C-322/19-1 No Redaction Needed

THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 769 J.R.]

BETWEEN

K.S. (PAKISTAN)

APPLICANT

AND

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL, THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

[2018 No. 927 J.R.]

BETWEEN

M.H.K. (BANGLADESH)

APPLICANT

AND

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL, THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 25th day of March, 2019

Registered at the Court of Justice under No. 111 3266
Luxembourg, 23. 04. 2019
Fax/E-mail:
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For the Registrar
Miroslav Aleksejev
Head of Unit

CURIA GREFFE
Luxembourg
Entrée 23. 04. 2019

Facts in *K.S.*

1. The applicant travelled from Pakistan to the UK in or about February, 2010. He did not apply for international protection there. He then travelled to Ireland in or about May, 2015 and applied for international protection in the State on 11th May, 2015. The Refugee Applications Commissioner decided to transfer the claim under the Dublin system to the UK on 9th March, 2016. This was affirmed by the Refugee Appeals Tribunal on 17th August, 2016. The applicant brought judicial review proceedings [2016 No. 702 J.R.] challenging the failure of the tribunal to apply art. 17 of the Dublin III regulation. Those proceedings remain pending. The applicant has the benefit of a general stay granted by the court in all Dublin system cases whereby the institution of proceedings acts as a stay on transfer (now set out in para. 8(2) of High Court Practice Direction HC81). The applicant did not in fact ask at the tribunal to exercise an art. 17 discretion in his favour and the respondents are contending that this is a fatal obstacle to his success in those judicial review proceedings, relying on *M.E. v. Refugee Appeals Tribunal* [2017] IEHC 464 (Unreported, O'Regan J., 17th July, 2017). The applicant was invited to discontinue his proceedings and the prospect is that if he does not do so, the respondents are likely to contend that those proceedings are bound to fail or are an abuse of process.

2. The applicant applied to the Labour Market Access Unit of the Department of Justice and Equality for a labour market access permission under reg. 11(3) of the European Communities (Reception Conditions) Regulations 2018 (S.I. No. 230 of 2018). That was refused. He applied for a review which was refused on 19th July, 2018. He then appealed that refusal to the International Protection Appeals Tribunal (IPAT), which rejected the appeal on 11th September, 2018. That decision is the one impugned in the proceedings and essentially is a straightforward application of the 2018 regulations, which provide that

persons such as the applicant who are liable to transfer under the Dublin system are not entitled to labour market access.

Facts in *M.H.K.*

3. The applicant travelled from Bangladesh to the UK on his own account on 24th October, 2009. His permission there expired when his college closed. He travelled to Ireland on 4th September, 2014 before finding out the result of an application for his extension of leave to remain there. He then applied for international protection in Ireland on 16th February, 2015. On 25th November, 2015, he was issued with a notice of decision to transfer the application to the UK under the Dublin III regulation. He appealed that decision to the Refugee Appeals Tribunal, which refused the appeal on 30th March, 2016. On 18th April, 2016 he applied for judicial review [2016 No. 235 J.R.] challenging the failure of the tribunal to exercise jurisdiction under art. 17 of the Dublin III regulation. Those proceedings remain pending and again the applicant is the beneficiary of the general stay ordered by the court suspending the transfer.

4. The applicant applied for labour market access under reg. 11(3) of the 2018 regulations, which was refused by the Department on 16th August, 2018. He then applied on 29th August, 2018 for a review of the decision which was refused on 5th September, 2018. On 18th September, 2018, he appealed to the International Protection Appeals Tribunal which rejected the appeal on 17th October, 2018. The tribunal noted that access to the labour market was not a "*material reception condition*" and while acknowledging the supremacy of EU law held that, in the light of the jurisprudence as it then stood, jurisdiction to consider disapplying national legislation lay with national courts rather than tribunals.

Procedural history

5. Leave to seek judicial review in *K.S.* was granted on 24th September, 2018 and a statement of opposition was furnished on 26th November, 2018. Leave in *M.H.K.* was

granted on 12th November, 2018 and a statement of opposition delivered dated 1st March, 2019. In the *M.H.K.* proceedings it appears that the applicant has instituted the proceedings under an abbreviation of his first name and that appears to be inappropriate, because pleadings should indicate the full name of the parties. I will therefore hear from counsel as to the appropriate amendment to reflect the applicant's full first name.

