AN CHÚIRT UACHTARACH
THE SUPREME COURT

S:AP:IE:2023:000096
[2024] IESC 42

Dunne J.
Charleton J.
Woulfe J.
Hogan J.
Murray J.

Between/

L.K.

Respondent

AND

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

Appellants

Judgment of Ms. Justice Elizabeth Dunne delivered on the 9th day of October 2024

Introduction

1. This appeal concerns the correct interpretation and application of the concept of "delay" in Article 15(1) of Directive 2013/33/EU of the European Parliament and of the Council

of 26th June, 2013 laying down standards for the reception of applicants for international protection ("the 2013 Directive"), to which effect is given by Regulation 11(4)(b) of the European Communities (Reception Conditions) Regulations 2018, S.I. No. 230/2018 ("the 2018 Regulations"). A further issue concerns the respondent's entitlement to *Francovich* damages for the State's alleged failure to correctly transpose Article 15(1) by way of Regulation 11(4)(b).

2. Article 15 of the 2013 Directive requires member states to establish standards regulating international protection applicants' access to the labour market. Paragraph (1) thereof obliges States to:

> "[E]*nsure that applicants have access to the labour market no later than nine 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.*"

3. Regulation 11(3) of the 2018 Regulations enables an international protection applicant to apply for a labour market access permission eight months after an international protection application has been made. Regulation 11(4) further provides:

> "*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.*

4. The different tests set out in the provisions above with respect to delay on the part of an international protection applicant are central to the issues arising in this appeal. In particular, the phrase "*or attributed in part*" contained in Regulation 11(4)(b) does not feature in Article 15(1) of the 2013 Directive.

Background

5. On 2nd September, 2019, L.K. ("the respondent") applied for international protection in the State on the basis that he would face a real risk of suffering serious harm if he was returned to Georgia, his home state. A preliminary Section 15 interview was scheduled with the International Protection Office ("IPO") for 16th September, 2019. The respondent did not receive written notification of this date and was never contacted personally in respect of his appointment by the IPO, the International Protection Accommodation Service, or the hotel accommodation at which he was residing. The respondent contacted his social worker, who arranged an interview for 12th December, 2019. He received an international protection questionnaire ("IPO 2 questionnaire") in Georgian to complete which was to be returned by 6th January, 2020.
6. Four extensions of time were ultimately granted by the IPO until 24th August, 2020 to facilitate the submission of the respondent's IPO 2 questionnaire. An extension was first granted on 7th January, 2020 until 5th February, 2020, in circumstances where the applicant did not have a solicitor to provide legal advice. On 28th January, 2020, the respondent was referred to a solicitor by the Legal Aid Board and further extensions were sought for the purposes of taking instruction, which were granted on 5th February, 2020 and 20th February, 2020. In circumstances where the respondent did not speak English, the services of a Georgian translator were required to complete the IPO 2 questionnaire. The third request for an extension of time was initially refused by the IPO on 4th March, 2020, but subsequently granted on 16th March, 2020 until 1st May,

2020 due to the advent of the Covid-19 pandemic and the related difficulties of arranging in-person translation services. A fourth, and final, extension of time was sought by the respondent's solicitor on 17th July, 2020 and this was granted by the IPO until 24th August, 2020. The respondent attended an in-person appointment with his solicitor in the presence of a translator on 5th August, 2020, and the questionnaire was submitted to the IPO on 25th August, 2020.

7. Separately, the respondent sought to apply for a labour market access permission pursuant to Regulation 11(3) of the 2018 Regulations. On 20th June, 2020, the respondent's solicitor submitted an application to the Labour Market Access Unit ("LMAU") for a workforce permit, as over eight months had expired since his international protection application was first made. This was refused by a letter dated 28th August, 2020 for the following reason: "*The delay in issuance of a first instance decision is attributable to you"*. It was further noted that the respondent had not returned his IPO 2 questionnaire despite same being issued on 12th December, 2019. Accordingly, the LMAU concluded that the respondent did not meet the conditions for the granting of a labour market access permission under Regulation 11(4).

8. On 11th September, 2020, the respondent's solicitor requested a review of the first instance decision pursuant to Regulation 20(1)(e) of the 2018 Regulations as a matter of urgency, in circumstances where the respondent had recently had a child and his weekly allowance of €38 was not sufficient to cover his family expenses. In a decision dated 2nd December, 2020, the Review Officer affirmed the decision of the LMAU, taking the view that the delay in the issuance of the respondent's first instance decision could be attributed to his actions by reason of failing to attend his Section 15 interview and return the IPO 2 questionnaire within a reasonable timeframe. In the absence of a

valid permission, the respondent worked illegally in the State between 12th November, 2020 and 1st January, 2021.

9. The respondent's solicitor submitted an appeal to the International Protection Appeals Tribunal ("IPAT") pursuant to Regulation 21 of the 2018 Regulations, which was refused in a decision dated 3rd March, 2021. Therein, the Designated Member of IPAT noted that she was obliged to apply the wording of Article 15(1) of the 2013 Directive over the Irish transposing Regulations, in line with the Court of Justice of the European Union ("CJEU") judgment in *Minister for Justice & Equality & Others v. Workplace Relations Commission & Ors* (Case C-378/17). In examining the issue of delay, the Designated Member relied on the recent judgment of the CJEU in *KS and MHK v. International Protection Appeals Tribunal & Ors* and *RAT and DS v. Minister for Justice and Equality* (Joined Cases C-322/19 and C-385/19) ("*KS*"), in which it was held that delay in the processing of an application for international protection within the meaning of Article 15(1) may be attributed to the applicant where he or she has failed to cooperate with the competent national authorities.

10. Based on the evidence before her, the Designated Member did not accept that Covid-19 was the delaying factor in the respondent's case. She considered that solicitors were regarded as "*essential services*" throughout the pandemic and did not accept that there was a dearth of Georgian translators for such an extended period of time. The Designated Member was satisfied that the respondent had not cooperated in the processing of his application for international protection and concluded:

> "*The appellant herein failed to engage in the process between 2 September 2019 and 11 December 2019 – a period of approximately 14 weeks during which time there was no pandemic. There is no explanation before the Tribunal in relation to the gap between the assignment of the appellant's legal representatives by the*

Legal Aid Board on 28 January 2020 and what appears to be a first appointment on 11 March 2020; again, this is a period of approximately 6 weeks, and only the final weeks were affected by the pandemic. The Tribunal notes in passing that the appellant's address is given as Bolton Street Dublin 1 and that his legal representative's office is located in the Capel Building, Dublin 7, approximately a 10/15-minute walk away. Even though some restrictions began to be imposed from 12 March 2020, the country did not enter full lockdown until 27 March 2020 …

Taking all the documents and evidence into account, the Tribunal is satisfied that the delay in issuing the first instance decision can be attributed to the Appellant himself. He has not cooperated in the processing of his application for international protection."

11. The respondent was ultimately issued a certificate of permission by the LMAU by letter dated 8th June, 2022, and since 6th February, 2023, has taken up a full-time job as a construction labourer.

High Court Proceedings ([2022] IEHC 441 and [2023] IEHC 210)

12. The respondent sought leave to apply for judicial review to quash the decision of the IPAT refusing the respondent labour market access, in addition to seeking a declaration that the appellants failed to adopt the measures necessary to transpose and/or implement Article 15(1) of the 2013 Directive and damages for same.

