

THE HIGH COURT**JUDICIAL REVIEW****[2013 No 584 J.R.]****[2013 No. 72 J.R.]****BETWEEN****N.H.V. AND F.T.****APPLICANTS****AND****THE MINISTER FOR JUSTICE AND EQUALITY****RESPONDENT****AND****THE IRISH HUMAN RIGHTS COMMISSION****NOTICE PARTY****JUDGMENT of Mr. Justice McDermott delivered on the 17th day of April, 2015**

1. These cases were heard together as they relate to the same issue. Both applicants are asylum seekers and requested temporary permission to work in the State claiming to have an entitlement to do so pursuant to s. 4 of the Immigration Act 2004 and s. 9(11) of the Refugee Act 1996 (as amended), or in the alternative, on the exercise by the respondent of her executive discretion. Both applications were refused on the grounds that the Minister was precluded by s.9 (4) of the Refugee Act 1996 (as amended) from considering or granting such permission, and no discretionary power had been vested in the Minister to do so.

2. The applicants were granted leave to apply for judicial review (McDermott J) on 14th October 2013 seeking the following reliefs:-

"(i) A declaration that the applicant(s) as person(s) who sought protection in the State, (are) not precluded in law from being granted permission (or) from taking up employment in the State by the respondent.

(ii) An order of certiorari quashing the decision(s) of the respondent to refuse to process and determine the applicant(s)' application(s) for permission to take up employment in the State on the basis of being precluded in law.

(iii) In the alternative to (i) and (ii), if the effect of s. 9 (4) of the Refugee Act 1996 (as amended) is that the respondent is precluded in law from granting permission to the applicant to take up employment, a declaration that s. 9 (4) is repugnant to the Constitution, and in breach of Articles 7 and 15 of the Charter of Fundamental Rights and/or incompatible with the European Convention on Human Rights"

3. Leave to reply for judicial review was granted on the following grounds:-

"(i) The respondent has wrongly applied s. 9(4) of the Refugee Act 1996 (as amended) by failing to recognise the express provision at s. 9(11) of the Act which allows for s. 9(4) to be waived.

(ii) By refusing to determine the application(s) made by or on behalf of the applicant(s) for a residence permit which would permit (them) to take up employment, the respondent unlawfully fettered his discretion and/or imposed a restriction on himself which in law did not exist and/or unlawfully refused to process a valid application.

(iii) The applicant(s)' (have) resided lawfully in the State since (2008). To continue to prohibit (them) from working after such a long period of lawful residence in the State is in breach of the applicant(s)' rights under the Constitution (including Article 40.3) thereof, the Charter of Fundamental Rights (including Article 7 and 15 thereof) and s. 3 of the European Convention on Human Rights Act 2003 (with reliance on inter alia Articles 8 and 14 of the European Convention on Human Rights).

(iv) By reason of (iii) if s. 9(4) of the Refugee Act 1996 (as amended) imposes a continuing prohibition on the applicant(s) taking up a lawful employment in the State, and prevents any exception being made to this prohibition, then the said section is repugnant to the Constitution, in breach of the Charter of Fundamental Rights and incompatible with the European Convention on Human Rights."

N.H.V. (Record No. 2013/584 J.R.)

4. Mr. V. is a Burmese national born on 1st June 1979. He arrived in the State on 16th July 2008 and applied for refugee status the following day. On 25th November 2008, he attended for interview with ORAC and received a negative recommendation in respect of his application for asylum on 22nd December. His appeal hearing before the Refugee Appeals Tribunal took place on 26th May 2009, following which a negative recommendation was made in July 2009. Judicial Review proceedings issued and the decision was quashed (Clark J.) on 16th July 2013. Following this determination the applicant was obliged to re-enter the process and re-attend the Tribunal for a fresh hearing which, he fears could take many years to reach a conclusion. Should the outcome be negative, he states that his intention is then to apply for subsidiary protection which, he is advised could also take several years. Mr. V. expresses distress and demoralisation at being obliged to remain in direct accommodation at St Patrick's Centre, Drumgask, Co Monaghan living on €19 per week. He experiences insomnia and deteriorating health because of his accommodation and feels depressed because he is prevented from engaging in meaningful employment. He fears that it could take up to 10 years to complete his engagement with the protection process and that it would transform his existence if he could take up employment.

5. By letter dated 8th May 2013, Mr. V. was offered employment as a chef in St Patrick's Accommodation Centre. By letter dated 30th May, his solicitor applied to the respondent for temporary permission to reside and work in the State either pursuant to s. 4 of the Immigration Act 2004 or s. 9(11) of Refugee Act 1996 (as amended) or, in the alternative, by the exercise of executive discretion. By letter dated 13th June, his application was refused. On 15th July, his solicitor wrote again repeating the submission that the respondent had the power to grant him permission to reside and work in the State whilst his protection application was being determined. By letter dated 15th July, the Department responded and again refused his application.

F.T. (Record No. 2013 726 J.R.)

6. Mr. T. is a national of Cameroon born on 23rd March 1989. He arrived in Ireland on 24th April 2008 and applied for asylum. On 4th September, 2008, Mr. T. received a negative recommendation from ORAC and appealed to the Refugee Appeals Tribunal. This appeal was refused on 5th July 2009 and leave to apply for judicial review was sought. On 18th April, 2013, the Tribunal decision was quashed (MacEochaidh J.) in the High Court and the matter was remitted back to the Tribunal for rehearing. No date or time-frame has been fixed for this process. If precluded from working, Mr. T. is obliged to remain in the direct provision hostel accommodation where he has been for the last 5 years in receipt of €19 per week. He emphasises that this is a difficult and demoralising situation.

7. On 1st August, 2012, his solicitor submitted an application for temporary permission to reside and work in the State, which he asserted was at the discretion of the Minister pending the determination of his asylum application. On 8th August, 2012, the respondent replied by letter stating that this was a matter for the Chief State Solicitors Office. On 14th August, the applicant's solicitor wrote again to the respondent (also sending a copy to the office of the Chief State Solicitor), reiterating the submission that the Minister retained a discretion to grant permission to reside and work in the State while his client's asylum application was being determined.

8. On 9th June, 2013, Mr. T. was offered employment as a gym instructor by Villa Football Club in Waterford. On 17th July, his solicitor again wrote to the respondent requesting that he be granted permission to take up employment and enclosed the job offer. The letter reiterated the submission that the respondent had the power under s. 4 of the Immigration Act 2004, to grant permission to remain on a temporary basis and that nothing in the Refugee Act 1996 (as amended) or the Immigration Act 2004, limited or restricted this power in respect of a person who has made an application for a declaration of refugee status. The letter requested that Mr. T. be granted stamp 4 conditions pending the outcome of his asylum application. It was also asserted that the overall effect of the delay in having the application for international protection determined amounted to an unlawful denial of reasonable access to the courts.

