



**Department of Justice:  
Draft scheme to regularise undocumented migrants**

**Submission by the Ombudsman for Children's Office**

**May 2021**

## 1. Introduction

The current Programme for Government commits to creating new pathways for long-term undocumented people and their dependents to regularise their status.<sup>1</sup> On 23 April 2021, the Department of Justice (Department) announced draft proposals for a scheme to regularise undocumented migrants. The Ombudsman for Children's Office (OCO) welcomes the commitment to create new pathways for undocumented migrants to regularise their status and the development of a draft regularisation scheme in line with this commitment.<sup>2</sup> The OCO also welcomes the consultative approach taken by the Department to the development of the scheme and the invitation to make a submission on the proposals outlined in the consultation paper.

The UN Committee on the Rights of the Child (Committee) has observed that in the context of migration, children may be in a situation of double vulnerability as children and as children affected by migration who are migrants themselves, either alone or with their families, or who were born to migrant parents in countries of destination.<sup>3</sup> The Committee has also observed that additional vulnerabilities can relate to the child's or their parents' migration, residence or citizenship status.<sup>4</sup>

Regularisation of status, including through time-bound schemes and long-term permanent mechanisms, are an important means of responding to the vulnerabilities of children who are undocumented. Having regard to the estimate by the Migrant Rights Centre Ireland (MRCI) that there are 2,000 to 3,000 undocumented children in the State, the proposal to establish a regularisation scheme represents an important opportunity to provide access for a significant number of undocumented children to long-term regular migration status. The establishment of a regularisation scheme therefore has the potential to mitigate the adverse impact that a lack of regular migration status has on the enjoyment by these children of their rights.

The OCO is an independent statutory body that was established in 2004 under the Ombudsman for Children Act 2002, as amended (2002 Act). Under the 2002 Act, the Ombudsman for Children has two core statutory functions:

- to promote the rights and welfare of children under the age of 18 years living in Ireland
- to examine and investigate complaints made by or on behalf of children about the administrative actions of public bodies, schools and voluntary hospitals that have or may have adversely affected a child.

The OCO is making this current submission pursuant to section 7(1)(a) and section 7(4) of the 2002 Act. In preparing this submission, the OCO has been mindful of the expertise and experience of the many stakeholders that are likely to contribute to the Department's consultation about the draft scheme. Accordingly, the purpose of this submission is to respond to the Department's consultation

---

<sup>1</sup> Government of Ireland, [Programme for Government – Our Shared Future](#) (2020), p. 76.

<sup>2</sup> Department of Justice, [Minister McEntee outlines draft scheme to regularise undocumented migrants to Cabinet](#) (23 April 2021).

<sup>3</sup> UN Committee on the Rights of the Child and Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, [Joint General Comment No. 3 \(2017\) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 \(2017\) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration](#) (2017), UN Doc. CRC/C/GC/22 at para. 3.

<sup>4</sup> Ibid.

paper on the draft scheme by highlighting areas for further consideration by the Department to ensure the scheme better promotes the rights and welfare of undocumented children in Ireland.

This submission is informed by a number of factors, including:

- the UN Convention on the Rights of the Child (UNCRC), which Ireland ratified in 1992<sup>5</sup>
- guidance provided by the Committee in its General Comments, including General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin;<sup>6</sup> General Comment No. 22 on the general principles regarding the human rights of children in the context of international migration;<sup>7</sup> and General Comment No. 23 on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return<sup>8</sup>
- research undertaken to inform the OCO's work in relation to undocumented children, including *Pathways to Irish Citizenship: Separated, Stateless, Asylum Seeking and Undocumented Children*.<sup>9</sup>

## 2. Eligibility of children

The OCO welcomes that the scheme aims to regularise undocumented families and that the consultation paper recognises that undocumented migrants include both adults and children.

