

Nasc Proposal for Dealing with the Legacy Issues

Introduction:

Nasc is an NGO based in Cork working to respond to the direct needs of all migrants, including refugees, asylum seekers and their families. Nasc was founded in 2000 in response to the introduction of the Government's policy on dispersal and the establishment of the Direct Provision System which resulted in an increase in the numbers of asylum seekers moving to Cork. At that time there were no services in the city to address the needs of this vulnerable population. Nasc, through our legal clinics, provides information, advice, and support to over 1,000 migrants and their families annually living in the Cork area. We have over fourteen years experience working in the immigration and protection systems and our contribution to this process 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.

Single/Unified Procedure

Nasc welcomes the proposed introduction of the Single/Unified Procedure which will go some way to reform our protection system for future asylum seekers. In its current inception the single procedure will not impact on the majority of asylum seekers currently in the system. We suggest that the measure be broadened to allow applicants awaiting a hearing before the Refugee Appeals Tribunal at the time the Single Procedure has commenced to benefit from its provisions. Applicants should be given the option to have their both their appeal and their application for Subsidiary Protection and any other complementary form of protection heard simultaneously. Provision could be made for this in the new legislation.

It is widely acknowledged that the Single Procedure may not provide a solution for the majority of asylum seekers currently in the system and we welcome the opportunity to propose a multifaceted approach to deal with this cohort of long-term applicants. We submit that to facilitate the efficient introduction of a Single Procedure, proper consideration has to be given to the development of tailored, durable solutions to match the particular circumstances of persons at different stages of the process. We outline four measures below which we believe would deal effectively with what can be termed the "legacy issues" in the system. These suggestions, including the introduction of a defined scheme, similar in effect to the Irish Born Child Scheme of 2005 – though much reduced in scope, have the potential to realise substantial cost savings to the exchequer in the medium to long term.

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Precedent for a once-off executive scheme – The Irish Born Child Scheme 2005

The Irish Born Child Scheme of 2005 (IBC05 Scheme) provides a good template and precedent for dealing with the legacy issues in our current system. In 2003 the State changed their policy of granting a right of residence to parents of Irish Citizen Children following the Supreme Court decision of *L and O v Minister for Justice and Law Reform*¹, which broadly found that the parentage of Irish Citizen Children did not confer an automatic right of residence to their parents. This was followed by the referendum² on citizenship in June 2004 which limited the right to citizenship of children born in the state to migrant parents.

The IBC05 Scheme was introduced by the then government in January 2005 to deal with the large cohort of migrant families living in the state with Irish Citizen Children. This was a time-bound scheme which, at that time, resulted in almost 17,000 residency permits being granted to qualifying persons. Residency was granted without prejudice to any "higher" form of residency an applicant may have had pending. This scheme, which was both limited and renewable, was a once off scheme that did not require any new legislative provisions. It was scrutinised by the Supreme Court in *Bode v Minister for Justice Equality and Law Reform*³, which found the scheme to be lawful and found to be an exercise of executive power by the then Minister for Justice, Equality and Law Reform.

Our Proposal – Asylum Seekers Scheme 2015

Nasc would propose that a similar scheme be adopted for protection applicants across the spectrum of the process. There are currently 4,300 residents in Direct Provision at various stages of our protection system. There are a potentially up to another 3000⁴ applicants remaining outside the system, however it is widely recognised that a number of those applicants may have left the state. This would be a dramatically smaller scheme in scope than the almost 17,000 applicants that were regularised under the Irish Born Child Scheme.

¹ *L and O v Minister for Justice and Law Reform* [2003] IR 1.

² The amendment to the constitution was given effect by the Irish Nationality and Citizenship Act which commenced in December 2004.

³ *Bode v Minister for Justice Equality and Law Reform* [2007] IESC 62

⁴ Figures to be confirmed by INIS

This scheme would be both temporal and expedient in nature, phased in over a period of time, dealing first with persons who have been waiting for a period in excess of five years, then considering those who are resident for four years, three years and so on and by prioritising applications where an expedient solution can be found.

Nasc would propose that the following "categories" of persons could be dealt with in the following manner:

1. Persons with an outstanding application for Temporary Permission to Remain under section 3 of the Immigration Act 1999. (Exact number to be confirmed by INIS).

Temporary Permission to Remain could be granted to the applicant and any co-joined or immediate family members in line with current Department of Justice policy⁵, these permissions would not give rise to a legitimate expectation that any family members remaining outside the state could be joined by the applicant at a later date. This should be a three year renewable permission with no change to the current conditions.

2. Persons awaiting a hearing before the Refugee Appeals Tribunal at a time when the Single Procedure has commenced.

Applicants should be given the option to have their both their appeal and their application for Subsidiary Protection and any other complementary form of protection heard at the same time in line with the provisions of the proposed Single Procedure. Provision could be made for this in the new legislation.

