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European Council  
on Refugees and Exiles

# THE RIGHT TO WORK FOR BENEFICIARIES OF INTERNATIONAL PROTECTION

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# INTRODUCTION

The ability to engage in decent work is a fundamental human right, integral to human dignity and self-respect. Failure to ensure proper access to the labour market hinders the ability of a beneficiary of international protection to successfully integrate into their new society, and leaves them at risk of destitution. It may also result beneficiaries of international protection engaging in unauthorized work in dangerous and degrading conditions, or their unauthorized onward secondary movement.<sup>1</sup> As a result, it is essential to ensure beneficiaries of international protection are given effective access to the labour market.

In order to effectively enjoy the right to work, individuals not only need effective access to the labour market, but also access to vocational training courses and to have their qualifications recognised in a reasonable period of time. Studies have revealed that when beneficiaries of international protection initially enter the labour market they frequently only have access to jobs subsidised by the State and/or requiring a lower level of qualifications or skills.<sup>2</sup> Vocational training can ensure that beneficiaries can update or transfer their skills that are more suitable to the labour market in their new host state and gain nationally recognised qualifications.

The focus of this note will be on the beneficiaries of international protection access to the labour market and to access to procedures for the recognition of qualifications. It will not examine the specific difficulties asylum seekers face as this is documented elsewhere.<sup>3</sup> It will examine the international and European standards, with particular attention paid to the Charter of Fundamental Rights of the EU, that can be invoked to ensure actual access the labour market.

## ACCESS TO THE LABOUR MARKET

### I. INTERNATIONAL LEGISLATION

#### The 1951 Refugee Convention

The 1951 Refugee Convention explicitly acknowledges the importance of socio-economic rights for refugees,<sup>4</sup> it contains four specific provisions on access to work and rights at work including the right to wage earning employment (Article 17), the right to self-employment (Article 18), the right to practice a liberal profession (Article 19) and the right to benefit from labour regulations (Article 24).<sup>5</sup> The right to work depends on the individual's level of attachment to the country of refuge. Article 17 of the Convention only grants refugees who are lawfully staying on their territory the right to take up employment under the same conditions as the most favoured foreigner. Within the EU, the most favoured foreigner is an EU national, exercising their right to free movement in accordance with EU law.

1. States are legally obliged to prevent and protect persons from such exploitation. In particular, the rights of asylum-seeking and refugee women must be respected, protected, and fulfilled under Article 11 (1) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and other guarantees of equality. See also the University of Michigan Law School, The Michigan Guidelines on the Right to Work, 16 March 2010, pp. 295-296. Furthermore, it is of benefit to both the individual and the State to ensure that any work is carried out legally and within the existing legal framework.
2. See e.g. Randall, B., (2013) 'Access to Employment' Webinar, Access to Employment: Connecting Refugees to the Labour Market.
3. See for example, the Asylum Information Database (AIDA) documents access to the labour market in 20 European States, available here <http://bit.ly/1EpevVN>.
4. UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137 (hereinafter '1951 Refugee Convention').
5. Other relevant provisions of the 1951 Convention include Articles: 2 (general duties, implicitly including duty to pay taxes and abide by rules relating to employment), 3 (non-discrimination), 6 (waiver of requirements that refugees cannot fulfil because of their position as a refugee), 10 (continuity of residence), 13 (acquisition of movable and immovable property, and leases and contracts), 14 (protection of artistic rights and industrial property), 15 (right of association), 16 (access to courts), 23 (social welfare), 25 (administrative assistance), 26 (freedom of movement), 27 (identity papers), 29 (fiscal charges) and 30 (transfer of assets).

## International Covenant on Economic, Social and Cultural Rights

Article 6 of the International Covenant on Economic, Social and Cultural Rights (hereinafter 'ICESCR') recognises the right to work and provides specific obligations to which State parties must comply. Article 6 (2) provides that these steps include 'technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual'. Furthermore, the principle of non-discrimination as set out in Article 2 (2) should apply in relation to employment opportunities. The Committee on Economic, Social and Cultural Rights, in their general Comment on the right to work,<sup>6</sup> provides that the right to work is essential for realizing other human rights and forms an inseparable and inherent part of human dignity.

## II. COUNCIL OF EUROPE LEGISLATION

### Revised European Social Charter

Various Articles in the revised European Social Charter relate to the right to work. The first Article of the revised Charter provides the 'the right to work' and Article 1 (1) provides that parties undertake to accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable a level of employment as possible, with a view to attain full employment. The European Committee on Social Rights (hereinafter 'ESCR') have deemed the right to work to be of 'fundamental importance' as the effective enjoyment of other revised Social Charter rights is 'inconceivable unless the right to work is guaranteed first'.<sup>7</sup> The Committee have interpreted Article 1 (1) as requiring States to adopt coherent employment policies that aim towards full employment.<sup>8</sup> Article 1 (3) and (4) place an obligation on Contracting Parties to establish and maintain free employment services and systems of vocational guidance or training.

