

# Clashing Interpretations of EU Rights in Domestic Courts<sup>\*</sup>

Liam THORNTON<sup>\*\*</sup>

*This article examines Ireland's implementation of the right to work for protection applicants, post Ireland's opt-in to the EU Reception Conditions Directive Recast (RCDr) in 2018. Ireland sought to exclude persons potentially subject to Dublin Regulation transfers from accessing the labour market. Competing legal interpretations on this issue, now exist in Ireland, between the International Protection Appeals Tribunal (IPAT) and the High Court. Engaging in an analysis of the legislative intent and emerging domestic case-law, it is argued that Ireland's wholesale exclusion of persons potentially subject to a Dublin transfer from the labour market is not permitted under EU law. With this ultimately to be decided by the Court of Justice, it is argued that the legal interpretation of IPAT, which would grant protection applicants within the Dublin transfer process an entitlement to enter the labour market, is to be preferred to the interpretation of the RCDr proffered by the Irish High Court. The focus of the High Court on 'abuse of rights' obfuscated key legal protections EU law provides to protection applicants.*

**Keywords:** International protection, Common European Asylum System, Dublin III Regulation, Reception Conditions Directive (recast), Labour Market, Abuse of Rights.

## 1 INTRODUCTION

Ireland has been a cautious participant in the Common European Asylum System (CEAS). Each proposed CEAS instrument can be scrutinized by government, who may then decide whether to opt-in to that legal measure.<sup>1</sup> To date, Ireland has opted into some asylum directives however has decided not to opt-in to other measures.<sup>2</sup> In 2015, an expert group recommended that Ireland opt-in to all EU

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<sup>\*\*</sup> Associate Professor in Law, School of Law, University College Dublin, Ireland. My thanks to the anonymous reviewers for comments, which ensured a better framing of issues than previous versions of this article. Any errors or omissions remain my own. Email: [liam.thornton@ucd.ie](mailto:liam.thornton@ucd.ie).

<sup>1</sup> The legal basis for opt-ins within fields of asylum, immigration and criminal justice, is found in Arts 1 and 2 and Art. 4a(1) of Protocol No 21 of the Treaty on the Functioning of the European Union (TFEU) 2012 OJ C326/49.

<sup>2</sup> Focusing exclusively on the field of asylum law, Ireland had previously exercised its opt-in power to the Dublin III Regulation (Regulation 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person

asylum directives ‘unless clear and objectively justifiable reasons can be advanced not to’.<sup>3</sup> However, this recommendation has not been followed through by the government. The only opt-in exercised to date by Ireland on measures it did not opt-in to initially, has been the Reception Conditions Directive Recast 2013 (RCDr 2013).<sup>4</sup> The immediate reason for opt-in, was not due to the recommendation of the expert group, but rather was due to a decision by the Irish Supreme Court, *N.H.V. v Minister for Justice*.<sup>5</sup> The Supreme Court in *N.H.V.* determined that the absolute prohibition on freedom to work for protection applicants breached Irish constitutional rights. This decision of the Irish Supreme Court did not require Ireland to exercise an opt-in to the RCDr 2013.<sup>6</sup> It was plausible, given Ireland’s cautious approach to Europeanization of domestic asylum law, that it would amend the constitutionally offending domestic legal provision, without reference to European reception norms. However, the decision to opt-in to the RCDr 2013, emerged as the preferred option quite soon after the Supreme Court decision.<sup>7</sup> Constitutional formalities for exercising opt-in to the RCDr followed in January 2018.<sup>8</sup> On 30 June 2018, Ireland completed its opt-in and transposition of the RCDr 2013 into domestic law, with the coming into domestic legal force of

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(recast) 2013 OJ L180/31), along with the Qualification Directive 2004 (Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted 2004 OJ L 304/12) and the Procedures Directive 2005 (Council Directive 2005/85/EC of 1 Dec. 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status 2005 OJ L326/13). Ireland has not opted into the Qualification Directive Recast 2011 (2011 OJ L337/9) nor the Procedures Directive Recast 2013 (2013 OJ L180/60, hereinafter PDr 2013).

<sup>3</sup> *Working Group to Report to Government on Improvements to the Protection Process including Direct Provision and Supports to Asylum Seekers* (June 2015), at 3.178. The Government had argued before the expert group, that Irish law substantially aligned with EU asylum law, while acknowledging that the State did not want to be bound by time-limits for protection decisions under the PDr 2013, see at 3.174–3.177.

<sup>4</sup> Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) 2013 OJ L180/96 (hereinafter, RCDr 2013).

<sup>5</sup> *N.H.V. v. Minister for Justice and Equality* [2018]1 *Irish Reports* (I.R.) 246.

<sup>6</sup> For an exploration of the right to work, and other reception rights, for protection applicants prior to Ireland’s opt-in, see L. Thornton, *A View from Outside the EU Reception Acquis: Reception Rights for Asylum Seekers in Ireland*, in *The Recast Reception Conditions Directive: Central Themes, Problem Issues, and Implementation in Selected Member States* (P. Minderhoud & K. Zwaan eds, Oisterwijk: WLP 2016).

<sup>7</sup> This analysis is based upon Freedom of Information (FOI Request No: 156/033/2018) documents the author requested, and outlined fully in L. Thornton, *Effective Access to the Irish Labour Market for Asylum Seekers* (22 Mar. 2018), <https://liamthornton.ie/2018/03/22/effective-access-to-the-irish-labour-market-for-asylum-seekers/>.

<sup>8</sup> Article 29.4.7° of the Irish Constitution requires approval of the Oireachtas (Irish Houses of Parliament) to exercise discretionary opt-ins within the EU asylum, immigration and criminal justice fields. The parliamentary processes for approval of Government opt-in to the RCDr was completed on 23 Jan. 2018. See EU Reception Conditions: Motion, *Seanad Eireann*, 23 Jan. 2018 and EU Reception Conditions: Motion, *Dáil Eireann*, 23 Jan. 2018. The European Commission were informed of Ireland’s opt-in on 24 Jan. 2018, Mr Declan Kelleher, Ireland, to DG of Justice and Home Affairs, Interinstitutional File: 2008/0244 (COD).

the European Communities (Reception Conditions) Regulations 2018 (2018 Regulations).<sup>9</sup>

There is one significant peculiarity within the 2018 Regulations that was bound to eventually require the Irish courts, or the Court of Justice of the European Union (CJEU), to determine whether Ireland had properly transposed the RCDr 2013. The 2018 Regulations created two types of protection applicant. The first type of protection applicant, are those within the substantive status determination process within Ireland, and who have access to all reception rights under the 2018 Regulations. These individuals are referred to as ‘applicants’ under the 2018 Regulations. The second type of asylum applicant, deemed to be ‘recipients’ of reception conditions under the 2018 Regulations, are those subject to an unexecuted Dublin transfer order. ‘Recipients’ of reception conditions under the 2018 Regulations have all the same rights as ‘applicants’ of reception conditions- with one significant exception- the right to work. With the legality of this to be determined ultimately by the CJEU,<sup>10</sup> it is important to document how this issue arose within Ireland. Ultimately, it is argued that Ireland has failed to properly implement its obligations relating to access to the labour market for protection applicants.

## 2 PROTECTION APPLICANTS ENTERING THE LABOUR MARKET: EU AND IRISH LAW CONTRASTED

### 2.1 LEGISLATIVE FRAMEWORKS

Article 15(1) RCDr 2013 provides that protection ‘applicants’ have the right to apply to access the labour market no later than nine months after the making of an international protection application, and where no first instance decision has yet been taken.<sup>11</sup> An ‘applicant’ is defined in the RCDr 2013 as a person who has made an application for international protection who is awaiting a final decision on this application. Recital 8 of the RCDr 2013 specifically states:

this Directive should apply during all stages and types of procedures concerning applications for international protection, in all locations and facilities hosting applicants and for as long as they are allowed to remain on the territory of the Member States as applicants.

Access to the labour market must be ‘effective’,<sup>12</sup> however Member States are permitted to allow employers give preference to EU and European Economic Area

<sup>9</sup> European Communities (Reception Conditions) Regulations 2018, S. I. No. 230 of 2018.

