21 Jan 2019 URP successful - past decision (24)

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:	1861834-ATLM-18
PERSON ID:	947123-15
APPELLANT:	XXX XXX XXX
NATIONALITY:	Bangladesh
SOLICITORS FOR THE APPLICANT:	XXX XXX
TRIBUNAL MEMBER[1]:	Cindy Carroll

INTRODUCTION

1. 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") on 22 November 2018. The Labour Market Access Unit, by letter dated 26 November 2018, declined to accept the application because it was determined that the Regulations did not apply to the Appellant as he had received a first instance decision on his protection application on 12 March 2018, which predated the coming into operation of the Regulations on 30 June 2018. The Labour Market Access Unit stated that the Regulations came into force on 30 June 2018, and do not apply retrospectively. Retrospective effect.

12 Mar 2018 - 1st inst decn.

2. The Appellant's solicitors sought a review of this refusal by email dated 4 December 2018. The Review Officer, in a decision dated 21 December 2018, took the same approach as the Labour Market Access Unit, finding that the Appellant did not come within the ambit of the Regulations because a first instance decision had issued in his protection application prior to the Regulations coming into operation. The Review Officer went on to note that, as a decision had not been made in accordance with the

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

Regulations in respect of his application to access the labour market, there was therefore no decision to be reviewed.

3. 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 email on 27 December 2018, with the hard copy of same received by the Tribunal on 3 January 2019.

4. Lest there be any doubt, the Tribunal considers that it has jurisdiction to determine the within appeal pursuant to Regulation 21 of the Regulations, notwithstanding the approach taken by both the Labour Market Access Unit and the Review Officer. The Tribunal is of the opinion that the correspondence that issued from the Review Officer on 21 December 2018 does constitute "a decision of a review officer" so as to engage the review process under Regulation 21 (1) of the Regulations.

CASE FACTS AND DOCUMENTS

5. According to his ASY1 Form, the Appellant left his country of origin on 15 September 2015 and made an application for refugee status in the State on 19 October 2015 following his arrival in Dublin, having travelled by sea and road from Bangladesh.

6. In the application for a review to the Review Officer pursuant to Regulation 20, the Appellant's legal representatives stated, at paragraph (ii) thereof, that he had applied for protection on 6 November 2015, and the Tribunal notes that he signed his ASY1 Form on 6 November 2015.

7. In Ground 4 of the Grounds of Appeal to the Tribunal, the legal representatives point out that the Appellant did in fact apply for protection on 19 October 2015. However, considering the provisions of Regulation 11 (17) (b), which provide that an applicant is deemed to have made a protection application under section 8 of the Act of 1996 *on the date on which the Minister receives an application completed by the applicant in accordance with that section,* the Tribunal considers the operative date of the application for protection for the purposes of the Regulations to be 6 November 2015.

8. Even though he completed his Refugee Status Questionnaire on 15 November 2015, the Appellant was not interviewed pursuant to section 11 of the Refugee Act, 1996 (as amended) until 14 July 2016. A decision had not been made on that application by the time the International Protection Act, 2015 came into operation. The Appellant completed an International Protection Questionnaire on 5 July 2017, and was interviewed pursuant to section 35 of the International Protection Act, 2015 on 26 February 2018. A Report was prepared pursuant to section 39 of the International

15 Nov 15 – Ref Stat Q. IPA Act ↓ IProt Questionnaire 5 July 2017 Interviewed 26 Feb 2018

09 March 2018 decision

Protection Act, 2015 on 9 March 2018 and the Appellant was informed of the negative decisions in respect of his applications for refugee status and subsidiary protection by letter dated 12 March 2018.

9. In the email dated 4 December 2018 to the Review Officer, the Appellant's legal representatives advised that the Appellant was awaiting a decision from the International Protection Appeals Tribunal in relation to his international protection application. The Tribunal understands that to be the current position.

10. The Tribunal finds, as a matter of fact, that the Appellant was waiting for a little over 28 months for a first instance decision from a competent authority on his application for international protection. No evidence has been put before the Tribunal to suggest that the Appellant himself has been culpable in or contributed to this delay.

28 mths for 1st inst decision.

