THE HIGH COURT

JUDICIAL REVIEW

[2023] IEHC 210

Record no. 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 Mark Heslin delivered on the 26th day of April 2023

Introduction

1. This decision must be read alongside the judgment delivered in this case on 9 June 2022, *LK v. IPAT & Ors* [2022] IEHC 441 (hereinafter "the judgment"). The underlying proceedings concerned a challenge to the refusal of a labour market access permit to someone who has applied for international protection. The impugned decision was made on 3 March 2021 (hereinafter "the decision"). For the reasons set out in the judgment, this Court held that the Applicant is entitled to the reliefs sought. A resumed hearing took place on 30 March 2023 during which arguments were made by both sides as to the Applicant 's entitlement, if any, to "*Francovich*" damages [see Joined Cases C-6/90 and C–9/90 *Francovich and Bonifaci & ors v Italian Republic* [1991] ECR I-05357 and Joined Cases C–46/93 and C–48/93 *Brasserie du Pêcheur SA v Federal Republic of Germany* and *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd & ors (no.3)* [1996] ECR I-01029].

2. As I indicated at the conclusion of the resumed hearing, I am very grateful to Mr. Power SC (for the Applicant) and to Mr. Travers SC (for the Respondents) for the assistance they provided in terms of detailed submissions of great sophistication, both oral and written. I have carefully considered all submissions and, during the course of this decision, I will refer to the principal submissions and to certain authorities to which counsel very helpfully drew to the Court's attention and which, in my view, were of most assistance in determining the questions which arise in this 'module'.

***Francovich* damages**

3. In *Francovich*, Italy failed to transpose Directive 80/987 which dealt with the protection of workers in the event of their employer becoming insolvent. The claimants were due monies by their employers, but the Member State had not implemented the said Directive as a consequence of which there was no guarantee scheme in respect of the wages payable. The claimants argued that the Directive was directly effective but, in the alternative, that Italy was liable in damages for failure to transpose the Directive in time. Although the Court held that the Directive was not directly effective in circumstances where it was insufficiently clear and did not identify the body to guarantee the wages in question, it held that it was a principle of Community law that Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible.

Three conditions

4. It is fair to say that, in order for a claim in damages to succeed, three conditions must be met. In the Supreme Court's decision in *Glegola v. Minister for Social Protection* [2019] 1 IR 539, O'Donnell J. (as he then was) commented on these three conditions in a *Francovich* damages claim, as follows:-

> *"23. The starting point for considering the award of [Francovich] damages is that it is decidedly not the case that the establishment of a breach of European Union law does not, as it might have done, give rise per se to an award of damages to a party who has suffered loss, or might have obtained a benefit under the relevant provision. The jurisprudence is strict, in requiring, first, that the rule infringed must have been intended to confer rights on individuals, second that the breach of the rule was sufficiently serious, and third, that there is a direct causal link between the breach of the obligation imposed on the State and the damage sustained by the injured party*" (p. 556) (emphasis added).

Preliminary issue

5. Whilst the Respondents submit that none of the three aforesaid conditions have been met by the Applicant, they argue, by way of a preliminary issue that:-

> "…. *the IPAT decision under review herein was entirely based on the wording contained in the Directive. Accordingly, whether the Directive had been correctly transposed into Irish law did not effectively arise herein. In essence the Court has been asked by the Applicant to make an order of certiorari quashing a decision which was based on an application of Article 15(1) of the Directive and not on how the Directive itself has been transposed into domestic legislation*". [see para. 3 of the respondent's written submissions].

6. Building on the foregoing, the Respondents submit that the Applicant 's claim for damages falls to be dismissed *in limine*, because, contend the Respondents, IPAT applied Article 15(1) of the Directive in the decision, not the implementing provision in the 2018 Regulations [see para. 6 of the Respondents ' written submissions].

7. Regardless of the undoubted sophistication with which they are made, the foregoing submissions are based on a misinterpretation of this Court's judgment, as illustrated by extracts from same (and page numbers are given, in circumstances where, between the approved judgment and the version published, certain paragraph numbering has gone awry):-

> "*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…" (p. 39);*
>
> *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". (p. 42).*
>
> *"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. Firstly, 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*" (p. 43);

8. The Respondents have signalled an intention to appeal the judgment, as is their absolute right. However, I regard myself as obliged to reject the submissions which comprise the preliminary issue, for the simple reason that they are constructed on the incorrect proposition that the impugned decision was entirely based on the wording contained in the Directive. In this Court's view, and for the reasons set out in the judgment, it was not.

9. The Respondents also make *inter alia* the following submissions:-

> *"Although the phrase 'attributed in part' contained in Regulation 11(4) (b) is not present in Article 15 (1) of [the] Directive, its presence in the 2018 Regulations does not necessarily mean that Article 15 (1) has been incorrectly transposed into Irish law, or that Regulation 11 (4) (b) has been drafted outside of the permitted discretionary limits provided under Article 249 TFEU to Member States when drafting national measures to give effect to the*

requirements of a directive, which limits have not been considered by this Honourable Court". (emphasis added) [see para. 9 of the respondent's written submissions]

10. With respect to the foregoing submissions, the following comments appear to me to be appropriate:-

- At para. 4 of section D of his statement of grounds, the Applicant pleaded an entitlement to "*damages for the failure to properly transpose and/or implement Article 15(1) of Council Directive 2013/33/EU*". (emphasis added);
- At para. vii. of section E, the Applicant pleaded the following legal grounds: "*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 June 2013, laying down standards for the reception of Applicants for International Protection (recast)"* (emphasis added);
- Nothing turns on the reference to the *first* (as opposed to the *third* named) respondent and this minor drafting error did not feature at all during the hearing which gave rise to the judgment;
- The plea of a failure to properly transpose the Directive was engaged with by the Respondents who pleaded, at para. 5 of their Statement of Opposition dated 16 July 2021:-

