

Dublin

23

S.S. Decision  
Dec 2018

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: 1866940-ATLM-18

PERSON ID: 959392-16

APPELLANT: XXX XXX

NATIONALITY: Pakistan

SOLICITORS FOR THE APPLICANT: XXX XXX

TRIBUNAL MEMBER<sup>1</sup>: Cindy Carroll

INTRODUCTION

1. It is not certain when the Appellant applied for a labour market access permission pursuant to Regulation 11 (3) of the European Communities (Reception Condition) Regulations, 2018 (hereinafter "the Regulations"). Her application was refused by the Labour Market Access Unit on 22 October 2018. The Appellant's solicitors sought a review of this refusal by letter dated 6 November 2018.
2. The Review Officer, in a decision dated 19 November 2018, upheld the decision to refuse the Appellant a labour market access permission. The Review Officer deemed the Appellant ineligible to apply for a labour market access permission because she is the subject of a transfer decision made pursuant to the European Union (Dublin System) Regulations 2018 and was therefore deemed to be a recipient pursuant to Regulation 2 (2) of the European Communities (Reception Condition) Regulations, 2018.
3. The Appellant submitted an appeal through her solicitors to the International Protection Appeals Tribunal (hereinafter "the Tribunal") pursuant to Regulation 21 of

Refused  
22/10/2018

Review  
19 Nov 18

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

the Regulations. The Appeal was submitted by email on 23 November 2018, and the Tribunal was asked to make a reference to the Court of Justice of the European Union on the issues arising in the case.

4. Correspondence issued from the Tribunal on 27 November 2018, advising that no evidence had been submitted to show that the Appellant had exhausted all first level reviews. It was also noted that the Schedule 7 Notice of Appeal had not been signed by the Appellant herself.
5. The requested documentation was received by the Tribunal by fax on 30 November 2018, with the hard copy of same received by the Tribunal on 3 December 2018. Following correspondence from the Tribunal on 3 and 4 December 2018, the Appellant's legal representatives sent detailed legal submissions dated 10 December 2018. The Tribunal is grateful for the assistance provided by these submissions. No submissions were received on behalf of the Minister.
6. This Decision has been determined within 15 working days from the date on which the complete appeal, including the Schedule 7 Notice of Appeal signed by the Appellant herself, was received by the Tribunal as provided for in Regulation 21 (4) (a) of the European Communities (Reception Conditions) 2018.

#### CASE FACTS AND DOCUMENTS

7. The Appellant applied for international protection in the State on 10 February 2016 to the Office of the Refugee Applications Commissioner. Following an examination of the Appellant's case, it was noted that the Appellant had previously been resident in the UK, and the case was subsequently transferred to the Dublin Unit. A take back request was made to the UK, and the Appellant was informed of the transfer decision on 8 September 2016. She appealed that transfer decision to the then Refugee Appeals Tribunal and the transfer decision was upheld by the International Appeals Tribunal<sup>2</sup> on 16 March 2017.
8. The Appellant has applied for judicial review of the decision of the International Protection Appeals Tribunal affirming the transfer decision, and her solicitor advises that she has obtained injunctive relief in that regard. The Tribunal understands that those judicial review proceedings remain in a holding list pending the outcome of a preliminary reference from the High Court on a systemic issue arising in relation to

10 Feb 16  
- APPLIC  
08 Sept 16  
- Transfer  
Upheld  
by  
IPAT  
16/03/17

J.R.  
07  
hold  
P.R.

<sup>2</sup> Section 71 (1) of the International Protection Act, 2015 transferred the functions and business of the Refugee Protection Appeals Tribunal to the International Protection Appeals Tribunal after the commencement of the said Act of 2015.

transfer decision. The Tribunal is aware that the judgment of the Court of Justice of the European Union on that issue is due to be delivered on 23 January 2019.

