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:	1881207-ATLM-18
PERSON ID:	959005 -16
APPELLANT:	XXXXXXXXXXXX
NATIONALITY:	Iraq
SOLICITORS FOR THE APPLICANT:	XXXXXXXXXXXXXXXXXXXX
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"), but the application was refused at first instance by letter dated 26 October 2018.

2. The Appellant's solicitors sought a review of this refusal by letter dated 9 November 2018, and made more detailed submissions on 21 December 2018. By letter dated 14 March 2019, the Appellant's solicitors sent a reminder letter to the Review Officer seeking a decision on the application for a review.

3. The Review Officer, in a decision dated 22 March 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 and is therefore deemed to be a *recipient* pursuant to

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

Regulation 2 (2) of the European Communities (Reception Condition) Regulations, 2018.

4. 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 Schedule 7 Notice of Appeal was originally submitted by email on 5 April 2019. However, the Notice of Appeal was not signed by the Appellant, nor was the impugned decision of the Review Officer included at that stage.

5. Correspondence issued from the Tribunal seeking that a signed copy of the Schedule 7 Notice of Appeal be furnished to the Tribunal, and that the decision of the Review Officer be submitted. All documentation was finally before the Tribunal on 10 April 2019, and that was deemed to be the date of acceptance of the appeal.

6. In the interim, correspondence dated 8 April 2019 had been received from the Appellant's legal representatives on 9 April 2019 advising the Tribunal that

   (a) the High Court proposed making a preliminary reference to the Court of Justice of the European Union pursuant to Article 267 TFEU on similar issues to those raised in their client's case, and
   (b) they were aware that the Tribunal itself had proposed making a reference of its own to the CJEU and, even though it was submitted that the issues were in fact *acte clair*, it would be appropriate to include the within appeal in any preliminary reference which the Tribunal planned to make.

7. The Tribunal sought written submissions from both the Appellant's legal representatives and the Department of Justice and Equality. The Appellant's legal representatives made their submissions in a timely manner by letter dated 17 April 2019 and received on 18 April 2019 by the Tribunal. They also furnished the Tribunal with the Decision of the International Protection Appeals Tribunal in respect of the Appellant's transfer decision, as well as the judgment of the High Court referred to at paragraph 6 (a) above. The Tribunal notes in passing that it has been very helpful to receive detailed submissions as well as the Decision in respect of the Transfer Decision – this has enabled the Tribunal to have regard to background information to which it would otherwise not have access.

8. The Department of Justice and Equality did not make formal submissions but submitted the aforementioned judgment of Mr. Justice Humphreys in two matters relating to similar issues as arise in the instant appeal (***KS (Pakistan) v The International Protection Appeals Tribunal, the Minister for Justice and Equality, Ireland and the Attorney General*** and ***MHK (Bangladesh) v The International***

***Protection Appeals Tribunal, the Minister for Justice and Equality, Ireland and the Attorney General,* [2019] IEHC 176**).

9. Both the Appellant's solicitors and the Department of Justice and Equality were given a brief opportunity to comment on the submissions made by the other party, but nothing further has been submitted to the Tribunal[2].

10. This Decision has been determined within 15 working days from 10 April 2019, the date on which the complete 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

11. The Tribunal has noted the following facts from the Appeal Decision of the International Protection Appeals Tribunal in respect of the Appellant's transfer decision. The Appellant applied for asylum in the State on 8 February 2016 to the Office of the Refugee Applications Commissioner, having left Iraq on 1 August 2015 at age 20. The Appellant stated that he had travelled to Austria via Turkey and Greece. The Appellant also stated that he had returned to Iraq in the middle of August 2015, and travelled from there to Ireland on 25 December 2015. The Austrian authorities have agreed to take back the Appellant pursuant to Article 18(1)(b) of Regulation (EU) No 604/2013.

12. The International Protection Appeals Tribunal upheld the transfer decision on 9 March 2017. The Tribunal Member in that appeal did not accept that there was reliable evidence showing that the Appellant in fact went back to Iraq. That decision has been challenged by way of Judicial Review (Record Number 2017/408JR), and those proceedings challenge the Tribunal Member's alleged breach of Articles 17 and Article 19 of the Regulation 604/2013.

