

**THE HIGH COURT  
JUDICIAL REVIEW**

[2022] IEHC 441

**[2021 353 JR]**

**BETWEEN**

**L.K.**

**APPLICANT**

**AND**

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

**RESPONDENTS**

**JUDGMENT of Mr. Justice Heslin delivered on the 9<sup>th</sup> day of June 2022**

**Introduction**

**1.** This case concerns a challenge to a refusal of a labour market access permit which was sought by the Applicant, who is someone who has applied for international protection. The decision challenged was made on 3 March 2021. The First Respondent found that the Applicant was not entitled to access the labour market and, pursuant to Regulation 21(5)(a) of the European Communities (Reception Conditions) Regulations, 2018, affirmed the earlier decision of the relevant review officer dated 2 December, 2020.

**2.** By order made on 26 April, 2021 (Ms. Justice Burns) the Applicant was granted leave to apply by way of an application for judicial review for the reliefs set out at para. D, on the grounds set out at para. E in the Applicant's statement of grounds dated 19 April, 2021. The reliefs sought at para. D thereof is in the following terms:

- "1. *An order of certiorari quashing the decision of the First Named Respondent dated 3<sup>rd</sup> March, 2021 finding that the Applicant is not entitled to access the labour market and under Regulation 21 (5) (a) of the European Communities (Reception Conditions) Regulations, 2018, affirming the decision of the review officer dated 2<sup>nd</sup> December, 2020.*
2. *A declaration that time required by the Applicant to instruct a solicitor and seek a translator for the purposes of applying for International Protection and delay on the part of the International Protection Office does not amount to a delay that can be attributed to the Applicant within the meaning of Regulation 11 (4) (b) of the European Communities (Reception Conditions) Regulations, 2018 or under Article 15 (1) of Council Directive 2013/33/EU of the European Parliament and of the Council of 26<sup>th</sup> June, 2013, laying down standards for the reception of Applicants for International Protection (Recast).*
3. *A declaration that the Respondents have failed to adopt the measures necessary to correct; transpose and/implement Article 15 (1) of Council Directive 2013/33/EU of the European Parliament and of the Council of 26<sup>th</sup> June, 2013, laying down standards for the reception of Applicants for International Protection (Recast).*
4. *Damages for the failure to properly transpose and/or implement Article 15 (1) of Council Directive 2013/33/EU.*
5. *An order remitting the appeal to be considered by another member of the First Named Respondent as a matter of urgency.*

6. *If necessary, an order extending the time within which to bring this application.*
7. *Further or other orders.*
8. *Costs."*

**3.** I will presently look closely at the facts which emerge from an analysis of the evidence before this Court. Before doing so, it is appropriate to note that, at the heart of the present case, is that the First Named Respondent refused labour market access on the grounds that the Applicant himself had been responsible for the delay which had occurred in determining his International Protection application. As to the legal grounds relied upon by the Applicant, these are set out in the following terms at para. E of his statement of grounds:

**"E. Grounds upon which such relief is sought:**

**Legal Grounds**

- i. *The First Named Respondent erred in law in incorrectly interpreting and applying the concept of "delay" under Regulation 11 (4) (b) of the European Communities (Reception Conditions) Regulations 2018 and/or Article 15 (1) of Council Directive 2013/33/EU of the European Parliament and of the Council of 26<sup>th</sup> June, 2013.*
- ii. *The First Named Respondent erred in fact and in law and acted unreasonably and/or irrationally and breached the principles of fair procedures and natural and constitutional justice in finding that the delay in issuing a first instance decision in the Applicant's international protection application can be attributed to the Applicant and/or that he failed to cooperate in the processing of his protection application, such that he be denied access to the labour market.*
- iii. *The First Named Respondent erred in finding that the Applicant failed to co-operate in the processing of his protection application, which said issue was not a relevant consideration.*
- iv. *The First Named Respondent, in failing to accept that there was a lack of availability of Georgian translators during the Covid-19 pandemic and by failing to address the submissions of the Applicant explaining the reasons for the delay, made findings that lacked any evidential basis and acted unreasonably and/or irrationally and/or in breach of fair procedures and natural and constitutional justice.*
- v. *The First Named Respondent, in finding that legal services were essential services during the Covid-19 pandemic and that this ought to negate any delay in the international protection process, made findings that lacked any evidential basis and acted unreasonably and/or irrationally and/or in breach of fair procedures and natural and constitutional justice.*
- vi. *In concluding that the Applicant had delayed in bringing his application for international protection, and that this delay included the time that the Applicant had required to instruct a solicitor and to secure a Georgian translator during the Covid-19 pandemic, and that this time period encompassed delays on the part of the International Protection Office in processing the Applicant's claim, the First Named Respondent acted unreasonably and/or irrationally and/or in breach of fair procedures and natural and constitutional justice and/or ultra vires and/or in breach of Regulation 11 (4) (b) of the European Communities (Reception Conditions) Regulations 2018 and/or Article 15 (1) of Council Directive 2013/33/EU of the European Parliament and of the Council of 26<sup>th</sup> June, 2013, laying down standards for the reception of Applicants for International Protection (Recast).*

vii. *The First Named Respondent failed to properly transpose Article 15 (1) of Council Directive 2013/33/EU of the European Parliament and of the Council of 26<sup>th</sup> June, 2013, laying down standards for the reception of Applicants for International Protection (Recast)*”

4. In essence, the First Named Respondent submits that the relevant tribunal member carried out a fair and well-reasoned assessment and correctly concluded that the delay in arriving at a first-instance decision in respect of the Applicant’s international protection application was attributable to the Applicant’s own actions. On that basis, the tribunal member found that the earlier decision by the Labour Market Access Unit (“LMAU”) to refuse the Applicant a work permit was a correct one. To better understand the legislative context in which the present dispute arises, it is appropriate to note the following.

#### **Directive 2013/33/EU**

5. Council Directive 2013/33/EU of the European Parliament and of the Council of 26<sup>th</sup> June, 2013, laying down standards for the reception of Applicants for International Protection (Recast) (“the 2013 Directive”) contains, *inter alia*, the following Articles:

“Article 15

#### ***Employment***

1. *Member States shall ensure that Applicants have access to the labour market no later than 9 months from the date when the application for international protection was lodged if a first instance decision by the competent authority has not been taken and the delay cannot be attributed to the Applicant.*

2. *Member States shall decide the conditions for granting access to the labour market for the Applicant, in accordance with their national law, while ensuring that Applicants have effective access to the labour market....”*

6. By mandating that Member States “shall” ensure that Applicants have access to the labour market in the foregoing manner, it seems uncontroversial to consider Article 15 of the 2013 Directive as creating a right, albeit one subject to conditions, for the granting of access to the labour market decided in accordance with national law. Although the facts will be set out later in this decision, it is useful to note that the Applicant first applied for international protection in this State on 2 September 2019 on the grounds that he would face a real risk of suffering serious harm if returned to Georgia. Thus, a relevant date for present purposes is nine months later, being 2 June 2020.

#### **S.I. No. 230 of 2018**

The 2013 Directive was transposed into Irish law by means of S.I. No. 230 of 2018 (“the 2018 Regulations”). These begin as follows:

“I, CHARLES FLANAGAN, Minister for Justice and Equality, in exercise of the powers conferred on me by [section 3](#) of the [European Communities Act 1972](#) (No. 27 of 1972), and **for the purpose of giving effect to Directive 2013/33/EU of 26 June 2013**, hereby make the following regulations:” (emphasis added).

Regulation 2 (1) states that:

“‘Labour market access permission’ means a permission granted or renewed by the Minister under Regulation 11;”

#### **Regulation 11**

Regulation 11 is entitled “*Labour market access permission*” and begins as follows:

"11. (1) Save as may be provided under any other enactment or rule of law, an Applicant shall not seek, enter or be in employment or self-employment except in accordance with—

- (a) a labour market access permission granted or renewed by the Minister under this Regulation (in this Regulation referred to as a 'permission') that is valid, and
- (b) this Regulation and, where applicable, Regulation 16.

(2) Save as may be provided under any other enactment or rule of law, a recipient who is not an Applicant shall not seek, enter or be in employment or self-employment.

(3) An Applicant may make an application for a permission, which application shall be—

- (a) in the form set out in Schedule 3, and
- (b) made on or after the expiry of the period of 8 months beginning on the application date.

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

- (a) subject to paragraph (6), a period of 9 months, beginning on the application date, has expired, and, by that date, a first instance decision has not been made in respect of the Applicant's protection application, and
- (b) the situation referred to in subparagraph (a) cannot be attributed, **or attributed in part**, to the Applicant..." (emphasis added).

### **Attributed in part**

7. It is appropriate to pause at this juncture to note that the words "or attributed in part" appear nowhere in the 2013 Directive.

8. Although the reference in the 2018 Regulations to eight months and nine months, respectively, has since been altered (i.e. reduced to five months and six months, respectively) for present purposes the 2018 Regulations, which were the operative ones, make clear that if, eight months after applying for international protection, there has been no decision, an application for labour market access may be commenced. In other words, such an application can be brought a month 'early' although labour market access cannot be granted until the expiry of nine months commencing on the date when international protection was sought.

### **Regulation 15**

Regulation 11 (15) of the 2018 Regulations provides as follows:

"(15) Where the Minister refuses to grant or renew a permission under this Regulation, he or she shall give the Applicant concerned a notice in writing of his or her decision."

The foregoing refers to what might be called a first-instance decision in respect of labour market access.

### **Regulation 20**

Regulation 20 is entitled "Review of certain decisions made under regulations" and it provides *inter alia* the following:

"20. (1) A recipient who is dissatisfied with a decision—

...

(e) under Regulation 11, to refuse to grant or renew a labour market access permission...

...

may, within 10 working days of the date of the notice of that decision, apply in writing to the Minister for a review of the decision or part of it."

9. In the manner I will presently come to, the Applicant first applied for labour market access permission on 20 June 2020 and the first instance decision, to refuse same, was made by the LMAU by letter dated 28 August 2020. On 11 September 2020 a review of the first instance refusal was sought and, in a decision dated 2 December 2020, a review officer upheld the first instance refusal of labour market permission.

### **Regulation 21**

Regulation 21 of the 2018 Regulations is entitled "Appeal" and it provides as follows:

*"21. (1) A recipient who is dissatisfied with a decision of a review officer under Regulation 20, may, subject to Regulation 22, within 10 working days of the date of the notice of the decision, appeal, in fact and law, against that decision to the International Protection Appeals Tribunal.*

*(2) An appeal under paragraph (1)—*

*(a) shall be made in writing in the form specified in Schedule 7, and*

*(b) shall include copies of the documents referred to in the appeal.*

*(3) The Chairperson of the International Protection Appeals Tribunal shall designate a member of the Tribunal to hear and determine appeals under this Regulation, and a reference in these Regulations to the designated member shall be construed as a reference to the member of the Tribunal so designated.*

*(4) The designated member of the International Protection Appeals Tribunal shall—*

*(a) determine an appeal under this Regulation within a reasonable time and in any case, within 15 working days from the date on which the appeal is received by the Tribunal, and*

*(b) unless it considers it is not in the interests of justice to do so, make its determination in relation to the appeal without holding an oral hearing.*

*(5)(a) The determination of the designated member under paragraph (4) shall be to affirm or set aside the decision of the review officer.*

*(b) The designated member may, for the purposes of paragraph (a), determine the date of effect of the determination under that paragraph having regard to the circumstances of the case."*

In the present case an appeal was submitted pursuant to Regulation 21. It is clear from Regulation 21 (4) (b) that the 'default' position is that an oral hearing will not be held, unless the Tribunal considers that the interests of justice require same. In the present case, a request was made for an oral hearing, but declined.

### **Regulation 22**

10. Regulation 22 is also of relevance in the present case and it is entitled "Recipient may request permission to make late appeal". It begins as follows:

*"22. (1) A recipient who fails to make an appeal within the period specified in Regulation 21(1) may request, in accordance with paragraph (3), the Tribunal to permit him or her to make an appeal under that Regulation..."*

11. An extension of time to bring an appeal was sought in the present case and the appeal was accepted by the First Named Respondent on the 9 February, 2021. That being so, it is appropriate to set out what is provided for in Regulation 22 (3) – (5):

*"22. (3) A request referred to in paragraph (1) or (2) shall be made by notice in writing, in the form specified in Schedule 8 or a form to the like effect—*

- (a) *setting out the reasons why the Applicant was unable to bring the appeal within the period specified in Regulation 21(1), and*
- (b) *requesting the Tribunal to permit him or her to make an appeal under Regulation 21.*
- (4) *The Tribunal, on receipt of a request under paragraph (3), shall, subject to paragraph (5)—*
  - (a) *permit the Applicant to make an appeal within such period as the Tribunal may specify, or*
  - (b) *refuse the request*
- (5) ***The Tribunal shall grant a permission under paragraph (4) only where it is satisfied that—***
  - (a) ***the Applicant has demonstrated that there were special circumstances as to why he or she could not make an appeal within the period specified in Regulation 21(1), and***
  - (b) ***in the circumstances concerned, it would be unjust not to grant the permission.”***  
(emphasis added)

**12.** Given the fact that the Tribunal granted permission (*per* Regulation 22) for an appeal to be brought outside of the period of ten working days (referred to in Regulation 21) it is uncontroversial to say that the Tribunal was satisfied that there were (i) special circumstances as to why the Applicant could not make an appeal within the said ten-day period and (ii) in the circumstances, it would have been unjust not to grant permission to the Applicant to appeal outside of the ten-day period.

#### **Regulation 27**

**13.** Before leaving the 2018 Regulations, it is appropriate to refer to Regulation 27 which is entitled “*Attribution of delay in making of first instance decision*” and provides as follows:

*“27. The matters to which the Minister may have regard in considering, for the purposes of Regulation 6(1)(a), paragraph (4)(b), (8)(a) or (13)(c) of Regulation 11 or Regulation 12(1)(a), whether the fact that a first instance decision has not been made in respect of the Applicant’s protection application can be attributed, **or attributed in part**, to the Applicant include whether the Applicant has failed, or is failing, to comply with his or her obligations in respect of his or her protection application, including by—*

- (i) *failing to make reasonable efforts to establish his or her identity,*
- (ii) *without reasonable excuse, acting in such a way as to delay the processing of his or her application,*  
*or*
- (iii) *otherwise failing to comply with an obligation under an enactment relating to the application.”* (emphasis added)

**14.** It seems uncontroversial to say that Regulation 27 comprises a non-exhaustive definition of delay, central to which is the question of whether there was a “*reasonable excuse*”. It is also appropriate to note, once more, that the words “*or attributed in part*” do not reflect the words used in Article 15 of the 2013 Directive, notwithstanding the fact that the 2018 Regulations were enacted for the explicit purpose of giving effect to the 2013 Directive. Having referred to relevant provisions, I now turn to look at the facts in the present case.

#### **Relevant facts in chronological order**

**15.** As a result of a careful consideration of the affidavits and exhibits put before the court, the following emerges by way of relevant facts, which, for ease of reference, I propose to set out in chronological order.