13. In a judgment dated 9th June, 2022 ([2022] IEHC 441; "the first judgment"), Heslin J. addressed the two principal grounds on which IPAT's decision was challenged by the respondent. First, it was contended that IPAT's finding that the delay in issuing a first instance decision could be attributed to the respondent and/or that he failed to cooperate in the processing of his application was unreasonable and irrational. Following a

detailed analysis of IPAT's decision and the evidence before it (see paras. 104 – 156 of the first judgment), Heslin J. concluded that a decision which attributed delay wholly to the respondent was not evidence-based and "*fl*[ew] *in the face of fundamental reason and common sense"* (*State (Keegan) v. Stardust Victims Compensation Tribunal* [1986] I.R. 642). Further, he held that IPAT's decision was made in breach of the principles of fair procedure and natural and constitutional justice, in circumstances where the decision-maker did not engage in a meaningful way with the reasons for the extensions granted by the IPO and the respondent was never put on notice of a potential finding of non-cooperation on his part.

14. Second, it was alleged that the appellants failed to properly transpose Article 15(1) of the 2013 Directive. The trial judge found there to be a "*material difference*" between the wording of Article 15(1) and that employed in Regulation 11(4)(b) of the 2018 Regulations, which amounted to a failure to properly transpose the former. The application of the Irish transposing provision gave rise to a situation whereby a labour market access permission could be refused if *any* delay could be "*attributed in part*" to an international protection applicant, even if delay was attributable to an oversight on the part of the State or the Covid-19 pandemic, as arose in this case. The trial judge held that while the Designated Member purported to rely on the wording of Article 15(1) in her decision, the approach set out in Regulation 11(4)(b) was applied in substance. It was considered that the conclusion that all delay from 2nd September, 2019 to 25th August, 2020 was attributable to the applicant was inconsistent with material findings in the body of IPAT's decision "*which plainly recognise that at least parts of this very delay were not attributed to the applicant, but to the Covid-19 pandemic"* (para. 175 of the first judgment). The trial judge concluded that had the State appellants successfully

transposed the 2013 Directive by means of the 2018 Regulations, the Designated Member would not have fallen into error.

15. A resumed hearing subsequently took place on 30th March, 2023 during which arguments were made by both parties as to the respondent's entitlement to "*Francovich* damages." In a judgment dated 26th April, 2023 ([2023] IEHC 210; "the second judgment"), Heslin J. examined the three conditions that must be satisfied for an individual to successfully claim damages against an EU Member State for a breach or failure to implement EU law, as established in the case of *Francovich v. Italy* (Joined cases C-6/90 and C-9/90) [1991] E.C.R. I-5357, and elaborated on in *Brasserie du Pêcheur SA. v. Bundesrepublik Deutschland* and *The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others* (Joined cases C-46/93 and C-48/93) [1996] E.C.R. I-1029 ("*Brasserie du Pêcheur and Factortame*"). These conditions were summarised by O'Donnell J. (as he then was) in *Glegola v. Minister for Social Protection* [2018] IESC 65, [2019] 1 I.R. 539, at p. 556:

> "*The jurisprudence is strict, in requiring, first, that the rule infringed must have been intended to confer rights on individuals, second that the breach of the rule was sufficiently serious, and third, that there is a direct causal link between the breach of the obligation imposed on the State and the damage sustained by the injured party.*"

16. First, Heslin J. found that Article 15(1) of the 2013 Directive intended to confer a right to access the labour market on international protection applicants and was recognised as a reception condition right by the CJEU in *KS*. It was considered that while this right was subject to member states' conditions for granting access to the labour market and was therefore not unqualified, those conditions must ensure that *"applicants have effective access to the labour market*" under Article 15(2). Second, Heslin J. was

satisfied that the appellants' failure to transpose Article 15(1) constituted a sufficiently serious breach of EU law. He characterised the difference between the wording of Article 15(1) and Regulation 11(4)(b) as "*fundamental and material*" which rendered the right of access to the labour market ineffective. He considered that the insertion of the words "*attributed in part*" into the domestic Regulations had the effect of diluting the rights provided for in the 2013 Directive. The trial judge rejected the appellants' contention that obstacles as to the clarity and precision of Article 15(1) necessitated the insertion of "*attributed in part*"; rather, these words had the effect of changing the meaning of the Directive in a material way.

17. Third, the trial judge concluded that there was a direct causal link between the failure to transpose the 2013 Directive and the financial loss sustained by the respondent. A number of findings of fact were considered relevant to the issue of both causation and the quantum of damage, namely, that the respondent did not secure a construction job on obtaining a labour market access certificate on 8th June, 2022 whilst residing in Dublin where he avers jobs in construction were in high demand; that he moved to Kerry in July, 2022, but did not secure a construction job until 6th February, 2023; and that he did not relocate to Dublin to avail of higher paid construction work. The trial judge also found that the maximum wage the applicant appeared to have earned since receiving his labour market access permission was €420.72 a week. From the starting point of 62 weeks and 2 days (the period of time between IPAT's refusal decision and the first High Court judgment), the trial judge deducted three weeks (the period for which he resided in Dublin with a labour market access permission, but without securing work) and subtracted further the seven-week period during which the respondent worked illegally, between 12th November, 2020 and 1st January, 2021. The

damages payable to the respondent was duly calculated as €420.72 multiplied by a period of 52 weeks, giving a total sum of €21,877.44.

Application for Leave to Appeal

18. The appellants were granted leave to appeal to this Court on 31st October, 2023 ([2023] IESCDET 130). The Court considered that this case raised issues of general public importance as to the transposition of the 2013 Directive by way of the 2018 Regulations and the correct application of the liability conditions for *Francovich* damages, insofar as there is a general absence of CJEU jurisprudence on the application of these conditions in cases concerning the asylum system. In the course of case management, the parties filed a Joint Document, which identified three issues to be addressed by this Court:

    (i) Whether the concept of delay for the purposes of Article 15(1) of Directive 2013/33 encompasses only a delay that may be attributed wholly and exclusively to the applicant for international protection, or does it encompass any not insignificant delay that may be attributed to the applicant or that may be considered to constitute 'non-co-operation' by the applicant?

    (ii) Whether a national measure transposing the Directive that provides that a delay that is attributable in part to the applicant for international protection may be attributed to them entirely and preclude access to the labour market constitutes a sufficiently serious breach of EU law such as to give rise to *Francovich* damages?

    (iii) Whether this Court should, or is obliged, having regard particularly to the extant judgment of the CJEU interpreting Article 15(1) of Directive 2013/33/EU in Joined Cases C-322/19 and C-385/19 *KS & MHK IPAT*,

to refer to the CJEU, pursuant to the third paragraph of Article 267 TFEU, a question(s) regarding the appropriate interpretation of Directive 2013/33/EU and especially the concept of "delay" under Article 15(1) thereof as regards decisions refusing access to the labour-market?