13. The Tribunal has considered all documentation submitted on behalf of both parties, and in particular:

- Schedule 7 Notice of Appeal deemed submitted on 10 April 2019 with Grounds attached;
- Submissions to Review Officer on 9 November 2018, 21 December 2018, 14 March 2019;

[2] The Appellant's legal representatives did query by email dated 24 April 2019 whether the Department had submitted material other than the judgment of the High Court; they were advised that nothing further was submitted.

- Impugned decision of the Review Officer dated 22 March 2019;
- Letter dated 8 April 2019;
- Submissions of 17 April 2019;
- Transfer appeal decision in respect of the Appellant dated 9 March 2017;
- Judgment from Mr. Justice Humphreys dated 25 March 2019 (***KS & MHK v International Protection Appeals Tribunal & Others*** **[2019] IEHC 176)** (submitted by each party)

REVIEW OFFICER'S DECISION

14. The Review Officer, in his decision dated 22 March 2019, found that the Appellant was not eligible for a labour market access permission. The Review Officer noted the Appellant's representations in relation to being an applicant for international protection. The Review Officer stated that Austria was the Member State responsible for examining the application for international protection, and held that the Appellant would not be receiving a first instance decision in the State on his application for international protection. He concluded that therefore the Appellant did not meet the conditions of Article 15 of the Directive, or Regulation 11 (4) of the Regulations, as he was in fact *a recipient* and not *an applicant* under the European Communities (Reception Conditions) Regulations 2018[3].

SUMMARY OF SCHEDULE 7 NOTICE OF APPEAL AND SUBMISSIONS

15. The Appellant submits that he is *an applicant* within the meaning of the Directive (in particular Articles 3 and 15 thereof), and he seeks to rely on the provisions of the Directive itself. He strongly opposes any suggestion that he has contributed to any delay because he contends that Ireland is the state responsible for processing his application for protection, and he has been waiting for three years in Ireland for a determination of his application at first instance.

RECENT LEGAL DEVELOPMENTS

16. Between September 2018 and December 2018, the Tribunal dealt with a number of appeals which were similar to the instant case. The issue of incompatibility of the domestic Regulations with the Directive was raised in the Grounds of Appeal in

[3] There is an error in the Review Officer's decision which states that the Appellant is the subject of a transfer decision under the European Union (Dublin System) Regulations 2018 (S.I. 62/2018). The Transfer Decision was made prior to the coming into operation of those Regulations, and accordingly it would appear that Regulation 23 (b) of those Regulations apply. However, the Tribunal finds that this error, while infelicitous, does not alter the position whereby the Appellant **is** the subject of a transfer decision, and therefore the error is not sufficient to set aside the decision of the Review Officer. (emphasis added)

virtually all of those appeals. At that time, 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."*

17. 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."*

18. 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.

19. Following on the delivery of that judgment, the Tribunal dis-applied national law and applied the provisions of Article 15 of the Directive in a decision dated 21 December 2018 ("the December decision"). It should be noted that the Tribunal took this approach after much consideration and in full knowledge of the seriousness of dis-applying national law. However, the Tribunal was satisfied that this was the correct approach to take in all of the circumstances.

20. Since December 2018, two other appeals raising these issues came before the Tribunal[4]. The first of those appeals was determined by the Tribunal on 7 March 2019 ("the March decision") and the Tribunal followed its own approach in the December decision and set aside the Review Officer's decision, finding that appellant to be *an applicant* for the purposes of Article 15 of the Directive.

21. A number of the Tribunal's decisions affirming the Review Officer's decisions to refuse labour market access permissions have been challenged in the High Court by way of judicial review ("the pre-December decisions"). Having heard two of these cases as "test cases", Mr Justice Humphreys delivered judgment on 25 March 2019, and has decided to make a preliminary reference to the Court of Justice of the European Union[5].