9. By letter dated 27th August, 2013, the respondent replied stating that he was precluded from granting permission by virtue of s. 9(4) of the Refugee Act 1996 (as amended). On 3rd October, the applicant's solicitor responded repeating the view that it was open to the Minister pursuant to s. 4 of the Immigration 2004, to grant him temporary permission to remain and that the restriction imposed by s. 9(4) may be waived or that s. 9(11) applies i.e. s. 9(4) may be waived in respect of a person who is a refugee applicant if permission to "*remain in the State*" is granted pursuant to another statute or executive discretion.

10. On 7th October, 2013, Mr. James Boyle of the Repatriation Division of INIS wrote outlining that the applicant was precluded by virtue of s. 9(4)(b) of the Refugee Act 1996 (as amended) from undertaking any paid employment. Mr. Boyle suggested that in order to facilitate a more speedy process, Mr. T. should withdraw from the asylum process and allow his case to proceed to the "*leave to remain in the State*" stage under s. 3 of the Immigration Act 1999, at which point he could make written representations against the making of a deportation order.

11. The applicant avers in his affidavit of 9th October 2013 that he has already experienced a delay of 5 years and 5 months, and points out that the process is a continuing one with no determined date of conclusion. He expresses exasperation at being precluded from taking up employment and the impact of being confined to living in the nominated accommodation on €19 per week. He outlines the effect that it is having on his mental health and self esteem. He would welcome the opportunity to take up the position offered with Villa Football Club and work there until the process has been completed.

Statutory Provisions

12. A person who arrives in the State seeking asylum or seeking the protection of the State against persecution or requesting not to be returned or removed to a particular country, or otherwise indicating an unwillingness to leave the State for fear of persecution as described in s. 8(1)(a) of the Refugee Act 1996 (as amended) is granted leave to enter or remain in the State pursuant to the provisions of s. 9 of the Act which provides:-

"(1) Subject to the subsequent provisions of this section, an applicant, being a person referred to in section 8 (1)(a), shall be given leave to enter the State by the immigration officer concerned.

(2) Subject to the subsequent provisions of this section, a person to whom leave to enter the State is given under subsection (1) or an applicant, being a person referred to in section 8 (1) (c), shall be entitled to remain in the State until

(a) the date on which his or her application is transferred to a Convention country pursuant to section 22 , or

(b) the date on which his or her application is withdrawn or deemed to be withdrawn pursuant to subsection (14) (b), or

(c) the date on which notice is sent that the Minister has refused to give him or her a declaration.

(3) The Minister shall give or cause to be given to a person referred to in subsection (2) a temporary residence certificate (in this section referred to as 'a certificate') stating the name and containing a photograph of the person concerned, specifying the date on which the person's application for a declaration was referred to the Commissioner and stating that, subject to the provisions of this Act, and, without prejudice to any other permission or leave granted to the person concerned to remain in the State, the person referred to in the certificate shall not be removed from the State before the final determination of his or her application.

(4) An applicant shall not –

(a) leave or attempt to leave the State without the consent of the Minister, or

(b) seek or enter employment or carry on any business, trade or profession during the period before the final determination of his or her application for a declaration.

...

(7) A person who contravenes subsection (4) ... shall be guilty of an offence and shall be liable on summary conviction to a fine...or to imprisonment for a term not exceeding 1 month or to both.

...

(11) Subsections (4), (5), (8) and (10) shall apply only to an applicant who, but for the provisions of this Act, would not be entitled to enter or remain in the State..."

13. Section 4 of the Immigration Act 2004, provides that an immigration officer may, on behalf of the respondent give to a non-national a document or place on his or her passport or other equivalent document a permission to land or be in the State. Section 4(2)(b) empowers the immigration officer to refuse to grant such permission if the non-national intends to take up employment in the State but is not in possession of a valid employment permit within the meaning of the Employment Permits Act 2003. Section 5 provides:-

"(1) No non-national may be in the State other than in accordance with the terms of any permission given to him or her before the passing of this Act, or a permission given under this Act after such passing, by or on behalf of the Minister.

(2) A non-national who is in the State in contravention of subsection (1) is for all purposes unlawfully present in the State.

(3) This section does not apply to -

(a) a person whose application for asylum under the Act of 1996 is under consideration by the Minister,

(b) a refugee who is the holder of a declaration (within the meaning of that Act) which is in force,

(c) a member of the family of a refugee to whom section 18(3)(a) of that Act applies, or

(d) a programme refugee within the meaning of section 24 of that Act."

Is there a discretion under Section 9?

14. The applicant claims that s. 9 does not preclude the respondent from granting permission to a refugee applicant to take up employment but imposes an obligation on a refugee not to seek or enter employment unless he obtains permission to take up such employment which may be granted outside the terms of the Act. It is submitted that s. 9 (11) expressly provides that the employment restriction may be waived by the granting of an alternative permission to a refugee applicant to remain in the State. Two examples are given. It is submitted that a temporary residence permission under s. 4 of the Immigration Act 2004 might be granted to a refugee applicant. It is also submitted that the respondent is vested with executive discretion such as that granted to foreign nationals to reside and work in the State under the IBC/05 Scheme as discussed in *Bode v. Minister for Justice Equality and Law Reform* [2008] 3 I.R. 663. The applicants submit that if the respondent did not have a discretion to grant an alternative permission to a refugee applicant s. 9 (11) would be superfluous. In addition, it is claimed that s. 9(3) contemplates that a refugee may be permitted to reside in the State while awaiting the determination of his or her application, on a more favourable basis than that provided for under the provisions of the statute. Therefore, it is claimed that there is a discretion vested in the respondent which can be exercised without offending the provisions of the Refugee Act 1996 and furthermore that the respondent is not precluded from granting the applicant permission to work under s. 4 of the Immigration Act 2004 or in the exercise of executive discretion. As a result, it is submitted that the refusal to consider the applicant's application is wrong in law.

15. The respondent submits that s. 9(11) has two purposes. It preserves the pre-existing entitlements of a person who may become a refugee *sur place* while otherwise lawfully present in Ireland and it enables an asylum seeker to benefit from legal entitlements which might otherwise accrue to him or her while present in Ireland as an asylum seeker; for instance, if a person has entered the State as an asylum seeker but subsequently acquires an entitlement to reside in the State following the birth of a child (for example under the IBC/05 Citizen Child Scheme or the Ruiz *Zambrano* Judgment) or following a marriage to an Irish citizen. It is submitted that s. 9(4)(b) applies only to an applicant who "but for the provisions of this Act would not be entitled to enter or remain in the State". Both applicants are persons who "but for" the permission to which they were entitled under s. 9 have no right or entitlement to be in the State. Therefore it is submitted that the provisions of s. 9(4) (b) apply in mandatory terms to the applicant. Furthermore, it should be noted that under s. 9(7) a person who contravenes s. 9(4) shall be guilty of an offence and liable on summary conviction to a fine or imprisonment for a term not exceeding one month or both. The respondent also relies on the fact that s. 9 is addressed and confined to those who are entitled as a matter of legal right to be granted leave to enter and remain in the State as applicants for protection defined under s. 8(1)(a) of the Act. The prohibition on seeking or entering employment during the course of that application is confined to those who "but for" their entitlement to be granted leave to enter and remain in the State as asylum seekers would not be entitled to enter or remain in the State.

