Enforcing the Right to Work for Asylum Seekers in Ireland & Europe

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Contribution Overview

1. Aspects of the Supreme Court decision- potential impact and limitations

2. Exploring the right to work for asylum seekers in select EU jurisdictions – the mirage of freedom to work?

3. Reflecting on the need to ensure a rights based ‘freedom to work’ for asylum seekers in Ireland
1. Aspects of the Supreme Court Decision
“Much work is drudgery, often the subject of complaint rather than celebration, and most often an economic necessity as a means to live a chosen life rather than an end in itself.”

“A Grumpy Decision”

A decision grudgingly given? (Nolan)

A decision with significant restrictions that must be unpacked and explored.
Acknowledging Restrictions in the SC Decision

• Resolution through *faster status determination processes*

  ➢ Previous High Court decision on damages for maladministration in the determination process (*D.N (a child)*, Feb 2017)

• Granting a freedom to work, **subject to Oireachtas decision!**

  ➢ No restrictions?
  ➢ May be limited to certain employment sectors (*N.H.V*, paras 18-19);
  ➢ May only become effective after a certain (unspecified) period of time (*N.H.V*, paras 18-19);
“the Taskforce is examining the implications that granting access to the labour market will have on those applicants.... In many EU Member States, the right to work is not an unfettered right for applicants, often arising after a particular period of time, usually 9 months to a year. In many instances access may be limited to particular job categories or may lead to the withdrawal of other financial supports...and to reflect the existing requirements placed on other Third Country Nationals who come to Ireland as lawful economic migrants.”

2. The Right to Work for Asylum Seekers & EU Law

Recognising the Limited Nature of the Right to Work in EU Law
(a) EU Legal Measures (Recast Reception Directive)

• Freedom to work “no later than” 9 months, where a first instance decision not issued (Art. 15(1) RRD) and applicant not at fault for delay.

• Access to labour market must be “effective” (Art. 15(2) RRD).....

• If granted before appeal, it should continue where first instance decision has “suspensive effect” (Art. 15(3) RRD)

BUT.......
Restrictions on Freedom to Work in EU Law

- EU Member States, “for reasons of labour market policies” *may give priority to:

  1. EU citizens and EEA Nationals, AND,

  2. Legally resident third country nationals.

- In essence, this permits national legal measures that employers have to *first seek to hire EU/EEA citizens and legally resident non-EU citizens, before they can hire asylum seekers.*
• European Parliament has highlighted:

“that slow and excessively bureaucratic procedures may hinder refugees and asylum seekers’ access to education and training, employment guidance and the labour market...”

European Parliament, Resolution of 5 July 2016 on refugees: social inclusion and integration into the labour market, 2015/2321(INI)

**European Commission Proposal**
- AS may enter employment “in no more than 6 months”, if no 1\(^{st}\) instance decision
- Accelerated procedures limits access to employment.
- Preference for EU citizens and lawful 3\(^{rd}\) country nationals to be maintained

**Parliament Proposals**
- “No later than two months from date of application”
- Accelerated procedures limits access to employment.
- Training and support provided to asylum seekers to assist them to look for work.
- On ground of labour market policy, to pay particular attention to youth unemployment of EU citizens, and provide preferential access to EU citizens/lawfully resident third country nationals to work opportunities.
- Parliament also proposed measures to permit asylum applicants who were granted permission to work and whose protection claims are unsuccessful, to apply for residence permit (not absolute grant of such a permit).
3. Overview of EU Member States Practice
Time before accessing employment (Select Countries)

• 0 months: Greece & Sweden

• 2 months: Italy

• 3-6 months: Switzerland, Austria, Belgium, Germany, Netherlands, Poland, Bulgaria, Spain

• 9 months: Cyprus, France, Hungary, Croatia, Malta,
Labour Market Tests & Other Limitations

• Required to have a **concrete job** offer before accessing employment (Germany)

• **Employment only in certain sectors** (Sweden, Switzerland, Austria, Cyprus).

• May not enter **self-employment** (Germany) or restricted self-employment (Belgium)

• Significant **language barriers** and/or **financial crisis** impacts rendering right to employment illusory (Spain, Greece, Italy, Poland, Hungary etc.).

• **Bureaucratic** hurdles (many EU member states).

• Recognition of **prior qualifications** may take time, be exceptionally difficult to access processes for gaining foreign qualification recognition.
3. Reflections on Implementing the freedom to work in Ireland

With a detour to the United Kingdom
Justice Concerns on the Common Travel Area & Right to Work for Asylum Seekers

“Having regard to the existence of the common travel area, there is the serious concern that should protection applicants be allowed access to full social welfare housing, and labour rights, Ireland could very quickly find itself dealing with an asylum crisis of significant proportions. The State would therefore be faced with immediate and considerable drain on its resources.”

Affidavit of Department of Justice official, November 2014, as cited in D.N (a child), para. 22.
The Position in the United Kingdom

• Exceptionally limited right to work for asylum seekers after 12 months, where no first instance decision provided (in line with UK’s obligations under 2003 EU Reception Directive).

• Asylum seekers can ONLY seek jobs on the Occupation Shortage List for the UK (and additional industries in Scotland);

• Highly skilled and specialised (ballet, nuclear scientist etc.)

• Self employment not permitted.

• Attempts to lift some restrictions by proposed amendments to the Immigration Bill 2015-16 (UK), failed due to lack of support by Parliament.
Detention Provisions

Delayed Legislation

Direct Provision

Refusal to examine a regularization scheme

Denial of leave to land

Prohibition on Right to Work

Suspicious participation in CEAS

Impact on judicial decisions

Where to post-Brexit?
Legislating for a Right to Work for Asylum Seekers

• Is it feasible that a strong right to work will be recognised by the Oireachtas?

• **McMahon Report** (2015): No 1st instance decision within 9 months, right to work to be granted. [McMahon Report acknowledgd at time of preparation, vast majority of 1st instance decisions issued (well within) 9 months].

• State to opt into the EU Recast Reception Directive (2013) unless “clear and objectively justifiable reasons” offered for not doing so.
Median Processing Times (at end of 2016)

- Prioritized 1st instance decisions: 16 weeks (about 4 months)
- 'Regular’ 1st instance decisions: 41 weeks (about 9.5 months)
Key Issues

• Oireachtas will have to legislate, but will it go beyond ‘copy and pasting’ the United Kingdom approach (see Ireland’s Skill shortage list)?

• Will it reflect EU trends on right to work for asylum seekers, which still have significant limitations.

• Issues as regards direct provision system and freedom to work?

• Employment and social security rights?

• What would a rights based ‘freedom to work’ system look like?
Thank You

References in next slides
AIDA (2016), Wrong counts and closing doors: The reception of refugees and asylum seekers in Europe.
AIDA (2016), Reception Rights for Asylum Seekers in Europe (Employment).
European Parliament, Committee on Civil Liberties, Justice and Home Affairs report on the proposal for a directive laying down standards for the reception of applicants for international protection (recast), 2016/0222(COD).
European Migration Network, The Organisation of Reception Facilities for Asylum Seekers in different Member States: EMN Synthesis Report (February 2014)
OECD (2016), Making Integration Work: Refugees and Others in Need of Protection.
ORAC (2016), Summary of Key Developments 2016.