  "*It is further denied that the Respondents have failed to adopt measures necessary to implement Article 15(1) of Council Directive 2013/33/EU. The Applicant has failed to provide any substantive argument as to why he believes Article 15(1) has not been properly transposed";*
- Prior to issuing the judgment, this Court considered all arguments which had been put and all authorities to which the Court was referred on the question of the pleaded failure to properly transpose the Directive;
- The outcome of this Court's consideration was to come to the view (for reasons set out at pp. 38–53 of the judgment) that there *was* a failure to properly transpose the Directive (see, for example, para. 117 on p. 42 and para. 122 on p. 43);
- In light of the foregoing, it does not seem to me to be appropriate for the Respondents to seek to argue, during the resumed hearing on *Francovich* damages aspect, that there has *not* been a failure to transpose Article 15(1) of the Directive into Irish law (which is the proposition at the heart of para. 9 of the respondent's written submissions);
- If this Court fell into error in deciding that there was a failure to transpose the Directive properly, such error will be identified by the appellate court;

11. Whilst, as a general principle, it may be possible for a court to revisit a judgment prior to making final orders, in the present case the resumed hearing was to deal with a discrete issue (namely *Francovich* damages) which followed on from the Court's findings in the judgment. Furthermore, counsel for the Respondents made clear that he was not seeking, at the resumed hearing, to dispute any findings in the judgment. That being so, it does not appear to me to be permissible for the

Respondents to argue that there was *no* failure to transpose, when the Court has found that there was.

New arguments

12. It should also be said that, at the resumed hearing, the Respondents advanced new arguments as to why there had not been a failure to transpose the Directive and drew the Court's attention to authorities which had not been opened at the original hearing, in the context of arguing that there was no failure to properly transpose (yet simultaneously stressed that no findings in the judgment were challenged other than by way of appeal). For the reasons given, it seems to me that the proper place for those new arguments is in the Respondents' appeal.

Discretion

13. For the purposes of a consideration of the present issue, I feel bound to reject submissions based on the proposition that this Court was wrong in the findings reached in the judgment. Thus, it does not appear to me to be open to the Respondents to argue that the discretion conferred on the State by virtue of Article 15.2 of the Directive is such that the insertion of the words "*or attributed in part*" means that there was no failure to transpose. In short, failure to transpose the Directive was pleaded, and it was pleaded as a basis for an entitlement to damages. The Court has found that there was a failure to transpose and I now turn to the three elements of the *Francovich* test.

Does Article 15.1 confer rights on individuals?

14. The Respondents submit that Article 15 (1) of the Directive does not vest individuals with rights in the *Francovich* sense. I take a different view, for the following reasons.

15. Joined cases C–322/19 and C–385/19 *KS & MHK v. The International Protection Appeals Tribunal & Ors.* EU:C:2021:11 (hereinafter "*KS*") concerned *inter alia* whether Article 15 of the Directive must be interpreted as precluding national legislation which excludes an Applicant for international protection from access to the labour market on the sole ground that a transfer decision was taken under the "Dublin II" Regulations. Commenting on Article 15, the Court of Justice stated inter alia the following at para. 62:-

> *". . . in accordance with Article 15(1) of Directive 2013/33, Member States are to ensure that Applicants have access to the labour market under the conditions laid down in that provision. . ..".* (emphasis added)

16. It will be recalled that Article 15(1) of the Directive states:-

> *"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 ".* (emphasis added)

17. On any first principles analysis, the foregoing confers a right on relevant individuals, namely, the right to access the relevant labour market. Article 15 (2) of the Directive goes on to provide the following:-

> *"Member States shall decide the conditions for granting access to the labour market for the Applicant, in accordance with their national law, <u>while ensuring that Applicants have effective access to the labour market.</u>*
>
> *For reasons of labour market policies, Member States may give priority to Union citizens and nationals of States parties to the Agreement on the European Economic Area, and to legally resident third–country nationals".* (emphasis added)

Effective Access

18. In light of the foregoing, it seems to me that whilst the right conferred on the individual is not an unqualified one (in that it is subject to such conditions as the Member State lays down) those conditions must ensure "*that Applicants have effective access to the labour market*". In other words, the entitlement of Member States to lay down conditions does not render what is granted any less of a right, nor can the conditions laid down by a Member State take away from the right granted (otherwise access to the labour market would be *less* than the effective access, which is mandated by the Directive).

Rights and benefits

19. At para. 68 of *KS*, the Court of Justice put matters as follows: -

> *"Although access to the labour market is not, strictly speaking, a material reception condition within the meaning of Article 2(g) of Directive 2013/33, it is nevertheless covered by reception conditions, within the meaning of Article 2(f) thereof, understood as <u>the rights and benefits conferred by that directive</u> on any Applicant for international protection whose application has not been finally determined. Accordingly, the obligation on the Member State concerned, pursuant to Article 15(1) of Directive 2013/33, to grant the Applicant for international protection access to the labour market ceases only when that Applicant is finally transferred to the requested Member State".* (emphasis added)

20. It seems to me that the corollary of the undoubted *obligation* on the Member State to grant an Applicant access to the labour market, is the *right* of such an Applicant to be granted same, and the use by the Court of Justice of the words "*rights and benefits conferred*" by the Directive "*on any Applicant"* fortify me in this view.