**16.** The Applicant is a Georgian national born in May 1996. On 2 September 2019 he applied for international protection in this State on the grounds that he would face a real risk of suffering serious harm if he was returned to Georgia.

**September - December 2019**

**17.** An interview was scheduled by the International Protection Office ("IPO") for 15 September 2019. From paras. 5 – 7 of his affidavit, sworn on 19 April 2021, the Applicant makes the following averments as regards the position *after* his application for international protection on 2 September 2019: -

*"5. Thereafter, an interview was scheduled by the International Protection Office for the 15<sup>th</sup> September 2019. I did not know that an interview was scheduled for this date. I was not put on notice of this date and the International Protection Office did not write to me about this date.*

*6. I went to my social worker when I had not heard from the International Protection Office to follow up and make arrangements for my interview.*

*7. My social worker called the International Protection Office to arrange for a section 15 interview on the 11<sup>th</sup> December, 2020. This was arranged for the next day, the 12<sup>th</sup> December 2020, and I attended on that date".*

**18.** It is not in dispute that the Applicant did in fact go to his "social worker" in the manner averred, nor is it in dispute that they called the IPO to arrange for a s. 15 interview. It is also common case that the Applicant attended this interview.

**19.** On any analysis, the foregoing evidences proactivity on the part of the Applicant. It is also entirely fair to say that the averments and evidence put forward by the Respondent do not undermine the positive averment made by the Applicant that he "*did not know that an interview was scheduled for 15 September 2019*" and that he was "*not put on notice of this date*" and that the IPO "*did not write to*" him about this date.

**20.** At para. 4 of the affidavit sworn by Sida Charnsilpa (Assistant Principal Officer in the IPO, Immigration Service Delivery, Department of Justice) it is averred that, when the Applicant initially attended the IPO on 2 September 2019 to make his international protection application, he requested the assistance of an interpreter to assist with his s. 15 application. It is averred that the s. 15 application had to be postponed until a Georgian translator could be arranged. The following is also averred: - "*It is accepted that the Applicant was not informed of the new appointment date on that occasion as the IPO needed to ensure interpreter availability and other logistical factors before finalising the date*".

**Notification of appointment**

**21.** Para. 5 of the same affidavit comprises averments with regard to notification to the Applicant of the 16 September 2019 appointment. It is not in dispute that, at the relevant time, the Applicant was residing in the Ballsbridge Hotel. It is averred that "*the IPO's well-established procedure*" was followed so as to ensure that the Applicant was on notice of his required attendance on the 16 September 2019. At para. 6, this "*procedure*" is explained in the following terms: -

*"6. This procedure involved the IPO contacting the International Protection Accommodation Service (IPAS) which is responsible for the administration of State provided accommodation to Applicants seeking international protection. The IPO notified the IPAS of the appointment details and requested that they arrange for the Applicant to attend at the International Protection Office on 16 September at 10 a.m. – 10:30 a.m. This notification was contained in an email from the IPO to IPAS on 12<sup>th</sup> September 2019 . . .".*

### **Email from IPO to IPAS**

**22.** A copy of the aforesaid email comprises "SC 1". It is an email sent by a Ms. Carol Blanche on Thursday 12 September 2019 at 11:25 addressed to a Mr. Robert Donnelly and others, the subject being "Applicants to attend I.P.O.". The text of the said email is in the following terms.

"Hi Robbie,

*Please arrange for the following Applicants to attend I.P.O. on the following dates to complete their international protection applications.*

Monday 16<sup>th</sup> September 2019 @ 10.00 – 10.30 a.m.

[DETAILS REDACTED] 16/09/2019 Ballsbridge Hotel

**[DETAILS REDACTED] LK 16/09/2019 Ballsbridge Hotel**

[DETAILS REDACTED] 16/09/2019 Central Hostel, Miltown Malbay

[DETAILS REDACTED] 16/09/2019 Lisanisk House, Carrickmacross

[DETAILS REDACTED] 16/09/2019 Lisanisk House, Carrickmacross

Tuesday 17<sup>th</sup> September 2019 @ 10.00 a.m. – 10.30 a.m.

[DETAILS REDACTED] 17/09/2019 Ballsbridge Hotel

[DETAILS REDACTED] 17/09/2019 Ballsbridge Hotel

[DETAILS REDACTED] 17/09/2019 Setanta Guesthouse Ardee

Wednesday 18<sup>th</sup> September 2019 @ 10.00 a.m. – 10.30 a.m.

[DETAILS REDACTED] 18/09/2019 Clayton Hotel Liffey Valley

[DETAILS REDACTED] 18/09/2019 Clayton Hotel Dublin Airport

[DETAILS REDACTED] 18/09/2019 Clayton Hotel Dublin Airport

[DETAILS REDACTED] 18/09/2019 Clayton Hotel Dublin Airport

[DETAILS REDACTED] 18/09/2019 Setanta Guesthouse Ardee

[DETAILS REDACTED] 18/09/2019 The White House Roscrea

[DETAILS REDACTED] 18/09/2019 Clayton Hotel Liffey Valley

Friday 20<sup>th</sup> September 2019 at 10.00 a.m. – 10.30 a.m.

[DETAILS REDACTED] 20/09/2019 Setanta Guesthouse Ardee

[DETAILS REDACTED] 20/09/2019 Travelodge Dublin Airport

Regards,

Carol". (emphasis added)

### **Email from IPAS to Hotel**

**23.** At para. 7, a second email dated 12 September 2019 is exhibited and it comprises "SC 2". This email was from a Mr. Robert Donnelly of IPAS and it was sent to "Reservations Ballsbridge <reservations@ballsbridgehotel.com >". The text of that email was in the following terms: -

"Good afternoon,

*Please inform he (sic) following (sic) guests that they are required to attend the IPO on the date and time below please?*

*Kind regards . . .*

Monday 16<sup>th</sup> September 2019 @ 10.00 – 10.30 a.m.

[DETAILS REDACTED] 16/09/2019 Ballsbridge Hotel

**[DETAILS REDACTED] LK 16/09/2019 Ballsbridge Hotel**

[DETAILS REDACTED] 16/09/2019 Ballsbridge Hotel



Tuesday 17<sup>th</sup> September 2019 @ 10.00 – 10.30 a.m.

[DETAILS REDACTED] 17/09/2019 Ballsbridge Hotel

[DETAILS REDACTED] 17/09/2019 Ballsbridge Hotel" (emphasis added)

**24.** With regard to the foregoing, a number of comments appear to me to be appropriate. The fact that a notification procedure is averred to be "*well-established*" does not constitute evidence that the Applicant in the present case was, in fact, notified of the 16 September 2019 appointment, *via* this procedure. The evidence before this court is that (i) the IPO contacted the IPAS; and (ii) IPAS, in turn, sent an email to "*Reservations Ballsbridge*" at the Applicant's hotel accommodation. That is as far as the evidence goes.

**25.** There was no individual requested to inform the Applicant of his appointment. No individual has identified themselves, or has been identified, as the person who says they informed the Applicant of the 16 September 2019 appointment. There is no averment made that anyone so informed him. No letter to the Applicant, with regard to the 16 September 2019 appointment, has been exhibited.

**26.** In short, even taking full account of such evidence as the Respondent has proffered, it is fair to say that the averments made by the Applicant to the effect that he was *never* notified of the 16 September 2019 appointment, are uncontested averments.

#### **74% attendance rate**

**27.** I am fortified in the view that this Court is entitled to hold on the evidence before it that the Applicant was never, in fact, notified of the 16 September 2019 appointment, having regard to the following averment, which is made at para. 5 in the affidavit sworn by Ms. Charnsilpa on 16 July 2021: -

*"It is the case that certain Applicants have failed to attend for s. 15 application as arranged. However, a search of all Applicants who resided at the Ballsbridge Hotel from June to December 2019 showed that 74% of them showed up for their s. 15 application first appointment".*

**28.** The fact that, on the First Named Respondent's calculation, only 74% of Applicants showed up for their first s. 15 appointments strongly suggests that the notification procedure is far from 'fool proof'. The First Named Respondent's evidence that 26% of persons residing at the Applicant's accommodation during the relevant period did *not* show up is certainly not evidence that the "*well-established procedure*" resulted in the Applicant being notified of his appointment in the present case.

**29.** In the manner touched on earlier, the evidence before this court certainly establishes (i) the fact that the Applicant was concerned when he had not heard from the IPO; and (ii) that he took the initiative by contacting his social worker, who (iii) made inquiries about his interview date. They contacted the IPO on 11 December 2020 and it was as a result of this, that a s. 15 interview was arranged for the following day, 12 December 2020. It is a matter of fact that the Applicant attended on that date. On any reasonable analysis, the foregoing is indicative of a person keen to engage in the process.

**30.** At the s. 15 interview which took place on 12 December 2020, the Applicant was given an international protection questionnaire in Georgian to complete. This was to be returned by 6 January 2020.

**31.** It is not in dispute that an Applicant for international protection is entitled to seek legal advice, including with respect to the completion of the international protection questionnaire which the Applicant received, for the first time, on 12 December 2020.

#### **7 January 2020 extension**

**32.** On 7 January 2020, an extension of time was granted to the Applicant, by the IPO with regard to the completion of the said questionnaire. That extension was granted until 5 February 2020, in circumstances where the Applicant did not have a solicitor at that time.

### **28 January 2020 - Applicant referred to a solicitor**

33. On 28 January 2020, the Legal Aid Board referred the Applicant to Messrs. Gary Daly & Company Solicitors. It cannot be disputed, in my view, that in order to be effective, a right to obtain legal advice necessarily involves being afforded sufficient time to obtain such advice.

34. Another feature of the present case is that it is acknowledged that the Applicant does not speak English and required the assistance of a Georgian translator. Thus, in order for any consultation with his legal advisor to be effective, the services of a Georgian translator would be required.

### **5 Feb and 20 Feb 2020 extensions**

35. It is not in dispute that, once the Applicant had been referred to Gary Daly & Co. Solicitors on 28 January 2020, the latter sought extensions for the purposes of taking instructions from the Applicant, which extensions were granted on 5 February 2020, and 20 February 2020, respectively.

36. It is also a matter of fact that, at no time was it indicated to the Applicant's solicitors that these, or any extensions sought, would have an adverse impact on any aspect of the Applicant's application or any related application.

### **11, 13 and 16 March 2020 – cancellation of appointments with translator**

37. It is averred at para. 13 of the Applicant's affidavit sworn on 19 April 2021 that his solicitor booked appointments with a Georgian translator, (translation.ie) all of which appointments had to be cancelled, as a translator could not be arranged in person. It is averred that these appointments were scheduled and cancelled on 11 March 2020; 13 March 2020 and 16 March 2020. The foregoing are uncontested averments.

### **Extension refused on 4 March but granted on 16 March 2020**

38. It is also not disputed that a third extension was sought by the Applicant's solicitor on 4 March 2020, with regard to the completion of the relevant questionnaire, which application was initially refused by the IPO. However, this initial refusal of an extension was subsequently reversed by the IPO in the manner averred by the Applicant at para. 16 of his affidavit, wherein he states the following:

*"16. Due to the advent of the Covid-19 pandemic and the related unavailability of a Georgian translator, the International Protection Office granted an extension of time to me to complete the International Protection Questionnaire on the 16<sup>th</sup> of March 2020 until, the 1<sup>st</sup> May 2020".*

### **12 March 2020 – IPO Important Notice**

39. Few of us will not recall the disruption caused by the Covid-19 pandemic, the effects of which were felt from March 2020 onwards. As of 12 March 2020, the International Protection Office issued a notice concerning delays and cancellations due to Covid-19. A copy of this notice comprises Exhibit "GD – 02" to the affidavit sworn by Mr. Gary Daly, the Applicant's solicitor, sworn on 27 October 2021. The IPO's 12 March 2020 notice stated the following: -

*"IMPORTANT NOTICE RE COVID-19*

*In light of the extraordinary circumstances of the current Covid-19 developments and the announcement made earlier today by the Taoiseach, the International Protection Office wishes to advise that the following arrangements will apply with immediate effect: -*

- All substantive interviews scheduled for Friday 13 March and up to and including 29 March 2020 have been cancelled. We will be in contact in due course with new interview dates.*
- Temporary Residence Certificate (TRC) Renewal Appointments and call-backs are being suspended up to and including 29<sup>th</sup> March. Applicants whose TRC is due for renewal between*

*now and the 29<sup>th</sup> March will have a new card automatically issued to them to cover them for the period.*

*Applicants who are impacted by these arrangements are requested not to visit the International Protection Office until further notice.*

*In addition, the International Protection Office will provide a limited service to new Applicants only from Friday 13<sup>th</sup> March.*

*These measures are considered necessary to help remit the spread of Covid-19 and support the national measures, including requirements on social distancing, announced by the Taoiseach earlier today.*

*Further updates will be provided in due course.*

*For further updates from the International Protection Office, please check: [www.ipd.gov.ie](http://www.ipd.gov.ie).*

*International Protection Office*

*12 March 2020”.*

#### **Covid-19 pandemic directly affected the Applicant’s case**

**40.** At paras. 4 and 5 of his 27 October 2021 affidavit, Mr. Daly, solicitor, makes the following averments, in respect of which no replying affidavit has been furnished: -

*“4. The Covid-19 pandemic directly affected the Applicant’s case in that multiple appointments with translators had to be cancelled, and relatedly, I was unable to take instructions from the Applicant, who does not speak English, for some time. Multiple translation appointments had to be cancelled with the advent of the pandemic.*

*5. Prior to Covid-19, extra time would always be required to take instructions from clients who do not speak English, and with Covid-19, it became even more difficult to take instructions from clients who do not speak English due to the inability to arrange for in-person translation services. During the first few months of Covid-19 matters were extremely unsettled regarding in-person meetings and delays were invariably caused due to the Covid-19 pandemic in my dealings with the Applicant’s case. These are not delays that can be attributed to the Applicant”.*

**41.** Exhibit “GD – 03” to Mr. Daly’s affidavit comprises a series of emails confirming the arrangement and cancellation of appointments scheduled for 11 March 2020; 13 March 2020, and 16 March 2020. The final email in the series exhibited comprises confirmation of an appointment scheduled for Wednesday 5 August 2020 in the offices of Mr. Daly’s firm.

**42.** Having regard to the evidence before the court, it is a matter of fact that a series of appointments arranged for March 2020 had to be cancelled because an interpreter could not be arranged in person. The evidence also establishes the fact that the Covid-19 pandemic adversely affected the Applicant’s case in the manner averred by Mr. Daly, the Applicant’s solicitor, including by frustrating Mr. Daly’s ability to properly take instructions from the Applicant due to the non-availability of a Georgian translator and causing delays in Mr. Daly’s dealings with the Applicant’s case.

**43.** In short, the evidence before this Court establishes that the Covid-19 pandemic adversely affected the Applicant’s ability to attend a translator, and consequently, to instruct his solicitor.

#### **The return of Questionnaires – IPO Notice**

**100.** At para. 2 of the affidavit sworn by Mr. Gary Daly, the Applicant's solicitor, on 27 October 2021, he avers inter alia that: *"It has been acknowledged by the International Protection Office that time to seek legal advice and provide instructions is not a delay"*.