<sup>10</sup> *KS and MHK* (C-322/19), Irish High Court referral, lodged, 23 Apr. 2019, *R.A.T and D.S.* (C-385/19), International Protection Appeals Tribunal referral, lodged, 25 May 2019.

<sup>11</sup> Article 15(3) RCDr 2013 provides that access to the labour market is not to be withdrawn during appeals of a negative first instance determination.

<sup>12</sup> Article 15(2) RCDr 2013.

nationals and lawfully residing third country nationals in hiring. By virtue of Article 27 RCDr 2013, protection applicants must be able to appeal initial decisions relating to refused access to the labour market to a 'judicial authority'.<sup>13</sup> In order to ensure access to justice, where necessary, free representation must be provided to applicants to challenge initial refusals before a judicial authority.<sup>14</sup>

'Applicants' for the purposes of the 2018 Regulations are defined as persons who have been accepted into the Irish system for substantive determination of a refugee or subsidiary protection claim.<sup>15</sup> Applicants may be granted permission to enter the Irish labour market where, a first instance status determination decision has not been taken within nine months from the date of the protection application.<sup>16</sup> If meeting these core legal requirements, then permission<sup>17</sup> to enter the labour market, as an employee,<sup>18</sup> or self-employed person,<sup>19</sup> is granted for a renewable period of six months.<sup>20</sup> The permission ceases once a final decision is reached on the applicant's international protection claim, where this is not subject to an appeal to a court.<sup>21</sup> Where an applicant no longer proceeds with her protection application, her permission to enter the labour market ceases.<sup>22</sup> Permission to enter the labour market can be denied where the delay in first instance decision making can be attributed, in whole, or in part, to the applicant.<sup>23</sup> The concept of attributable delay is not specified within the RCDr 2013. The 2018 Regulations do specify what an attributable delay can include. First, where an applicant fails to make reasonable efforts to establish her identity.<sup>24</sup> Second, without reasonable excuse, an applicant is deemed to have delayed the processing of her international protection application.<sup>25</sup> Third, where the applicant is 'otherwise failing to comply with an obligation under an enactment' relating to her

<sup>13</sup> Article 26(1) RCDr 2013.

<sup>14</sup> Article 26(2) RCDr 2013. This requirement may be limited in relation to applicants who have their own resources to fund such a review, or may be limited by the State where an applicant's challenge has limited chance of success, *see* generally Art. 26(3) and Art. 26(4) RCDr 2013.

<sup>15</sup> Regulation 2 of the 2018 Regulations. This includes applicants who are under eighteen years, *see* Regulation 16 of the 2018 Regulations.

<sup>16</sup> Regulation 11(4)(a) of the 2018 Regulations.

<sup>17</sup> The administrative form that must be completed by the protection applicant can be found in Sch. 3 of the 2018 Regulations.

<sup>18</sup> *See also* Sch. 6 of the 2018 Regulations which in essence prohibits public sector employment. This restriction, as per Regulation 13 of the 2018 Regulations, must be kept under review.

<sup>19</sup> Regulation 11(10) of the 2018 Regulations excludes a self-employed protection applicant from hiring any other person.

<sup>20</sup> Regulation 11(5) and Regulation 11(8) of the 2018 Regulations. Renewals at six-month intervals are required by the applicant, *see* Regulation 11(8) of the 2018 Regulations.

<sup>21</sup> Regulation 11(5)(b)(ii)(I) of the 2018 Regulations.

<sup>22</sup> Regulation 11(5)(b)(iii)(II) of the 2018 Regulations.

<sup>23</sup> Regulation 11(4)(b) of the 2018 Regulations.

<sup>24</sup> Regulation 27(i) of the 2018 Regulations.

<sup>25</sup> Regulation 27(ii) of the 2018 Regulations.

international protection application.<sup>26</sup> As regards this third ground, when read with the core primary legislation on status determination, the International Protection Act 2015, this could include where an applicant has not submitted all documentation relevant to her application as soon as reasonably practicable and a failure to co-operate with her application assessment, without adequate justification for not attending interviews or not otherwise engaging with the status determination body, on first instance or on appeal.<sup>27</sup>

Where a protection applicant is refused access to the labour market, she may request a review of that decision from a review officer in the Department of Justice and Equality.<sup>28</sup> A review officer may affirm, modify or set aside the initial refusal.<sup>29</sup> Post this review, where a protection applicant is not granted permission to enter the labour market, she can appeal the review officer refusal within ten working days to the International Protection Appeals Tribunal (IPAT).<sup>30</sup> A designated Tribunal Member,<sup>31</sup> will usually make a decision on the basis of paper submissions received from the person appealing the decision of the review officer,<sup>32</sup> as well as on the stated grounds for refusal of permission to enter the labour market proffered by the review officer.<sup>33</sup> The Tribunal Member may affirm or set aside the determination of the review officer.<sup>34</sup> Focusing on Ireland's decision to create two forms of protection applicant, the preparatory legislative materials for the Reception Conditions Directive 2003 (RCD 2003) and the RCDr 2013, clearly establish that EU law only ever considered there to be one type of protection applicant.

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<sup>26</sup> Regulation 27(ii) of the 2018 Regulations.

<sup>27</sup> Section 27 of the International Protection Act 2015.

<sup>28</sup> Regulation 20(1)(e) of the 2018 Regulations, establishing a right to review a rejection of a labour market access permission, *see also* Regulation 20(3) of the 2018 Regulations.

<sup>29</sup> Regulation 20(3) of the 2018 Regulations.

<sup>30</sup> Regulation 21 of the 2018 Regulations. A request to make a late appeal may be granted by IPAT, under Regulation 22 of the 2018 Regulations.

<sup>31</sup> Regulation 21(3) obliges the Chairperson of IPAT to designate a specified Tribunal Member to determine appeals, and decisions on appeal by the designated Tribunal Member must be made within fifteen working days of the receipt of an appeal, *see* Regulation 22(4)(a) of the 2018 Regulations. Concerns raised by the Chairperson regarding the extension of IPAT's remit to include reception conditions are discussed in L. Thornton, *Launching the Reception Conditions Regulation Database* (25 Nov. 2019), <https://exploringdirectprovision.ie/2019/11/25/launching-the-reception-conditions-regulations-decisions-database/>.

<sup>32</sup> The Tribunal Member may, if it is in the interests of justice to do so, require an oral hearing, *see* Regulation 21(4)(b) of the 2018 Regulations.

<sup>33</sup> Regulation 21(4)(b) of the 2018 Regulations.

<sup>34</sup> Regulation 21(5)(a) of the 2018 Regulations.

## 2.2 DISCOVERING LEGISLATIVE INTENT

The RCD 2003 sought to regulate access to the labour market for asylum applicants who claimed refugee status.<sup>35</sup> The RCD 2003 did not mention the then Dublin Convention that was then the basis for criteria for allocating refugee claims between Member States. So once an asylum applicant claimed refugee status, Article 11(2) RCD 2003 provided:

If a decision at first instance has not been taken within one year of the presentation of an application for asylum and this delay cannot be attributed to the applicant, Member States shall decide the conditions for granting access to the labour market for the applicant.

The Explanatory Memorandum attached to the European Commission's initial proposal on access to the labour market,<sup>36</sup> explicitly stated as regards the right to access the labour market,<sup>37</sup>:

the relevant factor is the length of the procedure, no distinction is made, within the admissibility procedure, between Dublin Convention cases and other cases. The rationale behind this rule does not change according to the specific causes of the length of the procedure when it cannot be directly related to the will of the applicant for asylum.

The RCD 2003 did not contain common rules relating to the meaning of a delay 'attributed to the applicant'. Yet, did contain specific measures relating to the withdrawal or reduction of reception conditions.<sup>38</sup> There was no specific ground within the Commission proposal<sup>39</sup> nor Article 16 RCD 2003 for withdrawing or reducing reception conditions, where an applicant was subject to potential removal to another EU Member State under the (then) Dublin Convention allocation criteria. The Explanatory Memorandum explicitly stated that the criteria for reduction or withdrawal of reception conditions were 'exhaustive'. This precise issue was not raised in consultations with the Committee of the Regions,<sup>40</sup> the

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<sup>35</sup> Article 2(b) and Art. 2(c) RCD 2003. Persons applying for subsidiary protection only were excluded from benefiting from material reception conditions and access to the labour market under the RCD 2003. Art. 3(4) permitted Member States to apply the RCD 2003 to those within the subsidiary protection process.