22. It is clear from the judgment, the questions referred and the proposed answers, that the learned High Court Judge is of the opinion that this Tribunal was correct in its original approach to the issues in the pre-December cases and potentially incorrect in its approach in the December and March decisions. In the proceedings before the High Court, Senior Counsel appearing on behalf of the Tribunal sought directions from the High Court as to the approach to be taken by the Tribunal in any appeals which came before it dealing with these issues, pending the determination of the Court in the cases before it. Mr Justice Humphreys held as follows:

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[4] There was another appeal which appeared to address the issue but as the appellant in that case had in fact been transferred the Tribunal determined that he was no longer *an applicant.*

[5] ***KS & MHK v IPAT &Others*** **[2019] IEHC 176**

As regards the clarifications sought by the tribunal, while the form of the proceedings does not allow me to give directions as such, it is open to the tribunal to take into account my proposed answers to the questions posed in the case in carrying out its functions, although of course those are by definition only proposed answers rather than answers. Nonetheless, I consider that the matter is not acte clair (as everyone except the applicants agrees), and irrespective of whether the proposed answers are right or wrong it is hard to see how, pending the CJEU judgment, the tribunal could be seriously faulted or held liable if it decides to take them into account in the meantime.

23. The Tribunal agrees with the learned High Court Judge that the matter is not *acte clair*.As a lower Court or Tribunal, this Tribunal is obliged to follow the jurisprudence of the Superior Courts. However, the Tribunal, having considered the issues, the relevant legislation and applicable case law, is of the opinion that its approach in the December and March decisions is correct, and therefore proposed to make its own preliminary reference to the Court of Justice of the European Union pursuant to Article 267 instead of continuing to make decisions in line with its December and March decisions. That is the second of the similar appeals referred to at paragraph 20 above ("the April decision"), and the Tribunal is presently finalising its submissions to the Court of Justice of the European Union in respect of the first appeal.[6]

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RELEVANT LEGAL PROVISIONS

24. 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

[6] There are two further appeals of this nature pending before the Tribunal raising the same issues as the instant appeal.

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.

25. 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.[7]

26. In the December and March decisions, the Tribunal considered that this categorisation of different types of applicants within the asylum / protection system was not envisaged by the provisions of the Directive. The Tribunal had regard to 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***).

27. In that case (where the original Reception Conditions Directive, namely Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers, and the Dublin II Regulation were at issue), French law prohibited the provision of reception conditions to asylum seekers who were the subject of transfer decisions under the Dublin II Regulation. The French authorities submitted *inter alia* that

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

the provisions of the directive are triggered by the formal lodging of a request for asylum with the competent authority of the Member State which is responsible for examining the application. Asylum seekers whose applications are subject to the Dublin II Regulation cannot be regarded as having lodged such an application.

28. Advocate General Sharpston in her Opinion delivered on 15 May 2012 (**ECLI:EU:C:2012:298**) disagreed with this contention and noted, at paragraph 44 as follows:

> *I can see no basis for such an interpretation. As already indicated, I do not consider that the definition set out in Article 2(c) of the Reception Conditions Directive excludes the asylum seekers in question from its scope. As I mentioned in point 40 above, the trigger for the application of the directive is the making of an application for asylum. As regards the obligation to provide information under Article 5(1), I cannot see that it can exclude applicants for asylum whose application may be subject to the taking charge or taking back provisions in the Dublin II Regulation from the reception conditions laid down under the directive. And Article 13(1) appears to me to require an interpretation that is the direct opposite of that proposed by France.* (emphasis added).