The consultation paper indicates that people over the age of 18 years will be considered as the principal applicant and that the applicant's family members, including children who are living with the principal applicant, may form part of the application. The categorisation of children solely as dependents is at odds with the recognition of children as rights-holders, as signalled by the State's ratification of the UNCRC, and may exclude children on behalf of whom a principal applicant is not in a position to submit an application.

In particular, it is unclear if children of undocumented parents in care or separated children in care will be eligible to apply for the scheme. The OCO is also concerned that children may be excluded from the scheme where their parent or an adult family member is not aware of the scheme, may be fearful of the risks associated with applying for the scheme or may not wish to apply.

The OCO therefore recommends that the Department clearly outline children's eligibility for the scheme not only as dependents of a primary applicant but also as applicants in their own right, including where an adult member of their family is unable or unwilling to submit an application on

---

<sup>5</sup> United Nations, [Convention on the Rights of the Child](#) (1989).

<sup>6</sup> UN Committee on the Rights of the Child. [General Comment No. 6 \(2005\) Treatment of Unaccompanied and Separated Children Outside Their Country of Origin](#) (2005), UN Doc. CRC/GC/2005/6.

<sup>7</sup> UN Committee on the Rights of the Child and Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, *supra* note 3.

<sup>8</sup> UN Committee on the Rights of the Child and Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, [Joint general comment No. 4 \(2017\) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 \(2017\) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return](#) (2017), UN Doc. CRC/C/GC/23.

<sup>9</sup> S. Arnold, [Pathways to Irish Citizenship: Separated, Stateless, Asylum Seeking and Undocumented Children](#) (2020).

their behalf. In this regard, we recommend that undocumented children in care be included within the scope of the scheme.

The OCO encourages the Department to work with the Department of Children, Equality, Disability, Integration and Youth (DCEDIY) and Tusla to put measures in place to facilitate the making of applications on behalf of children of undocumented parents in the care of the State. Similarly, the Department should work with the DCEDIY and Tusla to facilitate separated children to apply for the scheme, if it is assessed as being in the child's best interests to do so, including through access to free legal advice. This is particularly important for those children in care who have reached the age of 16, and who are therefore obliged to register their permission to be in the State with Immigration Service Delivery or the Garda National Immigration Bureau.

### **3. Residence criteria**

#### **Duration of undocumented residence**

The Department proposes that eligible persons must have a period of 4 years residence in the State without a residence permission prior to application and 3 years in the case of those with children and that such undocumented residence must be continuous.

We are concerned that a child or family's residence on the basis of a valid residence permission prior to becoming undocumented, and that periods of time spent undocumented between any periods of legal residence in the State, will not be counted towards the residence requirement. This may exclude undocumented children and families who have lived in Ireland for more than the proposed 3-year residence period but who have become undocumented within the last 3 years or who may have been undocumented for 3 years on a non-consecutive basis.

The OCO recommends that any period(s) of time a child or family has spent legally resident in the State, in addition to undocumented residence, should be counted towards the required residence period.

#### **Families who have submitted an application for leave to remain or are subject to a deportation order**

The OCO welcomes that it is proposed to explore how the principles underpinning the scheme may be applied to other groups, including those who are subject to a deportation order.

We are concerned that children and families who have resided undocumented in Ireland for the required period of time but who have been issued with a deportation order pursuant to section 3 of the Immigration Act 1999 (as amended), or who are awaiting a decision on an application for leave to remain, will be excluded from the scheme.

The OCO recommends that children and families who satisfy the residence requirement, and who are subject to a deportation order or who are awaiting a decision on an application for leave to remain, should be eligible to apply for the scheme on the same basis as other undocumented applicants.

#### **4. Income criteria and application fee**

The OCO welcomes that the Department does not propose to set an income requirement for applicants under the scheme. This will ensure that undocumented children in low-income households who have resided in Ireland for the required number of years, and who would otherwise be eligible for the scheme, have access to the scheme on an equal basis as other children.

