

THE HIGH COURT

[2021] IEHC 806

[Record no. 2020/621 JR]

BETWEEN

JURGEN ISAKU

APPLICANT

AND

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

RESPONDENTS

Judgment of Mr. Justice Cian Ferriter delivered this 17th day of December 2021

Introduction

1. In these judicial review proceedings, the applicant seeks a reference to the CJEU under Article 267 TFEU of the following question:

"In the implementation of Article 15 of Directive 2013/33, is a Member State entitled to adopt a legislative measure which precludes an applicant from access to the labour market where s/he has received a first instance decision within 9 months, but has lodged an appeal with suspensive effect therefrom?"

Background

2. The application for a reference arises in the following context.
3. The applicant, who is an Albanian national, arrived in the State on 29th March 2019 and made an application to the International Protection Office ("IPO") for international protection on 1st April 2019.
4. On 27th November 2019, the IPO issued a recommendation under s.39 of the International Protection Act 2015 (the "Act") that the applicant not be granted international protection. The recommendation made in this decision also contained a finding that s.39(4)(e) of the Act applied i.e. the applicant is from a safe country of origin.
5. On 10th December 2019, the applicant filed an appeal from the IPO decision to the International Protection Appeals Tribunal ("IPAT") under s.41 of the Act. At the time of the hearing of this judicial review, no decision had yet been made by IPAT on that appeal.
6. The respondents aver that the average processing time over the four years from 2017 to 2020 for completion of an IPAT appeal is approximately 8 months (allowing for the impact of Covid-19 restrictions in 2020).
7. The applicant made an application to the Labour Market Access Unit ("LMAU") division of the Department of Justice and Equality, for labour market access permission pursuant to Regulation 11(3) of the *European Communities (Reception Conditions) Regulations 2018, S.I. 230/2018* (the 'Reception Conditions Regulations'). The Reception Conditions Regulations implement *Directive 2013/33/EU of 26th June, 2013 laying down standards for the reception of applicants for international protection (re-cast)* ('the Reception Conditions Directive') into Irish law. The application was refused by the LMAU on 19th December 2019.

8. On 29th January 2020, the applicant's solicitors applied for a review of the LMAU refusal under Regulation 20(1)(e) of the Reception Conditions Regulations.
9. By its decision dated 5th February 2020, the LMAU Review Officer upheld the refusal decision, on the ground that the applicant was ineligible for labour market access permission as he had *"received a first instance recommendation within 9 months from the date of the application for international protection in the State"*.
10. On 12th February 2020, the applicant appealed from the Review Officer's decision to IPAT under Regulation 21 of the Reception Conditions Regulations.
11. By decision dated 3rd March 2020 (the "Impugned Decision"), IPAT determined that:

"... the Applicant applied for international protection on 1 April 2019 and a first instance decision by a competent authority was taken on 27 November 2019. By the Tribunal's calculations, this decision was taken just inside 8 months from the date of application for international protection. Therefore the Appellant does not satisfy the condition precedent in the Directive and in the Regulations, namely the lack of a first instance decision before 9 months has elapsed."
12. IPAT concluded that:

"... having determined that a first instance decision on the Appellant's application for international protection was taken by a competent authority less than 8 months after the lodging of that application, [the Appellant] does not meet the conditions to access the labour market pursuant to Article 15(1) of Directive 2013/33/EU or Regulation 11(4) of the European Communities (Reception Conditions) Regulations 2018"
13. IPAT accordingly affirmed the decision of the LMAU Review Officer under Regulation 21(5)(a) of the Reception Conditions Regulations.

Reliefs sought

14. The applicant was granted leave to seek the following reliefs in these judicial review proceedings:
 1. *An Order of Certiorari sending forward to this Honourable Court for the purpose of being quashed the decision of the First Named Respondent dated the 3rd March 2020 (the 'Impugned Decision') made under Regulation 21(5)(a) of the European Communities (Reception Conditions) Regulations 2018, S.I. 230/2018 (the 'Reception Conditions Regulations') affirming the decision of the Review Officer of the Labour Market Access Unit, Department of Justice and Equality which found the Applicant was not entitled to access the labour market;*
 2. *A Declaration that Regulation 11(4) of the Reception Conditions Regulations, interpreted to provide for the exclusion from access to the labour market of a category of international protection applicant who have received a first instance*

decision within nine months, is contrary to Articles 2(b) and 15 of EU Directive 2013/33/EU of 26th June 2013 (the 'Reception Conditions Directive');