21. At para. 69 of *KS,* the Court noted that respect for human dignity applies to all Applicants for international protection, including those awaiting a decision, and went on to state:-

> *"As the Advocate General observed in point 85 of his Opinion, work clearly contributes to the preservation of the Applicant 's dignity, since the income from employment enables him or her not only to provide for his or her own needs, but also to obtain housing outside the reception facilities in which he or she can, where necessary, accommodate his or her family*".

The right of access to the labour market

22. In the same opinion, Advocate General Jean Richard de la Tour stated, at para. 50, that:-

> *"…access to the labour market is not a minimum or material reception condition within the meaning of Directives 2004/9 and 2013/33. The right of access to the labour market is not intended to satisfy an essential or vital need of the Applicant ".* (emphasis added).

23. This opinion was offered in the context of considering whether a Member State in which an application for international protection had been made, was required to grant labour market access if that Member State had adopted a decision to transfer the Applicant to the Member State that had been identified as being responsible, in accordance with Regulation no. 604/2013. The use of the term "*right*" in respect of labour market access very obviously supports the proposition that such a right is conferred by the Directive on relevant persons.

24. Later in his opinion, and in the context of examining the significance of a transfer decision, the Advocate General opined (from para. 60):-

> *". . . neither the transfer decision adopted pursuant to Article 26 (1) of Regulation no. 604/2013 nor, where applicable, the competent national authority's decision not to examine the application for international protection constitutes a 'first instance decision', within the meaning of Article 15 (1) of Directive 2013/33. The right of access to the labour market laid down in that provision may be withdrawn only by a first instance decision.*
>
> *[61] In those circumstances the adoption of a transfer decision cannot have the effect of depriving the person concerned of his or her status of Applicant and the right of access to the labour market laid down in Article 15 (1) of that Directive.*
>
> *[62] That implies that anyone who lodges an application for international protection with the authorities of a Member State is considered to have the right of access to the labour market as provided for in Article 15 (1) of that Directive, even if that Member State is not responsible for examining the application and has not made a decision on the admissibility of merits of that application".* (emphasis added)

25. Again, the repeated use by the Advocate General of the term *"right"* in respect of access to the labour market fortifies me in the views expressed in this decision and speaks to the first of the *Francovich* conditions having been satisfied. At para. 16 of the respondent's submissions, they very appropriately acknowledge the following:-

> *"…the Advocate General also observes (s. 78 of his Opinion) that the Directive 2013 /33 is designed to protect the fundamental right to human dignity and it is established in the case law of the CJEU that the right to asylum is protected by Article 18 of the Charter of Fundamental Rights (see, recently, Case C–72/22 Valstybes Sienos Apsaugos Tarnyba, s. 61). Thus, were access to the labour market to be held by the CJEU to be part of the right to asylum, it might follow that Article 15(1) of the Directive would fall to be considered as a measure vesting individual rights in the Francovich sense. However, no such finding has been made by the CJEU".*

26. It does not seem to me that the foregoing submission is at all inconsistent with a finding by this Court that Article 15 (1) was intended to confer *rights* on Applicants for international protection, of which the Applicant in the present case was undoubtedly one. That seems to me clear from a literal interpretation of Article 15 and, perhaps more importantly, is a view which reflects the judgment of the Court in *KS*, as well as the Advocate General's opinion.

27. I want to make clear that, in coming to this view, I am not relying on the Supreme Court's recognition in *N.H.V. v. Minister for Justice and Equality* [2017] IESC 35 "*… that work is connected to the dignity and freedom of the individual which the Preamble tells us the Constitution seeks to promote".* Whilst the State opted-in to the relevant Directive in the wake of *NHV*, it is not constitutional rights which determine the first of the *Francovich* questions, but the interpretation of Article 15 itself, in the context of European Union law.

28. No authority was opened to this Court to the effect that to be a right, for the purposes of the first of the *Francovich* conditions, the right must be unconditional. The Article 15.1 right to labour market access is not unconditional, but in my view it certainly *is* a right and is recognised as a reception condition right by the Court of Justice (again, see para. 68 of *KS*). Satisfied that the Applicant has met the first of the *Francovich* questions, I now turn to the second.

Was the breach sufficiently serious?

29. The Respondents submit that this second condition is "*manifestly not satisfied".* They emphasise that it is a very onerous condition for any Applicant to meet. They further submit that it is not sufficient to say that there is a constitutionally-protected right to work which has been prejudiced by a failure to transpose the Directive. Regarding the latter submission, and as made clear in the context of discussing the first *Francovich* question, this Court is certainly not looking at the second question through the lens of constitutionally protected rights. I also accept entirely that the right of labour market access is one which comes with conditions. It is plain that Member States "*shall*" (*per* Article 15.2) "*decide the conditions for granting*" the right in question. However, Article 15.2 also makes explicit that, in so doing, the State must ensure "*that Applicants have effective access to the labour market*" (emphasis added). An error which results in the deprivation of access to the labour market is, on any analysis, material and serious.

30. Without wishing to replicate the analysis in the judgment, it is useful, for the sake of clarity, to contrast the words used in Article 15(1) with those employed in Regulation 11(4)(b) of the 2018 Regulations. Both deal with delay in the making of a first instance decision.

- Article 15 (1) employs the words ". . . *and the delay* ***cannot be attributed to*** *the Applicant*";
- Regulation 11 (4) (b) uses the words ". . . ***cannot be attributed, or attributed in part****, to the Applicant*" (emphasis added).

