[2024] IEHC 660

THE HIGH COURT

JUDICIAL REVIEW

[2023/1073 JR]

BETWEEN:

A.M.

APPLICANT

AND

THE MINISTER FOR ENTERPRISE, TRADE AND EMPLOYMENT AND THE MINISTER FOR JUSTICE, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Barry O'Donnell delivered on the 20th day of November, 2024

INTRODUCTION

1. These proceedings were commenced on the 4 December 2023, when the applicant made an application for leave to apply for judicial review seeking reliefs that are set out below. The High Court directed that a telescoped hearing take place. The applicant's case is set out in a statement of grounds dated the 27 September 2023. At that point in time the applicant was seeking the following relief:

> *"(a) A declaration that the prohibition contained within Regulation 11(9)(a) and Schedule 6 of the European Union (Reception Conditions) Regulations 2018 preventing international protection applicants, who are otherwise entitled*

to work in the State, from working in the public sector, is disproportionate, unlawful and ultra vires.

(b) A declaration that the prohibition on working in the public sector is a breach of the Applicant's right to work in the European Union under Directive 2013/33, which the State has failed to properly transpose, and/or a breach of the Applicant's rights under the Constitution and/or EU law.

(c) A declaration under s.5 of the European Convention of Human Rights Act 2003 that Regulation 11(9)(a) is incompatible with the Applicant's rights under Article 8 and Article 14 of the European Convention on Human Rights and/or a Declaration that the Respondent breached s.3 of the 2003 Act when making that said Regulation.

(d) A Declaration that persons with a work permit under the 2018 Regulations ought to be able to work in in [sic] *public sector jobs and/or ought to be capable of being considered on an individual basis and should not be subject to disproportionate restrictions.*

(e) Such further Declaration(s) of the legal rights and/or legal position of the Applicant and/or persons similarly situated as this Honourable Court considers appropriate;

(f) Damages, including damages for breach of duty, including breach of statutory duty and/or breach of Constitutional rights and/or breach of EU law and/or breach of s.3 of the European Convention on Human Rights Act 2003, and damages arising from the enactment of unlawful regulations.

(g) Further or other Order.

(h) The costs of the proceedings herein."

2. For the purposes of this judgment, I will refer to the European Communities (Reception Conditions) Regulations 2018 (S.I. No. 230/2018) as the *2018 Regulations*, and I will refer to the Reception Conditions Directive (Directive 2013/33EU) as the *2013 Directive*.

3. At the hearing of this application, the parties were agreed that the question of damages at (d) should be deferred until the court has delivered judgment on the other substantive issues. In addition, the applicant's counsel indicated he was not pressing for the relief at paragraph (c), albeit that ECHR principles may be relevant to the domestic law issues. The parties further refined the legal issues in their legal submissions. Those issues can be reduced to the following:

i. Is the blanket prohibition contained within the 2018 Regulations on international protection applicants applying for work in the public sector lawful, when the applicant otherwise fulfils the conditions for Labour Market Permission?

ii. Does the blanket prohibition on employment in the public sector contained in the 2018 Regulations mean that labour market access is not effective as required under the 2013 Directive, and that, as such, the 2018 Regulations do not correctly and / or adequately transpose the 2013 Directive and / or, by prohibiting employment in the public sector, the respondents are in breach of the 2013 Directive?

4. For the reasons set out in this judgment I have concluded that the application should be refused.

THE NATURE OF THE CLAIMS MADE

5. The applicant is a citizen of a country in the Middle East. He entered the State in January 2023, and applied promptly for international protection pursuant to the provisions of the International Protection Act, 2015. The applicant has a variety of qualifications in pharmacy and healthcare management, and he has worked as a pharmacist since 2005 with a particular specialisation in public health sector pharmacy. The applicant applied for and received a "*Labour Market Access Permission*" (*LMAP*) from the Minister. The LMAP permitted him to work in the State from the 30 August 2023 until the determination of his application for international protection. The applicant claims that he sought employment in the public health pharmacy sector but has been prevented from taking up any such employment - and employers are prohibited from offering him such employment - by virtue of the operation of regulation 11(9)(a) of the 2018 Regulations. That provision prohibits holders of LMAPs from working in the public sector.

6. The applicant claims that by virtue of Article 15(2) of the 2013 Directive, he is entitled to *effective access* to the labour market in the State. He claims that the prohibition contained in the 2018 Regulations amounts to a disproportionate limitation on his access to the labour market without legitimate justification, and that it unnecessarily impedes and limits his access to the labour market in breach of the obligations in the Directive to ensure he has effective access to that labour market.

7. In addition, the applicant claims that the respondents acted *ultra vires* and in breach of his rights under Article 40.1 and 40.2 of the Constitution and/or the Charter of Rights and/or

the 2013 Directive by prohibiting his access to employment in the public sector. He claims that the "*blanket prohibition*" is irrational, unreasonable, and disproportionate and therefore unlawful.

THE APPLICANT'S CASE

8. The applicant swore an affidavit on the 22 September 2023 grounding his application. The applicant describes his engagement with the process for seeking international protection and exhibits the relevant documents supporting that application. As matters transpired, the applicant received a declaration of refugee status on the 23 October 2023. Accordingly, to the extent that materials relating to his international protection application may have been relevant to the application, they no longer are material to the decision.

9. There was no particular disagreement from the respondents that the applicant is a person who holds qualifications in public health sector pharmacy work. The respondents expressed reservations about the adequacy with which the applicant presented his evidence supporting his contention that not only was he prohibited by operation of the regulations from seeking employment and taking up employment in the public health sector, but that he had a reasonable prospect of a specific offer of employment.

10. The evidence presented on behalf of the applicant regarding his potential employment was terse. He stated that he attended a jobs fair in the RDS in March 2023 where he met the chief pharmacist at a Dublin hospital. He states he was invited for an interview in August 2023. Between that date and the date of his interview he had received his LMAP. The LMAP took effect from the 30 August 2023 and remained effective until the 23 October 2023, when he

received his declaration of refugee status. He refers to an email dated the 4 September 2023 which he received from the Dublin hospital where he was informed that his work permit did not allow him to work in the public sector.