## III. EU LEGISLATION

### Recast Qualification Directive

In accordance with Article 26 of the recast Qualification Directive,<sup>9</sup> beneficiaries of international protection shall be granted access to employment and self-employment immediately after they have been granted their protection status and shall have access to employment support measures<sup>10</sup> including vocational training under the same conditions as nationals; furthermore, Member States shall endeavour to facilitate full access to these measures. The Court of Justice of the European Union (hereinafter 'CJEU') in the Gravier case adopted a broad definition of vocational training. It found that it included 'any form of education which prepares for a qualification for a particular profession, trade or employment or which provides the necessary training and skills for such a profession, trade or employment is vocational training, whatever the age and the level of training of the pupils or students, and even if the training programme includes an element of general education'.<sup>11</sup>

Article 34 of the recast requires Member States to 'take into account the specific needs of beneficiaries' in respect of integration measures and similar standards are also included in the proposed Qualification Regulation.<sup>12</sup>

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6. CESCR, General Comment No. 18: The Right to Work (Art. 6 of the Covenant), 6 February 2006, E/C.12/GC/18.

7. CoE, European Committee of Social Rights, Conclusion I, First supervision cycle, 1969-1970, 13.

8. CoE, European Committee of Social Rights, Conclusions III, 1973, 3.

9. Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast); (hereinafter 'recast Qualification Directive'), OJ 2011 L 337/9, Article 32.

10. These include activities such as 'employment-related education opportunities for adults, vocational trainings including courses for upgrading skills'.

11. ECJ, Gravier v. Ville de Liège and Others, Case 293/83 [1985] ECR 593, 13 February 1985.

12. Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents; COM (2016) 466, (hereinafter 'proposed Qualification Regulation'), Articles 30 and 38.

## 4. RELEVANT RIGHTS AND PRINCIPLES

### The principle of effectiveness

Article 4 (3) (b) and (c) of the Treaty of the EU<sup>13</sup> obliges Member States to undertake measures to ensure they fulfil their obligations arising from the treaties and to facilitate the achievement of the Unions' tasks. It essentially asks Member States to ensure that individuals coming within the realm of EU law are given effective legal protection. It requires that provisions are given full effect, so as to achieve the result sought by secondary EU law, by good administrative practice. In the *Marks and Spencer* case, the CJEU held 'Member States must ensure the full application of the Directive even after the adoption of those [implementing] measures. Individuals are therefore entitled to rely before national courts, not only where the Directive has not been implemented or has been implemented incorrectly, but also where the national measures correctly implementing the directive are not being applied in such a way as to achieve the result sought by it'.<sup>14</sup> In practical terms this means that access to the labour market needs to be practical and effective. Recital 42 of the recast Qualification Directive provides that efforts should be made in particular to address obstacles to effective access to employment-related educational opportunities and vocational training, inter alia, relating to financial constraints. The length of residence permits and the frequency of their review, may undermine effective access to the labour market, as employers can be less inclined to hire an individual whose residence status is open to question on a frequent basis. Such type of residence permits may undermine the effectiveness of the right to access employment as guaranteed in the recast Qualification Directive.<sup>15</sup>

### The right to good administration

- » The principle of the EU right to good administration requires that the entire procedure for considering an application for international protection does not exceed a reasonable period of time. Article 47 of the Charter requires a fair and public hearing within a reasonable period of time. Lengthy procedures can have unforeseen consequences for beneficiaries of international protection, particularly if they are unable to effectively access the labour market during their procedure. Prolonged absences from the labour market have proven to reduce an individual's skills and confidence and makes it significantly harder to gain access to the labour market once access is provided.<sup>16</sup>

### Principle of Non-discrimination (Article 21 of the EU Charter)

Under the 1951 Refugee Convention, protection against discrimination is absolute. The prohibition of non-discrimination is provided for by Article 14 of the European Convention on Human Rights (hereinafter 'ECHR'), which guarantees equal treatment in the enjoyment of the other rights laid down in the Convention.<sup>17</sup> The Charter of Fundamental Rights of the EU (hereinafter 'the EU Charter') also provides for the prohibition of discrimination (Article 21). Within the EU, there are also various Directives such as the Racial Equality Directive that stipulate the grounds under which Discrimination is prohibited, one of which is race.