Ineffective access

31. As explained in the judgment, I take the view that there is a clear and material difference between the meaning of the said provisions. To insert additional wording was plainly a conscious

act. I accept entirely that the Directive gives the Member State a degree of discretion, but this cannot, in my view, extend to 'diluting', in a material way, the right conferred by Article 15 (1). It seems to me that, by inserting into domestic Regulations these particular words (not found in the Directive) the effect was to dilute the right provided for in the Directive in a clear, and sufficiently serious way, which rendered access to the labour market ineffective insofar as the Applicant in this case was concerned.

32. To come at the matter from a slightly different perspective, Article 15(1) refers to "*the*" delay, whereas the additional wording in the Regulations seems to me to permit the State to refuse the right of labour market access if a "*part*" only (i.e. a sub–set of "*the*" delay) can be attributed to the Applicant. This is material and the effect of the error is serious.

33. It was not explained during the hearing which led to the judgment, nor was it explained at the resumed hearing, *why* the words "*or attributed in part*" were inserted into the Regulations. The absence of any such explanation on affidavit fortifies me in the view, previously expressed in the judgment (at p. 42, para. 117), that 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. Being fundamental and material, I take the view that it both amounts to (i) a failure to properly transpose the Directive; and (ii) a breach which is serious, in that it prejudiced effective labour market access.

Lack of co-operation

34. I take this view acknowledging that the Court in *KS* noted that the Directive gives no guidance on the question of "*. . . what acts may constitute delay attributable to the Applicant for international protection within the meaning of Article 15 (1) of Directive 2013/33*" (see paras. 74–75). The Court in *KS* went on to answer that question in the following terms (at para. 80): -

> ". . . *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* ". (emphasis added)

35. It does not seem to me that the foregoing analysis is determinative of the second question in respect of *Francovich* damages. Nowhere in *KS* did the Court engage with what appears to me to be an obvious and material distinction between delay "*attributed to the Applicant* " (*per* Article 15(1)) and "*attributed, or attributed in part, to the Applicant "* (*per* Regulation 11 (4)(b)). Rather, it seems to me that the core question considered in *KS* was the *meaning* of delay (which the Court regard as a lack of cooperation) not the legitimacy of denying labour market access where only *part* of the delay could be ascribed to an Applicant. In my view, nothing in *KS* speaks to the words inserted in the 2018 Regulations.

Stringent conditions

36. The Respondents place considerable emphasis on the following statement by Simons J. in this Court's very recent (23 March 2023) decision *in AA (a minor suing by his mother and next friend) AA, NA v. IPAT & MJE* [2023] IEHC 141:-

> "*None of this is to say that such a claim would ultimately be successful nor that the stringent conditions for Francovich damages have been met"* (emphasis added).

37. The principal issue in *AA* was whether, in circumstances where the Applicant for international protection was a *child* and, therefore, unable to work, the State was under an obligation to provide labour market access to the child's *parents*. In short, it was argued that in order for the child's contended-for right of access to the labour market to be effective, it was necessary that it be exercised *vicariously* by his parents. As is clear from the foregoing, the context in which *AA* was decided is entirely different to the present situation. That is not to say that the *Francovich* conditions are less than stringent, and I fully accept that the 'bar' facing an Applicant is a high one to clear. However, for the reasons set out in this judgment, I am satisfied that it has been 'cleared' in the present case.

Right to work

38. It should also be noted that at para. 28 in *AA*, the learned judge commented on ". . . *the supposed distinction between the right of access to the labour market and the right to work. . ."* (emphasis added) which he considered to be entirely artificial. Simons J. went on to state that:-

> "*The essence of the right provided for under Article 15 of the Reception Conditions Directive is a right to work. See the Advocate General's Opinion in Joined Cases C-322/19 and C-385/19, KS and Others v. The International Protection Appeals Tribunal, EU:C:2020:642".* (emphasis added).

39. Not only is the foregoing *dicta* consistent with my finding that the first of the *Francovich* conditions has been met, it also speaks to the second condition, in that wording which allows for the dilution at the national level of the right to work granted by the Directive, rendering the right of access less than effective, seems to me to be a manifestly serious breach (as the Applicant's denial of labour market access in the present case illustrates).

40. It seems uncontroversial to suggest that EU law can, on occasion, be less than readily understood. In my view, this could not fairly be said with respect to Article 15(1). The proposition that "*the delay cannot be attributed to the Applicant*" seems clear and comprehensible. It also seems uncontroversial to say that the State had the option of transposing the Directive by using the words contained in it (i.e. without inserting additional wording which, in my view, altered the meaning in a material way, to the detriment of the Applicant in the present case). In circumstances where no averment has been made on behalf of the Respondents as to *why* the additional wording was inserted in the Regulations, it is impossible to know the answer to that question, but insofar as the Respondents argue at the resumed hearing that (i) the meaning of the words used in Article 15 (1) was far from clear; and (ii) the additional words were inserted to clarify what was unclear, I feel

bound to reject those submissions. I do so because it seems to me that the additional words inserted do not clarify a proposition, but change it in a material way.

Altered meaning

41. Even if one substitutes for the word "*delay*" the term "*failure to cooperate*" (per *KS*) it remains the case that the additional wording in the Regulations alters the meaning of the Directive, in my view. Taking account of the clarification in *KS*, the approach under the Directive is that labour market access must be granted unless the absence of a first instance decision can be attributed to the Applicant's failure to cooperate. The approach under the 2018 Regulations is that labour market access may be denied if the absence of a first instance decision can be attributed in part to the Applicant's failure to cooperate. These seem to me to be materially different approaches – with the latter approach diluting the Applicant 's right, when compared to the former.