29. AG Sharpston continued as follows, at paragraphs 75 and 76, when looking at the issue of the duration of the provision of reception conditions to persons who are subject to a Dublin transfer:

> *Ordinarily, an asylum seeker will be present in the host Member State throughout the period necessary to determine which Member State is responsible for examination of his application. He may also be present there for the period of any appeal. Under Regulation No 1560/2003, which lays down detailed rules for the implementation of the Dublin II Regulation, that State must ensure that the applicant is put in a position, in practice, to transfer to the responsible Member State. I have already indicated that I consider that asylum seekers who make their application in the territory of the host Member State are entitled to the benefit of the reception conditions notwithstanding that their application is subject to the Dublin II Regulation. There seems no possible basis on which such an applicant could be provided with those benefits by the requested Member State during the period necessary for the arrangements concerning his transfer to be put in place. Such a situation would be quite unworkable in practice. Nor is it inevitable that, if the procedures under the regulation are initiated by the host Member State, the asylum seeker*

will, in fact, be taken in charge or taken back by another Member State. Those procedures may determine that he should remain where he is.
As the Commission observes, it would be contrary to the objectives of the Reception Conditions Directive to deprive an asylum seeker of the benefit of the reception conditions otherwise than as a result of his own conduct. It clearly follows, in my view, that the obligation to make those conditions available lies with the host Member State until the point, if any, at which the asylum seeker is transferred to the requested Member State.

30. The CJEU itself in its judgment also found that it is the application for asylum itself which triggers the operation of the Reception Conditions Directive (emphasis added). The Court looked at the definition of *application for asylum.*

31. In particular, the Court held, at paragraph 40, as follows:

> *Furthermore, it follows from Articles 2 and 3 of Directive 2003/9 that the directive provides for only one category of asylum seekers, comprising all third-country nationals or stateless persons who make an application for asylum. No provision can be found in the directive such as to suggest that an application for asylum can be regarded as having been lodged only it if is submitted to the authorities of the Member State responsible for the examination of that application*

32. The Tribunal is particularly struck by the quotation above. Two other matters in the judgment are also relevant, in the Tribunal's opinion, namely the purpose of the Directive and the length of time of the process itself, both of which were addressed by the Court.

33. The Court had regard, in its analysis of the issues referred, to the purpose of the Directive. At paragraph 42, it held as follows:

> *The provisions of Directive 2003/9 must also be interpreted in the light of the general scheme and purpose of the directive and, in accordance with recital 5 in the preamble to that directive, while respecting the fundamental rights and observing the principles recognised in particular by the Charter. According to that recital, the directive aims in particular to ensure full respect for human dignity and to promote the application of Articles 1 and 18 of the Charter.*

34. The Court also acknowledged that the transfer process may not be as swift as predicted by the time limits under the Dublin II Regulation and that, on occasion, an applicant may in fact not be transferred at all (paragraphs 44-45):

> *.... it cannot reasonably be argued that the minimum reception standards for asylum seekers do not apply to those among them subject to the procedure for determination of the Member responsible, on the ground that it is a swift procedure. It is apparent from Articles 17 and 18 of Regulation No 343/2003 that, for a usual procedure, five months may elapse between the date when the application for asylum is lodged and that on which the requested Member State rules on the request to take charge of the asylum seeker. To that period must be added the period of time necessary for implementing the transfer, which, according to Article 19 of Regulation 343/2003, is usually six months from the acceptance of the request to take charge.*
>
> *In addition, the procedure put in place by Regulation No 343/2003 may in certain cases result in the asylum seeker never being transferred to the requested Member State, the applicant thus remaining in the Member State in which he lodged his application for asylum. The time-limits laid down in Articles 17 to 20 of that regulation concern only the situation in which the requested Member State accepts the taking charge or taking back or does not reply to the request by the requesting Member State. Where the requested Member State replies in the negative, the legislation in question provides only for a voluntary conciliation procedure. In such situations, a temporary stay by the asylum seeker in the territory of the requesting Member State may stretch to a very long period. To exclude from entitlement to minimum reception standards for asylum seekers those applicants subject to the procedure for determination of the Member State responsible cannot, therefore, be justified by the length of the procedure.*

DETERMINATION OF THE TRIBUNAL

35. Having considered the documentation submitted on behalf of the Appellant and the judgment of the High Court in ***KS (Pakistan) and MHK (Bangladesh) v the International Protection Appeals Tribunal, the Minister for Justice and Equality, Ireland and the Attorney General*** **[2019] IEHC 176**, the Tribunal has looked at the ***Cimade*** judgment again in light of the Reception Conditions Directive (Recast). Aided by the issues raised by the High Court as part of its intended reference and its own decision to make a preliminary reference (the April decision), the Tribunal is of the opinion that it is necessary to make a preliminary reference to the Court of Justice of the European Union pursuant to Article 267 in the instant appeal.

