

Internal paper for Theme 3 Sub-Group

Initiatives for long stayers in other European countries

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The information set out in this paper was received from UNHCR Offices in Europe. It is being shared with the Sub-Group on a strictly internal basis to give a sense of the kind of initiatives used in other EU countries to seek to address the situation of long stayers. The internal basis of this paper arises not from any sensitivity of the information but rather that the information has not been subject to rigorous review before sharing with the Sub-Group.

In the case of Netherlands and France examples are given of initiatives rolled out since the 2008 European Pact on Immigration and Asylum. Others are long standing and continuous initiatives. It should be kept in mind that in the 8 countries profiled below, asylum seekers can access the labour market after a certain period and under certain conditions. Thus, some of the initiatives involve a consideration of whether a person is in employment/has integrated etc. These are conditions that would be of less relevance to the situation in Ireland.

Austria

Regularisation in cases of delayed processing

After a period during which (rejected) asylum-seekers could no longer regularize their stay in Austria even in cases where they had very well integrated into the society in the course of an asylum procedure which had lasted many years due to no fault of their own (this has led to protests by many citizens advocating for a right to stay for their neighbours or the schoolmates of their children which were often supported by the media), the Austrian legislation now again foresees a provision that allows long-term asylum-seekers to regularize their stay on other grounds (if a number of conditions are fulfilled).

According to Article 56 of the Austrian Asylum Act, the following requirements apply for a “resident title in exceptional circumstances”¹:

- The third country national must apply for a “residence permit plus”. [This isn’t done ex officio.] He must no longer be an asylum-seeker (e.g. because he has withdrawn the appeal). Where asylum-seekers withdraw their application to apply for such a residence permit in cases of delay they should be advised that such a residence permit does not protect them against refoulement.
- It can be verified that the applicant has consistently resided in Austria for at least five years. More than half of those five years and at least three years, the residence must have been lawful. [This is the case during a pending asylum procedure, but not after a final negative decision, even if the applicant could de-facto not be deported and his/her stay was tolerated.]

¹ The German version of the provision can be found here:

<https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Bundesnormen&Dokumentnummer=NOR40141099>

- The applicant must fulfil module 1 of the integration agreement [mainly this is about knowledge of German language], or gain income from legal work exceeding the monthly minor employment threshold [If this condition is not met, the applicant will be granted a different residence permit]. The integration of an applicant also has to be considered in the expulsion procedure (which is part of the asylum procedure, if the expulsion is unlawful the applicant would also be entitled to a residence permit).

In general, Article 56 is formulated as a discretionary provision. But if all conditions are met, the applicant in fact does have a right to receive the residence permit. The authority's scope for discretion is determined by the degree of integration of the applicant, his/her self-preservation capacity, professional or vocational education, employment and knowledge of German language.

Article 60 further requires that the applicant must have access to appropriate accommodation and health insurance. The applicant's stay must not financially burden the regional or local authorities. Those conditions may be established through a declaration of sponsorship.

Finally, the granting of a residence permit must not substantially damage the Republic's international relations, and the stay must not be contrary to public interests (extremist or terrorist activities).

Deportation Orders and Tolerated stay

A (...) foreigner with an irregular residence status can be "tolerated" ("geduldet") according to Article 46 (1a) in conjunction with (2b) Aliens Police Act if his or her deportation based on an expulsion or return decision cannot be facilitated for reasons of fact for which the foreigner is not responsible. However, there is no possibility to apply for a "tolerated stay". A person concerned can only suggest the determination ex officio and has no legal claim to a decision.

While persons concerned are to be issued – and may be able to apply for – a card for tolerated stay ("Duldungskarte"), this again depends on an administrative decision confirming their tolerated stay. While the authorities' decision on the "tolerated stay" is at their discretion, in line with the right to equal treatment under the Austrian constitution they are required to treat equal cases equally. Since positive administrative decisions are not reasoned, legal practitioners, however, report that it was difficult to determine why one person is being officially "tolerated" and another in a very similar situation not.

