the Government position on the length of time required for final determinations to be issued under the Single Procedure. As recently as May 2017, the Secretary General of the Department of Justice reiterated the intention for decisions to be issued “within a period of perhaps nine to 12 months”.³⁶
Time Limit	Protection Process – Second Instance Decision	<p>The right to work should be granted to protection applicants who received a first instance decision within 9 months but who have not received a final determination within 18 months.</p>	<ul style="list-style-type: none"> • Safeguard against re-emergence of delays which historically characterised the Irish protection process. • Protection appeals before the forerunner of the IPAT, that is, the Refugee Appeals Tribunal, encountered substantial delays in processing. • This period exceeds the Government position on the length of time required for final determinations to be issued under the Single Procedure. As recently as May 2017, the Secretary General of the Department of Justice reiterated the intention for decisions to be issued “within a period of perhaps nine to 12 months”.
Duration	Protection Process	<p>The right to work should continue until the final determination of the protection claim.</p>	<ul style="list-style-type: none"> • A complex system would be required to monitor multiple stages at which the right would extinguish. • Alignment with common practice among EU Member States. • Provides greater certainty for prospective employers.

³⁵ European Ministerial Conference on Integration – Draft Declaration (2010), available at <https://ec.europa.eu/migrant-integration/index.cfm?action=media.download&uuid=29D067B4-FBE7-FB1F-F534124C9DEEDF39> [accessed on 14th July 2017].

³⁶ Public Accounts Committee (2017) ‘Chapter 6 - Procurement and Management of Contracts for Direct Provision (Resumed)’, available at <https://www.kildarestreet.com/committees/?id=2017-05-11a.294&s=12+months%2C+asylum%2C+decision#g976> [accessed on 14th July 2017].

Conditionality	Labour Market	No labour market test or other restrictions should be attached to the right to work.	<ul style="list-style-type: none"> • A complex system would be required to administer any market text which would seem a disproportionate response in light of the low rates of asylum seeker employment in other EU Member States. Also, the Irish unemployment rate has reached a 9 year low. • A policy of open access to the labour market, after a defined period of time, would act as an additional incentive to the authorities to ensure that the determination process is operating as efficiently as possible. • Any restrictions placed on accessing the labour market may continue to push protection applicants into the “black market”. As a result, the State would be denied revenue from taxable earnings and the protection applicant placed in a vulnerable position. • Equity concerns between asylum seekers and other migrant categories need to consider all restrictions and rights related to status and not just those attached to this aspect alone.
Conditionality	Social Welfare System	No conditions restricting the earning potential of protection applicants - such as a cap on the number of eligible hours - should be attached to the right to work in the absence of legislative change enabling their effective access to relevant social welfare payments.	<ul style="list-style-type: none"> • A complex system would be required to administer restricted access which would seem a disproportionate response in light of the low rates of asylum seeker employment in other EU Member States. • Recognition should be afforded to the structural disadvantages experienced by protection applicants living in Direct Provision. • The decision not to increase the Direct Provision weekly allowance to the rate recommended by the Working Group on the Protection Process, means protection applicants have not been adequately facilitated in meeting the needs of themselves and their families or provided with a greater degree of control and decision-making power as intended. • The Habitual Residence Condition prevents eligibility for jobseekers allowance. • Eligibility for jobseekers benefit requires at least 2 years of contributions paid (or a mix of paid/credited contributions) within a certain timeframe, which protection applicants would not have made.
Supports	Education System	Protection applicants granted the right to work should be deemed unemployed for the purposes of accessing further education and vocational training courses on a comparable basis to Irish citizens.	<ul style="list-style-type: none"> • There exists a de facto cap on access to further education and vocational training courses above level 4 on the National Framework of Qualifications due to many of the level 5 and 6 courses requiring participants to be registered as unemployed with the Department of Social Protection. • Alignment with McMahon Report recommendations.
Reciprocity	Direct Provision System	Protection applicants who are successful in securing employment but remain living in Direct Provision, should only be means-tested (for the purposes of determining if their weekly allowance is reduced and if a contribution towards accommodation costs is appropriate) if their net income exceeds the applicable Supplementary Welfare Allowance rate.	<ul style="list-style-type: none"> • Avoids excessively burdensome administration by establishing an income threshold. • Direct Provision is a State function, funded by tax payers, which employed protection applicants would contribute to through general taxation. • Asylum seekers are not means-tested upon entry into Direct Provision and not required to make a payment for services rendered on exit from the system.

Recommendation Set 2 – Length of Time Concerns

The existence of a fair and transparent protection process providing final determinations within 12 months, delimits the number of persons realising the right to work as protection applicants.

Component	Statutory Interaction	Recommendation	Rationale
Addressing Legacy Backlogs	Protection Process.	The application of the same principle and mechanisms, recommended by the McMahon Report to address the situation of persons in the system for five years or more, to individuals living for lesser durations in Direct Provision.	<ul style="list-style-type: none"> • Recognition that it will be some time before the benefits of the new Single Protection Procedure, in terms of reduced waiting times for decisions, are experienced by protection applicants on the ground. • Avoidance of a repeat of the circumstances which gave rise to the establishment of the Working Group on the Protection Process. • Associated cost of average duration of stay of Direct Provision residents: 29 months.
Efficient Case Processing Going Forward	Protection Process.	The full allocation and recruitment of the required additional resources for the International Protection Office and the International Protection Appeals Tribunal to eliminate existing backlogs and to enable the Single Procedure operate efficiently as soon as practicable.	<ul style="list-style-type: none"> • The failure to eliminate outstanding backlogs in advance of the introduction of Single Procedure as recommended in McMahon Report resulted in the transfer of nearly 3,500 existing cases to the IPO. • Estimated 18 month wait for interview for new protection applicants (unless prioritised). • Significant number of legacy cases likely to seek recourse from IPAT, which does not possess processing capacities comparable to the IPO.
Equitable System	Irish Refugee Protection Programme	The provision of additional case processing resources to ensure that honouring Irish Refugee Protection Programme commitments, in particular, determining the status of those persons relocated from Greece and Italy, does not adversely impact the processing of existing applicants transferred to the Single Procedure.	<ul style="list-style-type: none"> • IPO processing capability has reached maximum capacity of 50 interviews per week. • Additional 600 persons to arrive from Greece via relocation before the end of 2017. • It is incumbent on the State, with all the resources at its disposal, to complete a final determination of an applicant’s claim for protection within a reasonable period of time. Many of the cases transferred from the Refugee Appeals Tribunal would have waited in excess of a year for a hearing before being transferred to the IPO. Essentially all that time will have been lost, so the only equitable way to recognise this reality is to ensure the resources are in place to facilitate accelerated processing capability.