Submissions

Application of Article 15(1) in the Impugned Decision

19. As a preliminary issue, the appellants contend that the High Court judge erred in finding that in substance, the Designated Member of IPAT applied the test featured in Regulation 11(4)(b) in her determination of the respondent's culpability for delay, as opposed to that set out in Article 15(1) of the 2013 Directive. The appellants draw attention to the fact that the Designated Member explicitly identified the difference in wording between Regulation 11(4)(b) and Article 15(1), and noted her obligation to apply the latter under EU law. Further, it is submitted that the Designated Member applied the CJEU's interpretation of 'delay' in *KS* to include that which results from a lack of cooperation by the applicant with the competent national authorities, and accordingly, based her findings on matters which were within the control of the respondent and his solicitor, notwithstanding the Covid-19 restrictions and delays arising therefrom. The appellants therefore submit that the issue as to whether the Directive had been correctly transposed into Irish law did not arise and the respondent's claim, based as it was exclusively on incorrect transposition, ought to have been dismissed by the High Court *in limine.*

20. The respondent affirms the High Court's finding that the wording of the Directive, rather than the implementing provisions in the 2018 Regulations, was applied in substance, by the Designated Member. It is submitted that the High Court judge

conducted a detailed and comprehensive analysis of the events preceding the submission of the respondent's IPO questionnaire and correctly identified the periods of delay that could not be attributed to him, including the delay on the part of the State in processing his claim, the time reasonably required to instruct a solicitor with the assistance of a translator, and the serious disruption engendered by the Covid-19 pandemic. The respondent states that the High Court was correct in holding that the IPAT's findings were irrational, unreasonable and lacking an evidential basis in light of these established facts.

Failure to Correctly Transpose Directive 2013/33/EU

21. The appellants submit that the High Court judge erred in finding that the State had failed to correctly transpose and/or implement Article 15(1) of the 2013 Directive by way of Regulation 11(4)(b), and to this end, advance three points. First, the appellants contend that the trial judge erred in law by failing to apply the requisite EU rules on statutory interpretation, which bound him to consider the aims, purposes, context and origin of Article 15(1) when construing the phrase, "*the delay cannot be attributed to the applicant.*" The appellants argue that the trial judge ought to have placed reliance on recitals 11, 23 and 31 of the 2013 Directive, which provide that the objective thereof is to establish standards for the reception of applicants and their access to the labour market; an aim which the appellants contend falls short of obliging member states to grant an automatic right of access. Further, it is submitted that Article 15(2) of the 2013 Directive provides that member states shall assure "*effective*" access to the labour market only, and it is for the respondent to demonstrate why the system in place in Ireland is "*impossible in practice or excessively difficult*" to enforce (Opinion of Advocate General de la Tour in *KS,* para. 74).

22. Second, the appellants submit that it was within the margin of discretion afforded to the State to transpose Article 15(1) by inserting the words "*attributed in part*" into Regulation 11(4)(b). The appellants contend that requiring an applicant to seek legal advice promptly and file their international protection application "*as soon as reasonably practicable*" (see s. 27(1) of the International Protection Act 2015) are appropriate "*conditions for granting access to the labour market*" under Article 15(2) of the 2013 Directive. In this respect, the appellants submit that if delay attributable to an applicant amounts to *significant* delay, then a Member State is entitled under Article 15(1) to deny access to the labour market. Further, the appellants contend that Heslin J.'s finding that the wording contained in Regulation 11(4)(b) exceeded the State's discretionary limits is inconsistent with the finding in *KS* that an applicant's cooperation is the touchstone for determining whether delay can be attributed to him or her. The CJEU therefore does not exclude other considerations aside from the conduct of an applicant as contributing the overall 'delay' in the process and the inclusion of the words. Third, the appellants submit that before the trial judge addressed the issue of potential State liability for incorrect transposition under EU law, he ought to have determined (i) whether it was possible to interpret Regulation 11(4) in conformity with Article 15(1) of the Directive ('sympathetic interpretation'), and if not, (ii) whether Article 15(1) has direct effect in the State, citing, *inter alia* the judgments of the CJEU in *Farrell v. Whitty* (Case C-356/05) and *Poplawski II* (Case C-573/17).

23. The respondent argues that the High Court was correct in finding that the State had failed to correctly transpose the 2013 Directive, notwithstanding the degree of discretion conferred by Article 15(2) on each Member State. The respondent rejects the appellants' contention that Regulation 11(4)(b) constitutes a faithful transposition of Article 15(1) and further notes that three points raised in support thereof were not made

in written or oral submissions before the High Court. The respondent contends that the appellants cannot, on the one hand, stand over the IPAT decision which identified a difference between the wording of the Regulations and the Directive and purported to disapply the former in favour of the latter, while also criticising the High Court's judgment for failing to interpret the Regulation in conformity with the Directive. The respondent submits that the trial judge had adequate regard to the purpose of Article 15(1), which is to ensure that international protection applicants "*have effective access to the labour market*" (Article 15(2)); a reception condition which was recognised by the CJEU as a "right" conferred by the 2013 Directive in *KS* and is expressed as a "facet of human dignity" in Article 20(5) and recitals 11, 25, 35 and Article 1 of the EU Charter of Fundamental Rights ("the Charter").

24. Further, the respondent submits that the trial judge was correct in finding that the insertion of the words, "*attributed in part"* fell outside the margin of discretion afforded to the State, noting as he did at para. 165 of his first judgment that the additional phrase had the effect of denying an applicant labour market access if any insignificant delay could be attributed to him. The respondent accordingly disputes the appellants' interpretation of Article 15(1) which entitles a Member State to deny access to the labour market if delay attributable to an applicant amounts to *significant* delay, notwithstanding other extraneous factors. It is submitted that this approach does not comport with and cannot justify the actual words employed in the transposing Regulations.

***Francovich* Damages**

25. Without prejudice to their argument that there is no transposition failure, the appellants submit that any such infirmity does not satisfy the cumulative *Glegola* criteria so as to merit an award of *Francovich* damages. The appellants emphasise that the trial judge

failed to consider that damages for a breach of EU law are awarded in exceptional cases only (*Tomášová v. Slovakia* (Case C-168/15)), a threshold which they submit is not met in the present case.

26. First, the appellants submit that Article 15(1) does not vest individuals with rights in the *Francovich* sense. To this end, the appellants rely on the CJEU's judgment in *Jutta Leth v. Austria* (Case C-420/11) in which it was held that a failure by member states to undertake an environmental impact assessment in breach of Directive 85/337/EEC did not of itself confer 'individual rights' so that affected individuals might recover pecuniary loss; the context and objectives of the 2013 Directive must also be considered. Further, the appellants note that while it is established in the case-law of the CJEU that the right to asylum is protected by Article 18 of the Charter, they point to the absence of CJEU case-law on the right to work under EU law with potential *Francovich* damages liability. The appellants further reject the High Court finding that the judgment in *KS* vests international protection applicants with a right to access the labour market.

27. The respondent submits that Article 15(1) intends to confer a specific right of labour market access on applicants for international protection, once they have been within the process for a specified amount of time. The respondent relies on the Opinion of Advocate General de la Tour in *KS* in support of his contention that the 2013 Directive and Article 15 thereof is intended to "*guarantee the effective protection of the applicant in the host Member State … in a way which supports his or her fundamental rights, in particular his or her dignity, and ensures equal treatment*" (para. 78). The respondent also refers to the judgment in *NHV v. Minister for Justice & Equality* [2018] 1 I.R. 246, in which the relationship between the right to work and human dignity was recognised by this Court. In response to the appellants' submission that the respondent must

demonstrate why the system in Ireland is ineffective for accessing the labour market, he argues that a situation whereby the respondent was unable to work and consequently could not provide for his family and child on an allowance of €38 a week constitutes a clear example of the system's ineffective protection of rights.