The consultation paper specifies that the scheme will set out any associated fees, including an application fee and registration fee. The OCO recommends that any application fee attached to the scheme is affordable to ensure that families are not deterred or precluded from making an application solely on the basis of cost. The OCO encourages the Department to adopt an approach similar to that taken in the Special Scheme for non-EEA nationals who held a Student Permission in the State, whereby payment of only one application fee should be required in the case of a principal applicant who is also applying on behalf of other family members.<sup>10</sup>

As noted above, the OCO is of the view that the scheme should include eligible children as applicants in their own right. Careful consideration would need to be given by the Department as to how the proposals in respect of an application fee for adult applicants may need to be developed and adjusted for children applying in their own right, in order to ensure such children may apply for the scheme irrespective of their financial means.

#### **5. Inclusion of the best interests of children as a primary consideration in the assessment of applications**

The Committee states that in the context of migration-related processes and decision-making, all children, including children accompanied by parents or guardians, should be treated as individual rights holders, their child-specific needs considered equally and individually and their views appropriately heard and given due weight.<sup>11</sup> As the Department foresees that undocumented children will form part of an application submitted by a principal applicant, the OCO strongly encourages the Department to give further consideration as to how the specific needs, best interests and views of children will be factored into decision-making under the scheme.

Article 3 of the UNCRC provides that the best interests of children must be a primary consideration in all actions concerning children. Administrative authorities, including in the area of immigration, must therefore systematically consider how their decisions will affect children's rights and interests.<sup>12</sup> This includes when States address the situation of migrants residing irregularly, such as through the implementation of regularisation mechanisms.<sup>13</sup>

The Committee states that a child's right to have their best interests taken into account as a primary consideration means that children's interests have high priority and, therefore, that a larger weight

---

<sup>10</sup> Department of Justice, [Special Scheme for non-EEA nationals who held a Student Permission in the State during the period 1 January 2005 to 31 December 2010](#) (2018).

<sup>11</sup> UN Committee on the Rights of the Child, *supra* note 8 at para. 15.

<sup>12</sup> UN Committee on the Rights of the Child, [General comment No. 14 \(2013\) on the right of the child to have his or her best interests taken as a primary consideration \(art. 3, para. 1\)](#) (2013), UN Doc. CRC/C/GC/14 at para. 30.

<sup>13</sup> UN Committee on the Rights of the Child and Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, *supra* note 3 at para. 44.

must be attached to what serves the child's interests best.<sup>14</sup> The Committee further clarifies that non rights-based arguments, such as those relating to general migration control, cannot override best interests considerations.<sup>15</sup>

Assessment of a child's best interests must include respect for the child's right under Article 12 of the UNCRC to express their views freely and for those views to be given due weight in all matters affecting the child.<sup>16</sup> This includes in immigration decision-making processes affecting the child's own situation or that of their parents.<sup>17</sup> In order to fully implement this right, children should be provided with all relevant information, in their own language, including on their rights, the immigration process and its outcomes, and administrative or judicial remedies.

The OCO recommends that the best interests of children be explicitly included as a primary consideration among the factors to be taken into account by the Department in its assessment of applications under the scheme, having regard to the requirement that any best interests assessment must take into account the child's views and necessarily involves the provision of all relevant information to children on the application process and its outcome.

## **6. Type of residence permission granted**

The OCO welcomes the Department's proposal to issue successful applicants with a residence permission that will provide for unrestricted access to the labour market and that is reckonable for the purpose of naturalisation. The consultation paper does not specify the type of residence permission that will be issued to eligible applicants, including eligible children.