11. At para. 10 of his affidavit, the applicant states that he had been offered two jobs in the private sector and, at the time he swore his affidavit in September 2023, he was working in a private pharmacy as a pharmacy technician. He asserted that he was being paid less than a person with his experience and qualifications should attract. In that regard he stated that he earned €22 per hour but would be expected to earn €40 to €50 per hour if working at the appropriate level.

12. The applicant also notes that at the time of swearing his affidavit, he had applied for and was still waiting for a licence to practice from the Pharmaceutical Society of Ireland (the *PSI*). Pending receipt of that licence, he asserted that he was qualified and entitled to work as a "*medication and patient safety specialist in the public sector*". He did note that he was much more restricted without the PSI licence in the private sector. Clearly the requirement to obtain a licence from the PSI is a separate matter to the question of any restriction imposed by the LMAP.

13. Among the exhibits to his grounding affidavit, the applicant exhibits a copy of the LMAP document issued by the Minister for Justice. The document notes that the permission is valid from the 30 August 2023 until the 30 August 2024, when it could be renewed. Among the other conditions and obligations set out in the body of the permission is the following statements: -

> "*The holder of this permission shall not seek, nor be employed in any of the occupations listed in Schedule 6 of the European Communities (Reception Conditions) Regulations 2018*", and
>
> "*The employer of a holder of this permission shall not employ an applicant in any of the employer's businesses unless, on the date of employment of the holder of the permission, 50 percent or more of the employees in the business are nationals of (i) an EEA Member State and/or (ii) the Swiss Confederation"*

14. The LMAP was sent under cover of a letter dated the 30 August 2023 from a representative of the Minister for Justice, and among other matters the letter reiterates the need to comply with the 2018 Regulations.

15. The applicant did not exhibit any documentation regarding his application to the PSI for a licence, and he did not expand on the implications of such a licence on his ability to take up employment other than to the extent referred to above. However, the applicant did exhibit two emails from the Dublin hospital referred to above. These were dated the 11 August 2023 and the 4 September 2023. There are some differences between the description of these interactions in the applicant's grounding affidavit and what is set out in the emails.

16. First, instead of referring to a meeting at the RDS, the 11 August 2023 email (which is from the chief pharmacist of the Dublin hospital) refers to a telephone call. The email notes the understanding of the hospital that the applicant is in the process of arranging a PSI licence and indicates "*we would like to meet you to determine how the pharmacy Dept. here could perhaps facilitate this*."

17. After describing the hospital's services and some features of the pharmacy department, the email concludes:

> "*Look forward to meeting you in person on Tuesday 22nd August at 10am"*

18. The email dated the 4 September 2023 appears to refer to a conversation or some form of discussion between the 11 August email and that date. The email reads:

> "*As mentioned, our HR department has advised that the public sector is unfortunately one area where asylum seeker work permits are not eligible.*
>
> *Our Director of Pharmacy would be happy to facilitate a 1-2 day a week unpaid placement if you would be interested in that. Again, we'll need HR to confirm they will support that arrangement – the HR manager is on leave at the moment, but will be back mid-September."*

19. Accordingly, the evidence exhibited by the applicant to corroborate his averments does not go so far as to support the proposition that he was offered a job interview. However, it does establish that the Dublin hospital was conscious that the LMAP did not permit work in the public sector.

20. As noted above, by letter dated the 19 October 2023 the applicant was informed on behalf of the Minister that, pursuant to s. 47(1) of the International Protection Act, 2015, he had been granted a declaration that he is a refugee. That declaration took effect from the 19 October 2023. The letter in question was exhibited to an affidavit sworn by the applicant's solicitor for the purposes of updating the court, prior to the hearing of the application for leave to apply for judicial review. The letter confirms that, if the applicant was granted permission to access the labour market as an applicant for international protection, the permission was no longer valid, and the permission letter must be returned. That note was necessary because pursuant to the provisions of the International Protection Act 2015, having been granted a refugee declaration, the applicant was now a "*qualified person*" pursuant to s. 2 of the 2015 Act and was entitled to seek and enter employment in the same way as an Irish citizen.

THE RESPONDENTS' CASE

21. The respondents delivered a statement of opposition on the 15 February 2024 opposing the grant of any relief. While putting the applicant on full proof of the matters set out in his statement of grounds, the respondents accepted that the applicant was granted a LMAP from August 2023 until the determination of his international protection application, subject to the provisions of the 2018 Regulations. In the statement of opposition, the respondents assert:

> "*4.…It is not admitted that the Applicant's experience as a chemist is most suited to public health pharmacy. From the correspondence exhibited by the Applicant, emails of 11 August 2023 and 4 September 2023, it is not accepted that the Pharmacy Department of* [the Dublin hospital] *told the applicant that they would offer him employment*."

22. The court is satisfied that this assertion is correct, at least on the basis that the emails exhibited by the applicant do not support the contention that the applicant was offered a job interview. It was open to the applicant to adduce further evidence clarifying this situation, but that was not done. Nevertheless, the issue around the evidence in this regard is not dispositive of the issues in the case for the reasons set out below.

23. The statement of opposition sets out denials of the claims made by the applicant and the legal assertions underpinning those claims. Insofar as a positive assertion is made regarding the entitlement of the respondents to restrict the applicants access to the labour market, this is set out as follows at para. 11 of the statement of opposition.

> "*11. The Respondents were and are entitled to restrict access for the Applicant to the public sector labour market during the course of his application for international protection. A person in the position of the Applicant is not entitled to unimpeded access to the full labour market in the State given that the Respondents are entitled to adopt conditions for granting access to the labour market in accordance with the provisions of Article 15(2) of Directive 2013/33/EU. There was no lack of proportionality in that inter alia the Applicant was entitled to unimpeded access to the private sector labour market during the course of his application for international protection and having regard to the fact that the restriction only applies in a temporally limited manner. The State is entitled to have regard to the fact that large numbers of persons do not succeed in their application for international protection and that the nature of the employment concerned, in the public sector, which is based on the provision of permanent positions is inconsistent with the temporary status accorded to international protection applicants to be present in the State solely*

for the purposes of having their international protection application determined. The State is also entitled to have regard to labour market conditions and to the fact that unimpeded access may lead to disproportionate numbers of third country nationals arriving in the State who may ultimately fail in their application for international protection. Finally the State is entitled to have regard to the position in other EU Member States insofar as they also apply conditions for access to their respective labour markets."