28. With regard to the second *Francovich* condition, both parties refer to the "*decisive test*" for finding that a breach of EU law is sufficiently serious, as set out by the CJEU in *Brasserie du Pêcheur and Factortame*: "*whether the Member State ... manifestly and gravely disregarded the limits of its discretion.*" Further factors that a national court may take into consideration in its assessment were set out at paras. 56 and 57 of that judgment:

    "*56. The factors which the competent court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national ... authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law.*

    57. On any view, a breach of [EU] law will clearly be sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established, or a preliminary ruling or settled case-law of the Court on the matter from which it is clear that the conduct in question constituted an infringement."

29. Applying the above principles to the present case, the appellants submit that Article 15(1) does not lack clarity or precision insofar as Article 15(2) renders access to the labour market conditional and the Directive gives no guidance as to what acts constitute

delay attributable to an international protection applicant, or what degree of delay triggers this provision. Heslin J. therefore erred in law in finding that the phrase, "*the delay cannot be attributed to the Applicant*" was clear and comprehensible (para. 45 of second judgment). Further, it is contended that Heslin J. did not find that the alleged failure to transpose Article 15(1) was intentional or voluntary, Ireland has not been criticised by the European Commission for its implementation of Article 15(1) of the Directive, the CJEU considered Regulation 11(4)(b) in *KS* without any adverse comment to that regard, and the trial judge gave no weight to the fact that there is no prior ruling of the CJEU on the type of conduct of an applicant that contributes to delay in the sense of Article 15(1). Ultimately, the appellants contend that the State did not "*manifestly and gravely disregard the limits of its discretion*" when transposing Article 15(1) in the form of Regulation 11(4).

30. The respondent contends that the State's erroneous transposition of Article 15(1) was a "*deliberate and voluntary act*". He highlights the fact that no reason on affidavit has been provided as to why the words "*attributed in part*" were inserted in the transposing Regulations. He further contends that the CJEU's decision in *KS* ought to have brought the infirmities of Regulation 11(4) to the attention of State appellants, and IPAT endeavoured to mitigate the failure of transposition by purporting to rely upon the wording of the Directive and disapply the Regulation. It is submitted that the High Court correctly found that the discretion afforded to the State under Article 15(2) to set out conditions for implementation cannot undermine the clear and precise rule in Article 15(1).

31. With regard to the third *Glegola* condition, the appellants submit that the trial judge erred in law in his second judgment by applying the 'but for' test to the issue of causation, when the correct approach is to assess whether there is a "*direct causal link*

between the infringement … and the harm suffered" (*Grossmania,* Case C-177/20). The appellants contend that no direct loss flows from the incorrect transposition of Article 15(1); rather, if the respondent sustained any financial loss at all, this arose solely from the interpretation and application of Art 15(1) by the Designated Member of IPAT in the impugned determination refusing labour market access permission. The respondent submits that the direct and causal link between the financial loss sustained by the respondent, on the one hand, and breach, on the other, is clear from the facts of the present case, because as a result of the decisions of the LMAU and IPAT, based on an application of the incorrectly transposed 2018 Regulations, the respondent did not have the ability to work and earn a wage.

Access to the Labour Market - Discussion

32. Leaving aside for a moment the differences in wording between the 2013 Directive and the 2018 Regulations, one thing is clear: pending a decision on an application for international protection, an individual who has applied for international protection is entitled to have access to the labour market no later than nine months after the application was first made. That is the position under the Regulations and the Directive. Thus, whether one has regard to the Regulations or the Directive, once a period of nine months has elapsed, and assuming that a decision on the application for international protection has not been concluded by that stage, an entitlement of access to the labour market arises. As noted earlier, under the provisions of the Regulations, an application can be made to the Minister for a labour market access permission eight months after the initial application for international protection has been made. The requirement to grant permission to access the labour market does not arise either under the Regulations or the Directive if there is a delay in making the first instance decision which is attributable to the applicant. Before considering the key issue in these proceedings,

namely, the difference in wording between the Regulations ("*cannot be attributed or attributed in part to the applicant*"), and the Directive ("*cannot be attributed to the applicant*"), it would be helpful to examine the time sequence that has occurred in this case in the first instance, by reference to the High Court judgment.

<u>The High Court Judgment</u>

33. There were two issues before the High Court in respect of the decision of IPAT. The first challenge to the decision of IPAT was on the basis that its findings were irrational and unreasonable. The second aspect concerned an argument that the 2013 Directive had not been properly transposed by reason of the difference in wording between the Directive and the Regulations in relation to delay. I will return to this issue later.

34. As to the first issue, it is fair to say that the trial judge carefully analysed and assessed the period of time between the application for international protection by the respondent, and the refusal by the LMAU to grant him a labour market access permission. That the trial judge was critical of the decision of IPAT, on the basis that it found that the respondent "*failed to engage in the process*" from 2nd September, 2019 to the 11th December, 2019 is, in my view, completely justifiable. It is quite clear that the respondent was not notified of his first appointment for an interview, and it was he who initiated the contact which led to his first appointment with the IPO. Therefore, I agree with the view of the trial judge that no blame can be attached to the respondent for that period of delay.

35. The second period of delay concerns the period between 12th December, 2019 and 6th January, 2020 when the respondent was due to furnish a completed IPO questionnaire. The IPO questionnaire was not completed by that date, and a further extension of time was provided until 5th February, 2020. The reason for this extension was that the respondent did not have a solicitor at that time to assist him in completing the

questionnaire. On 28th January, 2020, the respondent was referred to a solicitor by the Legal Aid Board. Thereafter, his solicitor sought a number of extensions for the purpose of taking instructions from the respondent. It seems to me that it would not be reasonable to attribute delay to the respondent in respect of the period between 12th December, 2019, when he had a preliminary interview with the IPO, and 28th January, 2020 when he was first referred to a solicitor to advise in relation to his international protection application. The trial judge at para. 33 of his judgment made an observation that "*in order to be effective, a right to obtain legal advice necessarily involves being afforded sufficient time to obtain such advice*." It is not unreasonable to observe that some period of time would be necessary for an applicant for international protection to avail of legal advice, following a referral to a solicitor. Coupled with that is the fact that in this case, the respondent is a Georgian national, and would have required the assistance of a Georgian translator, in circumstances where it appears that he does not speak English. Therefore, I do not think any issue could arise in relation to any delay in the immediate aftermath of the appointment of his solicitors. Indeed, those solicitors sought, and obtained, further extensions on 5th February, 2020 and 20th February, 2020 respectively. It was always going to be necessary for the respondent to have legal assistance in the completion of the questionnaire, and further, given his lack of English, he was also going to require the assistance of a translator. No objection could be taken to any time lapse which occurred up to this period.

36. A further extension of time for the completion of the questionnaire was sought by his solicitors on 4th March, 2020, but this was refused by the IPO. It was explained by the respondent's solicitor that a number of appointments had been made with a Georgian translator, but these had to be cancelled as a translator could not be arranged in person.

It appears that appointments were cancelled on 11th, 13th and 16th March, 2020 respectively.