3. *A Declaration that applicants for international protection can rely on the direct effect of Article 15 of the Receptions Conditions Directive and that, insofar as Regulation 11(4) of the Reception Conditions Regulations is inconsistent with the provisions of Directive, it should be disapplied;*
4. *A Declaration, if necessary, that the Regulation 11(4) of the Reception Conditions Regulations is invalid having regard to Articles 40.3 and 40.1 of Bunreacht na Éireann;*
5. *Damages for breach of the Applicant's rights under European Union laws, including the right to employment under the Reception Conditions Directive and/or damages for breach of statutory duty and/or damages for breach of constitutional rights."*

The Reception Conditions Directive and Implementing Regulations

15. Article 15 of the Reception Conditions Directive provides as follows:

"Employment

[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 the 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."*

16. The Reception Conditions Directive was implemented in Ireland by the Reception Conditions Regulations.

17. Regulation 11(4) of the Reception Conditions Regulations provides as follows: -

"Labour market access permission

(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) *subject to paragraph (6), 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."*

Amendment of the Reception Conditions Regulations in 2021

18. It is important to note that the Reception Conditions Regulations were amended in February 2021 by the European Communities (Reception Conditions) (Amendment) Regulations, SI 52/2021 ("the 2021 Amending Regulations"). The 2021 Amending Regulations were signed into law on 9th February, 2021. Regulation 3 of the 2021 Amending Regulations amended Regulation 11(4)(a) of the Reception Conditions Regulations by the substitution of "six months" for "nine months". The effect of this was that an applicant was entitled to apply for labour market access in circumstances where more than six months had elapsed between the applicant's international protection application date and a first instance decision having been made in respect of that application.

The Applicant is granted labour market access on 4th October 2021

19. The applicant made a further application for labour market access permission on 4th October, 2021, in light of the 2021 Amending Regulations, and was granted permission to access the labour market on that date, i.e. 4th October, 2021 in circumstances where he now satisfied the newly amended requirement that no more than six months had elapsed between the date of his application for international protection and the date of the first instance decision (it will be recalled that there was some eight months between the date of his application for international protection on 1st April 2019 and the date of the first instance decision by IPO on 27th November 2019).

The parties' submissions

Locus standi and mootness

20. Given that the applicant now has the labour market access permission he was originally refused and which refusal he was challenging in these proceedings, the respondents submit that the applicant has lost *locus standi* to seek the reliefs sought and that the matter has become moot in light of the well-established principles on mootness as summarised by McKechnie J in the Supreme Court decision in *Lofinmakin v. Minister for Justice* [2013] 4 IR 274. The respondents submit that the fundamental platform for all of the reliefs sought by the applicant was the fact that he had not been permitted to access the labour market contrary to what he maintained was his EU law entitlement to same. This has now fundamentally changed since 4th October, 2021 as a result of the applicant taking advantage of the change of law introduced in February 2021. It is submitted therefore that the applicant enjoys no enduring *locus standi* to challenge the application of the Directive and implementing Regulations as they then stood and as applied by IPAT in the decision under challenge in these proceedings.

21. The respondents submit that the necessity for reference to the CJEU is not made out in the circumstances and that this court has no jurisdiction to refer the matter. The respondents rely in this regard on the CJEU judgment in *Atif* case C-169/18, at para. 25 where the CJEU held:

"[25]. Since, however, all of the visa applications at issue in the main proceedings were the subject of negative decisions, which were contested by means of court actions which were not upheld, and since the referring court has noted that the Court's answer can no longer benefit the applicants in the main proceedings, as is clear from paragraphs 18 and 20 of the present order, the dispute in the main proceedings has become devoid of purpose and, consequently, an answer to the questions referred appears to be no longer necessary."