**101.** During the hearing, counsel for the Respondents made clear that no issue was taken with the foregoing averment which was described as "a fair statement of fact, subject to reasonable limitations". The averment made by Mr. Daly at para. 2 continues in the following terms:

*"It is unreasonable that the International Protection Office can state on their website that extra time is allowed for the receipt of legal advice and that at the same time, the Labour Market Access Unit may equate the time required to take legal advice with delay, caused in whole or in part by the Applicant."* He then exhibited a "Notice" issued by the IPO which is dated June 2021 and which states the following: -

*"Clarification re: deadline for the return of the application for  
International Protection Questionnaire (IPO2)*

**IMPORTANT NOTICE**

*The deadline for the return of the IPO2 International Protection Questionnaire to the IPO is 20 working days from the day you receive the questionnaire.*

*The International Protection Office is flexible on this return date. Extra time is allowed to complete the Questionnaire where something happens, such as illness, to delay the completion. Extra time is allowed for the receipt of legal advice if required.*

*Once the Questionnaire has been returned to the IPO it is still possible for you or your legal advisor to provide additional information. You should provide this information no later than two weeks before your interview.*

*Please be aware that repeated requests for extra time may not be granted. They will not only delay consideration of your application but may give rise to you deemed as not cooperating with the protection process".*

**102.** In oral submissions, counsel for the Respondents acknowledged that the IPO was entitled to and did grant extra time to the Applicant, but emphasised that the LMAU is a separate body, the thrust of this submission being that preparedness on the part of the IPO to grant extensions does not mean that the LMAU cannot validly consider the periods covered by those extensions to constitute delay caused by the Applicant and attributable to him. Counsel for the Respondents also submitted that the granting of an extension of time by the IPO does not mean that delay which occurred up to the point at which any given extension was granted is "justifiable".

**The IPO's approach to extensions of time**

**103.** It is fair to say that, notwithstanding the fact that the date on the IPO's aforesaid "Notice" is June 2021, the hearing proceeded on the basis that the contents of the Notice represented the IPO's view at the material time. Having set its terms out *verbatim*, it seems appropriate to make the following points. Although 20 working days is the deadline referred to in the Notice, it is perfectly clear that there is significant flexibility, as the IPO have made explicit. It is equally clear from the non-exhaustive list of examples given in the second paragraph of the Notice that any number of matters will give rise to extra time being allowed.

**104.** It would be unfair to interpret the wording in this Notice as if it were a piece of legislation but the phrase "extra time ***is*** allowed . . ." (emphasis added) emphasises flexibility rather than conveying the

impression that an extension of time is exceptional or would not be granted readily “*where something happens, such as illness*”. It could hardly be suggested that the health emergency precipitated by Covid-19 and the restrictions which accompanied this, falls outside the “*where something happens*”. The second paragraph of the Notice also draws a distinction between issues such as illness which result in delay, and the allowing of extra time, if required for the receipt of legal advice.

**105.** The reference in the third paragraph of the IPO’s Notice to the fact that it is possible for a legal advisor to provide additional information after the questionnaire has been returned – something the Respondents lay emphasis on – does not of course address the fundamental point that *prior* to submitting the questionnaire, the Applicant is entitled to obtain legal advice and, for that to happen, required an ‘in-person’ meeting between 3 parties, namely, (1) the Applicant; (2) a Georgian-speaking translator; and (3) his solicitor.

**106.** The fact that the fourth paragraph of the Notice points out that repeated requests for extra time may not be granted and may give rise to an Applicant being deemed as “*not cooperating*” seems to me to be highly relevant in the present case. Other than a refusal of an extension on 4 March 2020 which refusal was reversed shortly thereafter by means of an extension of time granted on 16 March 2020 (in the wake of the Taoiseach’s announcement; the IPO’s Important Notice; and the Country entering the first national ‘lockdown’) there is no evidence of any extension of time having been refused.

**107.** In other words, extensions of time were granted by the IPO, which, in effect, cover the entire period from (i) the appointment of the Applicant’s solicitor at the end of January to (ii) the submission of the questionnaire towards the end of August 2020. There is no doubt about the fact that the IPO could have regarded, but did not regard, the Applicant as *not cooperating* with the international protection process.

**108.** In light of the foregoing, extra time allowed by the IPO is *prima facie* not delay and the Applicant in the present case was never deemed by the IPO to be non-cooperative. Thus, for the LMAU to reach entirely contrary views would require, it seems to me: (i) evidence upon which to base contrary views; (ii) engagement with all relevant facts including the reasons extensions of time were sought by the Applicant, and granted by the IPO; (iii) engagement with the reality that the Applicant was *prima facie* cooperative; and (iv) an opportunity being given to the Applicant to address the potential of adverse findings by the LMAU of non-cooperation, in circumstances where the IPO never regarded him as such.

### **1.6 months**

**44.** At this juncture, it also seems appropriate to note that at para. 9 of her affidavit sworn on 16 July 2021, Ms. Charmsilpa makes the following averments: -

“9. *I say that the time taken by applicants to submit their section 15 questionnaires for the purposes of their international protection applications, is on average 1.6 months.*

10. *It is the case that IPO receives a significant number of requests from both applicants and their legal representatives to extend the deadlines for submission of questionnaires. This occurs on a regular basis. It is commonplace for applicants to be given at least one extension in order that they have the opportunity to meet with their legal representative in advance of completing their questionnaire.*

11. *As a result of the challenges caused by the Covid-19 pandemic, the IPO gave more extensions in 2020 than would normally be the case. In particular these extensions were generally provided when requests from Applicants were made in a spirit of cooperation to reflect the additional difficulties that the Covid-19 pandemic may have caused. In the case of the Applicant herein, the*

*request for a deadline extension was generally made by a phonecall or email from the Applicant's legal representative".*

**45.** Several comments can be made in relation to the foregoing, quite apart from the acknowledgment that extensions are *commonplace* and the fact that the Covid-19 pandemic gave rise to even *more* extensions being granted. There is no suggestion made on behalf of the IPO that any request for an extension which was made on behalf of the Applicant was other than "*in a spirit of cooperation*". Bearing in mind that, on 16 March 2020, the IPO granted the extension of time to 1 May 2020 (which extension had initially been refused on 4 March 2020) it is not suggested on behalf of the IPO that this extension or any subsequent extension did not "*reflect the additional difficulties that the Covid-19 pandemic may have caused*". Furthermore, it seems appropriate to examine the deponent's reference to "*1.6 months*" in context.

**46.** It is uncontroversial to say that 1.6 months equates to some 7 weeks. The evidence in this case demonstrates that the Applicant first received their s. 15 questionnaire on 12 December 2019 but was not referred by the Legal Aid Board to their solicitor until 28 January 2020. A period of 7 weeks from 28 January 2020 would expire as of 18 March 2020. That, of course, was: (i) in the week *after* the IPO's "*Important Announcement*" of 12 March 2020 which was made "*in light of the extraordinary circumstances of the current Covid-19 developments...*"; (ii) it was *after* the Taoiseach's announcement regarding Covid-19; (iii) *after* the Government's cancellation of the St. Patrick's day celebrations; and (iv) after the IPO had granted an extension to the Applicant.

**47.** I draw attention to the foregoing in circumstances where an element of the Respondent's submissions is to say that ". . . *in this case, a process which would on average take 6 – 7 weeks, took approximately twelve months*". That submission ignores, first, the reality that it was not until 28 January 2020 that the Applicant was first referred to a solicitor; secondly, that six weeks later, a period of national 'lockdown' restrictions commenced in response to the Covid-19 pandemic; and, thirdly, the IPO granted extensions to the Applicant in the context of the foregoing.

**48.** Weighing up the evidence before this Court, I am satisfied that it establishes that, but for the cancellation of in-person appointments with Georgian translators, the Applicant would have been in a position to meet with his solicitor as of 11 March 2020, i.e. within the period of "*1.6 months*" from the referral to a solicitor of this (non-English speaking) Applicant entitled to avail of legal advice from a (non-Georgian speaking) solicitor.

#### **17 July extension to 24 August**

**49.** Returning to the chronology, on 17 July 2020 a fourth extension of time, to complete the International Protection Questionnaire, was sought by the Applicant's solicitor. That extension was granted by the IPO until 24 August 2020.

#### **5 August meeting**

**50.** In light of the averments by Mr. Daly, solicitor, and the emails he exhibits as regards appointments with the Applicant, it seems clear that an 'in-person' appointment could and did proceed on 5 August 2020 at which a Georgian translator was available and instructions were, in fact, taken from the Applicant at that stage.

#### **25 August 2020**

**51.** It is not in dispute that, on 25 August 2020, the International Protection Questionnaire was submitted by email to the IPO and accepted by the latter without objection.

### **The IPO's attitude**

**52.** It also seems appropriate to note the following: (i) the IPO did not object to the receipt, on 25 August 2020, of the Applicant's international protection questionnaire; (ii) the IPO made no suggestion that it could not be considered; (iii) it was not suggested by the IPO that the Applicant was responsible for delay; (iv) it was not suggested by the IPO that the Applicant had, at any stage, failed to co-operate in the process; (v) at no stage did the IPO state or suggest that it intended to regard the Applicant as not cooperating with the process at a future point; (v) nor is there any evidence that at any point, the IPO 'took issue' with the time it was taking / had taken to forward the relevant questionnaire.

### **62 page Questionnaire**

**53.** Exhibit "LK-01" to the Applicant's affidavit comprises an email sent by his solicitors to the IPO on 25 August 2020, together with a cover letter and the questionnaire itself in the Georgian language. The questionnaire runs to 62 pages, the final page of which bears the date 25.08.2020.

### **Application for labour market access – 2 pages**

**54.** On 20 June 2020, the Applicant applied for a labour market access permission, pursuant to Regulation 11(3) of the 2018 Regulations. A copy of his application for same comprises exhibit "LK-02". In stark contrast to the questionnaire concerning his international protection application, the relevant application form for labour market access permission is a very short document, sections 1 to 4 comprising just two pages.

**55.** Section 1 requires an Applicant to insert their forename and surname. Section 1a requires an Applicant to state their personal ID number found on their Temporary Residence Certificate. Section 2 requires a phone number and email. Section 3 requires an Applicant to declare (by 'ticking' the relevant 'yes' box) that the conditions of application have been met. These are as follows:

- My application for international protection is 8 months old or more (the permission will not become valid until 9 months);
- I am still waiting on a first instance recommendation on my international protection application;
- I have cooperated fully with the international protection process;
- I have made reasonable efforts to establish my identity (please attach/enclose any copies of additional identity documents);
- I will register with Revenue Commissioners when I start a job or any self-employment activity (see [www.revenue.ie](http://www.revenue.ie) for more information);
- I have attached a copy of my valid (in date) TRC.

**56.** The Applicant placed a 'tick' in the box marked 'yes' opposite each of the foregoing conditions. By so doing, the Applicant declared that all the aforesaid conditions had been met. This included the Applicant's declaration that he had "*cooperated fully with the international protection process*". At this juncture it is important to state that there is simply no evidence that at the time he made the foregoing declaration or, for that matter, at any time thereafter, the IPO took a *different* view.

**57.** The Applicant was never advised by the IPO at any point prior to or on 20 June 2020 (or at any point since) that they regarded him as not having cooperated. He was never put on notice that the IPO was proposing to regard him as uncooperative as a result of any act or omission on his part. In short, that declaration by the Applicant that he had "*cooperated fully with the international protection process*" was

entirely consistent with the known attitude of the IPO in respect of his participation in the relevant process of applying for international protection.

**28 August 2020 first instance refusal**

**58.** By letter dated 28 August, 2020 the LMAU of the Department of Justice wrote to the Applicant in the following terms:

*"Dear [L.K.]*

*Your application for labour market access permission has been considered in accordance with the European Communities (Reception Conditions) Regulations, 2018. I wish to inform you that your application is ineligible for the following reason(s):*

***[x] the delay in issuance of the first instance recommendation is attributable to you:***

*It is noted that you were issued with your International Protection Questionnaire (IPQ2) on 12 December 2019, this was not returned to the International Protection Office. As part of the eligibility criteria for a labour market access permission you must not have contributed to the delay in the processing of your protection application.*

*As the delay in issuance of the first instance recommendation is attributed to you, you do not meet the conditions for the granting of a labour market access permission as per Regulation 11(4) of the European Communities (Reception Conditions) Regulations 2018.*

*If you are not satisfied with this decision, you may request a review within 10 working days. Please send your request for review to:*

*Review Officer*

*Labour Market Access Unit*

*P.O. Box 12931 ..."*

**59.** The foregoing is not the decision which is the subject of the within proceedings. However, a number of comments would seem to be appropriate. No criticism is made in the foregoing decision as regards the passage of time *prior* to 12 December 2019. It will be recalled that, on 11 December 2019, the IPO was contacted by the Applicant's social worker (specifically someone from the Jesuit Refugee Service, on behalf of the Applicant) to enquire about the progress of his international protection application. It was in response to that contact, which was made at the Applicant's instigation, that an appointment was made for the following day, 12 December 2019. A Georgian interpreter was available; the Applicant attended the meeting and was given, for the first time, the International Protection Questionnaire in his native language.

**60.** I make the foregoing point in circumstances where, as will presently be seen, the decision under challenge in the present proceedings is one which attributes delay to the Applicant, not from 12 December 2019, but states *inter alia* that the Applicant "*failed to engage in the process between 2 September 2019 and 11 December 2019*".

**Delay "attributed to" v. "contributed to" delay**

**61.** It is also clear from the contents of this first-instanced refusal that a material part of the reason underpinning it is that the LMAU took the view that the Applicant "*contributed to*" delay. This is plain from the statement in the letter that "*you must not have contributed to the delay in the processing of your protection application*". Earlier in this judgment I set out the relevant provisions of the Directive. Article



15 provides that “*the delay cannot be attributed to the Applicant*”. An appropriate test derived from Art. 15 is not that an Applicant must not have “*contributed to*” the delay.

**62.** It is also fair to say that the LMAU letter was factually incorrect when it stated that the Applicant’s questionnaire was not returned to the IPO. In fact, it had been returned three days earlier, on 25 August 2020. It is also appropriate to note that it is not in doubt that the IPO had granted to the Applicant, at the request of his solicitor, a number of extensions. These were initially for a short duration, in circumstances where the Applicant’s solicitor was not appointed until 28 January 2020. With the onset of the Covid-19 pandemic, extensions were for a longer duration. The last of the extensions granted by the IPO was for the period up to 24 August 2020. It is entirely fair to say that the LMAU’s letter, although it refers to delay as regards the engagement between the Applicant and the IPO, is entirely silent about the extensions of time granted by the IPO to the Applicant in respect of that engagement.

