

07/09/18 Decision on substance  
-JR IPAT  
Unsuccessful. (4)

**THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL**

**REGULATION 21 OF THE EUROPEAN COMMUNITIES  
(RECEPTION CONDITIONS) REGULATIONS 2018**

**APPEAL AGAINST REFUSAL OF LABOUR MARKET ACCESS PERMISSION**

**CASE DATA**

**ATLM NUMBER:** 1863205-ALTM-18  
**PERSON ID:** 911942-14  
**APPELLANT:** XXX XXX  
**NATIONALITY:** Malawi  
**SOLICITORS FOR THE APPLICANT:** XXX XXX  
**TRIBUNAL MEMBER<sup>1</sup>:** Cindy Carroll

**INTRODUCTION**

1. The Appellant's initial application for a labour market access permission made (on an unknown date) pursuant to Regulation 11 (3) of the European Communities (Reception Condition) Regulations, 2018 (hereinafter "the Regulations") was refused by the Labour Market Access Unit by letter dated 12 July 2018. The Appellant sought a review of this refusal pursuant to Regulation 20 (1) (e) of the Regulations by personal letter dated 19 July 2018. The Review Officer, in a decision dated 27 July 2018, upheld the decision to refuse the Appellant a labour market access permission.
2. The Appellant submitted an appeal through her solicitors to the International Protection Appeals Tribunal (hereinafter "the Tribunal") pursuant to Regulation 21 of

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<sup>1</sup> Designated pursuant to reg.21(3) of the European Communities (Reception Condition) Regulations, 2018.

the Regulations. The Notice of Appeal was signed by the Appellant on 13 August 2018, and was received by the Tribunal on 15 August 2018.

3. Regulation 21 (1) of the Regulations provides for the appeal to the Tribunal to be made within 10 working days of the date of the notice of the decision. As the date of the notice of the decision was 27 July 2018, the appeal should have been submitted to the Tribunal on or before 13 August 2018. The Tribunal deemed that the appeal had been made outside the statutory time period, thus depriving the Tribunal of jurisdiction to determine the appeal, and accordingly, by letter dated 16 August 2018 and sent by email, the Tribunal advised the Appellant's solicitors that an application to make a late appeal under Regulation 22 needed to be completed.
4. The Tribunal received the application to make a late appeal (sent by email on the evening of 16 August 2018) on 17 August 2018. In that application, the Appellant explained that she had collected the letter at her accommodation on 10 August 2018 (Friday) and she attended at her solicitor's office on 13 August 2018 (Monday). The Tribunal was satisfied that the Appellant had acted with all due haste and, in the interests of justice, accepted the Appellant's appeal and undertook to issue the within Decision on or before 7 September 2018, being 15 working days from the date of receipt of the appeal pursuant to Regulation 21 (4) (a) of the Regulations.

#### **CASE FACTS AND DOCUMENTS**

5. The following documents have been submitted and all documentation has been considered.
  - Schedule 8 Notice of Appeal dated 16 August 2018 seeking extension of time
  - Schedule 7 Notice of Appeal dated 13 August 2018 with the following documents attached:
    - Document 1: Review of Labour Market Access Refusal dated 27 July 2018;
    - Document 2: Application for review dated 19 July 2018;

- Document 3: Original refusal of Labour Market Access Permission dated 12 July 2018;
- Document 4: Application for Labour Market Permission – while the Schedule 7 Notice of Appeal referred to this document, it was not actually included;
- Document 5: Decision of IPAT dated 12 December 2017 (erroneously referred to as “transfer decision”)
- Document 6: Negative recommendation of IPO in relation to international protection application dated 1 September 2017;
- Document 7: Form ASY1 application for asylum dated 23 December 2014 issued pursuant to section 8 (2) of the Refugee Act, 1996 (as amended).
- The Appellant’s birth certificate (photocopy).

According to her ASY1 Form, the Appellant left her country of origin on 2 December 2014, arriving in the State on 9 December 2014. She applied for asylum under section 8 of the Refugee Act, 1996 (as amended) on 23 December 2014.

6. In the Grounds of Appeal prepared on her behalf, the Appellant set out the procedural history as follows:

- (i) 23 December 2014 – Applicant makes an application for asylum;
- (ii) January 2015 – completes Application for Refugee Status questionnaire;
- (iii) May 2015 – presents for interview under section 11 of the Refugee Act, 1996 (as amended);
- (iv) January 2017 – submits International Protection Questionnaire pursuant to the transitional provisions of the International Protection Act, 2015;
- (v) July 2017 – section 35 interview;
- (vi) 1 September 2017 – negative recommendation issued by IPO on international Protection application;
- (vii) 20 November 2017 – oral hearing before IPAT;
- (viii) 12 December 2017 – IPAT issues negative appeal affirming IPO recommendation;

- (ix) April 2018 – IPAT Decision quashed following judicial review.
7. It is significant to note that the chronology set out by the Appellant omits one step in the process, namely the original recommendation of the Office of the Refugee Applications Commissioner, which was a negative recommendation made pursuant to section 13 of the Refugee Act, 1996 (as amended) in relation to the Appellant's application for refugee status made on 23 December 2014. There is reference to the recommendation of the Commissioner in both the section 39 Report of IPO at page 1 thereof, and at page 2 of the IPAT decision. It would appear, from the Appellant's record on the system, that this negative recommendation (dated 28 May 2015)
8. was sent to her under cover of a letter dated 26 June 2015, and that the Refugee Legal Service filed a Notice of Appeal with the Refugee Appeals Tribunal on 28 July 2015.