16. The court is satisfied that the applicants' right to enter and remain in the State and the conditions under which they may do so are defined by the provisions of the Refugee Act 1996, which were considered by the Supreme Court in *G.A.G. v. Minister for Justice Equality and Law Reform* [2003] 3 I.R. 442. In that case, two of the applicants were failed asylum seekers in respect of whom deportation orders had been made and the third was an asylum seeker the subject of a transfer order to Germany for examination of his application for asylum in accordance with the Dublin Convention. They sought permission to remain in the State on the basis of an intention to invoke a right of establishment under the Association Agreements then in force between the Czech Republic and the European Union. This was refused by the respondent on the basis that the applicants could apply for a right of establishment from outside the State. It was held by the Supreme Court that member states of the European Union were entitled to impose a system of prior control requiring that applications for a right of establishment must be submitted from the applicant's home State and that such a system did not nullify or impair the benefits accruing to the applicants under the relevant Association Agreements. The court also held that asylum applicants were permitted to enter the State for the sole purpose of having the application for asylum examined and

upon refusal of such application they had no right or entitlement to remain in the State. In delivering the judgment of the court Murray J. stated at p. 474:-

"Entry to the State by the applicants for the purposes of making an application for asylum was the consequence of the exercise by the State of its inherent power to determine for what purposes and subject to which limitations non-nationals may be allowed to physically enter the State. Persons seeking asylum status are permitted pursuant to s. 9 of the Act of 1996 to enter the State solely (emphasis supplied) for the purpose of having their application for asylum examined by a fairly elaborate independent procedure, so that those genuinely entitled to asylum may be granted permission to enter and stay in the State on those grounds.

Persons allowed to enter the State for such a limited purpose are subject to a variety of restrictions. In an exceptional departure from general policy the applicant in the first case was at one point permitted to become employed and this permission ceased on the 9th November, 2002. After that date it was illegal for him to work in the State either as an employee or as a self-employed person. As and from the coming into force of the Refugee Act 1996 in October, 2000, the status of each of the applicants has been governed by the provisions of the Act of 1996. That is what is material for the purposes of these proceedings. Section 9(4) of the Act of 1996 provides that applicants for asylum shall not leave or attempt to leave the State without the consent of the first respondent or seek or enter employment or become self-employed in any form(emphasis supplied) before the final determination of their application for a declaration as to refugee status. Subsection 5 of the Act of 1996 permits an immigration officer to require such persons to reside or remain in a particular district or places in the State or to report at specified intervals to an immigration officer or a member of An Garda Síochána. Persons who contravene subs. (4) or subs. (5) of s. 9 of the Act of 1996 shall be guilty of an offence which may lead to a fine or a term of imprisonment not exceeding one month. Such persons are granted only a 'temporary residence certificate' pursuant to s. 9(3) which is governed by the foregoing restrictions. That temporary residence certificate ceases to be in force and must be surrendered as required by the Refugee Act 1996 Regulations, once notification is given to an applicant for asylum that the application has been refused or is being transferred to another country. Accordingly, at the time when they purported to make applications for establishment to the first respondent, none of the applicants possessed a temporary residence certificate.

It seems to me quite clear that the foregoing restrictions highlight and confirm that persons who are allowed to enter the State for the purpose of making an application for asylum fall into a particular category and never enjoy the status of residents as such who have been granted permission to enter and reside in the State as immigrants. Even though such immigrants may be subject to certain limitations as to time and requirements as to renewal of work permits, they nonetheless enjoy legitimate residence status. In fact the very purpose of an application for refugee status is to seek permission to be allowed to enter and reside in the State as an immigrant and benefit from such a status.

If the applicants are correct in their contentions, then it would mean that persons who are allowed to enter for no other purpose than having their application for asylum examined could seek to do so when their real purpose was to apply for establishment rights. In those circumstances any legitimate system of prior control could be circumvented...."

(See also *F.P. v. Minister for Justice Equality and Law Reform* [2002] 1 I.R. 164)

17. The Oireachtas specifically addressed the right of those who have been granted refugee status to work or earn a livelihood in s. 3(2)(a) of the Refugee Act 1996, as amended, which provides:-

"without prejudice to the generality of subsection (1), a refugee in relation to whom a declaration is in force -

(i) shall be entitled to seek and enter employment to carry on any business, trade or profession and to have access to education and training in the state in the like manner and the like extent in all respects as an Irish citizen..."

This is in accordance with the provision of Chapter 3 of the Geneva Convention of 1951, in respect of "gainful employment" which provides at Article 17 that the contracting state shall accord to refugees lawfully staying in their territory the right to engage in wage earning employment and also the rights under Articles 18 and 19 to engage in "self employment" and the "liberal professions". The Convention does not contain any provision regarding access to the labour market during the asylum process, nor did the state assume any obligation in that regard under the Convention.

18. I am satisfied that the Oireachtas intended the application of clear restrictions on those, such as the two applicants in this case, who were granted permission to enter and remain in the State for the purpose of seeking international protection. This precludes them from seeking or entering employment, as noted by Murray J., "in any form" pending the determination of their applications and failure to comply with these conditions renders them liable to prosecution.

19. The applicants rely upon the High Court decision in *D.D.A (Nigeria) v. Minister for Justice Equality and Law Reform* [2012] IEHC 308, in which Cooke J. considered whether the challenge to a decision of the Refugee Appeals Tribunal was rendered moot because the respondent Minister had granted temporary permission to the applicant to remain subject to a number of conditions in accordance with the decision of the CJEU in case C34/09 Ruiz *Zambrano* because the applicant had formed a long term relationship with an Irish citizen with whom he was living and with whom had a daughter who was an Irish citizen. It was submitted that the applicant was not a refugee and had no need of international protection. It was submitted on behalf of the applicant that there was no legal incompatibility between the making of an application for leave to remain because of the intervention of the subsequent birth to the applicant of an Irish citizen child and the pursuit to its conclusion of the asylum process. The right of residence granted was purely temporary and subject to a series of conditions and as a matter of law refugee status conferred benefits distinct from those available to the applicant under the current temporary permission. The court held that the applicant was not precluded in those circumstances from prosecuting to its conclusion the judicial review proceedings commenced in respect of the Tribunal decision and in respect of which leave had been granted. The granting of temporary permission on the basis of entirely new facts and intervening events did not in the absence of statutory provision to that effect defeat the entitlement to seek to have refugee status declared. Furthermore it was noted that a third country national might be present in the State on a temporary visa or permission for study or employment and yet because of some change of circumstances in the country of nationality become a refugee *sur place* and be entitled to a declaration to that effect. That would not alter the effect of those circumstances on his status in international law under the Geneva Convention of 1951. It is submitted on behalf of the applicants in this case that Cooke J. rejected the contention that a refugee applicant could not be granted a residence status other than that provided in the Refugee Act 1996 (as amended).