42. As mentioned earlier, it does not seem to me that such a material change comes within the margin of discretion afforded to the State. The argument based on State-discretion was not one which was made during the hearing which gave rise to the judgment. It was a new argument made for the first time in this 'module'. This is not a criticism, particularly in circumstances where different counsel represented the Respondents at the resumed hearing (wherein they stressed that the Respondents are not seeking to challenge, in the *Francovich* damages module, any of the findings in the judgment, which they intend to appeal). However, and by way of a general comment, it does seem to me that it would have been of benefit to the Court had *all* arguments been canvassed and *all* relevant authorities opened at the initial hearing, which gave rise to the judgment. I say this because, had all arguments been ventilated at the original hearing, it could only add to the quality of this Court's decision-making. Given that the Respondents made clear that they do not seek to re-open matters decided in the judgment, the appellate court will have the benefit of the additional arguments and authorities.

43. Leaving aside the foregoing comments and as touched on earlier, I take the view that nothing by way of State-discretion, in particular, that found in Article 15 (2), confers an entitlement to dilute the very right given in Article 15 (1) so as to prejudice its effectiveness. On the contrary, and using the language of rights, Article 15 (2) mandates that the State shall ensure that Applicants have "*effective access*" to the labour market. It seems to me that if such access can be denied to an Applicant if the absence of a first instance decision can, in *part* only, be attributed to them, the right is less than effective, and is prejudiced in a manifest and serious manner.

Obstacles as to clarity

44. I acknowledge that the present situation is not one where there was "*simply no transposition of the provision at all"* [see para. 203 of the judgment of Ferriter J. in *SH v. the Minister for Justice & Ors.* [2022] IEHC 392]. However, to borrow a phrase from the same paragraph, the Respondents have never sought to explain on affidavit, either at the original hearing or for this resumed hearing, what "*obstacles as to clarity*" were thought to require the words "*or attributed in part*" to be added into the 2018 Regulations (despite not appearing in Article 15 of the Directive).

45. It does not seem to me that Article 15 (1) is imprecisely worded or that it is reasonably capable of bearing the interpretation given to it in Regulation 11(4)(b) of the 2018 Regulations which purported to transpose it [see para. 43 of Case C–392/93 *the Queen v. H.M. Treasury ex parte British Telecommunications plc* [1996] ECR I-01631].

"in part"

46. Far from the additional words introducing greater clarity, one might rhetorically ask what the words "*in part*" mean? On the face of it, they mean that, irrespective of how small a part of the overall delay can be 'laid at the door' of an Applicant, the State is entitled, *per* the Regulations, to deny labour market access. That proposition seems to me to be fundamentally inconsistent with Article 15 considered as a whole.

47. In the manner examined in the judgment, it is a matter of fact that the decision-maker recognised the difference in wording between the Directive and the Regulations and, whilst purporting to make a decision in respect of the former, in this Court's view made the decision in accordance with the latter. This Court's analysis and findings in that regard appear in the judgment – in essence that the first named respondent's error was caused directly by the failure to transpose the Directive. In the context of the second of the *Francovich* damages conditions, the result of the insertion, into the 2018 Regulations, of wording not found in the Directive, was to deprive the Applicant of the right to labour market access to which he was otherwise entitled. This fortifies me in the view that (to quote from *Gleoga*) that ". . . *the breach of the rule was sufficiently serious"*.

48. It seem to me that in order for a breach to be serious it does not have to involve an intention to *deprive* someone of rights. I want to make clear that there is not a scintilla of evidence to suggest that there was any such intention as regards the additional wording inserted, but that is not the point. Seriousness seems to me to speak to the *effect* on the individual, not the *motivation* for the breach. The effect on this Applicant was of the starkest sort, in that it deprived him of the right to work which Article 15 conferred upon him. I acknowledge that it was a right subject to conditions, but the Applicant met the relevant conditions, save for an *additional* condition nowhere to be found in the Directive itself, but derived from extra wording introduced into the 2018 Regulations.

49. I also wish to make clear that I am not suggesting that there was no entitlement on the part of the State to add wording when transposing the Directive. Nor do I say that there was an obligation to use precisely the same form of words as appears in the Directive. However, a decision to change, for the purposes for national legislation, the wording found in the Directive very obviously runs the risk of a breach arising if, as in the present case, the meaning of the Directive is altered in a material fashion and to the detriment of persons which the Directive sought to confer benefit upon.

50. I also accept entirely that by adding wording into the 2018 Regulations which did not appear in the Directive, the State was not departing from any previously decided EU authorities. That does not render the addition of the words, and their effect, any less manifest and material. In other words, this is not a situation, such as commented upon in joined cases C–46/93 and C–48/93 *Brasserie du*

Pêcheur SA, wherein the Court's previous case law made clear that the domestic provisions at play were incompatible with EU legislation. It is useful to quote from the said authority in which the CJEU commented as follows in respect of the second of the *Francovich* damages conditions:-

> *"56. The factors which the competent court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law.*
>
> *57. On any view, a breach of Community law will clearly be sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established, or a preliminary ruling or settled case-law of the Court on the matter from which it is clear that the conduct in question constituted an infringement.*
>
> *58. While, in the present cases, the Court cannot substitute its assessment for that of the national courts, which have sole jurisdiction to find the facts in the main proceedings and decide how to characterize the breaches of Community law at issue, it will be helpful to indicate a number of circumstances which the national courts might take into account".* (emphasis added)