A tolerated stay is not considered lawful residence. The card for tolerated stay is merely a proof of identity, in particular for controls by police (thus sparing persons concerned from arrest for clarifying the status of their removal proceedings, possible pre-deportation detention and fines for unlawful residence).

After one year of tolerated stay a stateless person – under the same conditions as any other alien in this situation – can be awarded the residence permit "special protection" according

to Article 57 (1) sub-section 1 Asylum Act provided they have a clean criminal record and do not pose a threat the public or the security of the Republic of Austria.

If they fulfil additional requirements (enough income, health insurance, housing as well as a specified level of German language skills) stateless persons in this situation are entitled to a "Red-White-Red – Card Plus". The latter is a residence title of limited duration with unrestricted access to the labour market.

Belgium

Regularisation in cases of delayed processing

After 4 years (3 years if they have children that go to school) from when the asylum application was first lodged, asylum seekers can apply for regularization, which is regulated in article 9.bis of the Aliens Act.

This period includes first instance application and appeal. If a decision from the Council of State has been asked regarding their asylum application, this period is extended to 5 years (4 if they have children that go to school).

Regularization criteria are not specified in the law, which only states that it shall be granted only in exceptional circumstances. In 2009 a circular of the Secretary of State for Asylum and Migration expressly included among these exceptional circumstances the case of asylum seekers who had been awaiting a decision for a long time. This circular was annulled by the Council of State, but the criteria contained in it have continued to be applied – without reference to them- by the Aliens Office regarding the regularization of long-term asylum seekers. Accordingly Applicants do not have a legal entitlement but can avail of this by way of exercise of the State's discretion as a matter of practice.

France

Regularisation in cases of delayed processing

While asylum applications are being examined, asylum seekers can also apply for different kinds of statuses in France, such as a permit to stay for medical reasons (by serious illness) or for the protection of their right to private and family life. However, the granting of these permits is far from automatic.

Regularisation programs

From time to time, on a discretionary basis, regularization programs have been decreed by the French government for example in 1997, 2003 and 2006. This kind of programs (usually for a limited period) have been used several times. The last one took place in November 2012 tailored for migrants with family, professional or personal connections with France (i.e. for parents with children at school for at least 3 years and with a presence in France for 5 years ; for foreigners in France for more than 5 years who have been working and have a working contract).

Regularization programs are directed to migrants of all categories, including failed protection applicants. Criteria for regularization usually include whether the applicant (for regularisation) is working or not, and whether he/she has children who were born in France or who go to school there. Time spent in France is also taken into account.

The likelihood of regularisation does thus increase with the time spent as asylum seeker, as criteria for regularisation tend to take into consideration the degree of integration of the person, which is clearly influenced by the time spent in the country. However, time spent in the asylum procedure as itself is not specifically included as a criterion.

Other Regularisation mechanisms

While asylum applications are being examined, asylum seekers can also apply for different kinds of statuses in France. These are equally open to failed protection applicants. They can apply for a one-year stay permit based on:

- Their right to private and family life (as granted by art. 8 of the European Convention on Human Rights (ECHR), as long as they can prove sufficient connection to France
- Medical reasons (by serious illness)

The granting of these permits is far from automatic.

There is also the option to apply for a one-year residence permit on humanitarian grounds, but without having an entitlement to it.

Germany

Deportation Orders and Tolerated stay

Failed asylum-seekers who cannot be deported receive a so-called toleration permit ("Duldung"). The toleration permit does not constitute a residence permit; it is only a legal document certifying that the individual is obliged to leave the country. The Duldung also comes with several rights (social benefits, health care, accommodation etc.), but also certain restrictions regarding education, employment, accommodation etc.

According to the German Residence Act, a tolerated individual can obtain a residence title according to Sec. 25 Para 5 Residence Act if he/she stayed with a “Duldung” more than 18 months and forced return is not possible in the near future. Further, additional requirements must be fulfilled.

