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Case

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: 1864855-ALTM-18
PERSON ID: 917411-15
APPELLANT: XXX XXX
NATIONALITY: Bangladesh
SOLICITORS FOR THE APPLICANT: XXX XXX
TRIBUNAL MEMBER¹: Cindy Carroll

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INTRODUCTION

1. The Appellant's application for a labour market access permission, made on 9 August 2018 pursuant to Regulation 11 (3) of the European Communities (Reception Condition) Regulations, 2018 (hereinafter "the Regulations"), was refused by the Labour Market Access Unit on 16 August 2018. The Appellant sought a review of this refusal pursuant to Regulation 20 (1) (e) of the Regulations by letter dated 29 August 2018. The Review Officer, in a decision dated 19 July 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 he is the subject of a transfer decision made pursuant to the European Union (Dublin System) Regulations 2018.
2. The Appellant submitted an appeal through his solicitors to the International Protection Appeals Tribunal (hereinafter "the Tribunal") pursuant to Regulation 21 of the Regulations. The Appeal was submitted by fax on 14 September 2018, and a hard copy of same was received by the Tribunal on 19 September 2018. A fax copy was also

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

sent on behalf of the Appellant on 18 September 2018, received by the Tribunal on 19 September 2018. The Notice of Appeal received by fax on 19 September 2018 was signed by the Appellant himself, the earlier versions having been signed on his behalf by his solicitor.

CASE FACTS AND DOCUMENTS

3. The Appellant applied for international protection in the State on 16 February 2015. A transfer decision was made on 15 November 2015 and, following an appeal, IPAT affirmed the transfer decision on 30 March 2016. The Appellant remains the subject of a transfer decision.
4. The following documents have been submitted and the Tribunal has considered all the documentation:
 - Schedule 7 Notice of Appeal dated 18 September 2018 with three documents attached:
 - Document 1: Review of Labour Market Access Refusal dated 5 September 2018;
 - Document 2: Application for review dated 29 August 2018;
 - Document 3: Original refusal of Labour Market Access Permission dated 16 August 2018.
5. 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 is aware of those judgments and is cognisant of the issues raised therein.
6. The Tribunal notes that, in the application dated 29 August 2018 for a review pursuant to Regulation 20 of the Regulations, the Review Officer was advised that the Appellant herein has applied for judicial review in respect of the Decision of the International Protection Appeals Tribunal to affirm the transfer decision, that he has been given leave to apply for judicial review, and that he has been granted an injunction restraining his removal from the State pending his application for judicial review.

REVIEW OFFICER'S DECISION

7. The original refusal to grant a labour market access permission, which was a decision of the Labour Market Access Unit on 16 August 2018, was premised on the fact that, as the Appellant was the subject of a transfer decision, he was not regarded as an

applicant for international protection for the purpose of applying for a labour market access permission. His legal representatives sought a review of that decision, and in their representations dated 29 August 2018, they raised a number of issues:

- (i) the Appellant was a “recipient” under the Regulations, and as such was entitled to material reception conditions pursuant to Regulation 4 (1) and was entitled to access the labour market pursuant to Regulation 11;
- (ii) Any provisions of the Regulations which sought to preclude the Appellant from the labour market were incompatible with the Directive itself;
- (iii) The Appellant relied on the provisions of Regulation 3 of the Employment Permits Regulations 2017, as amended by the Employment Permits Regulations 2018 which ascribe to the phrase “international protection applicant” the definition which is set out in Section 2 of the International Protection Act, 2015. Under Section 2 (2) (c) of the 2015 Act, an individual will only cease to be an applicant once they are transferred from the State in accordance with the Dublin Regulation. It was argued that, as the Appellant had not been transferred from the State in accordance with the Dublin Regulation, he had not ceased to be an applicant for the purposes of the Act and of the Employment Permits Regulations 2017.

8. The Review Officer, in his decision dated 5 September 2018, held against the Appellant on all the issues raised.

- (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 the Directive 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 and the Appellant’s contention that he had been waiting for more than 9 months for a first instance decision. 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. Accordingly, time could not run in relation to a first instance decision on his international protection application, and the Appellant could not meet the conditions of Article 15 of the Directive, or Regulation 11 (4) of the Regulations.

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.

9. Ground 1:

- (a) While the Labour Market Access Unit determined that the Appellant is a *recipient but not an applicant*, the Appellant remains entitled to *material reception conditions* under Regulation 4 (1);
- (b) 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;
- (c) 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.

10. **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.

11. **Ground 3:** As a final point, the Appellant raises the issue that he remains *an applicant* within the meaning of the Directive itself, and points to the fact that he remains in the territory of the State.

RELEVANT LEGAL PROVISIONS

12. 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.