3. Persons who have Judicial Review Proceedings pending on a protection decision from the Refugee Appeals Tribunal and or the Office Refugee Applications Commissioner. (Currently an estimate of 500 cases.)

Applicants who have been waiting in excess of five years for a judicial review to come before the courts should be offered temporary permission to remain **without prejudice** to any higher form of residency permission that may be under consideration by the Court. This scheme could mirror the current temporary to remain permissions but would differ in that it would be a **Conditional Permission** for the duration of the proceedings and would not confer any legitimate expectation of more permanent residency permission or family reunification rights. This would be a defined administrative scheme outside the current section 3 process. This could then be phased in to include applicants who are

⁵<http://www.inis.gov.ie/en/INIS/Family%20Reunification%20Policy%20Document.pdf/Files/Family%20Reunification%20Policy%20Document.pdf>

waiting four years, three years than two years and so on. The 2014 decision of the High Court in I.E & Ors -v- The Refugee Appeals Tribunal & Ors⁶ found no legal barrier to granting temporary permission to remain to persons who have outstanding judicial review proceedings.

It would be open to the state to decide whether or not it would be more expedient to require people to formally apply for this proposed **Conditional Permission** as outlined, as was the case in the IBC 05 Scheme. If a formal application process were required, it could be time bound and discretionary in nature having regard to the following factors:

- (i) Any representations made by the individual in response to the proposal;
- (ii) The length of residence of the individual in the State;
- (iii) Employment record (if any) in the State;
- (iv) the right of that individual to enjoy family life, and in particular the right of any children to the care and company of parent(s) or guardians;
- (v) The best interests of the child
- (vi) humanitarian considerations;
- (vii) the common good; and
- (viii) considerations of public policy or national security.

4. Persons who have a Deportation Order in place or a Judicial Review of a Deportation Order Pending:

The INIS should conduct a review of all outstanding deportation orders and judicial reviews of deportation orders with a view to revoking orders and granting permission. The review should look at the prohibition on refoulement, family circumstances of the person concerned, their length of residence in Ireland and the feasibility of the State being able to carry out the deportation:

- Deportation Orders issued against nationals from countries experiencing a war, conflict or upheaval. This review must ensure that the Irish state is fully compliant with our legal prohibition

⁶ I.E & Ors -v- The Refugee Appeals Tribunal & Ors [2014] IEHC 409

on *refoulement*.⁷ Section 5 (1) of the Refugee Act 1996 provides; that A person shall not be expelled from the State or returned in any manner whatsoever to the frontiers of territories where, in the opinion of the Minister, the life or freedom of that person would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion. The State should examine the possibility of deteriorating circumstances in the persons' country of origin since the order was issued. In any cases that could where a breach could arise the Order should be revoked and Section 3 residence permission should issue.

- Applicants who have a deportation order issued against them and have been in the process for a cumulative period of five years or more, and similarly situated applicants with judicial review proceedings pending, the state should consider either revocation or the granting of a temporary **Conditional Permission** in line with the suggested scheme for those awaiting the outcome of other Judicial Review Proceedings as outlined above. Consideration should be given as to whether the Deportation Order could be amended to facilitate this. These permissions could then be phased in and granted to those who are in the state for lesser periods.
- "Non returnable migrants", that is, migrants who, for a variety of reasons cannot be returned to their country of origin with no reasonable possibility that they can be returned at a future date. The state should consider a form of regularisation here by either issuing a **Conditional Permission** to remain, or by revoking the Order and granting a Section 3 Temporary Permission to Remain. Similar schemes to deal with non returnable migrants are in place in a number of E.U. countries notably, France, Germany, Italy and Romania.
- Families with subsisting Deportation Orders: where a family, particularly with young children who have been born in Ireland or spent a considerable amount of their childhood in Ireland, is subject to a Deportation Order and the order has not been effected within 1 year of its initial issuance and there is no reasonable degree of likelihood that the Deportation Order will be effected within a six months period, consideration should be given to revoking the deportation order and granting permission under section 3.

⁷ Article 33 of the 1951 Convention on the status of Refugee provides "*No Contracting State shall expel or return (—refouler!) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion*". This principle is reaffirmed by Article 3 of the 1984 Convention against Torture, Other Cruel, Inhuman and Degrading Treatment or Punishment, and has been enacted into Irish law by Section 5 (1) of the Refugee Act 1996.

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Conclusion

This working paper represents Nasc's initial thoughts on how we may deal with the legacy issues in our reception and protection system. We firmly believe that the working group presents an ideal and unique opportunity to reform our current system to reflect the States commitment to building a fair transparent and equitable process in which the human dignity of all persons across the process is respected.

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