

SUMMARY

2017/34 Ireland's ban on asylum seekers working found to be unconstitutional (IR)

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Facts

In this case, a Burmese national who had applied for refugee status in Ireland was challenging the ban in s9(4) of the Refugee Act 1996 (the "1996 Act") on asylum seekers seeking or entering into employment until such time as their application for refugee status had been decided. While awaiting a decision on his application, the applicant, like all asylum seekers, was required to live in State-provided accommodation known as "direct provision". Whilst there, an asylum seeker's food, accommodation and utilities are paid for by the State and they receive an allowance of €19 a week in order to support them, as they cannot work.

By the time the applicant's application for refugee status was finally granted, he had spent eight years in direct provision, unable to work. The refugee determination process had been particularly drawn out for the applicant owing to procedural flaws in the decision-making process which had led to refusals of refugee status being quashed in two separate judicial review actions before the High Court.

In 2013, the applicant was offered work in the direct provision facility where he was living. He could not, however, take up this offer of employment due to the legislative ban on asylum

seekers entering employment in Ireland. The applicant challenged the constitutionality of this provision claiming that as a direct result of the ban he had suffered depression, frustration and an “almost complete loss of autonomy”.

Judgment

The first issue which the Supreme Court had to deal with was that of mootness. By the time the issue came before the Supreme Court, the Applicant had been granted refugee status in Ireland and was now allowed to work. While the State argued that the case should not be heard, the Supreme Court chose to hear the case as a person can still challenge a statute which they believe to be unconstitutional even if it is no longer being applied to them. Furthermore, the Supreme Court felt this was a point of general public importance.

The Court concluded that the right to work was a constitutionally protected right and an aspect “of the human personality”. As Article 40.1 of the Irish Constitution requires that people be held equal before the law, it was not acceptable to withhold the right to work from non-nationals absolutely.

The Court found that the State could legitimately have a policy restricting the ability of asylum seekers to work, however, as there was no time limit within which an applicant’s asylum claim must be made, such a restriction could amount to an absolute ban, which was unconstitutional.

The Court recognised the fact that allowing asylum seekers to work could constitute a “pull factor” which might potentially lead to a surge in the numbers of people who seek asylum in Ireland. Thus, they felt that any decision as to how and when to allow asylum seekers would be allowed to work in Ireland would have to be left to the legislature and executive. However, the Court suggested that it would be legitimate to limit the areas of economy in which asylum seekers could work or to require asylum seekers to have been within the refugee determination system for a certain amount of time before the asylum seeker would be permitted to seek or enter employment.

On this basis, the Court adjourned its order for six months to allow the Government to address the matter and after that time had elapsed the Court stated that it would allow the parties to make submissions as to what form the order should take “in the light of circumstances then obtaining”.

Commentary

This case brings up some interesting issues. Firstly, while the applicant was offered a job

within the direct provision centre in which he was living, there is no reason why this judgment would not extend to allowing an asylum seeker to accept a job offer in the open labour market.

Secondly, the way in which the Government resolves the issue will be of interest. Potentially, it may choose to grant the right to work to asylum seekers after they have been in the refugee status determination system for a certain set period of time or it may opt to impose a definite time limit on the determination of asylum claims and retain the absolute ban. Alternatively, it might simply provide that a person seeking asylum is allowed to work provided they comply with the Employment Permits Act 2003 or it may choose only to allow asylum seekers to work in specified limited sectors of the economy.

Thirdly, the decision made by the Government has the potential to bring it more into line with the international community. In its judgment, the Court noted the ban was arguably repugnant to the provisions of the International Covenant on Economic and Social Rights which refers to the right as the “right to be able to work” or the “right not to be deprived of work unfairly”. The right of asylum seekers to work is also recognised by the UN in the 1951 Convention Relating to the Status of Refugees and the Universal Declaration of Human Rights. Additionally, under EU law member states to ensure that asylum seekers have access to the labour market no later than nine months after their application for international protection is lodged, provided the delays are not attributable to applicants themselves. Presently Ireland, the UK and Denmark are the only EU member states which do not apply this directive, and Ireland and Lithuania are the only EU member states which do not allow asylum seekers to work at all.

Subject: Fundamental rights, right to work

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