### **Fact of and reasons for extensions**

**63.** As well as not addressing the fact of those extensions granted by the IPO to the Applicant, the 28 August 2020 decision is equally silent as to the reasons for the extensions sought and granted. The evidence before this court entitles it to hold that the reasons can fairly be summarised as follows:

- the need for the Applicant’s solicitor to take instructions and to advise the Applicant with regard to the completion of the s. 15 questionnaire;
- the need, with respect to the foregoing, for a Georgian translator to be available;
- difficulties securing a Georgian translator and the cancellation of a series of in-person meetings;
- delays and difficulties caused by Covid-19 which prejudiced the ability of the Applicant’s solicitor to deal with the Applicant’s case.

**64.** Ms. Niamh Rabbitt (Higher Executive Officer in the LMAU) swore an affidavit on 15 July 2021 in which she set out the role and function of the LMAU which, in the manner she avers, is distinct from the role performed by the IPO. At para. 4 of her affidavit, she makes the following averment with regard to the role of the LMAU in carrying out an assessment in accordance with Regulation 11(4) of the 2018 Regulations: “*Its function inter alia is to determine whether the delay which has occurred in the issuance of a first instance decision by the IPO is attributable to the Applicant.*” She goes on, at para. 5 to aver that “[t]his involves examining the Applicant’s record with the IPO, as well as all other matters relating to his, or her, immigration history within the State.” At para 11, Ms. Rabbitt avers *inter alia* that the LMAU: “... is entitled to employ its own decision making process in determining whether the delay in the issuance of a first instance decision by the IPO is attributable to the Applicant, or has been caused by other factors.” She goes on to aver, at para. 12 that: “*While the IPO may have a variety of reasons for allowing extensions of time to an Applicant to comply with the international protection process, that approach taken by the IPO does not bind, or restrict the LMAU in its functions.*”

**65.** It seems fair to say that the foregoing averments in effect assert that the LMAU can, at a later date, decide *why* adjournments were granted, notwithstanding the reasons why, in fact and at the relevant time, those extensions were granted by the IPO. In more concrete terms (and focusing for present purposes on the extension of time granted on 16 March 2020, i.e. shortly after the IPO itself recognised “*the extraordinary circumstances of the current Covid-19 developments*”) the logic of the averments made in Ms. Rabbitt’s affidavit appears to be that the LMAU may exclude from its consideration, any difficulties and

delays caused by the onset of the Covid-19 pandemic, insofar as they constituted the reasons why extensions of time were in fact given. In my view such a proposition is wrong, both in logic and in law.

#### **11 September 2020 request for review of first instance refusal**

**66.** On 11 September 2020, the Applicant's solicitor requested a review of the first instance decision. It was also requested that such a review be processed as a matter of urgency, in circumstances where the Applicant and his wife recently had a baby boy (born in early May 2020) and the weekly allowance of €38 was not sufficient income to cover expenses.

#### **2 December 2020 – first instance refusal upheld**

**67.** In a decision of 2 December 2020, the review officer upheld the first-instance decision to refuse the Applicant a labour market access permission. It is plain from the review decision that the review officer took the view that the Applicant had failed to cooperate with the international protection process by not attending his first s. 15 interview (on 2 September 2019) and by failing to return his International Protection Questionnaire within what the review officer considered to be a reasonable time frame, leading to a delay in the issuance of the first instance decision. The review decision included *inter alia* the following:

*"Your client had an established pattern of acting in such a way as to delay the processing of his application in the period between his international protection application on 2<sup>nd</sup> September 2019 and the commencement of Covid-19 restrictions on 12<sup>th</sup> March 2020. This pattern included failing to attend his first section 15 interview and failing to return the questionnaire issued in his native language.*

*Your client's failure to cooperate with the protection process has led to a delay in the issuance of the recommendation in respect of your international protection application. This delay is attributed to his actions by way of failing attend (sic) his first section 15 interview and failing to return the IPO 2 questionnaire in a reasonable time frame in order for the IPO to make a full decision on his claim.*

*He is therefore not eligible for a labour market access permission as per Regulation 11(4)(b) of the European Communities (Reception Conditions) Regulations 2019. I therefore inform you as per Regulation 20(5) of the European Communities (Reception Conditions) Regulations 2018 that the initial decision to refuse an access to the labour market is affirmed."*

**68.** Before turning to the appeal against the foregoing decision, which was brought on behalf of the Applicant, two brief comments seem appropriate. First, the first-instance decision, made no reference to any "delay" prior to 12 December 2019. Secondly, the review decision made clear that Covid-19 restrictions commenced on 12<sup>th</sup> March 2020. The significance of the foregoing will presently be seen when I look in some detail at the decision under challenge.

**69.** Earlier in this judgment I set out the provisions of Regulation 22 of the 2018 Regulations, which allows an appellant who has not made an appeal within 15 working days of the review officer's decision, to be permitted to have their appeal considered. I also looked, earlier, at what (*per* Regulation 22(5)) the Tribunal is required to be satisfied of, if it decides to entertain a late appeal, namely, (a) the Applicant must have demonstrated that there were "*special circumstances ... why he ... could not make an appeal*" within the 15 days; and (b) it would be "*unjust*" not to permit the making of a late appeal.

#### **Request for extension of time to appeal**

**70.** The relevant form which an appellant must use when seeking an extension of time pursuant to Regulation 22 is specified in Schedule 8 of the Regulations. A copy of the completed Schedule 8 form in the present case comprises part of exhibit "LK-05" to the Applicant's affidavit. The pre-printed question at Part 3.2 of the Schedule 8 form asks a would-be appellant to set out clearly the reasons why they were unable to bring the appeal within the period specified in Regulation 21(1). The answer given is "*please see attached letter*" and the letter exhibited comprises an 8 February 2021 letter addressed to the IPAT in which the Applicant's solicitors refer to the 2 December 2020 review decision and state the following:

*"1. The Applicant has not delayed unreasonably at any stage of the process in his application for international protection.*

*2. The Applicant fully cooperated with the IPO regarding his s. 15 interview. The Applicant did not receive a letter from the IPO about having to attend for his hearing on the 16<sup>th</sup> September, 2020. The Applicant went to his social worker when he had not heard from the IPO. His social worker called the IPO to arrange for an interview on the 11<sup>th</sup> December 2020. This was arranged for the 12<sup>th</sup> December 2020, and the Applicant attended on that date.*

*3. The Applicant was unable to complete his questionnaire due to the unavailability of a Georgian translator, and the fact that no translator could be arranged for him during the Covid-19 pandemic. The IPO was put on notice of the unavailability of a Georgian translator and extensions were granted for that reason. Extensions were also granted due to the ongoing Covid-19 pandemic.*

*4. The IPO cannot on the one hand argue that an extension ought to be granted due to the ongoing Covid-19 pandemic and, on the other hand accuse the Applicant of delaying in his application for international protection.*

*5. In all the circumstances, the Applicant had reasons at all times for the delay in the completion of his questionnaire, due to the ongoing pandemic and the unavailability of a Georgian translator. Further, it is contested that the Applicant delayed at all in attending for interview at the IPO. On the contrary, he proactively engaged for an interview at the IPO.*

*6. The Applicant was unable to bring the appeal within the specified limit due to the ongoing pandemic, and also due to the unavailability of translators as a result of the pandemic.*

*7. The Applicant reserves the right to make further submissions at hearing.*

*We would be grateful if you would please acknowledge receipt of this letter and the herein Schedule 8 form by return ..."*

#### **Extension of time granted**

**71.** It is not in dispute that the appeal was accepted by the First Named Respondent on 9 February 2021. The notice of appeal was in the form specified in Schedule 7 to the 2018 Regulations and can be seen behind exhibit "LK-05" to the Applicant's affidavit. The first page of the notice of appeal refers to 10 pre-printed alternative appeals and the first 'box' has been 'ticked' indicating that this was an "*Appeal of a decision under Regulation 11 to refuse to grant or to renew a labour market access commission*".

#### **Notice of appeal**

**72.** The second page comprises the Applicant's details as well as confirmation that he had legal representation and his solicitor's contact details. The grounds of appeal relied on can be seen at Part 4 of the notice of appeal, which is on the third internal page. They comprise a *verbatim* setting-out of the contents of the letter dated 8 February 2021 from the Applicant's solicitor to IPAT, which I have quoted

earlier. The only difference is that the numbering scheme used in the 8 February 2021 letter was not used in the notice of appeal, but the text insofar as paras. 1 – 7, inclusive, was identical.

### **LMAU submissions**

**73.** It is not in dispute that IPAT sought written submissions both from the Applicant and from the LMAU. By email dated 15 February 2021 the LMAU stated the following in response to the request for submissions:

*"The substance of the delay on which the Applicant has been refused is outlined in the review letter. The refusal and review letter outline the issues which have caused delays to date and which are the basis of the Applicant's refusal. LMAU have no further submissions with respect to the delay to date.*

*I will note that the original review stated:*

*'Your client may re-apply for labour market access on 25<sup>th</sup> May 2021, which is 9 months from the date the IPO recorded receiving the IPO 2 Questionnaire, this is providing that the IPO has not made a decision on his protection application and you have fully co-operated with them in the interim'*

*With the Minister's announcement on the 28<sup>th</sup> January, that period is now 6 months or 25<sup>th</sup> February. However, it has come to the attention of LMAU that this individual has been working illegally and has failed in his obligations to abide by Article 16.1(b) of the International Protection Act, 2015 which states, an Applicant will 'not seek, enter or be in employment or engage for gain in any business, trade or profession'. In addition, he has refused to abide by the refusal decision of the Labour Market Access Unit and upon receipt of any further applications from this Applicant this information will be considered."*

**74.** The extent to which the Applicant's engagement in employment may comprise an element of a decision were any future application to be made and considered, is not the issue before the court in the present case. It is clear that other than the foregoing, the LMAU made clear that they had no further submissions with respect to delay.

**75.** The LMAU's submissions were provided to the Applicant's solicitor on 15 February 2021 and a response was sought by 19 February. The IPAT specifically asked the Applicant to reply to the point raised by the LMAU with regard to working illegally in the State.

### **Request for oral hearing refused**

**76.** In an email sent by the Applicant's solicitor, also on 15 February 2021, a request for an oral hearing was made. It will be recalled that, whilst the 2018 Regulations make clear that the 'default' position is for an appeal to be determined without the holding of an oral hearing, Regulation 21(4)(b) allows for an oral hearing where the First Named Respondent, in effect, considers an oral hearing to be necessary in the interests of justice.

**77.** On 23 February 2021 the First Named Respondent refused the request for an oral hearing. The Applicant's solicitor was afforded until 4pm on 25 February 2021 to make further submissions. These were forwarded by email on 26 February 2021 and no issue was taken in respect of the delivery of same.

### **Applicant's submissions**

**78.** A copy of these submissions, comprising a letter to the IPAT from Gary Daly & Co. Solicitors can be seen at exhibit "LK-07" to the Applicant's affidavit. These submissions stated the following:

*"We have taken instructions from our client and he instructs that he was working in the State from the 8<sup>th</sup> December to 24<sup>th</sup> December 2020. He instructs that he had no choice but to undertake this work at the time, as his family of three could not live off €107 per week.*

*He is no longer working. He stopped working of his own volition.*

*We submit that the fact that the (sic) our client was working for a short period of time is not a matter you can take into consideration on this appeal.*

*Our client was refused his work permit on the grounds of delay, and it has been explained that none of this delay is attributable to our client. Our client cooperated with the IPO at every stage of the process, and delays were caused due to the Covid-19 pandemic and the unavailability of Georgian translators.*

*Our office sought short extensions to take instructions from our client at the beginning of the 2020 and at no time was it indicated to us that this would have an adverse impact on our client's application. Moreover, when the Covid-19 pandemic began, our legal assistant Sanja Stojak spoke to the International Protection Office on numerous occasions on the phone and she was assured that it was understood that Covid-19 had caused delays across many client's cases. It was understood by our office that this would have no bearing on our client's application for a work permit, and that no delay would be attributed to him for the lack of progression in cases at the International Protection Office due to Covid-19.*

*It is our position that the fact that our client worked for a few weeks and has since stopped can have no bearing on the matters you must consider in this appeal.*

*The reasons set out in 11(4)(b) of the European Communities (Reception Conditions) Regulations 2018 are relied upon in this regard. The Applicant was refused his work permit under 11(4)(b), and nowhere is it stated therein that the Applicant may be refused a work permit on the grounds that he was in employment for a short time period.*

*We request that a decision be given as soon as possible in circumstances where the Applicant is under extreme financial pressure and cannot provide for his family of three on €107 per week."*

**79.** There is no doubt about the fact that the foregoing submission was before the First Named Respondent prior to the impugned decision being made. At no stage did the First Named Respondent take issue with the accuracy of anything stated in the 26 February 2021 submission. Nor, in the manner which will presently be discussed, did the First Named Respondent contact the IPO in respect of the account given on behalf of the Applicant, including as regards assurances said to have been provided by the IPO.

#### **The Respondents' submissions to this Court**

**80.** Among the principal submissions made on behalf of the Respondents were the following: -

The First Named Respondent made a credibility finding which she was fully entitled to make;

Cooke J. stated in SBE [2010] IEHC 133 that: -

*"In reviewing a decision which turns predominantly on credibility the court is fully conscious of the fact that the issue is one which is exclusively for the decision-maker to determine. It must resist any temptation to substitute its own view of credibility for the assessment made by the tribunal member. It is concerned only to ensure the legality of the process by which that conclusion has been reached";*

**81.** Credibility findings can only be set aside if they are irrational and unreasonable or were arrived at in breach of natural and constitutional justice. It is acknowledged that the IPO gave a number of extensions to the Applicant, both before and after the onset of the Covid-19 pandemic, so as to ensure that consultations with his solicitor could take place. It is acknowledged that it is "standard IPO policy" that extensions of time to complete the IPO questionnaire will be provided, especially in circumstances where legal advice is required. In both the LMAU first-instance and review decisions, and in the First Named Respondent's decision, acknowledgement was given of the fact that the Applicant may have required additional time to consult with his solicitor as a result of the 'lockdown' measures which had been introduced.

**82.** The issue in this case, submits the Respondent, is the Applicant's unsubstantiated claim that it was not possible to consult with his solicitor in the presence of an interpreter for a period of more than six months. The tribunal member was entitled to conclude that there had been ample time for the necessary consultations between the Applicant and his solicitor to take place. The fact that solicitors were deemed essential workers during the period of Covid-19 lockdowns was relevant to this consideration.

**83.** In the face of an unsubstantiated claim by the Applicant that he was not able to access translation, it fell to the tribunal member to make a credibility finding as to whether such a claim was plausible and, in that context, the tribunal member's finding that she cannot believe that there was a "*dearth of translators*" was entirely rational. Even with the challenges posed by Covid-19, the general expectation would be that it would have been possible to access translation services during the relevant six-month period. It is acknowledged that it can be difficult to quantify what constitutes an appropriate or acceptable period of delay in circumstances such as these, the Respondents submit, however, that there was "excessive delay" in the present case prior to the onset of the Covid-19 Pandemic.

**84.** It is acknowledged that the measures introduced by the State to combat the effect of the Covid-19 Pandemic did cause a period of "justifiable delay".