51. With respect to the particular facts in Case C–46/93, the Court proceeded, at para. 59, to state that:-

> *"As regards the provisions of the German legislation relating to the designation of the product marketed, it would be difficult to regard the breach of Article 30 by that legislation as an excusable error, since the incompatibility of such rules with Article 30 was manifest in the light of earlier decisions of the Court, in particular Case 120/78 Rewe-Zentral [1979] ECR 649 (Cassis de Dijon) and Case 193/80 Commission v Italy [1981] ECR 3019 (vinegar)".* (emphasis added)

52. Unlike the position in Case C–46/93, no earlier decision by the Court of Justice explicitly prohibited the addition of the relevant words into the 2018 Regulations. That does not render the error any less manifest, given the material change those added words make to Article 15. It seems to me that State-discretion can only be exercised within the 'guardrails' of the explicit requirements of Article 15. In other words, where the words added dilute the right provided for so as to prejudice its effectiveness, the State's discretion strays impermissibly beyond those guardrails, in my view.

53. With reference to para. 56 *of Brassiere du Pêcheur*, it is difficult to take the view that Article 15 lacked clarity or precision. Nor do the words added into the Regulations appear to me to bring clarity and precision which was lacking in the Directive. Rather, and for the reasons explained in the judgment and touched on in this decision, the effect of the wording added into the Regulations is to change the meaning of the Directive in a material way. In short, the State breached Community law

in the approach taken to delay in the Regulations. This failure to transpose constitutes a serious and manifest error which was at the heart of the decision impugned. For the foregoing reasons I am satisfied that the second of the *Francovich* damages conditions has been met. I now turn to the third.

Is there a direct causal link between the breach of the obligation and the damage sustained by the Applicant ?

54. Thus far, I have come to the view that (i) Article 15 (1) creates an individual right in the sense understood in State liability case law; and (ii) that the failure to properly transpose the Directive (by adding the words "*or attributed in part*" into the 2018 Regulations) comprised a manifest and sufficiently serious error. The third question is (iii) whether the Applicant can demonstrate that, but for the said error, he would not have suffered the loss claimed.

55. The present situation is wholly unlike that which pertained in Case C–420/11 *Jutta Leth v. Republik Österreich, Land Niederosterrich* EU:C:2013:166 ("*Jutta Leth*") where the CJEU held that there was no direct causal link between the pecuniary loss and the relevant breach of EU law. In the said case, Ms. Leth brought proceedings in which she sought payment of €120,000 in respect of the decrease in value of her property, in particular, due to aircraft noise, as well as a declaration that the defendants would be liable for any future damage, including, damage to her health arising from the late and incomplete transposition of Directives 85/335; 97/11 and 2003/35, and from the failure to carry out an environmental impact assessment before giving consent regarding development of a certain Airport. Ms. Leth resided in a house built on property situated within the security zone of that airport. Whilst emphasising (at para. 45) that the existence of a direct causal link is a matter for the national courts to ascertain, the Court proceeded (at para. 46) to observe that the rule prescribing an assessment of the environmental impact of a public or private project:-

> *". . . does not lay down the substantive rules in relation to the balancing of the environmental effects with other factors or prohibit the completion of projects which are liable to have negative effects on the environment".*

56. Consequently, the Court went on to state (at para. 47) that the fact an environmental impact assessment had not been carried out, in breach of the relevant Directive did not: -

> *". . . confer on an individual a right to compensation for purely pecuniary damage caused by the decrease in the value of his property as a result of environmental effects".*

57. It does not seem to me that case C-420/11 is of any relevance or assistance to deciding the present question. At para. 29 of their written submissions, the Respondents proffer the following argument with respect to the Applicant:-

> "*If he suffered loss at all, it only arose from the interpretation and application of Article 15 (1) of the Directive by the IPAT in the impugned decision refusing him market access of 31 March 2021".*

58. I do not accept that the damage (specifically, financial loss to the Applicant) flows from the misapplication by the first named respondent of the Directive (as opposed to the 2018 Regulations). With respect, such a submission again appears to ignore the very findings in the judgment even though, at the very outset of oral submissions, counsel for the Respondents made clear that his clients were "*not seeking to contest the judgment*" (other than to an appellate court). To agree with this submission would, in reality, be to hear, and allow, an appeal against this Court's own judgment. Very obviously, this is inappropriate and whilst the Respondents have every right to pursue an appeal to a higher court, I regard myself as obliged to reject the foregoing submission based, as it is, on a fundamental misunderstanding of the judgment.

59. In my view, the evidence before this Court allows for a finding that, in the present case, the Applicant *has* established a direct causal link between the breach and damage sustained by him. I now propose to refer to that evidence, which speaks both to the direct *causal link* and also to the *quantum* of damage.