20. Counsel for the respondent submits that *D.D.A* has no bearing on the facts of these proceedings. Once the applicant in *D.D.A* was granted permission to reside and work in the State on the basis of the *Zambrano* judgment, he was no longer a person who "but for"

the provision of s. 9 of the Act would not be entitled to remain in the State. The issue arose as to whether as a person with a *Zambrano* entitlement to reside and work in the State to which effect was given by the permission under s. 4 of the Immigration Act 2004, he was nonetheless entitled to pursue his claim for refugee status. Cooke J. determined that he was and identified circumstances in which a person already lawfully in the State might claim to be a refugee *sur place* and apply for asylum.

21. I am satisfied that the decision in *D.D.A* does not alter the statutory restrictions placed on the applicants' residence rights. The applicants were granted permission to enter and remain in the State for the sole purpose of making an application for asylum. That permission was subject to the restrictions, *inter alia*, of s. 9(4). Section 9(11) exists for the purpose of facilitating applications for asylum *sur place* and accommodating the occurrence of events in the life of an asylum applicant whereby they become entitled as a matter of law to a right to reside separate to that conferred by s. 9, such as *Zambrano* rights or rights deriving from the birth of their Irish citizen child. It is entirely contrary to the purpose and intention of the statute and the clear wording of s. 9(4) to interpret s. 9(3) or (11) as conferring a wider discretion on the Minister to consider and grant permission to asylum seekers to work pending the determination of their applications. I am satisfied that such an interpretation is contrary to the plain meaning of the subsection and to its intended purpose which was to prevent an asylum seeker from having access to the labour market. It would facilitate the mischief identified by Murray J., whereby a claimant for asylum could thereby provide himself/herself with a platform upon which to claim establishment rights.

22. I am also satisfied that the decision of the Supreme Court in *Bode*, does not support the contention that the respondent is vested with an executive discretion which permits her to consider and grant permission to any asylum seeker to seek and obtain employment in the State contrary to the express provision of section 9(4). The executive discretion which vested in the Minister under the IBC05 Scheme arose from the existence of unique circumstances which pertained at that time as a result of which a special administrative scheme was introduced by the Minister for Justice having obtained government approval. The scheme was a revised set of administrative arrangements pursuant to which applications for permission to remain in the State based on the parentage of an Irish born child born before 1st January, 2005, might be considered. This followed a constitutional amendment which changed the law to exclude from automatic Irish nationality and citizenship, a child born to parents neither of whom is entitled to Irish citizenship at the time of the child's birth. It was an example of the State exercising its discretion to allow specific foreign nationals to reside in Ireland where it had been determined:-

"that the common good is served by giving benefits of residency to a category of foreign nationals - as a gift, in effect. The inherent power of the State includes the power to establish an *ex gratia* scheme of this nature. Such an arrangement is distinct from circumstances where legal rights of individuals may fall to be considered and determined. (per Denham J. in *Bode* at p. 690).

23. The Supreme Court regarded the scheme as *sui generis* and one which was introduced to address in an administrative and generous manner a unique situation which concerned a significant number of foreign nationals within the State. However, those whose applications failed remained in the same situation in which they had been prior to the making of the application. They were still entitled to have their asylum applications determined in accordance with law. No such scheme has been introduced by the Minister or the government concerning access to the labour market by asylum seekers. Moreover, since the application for asylum and the conditions under which the applicant is allowed to enter and remain in the State during its consideration are determined under the provisions of the Refugee Act 1996, the existence of the claimed discretion would be inconsistent with the expressed will of the legislature.

24. In the light of these findings the applicant challenges the respondent's decision on the basis of a claimed right to work and earn a livelihood established under the provisions of the Constitution, under the provisions of European Union Law and/or derived from the right to private life under Article 8 of the European Convention on Human Rights. For the reasons set out below the court has rejected the applicants' submissions in respect of Article 8 of the Convention and is satisfied to consider the constitutional issues in the case in accordance with the decision in *Carmody v. Minister for Justice* [2009] IESC 71 [2010] 1 I.R. 635.

The right to work or earn a livelihood under the Constitution

25. The applicants claim that as asylum seekers they are entitled to the right to work or earn a livelihood as a "*personal right*" under Article 40.3 of the Constitution. It is accepted that the right is not absolute. In *Cafolla v. O'Malley* [1985] I.R. 486, Costello J. (as he then was) at first instance stated at p. 493:-

"Generally speaking the right to earn a livelihood can properly be regarded as an unspecified personal right first protected by Article 40. 3, sub-section 1. But this right may also exist as one of the bundle of rights arising from the ownership of private property capable of being commercially used and so receive the protection of Article 40, s. 3, sub-section 2...."

26. Article 40.3.1 contains a State guarantee in its law to respect and as far as practicable, to defend and vindicate the personal rights "*of the citizen*". Article 43 concerns the right to private ownership of external goods as a natural right which may be regulated by the principles of social justice or be delimited by law to reconcile its exercise with the exigencies of the common good. Insofar as the right to work or earn a livelihood derives from Article 43 it is not said to depend upon citizenship.

27. The Supreme Court in *Re Article 26 and Sections 5 and 10 of the Illegal Immigrants (Trafficking) Bill 1999* [2000] 1 I.R. 360 , considered the extent to which a non-national who is not entitled to be in the State is entitled to avail of constitutional protection as follows:-

"a person who is not entitled to be in the State cannot enjoy constitutional rights which are coextensive with the constitutional rights of citizens and persons lawfully residing in the State. There would however, be a constitutional obligation to uphold the human rights of the person affected which are recognised, expressly or by implication, by the Constitution, although they are not co-extensive with the citizen's constitutional rights." (at p. 410)

28. The court held that non-nationals were entitled to avail of the right of access to the courts as guaranteed under Article 40.3, though this may be subject to conditions or limitations which might not apply to citizens. Likewise, non-nationals were entitled to fair procedures and the application of natural and constitutional justice in applying for asylum. Those who are charged with taking decisions under the Refugee Act 1996 and the Immigration Acts 1999 - 2004, may be the subject of judicial review: their decisions may be challenged by non-nationals who are entitled to the same degree of natural justice and fair procedures as a citizen. However, the court also acknowledged that:-

"The rights, including fundamental rights, to which non-nationals may be entitled under the Constitution do not always coincide with the rights protected as regards citizens of the State, the right not to be deported from the State being an obvious and relevant example." (at p. 384)

29. Similarly, the non-national does not have a right to vote (per Barrington J. in *The State (McFadden) v. Governor of Mountjoy Prison* [1981] ILRM 113), but is entitled to a right to privacy under Article 40.3 (per Hamilton P. in *Kennedy & Arnold v. Ireland* [1987] I.R. 587 at 593).

30. In *Ighama v. Minister for Justice, Equality and Law Reform & Ors* (Unreported, High Court, 4th November, 2002), O'Keefe J. considered an application for an order of *mandamus* directing the Minister to provide the applicant with a work permit. The applicant, a Nigerian national, had been refused refugee status and was the subject of a deportation order under s. 3 of the Immigration Act 1999. He had been offered employment in the State but refused a work permit. He claimed this constituted a failure to protect and vindicate his right to work under Article 40.3 O'Keefe J. held (at p. 19):-

"With regard to his claim to an entitlement to work, I am satisfied that, as indicated herein, the decision of this Court in the case of *Murtagh Properties v. Cleary* [1972] I.R. 330 was based upon the entitlement of citizens under the Constitution. I am satisfied that the applicant has failed to show he has been deprived of any constitutionally protected right to work and that the scheme introduced by the Minister was not in abrogation of any constitutionally protected fundamental right of the applicant."