37. Matters then took an unexpected turn. The Covid-19 pandemic broke out on an unsuspecting world. As of 12th March, 2020, steps were taken to "lock down" the country to limit the spread of Covid-19. This, unsurprisingly, had many consequences, not least in relation to the processing of applications for international protection. In this context, as already mentioned, the IPO granted a further extension of time on 16th March, 2020 to all applicants until 1st May, 2020. It is the case that this extension was expressly provided by reason of "Covid-19 considerations", according to the affidavit of the respondent and a letter from the Department of Justice dated 2nd December, 2020.

38. There is no doubt that the arrival of the Covid-19 pandemic disrupted life everywhere. It would not be a surprise to learn that in the immediate aftermath of the government announcements of restrictions on daily life and every aspect of day-to-day activities, there would be disruptions to the way in which people worked, interacted, and carried on business. It is, therefore, understandable that in the immediate aftermath of the announcement of restrictions that appointments made by the respondent's solicitors with Georgian translators for the purpose of assisting the respondent might be cancelled. Details of appointments which were cancelled were set out by the solicitor for the respondent in his affidavit, and they consisted of appointments made for 11th March, 13th March, and 16th March, 2020. Presumably, the appointment for 11th March was cancelled for reasons other than the onset of Covid-19, as the announcement as to restrictions did not occur until 12th March, 2020. Further, it should be noted that these are the only dates on which it is said that appointments booked by the respondent's solicitor with a Georgian translator were cancelled. There is no suggestion that any other appointments had been made or cancelled prior to that date. Accordingly, it seems

clear that there was some disruption to the efforts made by the respondent's solicitor to take instructions from him which necessitated the assistance of a Georgian translator. However, there is no evidence to explain the delay between the date when the respondent was first referred to a solicitor and the date of the first appointment with a Georgian translator (which had to be cancelled). That is, in itself, a period of almost six weeks.

39. Ultimately, it appears that an appointment for this purpose was made for 5th August, 2020. It should be noted that a further extension of time had been sought on 17th July, 2020 (the fourth such extension of time), and this was granted until 24th August, 2020. Whilst accepting that Covid-19 played a part in disrupting day-to-day activities for most parts of society, and that this was indeed recognised by the IPO in its decision to grant a general extension of time for the purpose of completing questionnaires, there is no explanation as to why there was delay on the part of the respondent between 16th March, 2020 when the general extension of time was granted to all applicants, and 17th July, 2020, when the fourth extension of time was sought. Looked at overall, there is little or no explanation for the delay in taking instructions from the respondent from 28th January 2020 onwards, other than a general observation by his solicitor that he could not take instructions without the assistance of a translator. In fact, although the fourth extension was granted until 24th August, 2020, the questionnaire was not actually returned until 25th August, 2020, one day beyond the period by which time had been extended for the purpose of completing the questionnaire.

40. While there was clearly significant delay in dealing with the questionnaire which was required to be submitted to the IPO, it should be noted that the respondent, through his solicitor, submitted an application to the LMAU for a workforce permit on 20th June, 2020. Under the 2018 Regulations, such an application could be made once eight

months had expired since his application for international protection was first made. The trial judge commented in the course of his judgment on the differences between the form required to be completed when making an application to the LMAU, and the questionnaire to be furnished by the respondent to the IPO. It is undoubtedly the case that the form seeking access to the labour market is far less detailed and complicated than the questionnaire. Nonetheless, it requires an applicant for access to the labour market to fill in the details required, and it is puzzling that it was possible for the solicitor to do this on behalf of the respondent (which must have necessitated taking instructions from him) whilst it remained impossible for him to complete the questionnaire. Ultimately, the LMAU wrote to the respondent indicating that his application for access to the labour market was refused on the basis that "*the delay in issuance of the first instance recommendation is attributable to you*".

41. There was an error contained in the letter of the 28th August, 2020 by which the LMAU rejected the application of the respondent to have access to the labour market. It stated that the respondent had been issued with the international protection questionnaire on 12th December, 2019, but that the form had not been returned to the IPO. As is now known, the questionnaire was, in fact, returned on 25th August, 2020, a day later than the previous extension he had been granted. However, insofar as it is stated that the questionnaire had not been returned, that was an error.

42. The decision of the LMAU was not accepted by the respondent, and while it is not necessary to outline in detail the challenges to that decision, suffice it to say that its initial decision was the subject of a review, followed by an appeal to IPAT. That decision also found against the respondent. IPAT's decision was then the subject of judicial review in the High Court, the decision which is now under appeal.

43. I have to say that, while the trial judge engaged in an extensive analysis of the timeline, the evidence, the correspondence, and the fact that a number of extensions were granted by the IPO to enable the respondent to complete the questionnaire, it seems to me that, apart from the initial indication that a number of appointments with the respondent and a Georgian translator had to be cancelled up to 16th March, 2020, and accepting that there was a degree of disruption caused by restrictions put in place by the State to deal with Covid-19 up to a period in June of 2020, there is simply no satisfactory explanation provided on behalf of the respondent as to the lengthy delay in submitting the questionnaire. Even if one assumed that it was difficult for solicitors to arrange consultations with clients and interpreters until such time as the Covid-19 restrictions were lifted, and bearing in mind that there was disruption to society as a whole as a result of Covid-19, that cannot explain the overall delay in submitting the respondent's questionnaire, without which his application for international protection could not be processed.

44. I acknowledge that not all of the delay in this case can be laid at the door of the respondent. As I have already accepted, the delay in the period between his initial application on 2nd September, 2019 up to 12th December, 2019 cannot be attributed, in any shape or form, to the respondent. His questionnaire was to be returned by 6th January, 2020. In circumstances where he was first referred to a solicitor on 28th January, 2020, I would have thought that, once again, there can be no question of delay being attributed to the respondent for delay in respect of a reasonable period of time after 28th January, 2020 for the purpose of completing the form. Indeed, extensions of time were granted to facilitate this. Nevertheless, by 4th March, despite the fact that extensions had been given to the respondent on 5th February and 20th February, 2020, the questionnaire had still not been completed. It was only by reason of the onset of

Covid-19, and the restrictions associated with that, that a further extension was granted to all applicants on 16th March, 2020 which was to avail the respondent until 1st May, 2020. Indeed, it is noteworthy that it was not until 17th July, 2020 that a further extension was sought. The fact that the IPO had been prepared to grant a number of extensions of time in which to furnish the questionnaire seems to me to be irrelevant. The application could not be processed when the respondent had failed to comply with his obligations to provide the necessary information. The IPO was entitled to give further extensions as, without the completed questionnaire, the application for international protection could not be considered.

45. I am therefore of the view that the trial judge was in error in his approach to the question of delay on the part of the respondent. In those circumstances, I am of the view that there were a number of periods over the nine months from when the respondent first applied for international protection where there was significant delay on his part in providing the questionnaire which the IPO required to process his application.

Concept of Delay for the Purposes of Article 15(1) of the Directive

46. My view that there was significant delay on the part of the respondent does not, in itself, resolve this appeal. A key issue in this case concerns the meaning of the word "*delay*", as that word is used in the 2013 Directive, and more particularly, the phrase "*and the delay cannot be attributed to the applicant*", in Article 15(1) thereof.