Case  
C-661/17  
MA  
23 Jan  
2019

9. The Appellant's current status in the State is that she remains the subject of an unexecuted transfer decision.

10. The Tribunal has considered all the documentation submitted – not all the documentation referenced in the Notice of Appeal was in fact submitted to the Tribunal:

➤ Schedule 7 Notice of Appeal undated and submitted on 23 November 2018 with three documents attached:

- Document 1: Review of Labour Market Access Refusal dated 22 November 2018 (erroneously stated to be 5 September 2018);
- Document 2: Application for review dated 6 November 2018;
- Document 3: Original refusal of Labour Market Access Permission dated 22 October 2018;
- Document 4: Initial application for Labour Market Access Permission - not included.

11. The Tribunal was also referred to two recent judgments of the High Court, namely *M.A. (a minor) v The International Protection Appeals Tribunal & Others* [2017] IEHC 677, and *M.E. (Libya) v the Refugee Appeals Tribunal and Others* (No. 2) [2018] IEHC 300. The Tribunal has read these judgments and is cognisant of the issues raised therein.

#### **REVIEW OFFICER'S DECISION**

12. The Appellant has been refused access to the labour market on the basis that she is the subject of a transfer decision pursuant to European Communities (Dublin System) Regulations, 2018 and was therefore regarded as a *recipient* within the meaning of the European Communities (Reception Conditions) Regulations, 2018. The case advanced to the Review Officer was that she remained an *applicant* pursuant to both the International Protection Act, 2015 and the Employment Permits Regulations 2017.

13. The Review Officer, in his decision dated 5 September 2018, found that the Appellant was not eligible for a labour market access permission for the following reasons:

- (i) In relation to the first issue, it was noted that the Appellant was entitled to *material reception conditions* and that labour market access permission was not included in the definition of *material reception*

*conditions*. It was noted that this distinction was also made in Directive 2013 / 33 / EU (The Reception Conditions Directive (Recast)) itself;

- (ii) It was stated that the Appellant had failed to identify any incompatibility between the Regulations and the Directive;
- (iii) It was stated that the Employment Permits Regulations were not relevant in relation to a Labour Market Access Permission which is granted only under the Reception Conditions Regulations. A person who is the subject of a transfer decision is specifically excluded from applying for a labour market access permission under the Regulations.
- (iv) The Review Officer concluded his decision by reference to Article 15 of the Directive. The Review Officer noted the Appellant's position in relation to being an applicant for international protection. It was noted that the UK was the Member State responsible for examining the application for international protection and that the Appellant would not be receiving a first instance decision in the State in that regard. The Appellant did not meet the conditions of Article 15 of the Directive, or Regulation 11 (4) of the Regulations.
- (v) The Review Officer had specific regard to Regulation 2 (2) and Regulation 11 (2) of the Regulations in relation to the Appellant's status, both in the State and in the protection system.

#### **ISSUES RAISED IN THE SCHEDULE 7 NOTICE OF APPEAL**

In the Schedule 7 Notice of Appeal to the Tribunal, the Appellant raised a number of issues, and the Tribunal notes that the Grounds raised in the within Notice of Appeal are virtually identical to those raised in similar appeals before the Tribunal.

#### **14. Ground 1:**

- (i) The Appellant remains entitled to *material reception conditions* under Regulation 4 (1);
- (ii) The Appellant remains *an applicant* as per the Employment Permits Regulations 2017, and the Labour Market Access Unit and the Labour Market Access Unit erred in finding this irrelevant;
- (iii) Regulations 20 and 21 specifically provide a "recipient" with the means to challenge a refusal to grant or renew a labour market access permission under Regulation 11. These provisions are not limited to *applicants* nor do they exclude a *recipient but not an applicant* from the review or appeal process. These provisions only make sense if recipients, including a person

deemed to be a *recipient but not an applicant* are entitled to challenge a denial of labour market access permission.

15. **Ground 2:** The Tribunal notes that the Appellant also raises in the within appeal challenges which can be described as systemic in that they query the compatibility of the domestic Regulations with the Directive because the Regulations seek to preclude the Appellant from the labour market because of his status in the protection system by the creation of a specific status of “recipient” rather than “applicant”.
16. **Ground 3:** As a final point, the Appellant raises the issue that she *remains an applicant* within the meaning of the Directive itself, and points to the fact that she remains in the territory of the State.