31. I am satisfied that the applicants as asylum seekers do not have a right to work or earn a livelihood under Article 40.3 of the Constitution. The applicants' presence in the State is permitted and restricted by the provisions of the Refugee Act 1996 (as amended). The right of non-nationals to enter the State other than as asylum seekers is regulated by the provisions of the Immigration Act 1999 (as amended). Non-nationals (who are not European Union citizens or are not vested with rights to enter or remain and/or work in the State deriving from European Union law) do not have a statutory or constitutionally vested right to work in the State, or to apply for and be granted permission to work in the State. The applicants' rights to seek and obtain employment as asylum seekers in the State are regulated entirely by the statutory provisions discussed above.

32. The court is also satisfied that even if the applicants had a constitutional right to work or earn a livelihood under Article 40.3 or 43, the scope and exercise of such rights may be defined and regulated pursuant to the very wide power which the State has to control aliens and their entry into the State and activities whilst present. It is well established that the restriction or regulation of immigrants may involve legislation and administrative measures which could not be applied to citizens of the State (per Costello J. in *Pok Sun Shum v. Ireland* [1986] ILRM 593 at p. 599 as applied by Keane J. in *In the matter of Article 26 of the Constitution and in the matter of ss. 5 and 10 of the Illegal Immigrants (Trafficking) Bill 1999* cited above at pp. 382 - 3). Although the applicants accept that, if such a right existed, it could not be absolute, it is nevertheless submitted that the provisions of s. 9 of the Act and its interpretation and application (as accepted by the court) undermines the essence of the right and is disproportionate. It is claimed s. 9 prohibits the respondent from considering the applicants' circumstances including the length of their lawful residence in the State pending the determination of their asylum claims, and that it imposes an automatic and permanent ban on the applicants from working regardless of circumstances. It is claimed that as a result, the effect of the legislation is disproportionate.

33. The evidence adduced on behalf of the respondents in Mr. Duffy's affidavit outlines the policy underpinning the legislation in that it is intended by the legislature not to extend the right to work to those seeking international protection and awaiting decisions in that process. In that respect Mr. Duffy outlined the effect of an exceptional measure which allowed asylum applicants to seek employment on 27th July, 1999, which led to a threefold increase in the average number of applications per month for asylum. In addition, it is claimed that the separate system for the admission of non-national immigrants pursuant to the Immigration Acts 1999 - 2004 would be undermined by conferring the same access to employment to entrants who choose to seek asylum rather than obtain the necessary permissions subject to appropriate conditions under immigration legislation. The potential consequences for the labour market and demands on the social welfare budget were also relied upon as relevant policy considerations. Apart from the evidence I am satisfied from the clear wording and terms of s.9 and the overall statutory scheme regulating asylum and immigration that Mr. Duffy's description of the purpose of the provision is evident from a reading and interpretation of the section itself.

34. The applicants rely upon the proportionality test set out by Costello J. in *Heaney v. Ireland* [1994] 3 I.R. 593 at p. 607 as follows:-

"In considering whether a restriction on the exercise of rights is permitted by the Constitution, the courts in this country and elsewhere have found it helpful to apply the test of proportionality, a test which contains the notions of minimal restraint on the exercise of protected rights, and of the exigencies of the common good in a democratic society...The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:-

- (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
- (b) impair the right as little as possible, and
- (c) be such that their effects on rights and proportional to the objective..."

35. Even if the court were to accept that the applicants had a constitutional right to work and/or earn a livelihood, I am not satisfied on the evidence that regulation and restriction of the applicants' access to the labour market pursuant to s. 9 is disproportionate. I am satisfied that the section in its terms and application bears a rational connection to the objective of regulating the access of asylum seekers to the labour market, and is not arbitrary, unfair or based on any irrational considerations. In particular, when the asserted rights are considered against the fundamental rights of the State to protect its borders and its national territory and to have regard to wider issues of social policy, I am satisfied that any effects on such rights are proportionate to the State's legitimate aims and objectives.

Is Section 9 in Breach of European Union Law?

36. The applicants contend that if s. 9 of the Refugee Act 1996, (as amended) prohibits the respondents from considering or granting an asylum seeker permission to work in the state, it is incompatible with European Union law and the Charter of Fundamental Rights because it prohibits the respondent from considering the claimed negative effects which the ban on working has on the applicants, which has been compounded by the delay involved in considering their applications. Furthermore, it is claimed that the provisions of s. 9, as applied by the respondent, has insufficient or no regard for the possibility that the applicants may obtain a declaration of refugee status or subsidiary protection. It is submitted that Irish law fails to recognise the essence of the right to work and/or is a measure which is disproportionate and unnecessary and does not genuinely meet the objective of and need to protect fundamental rights recognised by the Union. The applicants rely on the following rights under the Charter:-

“Article 7

Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

Article 15

Freedom to choose an occupation and right to engage in work

1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.
2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.
3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.

Article 18

Right to asylum

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.”

The applicants claim an entitlement to rely upon the provisions of the Charter pursuant to Articles 51 and 52:-

“Article 51

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.
2. This Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

Article 52

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.
2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.
3. Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.
4. Insofar as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.
5. The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.
6. Full account shall be taken of national laws and practices as specified in this Charter.
7. The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.”

37. It is submitted that Article 15(1) of the Charter applies to all persons and is not restricted to citizens of the Union. In addition, it is submitted that an automatic and permanent ban on the applicant taking up employment in the State, whatever his circumstances as a refugee applicant now or in the future manifestly fails to “respect the essence” of the applicant’s right to work, and fails to meet any “objective of general interest recognised by the Union”. Furthermore, it is claimed that because the European Union has recognised the need to permit refugee applicants to work after a certain period of time if their application has not been finalised under Directive 2003/9/EC, the absolute and permanent nature of the denial of the right to work to asylum seekers under s. 9 is disproportionate.

38. In *Ymeraga & Ors v. Ministre du Travail de l’Emploi et de l’Immigration* (Case C-87/12, 8th May, 2013) the CJEU (2nd Chamber) reaffirmed that the fundamental rights set out in the Charter are addressed to the member states only when implementing European Union law. Under Article 51(2) the Charter does not extend the field of application of European Union law beyond the power of the Union and does not establish any new power or task for the Union or modify powers and tasks as defined in the Treaties. In order to ascertain whether a decision, in this instance, to refuse to consider or grant permission to the applicants to work in the state involves the implementation of European Union law within the meaning of Article 51:-

"It must be ascertained among other things whether the national legislation at issue is intended to implement a provision of European Union law, what the character of that legislation is, and whether it pursues objectives other than those covered by European Union law, even if it is capable of indirectly affecting that law, and also whether there are specific rules of European Union law on the matter capable of affecting it" (para. 41).

