Granting ‘independent’ residence permits to migrants who experience domestic violence

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1. Introduction
Whilst any person can experiencing domestic violence can encounter difficulties in reporting incidents, accessing support services and remedies, migrants can face additional barriers, including, for example, language barriers, social isolation and lack of knowledge regarding available supports or remedies. The focus of this briefing is one specific and particular barrier to protection, namely ‘dependent’ residence status in Ireland.

The challenge to the Government involves two key matters that need to be reformed:

- Providing formal recognition of domestic violence in immigration law by making provisions which enable dependant family members to apply to remain in Ireland as victims of domestic violence; and
- Pending determination of applications to remain in Ireland, providing that victims of domestic violence can access safe emergency housing and essential welfare benefits to meet basic needs.

2. General Background and Immigration Context: Family Life and ‘Dependent’ Residence Status
Family members of Irish citizens and legally resident non-EEA nationals are currently allowed to apply for permission to enter and reside or remain in Ireland in accordance with general administrative policies and procedures. Such applications are currently granted on an individual case-by-case basis and granted on the basis of Ministerial discretion, although some generally applicable statutory provisions, such as s.4 and s. 4(7) of the Immigration Act, 2004 may be relevant to such applications.

When first granted admission to Ireland, family members of Irish citizens and legally resident non-EEA nationals are usually granted a Stamp 4 or Stamp 3 residence permit depending on the situation. These different residence stamps provide different entitlements in terms of access to the labour market or social protections, if needed, can be granted different types of residence permit depending on the situation. However, regardless of the residence all family members are considered to have ‘dependent’ residence – dependent in the sense that the permit has only been granted because of their existing relationship with a family member in Ireland. The permission to be in and remain in Ireland is dependent on the subsisting and cohabiting nature of the relationship. The permission that is granted is temporary and must be renewed, usually annually. There is no entitlement to be granted an ‘independent’ residence permit having lived in Ireland for a number of years or if there are particular changes in circumstances following arrival, although it may be possible for an individual to apply for a discretionary ‘change of status’ on some alternative administrative basis or under s.4(7) of the Immigration Act 2004.

In contrast to the current discretionary approach outlined above, most EU countries provide for the granting of an independent residence permit to a family member on completion of a certain number of years ‘probationary’ residence (two-five years) in the country and have specific arrangements to deal with changes in family circumstances (including separation/divorce, death, departure of family member from the country or relationship breakdown in the context of domestic violence. This is due to the fact that EU Member States, with the exception of Ireland, UK and Denmark, are bound by the provisions of the EU Family Reunification Directive (2003/86/EC). Although, like Ireland, the UK opted-out of the Directive, entry to and residence in the state of family members of British citizens and settled residents is dealt with under domestic immigration rules.¹

¹ http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/
3. Current Administrative Approach to Domestic Violence in the Irish Immigration System

As mentioned above, on a discretionary administrative basis, applications for a ‘change of status’ can be made by any individual residing in Ireland and, where domestic violence has occurred, it is the experience of the organisations of the Domestic Violence Coalition that such applications often receive very positive and humane consideration – and, importantly, are determined by the Irish Naturalisation and Immigration Service (INIS) within a reasonable and relatively short processing time, regardless of the immigration status of the applicant requiring assistance. Whilst there is no clearly stated position of the Department of Justice and Equality/INIS, it would appear from decisions that have been taken in individual cases that the approach taken by the Department is to respond to the protection needs of the applicant rather than simply view the situation as an ‘immigration issue’. Indeed, very positive decisions have been received in some cases that would not necessarily qualify under what ‘Domestic Violence’ immigration rules in other countries (for example, cases where residence has not been established in Ireland on the basis of a family relationship, e.g. international students) and the Minister for Justice and Equality and immigration officers acting on his behalf are to be commended for this approach.

