Dublin .

(26)

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:	1890197-ATLM-18
PERSON ID:	1049239-18
APPELLANT:	XXXXXX
NATIONALITY:	Albania
SOLICITORS FOR THE APPLICANT:	XXXXXX
TRIBUNAL MEMBER[1]:	Cindy Carroll

INTRODUCTION

1. The within Decision concerns an appeal against a refusal of a Review Officer to grant the Appellant a labour market access permission. It is not certain when the Appellant made his initial application for a labour market access permission pursuant to Regulation 11 (3) of the European Communities (Reception Condition) Regulations, 2018 (hereinafter "the Regulations"), or when that application was refused by the Labour Market Access Unit. The Appellant's solicitors sought a review of this refusal by letter dated 23 January 2019.

2. The Review Officer, in a decision dated 11 February 2019, 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 and was therefore deemed to be a *recipient* pursuant to Regulation 2 (2) of the European Communities (Reception Condition) Regulations, 2018.

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

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 14 February 2019. Correspondence issued from the Tribunal on that date to both the Appellant's legal representatives and the Department of Justice and Equality seeking submissions on the issues by Friday 22 February 2019.

4. The Domestic Residence and Permissions Division of the Department sent submissions on 20 February 2019, while the Appellant's legal representatives sent submissions on 25 February 2019. On that date, the Tribunal sent each party's submissions to the other party, seeking observations by 28 February 2019. While the Domestic Residence and Permissions Division responded by 28 February 2019, nothing further was received from the Appellant's legal representatives until 5 March 2019. The contents of this correspondence will be addressed below (paragraphs 7 and 8).

5. This Decision has been determined within 15 working days from the date on which the appeal was received by the Tribunal as provided for in Regulation 21 (4) (a) of the European Communities (Reception Conditions) 2018.

CASE FACTS AND DOCUMENTS

6. The Appellant applied for international protection in the State on 20 April 2018 to the International Protection Office. On 24 July 2018, the Appellant was issued with a Transfer Decision pursuant to the European Union (Dublin Systems) Regulations 2018. He appealed that transfer decision to the International Protection Appeals Tribunal, and that appeal was heard on 17 October 2018 ("the DIII Appeal").

7. On 5 March 2019, this Tribunal was sent, by email from the Appellant's legal representatives, a copy of a Decision issued by Tribunal Member Zeldine O'Brien on the DIII Appeal, whereby she set the Transfer Decision aside. The Decision was not accompanied by any legal submissions. In the interests of fair procedures and natural justice, on 6 March 2019, the Tribunal directed that a copy of the DIII Decision be sent to the Domestic Residence and Permissions Division lest they have any observations on same. By email dated 7 March 2019, the Domestic Residence and Permissions Division indicated that they had no observations save to note that their review of 11 February 2019 *was based on the existence at that time of a Dublin Transfer Order against the recipient.*

8. Having considered the issue, the Tribunal does not think that the fact that the Transfer Decision has been set aside is relevant in its consideration of the appeal against the Decision of the Review Officer of 11 February 2019. Accordingly, the Tribunal will not

place any reliance on the correspondence of 5 March 2019 from the Appellant's legal representatives.

9. The Tribunal has considered all other documentation submitted:

   - Schedule 7 Notice of Appeal submitted on 14 February 2019 with one document attached:
     - Document 1: Review of Labour Market Access Refusal dated 11 February 2019;
     - Legal Submissions from Domestic Residence and Permissions Division dated 20 February 2019;
     - Legal Submissions from Appellant's legal representatives dated 21 February 2019 and received on 25 February 2019;
     - Observation from Domestic Residence and Permissions Division dated 28 February 2019.

REVIEW OFFICER'S DECISION

10. The Review Officer, in his decision dated 11 February 2019, found that the Appellant was not eligible for a labour market access permission. The Review Officer noted the Appellant's position in relation to being an applicant for international protection. It was noted that Spain 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.

SUBMISSIONS ON BEHALF OF THE DOMESTIC RESIDENCE AND PERMISSIONS DIVISION

11. In the submissions of 20 February 2019, the Domestic Residence and Permissions Division made a number of points:

    (i) The Regulations properly transpose the Reception Conditions (Recast) Directive;
    (ii) A person who has applied for international protection but who is to be transferred to another Member State where their application will be considered does not come within the terms of Article 15 of the Directive. The entitlement to seek access to the Labour Market is intended to allow applicants who are waiting for over nine months for their first instance decision, where no delay can be attributed to their actions, to be given an entitlement to work ;

(iii) Once a transfer decision is made, an applicant who is the subject of that transfer decision will not be receiving a first instance decision in the State, and therefore time cannot run in respect of waiting for a first instance decision in the context of international protection;

(iv) Under the Regulations, such a person is termed a *recipient* rather than an *applicant.* While they are entitled to material reception conditions (e.g. accommodation, food), they are not entitled to access the labour market;

(v) Access to the labour market is not a *material reception condition* and accordingly falls outside the scope of the decision of the CJEU in ***Cimade;***

(vi) The right to employment under Article 15 of the Charter of Fundamental Rights of the European Union is not referenced in the Reception Conditions Directive (Recast) even though 8 of the rights protected under that Charter are so mentioned.

LEGAL SUBMISSIONS ON BEHALF OF THE APPELLANT

12. In the legal submissions received on 28 February 2019, after the history of the case was summarised, the following points were made:

a) The issue of the effectiveness of the transfer decision (called a transfer order in the legal submissions) was addressed in considerable detail, in circumstances where the actual transfer decision was under appeal and the execution of same is suspended. In the Tribunal's opinion, it is difficult to ascertain exactly what point is being made on this issue, and the Tribunal finds that the arguments made on this point are irrelevant.

b) Reliance was placed on the definition of an *applicant* under section 2 (2) of the International Protection Act, 2015.

c) The third point raised relates to delay, such delay being identified as the fact that the Appellant's two day stop in Spain. It is submitted that only delays which post-date the date of application for protection are relevant. The Tribunal finds that it is not necessary to address this issue as nearly 11 months have passed since the Appellant's application for international protection in this State.

RESPONSE FROM DOMESTIC RESIDENCE AND PERMISSIONS DIVISION

13. While the Domestic Residence and Permissions Division did respond to the Tribunal's invitation to make observations on the legal submissions made on behalf of the Appellant, the said response only addressed point a) above (namely the effectiveness of the Transfer Decision) which the Tribunal has already found to be an irrelevant issue.

LEGAL DEVELOPMENTS

14. 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."*

15. It should be noted that the Appellant's legal representatives did not in fact make any argument on compatibility. However, the Domestic Residence and Permissions Division did submit that the Directive was transposed correctly and therefore the issue is fully before the Tribunal.

16. 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**. 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.

RELEVANT LEGAL PROVISIONS

19. 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.*

20. 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]

21. 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***).

22. 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.

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

23. 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.*

24. 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).

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

DETERMINATION

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

27. 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.

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) (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."

29. As submitted on behalf of the Appellant in the instant case, 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[3] 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 has made an application for international protection and that, as he has not yet been transferred from the State pursuant to the Dublin III Regulation, he remains an applicant for the purpose of the International Protection Act, 2015, the Directive and the Regulations. As he has also not received a first instance decision in relation to his protection application within 9 months of the making of his initial application, the Tribunal is also satisfied that he comes within the provisions of Article 15 of the Directive, and is entitled to apply for access to the labour market.

CONCLUSION

31. 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 11 February 2019.

.....

Cindy Carroll
Designated Member of the International Protection Appeals Tribunal
7 March 2019

[3] Section 70 (1) of the 2015 Act applies