Both direct and indirect discrimination are prohibited, so even if a provision on paper appears neutral, if it affects one group more considerably than another, it may be considered as indirect discrimination. Protection against discrimination in the field of employment extends across all the protected grounds provided for under the non-discrimination directives.<sup>18</sup> Furthermore, the CJEU have interpreted the prohibition of discrimination

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13. Treaty on European Union (TEU), European Union, Consolidated version of the Treaty on European Union, 13 December 2007, 2008/C 115/01.

14. CJEU, Case C-62/00 *Marks & Spencer plc v. Commissioners of Customs & Excise*, 11 July 2002, para 27.

15. Under the proposed Qualification Regulation, Article 26 provides that residence permits for refugees will be valid for 3 years and renewable thereafter for periods of three years, residence permits for subsidiary protection beneficiaries will be for one year and renewable thereafter for periods of two years. Article 15 and 21 of the Regulation provides that there will be a review of the status when renewing for the first time the refugee's residence permit, and when reviewing for the first and second time the residence permit of a subsidiary protection beneficiary. See also ECRE/AIDA 'AIDA Legal Briefing: Asylum On the Clock? Duration And Review Of International Protection Status In Europe', June 2016 available here <http://bit.ly/28W9F68> and ECRE Comments on the Commission Proposal for a Qualification Regulation COM(2016) 466, November 2016, available here <http://bit.ly/2fDiAu6>.

16. Connor, P. (2010). 'Explaining the Refugee Gap: Economic Outcomes of Refugee versus Other Immigrants', *Journal of Refugee Studies*, Vol.23, No. 3, pp. 377-397.

17. Protocol 12 (2000) to the ECHR, not yet ratified by all EU Member States, expands the scope of the prohibition of discrimination by guaranteeing equal treatment in the enjoyment of any right (including rights under national law).

18. See for example, Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (29 June 2000) and Council Directive of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

in relation to access to employment in a broad manner.<sup>19</sup>

### Health care and access to the labour market

- » Health issues and past trauma can have serious implications on a beneficiary's ability to enter the labour force, or partake in vocational courses. Studies have shown individuals with poor health have more difficulty with language courses, an essential prerequisite for access to employment.<sup>20</sup> Member States have numerous obligations to ensure that asylum seekers receive sufficient health care under the recast Reception Conditions Directive and similar obligations are proposed under the proposed recast Reception Conditions Directive. Particular attention is paid to those with specific reception needs and vulnerabilities. Under the recast Qualification Directive, States are required to provide access to healthcare to beneficiaries of international protection under the same conditions as nationals, including the treatment of mental disorders when needed. Similar provisions are foreseen under the proposed Qualification Regulation.<sup>21</sup>

Article 35 of the EU Charter provides that '[e]veryone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities'. As per the Explanations of the Charter, the term 'preventative health care', is based on Article 168 TFEU (Public Health) and Article 11 (the right to protection of health) and Article 13 (the right to social and medical assistance) of the European Social Charter.<sup>22</sup> From this it can be deduced that there is an obligation on the State to ensure that applicants are not placed in a situation which would cause ill-health, i.e. to prevent their ill-health<sup>23</sup> and that health care is accessible in practice to beneficiaries of international protection.<sup>24</sup>

## THE RECOGNITION OF QUALIFICATIONS

Ensuring timely access to the recognition of qualifications enables beneficiaries of international protection to take more appropriate routes into employment or further education and training. Beneficiaries, due to the nature in which they had to flee, may not have all relevant documentation with them; furthermore, the responsible Member State may not be familiar with the body or institution that awarded the qualification. Nevertheless, there is an onus on Member States to facilitate recognition of qualifications in order to ensure effective access to the labour market.

### IV. INTERNATIONAL LEGISLATION

#### 1951 Refugee Convention

While the 1951 Refugee Convention does not include a specific provision on the recognition of qualifications, it does provide that 'when the exercise of a right by a refugee would normally require the assistance of authorities of a foreign country to whom he cannot have recourse, the Contracting States in whose territory he is residing shall arrange that such assistance be afforded to him by their own authorities or by an international authority'. The authorities 'shall deliver or cause to be delivered under their supervision to refugees such documents or certifications as would normally be delivered to aliens by or through their national authorities'.<sup>25</sup> This places an obligation on the responsible Member State to facilitate the refugee obtain any documentation required for the recognition of qualifications.

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19. CJEU, Case C-116/94 Meyers v. Adjudication Officer, 13 July 1995.