6. Both sets of proceedings seek essentially three substantive reliefs. Firstly, orders of *certiorari* quashing the refusals of labour market access. Secondly, declarations that regs. 2 (2) and 11(2) and (12) of the 2018 regulations are contrary to the Reception Conditions Directive (Recast) 2013/33/EU. And thirdly, damages. It has been in effect agreed by the parties that the question of damages can be postponed to a later module of the proceedings, if it arises.

7. I have received helpful submissions on behalf of Mr. K.S. from Mr. Michael Conlon S.C. (with Mr. Eamonn Dornan B.L.), on behalf of Mr. M.H.K., from Mr. Conlon (with Mr. Paul O'Shea B.L.), on behalf of the International Protection Appeals Tribunal, from Ms. Sara Moorhead S.C. and on behalf of the remaining respondents from Mr. Robert Barron S.C. (with Ms. Sarah-Jane Hillery B.L.).

Relevant provisions of EU law

8. The most pertinent provisions of EU law relied on are as follows:

(i). Article 78 of the TFEU, which envisages a series of measures for a Common European Asylum System, including legislation on reception conditions and on procedures for the grant of protection.

(ii). The Procedures Directive, and in particular the Procedures Directive (Recast), which does not apply to Ireland. Article 31(3) of the latter directive envisages that the time period of six months for examination of an application only starts to run from when the applicant is "*on the territory of [the responsible] member*

state and has been taken in charge by the competent authority". While this does not apply to Ireland, it was adopted on the same day as the Reception Conditions Directive (Recast) and is submitted to be relevant to the interpretation of the latter. In particular Mr. Barron submits that "*it was intended that there be consistency between the different measures*" (see also para. 46 of the State respondents' written submissions).

(iii). The Reception Conditions Directive (Recast) is central to the proceedings. On the one hand, art. 2 and recital 8 envisage a wide scope applying to all applicants. Article 2(b) defines applicant 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*". Article 3 defines the personal and geographical scope of application of the directive. On the other hand, recital 35 refers to the rights of human dignity and various articles of the EU Charter of Fundamental Rights but does not refer to art. 15 of the Charter regarding the right to work (contrast Recital 39 of the Dublin III regulation). Article 15 of the directive envisages a right to work after a nine-month period, unless delays can be attributed to the applicant. That is a broad test when contrasted with the language of art. 31(3) of the Procedures Directive (Recast) which refers to delay that can be "*clearly*" attributed to the "*failure*" of an applicant to comply with his or her obligations.

Legislative history

9. In illuminating the questions of interpretation here it is necessary to look at the *travaux préparatoires* (see Case C-162/09 *Secretary of State for Work and Pensions v. Lassal* paras. 49 and 50). The original Commission proposal would have given rights of access to the labour market after six months. That was not agreed and in 2011 a modified proposal was

put forward linking the right of access to the labour market with the progress of the application, pursuant to the Asylum Procedures Directive (Recast). A proposed recital 19 suggested that the rules on access to the labour market should be consistent with the rules on duration of the examination procedure to be set out in the Asylum Procedures Directive (Recast). That became recital 23 of the Reception Conditions Directive (Recast), which simply refers to the need to provide clear rules on access to the labour market.

10. The 2011 proposal had indicated that member states should ensure access to the labour market no later than six months from the date when the application was lodged and that member states could extend the time in cases provided for in arts. 31(3)(b) and (c) of the Asylum Procedures Directive (Recast). That is explained at p. 8 of the proposal, which linked the proposed time limits to the proposed provisions of the proposed Procedures Directive (Recast).

11. In the adopted version of the directive the reference to the Procedures Directive was dropped but instead reference was made to delay that was attributable to the applicant, so the adopted version incorporates a similar point. Indeed, when the Commission made a communication to the Parliament on the legislation in 2013, it pointed out that the Council's text was "*more restrictive than the Commission proposal*" (p. 4).