24. The respondents' opposition was verified by and grounded by an affidavit of Maeve-Anne Kenny, sworn on the 11 April 2024. Ms. Kenny is a Principal Officer in the Migration Policy Division Unit of the Department of Justice.

25. Ms. Kenny notes that, because he was granted refugee status on the 19 October 2023, the applicant's LMAP dated the 30 August 2023 was only required for a period of 50 days. Ms. Kenny asserts that the applicant has failed to particularise his claim that he was more restricted in the private sector than in the public sector pending the issue of his PSI licence and, as a consequence, the respondents were unable to address that averment in any detail.

26. Again, the court is satisfied that there is force in this point. In a similar way to the deficits in the applicant's assertion that he was offered a job interview, it was open to the applicant to expand on his evidence regarding the effects on his potential employment prospects of the PSI licence. The pharmacy sector is a regulated environment, and the applicant bears the burden of proof in making his case. However, I will address later in this judgment the question of whether it was necessary for the applicant to establish anything more than that the operation of the 2018 Regulations affected his ability to access the labour market.

27. Having referred to and exhibited the relevant LMAP and an information booklet which sets out more details about the operation of the LMAP, Ms. Kenny refers to the approach taken by other EU Member States to conditions for granting access to the labour market pursuant to Article 2 of the Directive. In that regard, she referred to the European Migration Network (*EMN*) report, "*Integration of Applicants for International Protection in the Labour Market*", dated October 2023. Ms. Kenny contends that the EMN report demonstrates that different EU member states operate different waiting periods for access to the labour market; several countries require international protection applicants to obtain a work permit which is connected to a particular employer; some countries do not require an official work permit; some of the countries that do require a work permit apply procedures involving a labour market test which consists of an assessment as to whether the position could be filled by national workers, EU citizens or legally resident third country nationals. Other examples are given of restrictions on the type and form of employment that can be accessed.

28. Ms. Kenny also refers to the European Council on Refugees and Exiles (*ECRE*) paper from January 2024 entitled "*Policy Paper – The Right to Work for Asylum Applicants in the EU*", within which she asserts there is a table that sets out the various conditions and limitations attached to the right to work in different EU Member States.

29. Overall, the reports provide support for the contention that there is no uniformity within the EU regarding the extent to which applicants for international protection may access the labour market.

30. With specific reference to Schedule 6 of the 2018 Regulations, Ms. Kenny avers that the respondents were entitled to restrict access for the applicant to the public sector labour market during the course of his application for international protection. According to Ms. Kenny:

> "*A person in the position of the Applicant is not entitled to unimpeded access to the full labour market in the State given that the State is entitled to adopt conditions for granting access to the labour market in accordance with the provisions of Article 15(2) of the Directive. The applicant was however entitled to unimpeded access to the private sector labour market during the course of his application for international protection and he is now, as a beneficiary of international protection, eligible to apply for a broad range of public sector positions*."

31. Ms. Kenny also makes the point that the State is entitled to have regard to the fact that large numbers of persons do not succeed in their application for international protection. Ms Kenny avers that employment in the public sector is based on the provision of permanent positions, and hence is inconsistent with the temporary status accorded to international protection applicants. Such persons are entitled to be present in the State solely for the purposes of having their international protection application determined. In that regard Ms. Kenny provides figures for what could be described as the success rate of international protection applicants in 2019 and 2020. Those figures were the subject of further evidence later in the proceedings.

32. It is true to observe that some jobs in the public sector are permanent and very likely to be unsuited to persons whose permission to seek employment is necessarily temporary and

contingent. However, it appeared to be common case that the manner in which the current prohibition on employment is framed would rule out all employment not just in what traditionally would be considered as the public service, such as the Civil Service, but also employment in a very large category of jobs in the public sector, such as in public hospitals, where there may be less emphasis on permanent employment.

33. Ms. Kenny makes the further point that the State is entitled to have regard to immigration patterns in the context of labour market conditions and the fact that unimpeded access to the labour market has the potential of leading to disproportionate numbers of third country nationals arriving in the State who may ultimately fail in their application for international protection ("*pull factors"*).

34. Ms. Kenny seeks to substantiate the pull factor argument by referring to a relaxation on the rules surrounding the seeking of employment by asylum seekers that occurred in July 1999. Ms. Kenny asserts that "*the immediate effect of that measure was a threefold increase in the average number of applications per month leading to a figure of 1,217 applications in December 1999 (compared with an average of 364 per month for the period January to July 1999)."*

35. Ms. Kenny asserts that from a practical point of view it is not appropriate to hire international protection applicants whose continuing residence in the country is contingent on being granted international protection or some other permission to reside and work in the State where public service jobs in Ireland normally involve permanent contracts following a period of probation. Ms. Kenny makes the point that even where an applicant is granted international protection there are some roles within the public service that require Irish citizenship, such as

roles in the diplomatic stream of the Department of Foreign Affairs and Trade. Ms. Kenny points out, by way of analogy, that, as a matter of EU law, Member States are entitled to restrict access to public sector jobs to their own nationals pursuant to Article 45 (4) of the Treaty on the Functioning of the European Union (TFEU). The argument is made that if access to public sector jobs can be restricted in the case of EU citizens in the State, it must be the case that Member States may restrict access to public sector jobs for both non-EU citizens legally resident on their territory and those permitted to remain while their application for international protection is pending.

ADDITIONAL EVIDENCE

36. The applicant did not take the opportunity to reply to Ms Kenny's affidavit, but shortly prior to the hearing - and indeed after the hearing - the parties delivered a number of additional affidavits to exhibit documents that they say supported their position or undermined the other sides position.