11. The Tribunal has considered all the documentation submitted.

    - Schedule 7 Notice of Appeal dated and submitted on 27 December 2018 with eight documents attached:

        - Document 1: Email of 4 December 2018 seeking a review of the Labour Market Access Unit decision;
        - Document 2: Decision of IPAT in case ID 1869683-ATLM-18;
        - Document 3: Decision of Review Officer dated 21 December 2018;
        - Document 4: Original refusal of Labour Market Access Permission dated 26 November 2018;
        - Document 5: Initial application for Labour Market Access Permission dated 22 November 2018 – partially included along with a copy of the Appellant's temporary residence card (expired on 25/12/2018), and a copy birth certificate;
        - Document 6: Letter from IPO dated 12 March 2018 issuing first instance decision;
        - Document 7: ASY1 Form signed by the Appellant on 6 November 2015;
        - Document 8: Grounds of Appeal for the within Appeal.

ISSUES RAISED IN THE SCHEDULE 7 NOTICE OF APPEAL

12. There are two issues raised in the Notice of Appeal. The first issue raised relates to asking the Tribunal to exercise its jurisdiction actually to determine the appeal. The Appellant makes the point that, because of the way the Labour Market Access Unit and the Review Officer phrased their refusals, same were such as to deny the Appellant his right of review and appeal. However, the Tribunal, as is set out at paragraph 4 above, is satisfied that it has jurisdiction to determine the within appeal.

13. The second issue raised in the within appeal and in the application for a review to the Review Officer is net: There is no doubt that the Appellant was awaiting his first instance decision for a period in excess of 9 months from the date of application for international protection, and accordingly his legal representatives submit that he should come within the ambit of Article 15 of Directive 2013 / 33 / EU, the Reception Conditions Directive (Recast), as he has satisfied the condition that a first instance decision was not made by a competent authority before the expiry of 9 months from the date of his application for international protection.

14. The approach taken by the Labour Market Access Unit and the Review Officer is also net: The Appellant cannot benefit from the provisions of the Directive because the transposing Regulations did not come into effect until after he had received his first instance decision and therefore those Regulations and even the Directive itself cannot apply to him. In short, neither the Labour Market Access Unit nor the Review Officer engaged with the substantive issues raised on behalf of the Appellant.

15. Therefore, the question which the Tribunal must address is whether the provisions of the Directive can apply to the Appellant even though the Directive had not been implemented in the State at the time he received his first instance decision 28 months after he had made an application for international protection?

THE APPLICATION AND OPERATION OF EUROPEAN UNION LAW

16. On 4 December 2018, the Court of Justice of the European Union 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."

17. 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.*

18. 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. However, the situation in the instant case is even more nuanced. The Labour Market Access Unit and Review Officer have not preferred an interpretation of national law over an interpretation of EU law; they have instead found that EU law just didn't apply. The Tribunal will now consider whether that approach was correct.

RELEVANT LEGAL PROVISIONS

19. In the within Decision, the Tribunal finds that it does not need to look at the domestic Regulations because they were not in force at the relevant time, that is when the Appellant received his first instance decision on his application for international protection. Therefore the Tribunal is confined to consideration of the Appellant's position vis a vis the Directive itself. 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.

20. The Tribunal accepts that individuals may reply on the provisions of a Directive once three conditions are satisfied, namely:

    (a) The provisions must be clear and unambiguous;
    (b) They must be unconditional, and
    (c) Their operation must not be dependent on further action being taken by the EU or the national authorities.[2]

21. The Tribunal has also had regard to the case of **C-148/78 *Pubblico Ministero v Ratti* [1979] EUECJ R-148/78**, where the Court of Justice held that a directive could only become effective once the date for implementation had passed. In the instant case, while the date of the Directive was 26 June 2013, the date of implementation was, pursuant to Article 31 thereof, 20 July 2015.

22. However, in the instant case, the date of implementation is irrelevant because Ireland was not only not a party to the 2013 Directive but had in fact opted out of the Directive entirely – as set out in Recital 33 thereof, *"the United Kingdom and Ireland are not taking part in the adoption of this Directive and are not bound by it or subject to its application."* [3]

23. Following on the delivery by the Supreme Court of its judgment in ***NHV v Minister for Justice & Equality* [2017] IESC 35**, the State made a decision to opt into the 2013

[2] C-2/74 Reyners v Belgium [1974] EUECJ R-2/74

[3] The United Kingdom is currently a party to the original Council Directive on this issue, that is Council Directive 2003 / 9 / EC laying down minimum standards for the reception of asylum seekers; they did not opt into the Recast Directive.