12. In the meantime the CJEU gave judgment on 27th September, 2012 in Case C-179/11 *Cimade v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*, on which the applicant here heavily relies, which was in the context of material reception conditions (rather than reception conditions generally), and held that the benefit of such conditions applied to applicants who were subject to the Dublin system. The case is discussed in Hailbronner and Thym, *EU Immigration and Asylum Law*, 2nd ed. (C.H. Beck/Hart/Nomos, 2016) at pp. 1390 to 1391 by Dr. Peek and Dr. Tsourdi. While *Cimade* deals with the previous Reception Conditions Directive 2003/9/EC, the recast directive is

similar in terms of the distinction between material reception conditions (art. 2(g)) and "*reception conditions*" (art. 2(f)). The basic argument made by the State respondents here is that *Cimade* is only authority for the proposition that material reception conditions should be afforded to Dublin system applicants.

13. On 26th June, 2013 the Procedures Directive (Recast) 2013/32/EU and the Reception Conditions Directive (Recast) 2013/33/EU were both adopted. A further Commission proposal of 13th July, 2016 for a Recast Reception Conditions Directive is proposed to exclude Dublin transferees from labour market access, but that clarification does not imply that such access must be taken as already existing under directive 2013/33/EU.

Relevant provisions of national law

14. The relevant national law implementing the Reception Conditions Directive (Recast) is the European Communities (Reception Conditions) Regulations 2018. Three provisions of those regulations are impugned in the proceedings:

(i). Regulation 2(2), which provides that on the making of a transfer decision a person subject to such a decision ceases to be an "*applicant*" for the purposes of the regulations. Regulation 2(2)(a) excludes persons who have been sent a notification of a transfer decision from being applicants and reg. 2(2)(b) creates a category of "*recipient but not an applicant*". The term "*applicant*" is defined in reg. 2(1), which refers to s. 2(1) of the International Protection Act 2015, which defines the term as a person who "*(a) has made an application for international protection in accordance with section 15, or on whose behalf such an application has been made or is deemed to have been made, and (b) has not ceased, under subsection (2), to be an applicant*". Pursuant to reg. 2(3), where a person against whom a transfer decision has been made makes an appeal to the IPAT, he or she shall be deemed to be a recipient but not an applicant.

(ii). Regulation 11(2), which provides that "*save as may be provided under any other enactment or rule of law, a recipient who is not an applicant shall not seek, enter or be in employment or self-employment*". While it is not entirely clear what the reference to any other enactment or rule of law means, Mr. Barron suggested that it could mean for example EU Treaty Rights. However, nothing has been put forward to suggest that there is any route to lawful employment available to these applicants.

(iii). Regulation 11(12), which provides that the Employment Permits Acts 2006 to 2014 shall not apply to applicants or recipients, that is Dublin system transferees.

15. In the *H.M.K.* case, the tribunal essentially considered the question of whether it could disapply the 2018 regulations and held that it could not, having regard to the Supreme Court judgment in *Minister for Justice and Equality v. Workplace Relations Commission* [2017] IESC 43 (Unreported, Supreme Court, 15th June, 2017) (also referencing the opinion of Advocate General Wahl in the CJEU reference arising from that case, Case C-378/17 *Minister for Justice and Equality v. Workplace Relations Commission,* ECLI:EU:C:2018:698). Pending the CJEU judgment itself, the tribunal was of the opinion that it was a matter for the courts on judicial review to consider if necessary any disapplication of the 2018 regulations. However, the judgment of the CJEU (Case C-378/17 *Minister for Justice and Equality v. Workplace Relations Commission,* CJEU, 4th December, 2018, ECLI:EU:C:2018:979) held that the obligation to apply EU law in preference to national law was owed by all organs of State. Thus in a separate case to the present proceedings, that of *S.S.* (IPAT, 21st December, 2018), the tribunal decided that it had jurisdiction to disapply the 2018 regulations, and indeed did so in that case. Whether that

approach was right or wrong is really what falls for decision now. Apart from one other case, it appears the tribunal has not made any other decisions based on the *S.S.* approach.