37. On the 10 September 2024, a solicitor for the applicant swore an affidavit exhibiting extracts from Dáil debates on the 5 July 2018, and a press release from the Department of Children and Integration Disability and Youth and Department of Justice from October 2020.

38. I did not consider the Dáil debates to be relevant, even if they were admissible, as the Regulations are fully capable of being interpreted on their own terms. Alternatively, if the applicant wished to deploy statements made to the Oireachtas by the former Minister for Justice in order in some sense to contradict the evidence given on behalf of the State respondents in the affidavit of Ms. Kenny (and it is not at all clear that those statements have that effect) the

proper course of action would have been to seek to cross examine Ms. Kenny on her affidavit evidence.

39. Similarly, the press release appears to have been proffered by the applicant on the basis that it suggested an intention on the part of the Minister at the time to make some amendments to the Schedule 6 categories of employment. In that regard it seems to the court that *prima facie* it is a matter for the respondents to decide on what employments are or are not scheduled to the 2018 Regulations. An expression in a press release that some amendments may be made in the future to Schedule 6 cannot be taken as any form of acceptance or admission that there is a legal frailty surrounding the contents of an existing schedule to regulations. Ultimately, the press release does not assist in the interpretation of the relevant Regulations or in the court's understanding of the arguments deployed by the parties.

40. Finally, following the hearings, with the consent of the court, the parties submitted some further documentation as exhibits to affidavits sworn by representatives of each side. These were directed towards setting out statistics regarding the numbers of applicants for international protection who successfully achieved a declaration of refugee status or some other form of protection.

41. The affidavit submitted on behalf of the applicant sets out statistics that were extracted from the Asylum Information Database (*AIDA*) for 2022. The database provides information on asylum practice in 23 countries and is co-ordinated by the European Council on Refugees and Exiles. A replying affidavit on behalf of the respondents was sworn on the 17 October 2024 by Mr. David Durnin, who is an assistant principal officer in the International Protection Office. Mr Durnin accepted that the AIDA statistics exhibited by the applicant were correct,

but he asserted that they were taken out of context in the post Covid 19 pandemic landscape and did not reflect the normal rates of grant or refusal made by the International Protection Office. In that regard he sets out further statistics dealing with 2022 and 2023. The manner in which the statistics were presented was not altogether clear. Nevertheless, it appears from the statistics averred to by Mr Durnin that approximately 42% of applicants were granted Permission to Remain. It can be further extrapolated from the statistics provided that approximately 34% of applications for international protection at first instance between September 2023 and September 2024 were granted some form of protection status.

VIEWS ON THE EVIDENCE

42. At this point, it can be identified that the applicant's case that he was qualified for and seeking employment in the public health pharmacy sector was not displaced by the respondents. While his evidence in this regard was terse, it was not substantively disputed. The court is not satisfied that he has established that he was offered a job interview, although it is accepted that he was in some discussion with the Dublin hospital. However, it was common case that for the period between the 30 August 2023 and the 19 October 2023 the applicant was prohibited from seeking employment in the public sector, as that term is understood in the Regulations.

43. The court is satisfied that the respondents have established that there is a concern about creating pull factors and that those concerns are borne out by historic experience. That element in the respondents' evidence was not put in issue. Likewise, the court is satisfied that the evidence establishes that a large number of applicants for international protection do not succeed in achieving protection, whether by a grant of refugee status or other forms of

protection. In that regard, even if there is some dispute about what precisely is revealed by the statistics, the core point made by the respondents in that regard is supported by the evidence.

44. Insofar as the respondents contended as a matter of fact that most employment in the public sector is of a permanent nature, the court is not entirely persuaded that such a broad proposition is of assistance in considering the nature of the Regulations under challenge in this case. As explained below, the effect of the 2018 Regulations is to prohibit all employment – whether permanent or temporary – in a very wide range of job sectors that fall under the description of public services in Schedule 6.

THE LEGISLATION

45. The 2013 Directive addresses a variety of issues concerning applicants for international protection. On the issue of labour market access, recital 23 notes:

> "(23) *In order to promote the self-sufficiency of applicants and to limit wide discrepancies between Member States, it is essential to provide clear rules on the applicants' access to the labour market."*

46. Article 15 of the Directive is the substantive provision dealing with employment and 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."

47. Ireland gave effect to the 2013 Directive by making the 2018 Regulations. Labour market access permission is addressed in regulation 11.

48. Regulation 11 provides a structure by which applicants for international protection may seek to access the labour market. The primary position is that an applicant is not entitled to seek, enter or be in employment or self-employment except in accordance with a LMAP granted or renewed by the Minister under the 2018 Regulations. An applicant is entitled to make an application for permission in a specified form on or after the expiry of eight months beginning on the application date. Notably, by regulation 11(12), the Employment Permits Act, 2006 to 2014 do not apply to a non-national (within the meaning of that Act) who is an applicant or a recipient of international protection. Hence, it appears the only mechanism whereby a

person resident in a state pending the determination of an application for international protection may access the labour market is in accordance with the 2018 Regulations.

49. Nevertheless, it is clear that the Regulations correspond in some respects to the framework established by the Employment Permits Acts. For instance, by regulation 14(6) an employer is not permitted to employ a person with an LMAP unless 50% of the employees are nationals of one or more member states of the EEA or the Swiss Confederation or a combination of those states. As discussed below, the court considers that the scheme of the Employment Permits Act has some relevance to the broader consideration of the legal issues in this case.

50. Regulation 11(9) provides that where an applicant has succeeded in obtaining a permission from the Minister:

> *"(9) An applicant who holds a permission—*
>
> *(a) shall not be or seek to be employed by, or enter into a contract for services with, a body specified in Schedule 6,*
>
> *(b) shall inform the Minister of his or her income from any employment or self-employment pursuant to the permission and from any other source, and*
>
> *(c) where he or she becomes self-employed pursuant to the permission, shall inform the Minister of his or her self-employment and of any change in that self-employment."*

51. Schedule 6 provides a list of bodies, specified for the purposes of Regulation 11(9)(a), with whom an applicant is not permitted to be or seek to be employed. It should be noted that,

by regulation 13, the Minister for Justice in consultation with the Minister for Business, Enterprise and Innovation is required to keep under review the bodies specified in Schedule 6, and that as part of that review the Minister is required to have regard to the following factors:

> "*(a) any disturbance or development that the labour market is experiencing or is likely to experience that may result in job losses or salary reductions,*
>
> *(b) whether, where a development or disturbance referred to in sub paragraph (a) has occurred, the inclusion of particular occupations in Schedule 6 would have a stabilising effect on the labour market, and*
>
> *(c) the nature of the work available to applicants*."