22. The applicant for his part contends that the matter is still live as his damages claim still "bites" and that in any event there is a public interest in referring the question sought to be referred in that in substance the same issue remains to be resolved notwithstanding the 2021 Amending Regulations.
23. In answer to the contention that the applicant's claim for damages remained live, it was pointed out by counsel for the respondents that a claim for *Francovich* damages for an alleged failure of the State to properly comply with EU law was a very serious claim which required to be properly substantiated and particularised by way of pleading (citing in this regard the Supreme Court decision in *Ogieriakhi* [2017] IESC 52 at paragraphs 11 to 13, and the outcome of the application of those principles as found at paragraphs 103 to 106 of the judgment of O'Malley J. in that case). The respondents submitted that there was simply no particularisation whatsoever of the asserted damages claim and no *prima facie* evidence in respect of a claim of damages advanced in the applicant's grounding papers. The respondents submitted that a substantial amendment to the pleadings would be needed to allow a damages claim to proceed at all (referencing, by analogy, the situation which obtained in *PM v. The Minister for Justice* [2021] IEHC 29 where the applicant's case there became moot in very similar circumstances as he had obtained labour market access after being granted leave to pursue a Judicial Review against a refusal of such access).
24. It was accordingly submitted that the court should refuse to entertain the reference request in those circumstances.

The substantive application

Applicant's submissions

25. The applicant's submissions on the necessity for a reference to the CJEU may be summarised as follows. The applicant says that the whole purpose and thrust of the Reception Conditions Directive is, as set out in Recital (8) of the Directive, in order "to ensure equal treatment of applicants throughout the Union, and this Directive should apply during all stages and types of procedures concerning applications for international protection, in all locations and facilities hosting applicants and for as long as they are allowed to remain in the territory of the Member States as applicants".

26. The applicant says that it follows that the ability of an applicant for international protection to be able to access the employment market in any Member State, including Ireland, must be the starting point in evaluating the proper interpretation of the terms of the provisions of the Directive, including Article 15. The applicant relies in this regard on Recital (11) which provides that *"standards for the reception of applicants that will suffice to ensure that a dignified standard of living and comparable living conditions in all Member States should be laid down"*.
27. The applicant further invokes Recital (23) which provides:
- "In order to promote the self-sufficiency of applicants and to limit right discrepancies between Member States, it is essential to provide clear rules on the applicant's access to the labour market"*.
28. The applicant says that, when one turns to the definition of "applicant" in Article 2 (which provides that *"applicant" "means 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"*) and applies that definition in light of the aforementioned recitals to the terms of Article 15, there is a serious question as to whether the proper interpretation of Article 15(1), read in light of Article 15(3) is to the effect that applicants should have access to the labour market if a period of more than nine months has elapsed between the applicant's initial application for international protection and a final decision (as opposed to a "first instance" decision, which is the language of Article 15(1)) on that application. He submits that to confine the interpretation of Article 15(1) to a period of nine months from the date of lodging of an application for protection to a first instance decision on that application is to run counter to the objectives and purposes of the Directive and that it creates anomalous and invidious results contrary to those objectives and purposes.
29. Counsel for the applicant gave the example in his oral submissions of a situation where, say, two twins arrive from Afghanistan and make applications for international protection on the same date. If the first of the twins gets a first instance decision nine months and one day after his application for international protection, he can, under the interpretation of Article 15 advanced by IPAT and the State, access the labour market, thereby putting him in a position to e.g. get his own accommodation and potentially start accruing Article 8 ECHR private life rights. If in contrast his twin had his application for protection dealt with by the IPO in a day under nine months, his twin brother will be excluded from the labour market. This is all the more invidious, he submits, in circumstances where (as was the case in fact here) a significant period of time elapses before an appeal from the first instance decision is determined by IPAT.
30. The applicant submits that this is to create, without foundation in the Directive itself, two different categories of applicant, whose circumstances are otherwise identical, but who are treated fundamentally differently in terms of access to the labour market. It is submitted that this cannot be what was intended by Article 15 of the Directive and that

there is a serious issue to be referred to the CJEU so that these issues can be resolved in a ruling from the CJEU.

31. The applicant submits that the proper interpretation of Article 15(3) is that the reference to "access to the labour market shall not be withdrawn during appeals procedures" applies to a situation where an applicant is seeking access to the labour market and not just a situation where permission has been granted for labour market access.
32. The Applicant submitted that ultimately the matter was one of "first impression" for the court in circumstances where there was no prevailing case law (whether from the CJEU or other Member States) relating to the proper interpretation of Article 15 in this context, and where there appeared to be no available academic commentary on the matter either.
33. The Applicant sought to rely on certain passages in the opinion of Advocate General De La Tour in the cases of *KS and MHK v. IPAT & ors* (which was a request for a preliminary ruling from the Irish High Court) and related case of *RAT and DS v. Minister for Justice and Equality* (a request for a preliminary ruling from the Irish IPAT) ("*KS & DS*"). Those requests for preliminary rulings related to the question of whether a transferee under the Dublin Regulation system was an "*applicant*" for the purposes of the Reception Conditions Directive such as to *prima facie* entitle such category of persons to seek labour market access permission if the conditions of the Directive in that regard were otherwise met.
34. At paragraph 59 of Advocate General De La Tour's opinion in *KS & DS*, he said as follows:

"[59] In the second place, it is clear from the wording of Article 15(1) of that directive that the applicant must have access to the labour market no later than nine months from the date when the application for international protection was lodged and until a 'first instance decision' has been adopted by the competent authority. Moreover, Article 15(3) of that directive provides that where an appeal is lodged against a negative decision, the applicant is to retain access to the labour market until such time as a negative decision on the appeal is notified.

[60]. The EU legislature does not define the concept of 'first instance decision' in Directive 2013/33. Reference must be made, for that purpose, to the provisions set out in Chapter III of Directive 2013/32. It follows from the provisions set out in Article 32 and 33 of that directive that a first instance decision is a decision by which the determining authority decides both on the admissibility of the application for international protection and on its merits. However, I note that, when adopting a transfer decision, the competent national authority does not decide either on the admissibility of the application or on its merits. Furthermore, should the authority which has adopted the transfer decision decide not to examine the application for international protection, that situation is not within the list of cases in which Member States may consider an application to be inadmissible for the purposes of Article 33 of Directive 2013/32. In that context, neither the transfer decision adopted pursuant to Article 26(1) of Regulation No 604/2013, nor, where applicable, the competent national authority's decision not to examine the

application for international protection constitutes a 'first instance decision', within the meaning of Article 15(1) of Directive 2013/33. The right of access to the labour market laid down in that provision may be withdrawn only by a first instance decision."

35. The CJEU, in its judgment of 14th January, 2021 in *KS & DS* noted as follows at paragraphs 63 and 64:

"[63]. Article 2(b) of Directive 2013/33 defines an 'applicant' as 'a third-country national or stateless person who has made an application for international protection in respect of which a final decision has not yet been taken'. In using the indefinite article 'a', the EU legislature indicates, as the Advocate General noted in point 54 of his Opinion, that no third-country national or stateless person is, a priori, excluded from the status of applicant.

[64]. Furthermore, Article 2(b) makes no distinction as to whether or not the applicant is the subject of a procedure for transfer to another Member State under the Dublin III Regulation. Under that provision, the applicant is to retain that status provided that 'a final decision has not yet been taken' on his or her application for international protection. As the Advocate General observed in points 55 to 58 of his Opinion, a transfer decision does not constitute a final decision on an application for international protection, with the result that the adoption of such a decision cannot have the effect of depriving the person concerned of the status of 'applicant' within the meaning of Article 2(b) of Directive 2013/33."

36. Counsel for the applicant also laid emphasis on paragraphs 69 to 71 of that judgment as being supportive of his position, as follows:

*"[69] In the fourth place, recital 11 of Directive 2013/33 states that standards for the reception of applicants that will suffice to ensure them a dignified standard of living and comparable living conditions in all Member States should be laid down. The Court has also stated that respect for human dignity applies not only with regard to asylum seekers present in the territory of the Member State responsible pending the decision on their application for asylum but also to asylum seekers awaiting a decision on which Member State will be held responsible for their application (judgment of 27 September 2012, *Cimade and GISTI*, C-179/11, EU:C:2012:594, paragraph 43). As the Advocate General observed in point 85 of his Opinion, work clearly contributes to the preservation of the applicant's dignity, since the income from employment enables him or her not only to provide for his or her own needs, but also to obtain housing outside the reception facilities in which he or she can, where necessary, accommodate his or her family.*

[70] In addition, recital 23 of Directive 2013/33 states that one of the objectives pursued by that directive is to 'promote the self-sufficiency of applicants' for international protection. In that regard, it must be borne in mind that, as the Commission pointed out in its Proposal for a Directive of the European Parliament

and of the Council of 3 December 2008 laying down minimum standards for the reception of asylum seekers (COM(2008) 815 final), access to the labour market is beneficial both to applicants for international protection and to the host Member State. Simplification of access to the labour market for those applicants is likely to prevent a significant risk of isolation and social exclusion given the insecurity of their situation. The self-sufficiency of applicants for international protection, which is one of the objectives of Directive 2013/33, is also thereby promoted.