20. European Parliament, 'Labour Market Integration of Refugees: Strategies and good practices' March 2016. P27.

21. Article 35, Qualification Regulation.

22. Explanations relating to the Charter of Fundamental Rights; 2007/C 303/02.

23. Article 11 of the European Social Charter provides that '[w]ith a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed inter alia: to remove as far as possible the causes of ill-health'.

24. Article 11 of the revised European Social Charter provides that the parties shall undertake to 'provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters in health'. This could be deduced as meaning that Member States need to inform applicants of health care available in order to ensure the promotion of health and that they take responsibility for their own health care.

25. Article 25 1951 Refugee Convention.

## V. COUNCIL OF EUROPE LEGISLATION

### Lisbon Recognition Convention

The 1997 Lisbon Recognition Convention,<sup>26</sup> provides a European framework for the recognition of higher education qualifications.<sup>27</sup> The Convention places the burden of proof with the receiving institution to prove that a foreign qualification does not fulfil the relevant requirements,<sup>28</sup> and requires that each country shall recognise foreign qualifications unless it can show that there are substantial differences between the foreign qualification for which recognition is sought and the corresponding qualification of the host country. Parties to the Lisbon Convention are required to develop procedures designed to fairly assess and expeditiously ascertain whether refugees, displaced persons and persons in a refugee-like situation fulfil the relevant requirements for access to higher education or to employment even in cases where refugees lack documentary evidence.<sup>29</sup>

## VI. EU LEGISLATION

### Recast Qualification Directive

Recital 44 of the recast Qualification Directive acknowledges that special measures need to be considered to address the practical difficulties encountered by beneficiaries of international protection concerning recognition of their qualifications (such as the waiver of fees).<sup>30</sup> Article 28(2) requires Member States to endeavour to facilitate full access for such persons to appropriate schemes for the assessment, validation and accreditation of their prior learning in compliance with the Directive on the recognition of professional qualifications and should be in compliance with the Directive on the recognition of professional qualifications.<sup>31</sup> The proposed Qualification Regulation also foresees that beneficiaries will have access to appropriate schemes for the assessment, validation and accreditation of their prior learning and experience.<sup>32</sup> Any assessment must be in compliance with the European Agreement on the recognition of professional qualifications.<sup>33</sup>

## VII. RELEVANT RIGHTS AND PRINCIPLES

### The right to Good Administration

By virtue of the EU principle of the right to Good Administration, Member States are obliged to facilitate and recognise the qualifications of beneficiaries of international protection in a timely manner.<sup>34</sup> Furthermore, the principle also imposes on Member States a duty of care towards the beneficiary to examine carefully and impartially all the relevant aspects of the individual case.<sup>35</sup> Moreover, any decision taken must be capable of being made the subject of judicial proceedings in which its legality can be reviewed and that the person concerned must be able to ascertain the reasons for the decision taken in his regard.<sup>36</sup>

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26. Convention on the Recognition of Qualifications concerning Higher Education in the European Region, Lisbon, 11.IV.1997 (hereinafter 'Lisbon Recognition Convention').

27. All EU Member States bar Greece have signed and ratified the Convention.

28. Lisbon Recognition Convention, Article IV.1.

29. Lisbon Recognition Convention, Article VII.

30. In particular, given the forced nature of their departure from their country of origin or habitual residence, beneficiaries of international protection may have left behind their diplomas and certificates and be unable to provide documentary evidence of their qualifications.

31. Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications.

32. Article 32 (3) proposed Qualification Regulation.

33. Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications.

34. For more on the right to Good Administration, see ECRE and Dutch Council for Refugees 'The Application of the EU Charter of Fundamental Rights to asylum procedural law.

35. See for example Joined Cases T-3/00 and T-337/04, *Pitsiorias v Council and ECB*, 2007, para 163.

36. See CJEU, Case C-340/89 *Vlassopoulou v Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg*, 7 May 1991, para 22.

## CONCLUSION

As noted in the preamble to the recast Qualification Directive, the special needs of beneficiaries of international protection need to be taken into account in order to facilitate their integration; ensuring access to the labour market is one of the main avenues to enable integration. Effective access also requires Member States to be mindful of the fact that prolonged absences create a difficult environment to re-enter the labour force. Moreover, multiple studies have shown the detrimental and knock-on effect inadequate health care has on ensuring beneficiaries access to the labour market. Effective access to health care is essential to enable beneficiaries access the right to work.

Member States have an obligation to ensure that certain services and courses, such as vocational courses are offered and accessible to beneficiaries in order to facilitate their access to the labour market. Furthermore, States are required to facilitate the timely recognition of qualifications, without which a beneficiary's ability to continue with their chosen path of employment is seriously hindered.



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