52. Schedule 6 of the 2018 Regulations sets out a list of twelve bodies in respect of which an applicant for international protection may not seek employment would be employed. These include the Civil Service of the government, Civil Service of the state, local authorities, the Defence Forces and An Garda Siochana. In addition, a number of other entities are described as follows:

> *"(d) any other entity established by or under any enactment (other than the Companies Acts), statutory instrument or charter or any scheme administered by a Minister of the Government.*
>
> *(e) a company (within the meaning of the Companies Acts) a majority of the shares in which are held by or on behalf of a Minister of the Government.*
>
> *(f) a subsidiary (within the meaning of the Companies Acts) of such a company.*
>
> *(g) an entity established or appointed by the Government or a Minister of the Government.*
>
> *(h) any entity (other than one within paragraph (f)) that is directly or indirectly controlled by an entity within any of paragraphs (c) to (g).*

(i) An entity on which any functions are conferred by or under any enactment (other than the Companies Acts), statutory instrument or charter.

(j) An institution of higher education (within the meaning of the Higher Education Authority Act 1971) in receipt of public funding."

53. Hence, in addition to what could be seen as core public service bodies, such as the Civil Service, the Defence Forces or An Garda Síochána, it is clear that Schedule 6 is intended to capture a wide range of bodies falling within a broad definition of public service. For the purposes of this action, it was agreed by the parties, and clearly seems to be the case, that the definitions of bodies contained in Schedule 6 include hospitals within the public health sector, and specifically the Dublin hospital with whom the applicant in this case exchanged emails.

54. As noted above, the applicant seeks to challenge the restrictions imposed by the Regulations as "*disproportionate, unlawful and ultra vires*". This is based on the contentions pressed at the hearing that the restrictions breach the applicant's rights as a matter of EU law as expressed in the Directive and / or breach his rights under the Constitution. I propose to address the EU law question first, and I will then address the Constitutional position.

DISCUSSION – THE DIRECTIVE

55. On one level, the response to these proceedings is that the applicant in fact did access the labour market. Once he obtained his LMAP, he was entitled to access a broad range of potential employments and succeeded in obtaining employment in the private pharmacy sector. The concern of the applicant therefore is not about accessing the labour market *per se*, but with being permitted to access his preferred type of employment. This is a different proposition and

as explained below does not appear to constitute a basis for challenging the measures successfully.

56. The CJEU has made clear on numerous occasions that the 2013 Directive is a mechanism for ensuring that the Charter rights of applicants for international protection are preserved. In particular, the provision of material reception conditions for such applicants are directed to ensuring that Member States respect the applicants' right to dignity.

57. The question of how a right to effective access to the labour market promotes those core values was considered by the CJEU in Joined Cases C-322/19 and C-385/19 *K.S. v. I.P.A.T.* [ECLI:EU:C:2021:11], (*K.S.*). The applicant in this case argued that the observations of the CJEU in *K.S.* supported his claim that the national law provisions infringed his rights under the Directive. I am not persuaded that the observations of the CJEU or the proper construction of Article 15 assist the applicant in his claims.

58. The issues in *K.S.* arose from a reference from the Irish High Court pursuant to Article 267 of the TFEU. The core questions posed in the reference differ from the questions that arise in this case. The applicants in those cases were applicants for international protection who had been the subject of a decision that their applications should be transferred to another Member State pursuant to the Dublin III Regulation. One of the questions that arose was whether, pending the completion of that process, Article 15 of the 2013 Directive precluded national legislation excluding the applicants from accessing the labour market solely on the grounds that a transfer decision had been taken in their regard under the Dublin III Regulation. Hence, the cases were concerned with a form of blanket prohibition on those classes of applicants accessing the labour market.

59. Ultimately, the CJEU found that national legislation *was* precluded from excluding applicants for international protection from accessing the labour market solely on the basis that a Dublin III Regulation transfer had been taken. That decision was grounded on a finding that the applicants remained "*applicants*" for the purposes of the 2013 Directive until a final determination on their status – whether they were to be transferred – had been made. However, in deciding the question, the CJEU made a number of important observations that inform the proper approach to this case.

60. First, the CJEU reiterated at para. 65 that the 2013 Directive applies during all stages and types of procedures concerning applications for international protection "*and for as long as applicants are allowed to remain on the territory of the Member States in that capacity*". This reflects the basic proposition that applicants for international protection enjoy rights under the 2013 Directive and the broader Common European Asylum System, but only while their applications are being determined. One of the key rights is a right to remain on the territory of the Member State.

61. Second, for so long as they operate, it is clear that the entitlements under the 2013 Directive are rights guaranteed to applicants as a matter of EU law.

62. Third, at para. 68 of the judgment, the CJEU found that access to the labour market is *not* a material reception condition within the meaning of Article 2(g) of the Directive. However, it found that it was nevertheless:

> "*… covered by reception conditions, within the meaning of Article 2(f) thereof, understood as the rights and benefits conferred by that directive on any applicant for international protection whose application has not been finally determined.*"

63. Fourth, the Court considered the relationship between access to the labour market and the broader concerns of the 2013 Directive to protect the dignity of international protection applicants. Hence, at para. 69 it was noted that:

> "*…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*."

64. Similarly, it was noted that accessing the labour market promoted self-sufficiency, an objective for the Directive identified in recital 23. In that regard the Court observed at paragraph 70 that:

> "*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*."

65. Finally, the Court noted that there was a benefit to the host Member State by reducing the costs in paying social benefits.