47. It goes without saying that an application for international protection must be considered carefully by the authorities in the member state where that application is made. A decision cannot be made without the cooperation of the applicant in supplying the necessary information to enable that consideration to take place. A period of time is required for that purpose, and in circumstances where the member state has not completed its consideration of the application within nine months of the date when the

application was first made, the applicant is entitled to have access to the labour market in that member state. That entitlement is not unconditional. The Directive, in recognising that there may be a delay in making a decision on such an application, goes on to provide that it is only where "*the delay cannot be attributed to the applicant*" that the obligation of the member state to ensure access to the labour market arises. In this case, the application for international protection was made on 2nd September, 2019 and therefore, provided that there was no delay that could be attributed to the respondent, he would have been entitled to access to the labour market on 2nd June, 2020. However, in this case, there can be no doubt that there was significant delay on the part of the respondent in providing the completed questionnaire to the IPO to enable a decision to be made on his application.

48. I have already set out in detail why I do not think the respondent can be criticised for any delay between the period commencing on 2nd September, 2019, until 12th December, 2019. Thereafter, there can be no dispute that the respondent was entitled to obtain legal advice in relation to completing the questionnaire, and for that purpose to obtain the services of a translator. That necessarily will take some time, as observed previously. Even allowing for the entirely unforeseeable circumstances of the Covid-19 pandemic, the length of delay in this case is difficult to understand and, in truth, there is no satisfactory explanation for it. It should be borne in mind that, but for the Covid-19 pandemic, the IPO would not have been willing to give a further extension of time to the respondent to complete the questionnaire. It was only by reason of the Covid-19 pandemic that a further extension of time was granted to all applicants up until 1st May, 2020. In circumstances where not all of the delay can be attributed to the respondent, should the 2013 Directive be understood as meaning that it is only where

the delay is wholly, or exclusively, that of the respondent, that the obligation of the State to ensure access to the labour market does not arise?

49. In order to obtain some guidance in this regard, the decision of the CJEU in *KS and MHK v. International Protection Appeals Tribunal & Ors* and *RAT and DS v. Minister for Justice and Equality* (Joined Cases C-322/19 and C-385/19) ("*KS*"), is of relevance. In the first of those joined cases, the two applicants, KS and MHK, came to Ireland from the U.K. One was a national of Pakistan, and the other was a national of Bangladesh. A decision in each case was taken to transfer the respective applications for international protection to the U.K. under the Dublin III Regulation (Council Regulation (EC) No. 604/2013). They both made applications for labour market access, which were refused on the basis that they did not enjoy a right of access in circumstances where a decision had been taken to transfer their applications for international protection. Those decisions were appealed, and the appeals were rejected by IPAT. They then both brought judicial review proceedings in the High Court.

50. A number of questions were posed by the High Court to the CJEU in relation to the interpretation of Article 15(1) of the 2013 Directive. Two other individuals were involved in the second of the joined cases: RAT, an Iraqi national who applied for international protection in Ireland, but in respect of whom a decision was made to transfer her to the U.K. under the Dublin III Regulation, and finally, DS, another Iraqi national who lodged an application for international protection initially in Austria, left Austria before a decision was taken on his application, claimed to have returned to Iraq, and then travelled directly to Ireland where an application for international protection was lodged. A decision was made in his case to transfer him to Austria. The view was taken in relation to both of those applicants that, as they were the subjects of decisions to transfer them to another member state, they no longer had the status of "*applicant*"

and were, therefore, "*recipients*" within the meaning of the 2018 Regulations. As a result, they could not be granted access to the labour market in Ireland. In their cases, a number of questions were referred to the CJEU by IPAT, particularly having regard to the interpretation of Article 15(1) of the Directive. One of the questions raised by the Tribunal in those cases concerned the type of conduct which would amount to delay attributable to the applicant within the meaning of Article 15(1).

51. The CJEU in its judgment in the first instance concluded at para. 73 that:

> "*Article 15 of Directive 2013/33 must be interpreted as precluding national legislation which excludes an applicant for international protection from access to the labour market on the sole ground that a transfer decision has been taken in his or her regard under the Dublin III Regulation".*

52. The court went on at para. 74 as follows:

> "*74. By the second question referred in Case C-385/19, the International Protection Appeals Tribunal asks, in essence, what acts may constitute a delay attributable to the applicant for international protection within the meaning of Article 15(1) of Directive 2013/33.*
>
> *75. It should be noted at the outset, as the Advocate General noted in point 99 et seq. of his Opinion, that Directive 2013/33 gives no guidance in that regard."*

53. Thus, it is clear from the outset that the Directive itself gives no guidance as to what acts constitute a delay attributable to an applicant for international protection.

54. The CJEU went on, at para. 76 to 80, as follows:

> *"76. Accordingly, it is necessary to refer to the rules of common procedures for granting international protection established by Directive 2013/32, which,*

as stated in paragraph 60 above, must be taken into account in interpreting the provisions of Directive 2013/33.

77. It thus follows from Article 31(3) of Directive 2013/32 that a delay in the examination of his or her application for international protection is attributable to the applicant where that applicant fails to comply with his or her obligations under Article 13 of that directive. That provision provides that applicants have an obligation to cooperate with the competent authorities with a view to establishing their identity and other elements referred to in Article 4(2) of Directive 2011/95, namely their age, background, including that of relevant relatives, nationality (or nationalities), country (or countries) and place(s) of previous residence, previous asylum applications, travel routes, travel documents and the reasons for applying for international protection. The applicant's obligation to cooperate means that he or she must supply, as far as possible, the required supporting documents and, where appropriate, the explanations and information requested (judgment of 14 September 2017, K., C-18/16, EU:C:2017:680, paragraph 38).

78. Article 13 of Directive 2013/32 also allows Member States to impose upon applicants other obligations necessary for the processing of their application, inter alia, to require them to report to the competent authorities or to appear before them at a specified time and place and to inform the authorities of their current place of residence, and even provide that applicants may be searched or photographed or have their statements recorded.

79. It follows, in essence, from the foregoing considerations that a delay in the processing of an application for international protection may be attributed to the applicant where he or she has failed to cooperate with the competent

national authorities. Bearing in mind the need for uniform interpretation and application of EU law, as recalled in paragraph 57 et seq. above, this interpretation is called for even where, as a result of a specific derogating act, in the present case Protocol No 21, Directive 2013/32 does not apply in the Member State concerned.

80. In the light of the foregoing considerations, the answer to the second question referred in Case C-385/19 is that Article 15(1) of Directive 2013/33 must be interpreted as meaning that a delay in the adoption of a decision at first instance concerning an application for international protection which results from a lack of cooperation by the applicant for international protection with the competent authorities may be attributed to that applicant."

55. The passage cited above makes it clear that an applicant for international protection has an obligation to cooperate with the competent authorities in a member state in the processing of their application. This includes providing relevant information as to their nationality, background, and so on. However, as noted, the CJEU observed that the Directive does not give any guidance as to what acts may constitute a delay attributable to an applicant.