**85.** Trying to quantify what qualifies as a justifiable period of delay is an inexact science. Although published in June 2021 and making no reference to Covid-19 restrictions, the Respondents accept that the IPO's notice (entitled "*Clarification Re: deadline for the return of the application for International Protection Questionnaire (IPO 2)*") does acknowledge that additional time may be required to facilitate a legal consultation. The said June 2021 document indicates two time periods which the IPO, in the normal course, believe is sufficient for the completion and return of the IPO 2 questionnaire (being 20- day and two-weeks respectively). Accordingly, it is submitted by the Respondents that any periods of additional time allowed must bear some relation to the time periods which have been specified in the document.

**86.** In the Applicant's case, 20 days "turned into in excess of six months". While such an extension could possibly be reasonable, depending on the circumstances, solicitors as "essential services", were entitled to work throughout the pandemic and, therefore, the rational assumption is that it would still have been possible to progress the Applicant's application, contend the Respondents.

**87.** Although in circumstances very different to those in the present case, the European Court of Justice set out in *A&S* (C – 550/16, EU: C: 2018: 248) that time extensions are not unlimited and, where additional time has been provided to an Applicant to exercise his or her rights, those rights must be exercised within a reasonable period of time (that case concerning an application for a family reunification in circumstances where the Applicant's minority status had changed during the course of the international protection application). The Respondents submit that the foregoing decision illustrates that extensions of time should

not be unlimited and that there is an onus on an Applicant to pursue their rights with reasonable expedition, in circumstances where the court said: -

*"It is true that, since, as the Netherlands Government and the Commission submit, it would be incompatible with the aim of Article 10(3)(a) of Directive 2003/86 for a refugee who had the status of an unaccompanied minor at the time of his or her application but who attained his or her majority during the procedure to be able to rely on the entitlement under that provision without any time limit in order to obtain a family reunification, his or her application seeking reunification must be made within a reasonable time. For the purposes of determining such reasonable time, the answer given by the EU legislature in the similar context of Article 12(1) third subparagraph of that directive has indicative worth, with the result that it must be held that the application for family reunification made on the basis of Article 10(3)(a) of that directive must, in principle, in such a situation be submitted within a period of three months of the date on which the 'minor' concerned was declared to have refugee status".*

**88.** Acknowledging that the aforesaid three-month time limit may not be relevant in the context of these proceedings, the Respondents submit that A&S is authority for the proposition that rights must be given effect to within a reasonable period of time. Applying the reasoning derived from A&S to the present case, it is submitted that any entitlement to an extension of time would have a concurrent duty on the Applicant's part to seek to give effect to his rights within that reasonable time period.

**89.** It is submitted that the foregoing is entirely consistent with the findings of the tribunal member, who found that the Applicant had not cooperated with the international protection process. It is submitted that, in essence, the First Named Respondent's finding was that the restrictions imposed in response to the Covid-19 pandemic were not a "charter for inaction". The decision made by the First Named Respondent was entirely valid and was consistent with ECJ case law. Notwithstanding the difficulties caused by the Covid-19 pandemic, the delay in this case was "excessive" and was attributable to inaction on the part of the Applicant, thereby justifying refusal of labour market access permission.

#### **Part of the delay - Covid-19**

**90.** It seems to me that a core aspect of the submissions made on behalf of the Respondents is to acknowledge, very properly, that the Covid-19 pandemic did, as a matter of fact, adversely affect the Applicant in the present case as regards his ability to progress his international protection application. Thus, it appears to me that in opposing the present application, the Respondents accept, very appropriately, that at least part of the overall delay was attributable to Covid-19, not to the Applicant.

#### **Part of the delay – legal advice**

**91.** Similar comments apply in relation to the Respondent's submissions, wherein it appears to be acknowledged, again very appropriately, that at least part of the overall delay with respect to a first instance decision concerning the Applicant's international protection application resulted from the Applicant's entitlement to exercise his right to obtain legal advice. Thus (and leaving aside the question of how large or small these *parts* might be) there seems to be a very appropriate acknowledgement that (i) part of the overall delay was caused by Covid-19; and (ii) another part, whether overlapping or not, resulted from the exercise of a right to seek legal advice. Therefore, even if, in *form* the decision under challenge found that all delay was attributed to the Applicant, it appears that in *substance*, there was an attribution to the Applicant of only part of the delay.

#### **Directive v. Regulations**

**92.** To my mind, the foregoing brings into sharp focus the difference, which in my view is a very material one, between, on the one hand, the provisions in Article 15(1) of the Directive and, on the other, those found in Regulation 11(4)(b) of the 2018 Regulations transposing same. The foregoing issue is discussed in greater detail later in this judgment. For present purposes, it is sufficient to note that a key aspect of the opposition to the present application appears to be the contention *not* that each and every day, between 2 September 2019 and 25 August 2020, constitutes delay exclusively attributable to the Applicant, but that the Applicant was guilty of, what para. 56 of the Respondent's written submissions describe as "*excessive delay*".

**"excessive delay"**

**93.** In the manner explained in this judgment, and as is clear from the wording in Article 15(1) of the 2013 Directive, there is no test of "*excessive delay*". The phrase "*excessive delay*" speaks to the proposition that the passage of a certain period of time is acceptable or reasonable (be that for the purposes of obtaining legal advice; or by reason of restrictions caused by, say, a global health crisis; or for some other reason) whereas the passage of a further period or periods of time ceases to be reasonable and becomes, instead, inordinate or unreasonable i.e. excessive. No such approach is provided for in the 2013 Directive.

**94.** Article 15(1) asks whether or not the delay can be attributed to the Applicant. It seems to me that by coming to the view that the Applicant was responsible for "*excessive*" delay and in opposing the Applicant's claim on the basis that matters should be looked at through the 'lens' of whether delay is excessive or not, the First Named Respondent departs from what was required in the context of Article 15(1) of the Directive. I now turn to look at the decision which is challenged in the present proceedings and, before looking at its terms, I want to make the following clear. It is no function of this court to focus on the manner in which a decision-maker has chosen to express themselves, as opposed to the substance of the decision itself, and whether it was lawfully made. Nor is this court's role to approach matters as if the present proceedings constitute a merits-based analysis of the underlying question. That is not what judicial review is concerned with. This court, in the present proceedings, is exclusively concerned with the way in which a decision has been made, rather than the merits of the conclusion reached. Nothing in this judgment is intended to suggest otherwise.

**The First Named Respondent's 3 March 2021 decision**

**80.** The decision by the First Named Respondent, 3 March 2021 which is challenged in the present proceedings ("the decision") begins in the following terms:

**"INTRODUCTION**

*1. The within Decision concerns an appeal to the International Protection Appeals Tribunal against a decision of a review officer pursuant to Regulation 20(4) of the European Communities (Reception Conditions) Regulations 2018, which decision refused to grant the Applicant a labour market access permission.*

*2. The Tribunal has not been informed of the **exact date** of the appellant's initial application for a labour market access permission pursuant to Regulation 11(3) of the European Communities (Reception Condition) Regulations, 2018 (hereinafter "the Regulations"), or the date of refusal of same by the Labour Market Access Unit. The appellant's legal representatives sought a review pursuant to Regulation 20(1)(e) by letter dated 11 September 2020." (emphasis added)*

**"exact date"**



**81.** It seems appropriate to pause at this juncture to make the following observations. It appears somewhat curious that the First Named Respondent was not aware of the “exact date” of the Applicant’s initial application for labour market access, or the date of the initial refusal by the LMAU, particularly in circumstances where the latter is plain from the LMAU’s 28 August 2020 letter comprising the first-instance refusal. In any event, it could hardly be fair to criticise the Applicant in this regard. The exact date of the application does, however, seem to me to be of some significance in the manner I will presently explain.

**82.** The decision continued by setting out the relevant history in the following manner:

*“3. The Review Officer, in a decision 2 December 2020, upheld the decision to refuse the appellant a labour market access permission. The Review Officer deemed that the appellant did not meet the conditions for the granting of a labour market access permission because he had failed to cooperate with the protection process by not attending his first section 15 interview, and by failing to return his questionnaire in a reasonable time frame, leading to a delay in the issuance of the first instanced recommendation.*

*4. The appellant’s legal representative submitted an appeal to the International Protection Appeals Tribunal (hereinafter “the Tribunal”) pursuant to Regulation 21 of the Regulations. The Schedule 7 Notice of Appeal was submitted by email on 27 January 2021. However, the appeal was submitted outside the statutory time period (although an extension of time was sought in the grounds of appeal) and the decision of the Review Officer was not included. Following correspondence from the Tribunal, a Schedule 8 Notice of Appeal and the impugned decision of the Review Officer were submitted, and the appeal was deemed accepted on 9 February 2021.*

*5. Written submissions were sought from both the appellant and the Labour Market Access Unit, with same to be submitted by 16 February 2021. The Labour Market Access Unit responded by email dated 15 February 2021 and their comments were shared with the appellant’s legal representatives by email that same day, with a reply sought by 19 February 2021.*

*6. The appellant’s legal representatives sought, by email dated 15 February 2021, that the appeal be determined by way of an oral hearing and this request was refused on 23 February 2021. The Tribunal was of the opinion that any submissions and explanations which the appellant wished to make to explain the delays in the process could be made in written submissions, including a written personal statement by the appellant himself. The Tribunal advised that the submissions of both parties would be considered in the light of the Reception Conditions Directive (recast) and the recent judgment of the Court of Justice of the European Union in Joined Cases – 322/19 and C – 385/19.*

*7. The Tribunal afforded the appellant’s legal representatives until 4pm on 25 February 2021 to make further submissions and advised that the decision of the Tribunal must be determined by 3 March 2021. Correspondence was received on 26 February 2021 and has been taken into account even though it was outside the time allowed for submissions.*

*8. The Decision has been determined within 15 working days from 9 February 2021, the date on which the complete appeal was accepted by the Tribunal as provided for in Regulation 21(4)(a) of the European Communities (Reception Conditions) 2018.”*

**83.** It is clear from the confirmation at para. 7 above that the Tribunal, in making its decision, took into account the submissions made on behalf of the Applicant in his solicitor’s letter dated 26 February 2021.

It will be recalled that these submissions included *inter alia*, confirmation that, during numerous phone calls between the legal assistant in Gary Daly & Co. Solicitors and the IPO, the latter made assurances that it was understood Covid-19 had caused delays across many clients' cases and that it was understood by the office of the Applicant's solicitor that such delays would have no bearing on the Applicant's application for a work permit and that no delay would be attributed to him for the lack of progression in IPO cases due to Covid-19. The fact that the First Named Respondent considered the foregoing is also confirmed in the next section of the decision which proceeded in the following terms:

"SUMMARY OF CASE FACTS AND DOCUMENTS

9. *The appellant applied for international protection on 2 September 2019. He did not attend his section 15 interview on 16 September 2019 and did not attend same until 12 December 2019. The appellant, having been granted several extensions, finally submitted his International Protection Questionnaire on 25 January 2020.*

10. *The Tribunal has considered all documents submitted on behalf of both parties:*

- *Schedule 7 Notice of Appeal accepted on 9 February 2021;*
- *Schedule 8 Notice of Appeal;*
- *covering letter dated 8 February 2021;*
- *Review Officer's decision dated 2 December 2020;*
- *email from Labour Market Access Unit dated 15 February 2021;*
- *email from appellant's legal representatives seeking oral hearing dated 15 February 2021;*
- *reply from the Tribunal dated 23 February 2021;*
- *correspondence from the appellant's legal representatives on 26 February 2021."*

**84.** The next section in the decision is entitled "*Relevant Legal Provisions*" and, at para. 11 of the decision, Art. 15 of the Reception Conditions Directive (Recast) is set out, followed by a reference to Regulation 11 of the 2018 Regulations and a setting out of Regulation 11(4). From para. 12 onwards, the decision continues in the following terms:

"ISSUES TO BE DETERMINED BY THE TRIBUNAL

12. *It is common case that the Appellant is an Applicant for international protection. It is also common case that he has not received a first instance decision in respect of his protection application, and a period of 9 months has elapsed since he made his application for international protection.*

13. *In exercising its jurisdiction under the 2018 Regulations, the Tribunal must determine whether the delay in issuing a first instance decision in respect of his protection application can be attributed to the appellant. A second issue has been raised by the LMAU, namely the fact that of (SSE) the appellant working illegally in the State.*

14. *The Tribunal notes a difference between the wording of the Directive – the delay cannot be attributed to the Applicant – and the wording of the Regulations – the situation referred to in subparagraph (a) [i.e. the delay] cannot be attributed, or attributed in part, to the Applicant.*

15. *As there is a difference between these two legal instruments, the Tribunal is obliged to apply the wording of the Directive in line with the Court of Justice of the European Union in its judgment*

in **C378/17 Minister for Justice & Equality & Others v. Workplace Relations Commission & Others ECLI:EU:C: 2018:979**.

16. *The Tribunal, having considered all the documents before it, is of the opinion that the appellant has done little to ameliorate his situation. Applicants are not passive participants in the process.*"

85. Before proceeding further, it is appropriate to recall that the decision is challenged in the present proceedings on two main grounds. The first is pursuant to well-known administrative law principles, in particular those of *unreasonableness* and *irrationality*. A second basis for the challenge to the decision relates to an alleged failure to properly transpose the Directive. Although made with far more detail and sophistication than the following summary suggests, at the heart of the Respondents' opposition to the present claim is that the decision and the findings therein are entirely reasonable and rational; that the Applicant was guilty of excessive delay; and that this excessive delay which was caused by his inaction, justified the decision to refuse a labour market access permit; which decision, submits the First Named Respondent, was made in an entirely valid manner, consistent with ECJ case law.

86. It is also useful, at this point, to recall the classic *dicta* from *The State (Keegan) v Stardust Victims Compensation Tribunal* [1986] IR 642, wherein Mr. Justice Henchy stated that:

*"I would myself consider that the test of unreasonableness or irrationality in judicial review lies in considering **whether the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense**. If it does, then the decision-maker should be held to have acted ultra vires, for the necessarily implied constitutional limitation of jurisdiction in all decision-making which affects rights or duties requires, inter alia, that the decision-maker must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision."*  
(emphasis added)

87. Having made the foregoing observations, I now return to looking at the decision itself. It is clear from para. 16 that the First Named Respondent came to the view that the Applicant was a *passive participant* in the International Protection process. Two comments seem appropriate. First, there is no 'active v. passive' participation test laid down in the Directive, nor is any such test provided for in the 2018 Regulations.

88. Similar comments apply in relation to the First Respondent's view that the Applicant had done "*little to ameliorate his situation*". I make the foregoing observations leaving aside, for the present, whether those findings are unreasonable or irrational.