66. While the *K.S.* case was not concerned with and did not determine the meaning of "*effective access to the labour market*" it provides considerable assistance in suggesting how that term should be interpreted if one approaches the question in a schematic manner.

67. Article 15(2) of the 2013 Directive makes clear that it is a matter for Member States to "*decide on the conditions for granting access to the labour market for the applicant, in accordance with their national law…*". The stipulation is that whatever conditions are in place, there is a need to ensure that "*applicants have effective access to the labour market.*" Member States also are entitled, for reasons of labour market policies, to give priority to EU citizens, EEA nationals and legally resident third-country residents. The primary purpose of allowing effective access to the labour market is to promote the dignity of applicants for international protection by enhancing their self-sufficiency. In that regard, recital (23) to the Directive locates the need for clear rules on labour market access in two concerns: "*to promote the self-sufficiency of applicants*" and "*to limit wide discrepancies between Member States…*".

68. In terms of broader policy concerns, recital (12) observes that harmonising reception conditions "*should help to limit the secondary movements of applicants influenced by the variety of conditions for their reception*". Accordingly, it is also possible to treat the provisions of Article 15 as addressing the potential tension between the need to minimise the variations in pull factors within the EU and the need to ensure that applicants enjoy a dignified standard of living and enjoy a level of self-sufficiency. The resolution of that potential tension is largely

left up to Member States, subject to the 9-month rule and the need for applicants to have effective access to the labour market.

69. It seems to the court that if the proper construction of the provision is conducted by a literal reading of the provision it produces a result that is entirely consistent with a schematic or purposive perspective. The court is satisfied that "*effective access*" encapsulates a dual requirement (a) that the access is effective in the literal sense: it must be real and not illusory, and (b) schematically, that the type of access provided for must be capable of bringing about a level of self-sufficiency and a dignified standard of living.

70. There is nothing in the text of Article 15 or the overall context of the 2013 Directive to suggest that the purpose of the legislation is to provide for a right on the part of applicants for international protection to access a *particular* or *preferred* sector within the labour market.

71. Viewed in that way, and accepting that the applicant has an EU right to effective access to the labour market, the court is not persuaded that the national restriction on employment in the public sector infringes that right. The evidence from the respondents showed that different Member States adopt different measures in regulating access to the labour market. The applicant here was able to access the labour market and find employment. There was no evidence that this infringed his ability to provide for himself. Rather, the applicant complains that he was not able to access his preferred sector of employment. However, the Directive does not protect access to particular sectors of the labour market. The court is satisfied that, in the case of Article 15, the national measures expressed in the 2018 Regulations operate to ensure that applicants' rights to access the labour market is effective, and in that way secures the outcome set by the Directive.

72. Contrary to the submission by the applicant I am not satisfied that the restrictions imposed by the 2018 Regulations are disproportionate. It seems to me that, insofar as they address access to the labour market, the national law provisions are consistent with the wording and purpose of Article 15 and the broader aims of the 2013 Directive. In this case, Article 15 expressly leaves the question of access to the labour market to the national law of the individual member states. The right to access the labour market is not freestanding, it arises in the context of the reasons why international protection applicants are entitled to remain on the territory of the state in question. The right to access the labour market is not unqualified, restrictions may be imposed so long as they do not impede effective access to the labour market. Applicants in Ireland who receive a LMAP are entitled to seek any form of employment in the private sector, and the applicant here succeeded in accessing such employment.

73. That view is strengthened by the fact that, as a matter of EU law, Member States have a limited entitlement to restrict employment opportunities in the public sector to nationals of the host Member State, thereby derogating from the general right of free movement of workers within the EU. The case law establishes that the relevant provisions, Article 45(4) TFEU, must be interpreted in a restrictive manner because they operate as derogations from a core principle of EU law. Hence, they must be limited to posts which involve direct or indirect participation in exercise of powers conferred by public law and duties designed to safeguard the general interests of the State, see for instance paragraphs 42 to 45 in Case-270/13 *Haralambidis v. Calogero Casilli* [ECLI:EU:C:2014:2185]. However, the point remains that even as between nationals of a Member State and other EU citizens, it can be permissible to restrict access to certain sectors of the labour market. Accordingly, there is nothing incongruous in placing

further restrictions on the sectors of the labour market that can be accessed by an applicant for international protection.

74. Accordingly, the answers to the second question must be that the prohibition on employment in the public sector set out in the 2018 Regulations does not prevent effective access to the labour market; the 2018 Regulations properly transpose Article 15 of the 2013 Directive; and the respondents are not in breach of their obligations under the 2013 Directive. The applicant's claims in that regard must therefore be rejected. That leaves the issues raised by reference to domestic law.

DISCUSSION – NATIONAL LAW

75. Aside from the arguments grounded in their interpretation of the Directive, the applicants also claimed, in essence, that the restrictions in the 2018 Regulations were unlawful because they operated as a disproportionate restriction on his right to work. In that regard the applicant placed considerable emphasis on the judgment of the Supreme Court in *N.H.V. v. Minister for Justice and Equality* [2018] 1 IR 246 (*N.H.V.*) That judgment was concerned with matters that pre-dated the 2018 Regulations and events that occurred before the State opted into the regime provided for by the 2013 Directive. While there are important distinctions between the legal and factual backdrops in *N.H.V.* and the present case, the Supreme Court provided detailed contextual and legal analysis that assists considerably in identifying how the issues in the present case should be approached.

76. The judgment is careful and nuanced. It does not stand either for a bald proposition that applicants for international protection have an automatic entitlement to invoke the

unenumerated Article 40 right to work, as that term is properly understood, or for a contrary proposition that such applicants are automatically precluded from invoking the right or freedom. Rather, what is required is a careful consideration of the potential impact of the restriction itself on the Constitutional value of individual dignity, bearing in mind that employment policy regarding non-citizens involves the exercise of an executive function.