56. In the present case, there has been a delay in processing the application for international protection. No application for international protection can be processed without the provision of information which the questionnaire referred to previously is designed to elicit. In this case, the questionnaire was not furnished until 25th August, 2020, almost 12 months after the respondent arrived in the country. In that sense, the State cannot be faulted for the fact that the application for international protection had not been determined prior to that date. It should be recalled that the respondent made his application for labour market access on or about 20th June, 2020. That was at a time

when the necessary information had not been provided by him to the IPO for the processing of his application for international protection. On one view of the facts and circumstances in this case, it might be said that the delay in processing the application for international protection was entirely that of the respondent, in circumstances where the IPO simply could not process his application in the absence of him cooperating with the IPO with a view to establishing the various matters referred to in Article 4(2) of Directive 2011/95/EU of the European Parliament and of the Council of 13th December, 2011.

57. However, for reasons previously explained, some of the delay over the nine-month period involved delay which could not fairly be attributed to the respondent, in particular, the period of time between September and December of 2019. It is also an essential part of any system for processing such claims that those seeking international protection be provided with assistance, including legal assistance and translation services, where necessary, in order to assist them in complying with their obligations. That is a normal part of the process. In the course of these proceedings, evidence was given on behalf of the State as to the length of time it normally takes for the questionnaire to be submitted, being on average a period of approximately seven weeks. In this case, the application simply could not be processed because of the delay in furnishing the questionnaire. This Court is conscious of the fact that the onset of the Covid-19 pandemic disrupted the processing of such applications. However, allowing for the difficulties caused by the Covid-19 pandemic, some of the delay that has taken place in this case is simply inexplicable and can only be attributable to the respondent. That begs the question: how are the various elements of delay in processing this application for international protection to be attributed? As was noted by the CJEU in *KS*, the 2013 Directive itself gives no guidance as to what acts may constitute a delay

attributable to an applicant for international protection. In considering what is meant by delay in Article 15(1), is it appropriate to consider the overall period of time and to assess the extent of the delay that can be attributed to the respondent himself, as opposed to any delay on the part of the State? Is it possible to say that, in circumstances where there is significant unexplained delay on the part of an applicant for international protection, that is delay that can be attributed to the applicant, even though it is clear that there has been some delay on the part of the State itself? In other words, can part of the overall delay be "*attributed to the applicant*" for the purposes of the Directive, or must the delay in processing the application be exclusively that of the applicant? This requires consideration of the arguments in relation to the transposition of the Directive which will be considered further below.

58. It will be apparent that these questions do not admit of a clear answer, and in those circumstances, it appears to the Court that it would be appropriate to refer a question to the CJEU pursuant to Article 267(3) TFEU, with a view to clarifying what acts constitute a delay attributable to an applicant for international protection.

The Transposition of the 2013 Directive

59. A further issue arises in relation to the transposition of the 2013 Directive by means of the 2018 Regulations. When the respondent's appeal against the decision not to allow him access to the labour market came before IPAT, the decision-maker took the view that because of the difference in wording between the Directive and the 2018 Regulations, it would be appropriate to disapply the Regulations. Therefore, the matter proceeded before IPAT on the basis of the wording used in the Directive and not that used in the 2018 Regulations. The Directive enables a person to have access to the labour market when a decision on their application has not been made within the period of nine months, and the delay in taking the decision "*cannot be attributed*" to the

applicant, as opposed to the wording used in the 2018 Regulations: "*cannot be attributed, or attributed in part"* to the applicant for international protection. The High Court judge concluded that the decision-maker in IPAT, while noting the difference in wording and purporting to disapply the 2018 Regulations, did not, in fact, apply the wording of the Directive but rather had regard to the wording used in the 2018 Regulations in substance. However, regardless of that view on the part of the trial judge on that issue, this Court is of the view that part of the delay in this case cannot be attributed to the applicant, namely, the period between September, 2019, when he first made his application for international protection, and the date in December, 2019, when he attended at the IPO and was furnished with the questionnaire. This Court is also of the view that there was significant delay on the part of the respondent in completing the questionnaire and therefore, there was delay attributable to him. It is therefore necessary to consider: what is the effect and meaning of the phrase "*attributed in part*" as used in the 2018 Regulations? Does the inclusion of that phrase in the 2018 Regulations mean that the State has failed to properly transpose the 2013 Directive?

60. In considering whether or not there has been a failure to transpose the Directive correctly, it is impossible not to have regard to the fact that the wording in the 2018 Regulations is different from that used in the Directive, by reason of the inclusion of the additional words, "*attributed in part*". The trial judge in the course of his second judgment, while acknowledging that each member state had some degree of discretion in the manner in which it could transpose the Directive, stated at para. 31:

> "*It seems to me that, by inserting into domestic Regulations these particular words (not found in the Directive) the effect was to dilute the right provided for in the Directive in a clear, and sufficiently serious way, which rendered access*

to the labour market ineffective insofar as the Applicant in this case was concerned."

61. In dealing with this matter in his first judgment, he observed, at para. 172, as follows:

> "*In my view, there is a fundamental and material difference as between the wording found in Article 15(1) and that employed in Regulation 11(4)(b) of the 2018 Regulations which amounts to a failure to properly transpose the former.*"

62. In this context, it was stated on behalf of the appellants that the trial judge erred in law by failing to apply EU rules on statutory interpretation in failing to consider not only the wording of Article 15(1) of the Directive, but also its aim, purpose, context and origin (see *HK v. Service fédéral des Pensions* (Case C-45/22); *Imperial Tobacco Bulgaria*, (Case C-55/21), and *NovaText GmbH v. Ruprecht-Karls-Universität Heidelberg* (Case C-531/20). It was said that, only after carrying out such an exercise, could it be considered whether or not there had been a failure to properly transpose a Directive. It was argued on behalf of the appellants that the words "*attributed in part*" came within the margin of discretion afforded to member states when one considered the wording of the Directive together with its aims, purpose, context and origin. The appellants placed reliance on a number of recitals in the Directive to support their arguments. In the first instance, reference was made to Recital 11, which provides as follows:

> "*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.*"

63. Reference was also made to Recital 23, which states:

> "*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.*"

64. The point was made on behalf of the appellants that Recital 23 falls short of obliging member states to grant access to the labour market. The point was also made that Recital 31 states that the objective of the Directive is to "*establish standards for the reception of applicants in Member States*" and consequently, it was argued that that objective does not confer an automatic right of access to the labour market.

65. It may be correct to say that the obligation contained in Article 15 is to provide "*effective access to the labour market*", as opposed to creating an automatic right of access once a nine-month period has elapsed from the date when the application for international protection was lodged. Nevertheless, Article 15(1) does state that member states "*shall ensure that applicants have access to the labour market …*". However, Article 15(2) of the Directive goes on to provide that:

> "*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*".

66. Thus, there is force in the arguments of the appellants that the right to have access to the labour market is not absolute.