89. The next section of the decision is entitled "*Representations*" and paras. 17 to 21, inclusive, refer to (i) the Review Officer's 2 December 2020 decision (setting out a chronology of dates, although this excludes the date when the Applicant applied for labour market access); (ii) the Schedule 7 Notice of Appeal and the grounds therein; (iii) the 8 February 2021 letter from the Applicant's solicitor (which accompanied the Schedule 8 request to make a late appeal, and which reiterated the points made in the Section 7 Notice of Appeal); (iv) the LMAU's email of 15 February 2021 (confirming that no further submissions were being made on the delay issue, but pointing out that the appellant had been working illegally); and (v) the 26 February 2021 letter from the Applicant's solicitor (comprising submissions). The decision continued from para. 22 as follows: -

"*DETERMINATION OF THE TRIBUNAL*

22. The Tribunal relies on the judgment of the Court of Justice of the European Union in linked cases C – 322/19 and C- 385/19 ECLI: EU:C: 2021: 11, which judgment was delivered on 15 January 2021, where the court specifically examined the issue of delay on the part of an Applicant in relation to permission to access the labour market.

23. The court held, and the Tribunal adopts, as follows (paras. 74 – 80): -

"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. 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".

24. The Tribunal is of course well aware of the impact which Covid-19 has had in general, and more specifically in the context of international protection Applicants. However, the Tribunal is of the opinion that Covid-19 is not the delaying factor in the instant case. 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".

**90.** It seems appropriate to pause at this juncture to make a number of observations. The decision - maker has found that "*the appellant herein failed to engage in the process between 2 September 2019 and 11 December 2019*". It is appropriate to note that in the first-instance decision made by the LMAU on 28 August 2020, there was no reference made, whatsoever, to the period of time *prior* to 12 December 2019. Furthermore, there was, before the decision-maker, a clear setting - out of the fact that the Applicant fully cooperated with the IPO as regards the s. 15 interview; that he did not receive a letter from the IPO about having to attend for interview on 16 September; that he went to a social worker when he had not heard from the IPO; that his social worker called the IPO to arrange for an interview on 11 December 2020; and this was in fact arranged for 12 December 2020, when the Applicant attended on that date.

**91.** Having regard to the foregoing, what evidence the decision-maker relied upon for a finding that the Applicant "*failed to engage in the process*" from 2 September 2019 to 11 December 2019 is entirely unclear. There is certainly no engagement, in the decision challenged, with the clear and cogent submission made by the Applicant's solicitor to explain what occurred, or did not occur, between 2 September 2019 and 11 December 2019.

**92.** In the manner examined earlier in this judgment, the evidence put before the court in the present application entitles me to hold that the Applicant was not, in fact, ever made aware of an appointment scheduled for 16 September 2019. Moreover, it is not at all in dispute that contact was, in fact, made with the IPO by the Applicant's social worker on 11 December 2019. This was contact with the IPO at the behest of the Applicant, not the other way around. It was contact for the purpose of ascertaining progress in respect of the Applicant's international protection application and the consequence of this contact was for it to be progressed. This is manifest by reason of the fact that, directly resulting from this contact at the behest of the Applicant, an appointment was arranged for the next day which, it is not in doubt, the Applicant attended.

**93.** Thus, the evidence is of pro-activity on the Applicant's behalf. It will also be recalled that it is common case that on 2 September 2019 when he commenced his international protection application, the Applicant was not informed of any date for interview. This was by reason of the fact that a Georgian interpreter was not available on 2 September 2019 and it was not then known when one would be available.

**94.** It is also fair to say that there is no suggestion in the decision that the explanation tendered by the Applicant's solicitor in respect of the period from 2 September 2019 to 11 December 2019 is something which (i) was put by the decision-maker to the IPO, but (ii) something the latter took issue with. It is

confirmed on affidavit that the decision-maker did not contact the IPO as regards the submissions made on behalf of the Applicant which related to engagement with the IPO.

**95.** It is also plain that the decision-maker concluded that there was “*no explanation*” in relation to the period between 28 January 2020 and 11 March 2020. The basis for this conclusion is entirely unclear. It is common case that the Applicant’s solicitor was not assigned by the Legal Aid Board until 28 January 2020. Counsel for the Respondents submit that there has never been any suggestion that the Applicant was not entitled to avail of legal advice and representation, in particular, as regards the completion of his International Protection Questionnaire. It is acknowledged in very clear terms that the Applicant has such a right, recognised by Article 15(1) (of Directive 2005/85 EC) which provides that:

“Member States shall allow Applicants for asylum the opportunity, at their own cost, to consult in an effective manner a legal adviser or other counsellor, admitted or permitted as such under national law, on matters relating to their asylum applications”.

**96.** Notwithstanding this very appropriate acknowledgment made by counsel for the Respondents, it is fair to say that the finding at para. 24 that there was “*no explanation*” concerning the period between 28 January and 11 March 2020 takes no account whatsoever of the reality that (i) a period of time will necessarily be required for instructions to be taken by and advice to be given by a legal adviser whom (ii) the Applicant is entitled, as of right, to consult. Nor does the decision engage with (iii) the reality that as a non-English speaking national of Georgia, the services of a translator would necessarily be required for any consultation with a legal advisor to be effective.

**97.** Moreover, the grounds of appeal contain *inter alia* the explicit statement that “*the Applicant was unable to complete his questionnaire due to the unavailability of a Georgian translator . . .*”. In addition to the foregoing, the decision-maker’s finding that there was “*no explanation*” for the 28 January 2020 to 11 March 2020 period, is impossible to reconcile with the fact that, having only been appointed on 28 January 2020, (i) Gary Daly & Co. sought an extension of time which was in fact granted on 5 February 2020, extending time up to 20 February 2020; and (ii) then sought an extension on 26 February 2020 which was also granted by the IPO, extending time up to 4 March 2020.

#### **Unreasonable and irrational**

**98.** There is an obvious relationship between the Applicant’s Article 15 right to consult a solicitor and the relatively short extensions sought by that solicitor, immediately following their appointment, which extensions were in fact granted by the IPO. In this context, the First Named Respondent’s finding that there was “*no explanation*” regarding the period from 28 January 2020 to 11 March 2020 seems to me to be unreasonable or irrational in the sense explained in the *Stardust Victims Compensation Tribunal* decision. Similar comments apply in relation to the Tribunal’s findings that the Applicant was a “*passive participant*” in the process and someone who did “*little to ameliorate his situation*”.

#### **10/15 minute walk away**

**99.** It is not entirely clear why the decision - maker noted in passing that the address of the Applicant and his solicitor’s office, respectively, are “*approximately a 10/15-minute walk away*”. If that was included in the decision to underpin a view that legal advice could have been sought and obtained, if not in a matter of minutes, then very readily and more quickly than it was in fact obtained, it is a view which is irrational in the sense in which that term is used in judicial review. The proposition that geographical proximity (“*a 10/15 minute walk*”) to a solicitor’s office necessarily guarantees the prompt availability of legal advice is entirely flawed in my view. It wholly ignores, at the very least, the reality that in the present case, there

was a need for a non-English speaker to have a Georgian translator present. This was so that any face-to-face meeting between the Applicant and his solicitor could be meaningful in the context of the Applicant's right to avail of legal advice and the solicitor's ability to provide same, which self-evidently required the solicitor to understand the instructions given and the client to understand the advice proffered. It is also a proposition which ignores the reality that any solicitor is likely to have more than one client and, thus, likely to have competing demands on their time in the context of serving other clients, such that immediate access is not reasonable to expect, irrespective of how close a client might reside to their office.

**100.** Insofar as a material element of the First Named Respondent's decision was that "*the country did not enter full lockdown until 27 March 2020*", that is impossible to square with the IPO's own announcement which I quoted, verbatim, earlier in this judgment. The IPO's "**IMPORTANT NOTICE RE COVID-19**" did not issue on 27 March, but on 12 March 2020, giving notice that, in light of what it described as "*the extraordinary circumstances of the **current Covid-19 developments** and the announcement made earlier today by the Taoiseach, the International Protection Office wishes to advise that the following arrangements will apply **with immediate effect***" (emphasis added)

**101.** The decision challenged in the present proceedings continued in the following terms: -

*"25. An Applicant's questionnaire is an essential document in the process. It sets out a number of matters to be taken into account by decision-makers in the international protection process. Despite the fact that a number of extensions were granted by IPO (and one was refused, a fact which was not mentioned by the appellant's legal representatives in the Schedule 7 notice of appeal and the letters dated 8 and 26 February 2021), the appellant's questionnaire was not submitted until 25 August 2020 (nearly 30 weeks after the appellant's legal representatives were assigned). The Tribunal notes that the country emerged from the first lockdown in mid-June 2020 and still it took a further 2 months to submit the questionnaire".*

**102.** With regard to the foregoing, it appears that the decision-maker relied to a material extent on the fact that the Applicant's legal representatives had not mentioned that one request for an extension was refused. Insofar as this was the extension sought on 4 March 2020, but refused by the IPO, it is not in dispute that the matter was explicitly referenced in the review decision dated 2 December 2020 which, self-evidently, issued *prior* to the preparation by the Applicant's legal representatives of both the Schedule 7 notice of appeal and their letters of 8 and 26 February 2021. That such an extension request was refused is not, of course, the full story, as the review decision makes clear in the following terms:

*"On 4/03/2020 a further extension was requested by Gary Daly Sol's and was refused.*

*Due to Covid-19 considerations, this refusal was relaxed on 16 March 2020 and an extension was granted until 1<sup>st</sup> May 2020.*

*On 17/07/2020, Gary Daly Solicitors again requested an extension to the questionnaire and a final extension was given until 24<sup>th</sup> August 2020 . . .".*

**103.** It seems clear that the decision-maker relied to a material extent and made findings averse to the Applicant by reason of the fact that the relevant questionnaire was not submitted until 25 August 2020 which, as the decision-maker put it, was "*nearly 30 weeks after the appellant's legal representatives were assigned*". The foregoing does not engage with the reality that, from 28 January 2020 (when the Applicant's solicitor was first appointed by the Legal Aid Board) to 12 March 2020 (when Covid-19 restrictions impacted, according to the IPO itself) is a period of just 6 weeks, in the context of the exercise of Article 15 rights to legal advice, necessarily involving time for advice to be taken and provided, in particular where a Georgian

translator was required. Nor is there engagement with the explanation which was before the Tribunal in that regard.

**104.** Moreover, the 24 weeks commencing on 12 March 2020 coincided with the first national lockdown and there is no engagement by the decision-maker with the fact of extensions given by the IPO and/or the reasons for same in the context of Covid-19 restrictions.

**105.** In addition, the decision-maker had before them, and made explicit that they took account of, *inter alia*, submissions made by the Applicant's solicitors (dated 26 February 2021) to the effect that their office spoke to the IPO on numerous occasions and received assurances that Covid-19 had caused delays across many cases; and that it was understood by the Applicant's solicitors that this would have no bearing on the Applicant's application for a work permit; and that no delay would be attributed to him for the lack of progress in respect of the international protection case, due to Covid-19.

**106.** The Tribunal's reliance on the country's emergence "*from the first lockdown in mid-June 2020 and still it took a further 2 months to submit the questionnaire*" does not engage at all with the fact that the IPO granted an extension on 17 July 2020 up to 24 August 2020 (no issue having been taken by the IPO with the fact that the questionnaire was provided the following day, 25 August 2020). The foregoing constitutes *unreasonableness* and *irrationality* in the decision challenged.

**107.** The Tribunal's findings do not appear to be evidence-based. There was no evidence that the IPO ever informed the appellant that it regarded him as having an established pattern of acting in a way so as to delay the process of his international protection application. There is, however, evidence to the contrary. For the Applicant to have taken the initiative and made contact with his social worker who got in touch with the IPO on 11 December 2019 to enquire as to progress of the Applicant's international protection application is the *opposite* of acting in such a way as to delay the processing of that application. For this contact, on 11 December 2019, at the Applicant's behest, to have resulted in an appointment the very next day on 12 December 2019 which the Applicant attended is not acting in such a way as to delay the processing of the application in respect of which that appointment played an important part. It seems to me that the findings at para. 28 of the decision 'fly in the face of' relevant facts and are not evidence-based, yet plainly form the material element of the decision.

**108.** Similar comments apply in relation to the findings at para. 29. There was, before the Tribunal, an explanation for the delay. It is unnecessary to repeat the analysis earlier in this judgment, but it is clear that the findings at para. 29 constitute a wholesale rejection of the account given by the Applicant's solicitors with which no issue was taken by the IPO. The finding that the Applicant "*has not cooperated in the international protection process*" does not appear to me to be at all evidence-based. Rather, it appears to be undermined by the very evidence which was before the Tribunal. At no stage did the IPO take the view that the Applicant had not cooperated in the international protection process with which, of course the IPO is concerned.

**109.** As to the decision-maker's finding that the only time the Applicant "*has acted with any alacrity is in his application to enter the labour market*", it will be recalled that, at para. 2 of the decision, the Tribunal made clear that it did not even know the "*exact date*" when the Applicant initially sought a labour market access permission, or the date when same was refused. Despite this, the Tribunal plainly made an adverse finding in respect of the Applicant, and a finding for which knowledge of when the Applicant sought to enter the labour market was essential.



**110.** Furthermore, Regulation 11 (3)(b) entitles the Applicant to make an application for labour market access permission on 2 May 2020 (being 8 months after the Applicant's international protection application on 2 September 2019). The Applicant in the present case did not make his initial application until nearly 2 months *later*, namely on 20 June 2020. The finding that the only time the Applicant "*has acted with any alacrity in his application to enter the labour market*" is not evidence-based and flies in the face of the facts, in my view.

**111.** It does not seem to me to be an over-simplification to say that the only point of dispute in relation to the facts, as between the Applicant and the IPO, concerned the 16 September 2019 appointment and, in the manner examined earlier in this judgment, the evidence entitles me to hold that the Applicant was never, in fact, notified of same. It bears repeating however that the decision-maker did not contact the IPO in respect of that or any other issue. Thus, the Applicant's explanation was before the First Named Respondent and a rational basis for its rejection is entirely unclear.

**112.** For the Tribunal to echo the review officer's comment to the effect that the Applicant had "*an established pattern of acting in such a way as to delay the processing of his application*" is a finding which, to my mind, is not evidence - based and flies in the face of the facts which were before the Tribunal.

**113.** It will be recalled that Regulation 27 of the 2018 Regulations which is entitled "*Attribution of delay in making of first instance decision*" refers to matters which the Minister may have regard to in considering, for the purposes of Regulation 11, whether the fact that a first instance decision has not been made in respect of the Applicant's protection application can be attributed, or attributed in part, to the Applicant, include whether the Applicant has failed to comply with the obligations by inter alia "(ii) **without reasonable excuse**, acting in such a way as to delay the processing of his or her application" (emphasis added). In circumstances where the IPO at no stage ever suggested to the Applicant that he was acting in such a way as to delay the processing of his application, the question of whether he did or did not have a "*reasonable excuse*" simply did not arise. It is also entirely fair to say that, other than a wholesale rejection of the explanation proffered on behalf of the appellant, there is no engagement by the decision-maker with the question of whether a reasonable excuse existed in respect of delay.