We note that children aged below 16 are currently exempt from the requirement to register their residence permission in the State and accordingly derive their permission to be in the State from that of their parents. The OCO is concerned by reports that residence permissions issued to children once they reach the age of 16 vary and that children have in some cases been issued with permissions that are inappropriate for their circumstances.<sup>18</sup>

The OCO recommends that the final terms of the scheme clearly set out the type of residence permission with which eligible applicants, including eligible children, will be issued. We encourage the Department to give consideration to issuing successful applicants with a Stamp 4 residence permission, which will grant holders unrestricted access to the labour market and is reckonable for citizenship, in line with the Department's proposals. In this regard, the OCO recommends that children forming part of applications made by a principal applicant should be issued with the same residence permission and associated entitlements as those granted to the principal applicant.

## **7. Establishment of clear and accessible formal procedures for conferring immigration status on children and families in an irregular migration situation**

The Committee recommends that States provide avenues for status regularisation for migrants in an irregular situation residing with their children, particularly when a child has been born or has lived in

---

<sup>14</sup> UN Committee on the Rights of the Child, *supra* note 12 at para. 39.

<sup>15</sup> UN Committee on the Rights of the Child, *supra* note 6 at para. 85.

<sup>16</sup> UN Committee on the Rights of the Child, *supra* note 12 at paras. 53-54.

<sup>17</sup> UN Committee on the Rights of the Child, *supra* note 3 at paras. 34-39.

<sup>18</sup> S. Arnold, *supra* note 9. See also: K. Mannion, [Child Migration Matters](#) (2016).

the country of destination for an extended period of time, or when return to the parent's country of origin would be against the child's best interests.<sup>19</sup>

Statutory mechanisms to regularise the status of children and their families have been established in other countries, such as Norway, Luxembourg and France.<sup>20</sup> Such mechanisms provide for the granting of individual residence permissions to children, independent of the immigration status of their parents, based on factors such as the number of years the child has resided in the country and number of years the child has spent in the education system.

In 2016, the Committee recommended that Ireland:

- adopt a comprehensive legal framework which is in accordance with international human rights standards for addressing the needs of migrant children in the State party;
- ensure that the said legal framework includes clear and accessible formal procedures for conferring immigration status on children and their families who are in irregular migration situations; and
- take measures to ensure that children in irregular migration situations are provided with independent legal advice and timely clarifications on their migration status.<sup>21</sup>

In 2020, the Committee asked the State to provide information on the measures Ireland has taken to adopt a comprehensive legal framework to address the needs of migrant children, guarantee their rights to legal residency and independent legal advice, and address all violations of those rights, in its combined fifth and sixth report to the Committee.<sup>22</sup>

As noted in the consultation paper, there is currently no clear pathway for an undocumented child to become regularised, unless their parent(s) is granted permission to reside in the State. While the OCO welcomes the introduction of a time-bound regularisation scheme, the decision to introduce a time-bound scheme subject to certain eligibility criteria will, by its nature, benefit a defined number of undocumented families and children. The OCO is concerned that children who are currently residing in Ireland but who will not have a sufficient period of residence as required in the final scheme, and children who become undocumented subsequent to the scheme, will continue to lack a clear formal procedure to regularise their immigration status.

The OCO recommends that the Department establish clear, formal statutory mechanisms for conferring immigration status on undocumented children and their families, in line with the Committee's recommendations and the Government's commitment to create new pathways for undocumented people to regularise their status in the State.

---

<sup>19</sup> UN Committee on the Rights of the Child and Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, *supra* note 8 at para. 29.

<sup>20</sup> S. Arnold, *supra* note 9 at p. 24; K. Mannion, *supra* note 18 at pp. 146-149; Platform for International Cooperation on Undocumented Migrants, *Manual on regularisations for children, young people and families* (2018).

<sup>21</sup> UN Committee on the Rights of the Child, *Concluding observations on the combined third and fourth periodic reports of Ireland* (2016), UN Doc. CRC/C/IRL/CO/3-4, at paras. 67-68.

<sup>22</sup> UN Committee on the Rights of the Child, *List of issues prior to submission of the combined fifth and sixth reports of Ireland* (2020), UN Doc. CRC/C/IRL/QPR/5-6, at para. 29(d).