Directive. Even though the Supreme Court delivered their judgment on 30 May 2017, it was recognised by O'Donnell J, in delivering the unanimous judgment of the Supreme Court, that addressing the issue of protection applicants entering the labour market was a significant task for the executive and the legislature, and the perfection of the Court Order was adjourned for a number of months.

24. In the Dáil Debates on the matter, the Minister for Justice and Equality advised the Dáil that once the decision had been made by the State to opt into the Directive *"the formal notification letter will be sent to the European Council and the European Commission immediately thereafter so that we will be in a position to begin the four month compliance procedure with the Commission. I should point out that this four month period is mandated under the EU treaties."*[4]

25. Therefore, in circumstances where the Supreme Court, the two Houses of the Oireachtas, the European Council and the European Commission have recognised the enormity and significance of the State opting into a Directive, and where the State had been afforded an opportunity by these bodies to implement the necessary arrangements for opting in and implementation, it would be both inappropriate and outside this Tribunal's jurisdiction to look behind those arrangements.

26. Accordingly, while finding that the Directive, and in particular Article 15 thereof, is now capable of direct effect in Ireland, and while also finding that an affected person may rely on the provisions of the Directive, the Tribunal finds that an applicant such as the Appellant herein could only have relied on the provisions of the Directive at the time it came into operation in the State. That date was the date of the coming into operation of the Regulations, namely 30 June 2018.

PREVIOUS DECISION OF THE TRIBUNAL

27. The Appellant's legal representatives submitted, both to the Review Officer and to the Tribunal, a redacted copy of a Decision of this Tribunal where, in virtually identical circumstances, the Tribunal set aside the decision of the Review Officer. In that Decision, the appellant received his decision on 4 May 2018, almost 12 months after he had made his application for international protection, and nearly two months before the Directive came into operation.

28. The Tribunal is cognisant of Geoghegan J's judgment in ***Atanasov v the Refugee Appeals Tribunal*** **[2006] IESC 53**, where he held that *"It is not that a member of a*

[4] https://www.oireachtas.ie/en/debates/debate/dail/2018-01-23/30/

tribunal is actually bound by a previous decision but consistency of decisions based on the same objective facts may, in appropriate circumstances, be a significant element in ensuring that a decision is objectively fair rather than arbitrary." The Tribunal is in agreement with that statement. The avoidance of undue divergence by Tribunal Members is also placed on a statutory footing in section 63 (6) of the International Protection Act, 2015. Bearing all of this in mind, however, the Tribunal declines to follow the aforementioned Decision.

29. The Tribunal has taken this approach for two reasons: Firstly, in the previous decision referred to by the Appellant's legal representatives, the Review Officer engaged with the submissions made by that appellant. In that case, the Review Officer cited Regulation 11 (4) of the Regulations and confined his interpretation of Regulation 11 (4) as applying only to those applicants still awaiting a first instance decision. The relevant extract from that decision sets out as follows:

> *The Tribunal finds that the Review Officer erred by disregarding the fact that the Appellant had been waiting for longer than 9 months for a first instance decision, confining his interpretation of Regulation 11 (4) to those international protection applicants awaiting a first instance decision from the International Protection Office. Under both the Regulations and Directive, the crucial factor is that an international protection applicant must be awaiting such a first instance decision for a period longer than 9 months from the date of their application for international protection.* (emphasis added).

30. In that previous decision, the Tribunal found that the Review Officer had erred in his interpretation of the Regulations. In the within case, there was no interpretation save as to find the Regulations just did not apply.

31. Secondly, the Tribunal has considered the issues raised, the aforementioned case law and the approach taken by the Labour Market Access Unit and the Review Officer in this instant case. Following the letter of the law, which this Tribunal is bound to do, the Tribunal has concluded that its approach in the previous decision was incorrect and that it would therefore be unlawful and misleading to follow that decision.

DETERMINATION

32. Applying all of the above, while the Tribunal accepts that the Appellant did not receive a first instance decision in relation to his protection application within 9 months of the making of his initial application, he cannot benefit from the provisions of Article 15 of the Directive because, by the time the Directive came into operation in the State, the

Appellant had received his first instance decision. The Appellant is not entitled to apply for access to the labour market.

CONCLUSION

33. The Tribunal finds that the Appellant is not entitled to access the labour market and, under Regulation 21 (5) (a) of the Regulations, affirms the decision of the Review Officer dated 21 December 2018.

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Cindy Carroll

Designated Member of the International Protection Appeals Tribunal

21 January 2019