Argument based on art. 15 of the EU Charter of Fundamental Rights

16. A separate argument based on art. 15 of the Charter of Fundamental Rights was rather faintly pleaded, but sensibly that was not pressed by Mr. Conlon who based his argument solely and squarely on the reception conditions directive. Either the directive gives the applicants a right to work or not. If it does not then they cannot rely on the Charter because Ireland is not implementing EU law in assessing their applications for labour market access and, therefore, the Charter simply does not apply. Even if it did apply, art. 15 of the Charter does not confer rights on third country nationals (see *R. (Rostami) v. Secretary of State for the Home Department* [2013] EWHC 1494 (Admin.)), so the present case boils down to whether the directive confers such a right on these applicants.

Questions of EU law arising

17. Resolution of the proceedings involves the determination of a number of questions of European law. I set these out below and have decided, in the exercise of my discretion under art. 267 of the TFEU, to refer these questions to the Court of Justice of the European Union.

First question

18. The first question is, where in interpreting one instrument of EU law that applies in a particular member state, an instrument not applying to that member state is adopted at the same time, may regard be had to the latter instrument in interpreting the former instrument.

19. The applicants submit that it makes sense that a legal instrument means the same thing in every member state. Mr. Conlon suggests that there may be an issue in Ireland in circumstances where the State is not a party to the Procedures Directive (Recast). He suggests that possibly the court could look at the non-applying instrument as long as the court also looks at the instrument that does apply. While not particularly supporting the *obiter*

comments in a contrary sense of Hogan J. (now Advocate-General Hogan) in *X.X. v. Minister for Justice and Equality* [2018] IECA 124 (Unreported, Court of Appeal, 4th May, 2018) , to which I will come shortly, he submitted that that was in a slightly different situation and submits that a recast directive that does not apply could be considered in so far as it was declaratory or codificatory. The State respondents submit that the answer to this question is yes. Mr. Barron says that the fact that Ireland has not opted into the Procedures Directive (Recast) is not relevant because directives are Europe-wide measures and "*you can't have a different interpretation in different member states*". In effect, he also urged a somewhat different position from the views expressed *obiter* by Hogan J. in *X.X. v. Minister for Justice and Equality*. The IPAT did not get involved in this particular issue.

20. My proposed answer is as follows while there is a certain common ground between the parties, here the position of the parties is somewhat in tension with views expressed *obiter* by Hogan J. in the Court of Appeal in *X.X.* In that case, I had said in my judgment in the High Court in *X.X. v. Minister for Justice and Equality* [2016] IEHC 377 [2016] 6 JIC 2409 (Unreported, High Court, 24th June, 2016) (para. 82) that art. 32 of the Asylum Procedures Directive allowed for subsequent reapplications for protection on the basis of new elements and I had regard to art. 40 of the Asylum Procedures Directive (Recast) 2013/32/EU as being even more explicit on the need for new elements to be identified before substantive examination. This approach was impliedly differed from by Hogan J. in the Court of Appeal in *X.X. v. Minister for Justice and Equality* at para. 64 by saying: "*One can, I think, leave to one side the provisions of the Recast Asylum Procedures Directive (2012/32/EU) since it does not apply to Ireland. It could not, therefore, be relied [on] for any purpose in interpreting the relevant provisions of s. 17(7) [of the Refugee Act 1996]*". With immense respect to Hogan J., the fundamental fallacy in this approach, and the reason why it is a misunderstanding of EU law is, as succinctly and elegantly put by Mr. Barron in his written

submissions, at para. 43, that "*Whether Ireland opted into one or more of those instruments does not affect their meaning.*" If a non-applicable instrument is in particular circumstances relevant to the interpretation of an applicable instrument, then (contrary to the *obiter* view of Hogan J. in *X.X.*), it must also be relevant to the interpretation of national law which implements the applicable instrument. It would run the risk of a "Little Irelander" approach to think that merely because Ireland had not opted into a particular instrument, that instrument cannot be relied on "*for any purpose*" in interpreting national law that gives effect to related EU obligations (an obvious example, and the one at issue in *X.X.*, was that a recast directive can illuminate what was intended by the previous directive, if the illumination is explanatory rather than a substantive amendment).