**114.** The final paragraphs of the decision appear in the following terms: -

*"30. As the Tribunal has, based on the evidence before it in relation to the appellant's delay, decided to refuse the appeal, the Tribunal does not feel it necessary to make a finding on the fact that the appellant worked illegally. However, the Tribunal is persuaded by the submission of 26 February 2021 by the appellant's legal representatives that any such consideration would be outside its jurisdiction. The Tribunal is a creature of statute and may only consider matters within this remit.*

*31. Taking all of the evidence and documents 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.*

**CONCLUSION**

*32. The Tribunal finds that the delay in taking a first instance decision in the appellant's international protection application can be attributed to the appellant.*

*33. Having found that the delay in issuing the first instance decision is attributable to the appellant, the Tribunal finds that the appellant is not entitled to access the labour market and, under Regulation 21 (5) (a) of the Regulations, affirms the decision of the Review Officer dated 2 December 2020".*

**115.** No issue is taken by the Applicant with regard to the contents of para. 30. For obvious reasons, very serious issue is taken with the findings at para. 31. The finding that the Applicant has not cooperated in the processing of his application for international protection seems to me to fly in the face of the facts and to be a finding which is not evidence-based. Given the relevant facts as set out on behalf of the Applicant in submissions which the Tribunal considered, one might rhetorically ask the following questions:

- How has the Applicant not cooperated?
- In what way did his so called non-cooperation cause delay?
- Where is the engagement with the relevant body responsible for the international protection claim (namely the IPO) who never accused the Applicant of failing to co-operate?
- Where is the engagement with the reality that extensions of time were sought and were given by the IPO who never stated, when these extensions were given, that they regarded it as inappropriate for the Applicant to have asked for extensions; and/or inappropriate for the extensions to be granted; and never suggested that they were granted without prejudice to a view (never expressed by the IPO) that the Applicant was not co-operating or might in the future be so regarded?

**116.** The finding that the only time the Applicant acted with any alacrity in his applications was to enter the labour market also seems to me to be based on the irrational premise that there is an equivalence between the work involved in (i) an application for international protection, as opposed to (ii) an application to enter the labour market. This is manifestly not so. It is also a finding to the effect that, had the Applicant wanted to, he could have submitted his international protection questionnaire at least as quickly as he submitted his application for labour market access and that he chose to act with speed in respect of the latter, not the former. This is not so. It is a finding which is contrary to the evidence and one which also ignores the fundamentally important fact that an application for labour market access comprises, very literally, a 'box ticking' exercise on an extremely short form. Apart from entering a name, "TRC" and contact details, the material part of the form comprises the 'ticking' of 6 'boxes'. By contrast, the international protection questionnaire requires an Applicant to provide (in a form which is a fundamental part of their application, wherein an Applicant is required to furnish as much detail as possible in respect of the answers given and to furnish as much documentation as supports) answers to a wide range of questions under various headings including personal details; family details; dependants; connection to Ireland; education; employment history; why international protection is sought; why there is a fear of serious harm; how the Applicant travelled to this state; details of all relevant incidents; details in respect of any criminal history; visa, passport and other information; and all reasons why an Applicant says that they or their dependants should be allowed to remain in this State as well as information concerning an Applicant's medical situation etc. The material part of an application for a labour market access permission is a single page. As noted earlier, the Applicant's international protection questionnaire runs to 62 pages excluding the documentation accompanying same and a setting out of a narrative is a fundamentally important aspect of the questionnaire, in stark contrast to the very limited scope and very different purpose of the labour market access application form. The proposition that speed in respect of one evidences an ability to submit the other more quickly is irrational and unreasonable in my view and a finding based on that premise is similarly flawed. Furthermore, in reaching this flawed finding, it does not appear that the First Named Respondent engaged with (i) the fact that the IPO had granted a series of extensions to the Applicant with regard to submitting the relevant questionnaire and (ii) the reasons for those extensions.

**117.** The evidence before the court entitles it to hold (i) that the IPO saw no difficulty with the granting of any of the extensions which were in fact granted; (ii) that the extensions granted up to 16 March 2020 recognised the appropriateness of facilitating the Applicant in availing of legal advice from a solicitor appointed on 28 January 2020; in circumstances where (iii) the provision of legal advice would require the availability and assistance of a Georgian translator. The evidence also entitles the court to hold that the extensions granted by the IPO from March 2020 onwards constituted (iv) a recognition of difficulties and delays resulting from the Covid-19 pandemic.

**118.** This Court is also entitled to hold that at no stage up to and including the delivery, by the Applicant's solicitor of his questionnaire on 25 August 2020 did the IPO consider (1) that the delay in submitting his questionnaire was caused by him and/or (2) that he was not cooperating in the processing of his international protection application.

**119.** Insofar as it is suggested that the First Named Respondent is entitled to exclude from its consideration the reasons why extensions of time were granted by the IPO in respect of the Applicant's international protection application in the context of forming a view that the Applicant is guilty of delay in respect of processing the self-same application and failed to cooperate in the processing of same, I reject that contention as fundamentally flawed in the present case. In circumstances where it does not appear that the reasons for the extensions given by the IPO were engaged with by the First Named Respondent decision-maker, I take the view that the decision is one which was arrived at in breach of the principles of fair procedures and natural and constitutional justice.

**120.** Insofar as the decision-maker formed the view that it was not credible that the Applicant's solicitors could not arrange for an in-person consultation in the presence of a Georgian interpreter during the Covid-19 'lockdown', there was simply no evidence on which to base such a view. There was, however, evidence to the contrary in the form of the explanation given by the Applicant's solicitor.

#### **International Protection Act 2015**

**121.** Under s. 27 of the International Protection Act, 2015 ("the 2015 Act") the Applicant is required to cooperate with State agencies in furthering his international protection claim. Prior to the decision challenged in the present proceedings, it had never been alleged that the Applicant was in breach of the foregoing provision. For the reasons set out in this decision, I take the view that the finding made by the First Named Respondent that the Applicant had not cooperated in the processing of his international protection application was made unlawfully.

**122.** It is also appropriate to observe that there is a specific procedure for a finding of non-cooperation set out in s. 38 of the 2015 Act. That procedure was not followed by the Respondent in relation to the finding of non-cooperation, which plainly formed a material aspect of the decision challenged. It also seems to me that there was a breach of fair procedures and natural and constitutional justice in circumstances where the Applicant was never put on notice of a potential finding of non-cooperation on his part.

#### **Fundamental reason and common sense**

**123.** It seems to me to run contrary to fundamental reason and common sense for the decision-maker to have found that, during what the IPO described (in its 12 March 2020 "IMPORTANT NOTICE RE COVID-19") as the "*extraordinary circumstances*" arising from Covid-19 including a national 'lockdown', that the Applicant was the cause of the delay in his application for international protection. In the manner explained

earlier, the decision-maker's view in this regard also runs entirely contrary to the fact of, and reasons for, extensions granted to the Applicant by the IPO in response to the Covid-19 health emergency.

**No contact with the IPO**

95. In her affidavit sworn on 15 July 2021, Ms. Rabbitte of the LMAU made the following averments in relation to what a review officer will do in the event of an Applicant calling for a review of a first instance decision to refuse labour market access. The following was averred at para. 8:-

*"For the purpose of the review, the Review Officer will do the following:-*

- Examine the review letter and the basis on which the review has been requested.*
- Examine the electronic record that the Applicant has with the IPO and any other relevant immigration history that the Applicant has in the State. This is done in great detail. **If the electronic record lacks clarity, the Review Officer is entitled to contact the IPO for clarification, however, this is a matter for the Review Officer and in respect of the Applicant's case herein, was deemed not necessary.***
- The information gathered by the Review Officer is then assessed in accordance with the 2018 Reception Conditions Regulations, as well as the International Protection Act 2015 and any other relevant legislation.*
- A conclusion is then reached on whether the original refusal should be upheld or set aside.*
- Where a refusal is upheld, the Review Officer also considers whether the reason for refusal can be mitigated by future actions of the Applicant. These potentially include whether an extended period of cooperation with the IPO has subsequently taken place. This provides for the Applicant to be given the opportunity to re-apply for labour market access at a later date, if he or she so wishes." (emphasis added)*

96. It is clear from the foregoing that, in the context of the review decision, the LMAU did not contact the IPO. It is common case that, in the context of the decision challenged in the present proceedings, IPAT did not contact the IPO.

97. Leaving aside whether the following averments are more in the nature of legal submissions, Ms. Rabbitte's affidavit concludes with the following averments: -

*"10. It is respectfully submitted that in the Applicant's Statement grounding his application for judicial review and in the accompanying documentation, there is an attempt to convey the impression that the LMAU is bound to follow, and cannot deviate, from the decision making of the IPO. In the context of these proceedings, this implies that the LMAU cannot look behind and draw its own conclusions from the repeated extensions of time which were granted to the Applicant by the IPO. I say that this is not the case.*

*11. Accordingly, for the purposes of these proceedings, it is very important to state that the LMAU is a separate and distinct body from the International Protection Office. Therefore, it is entitled to employ its own decision-making process in determining whether the delay in the issuance of a first instance decision by the IPO is attributable to the Applicant, or has been caused by other factors.*

*12. The LMAU is obliged to carry out a fair and considered assessment of where responsibility for any delays occurring in the international protection process lies. While the IPO may have a variety of reasons for allowing extensions of time to an Applicant to comply with the international protection process, that approach taken by the IPO does not bind, or restrict*

*the LMAU in its functions. Again, acting on behalf of the Minister, the LMAU is fully entitled to apply its own consideration to any delay that has occurred. While the LMAU will undoubtedly pay very close attention to what has happened in the course of the IPO process, it is obliged to make its own independent assessment as to who, or what, is responsible for the delay which has taken place."*

**98.** The case made by the Applicant is not that the LMAU or IPAT is not entitled to employ its own decision-making process. However, it is submitted that the process employed by the First Named Respondent must comply, *inter alia*, with fair procedures and natural and constitutional justice principles including *audi alteram partem*. I entirely agree. In the present case, highly material adverse credibility findings were made by the decision-maker without an opportunity having been afforded to the Applicant to address the issues. These findings in the decision included, variously:-

- That he had "*done little to ameliorate his situation*" (para. 16);
- That he was in effect a "*passive*" participant in the international protection process (para. 16);
- That COVID-19 was "*not the delaying factor*" in this case (para. 24);
- That living "*approximately a 10/15 minute walk away*" from his solicitors office was significant (para. 24);
- That, according to the Tribunal, "*the country emerged from the first lockdown in mid-June 2020, and still it took a further 2 months to submit the questionnaire*" (para. 25);
- That there was no "*dearth of interpreters*" for the period in question (para. 25);
- It was significant that legal services provided by solicitors and barristers were regarded as "*essential services*" during the COVID-19 pandemic (para. 27);
- That the Applicant "*has not co-operated in the international protection process*" (para. 29);
- That the only time the Applicant "*acted with any alacrity is in his application to enter the labour market*" (para. 29).

**99.** As well as the principle of *audi alteram partem* being an essential element of fair procedures, another essential cornerstone of lawful decision-making is that the decision-maker has before it relevant material or evidence supporting the decision made. In the manner outlined in this judgment, I take the view that this cannot be said of the decision challenged. Perhaps the starkest example of this is the Tribunal's view that there was not "*a dearth of interpreters*". There is simply no evidence for such a finding. By contrast, the evidence before this Court establishes that, within 6 weeks of having been assigned as the Applicant's solicitor, Gary Daly & Co. had secured the services of a Georgian speaking translator and had arranged for a meeting in the solicitor's office on 11 March 2020 to be attended by (a) the Applicant and his wife, (b) the Georgian translator and (c) the Applicant's solicitor. The evidence also establishes that that meeting had to be cancelled and was rearranged for Friday, 13 March 2020 which meeting also had to be cancelled and was rearranged for Monday, 16 March 2020 but also had to be cancelled, the aforesaid meeting ultimately taking place on 5 August 2020. The proposition that there was no *dearth* of interpreters was never put to the Applicant. Furthermore, the Tribunal's finding which, in my view was made in breach of the *audi alteram partem* principle, speaks to the number of such interpreters, whereas as everyone who lived through the national 'lockdowns' will recall, there were long periods where people simply could not meet 'in-person', irrespective of how many translators speak the Georgian language.

**100.** The evidence also establishes that, as a consequence of difficulties and delays caused by the COVID-19 pandemic (i.e., not caused by the Applicant), the IPO granted extensions, including an extension

which the IPO confirmed on 16 March 2020. Insofar as the decision-maker attributes all delay to the Applicant, that is a decision which, in my view, flies in the face of reason and common sense as well as being a decision undermined by the evidence which was before the decision-maker.

**101.** The evidence also establishes that the rescheduled meeting (between Applicant, solicitor and translator) of 5 August 2020, was during a period covered by an extension granted by the IPO.

**102.** Insofar as the LMAU or IPAT can decide that an Applicant has not co-operated with the IPO, even though the IPO never took any such view, such a decision would have to be based on evidence and would have to be one taken in the context of the Applicant having been afforded fair procedures consistent with natural and constitutional justice. By way of illustration, the Tribunal would have had to engage in a meaningful way with, for example, the context in which extensions of time were sought, as well as the reasons those extensions of time were, or were not, granted. In my view, an Applicant would, at the very least, need to be put on notice that consideration was being given to the making of a finding of non-cooperation with the IPO (which the IPO itself had never reached) and the Applicant would need to be afforded a meaningful opportunity to address that issue.

**124.** Doubtless the tribunal member was acting, at all times, entirely in good faith and attempting to perform a difficult and important task diligently. For the reasons outlined in this judgment, the First Named Respondent unfortunately fell into error, in that the decision was not made lawfully and is, in my view, was irrational and unreasonable in the sense in which those terms are used in administrative law. I also take the view that it was a decision made in breach of natural and constitutional justice with respect to the Applicant's fair procedures rights.

### **Transposing the Directive**

**103.** For the reasons set out in this judgment, I am satisfied that the Applicant has established the legal grounds (i) to (vi) set out at para. E of his statement of grounds dated 19 April 2021. The second aspect of the Applicant's case is pleaded at para. E (vii), namely, that the Respondents have failed to properly transpose Article 15(1) of the 2013 Directive. Earlier in this judgment, I set out, *verbatim*, Article 15(1) which employs the words "*and the delay **cannot be attributed to the Applicant***". This can be contrasted with the wording in Regulation 11(4)(b) of the 2018 Regulations which states, with regard to delay in the making of a first instance decision concerning an international protection application, that the situation "*cannot be attributed, **or attributed in part, to the Applicant***". As I have already observed, this seems to me to be a material difference. Indeed, the reality and effect of that difference seems to be to be borne out by the decision challenged in this case given that, in submissions made very appropriately on behalf of the Respondents, it was acknowledged that two different issues gave rise to some delay (the taking of legal advice and the effects of the Covid-19 pandemic), the thrust of the Respondents' submissions being, not that the Applicant was responsible for the entire delay, but that he was responsible for part of the entire. This is what the Respondents call "*excessive delay*". The inescapable logic of the foregoing is that certain delay (not being attributable to the Applicant, but to those other two issues) is delay but not excessive delay. Quite apart from the issue of the compatibility or otherwise of this approach with the wording of the 2013 Directive, it is fair to say that the impugned decision is not at all consistent in adopting the approach articulated in the Respondents' submissions. I say that for the following reasons.