4. The Issue: Hidden Remedy & Consequences

Specific to immigration and residence procedures, the Domestic Violence Coalition is concerned that whilst there may be a remedy – it is currently a hidden remedy. In addition to the absence of any entitlement to a residence permit as the family member of someone living in Ireland or any entitlement to remain in Ireland following changes of circumstances, the fact that there may be remedy – even if only possibility of making an application that will be considered on a discretionary basis – is not in any way publicly advertised by the INIS, Department of Justice and Equality and there is no information in the public domain as to what information is needed by decision makers to assess an application, guidelines regarding criteria, if any, to be fulfilled, etc or, if such an application were to be granted, what type of permit would be issued. In fact, not only is the remedy hidden, explicit information is provided on the INIS website that indicates there is no possibility of addressing the situation. The website states in relation to those who are resident in Ireland on the basis of a marriage to an Irish national, that "there are no rights of retention of residence in the event of separation/divorce."2 Similarly those in a de-facto relationship with Irish and non-EEA nationals are informed that "there are no rights of retention of residence in the event of separation."3

Consequently, this means that individuals experiencing domestic violence are often unaware that there is a possible remedy to address any issues arising from an immigration/residence perspective. Additionally, migrant women may seek advice from an organisation or legal advisor who is not aware of the possibility either. As a result, an individual may be poorly advised to apply for asylum, which is not necessarily in the interests of that individual not the relevant agencies charged with considering such an application. Or, individuals may simply be advised to do nothing at all to avoid a risk of getting deported. Also, because of the lack of clarity as to the existence of a potential remedy and the fact that any application made is determined on an entirely discretionary basis, there is a lack of clarity for other service providers who the individual may be seeking supports from (i.e. community welfare officers, refuges, etc) about the entitlements of an individual or how any application for a ‘change of status’ may fare ultimately.4 Migrants experiencing domestic violence are often, though not

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2 http://www.inis.gov.ie/en/INIS/Pages/WP07000024
3 http://www.inis.gov.ie/en/INIS/Pages/WP07000278
4 This contrasts significantly with the approach that has been taken by the UK Border Agency under the pilot ‘Sojourner Project’ in cases where a person is eligible to apply for leave under the relevant UK ‘Domestic Violence Concession’ immigration rules. Under this project, eligible applicants are entitled to 30 working days (6 weeks) of funded accommodation and support to enable them to apply during this period to apply for indefinite leave under the domestic violence rule. Once the application has been submitted, the applicant is eligible for a further 20 working days (4 weeks) of funded accommodation and support whilst waiting for a decision on the application. With effect from 1 April 2012, the current ‘Sojourner Project’ will be replaced
always, refused welfare payments, including discretionary community welfare (exceptional needs or supplementary welfare) payments on the grounds that the conditions of the residence permission they have (or had) may include 'no recourse to public funds' or they may be deemed not to comply with habitual residence conditions.

The Domestic Violence coalition is therefore concerned, and it is also their experience in dealing with individual cases, that many migrant women remain in (or return to) abusive relationships due to destitution and ultimately fear of losing their right to reside in Ireland and with that, possibly, access to their legally resident children.

5. Measures Required to Address the Issue
In order to protect migrants experiencing domestic violence, the members of the Domestic Violence Coalition urge that Government formalise the current discretionary administrative approach that is taken towards applications to be granted an independent residence permit.

In the **short term**, a comprehensive and coordinated administrative response is required by the relevant statutory stakeholders, namely the Irish Naturalisation and Immigration Service (INIS) and the Department of Social Protection/HSE. Positive steps to be taken include publishing information on the INIS about the possibility to apply for an independent permit where domestic violence has been experienced and setting out guidelines for the making of such an application. Community welfare officers should be directed to positively exercise the discretion, which they already have, to issue a temporary basic supplementary welfare payment to ensure that a person is in a position to access emergency accommodation and supplies. This is essential to ensure that women and their children who are at risk can remain in their homes safely or, if they need to leave, that they can do so safely and without risk of being left destitute or having to return to their partner to avoid destitution or if they are unable to be accommodated at refuge accommodation for financial reasons.