77. In that case, the applicant was a person who had arrived in the State in 2008 and applied for asylum. His application was characterised by considerable delay, and during his period while seeking international protection the applicant was living in direct provision. In 2013, while he was still awaiting a final determination, the applicant was offered employment in a direct provision facility and sought permission from the Minister to take up that employment. The application for permission was refused on the basis of the then provisions of s. 9(4) of the Refugee Act, 1996 as amended. It was clear that s. 9(4) of the 1996 Act operated as a blanket prohibition that prevented applicants for international protection from seeking or taking up any employment pending the determination of their application.

78. The applicant sought orders of *certiorari* quashing the decision and a declaration that the applicant was not precluded in law from being granted permission to take up employment. The High Court rejected the application, and the Court of Appeal dismissed the subsequent appeal. As noted by the Court of Appeal in a judgment delivered by Finlay Geoghegan J., the applicant contended that he had personal right to work or earn a livelihood protected by Article 40.3 which he was entitled to enforce against the State.

79. In addressing the appeal, the Court of Appeal noted that the Supreme Court in *Illegal Immigrants (Trafficking) Bill, 1999* [2000] 2 IR 360 had expressly noted that the rights

including fundamental rights to which non-nationals may be entitled under the Constitution do not always coincide with the rights protected as regards citizens of the State. Accordingly, the Court of Appeal considered that where it is contended that a non-citizen has a right in the State which is claimed to be a fundamental right or a personal right protected by Article 40.3 it was necessary to look at both the status of the non-citizen and also the nature of the particular right being contended for. The court noted the question of the extent of the rights enjoyed by non-citizens under the Constitution were a matter of ongoing debate and discussion.

80. In the majority judgment in the Court of Appeal, Finlay Geoghegan J. concluded:

> *"[26] In my judgment it cannot be concluded that a person who is in the State for one purpose only namely to have his application for refugee status decided and does not have any right to reside in the State as an immigrant, has a personal right protected by Article 40.3.1 to work or earn a livelihood within the State. A right to work or earn a livelihood within the State is inextricably linked to a person's status within the State. A right to work cannot be exercised in vacuo. It is a right to work and earn a livelihood in the State."*

81. The decision of the Supreme Court was set out in a judgment delivered by O'Donnell J. (as he then was) with whom all the other members of the court agreed.

82. Of significance to the current case, O'Donnell J. commenced by noting that even though s. 9(4) of the 1996 Act as amended had been repealed by s. 6(1) of the International Protection Act, 2015, and that, by the date of the hearing in the Supreme Court, the applicant had refugee status and was no longer an asylum seeker, the matter could not be considered moot. In that regard, O'Donnell J. observed:

> *"[6] … A person affected by the operation of a statute which he or she contends is unconstitutional, may be entitled to maintain the claim even if the statute is no longer being applied to them. They have been affected by the operation of a provision which they contend is unconstitutional, and in the normal course are entitled to have that issue determined, and if successful to have the treatment declared unlawful, and if necessary the provision declared unconstitutional."*

83. Relatedly, the court did not consider it was necessary that the applicant produce evidence in relation to the job offer which he contended to have been offered:

> *"In any event, I do not think it was in fact necessary to show that the applicant had a job offer in order to establish standing to challenge s.9(4). The appellant was plainly affected by s. 9(4) in that he wished to seek employment, and s.9(4) clearly inhibited and on its face, prevented that."*

84. Accordingly, it can be seen that the fact that the applicant in this case has obtained protected status, and therefore is not bound by the LMAP restrictions, does not render moot his complaint that the restrictions are unlawful. Similarly, the quality of his evidence regarding offers of job interviews or his evidence on the effect of his not having a PSI licence at the relevant time does not affect the core fact that he was prohibited from seeking certain forms of employment under the terms of his LMAP.

85. Returning to the *N.H.V.* judgment, when it came to the question of whether a non-citizen could invoke the provisions of Article 40.1, the Supreme Court found, at a level of principle, that a non-citizen, including an asylum seeker, may be entitled to invoke the unenumerated personal right, including possibly the right to work which has been held guaranteed under Article 40.3, "*if it can be established that to do otherwise would fail to hold such a person equal as a human person"*. However, the analysis and steps leading to that finding requires close reading.

86. Importantly for the purposes of considering a claim based on the right to work, the Supreme Court noted at para. 12:

> *"[12] … It is easier I think to conceive of any constitutional protected interest as a freedom, and in this case, freedom to seek work which however implies a negative obligation not to prevent the person from seeking or obtaining employment, at least without substantial justification."*

87. The Supreme Court concluded that, in the particular circumstances of the applicant in that case, the operation of the prohibition for such an extensive period meant that a point had been reached where it could not be said that the legitimate differences between an asylum seeker and a citizen could continue to justify the exclusion of the asylum seeker from the possibility of employment. That finding was firmly rooted in a finding that the damage to the individual's self-worth and sense of himself was exactly the damage that the Constitution sought to guard against.

88. It can be seen that the decision did not go so far as to establish that an asylum seeker may invoke the personal right to work *simpliciter*. The right for these purposes is best

considered as a freedom to seek work and the necessary analysis requires the court to consider whether a restriction on that freedom is substantially justified. The critical factor in *N.H.V.* was the potential effect of a blanket prohibition on employment in the context of a statutory process that could be very lengthy.

89. In this case, there is no indefinite blanket prohibition. Instead, 8 months after the initial application for internation protection is made, a LMAP can be given. The holder of a LMAP is afforded freedom to seek work, subject to certain restrictions. The question therefore is whether the restriction on employment in the public sector amounts to a breach of the applicant's rights, from the point he was entitled to apply for a LMAP to the point when his application for protection was determined.

90. In addressing the particular provision in issue in *N.H.V.*, the Supreme Court noted that s. 9(4) of the 1996 Act operated as a blanket provision on employment and made a number of observations about the status of applicants for internation protection in that context.

