



An Binse um Achomhairc i dtaobh Cosaint Idirnáisiúnta
The International Protection Appeals Tribunal

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: 1937268-ATLM-19

PERSON ID: XXXXXX-XX

APPELLANT: XXXXX XXXXX

NATIONALITY: XXXXX

SOLICITORS FOR THE APPLICANT: XXXXX XXXXX

TRIBUNAL MEMBER¹: 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. The Review Officer, in a decision dated 25 October 2019, deemed the Appellant ineligible to apply for a labour market access permission because he was the subject of a transfer decision to Austria and was therefore deemed to be a *recipient* pursuant to Regulation 2 (2) of the European Communities (Reception Condition) Regulations, 2018. There is no equivalent provision in the Reception Conditions Directive (Recast), Directive 2013/33/EU (hereinafter “the Directive”).
2. The Appellant initially submitted an appeal to the International Protection Appeals Tribunal (hereinafter “the Tribunal”) pursuant to Regulation 21 of the Regulations on

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

11 November 2019. Following correspondence from the Tribunal, further documentation was submitted and the appeal was deemed accepted on 14 November 2019. The Appellant's legal representative and the Labour Market Access Unit were advised by letter dated 14 November 2019 that the Tribunal had made a preliminary reference to the Court of Justice of the European Union on two matters raising similar issues to the Appellant's appeal, and that all appeals of a similar nature pending before the Tribunal would now be stayed pending further correspondence from the Court of Justice.

3. Advocate General de la Tour delivered his Opinion on 3 September 2020 and the Court delivered its judgment on 14 January 2021.
4. The Tribunal is aware that the Appellant was granted a labour market access permission on 10 December 2020. Under Regulation 21(5)(a), the Tribunal only has jurisdiction either to affirm or set aside the decision of the Review Officer. Accordingly, even though the Appellant no longer requires a decision on foot of his appeal to the Tribunal, the Tribunal must still make a decision in respect of the within appeal.

CASE FACTS AND DOCUMENTS

5. The Appellant applied for international protection in the State on 13 August 2015. The Appellant was advised, by letter dated 30 December 2015, that his application would not be dealt with in the State.
6. The Tribunal has considered all documentation submitted on behalf of both parties:
 - Schedule 7 Notice of Appeal with detailed submissions to the Tribunal;
 - Schedule 8 Notice of Appeal;
 - Review of Labour Market Access Refusal dated 27 September 2019;
 - Opinion of the Advocate General dated 3 September 2020 in linked cases C-322/19 and C-385/19 ECLI:EU:C:2020:642;
 - Judgment of the Court of Justice in linked cases C-322/19 and C-385/19 ECLI:EU:C:2021:11

REVIEW OFFICER'S DECISION

7. The Review Officer, in his decision dated 25 October 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.

QUESTIONS REFERRED BY THE TRIBUNAL TO THE COURT OF JUSTICE OF THE EUROPEAN UNION

8. In its Preliminary Reference, the Tribunal referred the following questions to the Court of Justice:

Question 1: Are there separate categories of “applicant” envisaged in Article 15(1) of Directive 2013/33/EU?

Question 2: What type of conduct will amount to delay attributable to the applicant within the meaning of Article 15(1) of Directive 2013/22/EU?

JUDGMENT OF THE COURT OF JUSTICE

9. The Court of Justice had regard to, *inter alia*, the recitals in the Directive itself and to the overall objectives of the Directive. It was specifically noted, at paragraph 71 as follows:

preventing applicants for international protection from gaining access to the labour market is contrary to that objective, in addition to placing costs on the Member State concerned as a result of the payment of additional social benefits. The same is true if an applicant who is the subject of a decision on transfer to another Member State is prevented from accessing the labour market during the entire period between the date of lodging his or her application for international protection and the date of acceptance of his or her transfer to the requested Member State, a period to which is added the period corresponding to the actual examination of his or her application, which may last up to six months from the date of acceptance of the transfer of the person concerned by the requested Member State.

10. The Court held, on the first question referred by the Tribunal, that Article 15 of the Directive

precluded national legislation which excludes an applicant for international protection from access to the labour market on the sole ground that a transfer decision has been taken in his or her regard under the Dublin III Regulation

11. The High Court had also made a preliminary reference in two judicial review matters which were pending before it, and had raised five questions for consideration by the Court of Justice/ In its fifth question, the High Court specifically asked the Court of Justice to consider if an applicant's involvement in litigation could amount to "delay". The Tribunal's second question was more open, seeking guidance on what exactly would constitute "delay". The Court of Justice's analysis is to be found at paragraphs 74-80, holding specifically at paragraph 80 as follows:

a delay in the adoption of a decision at first instance concerning an application for international protection which results from a lack of cooperation by the applicant for international protection with the competent authorities may be attributed to that applicant

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.

14. The Tribunal is obliged to apply the wording of the Directive in line with the judgment of the Court of Justice of the European Union in its judgment in *C378/17 Minister for Justice & Equality & Others v Workplace Relations Commission & Others* ECLI:EU:C:2018:979.

15. However, the Tribunal does not now have to dis-apply national law since the coming into operation on 15 April 2021 of the European Communities (Reception Conditions) (Amendment) (No. 2) Regulations 2021 (S.I. 178/2021). These Regulations remove the classification of those subject to transfer decisions as “recipients” rather than “applicants”. Such persons are now “applicants” under both Irish and European Union law.

DETERMINATION OF THE TRIBUNAL

16. Having considered the documentation submitted on behalf of the Appellant and the Labour Market Access Unit and in the light of the judgment of the Court of Justice in linked cases C-322/19 and C-385/19 ECLI:EU:C:2021:11, the Tribunal finds as follows:

- The Appellant is “*an applicant*” within the meaning of Directive 33/2013 and the European Communities (Reception Conditions) Regulations 2018-2021;
- The Appellant did not receive a decision on his application for international protection within 9 months of his application for same;
- The delay cannot be attributed to the Appellant at this juncture – the Tribunal does note that the Appellant absconded in September 2016 and was classed as an evader at that stage. However that was over four years ago.

CONCLUSION

- 17. The Tribunal, pursuant to Regulation 5(a) of the Regulations, sets aside the decision of the Review Officer dated 25 October 2019 and finds that the Appellant is entitled to access the labour market.

- 18. The Tribunal invokes Regulation 5(b) of the Regulations and finds that the date of effect of the within determination is 4 February 2021, being 15 working days after the date of the judgment of the Court of Justice of the European Union in the preliminary reference made by the Tribunal.

.....

Cindy Carroll

Deputy Chairperson and Designated Member of the International Protection Appeals
Tribunal
30 April 2021