In the **longer term**, a legislative response is required. Within the existing Programme for Government there are a number of opportunities to progress legislative reform, including, for example, the review of existing domestic violence legislation. However, the proposed Immigration Residence and Protection Bill and/or secondary regulations made there under are an obvious place for addressing this issue.

Part 5 of the current draft Immigration, Residence and Protection Bill 2010 is concerned with residence permission. Article 35 gives the Minister power to grant residence permissions to different categories and subject to different circumstances. The nature and content of the permissions is left to regulations at some later date. Pursuant to s. 141 the Minister has wide powers to make regulations governing the grant of, *inter alia*, residence permissions. Under s. 37 the holder of a residence permission, who is entitled to do so, can apply to the Minister for a residence permission of a different category. Furthermore, under section 39, a person may apply for renewal of the residence permission, provided that this is done not later than 21 days before their current permission expires. Whilst section 39(3) provides that the Minister is not obliged to consider an application to renew residence that is not made within time, the Minister may nonetheless consider such an application and is required to have regard to any reason given or known to the Minister as to why the application was not made in time. An application to renew that is not made within 3 months of the expiry of residence permission may still be considered if the Minister is satisfied that the failure to submit the application within that time due to a number of reasons, including, “exceptional circumstances by virtue of which, through no fault of the foreign national, his or her application could not have been made within that period”.

by a new policy to the UKBA for a 3 month period of leave (which will be known as Special Temporary Leave) permitting recourse to public funds. This will allow the applicant to make a claim for income-related benefits and local authority housing while an application for indefinite leave under the Domestic Violence Immigration Rule is made and decided.
The members of the DV Coalition would like to acknowledge that taking these various draft statutory provisions together it is arguable that the Minister has the power as the Bill stands to make regulations to achieve the outcome sought by the Coalition – namely the granting of independent residence permission to migrants experiencing domestic violence.

However, there are nonetheless a number of difficulties with the legislation as currently drafted, including:

- Presently, there is no outline of the type of permissions that the Government envisages will be legislated for under future Regulations.
- There is no definition or guidance as to what is deemed to qualify as “exceptional circumstances”.
- It is very unclear how the draft provisions sit alongside other provisions of the Bill, specifically section 6 (known as the ‘summary removal’ provisions) which provides explicitly that a person without a residence permission is unlawfully present and under an immediate and continuing obligation to leave the State, and may be arrested and detained for the purpose of securing their removal.

In the absence of real clarity as to what may actually qualify for consideration under the Bill or future secondary regulations, what is required, how long applications may take to be processed, the likely outcome (i.e. what type of residence permission and any conditions attaching), on the basis of our experiences of supporting women experiencing domestic violence, the DV coalition organisations remain concerned that women or organisations supporting them will remain unclear as to what remedy, if any, is really available to them to address their situation.

The Domestic Violence Coalition recommends that the Minister for Justice and Equality should amend the draft provisions of Part 5 (residence permissions) of the Immigration Residence and Protection Bill 2010 (or any newly published draft legislation) and introduce comprehensive secondary regulations dealing with family reunification, including matters related to entry, residence and access to independent/permanent residence for family members of Irish citizens and third country nationals living in Ireland, including where domestic violence is experienced.

5.1 General Principles to Guide the Administrative and Legislative Approach

The Domestic Violence Coalition recommends that the administrative and legislative response should contain explicit reference to domestic violence and is broad enough to cover the range of situations in which the Minister already issues independent residence permits where domestic violence has been experienced.

By way of very general considerations, having regard to UK experience of introducing and refining the Domestic Violence Concession over a number of years, any administrative and/or legislative approach in Ireland should take account of the following:

- The broad ‘protection’ focus currently taken by the INIS when dealing with any applications received should be retained.
- A wide definition of domestic violence should be used, importantly including violence from the partner’s family members. The definition used under the UK immigration rules is:

  Domestic violence is classed as any incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional) between adults who
are or have been intimate partners or family members, regardless of gender or sexuality.\(^5\)

- The fact that the relationship broke down due to domestic violence during the very early stages of residence in Ireland should not be an adverse factor in reaching a decision.