91. First, viewed in its wider context, the starting position was that – unlike the position of EU citizens and citizens of other states who can avail of international treaty rights - non-citizens do not have a right to come to the State seeking employment. The Supreme Court noted that the *"area of employment within the State is one area where the State may…* [make] *very clear distinctions between citizens and permitted residents and non-citizens"*. This was framed as a *"core part of the executive function not merely to control access to the State, but also to regulate the activities of non-citizens while here."*

92. In turn, the importance of this area of the executive function was attributable to the proposition that *"the right to work is very much linked to the economy, and the society, to which the individual is attached."*

93. In those premises, *"any right to work guaranteed by the Constitution could be argued to be capable of being enjoyed only by citizens or perhaps those with some established connection to the State."*

94. That general constitutional proposition could be qualified where the effect of a restriction on the freedom to seek work reached a certain threshold. A situation may arise where the restriction operated to infringe the core constitutional value of the dignity of the individual. The reason for the qualification is that "*work is connected to the dignity and freedom of the individual which the Preamble tells us the Constitution seeks to promote*". As I understand it, the gravamen of the Supreme Court's analysis and findings was as follows:

> *"[17] Accordingly I have concluded that 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 the law, means that those aspects of the right which are part of human personality cannot be withheld absolutely from non-citizens."*

95. The State was entitled to draw legitimate distinction between citizens and non-citizens, and particularly those non-citizens whose presence in the State is a result of an application for international protection. In the area of employment, it was justifiable to draw "*significant distinctions*". The task of drawing those distinctions is a matter for the other branches of

government "*and the Court must give considerable latitude to those legislative, and (where appropriate) executive, judgements".*

96. The Supreme Court identified a number of considerations that could justify the State in drawing a distinction between citizens and non-citizens in the field of employment policy.

97. First, the fact that not all applicants succeed in achieving international protection and therefore the State legitimately can seek to avoid creating "*pull factors*" for potential applicants. In this regard, the uncontested evidence in the present case was that it remains the case that many applicants for international protection do not succeed in obtaining a positive determination, and that historic experience with "*pull factors*" was a factor informing the 2018 Regulations restrictions on employment. As noted by the Supreme Court "[t]*his is precisely the type of judgement which the Government and Oireachtas are required to make, and it is a judgement which courts should be extremely slow to second guess, even by reference to a proportionality standard.*

98. Second, the Court identified the State interest in avoiding a situation where it becomes more difficult to remove an unsuccessful applicant because of a change in their position in the State. As such the State may legitimately seek to maintain the situation in a form of status quo.

99. Third and of particular relevance to this case, the Supreme Court was clear that even if some employment is permitted after some time, *"it does not follow that any employment should be permitted: it may be legitimate to limit that to defined areas of the economy, perhaps where there is a demonstrated need."*

100. As noted above, in *N.H.V.* the Supreme Court was dealing with a blanket prohibition with no time limit where there was no limitation on the length of time the asylum process could take. Accordingly, the court found that the point had been reached where it could not be said that the legitimate differences between an asylum seeker and a citizen could continue to justify the exclusion of the asylum seeker from the possibility of employment.

101. I consider that the current situation is materially different to the situation that formed the backdrop to *N.H.V.* and that led to the final decision. Here, there is no blanket prohibition on seeking work. An applicant is entitled to access the labour market, subject to certain restrictions. That entitlement to seek work arises after a number of months. There was no complaint on that time limitation, which itself is consistent with the EU legal requirements. Subject to compliance with the conditions attached to a LMAP an applicant retains that freedom to seek and take up employment until their application for protection has been determined. In this case there is no basis for suggesting that in any sense the restrictions imposed on the applicant can be said to infringe their right to dignity.

102. The State has a legitimate interest in regulating the access of non-citizens in the area of employment. One of the premises of the Employment Permits Act 2006, as amended – which still was in place when the events in this case occurred - was that, in broad terms, foreign nationals required employment permits to take up employment. While that Act did not apply to those seeking international protection, it is notable that the regime of the Act afforded the relevant Minister some latitude in identifying the sectors where permits could and could not be granted. On one analysis, the disapplication of the Employment Permits legislation to international protection applicants may result in such persons being able to access a broader range of employments and with fewer administrative barriers than other foreign nationals.

103. In this case, in promulgating the 2018 Regulations, the State has chosen to treat applicants for international protection differently from citizens. This is done by restricting them to employment in the private sector. The respondents justified that distinction by reference to the need to avoid "pull factors" and the nature of work in the public sector. There is no doubt that there is a restriction, but I consider that this is an area of judgment to which the court must afford considerable latitude and there must be a high level of deference to the executive and legislative judgment underpinning that policy decision. The critical feature of this case is that the impact of the restrictions set out in the 2018 Regulations does not mirror or approach the level of restrictions that led to the conclusion in *N.H.V.*

104. It must be borne in mind that what is challenged in this case is not the lawfulness of the decision to attach conditions to the LMAP, but instead the lawfulness of the provision that allowed that decision to be made. The effect of that provision at its highest is not to breach a constitutionally protected right but to operate as a restriction on a freedom which itself has been found to be highly qualified in the case of applicants for international protection. Moreover, the policy considerations that underpin the restriction are matters very firmly located in the executive and legislative spheres and which must be afforded a considerable margin of appreciation. That policy framework – which is consistent with the EU policy framework – must be recognised.

105. Viewed in that light, it cannot be said that the 2018 Regulations impermissibly curtails or burdens a freedom that in this case is already quite limited. I am satisfied that the provisions in the 2018 Regulations that provide a limited but effective access to the labour market clearly are connected to a legitimate statutory object – as articulated in Article 15 of the 2013 Directive. The restrictions have been substantially justified by the respondents as achieving ends that are proportionate to the public interest in regulating and managing the activities of persons who

are permitted to remain on the territory of the State. The restrictions are reasonably necessary to achieve the objectives in the sense that the primary EU law objective is to permit international protection applicants to have effective access to the labour market, *inter alia* to achieve a degree of self-sufficiency. In this case, the applicant's circumstances in fact demonstrate that, for the short period between the grant of the LMAP and obtaining a declaration, he was in a position to access the labour market and was employed in the private pharmacy sector.

CONCLUSION

106. For the reasons set out above, I am satisfied that the application for judicial review cannot succeed, and the application will be refused. In those premises there now will be no necessity to address the question of damages. I will list the matter before me for further argument on the question of costs at 10.30am on the 11 December 2024.