21. Obviously matters are different if a directive brings about a significant change in the law but insofar as it simply casts light on the intention of the European legislature it is really immaterial whether any individual country has opted into a particular directive or not. The relevance of this question is that it enables the court to know whether it can take into account the Asylum Procedures Directive (Recast), which does not apply to Ireland, in interpreting the Reception Conditions Directive (Recast). If the court can do so, that would lend a certain degree of support to the argument advanced by the State respondents.

Second question

22. The second question is, does art. 15 of the Reception Conditions Directive (Recast) 2013/33/EU apply to a person in respect of whom a transfer decision under the Dublin III regulation, Regulation (EU) No. 604/2013, has been made.

23. The applicants submit that the answer is yes because of the wide definition of "*applicant*". The respondents submit that the answer is no because of the wording of the provision and the *travaux préparatoires*, and that it was never part of the aims of the directive to provide such protection. The IPAT submits that it is not entirely clear whether the *Cimade*

judgment does cover art. 15 rights, that it is more likely than not to cover such rights but it is a matter of doubt.

24. My proposed answer is that the provisions of art. 15 are predicated on the assumption that there has been some delay by the competent authority in failing to make a decision within nine months. That presupposes that the competent authority is in a position to make such a decision. That could not apply in the Dublin III context until the actual transfer of the applicant. Furthermore, the *Cimade* doctrine should not be unduly extended and indeed, possibly *Cimade* needs to be limited to a certain extent. It is not at all clear that that decision gives enough weight to the "pull factor" of affording rights, and thus *a fortiori*, access to the labour market to persons whose sole basis for their presence on the Union territory is the making of a protection claim, whether unfounded or otherwise. In the context of the overall goal of ever closer union (TEU art. 1), the CJEU needs no reminder that if there is any issue that requires enhanced sensitivity and flexibility it is that of immigration, which as a matter of purely empirical observation was central in bringing UK membership of the Union to breaking point. While the merits or otherwise of such withdrawal are entirely a policy matter for the UK itself, there is a legal and geographical sense in which, as put by Hans-Olaf Henkel MEP, "*the EU will never be complete without the UK*" (Andrew Sparrow, theguardian.com live blog, 13th March, 2019). It would be naïve to think that concerns leading to questioning of EU membership due to that particular sensitive issue are confined to any one country. One could certainly make the case for caution by national and European judicial bodies in engaging in any interpretative extension of EU rights in the immigration context, particularly as regards third-country nationals.

25. Furthermore, there is a significant abuse of rights issue in the Dublin system context. A person, such as either of these applicants, who finds themselves the subject of a Dublin transfer decision is by definition someone who has, to a certain extent at least, abused the

process envisaged by the Common European Asylum System by failing to apply for asylum in the EU member state on whose territory they were first present, or who, having made such an application, then abusively leaves that country and applies elsewhere. Under the general doctrine of abuse of rights, such a person is not someone who should be lavished with further rights of access to the labour market. The relevance of this question is that if art. 15 does not apply to these applicants, then their case fails.

Third question

26. The third question is, is a member state in implementing art. 15 of the Reception Conditions Directive (Recast) 2013/33/EU entitled to adopt a general measure that in effect attributes to applicants liable for transfer under the Dublin III regulation, Regulation (EU) No. 604/2013, any delays on or after the making of a transfer decision.

27. The applicants submit that the answer is no but accept that this argument was not addressed in *Cimade*. The respondents submit that the answer is yes and that the State is entitled to adopt a general measure attributing all such delays to applicants. The IPAT stated that they did not have a view on this question.

28. My proposed answer is that an applicant who fails to apply for asylum in the first member state on whose territory he or she is present, and who then leaves that member state and applies in another member state, is entirely responsible for the need to invoke the procedures provided for in the Dublin system and it certainly could not be the case that the consequent delays are not attributable to that applicant. Thus, an individual member state is entitled to adopt a general provision to that effect. To do so does not undermine the *Cimade* judgment generally because the concept of delay attributable to the applicant is not a general issue in the Reception Conditions Directive (Recast) but only applies in the context of art. 9(1) (detention) and art. 15(1). The relevance of this question to the proceedings is that if the answer to this question is yes, then the applicants' claim fails.