13. 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.²

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

DETERMINATION

Ground 1 (a)

14. The Tribunal agrees with the Appellant's statement in his Notice of Appeal that, as a recipient, he is entitled to material reception conditions. However, aside from making that statement, the Appellant does not develop this point further.
15. The Tribunal refers to Regulation 2 (1) and the definition of the phrase *material reception conditions* which provides as follows:

"material reception conditions" means the following provided to a recipient for the purposes of compliance with the Directive –

- (a) the housing, food and associated benefits provide in kind,*
- (b) the daily expenses allowance, and*
- (c) clothing provided by way of financial allowance under section 201 of the Social Welfare Consolidation Act 2005;*

16. The Tribunal notes that neither the Regulations, nor indeed the Directive itself, include access to the labour market as a *material reception condition*. The Tribunal therefore finds that access to the labour market is not a *material reception condition* and, as such, this ground is misconceived. The Tribunal rejects this ground of appeal.

Ground 1 (b)

17. The Appellant submits that he remains *an applicant* as per the Employment Permits Regulations 2017, thus enabling him to access the labour market. The Tribunal disagrees with this submission for two reasons.
18. Firstly, as the Appellant is the subject of a transfer decision, he is deemed to be a recipient under the Regulations. Regulation 11 (2) provides as follows:

Save as may be provided under any other enactment or rule of law, a recipient who is not an applicant shall not seek, enter or be in employment or self-employment.

19. Secondly, Regulation 11 (12) provides that the Employment Permits Acts 2006-2014 (and the regulations made thereunder) shall not apply to a non-national (within the

meaning of that Act) who is an applicant or a recipient. In other words, even those individuals who are regarded as applicants for international protection and are actually entitled to apply to access the labour market are excluded from the provisions of the Employment Permits Acts and as such, as found by the Review Officer, may only access the labour market under the Reception Conditions Regulations. The Tribunal rejects this ground of appeal.

Ground 1 (c)

20. The Appellant makes the point that by referring only to “recipient” in Regulations 20 and 21, both of which enable an individual to challenge a refusal to grant or renew a labour market access permission, the legislation itself contemplates that a person who is merely a recipient is considered to be included in the categories of persons who are entitled to seek labour market access permissions.

21. While this is an interesting proposition, the Tribunal finds that it is made without regard to the provisions of Regulation 2 (1) and Regulation 2 (2). The Tribunal finds it useful to set out those provisions in full at this juncture:

22. Regulation 2 (1) defines a recipient as being,

(a) A person who –

(i) has given, or is deemed to have given under paragraph 5 to have given, an indication referred to in paragraph (a), (b) or (c) of section 13 (1) of the Act of 2015, and

(ii) has not ceased, under paragraph (4), to be a recipient, and

(b) an applicant;

23. However, this definition is subject to Regulation 2 (2) which in turn provides,

For the purposes of these Regulations, where a transfer decision, within the meaning of the Regulations of 2018, is made in respect of an applicant, he or she shall, on and from the date of 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.

24. Having regard to these definitions, the Tribunal is of the view that the Regulations are clear: while every applicant is a recipient, not every recipient is an applicant. The Tribunal is satisfied that the word *recipient* in Regulations 20 and 21 does not have the meaning ascribed to it by the Appellant, and the Tribunal rejects this ground of appeal.

Ground 2

25. The Appellant submits that the Regulations seek to exclude him from the labour market by creating a discrete category of recipients who are not regarded as applicants, namely those who are subject to the provisions of the Dublin System Regulations. As the Directive does not contain a similar category, the Appellant argues that the Regulations are therefore incompatible with the Directive.

26. This is an interesting argument and the Tribunal is mindful of the case of **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**)).

27. 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.

28. 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.

29. 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.

30. The Tribunal notes however that neither the Advocate General nor the Court itself considered the issue of access to the labour market, nor did the UNHCR address same in its position paper to the Court.³

31. 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.

32. The Tribunal acknowledges the supremacy of EU law in this jurisdiction. However, having had regard to the case law cited in paragraph 31 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.

Ground 3

33. The Appellant relies on the provisions of Article 3 of the Directive as support for the proposition that, as he has secured injunctive relief from the High Court restraining his removal from the State, that is sufficient to bring him within the scope of the Directive as an applicant for international protection.

34. The Tribunal has had regard to the provisions of Article 3 and disagrees with the Appellant's submission. The Appellant is not regarded as an applicant for international protection under national law. National law (Regulation 2 (2)) specifically excludes him from the status he claims. At the present time, the Appellant is the subject of a transfer decision and his sole permission to be in the State derives from the injunctive relief granted by the High Court. The Tribunal rejects this ground of appeal.

CONCLUSION

³ <http://www.refworld.org/docid/4e37b5902.html>

35. While the Appellant has put forward detailed grounds of appeal in his Schedule 7 Notice of Appeal, the Tribunal has not been persuaded that Regulation (2) (2) and Regulation 11 (2) do not apply. The Tribunal rejects all the grounds advanced in the Notice of Appeal and finds that the Appellant is ineligible to apply for a labour market access permission.

36. The Tribunal, under Regulation 21 (5) (a) of the Regulations, affirms the decision of the Review Officer dated 5 September 2018.

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Cindy Carroll
Designated Member of the International Protection Appeals Tribunal
17 October 2018