### LEGAL DEVELOPMENTS

17. The Tribunal has dealt with a number of similar appeals since September 2018. The issue of incompatibility of the domestic Regulations with the Directive was raised in the Grounds of Appeal in virtually all of those appeals. The Tribunal had reservations in relation to its own jurisdiction and expressed the reservation as follows in its previous decisions:

*“In light of the issues raised with and pleaded to the Tribunal in Ground 2 of the Schedule 7 Notice of Appeal, the Tribunal has carefully considered the judgment of the Supreme Court in **Minister for Justice & Equality & Others v Workplace Relations Commission & Others [2017] IESC 43**. The Tribunal has also read the Opinion of Advocate General Wahl in the related reference for a preliminary ruling pursuant to Article 267, **C378/17 Minister for Justice & Equality & Others v Workplace Relations Commission & Others ECLI:EU:C:2018:698**, and notes that the judgment of the Court of Justice of the European Union in that case is awaited.*

*The Tribunal acknowledges the supremacy of EU law in this jurisdiction. However, having had regard to the case law cited in paragraph 33 above, the Tribunal is of the opinion that, while national law may be dis-applied if it is not in compliance with EU law, the jurisdiction to take such an approach is currently vested in the national courts on judicial review.”*

18. Since the Appellant’s legal representatives submitted the Schedule 7 Notice of Appeal, the legal landscape has changed. Firstly, in relation to the instant case, in response to

a request from the Tribunal on 4 December 2018, the Appellant's legal representatives furnished legal submissions, raising issues and engaging with these issues which they had not done in previous appeals of this nature.

19. Secondly, as a matter of general applicability, later on 4 December 2018, the Tribunal became aware that the Court of Justice of the European Union had issued its judgment in the case of **C378/17 Minister for Justice & Equality & Others v Workplace Relations Commission & Others** ECLI:EU:C:2018:979. In the judgment, the Grand Chamber stated clearly that,

*As the Court has repeatedly held, that duty to dis-apply national legislation that is contrary to EU law is owed not only by national courts, but also by all organs of the State – including administrative authorities – called upon, within the exercise of their respective powers, to apply EU law..... It follows that the primacy of EU law requires not only the courts but all the bodies of the Member States to give full effect to EU rules."*

20. The Court went on to hold, specifically in relation to the Irish case which had been referred to them:

*Indeed, it would be contradictory if an individual were able to rely upon the provisions of EU law in a particular area before a body upon which national law has conferred jurisdiction over disputes in that area but that body were under no obligation to apply those provisions by refraining from applying provisions of national law which conflict with them .... Rules of national law, even constitutional provisions, cannot be allowed to undermine the unity and effectiveness of EU law .... It follows from the principle of primacy of EU law, as interpreted by the Court in the case-law referred to in paragraphs 35 to 38 of the present judgment, that bodies called upon, within the exercise of their respective powers, to apply EU law are obliged to adopt all the measures necessary to ensure that EU law is fully effective, dis-applying if need be any national provisions or national case-law that are contrary to EU law. This means that those bodies, in order to ensure that EU law is fully effective, must neither request nor await the prior setting aside of such a provision or such case-law by legislative or other constitutional means.*

21. The Appellant's legal representatives referred to the judgment of the CJEU in their legal submissions of 10 December 2018. In all the circumstances, the Tribunal now directs itself that, if there is a conflict between the domestic Regulations and the relevant EU law provisions, the domestic law must be dis-applied.

## RELEVANT LEGAL PROVISIONS

22. Article 15 (Employment) of the Reception Conditions Directive (Recast) 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. Regulation 11 (4) 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.

23. However Regulation (2) (2) of the Regulations provides as follows:

For the purposes of these Regulations, where a transfer decision, within the meaning of [European Union (Dublin System)] Regulations 2018, is made in respect of an applicant, he or she shall, on and from the sending to him or her of the notification under Regulation 5 (2) of those Regulations of the making of the transfer decision-

(a) cease to be an applicant, and

(b) be deemed to be a recipient but not an applicant.<sup>3</sup>

24. The Tribunal considers that this categorisation of different types of applicants within the asylum / protection system was not envisaged by the provisions of the Directive. The Tribunal is bolstered in this view by the judgment of the CJEU in C-179/11 *CIMADE Groupe d'Information et de soutien des immigrés (GISTI) V Ministre de l'Interieur, de l'outre-mer, des collectives territoriales et de l'immigration* ECLI:EU:C:2012:594 (hereinafter referred to as *CIMADE*).