Fourth question

29. The fourth question is, where an applicant leaves a member state having failed to seek international protection there and travels to another member state where he or she makes an application for international protection and becomes subject to a decision under the Dublin III regulation, Regulation (EU) No. 604/2013, transferring him or her back to the first member state, can the consequent delay in dealing with the application for protection be attributed to the applicant for the purposes of art. 15 of the Reception Conditions Directive (Recast) 2013/33/EU.

30. The applicants submit that the answer is no and submit that this is implicit in *Cimade* and rely on recital 8 of the directive. The respondents submit that the answer is yes and that any such delays can be attributed to the applicant. The IPAT is not getting involved in this question.

31. My proposed answer is that the applicant in such a situation must be capable of having such delays attributed to him or her because it is the applicant's failure to seek protection in the first member state and the voluntary travelling to another member state and the making of an application there, contrary to the system envisaged by the regular and orderly application of EU law, that causes the delay in question. Recital 8 is not decisive in the sense that the Reception Conditions Directive would apply generally to such an applicant, just simply not the limited provisions of the directive, such as art. 15, where the question of whether delays attributable to the applicant would arise. The relevance of this question to the proceedings is that if the question is answered in the affirmative, then the applicants' claim fails.

Fifth question

32. The fifth question is, where an applicant is liable to transfer to another member state under the Dublin III regulation, Regulation (EU) No. 604/2013, but that transfer is delayed

due to judicial review proceedings taken by the applicant which have the consequence of suspending the transfer pursuant to a stay ordered by the court, can the consequent delay in dealing with the application for international protection be attributed to the applicant for the purposes of art. 15 of the Reception Conditions Directive (Recast) 2013/33/EU, either generally or, in particular, where it may be determined in those proceedings that the judicial review is unfounded, manifestly or otherwise, or is an abuse of process.

33. The applicants submit not because they say a judicial review applicant is exercising a right of access to the court. They submit that the Reception Conditions Directive applies as long as an applicant is allowed to remain on the territory (see art. 3(1)) and they are currently allowed to remain on the territory of the State because of the general stay. The respondents submit that the question should be answered in the affirmative if it arises. The IPAT do not wish to get involved with this question.

34. My proposed answer is that the taking of judicial review proceedings, while lawful, is nonetheless a voluntary act of an applicant and, therefore, any consequential delay can be attributed to the applicant. That is doubly so where the judicial review may be abusive or unfounded.

35. The relevance of the question to the proceedings is that if the question is answered in the affirmative, the applicants' claim fails. If the answer is that delays due to judicial review proceedings are only attributed to the applicant if the proceedings are unfounded or abusive, then I would propose to adjourn the present proceedings until that issue can be addressed in the first set of judicial review proceedings taken by each applicant.

Order

36. Accordingly, the order will be as follows:

(i). that the following questions be referred to the CJEU pursuant to art. 267 of the TFEU:

(a). where in interpreting one instrument of EU law that applies in a particular member state an instrument not applying to that member state is adopted at the same time, may regard be had to the latter instrument in interpreting the former instrument;

(b). does art. 15 of the Reception Conditions Directive (Recast) 2013/33/EU apply to a person in respect of whom a transfer decision under the Dublin III regulation, Regulation (EU) No. 604/2013, has been made;

(c). is a member state in implementing art. 15 of the Reception Conditions Directive (Recast) 2013/33/EU entitled to adopt a general measure that in effect attributes to applicants liable for transfer under the Dublin III regulation, Regulation (EU) No. 604/2013, any delays on or after the making of a transfer decision;

(d). where an applicant leaves a member state having failed to seek international protection there and travels to another member state where he or she makes an application for international protection and becomes subject to a decision under the Dublin III regulation, Regulation (EU) No. 604/2013, transferring him or her back to the first member state, can the consequent delay in dealing with the application for protection be attributed to the applicant for the purposes of art. 15 of the Reception Conditions Directive (Recast) 2013/33/EU;

