

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 (recast).

Briefing Note for Oireachtas Members

Issue:

The Minister for Justice and Equality is seeking the approval of the Houses of the Oireachtas to exercise the State's discretion under Protocol No. 21 on the position of the UK and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, to opt into the following EU Directive: ***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 (recast).***

The Government Decision to propose an opt-in to the Directive to give effect to the Supreme Court judgment of 30 May last is reflective of its ongoing commitment to fundamentally reform Ireland's international protection system. It proposes going beyond the singular issue of providing access to the labour market for international protection applicants and instead using the opportunity afforded by the Supreme Court decision to align the supports and reception conditions provided to applicants with the norms across the rest of the European Union Member States.

In addition to labour market access, the Directive also includes important provisions in relation to children's rights, health, education and material reception conditions for applicants (housing, food, clothing and a daily expenses allowance). Participation in the Directive would place the provision of material reception conditions for applicants (currently provided under the system of Direct Provision) on a statutory basis for the first time.

Background:

The Supreme Court judgment of O'Donnell J. of 30 May 2017 found that in an international protection system with no temporal limits as to when the application process will be concluded (as is the case in Ireland) an absolute prohibition on the right to seek employment for persons in the protection process is unconstitutional.

Under Section 16(3)(b) of the International Protection Act 2015, an applicant is prohibited from accessing or seeking to access the labour market or to engage in self-employment while their application is being determined.

The Court in its declaratory judgment of 30 May, recognises that there are complex matters in relation to this judgment and that the State has a right to determine not just, who can enter the State but also to regulate what their rights are while within the State, particularly as regards employment. As this is a matter primarily for the Executive and Legislature, the Court adjourned consideration of its Order for six months to enable the State to consider its response.

Government Decision (S180/20/10/01221) of 11 July 2017 approved the establishment of an Inter-Departmental Taskforce to examine the implications of the judgment and to propose appropriate solutions to Government as quickly as possible.

Government Decision (S180/20/10/01221) of 21 November 2017 approved the key recommendation of the Taskforce that the State comply with the judgment by opting into the EU (recast) Reception Conditions Directive (2013/33/EU). The Minister is now seeking the approval of the Oireachtas, as required under Article 29.4.7 of the Constitution.

At its hearing on 30 November 2017, the Supreme Court was informed of the Government Decision to opt into the EU (recast) Reception Conditions Directive as the most appropriate solution to give effect to the Court's judgment. The Court was not minded to grant the State further time to complete the necessary opt-in process and

the compliance procedure with the European Commission (which can take up to 4 months from formal notification of our wish to be bound by the Directive) and instead ordered that Section 16(3)(b) of the International Protection Act 2015, which prohibits access to employment for applicants, simply be struck down on 9 February 2018. An information campaign will be launched shortly to advise applicants and all stakeholders what will happen between the striking down of Section 16(3)(b) on 9 February 2018 and the entry into force of the EU Directive.

What is provided for under the Directive?

The Directive lays down the standards for the reception of applicants for international protection. Ireland has not previously opted into the Directive due to the prohibition under national law (Section 16(3)(b) of the International Protection Act 2015) for access to the labour market for applicants.

Under the Directive, international protection applicants (also known as asylum seekers) who have not received a first instance determination of their case within nine months from making their application (and provided that the delay is not attributed to the actions of the applicant) will have a right to a temporary access to the labour market until such time as their application for protection reaches a conclusion. **Those that receive a first instance recommendation within the nine months and who avail of their right to appeal or review will have no right to this temporary access.** The Member State decides on the conditions for access to the labour market, in accordance with their national law, while ensuring that applicants have effective access to the labour market. The access for eligible applicants will be granted irrespective of whether or not an applicant chooses to avail of the State's offer of Direct Provision accommodation and other supports.

As previously mentioned, the Directive also includes important provisions in relation to health, education and material reception conditions for applicants (housing, food, clothing and a daily expenses allowance). Participation in the Directive would place the provision of material reception conditions for applicants (currently provided under the system of Direct Provision) on a statutory basis for the first time.

Under the Directive, Member States can means test the provision of material reception conditions. Where appropriate, they can require an applicant to contribute towards the costs, if the applicant has sufficient resources, including if they have been working for a reasonable period.

What are the next steps?

Subject to the approval of the Houses of the Oireachtas, the State will formally notify the European Council and the European Commission of our wish to take part in the Directive. The Commission will then commence its procedure to determine our compliance with all the provisions in the Directive before formal acceptance of our participation is confirmed. The Commission has up to 4 months to complete this procedure. The Directive may be transposed by way of secondary legislation under the European Communities Act 1972.

The State's implementation procedures commenced immediately following the Government Decision of 21 November 2017. The Government approved the establishment of an Implementation Group, which has been drawn from the nine Government Departments that were represented on the Taskforce, along with the Office of the Attorney General and other operational areas from relevant Departments, as required. The Implementation Group is overseeing the opt-in procedure and is putting in place the practical arrangements to facilitate temporary access to the labour market for eligible applicants.

On 9 February 2018, the Supreme Court will strike down the prohibition under Section 16(3)(b) of the International Protection Act 2015, which prevents international protection applicants from entering the labour market or engaging in self-employment. On this date, the State will not have completed the opt-in procedure to the EU Directive or the compliance process with the European Commission. Therefore, an interim scenario will exist between 9 February 2018 and the State's participation in the Directive (subject to Oireachtas approval to participate in the measure). During this period, all applicants, regardless of when they made their application for

international protection, will be entitled to apply or to have their prospective employer apply for an employment permit on their behalf under the Employment Permits Act 2003, as amended. The normal fee and conditions of employment (including the permitted sectors of employment) will apply as for all other Third Country Nationals. To regulate access to self-employment for applicants, the Minister intends to introduce an administrative scheme under his discretionary powers. Under the administrative scheme, the Minister will consider applications for a permission to engage in self-employment. The permission will be for a period of 6 months and may be renewable. It will be subject to a number of conditions, including that the applicant has not received a first instance decision on their application within 9 months, has made reasonable efforts to establish their identity and has cooperated with the international protection process.

The permission and conditions under the administrative scheme will mirror the legislative provision to be put in place to regulate self-employment for applicants once the State opts into the EU (recast) Reception Conditions Directive. Once the State's participation in the EU Directive is confirmed, access to the labour market for eligible applicants will be on more generous terms than that permitted under the employment permits system. This will include access to some sectors of employment that are currently restricted and will not be dependent on the issuing of an employment permit and its associated fees and conditions.