60. A range of averments were made by the Applicant, in the wake of the judgment, from which the following facts emerge:-

- The Applicant worked (without permission) during the period 12 November 2020 to 1 January 2021. He avers that this is because:-
  "*I felt that I had no choice but to seek work at the time, as I could not financially provide for my family on the allowance given to us. I had two different jobs during this period*". [see para. 3 of the Applicant's 10 March 2023 affidavit];
- The first of the aforesaid jobs was as a general operative, from 12 November 2020 to 6 December 2020, at a factory located some distance outside of Dublin to which the Applicant was driven each morning by a friend. [see para. 6 of the Applicant's 10 March 2023 affidavit];
- The Applicant recalls that the rate of pay for this job was €10.40 per hour. His gross pay for the period 12 November 2020 to 6 December 2020 was €1,630.12. Apart from USC paid (€8.15), deductions from his gross pay comprised employee PRSI (€44.67) and employer PRSI (€164.87). [see para. 6 and Exhibit "LKSA 1" of the Applicant 's 10 March 2023 affidavit];
- The Applicant is experienced in labouring work on construction sites, which includes preparing the sites by clearing material and removing any hazards, handling and transporting construction materials, unloading supplies and generally following instructions from supervisors. His experience includes work as a labourer in Georgia for an approximately two–year period in and around the capital, Tbilisi. He has qualifications in safe pass and manual handling. [see paras. 14–16 of his 10 March 2023 affidavit];
- Due to *inter alia* the Applicant's previous experience in construction in Georgia, a friend recommended a second alternative job as a labourer, which he took up on a construction site for the period 8 December 2020 to 1 January 2021. [see para. 7 of the Applicant 's 10 March 2023 affidavit];

- The Applicant recalls that the rate of pay for this second job was €18.50 per hour. His gross pay for the period 8 December 2020 to 01 January 2021 totalled €2,217.50 from which employee PRSI (€79.42) and employer PRSI (€239.82) was paid. [see para 7 and Exhibit "LKSA 2" of the Applicant's 10 March 2023 affidavit];
- The Applicant was advised that he could not work without a work permit, so he ceased working on 1 January 2021 and he did not apply for any other jobs after this, as he did not have permission to work. [see paras. 8 and 9 of the Applicant's 10 March 2023 affidavit];
- It will be recalled that the decision to refuse the Applicant labour market access was made on 3 March 2021. By letter dated 8 June 2022, the labour market access unit of the Department of Justice issued a certificate of permission to the Applicant. [see para. 10 and Exhibit "LKSA 3" to the Applicant 's 10 March 2023 affidavit];
- The Applicant was fit and able to work during the period between the decision and the judgment. [see para. 17 of the Applicant 's 10 March 2023 affidavit];
- If the Applicant had been given a work permit on 31 March 2021, he would have applied to work in construction in Dublin and he understands that jobs in construction were in high demand at that time. [see paras. 13 and 18 of the Applicant's 3 March 2023 affidavit];
- In July 2021, the Applicant was transferred by International Protection Accommodation Services ("IPAS") to a certain address in a town in Kerry which remains his current address. [see para. 20 of the Applicant's 10 March 2023 affidavit];
- The Applicant does not specify what *date* in July the foregoing occurred. Nor was clarification on that date provided during the resumed hearing;
- Since receiving his labour market access permission, the Applicant has searched for work in Kerry, in particular, in construction. The Applicant avers that opportunities are more limited than in Dublin. [see para. 20 of the Applicant's 10 March 2023 affidavit];
- Whilst the Applicant has searched for work in Kerry since receiving his labour market access permission, he did not secure any employment until the week beginning 6 February 2023. The Applicant now works full time as a construction labourer for a certain firm in Kerry, which position is temporary in nature, but the Applicant intends and expects to find further work in construction, going forward. [see para. 20 of his 10 March 2023 affidavit];
- The Applicant has exhibited a copy of his payslip in respect of his current employment, and this shows net pay of €420.72 for the relevant week. [see para. 20 and exhibit "LKSA 5" of the Applicant 's 10 March 2023 affidavit].

61. Certain observations can fairly be made in respect of the foregoing. Notwithstanding the fact that the Applicant received a labour access permit, he remained unemployed from 8 June 2022 until 6 February 2023 (a period just shy of 8 months).

62. Furthermore, the Applicant resided in Dublin (where, he avers, jobs in construction were in high demand) for at least the first 3 weeks of that period (if calculated to 1 July 2022).

63. Obviously, if his move to Kerry did not take place until the end of July 2022, he was residing in Dublin *and* in possession of a labour access permission for over 7 weeks *prior* to moving to Kerry, but without securing any job, be that in construction or otherwise.

64. The period of time between the refusal decision and this Court's judgment was some 62 weeks and 2 days.

65. The Applicant worked without permission for a period of just shy of 7 weeks. The period when the Applicant worked without permission post-dates the date when he first applied for labour market access.

66. There is no evidence before this Court of anything which prevented the Applicant for applying for jobs in Dublin at any point after he received, on 8 June 2022, his labour market access certificate.

67. The evidence allows for the following findings of fact (i) the Applicant did not secure a construction job in Dublin whilst residing in Dublin in possession of a labour market access certificate (i.e. June/ July 2022); (ii) the Applicant did not secure a construction job in Dublin since moving to Kerry (July 2022 onwards); and (iii) the Applicant has not relocated back to Dublin to avail of higher paid construction work, insofar as same is available to someone with his qualifications.

68. It will also be recalled that the one construction job which the Applicant secured (i.e., "*. . . as a labourer on a construction site for the period 8th December 2020 to 1st January 2021*") at the rate of €18.50 per hour, was due to being "*recommended*" as a labourer by the Applicant's "*friend*". There is no evidence that the Applicant's friend was relocated to Kerry and this seems to speak to the lack of evidence of a specific impediment which prevented the Applicant from seeking better paid/more available construction work in Dublin, notwithstanding his relocation to Kerry.