39. In support of the submission concerning the application of rights under the Charter, the applicants rely (under Article 52(7)) upon "explanations relating to the Charter" concerning Article 15(1) as follows:-

"Freedom to choose an occupation, as enshrined in Article 15(1) is recognised in Court of Justice case law (see, *inter alia*, judgment of 14th May, 1974, Case/473 *Nold* [1974] ECR 491, paras. 12 – 14 of the grounds; judgment of 13th December, 1975, Case 44/79 *Houder* [1979] ECR 3727; judgment of 8th October, 1986, Case 234/85 *Keller* [1986] ECR 2897, para. 8 of the grounds).

This paragraph also draws upon Article 1(2) of the European Social Charter which was signed on 18th October, 1961, and has been ratified by all the member states, and on Point 4 of the Community Charter of the Fundamental Social Rights of Workers of 9 December, 1989. The expression "working conditions" is to be understood in the sense of Article 156 of the Treaty on the Functioning of the European Union."

Article 1(2) of the European Social Charter provides:-

"With a view to ensuring the effective exercise of the right to work, the Contracting Parties undertake

1...

2. To protect effectively the right of the worker to earn his living in an occupation freely entered upon."

40. The applicants also rely upon what they claim is the general right to work to be derived from Article 11 of Council Directive 2003/9/EC (the Reception Directive) and the provisions of Council Directive 2013/33/EU, its successor.

41. Article 11 of the Reception Directive provided:-

"1. Member States shall determine a period of time starting from the date on which an application for asylum was lodged, during which an applicant shall not have access to the labour market.

2. 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.

3. Access to the labour market shall not be withdrawn during appeals procedures, where an appeal against a negative decision in a regular procedure has suspensive effect, until such time as a negative decision on the appeal is notified.

4. For reasons of labour market policies, Member States may give priority to EU citizens and nationals of States parties to the agreement on the European economic area and also to legally resident third country nationals."

Ireland elected not to participate in the terms of the 2000 Directive in accordance with Article 1 of the Protocol on the Position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community.

42. Article 15(1) of Council Directive 2013/33/EU reformulated the entitlements of asylum seekers in that participating member states were now obliged to ensure that applicants for asylum have access to the labour market no later than nine months from the date when the application for international protection was lodged if a first instance decision by a competent authority had not been taken, and the delay could not be attributed to the applicant. Applicants must be granted "effective access" to the labour market, but the member states retain the right to determine the conditions upon which access would be permitted. Ireland also decided not to participate in this Directive in accordance with Article 1 of the Protocol. In that regard, the State was entitled not to participate and become subject to the terms of the Directive and it follows that the State could not be said to be "implementing European law" in relation to any obligation said to arise under either Directive. Furthermore, it is clear from the terms of both Directives if adopted and implemented, that the provisions in respect of employment of asylum seekers fall far short of the general right to work asserted by the applicants in this case as arising under the Charter.

43. As stated earlier Ireland recognises the statutory right of those granted refugee status to work or earn a livelihood under s. 3 (2) (a) of the Refugee Act 1996, as amended, in accordance with the provisions of Chapter 3 of the Geneva Convention of 1951 in respect of "gainful employment". Access to the labour market is entirely within the competence of the Oireachtas and if access were to be extended to asylum seekers, one would expect a specific provision in that regard in clear and unambiguous terms.

44. In *Fariborz Rostami v. The Secretary of State for the Home Department* [2013] EWHC 1494, Hickinbottom J. (High Court, Queens Bench Division) having outlined and adopted the well established principle that a state has a right to protect its citizens' right of access to the labour market and to restrict the ability of non-nationals to enter the market (from which it follows that a non-national has no right to have an opportunity to work at all or on any particular basis), considered the scope and application of Article 15 of the Charter:-

"53. In fact, Article 15(1)...quite clearly does not confer the general right to work. Despite its terms...there is clearly no absolute right to work: the provision can refer to no more than some form of access to the labour market. However, there are many UK nationals and other EU citizens who, without permission, have a right to work because of their nationality and citizenship and who wish to work but are unemployed because of a lack of jobs for which they are equipped and qualified. They have a right of access to the labour market, but that right for many is empty in the sense that they have at best a very limited chance of obtaining employment.

54. But leaving that general point to one side, it is clear from Article 15(2) and (3) that Article 15(1) does not confer a right to work on everyone, in the sense of all individuals who happen to be within the territories of the EU at a particular time. Article 15(1) cannot be considered in a vacuum. Article 15(2) provides that every citizen of the EU has the right to seek employment and to work in any member state, a right which presumes that there is no wider right to work or access to the labour market, available to EU and non-EU citizens. Article 15(3) also presumes that, to work, those who are not

EU citizens require authorisation outside the Charter itself. Despite the use of the word "everyone" in Article 15(1), far from conferring a general right to work on all who happen to be in EU territories at any time, in terms of the right to engage the labour market, Article 15 draws a fundamental distinction between citizens of the EU on the one hand and those who are not such citizens on the other; and its objective, patently, is to recognise that EU citizens have the freedom or right to seek employment and to work, but not to recognise that same freedom or right in non EU citizens. It is perhaps worthy of note that Mr. Wilson (for the applicant) did not contend that Article 15 gave a *failed* asylum seeker any right to work.

55. I consider it is plain, that on the face of the wording of Article 15, read as a whole, it does not confer a discrete right to work on non EU nationals who happen to be in the EU at any particular time, including asylum seekers...however, considerable support for that construction is gained from the authorities. In none of the authorities to which I was referred – and there were many – have either the European courts or the domestic courts found there to be such a right.

56. In most instances, the existence of such a right has not even been contended, in cases in which it would have been a remarkable omission of such a right actually, or even arguably, existed. For example in *Ruiz Zambrano v. Office National de l'Emploi* [2011] EUECJ C-34/09 [2012] Q.B. 265, Mr. Zambrano was not an asylum seeker at the relevant time, because his asylum claim had simply been refused but he had nevertheless stayed in Belgium; and without the required permit, had worked. Mr. Zambrano lost his job, having completed the requisite working days that would otherwise have qualified him for unemployment benefit; but he was denied that benefit because the Belgian legislation in respect of employment of foreign workers took out of count days worked without a work permit. Before a Belgian Employment Tribunal, he argued that he, as a non EU national, could derive rights under EU law from the rights of residents conferred on his dependent EU citizen children by Articles 20 and 21 of the Treaty on the Functioning of the European Union. The rights he sought were of residence and of exemption from a work permit. In that case it was not suggested that Mr. Zambrano, as a non EU citizen, had a right to work in the EU under Article 15(1) of the Charter, a much more straightforward route to relief than the one upon which he (in the event, successfully) embarked. Neither has such a suggestion been made in the European and domestic cases that have followed *Zambrano*...in the cases in which such a contention has been made it has been dismissed...