<sup>36</sup> European Commission, Proposal for a Council Directive laying down minimum standards on the reception of applicants for asylum in Member States 2001 OJ C213E/286, Art. 13. The initial Commission proposal had sought to grant asylum applicants access to the labour market within six months.

<sup>37</sup> European Commission, Explanatory Memorandum on a Proposal for a Council Directive laying down minimum standards on the reception of applicants for asylum in Member States, Document No. 52001PC0181, Art. 13 Commentary.

<sup>38</sup> 'Reception conditions' are defined in Art. 2(i) RCD 2003 as 'the full set of measures that Member States grant to asylum seekers' under the RCD 2003. This includes access to the labour market.

<sup>39</sup> European Commission, Explanatory Memorandum on a Proposal for a Council Directive laying down minimum standards on the reception of applicants for asylum in Member States, Document No. 52001PC0181, Art. 22 Commentary.

<sup>40</sup> Opinion of the Committee of the Regions on the Proposal for a Council Directive laying down minimum standards on the reception of applicants for asylum in Member States 2002 OJ C48/63. The

Economic and Social Committee<sup>41</sup> or the European Parliament.<sup>42</sup> Therefore, as adopted, the RCD 2003 only envisaged one type of ‘asylum applicant’, whose reception conditions would be met in the Member State they were present in, regardless of whether the applicant was placed within a substantive status determination procedure or was subject to a potential Dublin removal. This interpretation, based on preparatory legislative materials, was ultimately confirmed in the case of *Cimade and Gisti* in September 2012.<sup>43</sup> In *Cimade*, French law purported to deny asylum applicants subject to Dublin removal procedures access to reception conditions.<sup>44</sup> The Court of Justice noted that the scope of the RCD 2003 included all persons who made an application for asylum, as per Article 2 and Article 3 RCD 2003.<sup>45</sup> The Court of Justice held that,<sup>46</sup>:

No provision can be found in the directive such as to suggest that an application for asylum can be regarded as having been lodged only if it is submitted to the authorities of the Member State responsible for the examination of that application.

The Court of Justice held that Dublin procedures do not begin to operate until an application for asylum was lodged.<sup>47</sup> The object and purpose of the RCD 2003, being to protect fundamental human rights,<sup>48</sup> meant that as long as an asylum applicant was on the territory of a Member State, that particular Member State was responsible for adhering to reception rights for that asylum applicant.<sup>49</sup> The Court of Justice recognized that in spite of the time limits established under the Dublin system for take back or take charge requests to be fulfilled, ‘a temporary stay by the asylum seeker in the territory of the requesting Member State may stretch to a very long period’.<sup>50</sup> The Court of Justice concluded that the EU asylum acquis only ever acknowledged one type of asylum applicant.<sup>51</sup> The only grounds for

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Committee of the Regions agreed with the six month period post application, although felt the wording of the Commission’s proposal needed to be amended to strengthen this right, at 1.7.

<sup>41</sup> Opinion of the Committee of the Regions on the Proposal for a Council Directive laying down minimum standards on the reception of applicants for asylum in Member States 2002 OJ C48/14.

<sup>42</sup> Report on the Proposal for a Council directive laying down minimum standards on the reception of applicants for asylum in Member States (COM(2001) 181) A5-0112/2002, 25 Apr. 2002. The Parliament did recommend reducing the period of access to the labour market to four months.

<sup>43</sup> Case C-179/11, *CIMADE and Groupe d’information et de soutien des immigrés (GISTI) v. Ministre de l’intérieur, de l’outre-mer, des collectivités territoriales et de l’immigration*, ECLI:EU:C:2012:594 (hereinafter, *CIMADE*).

<sup>44</sup> *CIMADE*, *supra* n. 43, at 36.

<sup>45</sup> *Ibid.*, at 38. This corresponded to the definition of application for asylum under Art. 2(c) of the Dublin Regulation 2003.

<sup>46</sup> *CIMADE*, *supra* n. 43, at 40.

<sup>47</sup> *Ibid.*, at 41.

<sup>48</sup> *Ibid.*, at 42.

<sup>49</sup> *Ibid.*, at 61.

<sup>50</sup> *Ibid.*, at 45.

<sup>51</sup> See analysis of definition of applicant under the RCD 2003, Dublin Regulation 2000 and Procedures Directive 2005, *CIMADE*, *supra* n. 43, at 44–49.

withdrawal of reception rights were as set down in Article 16 RCD 2003, which did not permit withdrawal (or reduction) of reception rights due to an applicant being subject to Dublin removal procedures.<sup>52</sup> Although the specific factual matrix in *Cimade* related to material reception conditions, the entirety of the decision was framed as relating to all reception conditions that applicants were entitled to under the RCD 2003.<sup>53</sup>

From 2008 to 2013, discussions occurred between the Commission, Council and Parliament regarding the RCDr, resulted in a number of proposals for the recast directive. The Commission Staff Working Document from 2008, explaining the need for a recast, made it exceptionally clear that all asylum seekers benefitted from all reception rights under the RCD 2003, including persons subject to Dublin procedures.<sup>54</sup> The Working Document noted that three Member States sought to exclude applicability where asylum seekers were subject to Dublin procedures.<sup>55</sup> In discussing the scope of applicability to all asylum seekers, including those subject to Dublin procedures, the Commission Staff Working Document stated categorically that ‘reception conditions must be available to all areas hosting asylum seekers including detention centres and to all types of procedures including Dublin II cases’.<sup>56</sup> The Commission’s 2011 further proposal continued to ensure that at all stages of the process for applying for international protection, including within Dublin procedures, reception rights were guaranteed.<sup>57</sup> The European Parliament,<sup>58</sup> Committee of the Regions,<sup>59</sup> the Economic and Social

<sup>52</sup> *CIMADE*, *supra* n. 43, at 8 & 57.

<sup>53</sup> See e.g. *Ibid.*, at 36, where the Court of Justice refers more broadly to ‘reception conditions’, which per Art. 2(i) RCD 2003 refers to all reception rights under the Directive. This clearly encompasses right to enter the labour market. For an analysis of the impact of the *CIMADE* decision in select EU Member States, see ECRE, *Preliminary Deference: The impact of judgments of the Court of Justice of the EU in cases X.Y.Z., A.B.C. and Cimade and Gisti on national law and the use of the EU Charter of Fundamental Rights* (Mar. 2017), at 53–63.

<sup>54</sup> Commission Staff Working Document accompanying the Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers: Impact assessment COM(2008) 815 final.

<sup>55</sup> Commission Staff Working Document accompanying the Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers: Impact assessment COM(2008) 815 final, at 18 & 43.

<sup>56</sup> Commission Staff Working Document accompanying the Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers: Impact assessment COM(2008) 815 final, at 40.

<sup>57</sup> Amended proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers COM(2011) 320 final, Art. 3.

<sup>58</sup> Committee on Civil Liberties, Justice and Home Affairs, Report on the proposal for a directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (recast) (2008/0244(COD)), at 20 and European Parliament legislative resolution of 7 May 2009 on the proposal for a directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (recast) [2010] OJ 212E/51, Art. 3.

<sup>59</sup> Committee of the Regions, Opinion of the Committee of the Regions on ‘The future Common European Asylum System II’ [2010] OJ C79/11, at 14.