69. Carefully considering the evidence which I have referred to above, it does not seem to me that the estimate of loss which comprises a letter from Messrs. Kilcoyne and Co. accountants (Exhibit "SA 4" to the Applicant 's 10 March 2023 affidavit) is of meaningful assistance to this Court, insofar as the calculation of quantum is concerned. The said letter states *inter alia* the following:-

> "*In accordance with Construction Industry Federation pay rates, Mr. K could have expected to earn €718.80 per week, based on a 40–hour week and his level of experience, during the period 1 October 2020 – 31 January 2022. From 1 February 2022 his weekly expected weekly wage would have increased to €738.80. During the period 31 March 2021 to 6 June 2022 he could have reasonably expected to earn €44,785.84, calculated as follows:-*
> *31 March 2021 – 31 January 2022 (43 weeks, 3 days @ €718.80 per week)*
> *€31,339.68*
> *01 February 2022 – 6 June 2022 (18 weeks, 1 day @€738.80 per week)*

€13,446.16
€44,78584".

70. Two very obvious comments can be made with respect to the foregoing analysis, namely: (i) despite being in possession of a labour market access certificate since 8 June 2022 (when still residing in Dublin), the Applicant secured no employment whatsoever, be that in construction or otherwise, until 6 February 2023; and (ii) since receiving labour market access permission, the maximum the Applicant appears to have earned is €420.72 per week.

71. In submissions on behalf of the Applicant, counsel acknowledged, very appropriately that the damages claimed by the Applicant involve "speculation". Were this Court to accept that the appropriate quantum comprises the sum calculated on behalf of the Applicant, it would be to assume that a construction job paying €718.80 per week would have been available immediately. This is notwithstanding the fact that there is no evidence before the Court (such as, for example, advertisements of such jobs at the relevant time, by construction firms). Furthermore and more importantly, when the Applicant obtained his work access permit as of 8 June 2022, he did *not* obtain a construction job immediately. He did not obtain any such job for the remainder of the period of his residence in Dublin (be that 3 weeks, or over 7 weeks, or somewhere in between). Nor did he obtain such a job upon moving to Kerry (noting the absence of evidence of an impediment to *applying* for same or being recommended for same by a friend).

72. Given what the evidence discloses, I cannot accept the submission made on behalf of the Applicant that, had he been given labour market access on 31 March 2021, it is foreseeable that, based on the increased earnings from a job he would have secured, he might well have had the means to pay for private accommodation on behalf of himself and his family and, therefore may not have had to relocate to Kerry at all. The evidence does allow the Court to take such a view (in respect of an Applicant who has never returned to Dublin with his family to take up better-paid construction employment and secure private accommodation from such increased earnings).

73. I want to state in the clearest terms that this is not a criticism of the Applicant. It is simply to engage with the evidence and to try and explore what findings the evidence does, and does not, support.

Weekly sum

74. Having regard to the analysis of the evidence set out in this judgment, I have come to the view that damages should be calculated by multiplying a weekly sum, by a number of weeks. As to the appropriate weekly sum, the maximum amount which the Applicant has ever earned since receiving labour access permission (at a time when he was still resident in Dublin) is a sum of €420.72 per week. Taking everything into consideration, that seems to me to be the appropriate weekly sum to employ. It also has the obvious benefit of being an established fact. It seems to me that to take a different sum would be to engage in speculation beyond that which is permissible, and outside that which is reasonably foreseeable, given the state of the evidence.

Number of weeks

75. As to the multiplier, the starting point seems to me to be 62 weeks. However, this Court cannot be 'blind' to the reality that it took the Applicant from 8 June 2022 to 6 February 2023 (some 8 months) to secure work of any kind. The Applicant has averred *inter alia* that "*jobs in construction were in high demand in Dublin*". The foregoing averment was made with respect to the period 31 March 2021 to 10 June 2022 when, as also averred by the Applicant , he was "*fit and able to work*". Given that the aforesaid period runs right up, and includes, the point at which the Applicant was, in fact, granted labour access permission (on 8 June 2022), the Court must take some account of the reality that the Applicant did not get a readily available construction job in Dublin, immediately upon receipt of labour market access on 8 June 2022. That remained the position, regardless of whether he was resident in Dublin for a further 3 weeks (i.e. to 1 July 2022) or 7 weeks (to 31 July 2022).

76. Although I have noted that there is no evidence of any specific impediment which prevented the Applicant from *seeking* better paid/more plentiful construction work in Dublin (or being recommended for same by a friend), notwithstanding his relocation to Kerry, common sense suggests that the move to Kerry may well have made this more difficult.

77. There is also evidence before the Court that construction opportunities in Kerry are less than those available in Dublin.

78. The Court also must have regard to the fact that the Applicant received earnings from work without permission carried out after his application for labour market access. Indeed, in submissions during the resumed hearing, the Applicant 's counsel acknowledged, very appropriately, the logic of the Court taking into account, in any calculation of damages found to be due to the Applicant, the period of time when he was in receipt of earnings from work, despite lacking permission to engage in such employment.

79. Taking everything into account I propose to subtract from the period of 62 weeks, (i) 3 weeks (i.e. the balance of June 2022 when the Applicant continued to reside in Dublin, in possession of a labour market access certificate, but without securing construction or any other work) and (ii) 7 weeks (equivalent to the period 12 November 2020 to 1 January 2021, during which the Applicant worked without permission).

80. In short, and for the foregoing reasons I calculate the damages payable to the Applicant as being €420.72 x 52 weeks = €21,877.44.

81. 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."

82. Having regard to the foregoing, the parties should correspond with each other, forthwith, regarding the appropriate form of order, including as to costs, which should be made. In default of agreement between the parties on any issue, short written submissions should be filed in the Central Office within 14 days.