[71]. Conversely, 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."

Alleged failure to transpose

37. The applicant further submitted that the Reception Conditions Regulations failed to transpose Article 15 in two respects.

38. Firstly, it was submitted that there is an alleged failure of transposition in that Regulation 11 of the Regulations make it a matter of discretion as to whether, even if more than 9 months has elapsed between an application for protection and a first instance decision, access to the labour market will be granted. This follows because of the use of the word "may" instead of "shall" ("shall" being the language of Article 15(1) of the Directive) in Regulation 11 of the 2018 Regulations (which remains unaffected by the 2021 Amending Regulations). It will be recalled that Article 11(4) provides that:

"The Minister may, on receipt of an application made in accordance with paragraph (3), grant a permission to the applicant where satisfied that-

(a) subject to paragraph (6), 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." (emphasis added)

39. Secondly, it was submitted that there was a failure of transposition in the Regulations in circumstances where these regulations perpetuate what the applicant submits is the flawed interpretation of Article 15(1) *i.e.* that the 9 months is applied (as a floor and not a ceiling, as he puts it) between the date of application and the first instance decision as opposed to a final decision on the protection application.

Alleged breach of constitutional rights

40. The Applicant finally submitted that the Supreme Court decision in *NVH v. Minster for Justice and Equality & ors* [2018] 1 IR 246 (“*NVH*”) supported the proposition that Article 15 needed to be interpreted in such a manner as to support an applicant’s right to access the labour market. In this regard, the applicant relied on paragraph 17 of the judgment of O’Donnell J. (as he then was) in *NVH*, as follows:-

“[17] ... a right to work at least in the sense of a freedom to work or seek employment is a part of the human personality and accordingly the Article 40.1 requirement that individuals as human persons are required be held equal before law, means that those aspects of the right which are part of human personality cannot be withheld absolutely from non-citizens.”

Respondents’ submissions

41. In relation to the substantive arguments as to the correct interpretation of Article 15, the respondent emphasised that the Advocate General’s opinion and the CJEU’s judgment, in the *KS and DS* matters, arose in a very different context, namely the question of whether a Dublin Regulation transferee was an “*applicant*” within the compass of the Reception Conditions Directive at all. The respondents submit that the CJEU was clearly not offering any view on the matters sought to be advanced by the applicant in this case as regards the proper interpretation of Articles 15(1) and 15(3) of the Directive.
42. Counsel for the respondents submitted, however, that paragraphs 59 and 60 of Advocate General De La Tour’s opinion in *KS and DS* (set out above) in fact clearly supported the correct interpretation of Article 15(3), i.e. that the reference in Article 15(3) to withdrawal of access to the labour market was clearly a reference to a withdrawal following the grant of such access (and not covering a situation where there had simply been an application for the grant of such access). It would have made no sense, it was submitted, for Article 15(3) to appear in Article 15 at all if the meaning sought to be contended for by the applicant were correct.
43. The respondents rely on the *travaux préparatoires* in relation to the Reception Conditions Directive, being the explanatory memorandum for the predecessor of the Directive which stated:
- “(2) Once Member States have granted access to the labour market, they should not withdraw it for the sole reason that an appeal with suspensive effect is pending. To avoid an interruption of work activities in cases when applicants are allowed to stay in the country waiting for a decision on their appeal is a reasonable response to their needs and to the interest of Member States (applicants may become destitute or slip into the illegal market).”*
44. The respondents submit that it is clear that Article 15(3) (as found in the materially identical predecessor provision of Article 13(2) of the original Reception Conditions Directive) only applied once a Member State had granted access to the labour market to an applicant which was not the situation in the applicant’s case.

45. The respondents submit that it is perfectly open to the EU legislature to have legislated, as a matter of policy, for a difference in treatment in terms of access to the labour market between those applicants for protection who would have to wait an unduly long period of time for a first instance decision, and those who were dealt with within a shorter period of time.
46. It was pointed out that in a survey of the approach taken by different Member States to the implementation of Article 15 in a "*Report of the Interdepartmental Group on Direct Provision*" dated 6th December, 2019 (which was an exhibit in the affidavit material before me in these proceedings) that there is no uniform approach as between Member States to the question of access to the labour market for those in a similar position to the applicant here. It was also submitted that the terms of Article 15(2) make clear that Member States are perfectly free to treat nationals on a more favourable basis when it comes to labour market access, than applicants for international protection.
47. In relation to the non-transposition argument, it was submitted that Regulation 11 of the 2018 Regulations was a faithful transposition. Irish case law on the proper interpretation of the word "*may*" was such that, where circumstances required, "*may*" would be interpreted as "*shall*" (see, for example, *Doyle v. Hearne* [1987] IR 601) and that, in any event, the obligation of the courts to give a conforming interpretation to regulations which transposed European law Directives was such that the Irish courts, if called upon to interpret the provision, would be obliged to interpret "*may*" as "*shall*" in light of the wording of Article 15(1) of the Directive.