Committee<sup>60</sup> all welcomed the confirmation that protection applicants, including those within Dublin procedures, would benefit from reception rights. The RCDr 2013 therefore provides that,<sup>61</sup>:

all third-country nationals and stateless persons who make an application for international protection on the territory, including at the border, in the territorial waters or in the transit zones of a Member State, *as long as they are allowed to remain on the territory as applicants*

Bolstering this analysis, the only mention of the Dublin III Regulation within the RCDr 2013 occurs in the context whereby Member States may, under the strictest of conditions,<sup>62</sup> detain persons subject to a potential Dublin transfer.<sup>63</sup> The wording of Article 15 RCDr 2013, dealing explicitly with the issue of right to work, utilizes the word ‘applicant’, as it also does throughout the RCDr 2013. These grounds taken together, indicates that in legislating for reception rights of international protection applicants, all reception rights, including access to work, inhere in all protection applicants, no matter whether in the Dublin transfer process or the substantive protection claim process. Therefore, it is clear, from preparatory legislative documents, the adopted Directive texts and jurisprudence of the CJEU, that all reception rights under RCDr 2013 apply to all protection applicants so long as they remain on the territory of a Member State. This explicitly includes applicants who are subject to Dublin removal procedures. There is no disaggregation of reception rights which Dublin procedure applicants are entitled to. Member States may not therefore withdraw or reduce reception rights, other than through the expressed terms provided in the RCDr 2013. Article 20 RCDr does not permit the withdrawal or reduction of reception rights based exclusively on the fact that an applicant may be subject to Dublin procedures. This principle is summed up succinctly by Advocate General Saugmandsgaard Ø,<sup>64</sup>:

Applicants have the right to remain not only in the Member State in which their application is being examined, but also in the Member State in which the application was lodged.

<sup>60</sup> Opinion of the European Economic and Social Committee on the ‘Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers’ [2009] OJ C317/110, at 2.7 & 3.1 and Opinion of the European Economic and Social Committee on the Amended proposal for a directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers (recast) 2012 OJ C24/80.

<sup>61</sup> Article 3, RCDr 2013, emphasis added.

<sup>62</sup> Article 28 of the Dublin III Regulation permits detention to be utilized only where Member States, on the basis of an individual evaluation of circumstances pertaining to a particular international protection applicant, may detain a person who is at risk of absconding.

<sup>63</sup> Article 8(3)(f) RCDr 2013.

<sup>64</sup> Opinion of Advocate General Saugmandsgaard Ø, Case C-528/15, *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v. Al Chodor and others*, ECLI:EU:C:2016:865, at 67, fn. 47.

### 3 THE CLASH ON EU LEGAL MEANING IN IRISH COURTS

Due to a series of challenges to this being brought before the body responsible on appeal, the IPAT, and under judicial review to the Irish High Court, there now exists two competing legal interpretations of EU law within the Irish legal system. Questions for preliminary reference have been referred by the Irish High Court<sup>65</sup> and the IPAT<sup>66</sup> in a bid to resolve this impasse. The questions referred to the CJEU by both bodies can be synthesized into three core issues. First, did the distinction drawn between an ‘applicant’ and ‘recipient’ as regards access to the labour market within the 2018 Regulations conform to Article 2 RCDr 2013, with reference to the right to work under Article 15 RCDr 2013.<sup>67</sup> Second, whether the taking of a legal challenge to a Dublin transfer order in domestic courts, which resulted in an order from a court not to remove the applicant from the jurisdiction until the challenge was disposed of, be considered as an ‘abuse of rights’ or delay attributable to the protection applicant.<sup>68</sup> A Third, only asked by the High Court, can the Procedures Directive Recast 2013 (PDr 2013), be utilized as interpretative tool, to explore what is meant by ‘attributable delay’ in the RCDr 2013.<sup>69</sup> Ireland has not opted into the PDr 2013. For reasons explained below, this is a rather confusing question, and would best not be answered by the CJEU.

#### 3.1 ON TWO TYPES OF ‘PROTECTION APPLICANT’ IN IRISH LAW

The issue of whether persons subject to an unexecuted Dublin transfer, who but for this, would satisfy the criteria for accessing the labour market under the 2018 Regulations, has been the mainstay of decisions issued to date by the IPAT. Between the coming into force of the 2018 Regulations and March 2019, there had been 111 refusals of access to the labour market by persons who were subject of an unexecuted Dublin transfer.<sup>70</sup> A significant majority of these 111 protection applicants may have had their transfer to the United Kingdom stayed, due to

<sup>65</sup> *K.S. (Pakistan) and M.H.K. (Bangladesh) v. IPAT and others* [2019] IEHC 176.

<sup>66</sup> *Unknown Nationality* [2019] IPAT 4 RC and *Iraq* [2019] IPAT 7 RC. Please note that the neutral identifiers are not part of IPAT’s decision numbering system, but have been created by the author. All IPAT decisions on the RCDr 2013 and 2018 Regulations utilized in this article are available through the *Exploring Direct Provision* project, <https://exploringdirectprovision.ie/reception-conditions-decisions-database/>. Decisions were made available to the author pursuant to Freedom of Information requests to IPAT (FOI Reference 01/2019, 02/2019 and 03/2019), and all decisions are on file with author. At the time of writing, these decisions are not available publicly on the IPAT decision database.

<sup>67</sup> [2019] IEHC 176, at 22 and [2019] IPAT 4 RC, at 39(i).

<sup>68</sup> [2019] IEHC 176, at 26, 29 and 32; [2019] IPAT 4 RC, at 39(ii), and, *Iraq* [2019] IPAT 7 RC, at 44.

<sup>69</sup> [2019] IEHC 176, at 18.

<sup>70</sup> Statistics contained in *K.S. (Pakistan) and M.H.K. (Bangladesh) v. IPAT and others* [2019] IEHC 176, at 41.

questions on the United Kingdom's continued membership of the European Union. The CJEU decision of *M.A.*, issued in January 2019, determined that the Brexit process had no impact on the ability of Ireland to transfer protection applicants to the United Kingdom under the Dublin system.<sup>71</sup> The preliminary reference had been sent by the Irish High Court in November 2017, meaning that there had been a significant build up on non-executed Dublin transfers to the United Kingdom.<sup>72</sup>

In September 2018, in six decisions, Tribunal Member Carroll had to consider whether the 2018 Regulations provided persons with an unexecuted Dublin transfer with permission to enter the labour market.<sup>73</sup> In all decisions, Tribunal Member Carroll held that the 2018 Regulations denied 'recipients' access to the labour market, even if satisfying all other conditions.<sup>74</sup> From the decisions of Tribunal Member Carroll, it does not appear that any arguments were made as regards whether this 'applicant'/'recipient' distinction was permitted under the RCDr 2013.<sup>75</sup> In eleven decisions, issued in the main by Tribunal Member Carroll, in October 2018 and November 2018, the issue of whether Ireland could adopt this 'applicant'/'recipient' distinction relating to access to the labour market came to the fore of legal argument made by appellants legal teams.<sup>76</sup> While the facts differed slightly, at the core, all eleven decisions related to persons who had been subject to Dublin transfer procedures, but the Dublin transfer had not been executed. Focusing on the *M.H.K. (Bangladesh)* decision as the first and lead decision in this second-wave of IPAT cases, it illustrated the tension between

<sup>71</sup> Case C-661/17, *M.A. and others v. IPAT and others*, decision of the Court of Justice (first chamber), ECLI:EU:C:2019:53.

<sup>72</sup> For domestic proceedings, see *M.A. (a minor) and others v. IPAT and others* [2017] IEHC 677. Post this decision, a significant number of proposed Dublin transfers to the United Kingdom were stayed, pending the decision of the CJEU. At the time of writing (Dec. 2019), the High Court has not yet dealt with the impact of the decision in C-661/17 on the stays on transfers placed in this case (or other similar cases).

<sup>73</sup> All decisions were issued on 11 Sept. 2018: see *Pakistan* [2018] IPAT 2 RC, *Bangladesh* [2018] IPAT 3 RC, *Pakistan* [2018] IPAT 4 RC, *Pakistan* [2018] IPAT 5 RC, *Bangladesh* [2018] IPAT 6 RC and *Pakistan* [2018] IPAT 7 RC.

<sup>74</sup> *Pakistan* [2018] IPAT 2 RC, at 12, this decision was made without substantive arguments being furnished from the appellant's legal team. See also *Bangladesh* [2018] IPAT 3 RC at 12; *Pakistan* [2018] IPAT 5 RC, at 12; *Pakistan* [2018] IPAT 4 RC, at 12; *Bangladesh* [2018] IPAT 6 RC, at 12 and *Pakistan* [2018] IPAT 7 RC, at 12.

<sup>75</sup> One of these 11 Sept. 2018 decisions, involving an appellant from Pakistan, partly formed the basis of the High Court decision in *K.S. (Pakistan) and M.H.K. (Bangladesh) v. IPAT and others* [2019] IEHC 176. It is not possible to precisely identify which Pakistani appellant brought the High Court case.