(e). where an applicant is liable to transfer to another member state under the Dublin III regulation, Regulation (EU) No. 604/2013, but that transfer is delayed due to judicial review proceedings taken by the applicant which have the consequence of suspending the transfer pursuant to a stay ordered by the court, can the consequent delay in dealing with the application for

international protection be attributed to the applicant for the purposes of art. 15 of the Reception Conditions Directive (Recast) 2013/33/EU, either generally or, in particular, where it may be determined in those proceedings that the judicial review is unfounded, manifestly or otherwise, or is an abuse of process.

(ii). in the light of the submission from the tribunal that it was anxious to have directions as to how to deal with applications in the meantime, I will respectfully request that the expedited procedure pursuant to r. 105 of the Rules of Procedure of the CJEU be applied. The basis for this is the potential difficulties for the tribunal's decision-making in the meantime and the potentially open-ended number of cases that could be affected both in Ireland and in principle under the Dublin system throughout the Union.

(iii). I will hear submissions from counsel as to the appropriate amendment to the proceedings as to the first name of the applicant in the *M.H.K.* proceedings.

37. 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.

Postscript – request for expedited procedure

38. Following further submissions on the issue of the expedited procedure I wish to record further reasons for my request in that regard. In Case C-127/08 *Metock & Ors v.*

Minister for Justice, Equality and Law Reform (Order of the President of the Court, 17 April 2008) the CJEU applied the accelerated procedure pursuant to Rule 104a (now the expedited procedure under Rule 105). The reasons for this were outlined in the Order of the President at paras. 14 to 17 as follows:

> *"14. The right to respect for family life within the meaning of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, is among the fundamental rights which, according to the Court's settled case-law, are protected in Community law (Case C-60/00 Carpenter [2002] ECR I-6279, paragraph 41; Case C-109/01 Akrich [2003] ECR I-9607, paragraphs 58 and 59; and Case C-540/03 Parliament v Council [2006] ECR I-5769, paragraph 52).*
>
> *15. In the present case, the Court is asked to interpret Directive 2004/38 with regard to the specific issue of whether that directive precludes a requirement that a non-EU national must previously have been lawfully resident in a Member State other than the host Member State, where such a requirement is imposed by the Irish legislation transposing that directive. The judgment of the Court will remove the uncertainty affecting the situation of the applicants in the main proceedings and, therefore, their family lives.*
>
> *16. A reply from the Court within a very short period could, therefore, bring a swifter end to that uncertainty, which is preventing the persons concerned from leading a normal family life.*
>
> *17. Those circumstances meet the condition of exceptional urgency referred to in the first paragraph of Article 104a of the Rules of Procedure."*

39. The request for the application of the accelerated procedure was also acceded to for similar reasons in Case C-256/11 *Dereci & Ors. v. Bundesministerium für Inneres*, Ordonnance du President de la Court, 9 Septembre 2011 (Procédure accélérée).

40. In these proceedings, the central issue is the denial of the right of access to the labour market provided for in the Reception Conditions Directive (Recast) to those subject to a transfer decision pursuant to the Dublin III regulation. The applicants argue that this is related

to the right to human dignity in art. 1 of the Charter of Fundamental Rights, which is specifically mentioned in Recital 35 as one of the aims of the Recast Reception Conditions Directive.

41. The applicants, and others who have instituted similar challenges in the High Court, are currently in a state of uncertainty in relation to their right to access the labour market. To date, the Minister for Justice and Equality of Ireland, the second-named respondent in these proceedings, has refused 111 applications for labour market access made by persons the subject of a transfer decision pursuant to the Dublin III regulation. The uncertainty for persons subject to a transfer decision has been compounded by the fact that the International Protection Appeals Tribunal, the first-named respondent in these proceedings, has granted labour market access to two other applicants in a similar situation. There are therefore conflicting decisions on the application of the directive within the Irish domestic sphere. A reply from the CJEU within a very short period could therefore bring an end to this uncertainty.

Approved Judgment

12/4/19