Dublin

(25)

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL

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

APPEAL AGAINST REFUSAL OF LABOUR MARKET ACCESS PERMISSION

Transfer decision

CASE DATA

ATLM NUMBER:	1856758 -ATLM-18
PERSON ID:	1019859-17
APPELLANT:	XXX XXX
NATIONALITY:	Egypt
SOLICITORS FOR THE APPLICANT:	XXXXXX
TRIBUNAL MEMBER[1]:	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") or when this application was refused by the Labour Market Access Unit. It would appear that the Appellant sought a review of this negative decision by letter dated 27 August 2018.

2. The Review Officer, in a decision dated 7 September 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 was 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.

EXTENSION OF TIME PURSUANT TO REGULATION 22

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

3. The Appellant submitted an application pursuant to Regulation 22 of the Regulations through his solicitors to the International Protection Appeals Tribunal (hereinafter "the Tribunal"). This application, seeking an extension of time to bring an appeal under the Regulations, was submitted by email on Friday 21 December 2018, and was received by the Tribunal on 27 December 2018, the Christmas period having intervened. The Schedule 8 Appeal noted identified a change in the law as the reason for the late appeal. On 4 December 2018, 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**.

4. The intended appeal therefore would focus on an allegedly incorrect implementation of Directive 2013/33/EU, and would comprise arguments which the Appellant could not have raised before. Before deciding whether to accept the appeal, the designated Tribunal Member requested the Appellant's legal representatives to advise when the decision of the Review Officer was actually made as that information had not been set out in the Schedule 8 Notice of Appeal. The request was made on 31 December 2018, with a response sought by 7 January 2019.

5. By email dated 7 January 2019, the Appellant's legal representatives sent a scanned copy of the Review Officer's Decision, which was dated 7 September 2018. The cover email erroneously said the date was 7 December 2018 but nothing turns on that. The Tribunal Member was satisfied to extend the time in the circumstances of this case, and, by letter dated 8 January 2019, the Appellant's legal representatives were invited to submit a complete Schedule 7 Notice of Appeal by close of business on 14 January 2019, which they did.

6. Pursuant to Regulation 21 (4) (a), the within Decision has been determined by 4 February 2019, being 15 working days from receipt of the complete Notice of Appeal. The Tribunal affirms the decision of the Review Officer for the reasons set out below.

CASE FACTS AND DOCUMENTS

7. The Appellant applied for international protection in the State on 14 July 2017 to the International Protection Office. A Transfer Decision was made by IPO in respect of the Appellant on 17 July 2018, and he appealed that transfer decision to the International Protection Appeals Tribunal on 30 July 2018. Following a hearing before it on 16 October 2018, the transfer decision was upheld by the International Appeals Tribunal on 14 December 2018.

8. In preparing the within Decision, the Tribunal has learned that the Transfer Decision was executed and the Appellant was in fact transferred from the State to the United Kingdom on 11 January 2019. The Tribunal was inclined to view the making of a decision on the within appeal as redundant, but in the interests of fair procedures, the Appellant's legal representatives were informed by the Tribunal, on 22 January 2019, of the fact of their client's transfer from the State, and they were invited to make submissions on the issue as to whether the within appeal is now redundant. The Minister was also similarly invited to make submissions.

9. By email dated 23 January 2019, the Appellant's legal representatives submitted that, although their client had been transferred from the State, he was destitute in the UK while his asylum claim there was being processed, and he had returned to the State and was living at his former address. His legal representatives stated that consideration was being given to bringing judicial review proceedings against the decision of the International Protection Appeals Tribunal in December 2018 to uphold the validity of the transfer decision.

10. By email dated 25 January 2019, the Appellant's legal representatives were invited to make legal submissions on the issues in the appeal, in particular the fact that section 2 (2) (c) of the International Protection Act, 2015 provides that a person ceases to be *"an applicant"* once they are transferred from the State in accordance with the Dublin III Regulations. Submissions were also invited from the Minister, and all parties were advised that submissions must be received by close of business on 30 January 2019.

11. Submissions were received from the Minister at 16.45 of 30 January 2019. While no supplemental submissions were received by or on behalf of the Appellant, in the interests of fair procedures, a copy of the Minister's submissions were sent to them on 31 January 2019, with any response to be sent by close of business on 31 July 2019. All parties were advised that the within Decision had to be determined by 4 February 2019. At the time of writing, nothing further has been received by the Appellant's legal representatives.