57. Despite the wording of Article 15(1) of the Charter, I am quite satisfied that the provision was not intended to and did not confer on non EU citizens any discrete right to work or permission to have access to the domestic labour market without national authorisation or outside the terms of any such authorisation. To find such a right, one must look elsewhere."

I find the judgment of Hickinbottom J persuasive and I respectfully adopt it.

45. The applicant in that case relied upon Article 11 of the Reception Directive but the court rejected the submission that it conferred a general right to work on asylum seekers or reflected such a right to work found elsewhere. Hickinbottom J. noted that in fact Article 11 could not assist the claimant at all because a general positive right of free access to the labour market could not be divined from a provision cast in terms of a negative obligation "to deny any and all access to all asylum applicants for a period to be no more than a year but otherwise to be determined by that state". The learned judge also noted that if it were intended to impose such a positive obligation to confer such a right, one would expect it to have been done expressly and clearly having regard to the radical nature of that step for the member states of the Union.

46. I am, therefore, satisfied that the applicants are not entitled to a right to work or access to the Irish labour market as asylum seekers pursuant to the Directives cited or the Charter of Fundamental Rights. Ireland did not participate and, in effect, opted out of the two Directives invoked in accordance with its Treaty entitlements. In the circumstances the provisions of Articles 51 and 52 of the Charter have no application. I am satisfied that the provisions of s. 9 as interpreted by the court fulfil the State's obligations pursuant to the Geneva Convention and the provisions of European Union law.

The Right to Private Life

47. The applicants claim that the failure to consider and/or grant permission to them as asylum seekers to work pending the determination of their applications constitutes a violation of their right to private life under Article 8 of the European Convention on Human Rights because of the unreasonable delay in processing their claims. It is submitted that the potential damage to the applicants leading normal lives because of the denial of the opportunity to work limits their capacity to develop social relationships and identity.

48. The applicants rely on s. 2(1) of the European Convention on Human Rights Act 2003, which provides:-

"In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions."

Reliance is also placed on s. 3(1) which requires the respondent to perform her functions in a manner that is compatible with the European Convention on Human Rights. Section 5(1) provides that the High Court may declare that a statutory provision or rule of law is incompatible with the State's obligations under the Convention, and the applicants claim such a declaration in respect of section 9 by reason of the alleged violation of their rights to private life under Article 8.

49. In *Sidibras v. Lithuania* [2004] 24 EHRR 104, the European Court of Human Rights reaffirmed previous decisions of the court that the concept of private life was not confined to social engagement in an inner circle excluding a person's working life. It concluded that a far reaching ban from working in the public and private sector because the applicants were formerly employed by the KGB was, to the extent that it curtailed their opportunities to engage in work in the private sector, an interference with the right to private life insofar as it interfered with their rights to self development and self -fulfilment. The court accepted that the ban had affected their ability to develop relationships with the outside world to a very significant degree and created serious difficulties in terms of earning their living with obvious repercussions on the enjoyment of their private lives. It noted that because of their past association with an oppressive regime they were marked in the eyes of society:-

"49. ...Hence, and in view of the wide ranging scope of the employment restrictions the applicants have to endure, the court considers that the possible impediment to their leading a normal personal life must be taken to be a relevant factor in determining whether the facts complained of fall within the ambit of Article 8 of the Convention.

50. In the light of the above, the court considers that the impugned ban affected, to a significant degree, the applicants'

ability to pursue various professional activities and that there were consequential effects on the enjoyment of their right to respect for their "private life" within the meaning of Article 8. It follows that Article 14 of the Convention is applicable in the circumstances of this case taken in conjunction with Article 8."

The court determined that the measure was disproportionate in its exclusion of the applicants from employment in the private sector.

50. A number of other authorities were relied upon by the applicants supporting the proposition that restrictions on employment contracts or interference with professional life may constitute a violation of private life within the meaning of Article 8 (See *Niemietz v. Germany* (Judgment of 16th December, 1992, Series SA 251-B 29: *Fernandez Martinez v. Spain* (Application No. 56030/07 judgment 15th May, 2012, 3rd Section): *Volkov v. Ukraine* (Application No. 217722/11 judgment 9th April, 2013, 5th Section)). In *Volkov*, a case involving the dismissal of a Ukrainian judge the court reaffirmed that the right to private life encompassed the right to engage in business and professional relationships. The judge's dismissal affected his professional relationships, had an impact on his inner circle and tangible consequences for the material wellbeing of the applicant and his family. The supposed reason for his dismissal, namely the breach of a judicial oath, suggested that his professional reputation was affected. Therefore, his dismissal constituted an interference with his right to private life. Similarly in *R. (Wright) v. Health Secretary* [2009] 1 A.C. 739, the Supreme Court of the United Kingdom declared a statutory provision to be incompatible with Article 8 of the Convention because it provided for the listing of a person on suspicion of serious misconduct for the purpose of indicating that he or she posed a risk to vulnerable adults. This resulted in a stigma so great as to constitute an interference with the right to respect for private life, which extended to the right to establish and develop relationships with others, including work colleagues. However, the cases relied upon concern nationals of the contracting state against which proceedings were brought. There is no authority to support the extension of a right to work under the rubric of Article 8 of the Convention to asylum seekers or illegal immigrants.

51. Counsel for the applicants relied upon *Tekle v. Secretary of State for the Home Department* [2008] EWHC 3064 (Admin: [2009] 2 All E.R. 193) in which Blake J. considered the claim of an asylum seeker which had been delayed as a result of which, he applied to vary the conditions of his temporary admission to include a permission to work: this was refused. It was held that in exercising its immigration functions a state had to respect the right to private life, that delay in processing an asylum application increased the right to respect for private life and diminished the strength of immigration control factors that would otherwise support refusal of permission to work. A deliberate decision had been taken to defer claims by the respondent for five or more years. This denied the claimant the ability to seek employment for a prolonged and indefinite period and was capable of being so detrimental that it could be said to be an interference with the right to respect for private life. The court made a declaration that the defendants policy was unlawfully over broad and unjustifiably detrimental to claimants who had to wait as long as the claimant. Blake J. accepted that there was no right to a decision on asylum within any given period of time and no right to permission for work arose merely because of the expiry of a particular period. However he concluded that undue delay as a result of the Home Office's inefficiency, increased the right to respect to private life that was carried on of necessity during the period of delay and may be said to diminish the extent of immigration control factors that would otherwise support a refusal of permission to work. A prohibition on being able to take employment when placed alongside the inability to have recourse to cash benefit restricted the claimant's ability to form relations either in the workplace or outside it. If such a requirement was imposed on somebody who could not be removed from the United Kingdom and who has been awaiting a decision for some four and a half years, that restriction may be regarded as an interference with the right to respect for private life. Blake J continued:-

"52. The question of precisely when and in what circumstances the maintenance of the prohibition on employment ceases to be justifiable depends on a policy judgment that it is not open to the court to make. Absent any obligation that may be found to arise under Article 11 of the Reception Directive that is the subject of an appeal to the Court of Appeal, I accept that the Secretary of State is not bound to permit access to the labour market simply because 12 months have lapsed since a fresh claim has been submitted for decision... Whether the prohibition should be relaxed after two, three or four years, whether a total period of continuous stay in the United Kingdom should be the basis of assessment, how far the practical ability to remove is a relevant criterion, whether claims outstanding after 12 months should be addressed by a sifting of potential merits, whether a specific date for decision could or should be given are all policy choices for the executive and not matters for this court in the first instance

53. I further can give the claimant no individual relief on his personal application in the absence of anything further being known about his circumstances.