#### **RELEVANT LEGAL PROVISIONS**

8. Article 15 (Employment) of the Directive provides as follows:
1. *Member States shall ensure that applicants have access to the labour market no later than 9 months from the date when the application for international protection was lodged if a first instance decision by the competent authority has not been taken and the delay cannot be attributed to the applicant.*
  2. *Member States shall decide the conditions for granting access to the labour market for the applicant, in accordance with their national law, while ensuring that applicants have effective access to the labour market.*  
*For reasons of labour market policies, Member States may give priority to Union citizens and nationals of States parties to the Agreement on the European Economic Area, and to legally resident third-country nationals.*
  3. *Access to the labour market shall not be withdrawn during appeals procedures, where an appeal against a negative decision in a regular procedure has suspensive effect, until such time as a negative decision on the appeal is notified.*

This Article was transposed into domestic law and given effect in Regulation 11 of the Regulations. The relevant provision at issue in the within Decision is Regulation 11 (4) which provides as follows:

*(4) The Minister may, on receipt of an application made in accordance with paragraph (3), grant a permission to the applicant where satisfied that – (a) ..... a period of 9 months, beginning on the application date, has expired, and by that date, a first instance decision has not been made in respect of the applicant’s protection application, and (b) the situation referred to in subparagraph (a) cannot be attributed, or attributed in part, to the applicant.*

9. There are two prerequisites to be satisfied before a person in the Appellant’s position may be given a labour market access permission, namely the person must be a protection applicant, and a first instance decision must not have issued within 9 months from the date of application for protection (refugee status and subsidiary protection). These will be addressed hereunder.

#### **REQUIREMENT TO BE AN APPLICANT**

10. In order to make an application for a labour market access permission, the person concerned must be “an applicant”.
11. Under Article 2 (b) of the Directive, an applicant means a third country national or a stateless person who has made an application for international protection in which a final decision has not yet been taken. Under Article 2 (a) it is noted that “application for international protection” means an application for international protection as defined in Article 2 (h) of Directive 2011 / 95 / EU which in turn means an application for refugee status or subsidiary protection.
12. Under Regulation 2 of the Regulations, an applicant means, for the purpose of this Decision, any of the following: (a) an applicant under the Act of 2015; (b) an applicant

under the Refugee Act, 1996 (as amended) to whom a declaration under section 17 of that Act has not been given or refused.

13. It is accepted by the Tribunal that the Appellant made an application pursuant to section 8 of the Refugee Act, 1996 (as amended) for refugee status. It is further accepted that, following the coming into operation of the International Protection Act, 2015, she completed a questionnaire in January 2017 and was the subject of a negative recommendation by the International Protection Office in relation to her subsidiary protection application on 1 September 2017. As the “transitional provisions” of section 70 of the International Protection Act, 2015 applied, and in particular section 70 (2) (a), the only matter to be considered by IPO at that stage was that of subsidiary protection.

14. It is common case that she appealed the negative recommendation of IPO (on subsidiary protection) to IPAT, and that she had already appealed the negative recommendation of ORAC in relation to her refugee status to the then Refugee Appeals Tribunal, and that both appeals were the subject of the Decision of IPAT on 12 December 2017, which decision was quashed in April 2018 as a result of a settlement by the parties to that litigation. One of the terms of settlement was that the Appellant’s appeals against the section 13 recommendation of ORAC in respect of refugee status and against the section 39 recommendation of IPO would be heard by a different Tribunal Member.

15. Therefore, as a final decision has not yet been taken on these appeals, the Appellant is considered to be “an applicant” for the purpose of the within Decision.

#### **DID A FIRST INSTANCE RECOMMENDATION ISSUE WITHIN 9 MONTHS?**

16. Under Regulation 2 of the Regulations, “a first instance decision” means (for the purpose of this Decision), a decision in relation to (a) an application under section 15 of the Act of 2015, a recommendation under section 39 of that Act, (b) an application under section 8 of the Act of 1996, a recommendation under section 13 of that Act. In

the instant case, the Appellant has received a recommendation under section 13 of the 1996 Act in respect of her section 8 application. She made that application on 23 December 2014 and was notified of the section 13 recommendation in June 2015, i.e. within 6 months.

17. She has also received a first instance recommendation under section 39 of the 2015 Act in respect of her subsidiary protection application, which was made following her submission of her International Protection Questionnaire in January 2017. That recommendation was dated 1 September 2017, and was made within 9 months of the application for subsidiary protection.

### **BASIS OF APPEAL**

18. The basis of the within appeal is that the Appellant alleges that the original decision maker and the review officer both erred in finding that the Appellant had received a first instance recommendation, thereby making her ineligible to be granted a labour market access permission.

19. The Tribunal disagrees with this contention. The Appellant received a first instance decision from ORAC well within the 9 month period provided for in the Directive and/or the Regulations. Moreover, the Tribunal is satisfied that ORAC, who was the statutory body ascribed with deciding first instance applications under the Refugee Act, 1996 (as amended), was a competent authority so as to satisfy the requirements of Article 15 (1) of the Directive. In the context of her subsidiary protection application, the Appellant also received a first instance decision within 9 months of her making that application by completing the International Protection Questionnaire in January 2017.

20. While the decision of the review officer does contain an error in that it only refers to the decision of IPO on 1 September 2017 as being the relevant first instance decision and does not note the fact that a first instance decision had also been made by ORAC

in June 2015, that error does not vitiate the factual matrix of the instant case, namely that the Appellant did receive a first instance decision from a competent authority within 9 months of the making of her application for refugee status.

**DETERMINATION**

21. The Tribunal finds that the Appellant is ineligible to apply for a labour market access permission. The Tribunal, under Regulation 21 (5) (a) of the Regulations, affirms the decision of the review officer dated 27 July 2018.

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Cindy Carroll

Designated Member of the International Protection Appeals Tribunal

7 September 2018