- The rules should apply equally to female and male partners, to married and unmarried partners, and to those in opposite and same sex relationships.

- The fact of domestic violence in Ireland should bring an individual within the scope of the provisions. Granting residence permission should not involve a consideration of the consequences for the migrant partner if they had to return to their country of origin, although this may of course be relevant in some applications.

- An applicant should not be required to have a valid residence permission to remain in Ireland at the time of making the application. This is a very important point as many victims of domestic violence take time to appreciate or be advised that there is a remedy available and, by that time, their leave may have expired. This does not preclude a successful application under the rules.

- Applicants are normally required to provide evidence of the domestic violence. Decision makers must be given guidance to understand that different applicants will have different evidence taking into account the well-established fact that victims of domestic violence will often not report matters to the police, will often not pursue legal action against the perpetrator, and may not seek support from other agencies (through lack of knowledge, fear, or shame). An unduly rigid approach should not be taken and any evidential requirements should be met if it is established ‘on the balance of probabilities’ that the relationship broke down to domestic violence whatever evidence is being produced.

- Applications should be processed within a specific period of time and the applicant should be eligible to receive necessary accommodation and other supports during the application process.

- Applicants should be exempt from the payment of any immigration-related fees.

- Not all applicants will require legal representation to make an application. However, legal aid should be available where applicants do require such assistance.

It is submitted by the Domestic Violence Coalition that implementing measures that follow the above principles would bring Ireland into line with all other EU countries approach to protecting migrant women experiencing domestic violence and would immeasurably improve the situation of individuals who desperately need access to visible and certain remedies.

5.2 Suggested worded amendments to the current draft Immigration, Residence and Protection Bill 2010:

As outlined above, there are a number of difficulties with the current draft wording of the Immigration, Residence and Protection Bill 2010, which affects the task of drafting a suitable proposed amendment. Some suggested worded amendments\(^6\) to consider include:

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\(^6\) The language used to frame the right of victims of domestic violence reflects that currently used in the ‘Protection’ section of the Bill (Part 7). However, this is not ideal given that the protection section
Suggestion 1:
Section 37
In page 46, between lines 16 and 17, to insert the following:

"(2) The holder of a residence permission whose permission to reside in the State is dependent on the residence status of a sponsor may make an application under subsection (1) on an individual and personal basis in particularly difficult circumstances.

(3) A holder of a residence permission whose permission to reside in the State has expired due to particularly difficult circumstances shall not be prohibited from making an application under subsection (1).

(4) For the purposes of section 37 “particularly difficult circumstances” includes the infliction of domestic violence by the sponsor on the holder while the relationship between them was subsisting.”.

OR

Suggestion 2:
Section 35
In page 45, between lines 7 and 8, to insert the following:

"(10) Without prejudice to the generality of subsection (1) the holder of a residence permission whose permission to reside in the State is dependent on the residence status of a sponsor may, in particularly difficult circumstances, apply to the Minister on an individual and personal basis for permission to reside in the State.

(11) A holder of a residence permission whose permission to reside in the State has expired due to particularly difficult circumstances shall not be prohibited from making an application under subsection (10).

(12) For the purposes of section 35 “particularly difficult circumstances” includes the infliction of domestic violence by the sponsor on the holder while the relationship between them was subsisting.”.

Suggestion 3 (Stand alone provision):
In page 169, between lines 24 and 25, to insert the following:

"139. – (1) A person whose permission to reside in the State is dependent on the residence status of another person may apply to the Minister on an individual and personal basis for a residence permission in particularly difficult circumstances.

(2) Without prejudice to the generality of subsection (1) particularly difficult circumstances includes domestic violence.

(3) A person shall not be prohibited from making an application under subsection (1) when their permission to reside in the State has expired due to particularly difficult circumstances”.

Section 141
In page 173, between lines 17 and 18, to insert the following:

“(xiii) specifying eligibility requirements for applications referred to in section 139,”.

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is separate from the residence section and the applicability of the definitions across sections would have to be reviewed if such an approach is adopted.