**104.** It will be recalled that the First Named Respondent asserted that the wording in the 2013 Directive, not in the 2018 Regulations, was relied upon (see paras. 15 and 23 of the impugned decision). The decision-maker had before it a clear and detailed explanation for the "*delay*" between 2 September 2019 and 11

December 2019. In the manner examined earlier in this judgment, the evidence allows the court to hold that the Applicant did not know of an appointment at the IPO on 16 September 2019 (something stated clearly in the letter from the Applicant's solicitor dated 8 February 2021 which comprised part of the submissions considered by the Tribunal). It was the Applicant, via his social worker, who took the initiative and, on 11 December 2019, contacted the IPO, as a direct result of which delay was brought to an end and an interview took place the following day on 12 December 2019. The foregoing delay was, in my view, delay on the part of the State in processing the claim. Notwithstanding the foregoing, it is plain from the findings at para. 24 that the decision-maker rejected wholesale the explanation given and considered the Applicant responsible for all delay between 2 September 2019 and 11 December 2020.

**105.** Similarly, whilst the Respondents, in submissions to this Court, fully accept the Applicant's right to seek and to be provided with legal advice and also acknowledge that the practical exercise of such right will necessarily take a period of time, the impugned decision gives no 'credit' whatsoever for the time reasonably required by the Applicant to instruct a solicitor (for which an in-person appointment with a Georgian- speaking translator was also required). That is clear from para. 24 of the decision.

**106.** From 12 March 2020 onwards, serious disruption was, without doubt, caused by the COVID-19 pandemic and the unprecedented restrictions introduced in response to same. Plainly, the Applicant was not responsible for the COVID-19 pandemic. Equally, it runs completely contrary to common sense and to the evidence, to suggest that there were no delays or disruptions caused to the Applicant as a result of COVID-19 restrictions insofar as his ability to progress his application (specifically, to have an in-person meeting with a Georgian translator and the Applicant's solicitor).

**107.** In light of the foregoing, it seems to me that the delay which the decision-maker in fact relied on was consistent, *not* with the wording in the Directive, but with the wording of Regulation 11(4)(b) of the 2018 Regulations. It seems to me that, in substance, the First Named Respondent, although purporting to rely only on the Directive and, no doubt, attempting to do so *bona fide*, in fact applied the wording found in the 2018 Regulations.

**108.** At paras. 14 and 15 of the Decision, the Tribunal noted the presence in the 2018 Regulations of the words "*or attributed in part*" (which are not present in the Directive) and, very understandably and appropriately, considered itself obliged to apply the wording of the Directive. However, a reading of the decision does not appear to indicate that this was done, or done consistently. I say this in light of the following:

- (i) At para. 24 the Tribunal makes clear that it is well aware of the impact which Covid-19 has had, including on international protection Applicants, but it goes on to state clearly that its opinion is that "*Covid-19 is not the delaying factor in the instant case*" (emphasis added). The foregoing is to say that Covid-19 played no part in the delay and to attribute all delay to the Applicant;
- (ii) Despite the foregoing, the Tribunal goes on to discuss the period "*of approximately six weeks*" beginning on 28 January 2020 and notes that "*the final weeks were affected by the pandemic*" (emphasis added). The foregoing seems to be an attribution of at least some delay, or part of the delay, to Covid-19, as opposed to the Applicant;
- (iii) Furthermore, at para. 25, the Tribunal draws a distinction between what it describes as the country emerging "*from the first lockdown in mid-June 2020*" and the fact that the Applicant's questionnaire was not submitted for "*a further 2 months*". The foregoing distinction, and the emphasis on the period of 2 months, again seems to recognise difficulties and delays caused by the Covid-19 national

'lockdown' and to lay the blame for delay of 2 months at the feet of the Applicant (as opposed to Covid-19 issues). In substance, that is to say that delay was attributed *in part* to the Applicant, and in part to Covid-19 issues.

**109.** In light of the foregoing, it does not seem to me that the decision challenged is one which was taken in accordance with the wording in the Directive. I also take the view that delay within the meaning of Regulation 11(4)(b) of the 2018 Regulations and/or under Art. 15 of the Directive, cannot, on the facts of the present case, include:

- (i) the period from 2 September 2019 to 11 December 2019, in circumstances where the evidence establishes the fact that the Applicant did not receive notification of the appointment scheduled for 16 September and it was the Applicant (via the Jesuit Refugee Service) who contacted the IPO on 11 December 2019, as a consequence of which a s. 15 interview was arranged for 12 December 2019, facilitated by a Georgian interpreter, which appointment the Applicant attended;
- (ii) the time sought by the Applicant to instruct a solicitor in the presence of a Georgian interpreter, particularly in circumstances where the solicitor was not appointed until 28 January. It seems to me that the acknowledged right of an Applicant to avail of legal advice necessarily involves an entitlement to have time to facilitate this advice being given, particularly where the services of a translator added an extra and essential 'moving part' (and I fail to see how time to exercise such an important right could fairly be considered to be 'delay', absent evidence which demonstrated a lack of any reasonable effort to obtain legal advice);
- (iii) delays caused by the advent of the Covid-19 pandemic which, *per* the IPO's own announcement, resulted in delays and cancellations with immediate effect from 12 March 2020 onwards.

**125.** For these reasons I take the view that the manner in which the Respondent interpreted "*delay*" under Regulation 11(4)(b) of the 2018 Regulations and/or Art. 15(1) of the Directive was incorrect, both as regards the facts in the present case and insofar as delay being attributed wholly to the Applicant.

#### **A different approach *per* the Regulations**

**110.** It seems to me that Regulation 11(4)(b) gives scope for the imposition of a different meaning or approach in respect of *delay* than is found in the Directive. In other words, if any delay (regardless of how significant or not) can be "***attributed in part***" to the Applicant, a labour market access permission may be refused even if, as the facts in the present case disclose, other delays were attributable to, say,:-

- delay on the part of the State (arising from a doubtless innocent failure to properly notify the Applicant of an appointment);
- delay in obtaining legal advice (e.g., the time reasonably required to meet with a recently-appointed solicitor, in the context of a Georgian-speaking interpreter being required for any such meeting to be effective);
- delay resulting from the COVID-19 pandemic (and public health restrictions in that context which, without doubt, affected the IPO and the Applicant's application).

**111.** It is submitted on behalf of the Respondents that, whether or not Article 15(1) of the 2013 Directive has been correctly transposed into Irish law does not arise in the context of the proceedings. This, submit the Respondents, is because the tribunal member based her decision on the provisions set out in the Directive, rather than in the 2018 Regulations. For the reasons set out in this judgment, I must disagree.

#### **Obligation to give effect to Directive**



**112.** In support of the proposition that this Court has an obligation to give effect to Article 15(1) of the Directive, over and above the 2018 Regulations, counsel for the Applicant refers to *Von Colson & anor v. Land Nordrhein-Westfalen* [1984] EUECJ R-14/83 (10 April 1984). In that case, the court considered 6 questions in respect of Directive No. 76/2007/EC of 9 February 1996 on the Implementation of the Principle of Equal Treatment for Men and Women as regards access to employment, vocational training and promotion, and working conditions. Question 6 was in the following terms:-

*"Does Directive No. 76/2007/EEC as interpreted by the Court of Justice in its answers to the questions set out above constitute directly applicable law in the Federal Republic of Germany?"*

**113.** At para. 25, it was made clear that it was for the national court alone to rule on a particular question which concerned the interpretation of its national law and appeared to relation to compensation. Paragraph 26 of the judgment continued in the following terms:-

*"However, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying the national law and in particular the provisions of a national law specifically introduced in order to implement Directive No 76/207, national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189."*

**114.** Reliance was also placed on the decision in case C-378/17 *Minister for Justice and Equality v. Workplace Relations Commission* [EU:C:2018:979]. The judgment began in the following terms by setting out the central issue:-

*"This request for a preliminary ruling concerns the question whether a national body established by law in order to ensure enforcement of EU law in a particular area must be able to disapply a rule of national law that is contrary to EU law."*

**115.** At para. 36 of the judgment, it was made clear that *"any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of EU law... which might prevent directly applicable EU rules from having full force and effect are incompatible with the requirements which are the very essence of EU law..."*. Later, at para. 38, it was stated that *"As the Court has repeatedly held, that duty to disapply national legislation that is contrary to EU law is owed not only by national courts, but also by all organs of the State..."*. At para. 39, the court stated that *"It follows that the principle of primacy of EU law requires not only the courts but all the bodies of the Member States to give full effect to EU rules"*. It was in light of the foregoing statements of principle that the question referred to the court fell to be answered. As to the answer given, it is sufficient to quote the following portions of the judgment:-

*"48. If a body such as the Workplace Relations Commission, entrusted by law with the task of ensuring that the obligations stemming from the implementation of Directive 2000/78 are implemented and complied with, were unable to find that a national provision is contrary to that directive and, consequently, were unable to decide to disapply that provision, the EU rules in the area of equality in employment and occupation would be rendered less effective (see, to that effect, judgment of 9 September 2003, CIF, C-198/01, EU:C:2003:430, paragraph 50).*

49. Rules of national law, even constitutional provisions, cannot be allowed to undermine the unity and effectiveness of EU law (judgment of 8 September 2010, Winner Wetten, C-409/06, EU:C:2010:503, paragraph 61).

50. It follows from the principle of primacy of EU law, as interpreted by the Court in the case-law referred to in paragraphs 35 to 38 of the present judgment, that bodies called upon, within the exercise of their respective powers, to apply EU law are obliged to adopt all the measures necessary to ensure that EU law is fully effective, disapplying if need be any national provisions or national case-law that are contrary to EU law. This means that those bodies, in order to ensure that EU law is fully effective, must neither request nor await the prior setting aside of such a provision or such case-law by legislative or other constitutional means.

51. Consequently, the fact, highlighted by the referring court, that in the present instance national law permits individuals to bring an action before the High Court founded on the alleged incompatibility of a national provision with Directive 2000/78 and allows the High Court, if it upholds the action, to disapply the national provision at issue is not capable of calling the above conclusion into question.

52. In the light of the foregoing considerations, the answer to the question referred is that EU law, in particular the principle of primacy of EU law, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which a national body established by law in order to ensure enforcement of EU law in a particular area lacks jurisdiction to decide to disapply a rule of national law that is contrary to EU law."

**N.H.V. v. Minister for Justice & Equality [2017] IESC 35, [2018] 1 IR 246**

**116.** Counsel for the Applicant emphasises that the 2018 Regulations were made in the wake of the Supreme Court's decision in *N.H.V. v. Minister for Justice & Equality* [2017] IESC 35, [2018] 1 IR 246. That case concerned a Burmese native who had been living in 'Direct Provision' accommodation for five years after his arrival in this State and who was precluded from taking up an offer of employment by reason of the then-statutory position. Counsel for the Applicant emphasised the recognition by the Supreme Court of the connection between work and the "*dignity and freedom of the individual*" in the context of holding that an absolute prohibition on the seeking of employment was unconstitutional. It was emphasised by the Applicant's counsel that, following on from the Supreme Court's decision in *N.H.V.*, the State opted in to the 2013 Directive, which was transposed into domestic law by means of the 2018 Regulations. The connection between dignity and the right to work is submitted to be particularly evident in the present case where (i) the Applicant has not been working/permitted to work for a considerable period; (ii) the Applicant and his wife have a baby and are struggling to provide for their family; (iii) the Applicant's right to work has been unlawfully denied by the First Named Respondent in breach of fair procedures and natural justice and by reason of the manner in which the Respondents have failed to properly transpose the 2013 Directive into Irish Law. It is submitted that the failure to transpose the 2013 Directive has allowed the First Named Respondent to refuse the Applicant access to the labour market for reasons outside the scope of the Directive.

**Failure to transpose**

**117.** 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.

**118.** It also seems to me that, in the present case, the Applicant was refused access to the labour market in this State for reasons *outside* the scope of the Directive.

**119.** For the reasons set out in this judgment, it seems to me that, whereas the First Named Respondent signalled an intention, doubtless genuinely held, to apply the Directive only, that was not achieved. I say this for two reasons. First, in the manner previously examined, even if it is correct to describe the entire period from 2 September 2019 to 25 August 2020 as 'delay' *parts* of same were, without doubt, not attributable to the Applicant. Thus, it was a decision which, in substance, applied the approach set down in the 2018 Regulations.

**120.** Secondly, although, on the one hand, the conclusion of the Decision (per para. 32 thereof) is that "*The delay in taking a first instance decision in the Appellant's International Protection Application can be attributed to the Appellant*", the foregoing appears to me to be inconsistent with material findings in the body of the decision which plainly recognise that at least parts of this very delay were *not* attributed to the Applicant, but to the Covid-19 pandemic.

**121.** It also seems to me entirely fair to say that if one compares the various statements made by the decision-maker in respect of the Covid-19 pandemic and its effects, there are unresolved inconsistencies therein. Standing back from the decision, and reading it as a whole, it appears to me to be a decision which acknowledges that Covid-19 did, in fact, cause *some* delay in respect of this Applicant's application for international protection (thus, only *part* of the overall delay could be attributed to him) and which regards the Applicant as responsible for the *majority* of the delay. I say this in light of the following statements made in the decision on the topic of Covid-19: -

- *The Tribunal is of course well aware of the impact which Covid-19 has had in general, and more specifically in the context of international protection Applicants*" (para. 24)
- *However, the Tribunal is of the opinion that Covid-19 is not the delaying factor in the instant case;* (para. 24)
- [regarding the period between 28 January and 11 March 2020] "*this is a period of approximately 6 weeks, and only the final weeks were affected by the pandemic;* (para. 24)
- *The Tribunal notes that the country emerged from the first lockdown in mid – June 2020 and still it took a further 2 months to submit the questionnaire;* (para. 25)
- *The Tribunal, as stated already, is cognisant of the effects of the pandemic;* (para. 27);
- *The Tribunal finds that the delay in taking a first instance decision in the appellant's international protection application can be attributed to the appellant;* (para. 32)"

**122.** For the reasons set out in this judgment, it seems to me that if there had not been a failure to transpose the 2013 Directive by means of the 2018 Regulations, the decision-maker would not have fallen into error by, in substance, albeit inadvertently, approaching the question of delay on the basis that labour access permission can be refused where delay is attributed **or attributed in part** to the Applicant. For these reasons, I am also satisfied that the Applicant has established ground (vii) of the legal grounds set out at para. E of his statement of grounds.

**123.** In the manner explained in this judgment, I am satisfied that the Applicant has established an entitlement to the relief sought. The parties should correspond with each other, forthwith, with a view to agreeing a form of order which reflects the findings in this judgment.

**124.** On 24 March 2020 the following statement issued in respect of the delivery of judgments electronically: "*The parties will be invited to communicate electronically with the Court on issues arising (if*

*any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate.”*

**125.** My preliminary view is that, in circumstances where the Applicant has been entirely successful, the justice of the situation is best met by not departing from the ‘normal’ rule that ‘costs’ should ‘follow the event’. The parties are invited to agree the terms of a draft Order and to furnish same within 14 days. In default of agreement between the parties on any issue, short written submissions should be filed in the Central Office within the said 14-day period.