<sup>76</sup> See *M.H.K. Bangladesh* [2018] IPAT 9 RC. This appellant, M.H.K., had brought a judicial review to the Irish High Court, and was the second applicant in the High Court decision, *K.S. (Pakistan) and M.H.K. (Bangladesh) v. IPAT and others* [2019] IEHC 176, which is discussed below. See also *Libya* [2018] IPAT 10 RC, *Pakistan* [2018] IPAT 11 RC; *Iraq* [2018] IPAT 13 RC; *Algeria* [2018] IPAT 14 RC, *Nigeria/Biafra* [2018] IPAT 15 RC, *Pakistan* [2018] IPAT 16 RC; *Pakistan* [2018] IPAT 17 RC; *Pakistan* [2018] IPAT 18 RC; *Pakistan* [2018] IPAT 19 RC and *Bangladesh* [2018] IPAT 20 RC.

Tribunal Member Carroll accepting Ireland had not correctly transposed the RCDr 2013 into domestic law, but requiring *M.H.K.* to remedy this before the Irish High Court. A key part of *M.H.K.*'s argument, was that the 2018 Regulations, in introducing the 'applicant'/'recipient' distinction, did not conform to the requirements of the RCDr 2013.<sup>77</sup> The review officer in the Department of Justice and Equality had determined that while *M.H.K.* was entitled to 'material reception conditions', within the 2018 Regulations, permission to enter the labour market was only open to persons within the substantive protection determination process.<sup>78</sup> The review officer concluded that *M.H.K.* had 'failed to identify any incompatibility between the [2018] Regulations and the [Recast Reception] Directive'.<sup>79</sup> The review officer stated that since the United Kingdom was the Member State responsible for substantively determining *M.H.K.*'s protection claim, the nine month period provided under Regulation 11 of the 2018 Regulations, could not start to run against Ireland.<sup>80</sup>

*M.H.K.* relied in particular on the *Cimade* decision.<sup>81</sup> While the issues for determination in *Cimade* related to the concept of 'material reception conditions', the broad principle stands as good law, that there is only one form of applicant for protection throughout the RCDr 2013.<sup>82</sup> However, whether this was the view of Tribunal Member Carroll in the IPAT, was somewhat obfuscated in her noting that *Cimade* engaged with obligations to provide 'material reception conditions' rather than engaging directly with the right to work for protection applicants.<sup>83</sup> Nevertheless, the tenor of the written decision suggests that Tribunal Member Carroll accepted that Ireland, in creating this 'applicant'/'recipient' distinction, did not correctly transpose the right to work requirements of the RCDr 2013. Tribunal Member Carroll acknowledged the 'supremacy of EU law' in Ireland,<sup>84</sup> however, noted that the jurisdiction to dis-apply national law in the face of a contradictory norm of EU law, lay with the superior courts in Ireland.<sup>85</sup>

<sup>77</sup> *M.H.K. Bangladesh* [2018] IPAT 9 RC, at 7(ii). Other arguments were submitted, but these are not relevant to the issues under discussion in this article.

<sup>78</sup> *M.H.K. Bangladesh* [2018] IPAT 9 RC, at 8(i).

<sup>79</sup> *M.H.K. Bangladesh* [2018] IPAT 9 RC, at 8(ii).

<sup>80</sup> *M.H.K. Bangladesh* [2018] IPAT 9 RC, at 8(iv).

<sup>81</sup> Case C-179/11, *CIMADE and Groupe d'information et de soutien des immigrés (GISTI) v. Ministre de l'intérieur, de l'outre-mer, des collectivités territoriales et de l'immigration*, ECLI:EU:C:2012:594. This case is discussed in *M.H.K. Bangladesh* [2018] IPAT 9 RC, at 25–29 and above at **7 to 8**. See also AG Sharpton ECLI:EU:C:2012:298.

<sup>82</sup> The fact that Art. 2(c) of the Reception Directive 2003 only related to applicants for refugee status, as opposed to Art. 2(b) of the RCDr 2013, which includes both refugee and subsidiary protection applicants, the core reasoning that there is only one form of 'applicant' under Art. 2 remains.

<sup>83</sup> *M.H.K. Bangladesh* [2018] IPAT 9 RC, at 30.

<sup>84</sup> *M.H.K. Bangladesh* [2018] IPAT 9 RC, at 32.

<sup>85</sup> *M.H.K. Bangladesh* [2018] IPAT 9 RC, at 32.

In December 2018, in the case of *S.S.*,<sup>86</sup> Tribunal Member Carroll had to determine the exact same legal issue as arose in *M.H.K. (Pakistan)*. *S.S.* had an unexecuted Dublin transfer order to the United Kingdom, which was stayed pending a response by the CJEU to the *M.A.* decision.<sup>87</sup> Tribunal Member Carroll noted that significant developments had occurred since the *M.H.K. (Pakistan)* decision, due to the CJEU decision in *Workplace Relations Commission*.<sup>88</sup> In *Workplace Relations Commission*, the CJEU determined that all courts and tribunals in Member States, who exercise powers to give effect to EU legal rights,<sup>89</sup> must stand prepared to disapply<sup>90</sup> a national law, judicial decision, legal norm or legal practice,<sup>91</sup> which conflicts with Member States obligations under European Union law.<sup>92</sup> An invitation by the Irish Supreme Court to the CJEU,<sup>93</sup> to permit Member States to decide how national rules be disapplied, vesting such jurisdiction solely in superior courts, was given short shrift by the CJEU. With this new legal landscape in mind and given that jurisdiction to ultimately determine the interpretation and application of right to enter the labour market under the 2018 Regulations was held by the IPAT,<sup>94</sup> Tribunal Member Carroll, considered whether Regulation 11 of the 2018 Regulations complied with Article 15 of RCDr 2013. Relying squarely on *Cimade*, Tribunal Member Carroll concluded that the entirety of rights provided under the RCDr ‘must be afforded to all applicants as long as they are on the territory of a Member State’.<sup>95</sup> Tribunal Member Carroll accepted that there was some differentiation on entitlement to accessing the labour market, envisaged under the RCDr 2013– that of a time–delay in potentially accessing this right.<sup>96</sup> However, the RCDr 2013 did not create any other form of

<sup>86</sup> *S.S. Pakistan* [2018] IPAT 21 RC. While the initial’s *S.S.* do not appear on the text of the IPAT decision, this is the initials of the applicant as outlined in the Irish High Court in *K.S. (Pakistan) and M.H.K. (Bangladeshi) v. IPAT and others* [2019] IEHC 176, at 15.

<sup>87</sup> Explained above, at 11.

<sup>88</sup> Case C-378/17, *Minister for Justice and Equality and others v. Workplace Relations Commission and others*, ECLI:EU:C:2018:979 (hereinafter *Workplace Relations Commission*). Discussed and applied in *S.S. (Pakistan)* [2018] IPAT 21 RC, at 17 to 21.

<sup>89</sup> *Workplace Relations Commission*, at 35.

<sup>90</sup> The CJEU, adopting the approach of the Advocate General (ECLI:EU:C:2018:698), stated that this disapplication, did not necessarily mean to ‘strike down’ formally the offending domestic legal provision, leaving that power within the hands of domestic superior courts, *Workplace Relations Commission*, at 32.

<sup>91</sup> *Workplace Relations Commission*, at 38.

<sup>92</sup> *Workplace Relations Commission*, at 52.

<sup>93</sup> See the domestic Irish Supreme Court preliminary reference decision, *Minister for Justice and Equality and others v. Workplace Relations Commission and others* [2017] IESC 43, in particular at 7.1–7.17, where Clarke J. delivering the decision of the Supreme Court, put up a spirited defence of the status quo in Ireland, noting inter alia the significant role of domestic superior courts in providing effective protection of EU legal rights, but one wherein the jurisdiction of Ireland’s domestic superior courts, who were (at that time) the only ones capable of disapplying national law in the face of contradictory EU legal norms.

<sup>94</sup> Regulation 21 of the 2018 Regulations.

<sup>95</sup> *S.S. Pakistan* [2018] IPAT 21 RC, at 29.