25. In that case (where the original Reception Conditions Directive was at issue), the French authorities, on the basis of French law, sought to avoid the provision of reception conditions to persons who were the subject of transfer decisions; in particular, they sought to preclude the provision of the *allocation temporaire d'attente* (a temporary tide-over allowance) to these persons.

26. Advocate General Sharpston in her Opinion delivered on 15 May 2012 (ECLI:EU:C:2012:298) disagreed with this contention and noted, at paragraphs 67 as follows:

*Since the Reception Conditions Directive lays down minimum reception standards for asylum seekers, it is those standards which a Member State must apply while the asylum seeker in question is on its territory.*

27. The CJEU went further than the Advocate General. While her Opinion concluded that the reception conditions be afforded to persons who are subject to the Dublin System Regulation until the take back / take charge request is accepted, the Court found that such conditions must be afforded to those affected until they are actually transferred (emphasis added).

28. This case was cited in EU Immigration and Asylum Law (2<sup>nd</sup> Edition) (2016) Itaiebranner / Thym, to which the Tribunal has also had regard.

## **DETERMINATION**

29. Therefore, the benefits of the Reception Conditions Directive (Recast) must be afforded to all applicants as long as they are on the territory of a Member State. It is

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<sup>3</sup> The same status pertains if such a person appeals the transfer decision to IPAT (Regulation (2) (3)).

clear from both the Directive and the Regulations that an applicant is entitled to "material reception conditions", i.e. food, housing, clothing.

30. The position is not as clear in relation to the entitlement to seek access to the labour market. However, the Tribunal has looked at the provisions of Article 15 and is satisfied that the Directive does envisage that access to the labour market is a discrete reception condition in that it necessitates a time lapse before it can apply, but there is nothing in the Directive to show that any category of persons are excluded from seeking access to the labour market once the other conditions of the Article are satisfied.

31. In order to seek access to the labour market under the Directive, the person concerned must be an applicant. An applicant is defined at Article 2 (b) as "a third country national or a stateless person who has made an application for international protection in respect of which a final decision has not yet been taken." Under the Regulations, Regulation 2 (1) (b) defines an applicant as (in the case of the Appellant who applied under the Refugee Act, 1996 (as amended)) "an applicant under the Act of 1996, to whom a declaration, within the meaning of that Act, has not, under section 17 of that Act, been given or refused."

32. Under section 2 (1) of the International Protection Act, 2015, an applicant is defined as a person who has made an application for international protection in accordance with section 15<sup>4</sup> and who has not ceased, under subsection (2) to be an applicant. Section 2 (2) (c) provides that a person shall cease to be an applicant on the date on which "he or she is transferred from the State in accordance with the Dublin Regulation"

33. Applying all of the above, the Tribunal is satisfied that the Appellant herein has made an application for international protection and that, as she has not yet been transferred from the State pursuant to the Dublin III Regulation, she remains an applicant for the purpose of the International Protection Act, 2015, the Directive and the Regulations. As she has also not received a first instance decision in relation to her protection application within 9 months of the making of her initial application, the Tribunal is also satisfied that she comes within the provisions of Article 15 of the Directive, and is entitled to apply for access to the labour market.

34. In light of the above findings, the Tribunal deems a preliminary reference to the CJEU to be unnecessary.

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<sup>4</sup> Section 70 (1) of the 2015 Act applies

**CONCLUSION**

35. The Tribunal finds that the Appellant is entitled to access the labour market and, under Regulation 21 (5) (a) of the Regulations, sets aside the decision of the Review Officer dated 19 November 2018.

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Cindy Carroll

Designated Member of the International Protection Appeals Tribunal

21 December 2018