67. It was further contended on behalf of the appellants that the obligation contained in Article 15 is to provide "*effective access to the labour market*", once a nine-month period of time has elapsed since the making of an application for international protection. The point was therefore made that the use of the words "*attributed in part*" did not render access to the labour market ineffective. Reference was made to the

comments of Advocate General de la Tour in *KS*, at para. 74, where he observed as follows:

> *"74. First, while Member States are entitled to introduce conditions other than those expressly mentioned in Article 15(1) of that directive, they must nevertheless ensure effective access to the labour market. In other words, in the absence of EU rules, the conditions determined by the Member States for access to that market must not render impossible in practice or excessively difficult the exercise of rights conferred by the EU legal order. In that context, a national rule which seeks to deprive the applicant of that status on the ground that he or she is subject to a transfer procedure seems contrary to the principle laid down by the EU legislature in so far as it prevents the applicant from enjoying the rights associated with that status.*
>
> *75. Secondly, while Member States may, for reasons relating to their employment policy, give priority to certain categories of persons, those persons must be EU citizens, nationals of the European Economic Area or legally resident third-country nationals. It follows from Article 15(2) of Directive 2013/33 that reasons relating to national employment policy do not justify drawing a distinction between applicants based on whether their application is to be examined by the host Member State or by the Member State which the competent national authorities have designated as responsible on the basis of the criteria laid down by Regulation No 604/2013.*"

68. Accordingly, the appellants consider that the trial judge erred by concluding that the use of the words "*attributed in part*" "*rendered access to the labour market ineffective*" (see para. 31 of the second judgment).

69. There are a number of observations that might be usefully made at this point. As mentioned previously, an applicant has obligations to provide the necessary information to the member state in order for that state to consider the application for international protection, as provided for in s. 27(1) of the International Protection Act 2015:

> *"It shall be the duty of an applicant:*
>
> *(a) to submit as soon as reasonably practicable all the information needed to substantiate his or her application;*
>
> *(b) to co-operate in the examination of his or her application and in the determination of his or her appeal in relation to that application, if any, ..."*

70. The manner in which this obligation is met is, in the first instance, by the completion of the questionnaire which, in this case, was provided to the respondent on 12th December, 2019. That questionnaire was not, in fact, returned to the IPO until 25th August, 2020, a period in excess of nine months. No decision could be made on the application for international protection until such time as the questionnaire had been completed by the respondent. That there was delay in making a decision on the respondent's application for international protection is not in question. It is equally the case that there can be no doubt that, in every application for international protection, some time will elapse in the processing of an application, by reason of the requirement to obtain legal advice and, where necessary, the need to obtain the services of a translator. Information, once provided by an applicant, has to be considered and assessed by the appropriate authorities. To that extent, there will always be some in-built delays in the system. That, no doubt, is why a period of nine months is set out in Article 15(1) of the 2013 Directive, before which it is not considered obligatory to provide access to the labour market.

71. I have already set out the circumstances of this case, and the fact that there was some delay on the part of the State in dealing with the respondent's application, notably in the period between 2nd September, 2019 and 12th December, 2019. The need to obtain legal advice and the services of a translator will necessarily result in some element of delay, for which no criticism or blame can be attached. That said, I have also set out the fact that there have been lengthy, unexplained delays on the part of the respondent in completing his questionnaire so that, ultimately, it was not provided to the IPO until 25th August, 2020, more than nine months after he first applied for international protection. To that extent, I am of the view that this is a case in which it could be said that there was culpable and material delay on the part of the respondent, such that the appellants were entitled to deny labour market access to the respondent. In other words, as explained in *KS,* a delay that "*results from*" an applicant's conduct is attributable to him or her.

72. That begs the question, in circumstances where there has been delay on the part of the State and there has been delay on the part of the applicant: can the fact that there has been delay on the part of the State mean that the delay on the part of an applicant is to be ignored or discounted? It seems to me that if there is significant delay on the part of an applicant in cooperating with the State, thus creating a situation where an application could not be dealt with within nine months, then that delay is attributable to the applicant, even if it could be said that only part of the delay can be attributed to the applicant. It should be borne in mind in this case, that despite the initial delay on the part of the State, the application could well have been processed within nine months were it not for the subsequent delays on the part of the respondent.

73. What then of the manner in which the Directive has been transposed into Irish law? The use of the words "*attributed in part*" does not appear to me to give rise to the view that

Ireland has not properly transposed the 2013 Directive. It is useful to remember the view of the Advocate General in *KS* set out at para 74 of his opinion above that *"the conditions determined by the Member States for access to that market must not render impossible in practice or excessively difficult the exercise of rights conferred by the EU legal order."* It seems to me that the inclusion of the words "*attributed in part*" do not render impossible in practice or excessively difficult the entitlement of an applicant for international protection to have access to the labour market. These words seem to reflect what, in any event, is implicit in Article 15(1) of the Directive. The respondent was furnished with the questionnaire which was designed to elicit the information necessary to consider and decide on his application. He was provided with legal representation to assist him in that regard. His legal representatives were able to look for translation services to assist in taking instructions from the respondent. The delays in organising the completion of the questionnaire are not the responsibility of the appellants. The conclusion that the inclusion of the words "*attributed in part"* in the 2018 Regulations is not an improper transposition of the Directive is, however, predicated on the view that the word "*delay*" as used in the Directive should be understood as involving the assessment of the acts of delay on the part of an applicant, and the consideration of whether those acts are of such substance as to constitute delay which can be attributed to the applicant. Where the CJEU has not furnished guidelines as to what constitutes "*delay*", is the correct approach to considering delay within the meaning of Article 15(1) to have regard to the acts of the applicant on the one hand and the State authorities on the other as to the various elements making up the delay in coming to a decision of the application for international protection? Can acts of delay on the part of the State outweigh acts of delay on the part of an applicant? If so, how is that to be assessed? Further, have the 2018 Regulations properly transposed the Directive into Irish law in

circumstances where it does not appear that the inclusion of the words "*attributed in part*" render impossible in practice or excessively difficult the exercise of rights conferred by the EU legal order? In the circumstances, it can be said that a number of questions arise as to the interpretation of the 2013 Directive and as to whether or not it has been properly transposed by means of the 2018 Regulations. This cannot be said to be *acte clair* and thus a number of questions are required to be referred to the CJEU.

74. In circumstances where it is far from clear to this Court that the Directive has not been properly transposed into Irish law by the 2018 Regulations, it would be premature to consider the issue of *Francovich* damages pending the outcome of the decision of the CJEU.

75. I propose the following questions should be referred:

    1. In *K.S.*, the CJEU noted that Directive 2013/33/EU gives no guidance in relation to what acts may constitute a delay attributable to the applicant for international protection within the meaning of Article 15(1) of the Directive. In considering what acts may constitute a delay attributable to an applicant, is it appropriate to have regard to the fact that the respondent in this case provided no information at all (by way of response to the questionnaire) for more than the nine-month period provided for under Article 15 of the Directive?

    2. Does the concept of delay for the purposes of Article 15(1) of Directive 2013/33/EU encompass only a delay that may be attributed wholly and exclusively to the applicant for international protection, or does it encompass any not insignificant delay that may be attributed to the applicant or that may be considered to constitute "non-cooperation" by the applicant?

3. In circumstances where there is significant unexplained delay on the part of an applicant for international protection, and there has also been delay on the part of the State itself, can part of the overall delay be "*attributed to the applicant*" for the purposes of Directive 2013/33/EU, or must any delay in processing the application be exclusively that of the applicant?
4. Does the inclusion of the phrase, "*attributed in part*" in Regulation 11(4)(b) of the European Communities (Reception Conditions) Regulations 2018, S.I. No. 230/2018 mean that Ireland has failed to properly transpose Directive 2013/33/EU, given the margin of appreciation that member states enjoy in how they choose to implement the Directive and in circumstances where it does not appear that the inclusion of this phrase renders impossible in practice or excessively difficult the exercise of rights conferred by the EU legal order?