<sup>96</sup> *Ibid.*

condition to access this right, and did not wholesale explicitly exclude protection applicants subject to an unexecuted Dublin transfer decision.<sup>97</sup> This interpretation was bolstered by how the concept of international protection applicant is defined for the purposes of Irish law under the International Protection Act 2015.<sup>98</sup> In Irish law, an individual continues to be an applicant for international protection, unless she 'is transferred from the State in accordance with the Dublin Regulation'.<sup>99</sup> The Tribunal Member declined to make a preliminary reference to the CJEU,<sup>100</sup> and held that S.S. was entitled to enter the Irish labour market.<sup>101</sup> A second decision, *Albania*, utilizing the reasoning outlined in *S.S.*, followed on 7 March 2019, granting the protection applicant who was subject to a non-executed Dublin transfer, the right to enter the labour market.<sup>102</sup>

In *K.S. (Pakistan)*,<sup>103</sup> Mr Justice Richard Humphreys in the Irish High Court reached a very different conclusion to Tribunal Member Carroll's decisions in *S.S.* and *Albania*. The applicants in *K.S. (Pakistan)* sought a declaration that Ireland had failed to properly transpose the right to work provisions of the RCDr 2013 into Irish law.<sup>104</sup> Judge Humphreys ultimately made a preliminary reference, consisting of five questions, to the CJEU.<sup>105</sup> This resulted in these proceedings being stayed, with the judge requesting the questions be dealt with as an expedited procedure.<sup>106</sup> Judge Humphreys suggested that Ireland should be able to distinguish between 'reception rights', shelter, food, daily expenses allowance, health-care, education, available to all protection applicants in Ireland, in contradistinction to freedom to access the labour market, which Ireland could exclude persons subject to a Dublin

<sup>97</sup> *Ibid.*, at 30.

<sup>98</sup> See s. 2(1) and s. 2(2) of the International Protection Act 2015, *S.S. Pakistan* [2018] IPAT 21 RC, at 32.

<sup>99</sup> Section 2(2)(c) of the International Protection Act 2015, with the reference to the Dublin Regulation interpreted as the domestic transposition measures, European Union (Dublin System) Regulations 2018, SI No. 62/2018.

<sup>100</sup> *S.S. Pakistan* [2018] IPAT 21 RC, at 34.

<sup>101</sup> *Ibid.*, at 35.

<sup>102</sup> *Albania* [2019] IPAT 3 RC.

<sup>103</sup> *K.S. (Pakistan) and M.H.K. (Bangladesh) v. IPAT and others* [2019] IEHC 176.

<sup>104</sup> [2019] IEHC 176, at 6. Two further orders were sought, not of central relevance to this article, but namely, a setting aside of the Tribunal Members decision not to grant them freedom to enter the labour market, and damages for violation of EU legal rights. Needless to say, the grant of both these orders were subject to a finding that Ireland had not properly transposed the RCDr 2013 relating to right to work. An argument was also made, but ultimately not pressed, as to whether protection applicants, subject to an unexecuted Dublin transfer, enjoyed a right to work due to Art. 15 of the Charter of Fundamental Rights (see [2019] IEHC 176, at 16). As explained by Humphreys J. the present case ultimately only related to the interpretation of Art. 15 RCDr 2013 and Regulation 2 and Regulation 11 of the 2018 Regulations. In addition, per *N.H.V v. Minister for Justice and Equality* [2018] 1 I.R. 246, at 273–279 (Court of Appeal) and 311 (Supreme Court), it is unlikely that the Charter argument would succeed.

<sup>105</sup> [2019] IEHC 176, at 18–35.

<sup>106</sup> The rationale for this request is outlined in [2019] IEHC 176, at 38–41, significantly hinging on the significant number of persons in a similar position to both applicants in this case.

transfer ('recipients'). Judge Humphreys noted that the *Cimade* case did not engage with the right to work issue, but only entitlement to material reception conditions.<sup>107</sup> The Commission's proposal for a recast of the RCDr 2013, which would explicitly exclude protection applicants subject to a non-executed Dublin transfer from accessing the labour market, was also mentioned, however the Judge stated that 'this clarification does not imply that such access must be taken as already existing under [the RCDr 2013]'.<sup>108</sup> In requesting the CJEU to permit the exclusion of persons with non-executed Dublin transfers from benefitting from the right to work under the RCDr 2013, and the 2018 Regulations, Judge Humphreys referred extensively to the issue of Brexit. The judge stated that *Cimade* may have failed to fully engage with the 'pull factor' argument. In addition, he noted that the CJEU 'needed no reminder' (yet, the judge proceeded to 'remind' in some detail),<sup>109</sup>:

that if there was any issue that requires enhanced sensitivity and flexibility it is that of immigration, which as a matter of purely empirical observation was central in bringing United Kingdom membership of the Union to breaking point.

Judge Humphreys continued:

It would be naïve to think that concerns lending to the question of EU membership due to particularly sensitive issues are confined to one country. One could certainly make the case for caution by national and European judicial bodies in engaging in any interpretive extension of EU rights in the immigration context, particularly as regards third country nationals.

### 3.2 'ABUSE OF RIGHTS' & ATTRIBUTABLE DELAY

Judge Humphreys stated that the Dublin system, was being subject to a 'significant abuse of rights' by protection applicants.<sup>110</sup> The judge stated that the key issue was persons subject to a non-executed Dublin transfer order bringing legal challenges delaying their removal from the State.<sup>111</sup> This he argued was a 'voluntary act', and that it was these protection applicants who were responsible for 'any consequential delay ... doubly so where the judicial review [of the Dublin transfer decision] may

<sup>107</sup> [2019] IEHC 176, at 12.

<sup>108</sup> [2019] IEHC 176, at 13, referencing Art. 15 of the proposed recast of the RCDr, COM(2016) 465 final/2, which if adopted would exclude persons subject to Dublin removal procedures from accessing the labour market, as well as limiting education rights for minors to mere 'educational activities', however per Art. 17A of the proposal, persons subject to non-executed Dublin transfers, are entitled to a 'dignified standard of living', but this is not equated to material reception conditions under the Commission proposal. Although not mentioned by Judge Humphreys, but confirming this observation, this must also be read in light of Commission proposals for the Dublin IV Regulation, see COM(2016) 270 final, in particular proposed Arts 3 and 5(3).

<sup>109</sup> [2019] IEHC 176, at 24.

<sup>110</sup> [2019] IEHC 176, at 25.

<sup>111</sup> [2019] IEHC 176, at 32.

be abusive or unfounded'.<sup>112</sup> This issue of 'abuse' of legal rights for those subject to Dublin removal procedures, formed a significant narrative on the remaining questions that Judge Humphreys requested a preliminary reference on. Judge Humphreys stated that persons subject to non-executed Dublin transfers, not be 'lavished with further rights to access the labour market'.<sup>113</sup>

Three of the other five questions referred to the CJEU by the High Court, all related to whether by challenging a Dublin removal decision of IPAT by means of judicial review in the Irish High Court, could entail a finding that the applicant was responsible for an attributable delay, hence denying entitlement to accessing the labour market. Judge Humphreys proposed answers, were that those subject to Dublin removal procedures, were solely responsible for the delay.<sup>114</sup> In concluding that the seeking of judicial review, which has the effect of often causing significant delays in the Dublin transfer process, Judge Humphreys stated, that these delays are solely attributable to a,<sup>115</sup>:

voluntary act of the applicant, and therefore, any consequential delay can be attributed to the applicant. This is doubly so where the judicial review may be abusive or unfounded.

This however absolutely fails to reflect realities of challenging a Dublin removal in Ireland. No discussion occurred in the High Court decision on the requirement for applicants seeking to judicially review a Dublin transfer order, must first gain permission to bring a judicial review before the Irish High Court. Proceedings involving Dublin transfers are administered, by way of judicial order, as follows<sup>116</sup>:

where the relief in respect of which leave is sought includes a challenge relating to a decision under the Dublin system, the court has directed by way of a global order that the filing of any such application acts as a stay on the decision proposed to be challenged, until the final determination of the proceedings on that application including the substantive proceedings if leave is granted and any appeal therefrom, unless the court subsequently otherwise orders.