Luxembourg

Regularisation programs

A regularisation scheme was put in place a few years ago as an exceptional measure for applicants affected by lengthy administrative back-logs during the implementation of the Asylum Procedures Directive.

Deportation Orders and Tolerated stay

Three categories are foreseen in the legislation:

Those benefiting from a “sursis à l’éloignement” (renewable, maximum duration: 2 years): if health of failed applicant is in need of serious medical care.

Those benefiting from a “report de la decision d’éloignement” (for a limited period determined in light of the circumstances of the case): if failed applicant demonstrates impossibility to leave the territory for reasons beyond his/her control, and can’t return to country of origin or another country.

Failed applicants falling within either of those two categories receive social aid equal to a/s during their procedure, and have the right to work if in possession of an “*autorisation d’occupation temporaire*” (AOT)² authorising them to work.

The third category deals with those benefiting from a temporary stay permit, which includes those who have obtained a “sursis à l’éloignement” twice and whose medical situation has not changed. The failed applicants falling within this category receive no social aid.

Netherlands

Regularisation programs

In the past the Netherlands had a policy whereby if a decision was not taken within 3 years a residence permit was to be granted. This has now been abolished as part of their new expedited procedures according to which the Government has either to issue a decision on the application within 6 months or to justify the reasons why an earlier answer was not possible.

² Can be requested after being an asylum seeker for 9 months

The Netherlands had a pardon in 2007 affecting some 30.000 persons

The Netherlands had a so called children's pardon, introduced 1 February 2013 for children who stayed in the Netherlands more than 5 years before turning 18. Some 700 children and their families benefitted.

United Kingdom

Previous Backlog Clearance procedures

In July 2006, the Home Secretary (then John Reid MP) announced an asylum “legacy” (or backlog) of around 450,000 cases. He said that this would be cleared within five years. It was decided in 2007 to set-up a dedicated resource known as ‘case resolution directorate’ to deal with the so-called legacy cases. A case qualified as legacy if it was submitted before March 2007. The intention was to conclude all cases by 2011. A case conclusion being either a grant of indefinite leave to remain, removal or administrative closure of the case. Granting of indefinite leave to remain is in contrast to 5 years granted for Asylum/HP or 2 ½ years for Discretionary Leave. CRD was disbanded in 2011 although the UK did not meet its objective to conclude all cases, the remaining cases are currently dealt with by the older live cases unit in Liverpool.

Alternative mechanisms

Although not specifically ‘regularisation schemes’, protection applicants (depending on their circumstances) may alternatively qualify for status on different grounds within the Immigration Rules³. For example Applicants may qualify on private life grounds where he/she:

- (iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or
- (iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or
- (v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or
- (vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant’s

³ <https://www.gov.uk/government/collections/immigration-rules>

integration into the country to which he would have to go if required to leave the UK.

Switzerland

Asylum seekers can apply for regularization in their cantons, but it is very unlikely that they will meet the requirements (no dependence on welfare, among others). Case law in this regards varies starkly among cantons.

It is extremely rare that decisions are awaited for more than two or three years in Switzerland. Asylum seekers are not entitled to work during the first three months after their application. Their right to work as asylum seekers is very restricted: they can only take jobs for which no “domestic workers” are available, including holders of temporary or permanent residence permits and foreigners entitled to free mobility in Switzerland. The application of this requirement varies starkly among cantons.

Deportation Orders and Tolerated stay

There is a possibility that failed asylum seekers will be recognised as “provisionally admitted persons” if their expulsion is not possible, legal or advisable due to the situation in their countries of origin (including those displaced because of conflict and violence).

Provisionally admitted persons are given a temporary stay authorisation which is renewed yearly, provided that the relevant circumstances remain unchanged. This status grants neither rights to move to a different canton or to travel (only in exceptional cases), nor to family reunification, except after three years and under strict requirements.

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