Discussion

48. I will deal briefly, firstly, with the contention that the applicant's proceedings are moot in light of the fact that the applicant has recently gained permission to access the labour market, and that the Article 267 reference request should not be entertained in the circumstances.
49. In my view, the action can fairly be said to be substantially moot such that a reference to the CJEU on the proposed question could not be said to be "necessary" within the meaning of Article 267. The core purpose of the applicant's institution of the judicial review proceedings i.e. to overturn IPAT's decision refusing him permission to access the labour market has been met; he now has such access. While it can be said that the action may not be completely moot, in the technical sense that the applicant has pleaded a claim for damages which could in theory still be pursued retrospectively notwithstanding that he has now been granted access to the labour market, this claim for damages was pleaded in the most general way by inclusion in the prayer for relief in the Statement of Grounds without substantiation by particularisation or affidavit evidence at all, leaving the applicant here in a materially equivalent position to that of the applicant in in *PM v. The Minister for Justice* (referred to earlier at paragraph 23 of this judgment).
50. Insofar as counsel for the applicant sought to contend that there was in any event a public interest in nonetheless proceeding with the issues raised by the applicant in his case, I do not see that there is any sufficient public interest within the meaning of the

relevant authorities on mootness made out on the facts here. There is no evidence before the court to demonstrate there was some pressing need to determine the question sought to be raised by the applicant on a more widespread basis particularly in light of the narrowing of the relevant window, by the 2021 Amending Regulations, from 9 months to six months.

51. Notwithstanding my view as to the matter being substantially moot, and lest I am wrong in that view, I propose to address the substance of the applicant's request for a reference to the CJEU under Article 267 TFEU. Article 267 provides as follows:

"The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of the Treaties;*
- (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;*

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay."

52. It will be recalled that the question which it is contended is necessary to refer to the CJEU is as follows:

"In the implementation of Article 15 of Directive 2013/33, is a Member State entitled to adopt a legislative measure which precludes an applicant from access to the labour market where s/he has received a first instance decision within 9 months, but has lodged an appeal with suspensive effect therefrom?"

53. It is useful to set out the text of Article 15 again at this juncture:

- 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 the 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."*

54. In my view, the requested reference is simply not "necessary" under Article 267 as the correct interpretation of Article 15 (1) and (3) is *acte claire*. I do not see that the ambiguity or doubt as to the proper interpretation of these provisions as contended for by the applicant in fact arises.
55. The plain words of article 15(1) impose an obligation on Ireland as a Member State to ensure that an applicant such as Mr Isaku shall have access to the labour market no later than 9 months from the date of his lodgement of an application for international protection if a *first instance* decision has not been taken by IPO (as the competent authority in Ireland) and where the delay cannot be attributable to the applicant. Nowhere in Article 15 or anywhere else in the Directive is it suggested, still less provided, that the 9 month period is to run not to the date of a first instance decision on the international protection application but to some later point such as the date of an appeal from the first instance decision. Nowhere is it suggested that the right to access the labour market is to be provided upon lodging an appeal against a first instance decision if the first instance decision has been made within 9 months. Indeed, the wording of Article 15(3) (as borne out by the relevant *travaux préparatoires*) indicates the contrary. It addresses the situation where an applicant already has labour market access (the need for such access to be in place highlighted by use of the word "withdrawn"). In such a situation, the lodging of an appeal where such appeal has suspensive effect cannot lead to that access being withdrawn. It does not provide for the reverse *viz.* that if an applicant does not have labour market access, the lodging of an appeal against a negative decision having suspensive effect must lead to the *grant* to an applicant of an entitlement to access the labour market from the point of lodging the appeal.
56. It is clear from the terms of Article 15 and the definition of an "*applicant*" in Article 2 that the Directive recognises the distinction between a first instance decision and a final decision. I see no tension between the definition of an "*applicant*" in Article 2 as a "*...person who has made an application for international protection in respect of which a final decision has not yet been taken*" and the wording of Article 15; indeed, the terms of Article 15 clearly recognise the difference between an applicant who is at the first instance stage of the international protection process (in Article 15(1)) and an applicant who is at appeal stage (in Article 15(3)). The EU legislature could have chosen to use the wording of a "*final decision*" instead of a "*first instance decision*" in Article 15 (1) but did

not. It could have provided in Article 15(3) that access to the labour market would be granted during appeals procedures where it had not previously been granted to an applicant, but did not.