36. While the issues raised in the April decision and in the instant case appear to be identical, in fact the factual matrix is different. In the April decision, the appellant in that case still has an appeal pending before the International Protection Appeals Tribunal against the decision to make a transfer decision. In other words, she is merely exercising her statutory right of appeal. However, the Appellant in the instant case has had his statutory right of appeal already and has instituted judicial review proceedings against that decision. That very action could be regarded as a *delay attributed to the applicant* as set out in Article 15.

37. Further, the decision of the Review Officer, which is the subject of the within appeal, states that any delay in receiving a first instance decision is attributable to the Appellant himself leaving Austria before such a decision could issue.

38. This Tribunal has not considered either of these allegations of delay in any of the appeals before it to date; in fact, as far as the Tribunal is concerned, this is the first appeal in which both issues are squarely before it for adjudication, particularly in light of the stance taken by the High Court on the issue of delay. The Tribunal is not aware of any judgment from the Court of Justice of the European Union on this issue. Conscious of the fact that there are two further appeals currently pending before the Tribunal (aside from the within appeal), the Tribunal is of the opinion that a determination from the Court of Justice of the European Union is necessary to enable it to do justice to both parties in the instant appeal.

39. The Tribunal has looked at the provisions of Article 15 of the Recast Directive 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. The Tribunal also notes the fact that the CJEU in ***Cimade*** specifically held that in the original Directive there was only one category of asylum seekers, rather than two categories as specifically provided for in the domestic Regulations and at issue in the test cases before the High Court.

40. 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) of the Recast Directive 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 domestic Regulations, Regulation 2 (1) (b) defines an *applicant* as (in the case of the Appellant who applied under the Refugee Act, 1996 (as

amended)) a person to whom a declaration has not been given pursuant to section 17 of the 1996 Act.

41. Further, 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[8] 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"*. This is in line with paragraph 55 of the judgment of the CJEU in ***Cimade***:

> *It can be concluded from the above that neither the decision of a Member State to call upon another Member State which it considers responsible for the examination of the application for asylum for the purposes of taking charge of the asylum seeker nor the acceptance of that request by the Member State requested is a final decision within the meaning of Directive 2003/9. It follows that only the actual transfer of the asylum seeker by the requesting Member State brings to an end the examination of the application for asylum by that State and its responsibility for granting the minimum reception conditions.*

42. Another issue which is of concern to the Tribunal is one which was alluded to by AG Sharpston but does not appear to have been addressed by the CJEU in its judgment. The Advocate General refers, at paragraph 76 of her Opinion and quoted at paragraph 26 *supra*, to the Commission's observation that an applicant can really only be deprived of the benefit of the reception conditions *as a result of his own conduct*. The phrase is echoed in Article 15 of the Recast Directive where it is stated that *the delay* [in processing the application] *cannot be attributed to the applicant.* The Tribunal has already decided that issue will be the focus of the preliminary reference in this appeal.

CONCLUSION

43. The Tribunal, having determined that the interpretation of the Court of Justice of the European Union is necessary to enable it to make a decision which is fair to all parties, will make a preliminary reference to the CJEU pursuant to Article 267.

44. In the reference on the April decision, the Tribunal has posed questions relating to the definition of *an* applicant, as well as the issue of delay. The Tribunal proposes the following question in this preliminary reference:

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

Case C-385/19

What is meant by the phrase *attributed to the applicant* in the context of delay?

45. Accordingly the Tribunal will postpone the making of a determination on the substantive issue before it pending the response of the Court of Justice of the European Union. The Tribunal will furnish both parties with the documentation and submission for the Court of Justice.

.....

Cindy Carroll

Designated Member of the International Protection Appeals Tribunal

1 May 2019

High Ct case re K.S is C-322/19 - prob be joined?