12. The Tribunal has considered all the documentation submitted:

   - Schedule 8 Notice dated 21 December 2018;
   - Correspondence dated 7 January 2019 with decision of Review Officer dated 7 September 2018 attached;
   - Schedule 7 Notice of Appeal dated 8 January 2019 and submitted on 14 January 2019 with Grounds of Appeal attached;
   - Email from Legal Aid Board dated 23 January 2019;

- Submissions on behalf of the Minister received on 30 January 2019.

REVIEW OFFICER'S DECISION

13. The Appellant was refused access to the labour market on the basis that he 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 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

14. The Appellant relies on the recent judgment of the Court of Justice of the European Union in the case of ***C378/17 Minister for Justice & Equality & Others v Workplace Relations Commission & Others*** **ECLI:EU:C:2018:979**. The Appellant submits that the domestic Regulations incorrectly transposed the Directive as the Regulations impose conditions which are not found in the Directive. The Appellant calls on the Tribunal to exercise jurisdiction to find the domestic regulations incompatible with the Directive.

15. The Tribunal is of the opinion that it does not have jurisdiction to declare legislation incompatible with EU law, and that that such jurisdiction remains vested in the Superior Courts. However, the Tribunal is of the opinion that it does have jurisdiction to dis-apply national law if it is not in compliance with EU law. The Tribunal has regard to the aforementioned judgment, where the Grand Chamber stated 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."*

16. 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.

17. 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

18. 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.

19. 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]

20. 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 terriroriales et de l'immigration*** **ECLI:EU:C:2012:594** (hereinafter referred to as ***CIMADE***).

21. 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.

22. 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.

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

23. 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).

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

LEGAL SUBMISSIONS ON BEHALF OF THE MINISTER

25. It is clear from the submissions made on behalf of the Minister in the instant appeal that the Minister is relying on the Regulations as being a correct transposition of the Directive. As is stated at paragraph 5 therein, *"The European Union Dublin System Regulation proceeds on the assumption that transfer decisions will be made within six months."* The first point to note is that clearly did not happen in the instant case – the Appellant was waiting for 12 months for a determination on the Transfer Decision at first instance. The second point to note is that, at paragraph 58 of her Opinion in ***Cimade***, Advocate General Sharpston noted that, while the Dublin Regulation did aim for a swift resolution in determining the Member State responsible,

> *None the less, the periods involved may be lengthy – easily over 12 months if the asylum seeker chooses to exercise his right of appeal and is permitted by the host Member State to remain there pending its resolution.*

26. However, at paragraph 3 of the submissions, the Minister relies on the fact that the Appellant was in fact transferred out of the State, and therefore ceases to be *an applicant* for the purposes of the Reception Conditions Regulations. The Tribunal agrees with this submission and, as set out in correspondence to the Appellant's legal representatives on 22 January 2019, the provisions of section 2 (2) (c) of the International Protection Act, 2015 apply. The Appellant is no longer *an applicant* within this jurisdiction.

27. In the absence of any information from the Appellant's legal representatives, it would appear that, if the Appellant is in the State, he is here without the permission of the Minister. The Tribunal is concerned that, at the time the within appeal was submitted to the Tribunal, i.e. on 14 January 2019, the Appellant had been transferred from the State. The Appellant's legal representatives did not disclose that fact to the Tribunal and did not address it until the Tribunal itself raised the matter with them. The Tribunal takes such a lack of disclosure of material facts very seriously.

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ETERMINATION

28. 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) (a) defines an *applicant* as *an applicant under the Act of 2015.*

29. 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 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"*

30. Applying all of the above, the Tribunal is satisfied that the Appellant herein did make an application for international protection. However, as he has been transferred from the State pursuant to the Dublin III Regulation, he is no longer an applicant for the purpose of the International Protection Act, 2015, and the domestic Regulations. Therefore, he is not entitled to apply for access to the Irish labour market.

CONCLUSION

31. 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 7 September 2018.

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Cindy Carroll

Designated Member of the International Protection Appeals Tribunal

4 February 2019