57. I agree with the respondents' submission that closest which the Recitals in the Directive come to explaining the objective and purpose of the Directive is found in Recital 2:

"[2] A common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Union. Such a policy should be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States."

58. The preceding Recitals of the Directive note that the Directive is being introduced "having regard to the Treaty and the functioning of the European Union and in particular Article 78 (2) (f) thereof". Article 78 (2) (f) relates to issues of freedom, security and justice. It is clear that the Directive in seeking to set out a framework for the provision of standards; the Directive lays down minimum standards and that the member states are entitled but not obliged to provide more favourable treatment if they so decide (Ireland, since the introduction of the 2021 Amending Regulations, having opted for more favourable treatment for applicants than that provided for in Article 15(1)).

59. The reference to "equal treatment" in Recital 8 needs to be read in that context. Nowhere in the Recitals or in the substantive articles of the Directive is there a reference to, still less a provision for, an unqualified right of an applicant to access the labour market other than in the circumstances delimited in Article 15(1). The conferral of the right contended for by the applicant in this case would require a policy decision to be made by the EU legislature and such a policy choice could only be implemented by appropriate amending legislation at EU level. It is not a policy decision which the courts can (or should be invited to) make.

60. It is clear from the Directive that a Member State is entitled to prohibit an applicant for international protection from entering into the labour market in the place of application for protection, other than in the circumstances set out in Article 15. As a result of the 2021 Amending Regulations, if an applicant for protection is waiting more than six months for a first instance decision, he or she can apply for permission to access the labour market. If he or she is waiting less than six months, and is refused protection, the EU has made a policy choice to say that, in those circumstances, it is permissible for a Member State not to permit the applicant to access the labour market (given that the six months is less than the 9 months provided for in Article 15(1)). It must be borne in mind that the status of the applicant at that point is that of a person who has been declined international protection at first instance. This makes his or her status different from that of an applicant for protection who has yet to receive a negative first instance decision in the same period. It is in the nature of any limitation period or cut-off date that it will lead to different categories of persons, i.e. those within the relevant period and those without.

However, there is nothing *prima facie* unlawful about such a policy approach by the EU legislature.

61. It follows from the foregoing that I do not believe there is any failure of transposition on behalf of the State or any question of unconstitutionality of the implementing regulations. Insofar as Article 11 of the 2018 Reception Conditions Regulations refers to “*may*”, it is clear that that must be interpreted as “*shall*” in light of the Irish courts’ obligations to interpret the transposing provision in conformity with the parent Directive.
62. I am further of the view that the Supreme Court’s judgment in *NVH* do not provide assistance to the respondent’s case. The issue in that case was an absolute prevention of access to the labour market on the part of applicants for protection: see paragraph 20 of the judgment of O’Donnell J. in *NVH*. There is no absolute prevention in question here; rather there is a restriction on access which mirrors and is in conformity with what is set out in Article 15. It will be recalled that Article 15(2) provides that Member States “*shall decide the conditions for granting access to the labour market for the applicant, in accordance with their national law*”. The reference that follows in Article 15(2) to “*ensuring that applicants have effective access to the labour market*” is a reference to effective access read in light of the requirements of Article 15. There is no absolute right of access to the labour market conferred on applicants. Furthermore, the second paragraph of Article 15(2) makes clear that Members States may prioritise access to the labour market for nationals and EU citizens in providing that “*For reasons of labour market policies, Member States may give priority to the Union citizens and nationals of States parties to the Agreement on the European Economic Area, and to legally resident third-country nationals.*”
63. Accordingly, for the reasons set out above, I do not see that there is a necessity to refer the proposed question to the CJEU.
64. It also follows that I am of the view that the impugned decision of IPAT was correct in law.

Conclusion

65. For the reasons outlined above, I refuse the relief sought.