54. What I can and do declare for the reasons given in this judgment that the present policy is unlawfully overbroad and unjustifiably detrimental to claimants who have had to wait as long as this claimant has."

52. In that case there was a State policy prioritising some cases and deliberately delaying a category of cases for a period up to four or five years. This judgment was distinguished in the subsequent decision of the Court of Appeal in *R. (Negassi and Lutalo) v. Secretary of State for the Home Department* [2013] EWCA Civ 151.

53. In *Negassi and Lutalo* the applicants claimed rights under Article 11 of the Reception Directive as then applied and transposed into United Kingdom domestic law and a stand alone right of access to the labour market under Article 8 following refusal of permission to work in the course of their respective applications for asylum. The decision relies heavily on the facts of each case. Mr Negassi originally sought asylum in 2005 but the claim was rejected at first instance and on appeal in March 2006. He then left for Ireland but was returned under the Dublin Convention and made a fresh claim in December 2007, two months after his return. He sought permission to work in September 2008. The case was delayed because of parallel litigation. His application for permission to apply for judicial review was issued in December 2009 but by March 2010 he had been granted indefinite leave to remain. Mr Lutalo entered the United Kingdom on a six months visitor's visa in May 2004 which prohibited him from working. In November 2004 he became an illegal over stayer and eluded the authorities until he was arrested in 2007 as a result of which he was convicted and sentenced to a term of imprisonment. He applied for asylum after his release on the 11th June 2009 which was refused. Following a number of appeals he was granted a rehearing and succeeded in his application on the 5th January 2012. In the meantime he had applied for permission to work on the 7th July 2010 which had been refused on the 23rd July and on review on the 6th September.

54. Kay L.J. (Rimer L.J. and Burton J. concurring) considered the decisions in *Niemietz*, *Sidabras* and *Wright* and noted that: -

"34. It is a striking feature of those cases that their contexts are domestic, in the sense that the complainants were nationals of the states in which the interferences with respect for their private lives occurred. None of the cases was concerned with the position of a foreign third-country national subject to immigration control..."

55. Those cases were considered to be "far removed from cases of foreign nationals with no pre-existing rights of access to the domestic labour market". The Court noted that in the case of Mr Lutalo he entered the United Kingdom with an express prohibition

against making or taking of employment there.

56. The court distinguished the judgment in *Tekle*. The court accepted *Tekle* may have been correctly decided on its facts, which went far beyond those of the cases in suit: it concerned a case in which the Secretary of State "had deliberately adopted a policy whereby decisions on claims such as the one under review were deferred for five years or more". The court was not satisfied that either of the cases "reach a point at which it can be said that the Secretary of State interfered with the respect for private life required by Article 8 by refusing permission to work". Kay L.J added:-

"38. In the present cases, where it is common ground that Article 8 does not embrace a general right to work, I do not consider that the protected right to respect for private life embraces the right of a foreign national, who has no Treaty, statutory or permitted right of access to the domestic labour market, to an entitlement to work. We have not been referred to any Strasbourg authority which supports the engagement of Article 8 in these circumstances."

The court therefore concluded that "these are simply not Article 8 cases".

57. Hickinbottom J. adopted and applied the judgment in *Negassi and Lutalo in Fariborz Rostami* when a similar submission was made that in certain circumstances, a positive prohibition or restriction on the ability to take up employment is capable of amounting to an interference with the right to respect for private life. Relief on this ground was refused.

58. In this case Mr V. had his initial application determined on appeal within a year of arriving in the State. Mr T's application was determined within 15 months. However, the delay which followed arose from the initiation of judicial review proceedings which took three to four years to be heard and determined. This was due to the huge backlog of cases and the pressure of work in the asylum and immigration list. The delay was not the fault of the applicants. They now complain of potential delay in the rehearing of their appeals and any subsequent judicial review that may arise and ultimately, if unsuccessful, any further subsidiary protection application which may follow. The court is satisfied that the delay in this case is not of the deliberate type considered in *Tekle*. The application for permission to work was made by Mr V. on 30th May 2013 and by Mr T. on the 1st August 2012. . The court is satisfied that the evidence advanced by both applicants indicates that they have suffered hardships as a result of their inability to work in the State. However, the Convention does not confer a right to work in specific terms and I am satisfied that the applicants do not have statutory, constitutional or European Union Law rights to work or earn a livelihood or to have access to the domestic labour market. The Strasbourg jurisprudence relied upon does not concern cases that extend that far.

59. The court notes that the provisions of Article 6(1) concerning the right to reasonable expedition in relation to the determination of civil rights do not apply to asylum seekers or decisions to expel aliens notwithstanding the serious potential employment and personal consequences for them (see *Maaouia v. France* (application 39652/98), judgment 5th October 2000 [2001] 33 EHRR 1037 para. 33-38). In *Latnifi -v- The Netherlands* (application 39328/98) the Court rejected a claim based on Article 6(1) that the delay in processing a request for a residence permit breached the reasonable expedition requirement for that reason. Of course other aspects of the asylum and immigration process attract the protection of other Articles of the Convention e.g. Articles 3 and 8. However, if delay in the processing of an asylum application is not justiciable under Article 6(1) it is difficult to see how this court may derive a right to work or earn a livelihood on the basis and under the umbrella of Article 8 which is said to arise solely and directly from the delay in assessing the asylum applications.

60. The court is not satisfied that the right to private life encompasses a derived right to work or earn a livelihood by an asylum seeker who has been granted leave to enter and remain in the State on the condition that he/she will not seek or enter employment.

61. The court is not satisfied that its interpretation of s. 9 gives rise to any conflict with the right to private life under Article 8 of the Convention. The section is compatible with the provisions of Article 8 and the jurisprudence of the European Court of Human Rights. Therefore, I am not satisfied that the respondent has acted in a manner incompatible with Article 8 or that there are any grounds on which to grant a declaration under s. 5 (1) of the 2003 Act (see *Donegan v. Dublin County Council* [2012] IESC 19 and *Carmody v. Minister for Justice* [2010] 1 I.R. 635).

62. The real complaint in this case concerns the delay which has occurred in processing the applicants' asylum applications to a conclusion through all the various procedures which are open to the applicants. That delay may give rise to other grounds for relief or remedies on the basis of a claimed breach of a right to reasonable expedition under Article 40.3 of the Constitution in the determination of their applications or a claim based on the breach of the right to good administration in respect of the processing of their applications in accordance with Ireland's obligations under European Union Law. However, I am not satisfied that it gives rise to an entitlement as part of the right to private life to be granted permission to work in the State or to have such an application considered.

Conclusion

63. For all of the above reasons these applications are refused.