Irish courts have the power, at the leave stage for judicial review, to dismiss the challenge to the decision of IPAT relating to a Dublin transfer. Therefore, to place total blame on persons subject to a Dublin transfer order for very significant delays in the Irish High Court determining whether their judicial review is successful or not in Dublin transfer cases is inappropriate. Within two key domestic cases over

<sup>112</sup> [2019] IEHC 176, at 34.

<sup>113</sup> [2019] IEHC 176, at 25.

<sup>114</sup> [2019] IEHC 176, at 32. Although coming later in time, the case of *B.S and R.S. v. Refugee Appeals Tribunal and others* [2019] IESC 32 provides an excellent discussion on the role and limits of judicial review specifically related to the Dublin transfer process.

<sup>115</sup> [2019] IEHC 176, at 36.

<sup>116</sup> Practice Direction 81, High Court of Ireland, Asylum, Immigration and Citizenship List, at 8(2).

the last few months, one successful for the applicants,<sup>117</sup> the other unsuccessful,<sup>118</sup> the significant delays were due to the necessity to consider important points of law.

Within the *K.R.S* decision, Mr Justice Humphreys framed proposed responses to the questions posed to the Court of Justice, as dealing with an ‘abuse of rights’. This was done in a manner whereby Judge Humphreys sought to label any challenge by all individuals to a Dublin removal decision as an ‘abuse of rights’. The concept of abuse of rights is understood (to varying degrees) as an ‘improper’ or ‘fraudulent’ use of EU law to gain a particular EU legal right.<sup>119</sup> Within the case-law of the CJEU on immigration issues, mainly arising from rights of third-country nationals and rights under the Citizenship Directive,<sup>120</sup> a State is responsible for proving that such an ‘abuse of rights’ is occurring, based on individual examination of each particular application. Yet seeking to make a determination that an ‘abuse of rights’ has occurred in the first place, is subject to significant safeguards. ‘Abuse of rights’ cannot be taken to mean that every individual who challenges a decision on Dublin removal is ‘abusing’ rights. Indeed, the Court of Justice have explicitly determined that this simply cannot be the case. In *Ghezelbash*, the CJEU noted that Article 27 of the Dublin III Regulation provides every person subject to a Dublin removal decision ‘to have the right to an effective remedy in the form of an appeal or a review, on points of fact and law against a transfer decision before a court or tribunal’.<sup>121</sup> The purpose of Article 27 of the Dublin III Regulation, in light of Recital 19 of Dublin III, is to ensure the determination of which Member State is responsible for assessing a protection claim ‘are correctly applied’.<sup>122</sup> The Dublin III Regulation, differed from the Dublin Convention and Dublin II Regulation, by ‘conferring on asylum seekers the right to an effective remedy in respect of any transfer decision that may be

<sup>117</sup> See *N.V.U. and others v. Refugee Appeals Tribunal and others* [2019] IECA 183. This decision had to consider whether the now International Protection Appeals Tribunal could consider the sovereignty clause under the Dublin III Regulation. The High Court ([2017] IEHC 490) determined this issue was solely for consideration of the Minister for Justice. The Court of Appeal reached the opposite conclusion, deeming the International Protection Office, and on appeal the International Protection Appeals Tribunal, responsible for exercising discretion under the sovereignty clause. There are a significant number (more than 100, although exact figures not available) of other similar cases currently stalled in the High Court, which were awaiting finalization post this Court of Appeal decision.

<sup>118</sup> The second case, discussed above, at 11 dealt with the important issues of law relating to the Dublin system, and Britain’s departure from the United Kingdom. This impacted all other cases in the High Court asylum and citizenship list, meaning that all these cases stalled until the delivery of the CJEU response to the preliminary reference request is dealt with by the Irish courts.

<sup>119</sup> See generally, K. Sorensen, *Abuse of Rights in Community Law: A Principle of Substance or Merely Rhetoric*, 43(2) Common Mkt L. Rev. 423–469 (2006).

<sup>120</sup> For a summary of these cases, see T. Szabados, *National Courts in the Frontline: Abuse of Rights Under the Citizens’ Rights Directive*, 33 Utrecht J. Int’l & Eur. L. 84–102 (2017). See further, E. Fahey, *Going Back to Basics: Re-embracing the Fundamentals of the Free Movement of Persons in Metock*, 36(1) Legal Issues Econ. Integration 83–89 (2009).

<sup>121</sup> Case C-63/15, *Ghezelbash v. Staatssecretaris van Veiligheid en Justitie* ECLI:EU:C:2016:409, at 30.

<sup>122</sup> *Ghezelbash*, *supra* n.121, at 44.

taken ...<sup>123</sup> Importantly, the CJEU made clear that the making of an application to review a Dublin transfer, ‘cannot ... be equated with forum shopping’.<sup>124</sup> Even if this results in delaying transfer to the Member State who has responsibility to determine the protection claim, where a judicial challenge to a Dublin removal order is progressed, ‘... the EU legislature did not intend that the judicial protection enjoyed by asylum seekers should be sacrificed to the requirement of expedition in processing asylum applications’.<sup>125</sup> Importantly, the CJEU also acknowledged that lodging an appeal against a transfer decision does not necessarily have a suspensive effect, and a national court may, depending on particular circumstances of an individual challenge, decide to suspend, or permit the transfer to occur pending conclusion of proceedings.<sup>126</sup> It is concerning that any judge would regard reliance on legal process to challenge administrative removal decisions as an ‘abuse of rights’.

In making the preliminary reference to the CJEU, Judge Humphreys made specific reference to Article 31(3)(c) of the Procedures Directive Recast 2013 (PDr 2013) in stating his belief that read together, with Article 15 RCDr 2013, this may bolster the argument of Ireland, that challenging a Dublin transfer order before a court, can be a delay attributed to an applicant.<sup>127</sup> Could the PDr 2013, which Ireland has not exercised its opt-in to, be utilized as an aid to interpretation of the RCDr 2013? Judge Humphreys sought to utilize the 2011 Commission proposals to bolster his contention that both instruments can usefully be used as interpretive aids in determining whether an applicant could be deemed as contributing to an attributable delay, such as deny the applicant the right to work under Article 15 RCDr.<sup>128</sup> Article 31(3)(c) PDr 2013 imposes a general obligation upon Member States to determine a substantive protection claim within six months, unless the delay in determining the claim ‘can clearly be attributed to the failure of the applicant to comply with his or her obligations’.<sup>129</sup> However, an important criterion was not included within Judge Humphreys’ reference to Article 31(3)(c), that the failure to comply, and what this means relates to ‘... obligations under Article 13 [PDr 2013]’. When considering Article 13 PDr 2013, the attribution of delay obliges Member States to impose a general duty of co-operation in the

<sup>123</sup> *Ibid.*, at 51.

<sup>124</sup> *Ibid.*, in particular, at 74.

<sup>125</sup> *Ibid.*, at 57. See also Opinion of AG Sharpston, ECLI:EU:C:2016:186, at 90–91.

<sup>126</sup> *Ghezelbash*, *supra* n. 121, at 59.

<sup>127</sup> [2019] IEHC 176, at 20–21.

<sup>128</sup> Judge Humphreys in particular explored draft 2011 proposed recitals to what became the RCDr, which initially made explicit mention of the PDr 2013, see [2019] IEHC 176, at 9–11.

<sup>129</sup> My emphasis, [2019] IEHC 176, at 8 (iii).

assessment of a substantive protection claim.<sup>130</sup> However, it has to be borne in mind, that the duty of co-operation under the PDr 2013, relates *solely* to protection applicants whose substantive protection claim is being determined by authorities of a Member State. The 2018 Regulations already include in substance these precise obligations as to when under Regulation 11, a refusal on permission to work, may be denied due to attributable delay by the applicant.<sup>131</sup> So, with domestic law imposing substantially the same concept of attributable delay vis-à-vis the PDr 2013, the necessity for a response to this question must be raised. While the question may not appear objectionable on the face of the record, it also should be highlighted that this appears to be an attempt by the judge to re-litigate an issue (using non-transposed asylum directives as an interpretive tool in Irish asylum law), where Irish superior courts have indicated that this should not be done.<sup>132</sup> In my view, this question proposed is somewhat perplexing, and I would contend, unnecessary to resolving the legal question at the heart of this case, given that the concept of attributable delay is dealt four-square within Regulation 27 of the 2018 Regulations,<sup>133</sup> as permitted by Article 15 RCDr 2013.

With the High Court reference then sent to the CJEU, Judge Humphreys had invited IPAT to follow his analysis provided in the interim until the CJEU provided a response.<sup>134</sup> This would have resulted in a rejection of the right to

<sup>130</sup> Reference is explicitly made in Art. 13 PDr 2013 to Art. 4(2) of the Qualification Directive Recast 2011 (QDr 2011) obligations on applicants within the substantive determination process, and which imposes an obligation on the protection applicant to disclose statements, documents, travel routes, previous asylum claims etc. Art. 13(2) PDr 2013, further specifies that Member States, in implementing obligations to impose a duty of co-operation, may require a protection applicant to report to authorities, inform the Member States of where she is residing, search the protection applicant, while respecting her dignity and integrity, take a photo of the applicant and record her oral statements to Member State authorities.

<sup>131</sup> Discussed above, at 5.

<sup>132</sup> Judge Humphreys in effect accepted that he was doing this, see [2019] IEHC 176, at 20–21, stating his belief that the Court of Appeal decision in *X and X v. Minister for Justice and Equality* [2018] IECA 124, at 64, which overruled Judge Humphreys High Court decision [2016] IEHC 377, at 82, as to whether Art. 32 and Art. 34 of the PDr 2013 could be relied upon by him in coming to his decision on subsequent asylum applications. It should be noted, that the issue of utilizing asylum directives which Ireland had not exercised its opt-in to, and what precise impact they had in the Irish legal system, was also considered in *C.A. & anor. v. Minister for Justice and Equality and ors* [2014] IEHC 532, at 11.09–11.10 and *N.H.V. v. Minister for Justice and Equality* [2016] IECA 86, where Finlay Geoghegan J. (in the context at the time, of the then non-transposition of the RCDr 2013), stated, at 44, ‘Ireland had already sometime previously elected to opt-out of the 2013 Reception Directive as it was fully entitled to do. By so electing, it must be accepted that the topics which were the subject matter of the Directive itself remained entirely within the sovereign realm of this State and, accordingly, fell outside the scope of EU law.’

<sup>133</sup> Discussed above, at 5.

<sup>134</sup> [2019] IEHC 176, at 37. The CJEU welcomes judges providing information on how legal questions may be resolved, see *Recommendations to National Courts and Tribunals in Relation to the Initiation of Preliminary Ruling Proceedings* [2018] OJ C257/01, at 17.

enter the labour market for persons subject to an unexecuted Dublin transfer who otherwise met conditions to access the labour market. In *Unknown Nationality*<sup>135</sup> and *Iraq*,<sup>136</sup> Tribunal Member Carroll, declined to follow Judge Humphreys suggested approach. Rather than following her previous decisions,<sup>137</sup> the Tribunal Member referred two questions to the CJEU, which substantially align with the questions asked by Judge Humphreys on meaning of ‘applicant’ for the purposes of the RCDr 2013,<sup>138</sup> and a question of what constitutes an ‘attributable delay’.<sup>139</sup> This itself is a fairly major departure from how legal systems operate in Ireland, whereby if there was a decision from the High Court, the IPAT would be obliged to follow this decision. Yet, given that Judge Humphreys answers were a suggested approach, pending determination by the CJEU, nothing would have prevented Tribunal Member Carroll from finalizing the case. Nonetheless, aware of the respective powers between a ‘mere’ tribunal and the approach that had found favour in the High Court, the requests for a preliminary reference from IPAT, was perhaps the most legally astute move.

#### 4 ACKNOWLEDGING THE DUBLIN REALITIES

As documented and analysed extensively by Costello<sup>140</sup> and others,<sup>141</sup> the Dublin system has never actually functioned in the manner it was supposed to. Just focusing on Ireland, between 2016 and 2018, there were 1,151 decisions approving outgoing Dublin transfers from Ireland to another EU Member State.<sup>142</sup> Between 2016 and 2018, 105 persons were transferred from Ireland to another European Union Member State.<sup>143</sup> Acknowledging some caution with these statistics, as they are not comparing like for like, these statistics nevertheless paint a picture of a highly ineffective operation of the Dublin system in Ireland. Therefore, the question of reception rights for persons subject to Dublin procedures is an important one. In most cases, a transfer to another EU Member State

<sup>135</sup> *Unknown Nationality* [2019] IPAT 4 RC, at 20.

<sup>136</sup> *Iraq* [2019] IPAT 7 RC, at 23.

<sup>137</sup> *S.S. Pakistan* [2018] IPAT 21 RC and *Albania* [2019] IPAT 3 RC.

<sup>138</sup> *Unknown Nationality* [2019] IPAT 4 RC.

<sup>139</sup> *Iraq* [2019] IPAT 7 RC, at 44.

<sup>140</sup> C. Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2016), in particular, Ch. 6.

<sup>141</sup> See e.g. Peter Nedergaard, *Borders and the EU Legitimacy Problem: The 2015–16 European Refugee Crisis*, 40(1) Pol’y Stud. 80 (2019).

<sup>142</sup> Eurostat, *Decisions on ‘Outgoing’ Dublin Requests*, [https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr\\_dubdo&lang=en](https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_dubdo&lang=en).

<sup>143</sup> These statistics are not absolutely comparable, given that transfers may have occurred for applicants outside these year ranges. Nevertheless, they do evidence the low number of transfers that will occur, even post decisions permitting a Dublin transfer.

will not occur. Ireland is not in any way unique within the European Union in this regard, and as AIDA have noted more generally,<sup>144</sup>:

Dublin remains an extremely inefficient responsibility-allocation mechanism, effectively regulating a very small fraction of the asylum seeker population in Europe.

Judge Humphreys in the High Court mentioned European Commission's proposal for a further recast of the RCDr 2013.<sup>145</sup> While certainly appropriate to mention this,<sup>146</sup> it would also have been equally appropriate to note the rejection of this proposal by parliamentary committees of the European Parliament. The rejection of this proposal by the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament, was not mentioned by Judge Humphreys, suggesting it may not have been brought to his attention by the applicants or respondents in the case.<sup>147</sup> The EU Parliamentary Committee sought to delete Commission proposals for a reduction in reception conditions, for those within a Dublin transfer decision process.<sup>148</sup> On the specifics of employment for protection applicants, all measures proposed by the Commission that would have explicitly removed this right for protection applicants subject to a Dublin transfer process, were deleted by the Parliamentary Committee.<sup>149</sup>

However, the issues in the Irish cases, are now likely to be determined by the CJEU. In my view, it is essential that the CJEU reiterate that there cannot be differentiated applicants for international protection. Delays resulting from overburdened courts (and tribunals) in Ireland cannot justify the rejection of labour rights for persons subject to significant delays in the Dublin removal process. This is not a question on 'lavishing' rights on persons challenging proposed Dublin transfer orders.<sup>150</sup> Rather, these are questions on dignity, respect and human rights, that must be guaranteed to all those seeking protection in the European Union. The decisions *S.S.* and *Albania* of the IPAT provide a comprehensive, well-reasoned and appropriate legal interpretation on the core legal issues that will arise from these preliminary references. The CJEU could not go far wrong in adopting that legal analysis.

<sup>144</sup> Asylum Information Database, *The Dublin System in 2016: Key Figures from Selected European Countries* 4 (2017).

<sup>145</sup> Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast) COM/2016/0465 final.

<sup>146</sup> Judge Humphreys stated, [2019] IEHC 176, at 13, in relation to the Commission's 2016 recast proposal, that this '... clarification does not imply that such access must be taken as already existing under directive 2013/33/EU'.

<sup>147</sup> European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Report on the proposal for a directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast) A8-0186/2017, 10 May 2017.

<sup>148</sup> See e.g. A8-0186/2017, deletion of Commission recital 8 (amendment no. 2), modification of Commission recital 13 (amendment no. 6), modification of Commission proposed Art. 2(1)(10) (amendment no. 32) and deletion of Commission proposed Art. 17A (amendment no. 101).

<sup>149</sup> See Amendments 72 to 86 of A8-0186/2017.

<sup>150</sup> The phrase 'lavished' is utilized by Judge Humphreys, [2019] IEHC 176, at 25.

