Neutral Citation Number: [2011] EWHC 386 (Admin)

Case No: CO/14611/2009

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 March 2011

Before :

Mr Justice Collins

- -

Between :

(R)NEGASSI Claimant

- and -

Secretary of State for the Home Department Defendant

- -
- -

Mr Richard Wilson Q.C. & Mr Declan O'Callaghan (instructed by **Duncan Lewis**) for the **Claimant**
Mr Tim Eicke & Mr Edward Brown (instructed by **the Treasury Solicitor**) for the **Defendant**

Hearing dates: 15 & 16 February 2011

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Judgment

Mr Justice Collins:

1. The claimant is a national of Eritrea who is now 35 years old. He first entered this country on 6 September 2005 using a false name and passport and claimed asylum the following day. On 27 January 2006 his application was refused. He appealed unsuccessfully and his appeal rights were finally exhausted when his application to this court for a reconsideration of the Immigration Appeal Tribunal's decision was rejected on 30 March 2006.

2. He did not leave this country. On 24 July 2006 his then solicitors made further representations based on the impossibility of returning Eritrean nationals to Eritrea. This was said to result in a breach of his human rights in particular, under Article 8 of the ECHR. Thus it was said to amount to a fresh claim. However, no response to this was forthcoming since the claimant left this country and went to Ireland where he made an asylum claim. The Irish authorities decided that he should be returned to the United Kingdom in accordance with the Dublin Convention and he arrived in the United Kingdom on 19 October 2007. On 12 December 2007 his then solicitors made what they said was a fresh claim for asylum on the claimant's behalf. On 11 October 2008 his present solicitors wrote threatening judicial review because of the delay in dealing with the application and asserting that the claimant 'should be granted employment rights whilst awaiting the determination of the Home Office'. It is said by the defendant, although there is no documentary evidence of it before me, that permission to work had been requested on 19 September 2008.

3. An asylum seeker's ability to have access to employment is based on Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers (the Reception Directive). Article 11 of this provides as follows:-

   "Employment

   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."

   The defendant was of the view that the Reception Directive applied only to a first application for asylum. Thus those such as the claimant who made subsequent applications could not benefit from the provisions of the Reception Directive unless the defendant accepted that the application amounted to a fresh claim. Since in most cases if a claim was regarded as a fresh claim the decision accepting or rejecting it would be made at the same time, such applicants would very rarely be able to rely on the Reception Directive.

4. So it was that on 21 October 2008 in answering the letter of 11 October 2008 it was said that the claimant was no longer entitled to work in the United Kingdom because he had exhausted his appeal rights.

5. A number of cases were brought challenging the defendant's view of the scope of the Reception Directive. Two cases were in due course (after an initial refusal of permission on the papers) heard together, namely *R(ZO(Somalia)) v Secretary of State for the Home Department* and *R(MM(Burma) v Secretary of State for the Home Department.* On 25 June 2008 HH Judge Mackie Q.C., sitting as a judge of this court, dismissed the claims. He refused leave to appeal, but leave was granted by the Court of Appeal which allowed the

appeals on 20 May 2009. The defendant was given leave to appeal by the Supreme Court. Her appeal was dismissed on 28 July 2010. Accordingly, the claimant is and was entitled to be treated in accordance with the Reception Directive and in particular Article 11 thereof.

6. The request for the grant of employment rights contained in the letter of 11 October 2008 was based on the delay in dealing with the claimant's application and did not specifically rely on Article 11 of the Reception Directive. On 18 June 2009 the claimant's solicitors wrote noting that almost 12 months had passed since the further representations were submitted and asking when a decision could be expected. The letter continued:-

> "In the interim, and in accordance with the recent decision in *ZO (Somalia) and Others* [2009] EWCA Civ 442, paragraph 360 of the H.L. 295 and Article 11 of the Council Directive 2003/9/EC, we would request that our client is also granted permission to work."

Paragraph 360 of HC 395 (the immigration Rules) constituted with Paragraph 360A the transposition of Article 11 into domestic law. This read (and still reads in the amendment to the Rules following the decision of the Supreme Court in *ZO* which came into effect on 9 September 2010) as follows:-

> "An asylum applicant may apply to the Secretary of State for permission to take up employment if a decision at first instance has not been taken on the applicant's asylum application within one year of the date on which it was recorded. The Secretary of State shall only consider such an application if, in the Secretary of State's opinion, any delay in reaching a decision at first instance cannot be attributed to the applicant. "

7. On 7 September 2009 the claimant's solicitors sent a pre-action protocol letter to the defendant based on, so far as material, Article 11 because more than 12 months had elapsed since the application for asylum was submitted in December 2007. On 8 December 2009 the defendant advised the solicitors that steps were being taken to expedite matters. However, on 1 December 2009 this claim had been lodged challenging the refusal of permission to work and seeking expedition and an immediate order directing the defendant to grant the claimant permission to work. In her Acknowledgement of Service served on 17 December 2009 the defendant asked for a stay for 4 months to enable the application for permission to work to be processed. It was accepted that it would not be tenable to defer decisions until the Supreme Court made its decision (leave to appeal had by then been granted) but measures were being taken which should result in a decision on cases such as the claimant's within 4 months. On 31 December 2009, Hickinbottom J refused a stay and granted permission for this claim to proceed. On 14 January 2010 the claimant's solicitors wrote stating that the claimant was very anxious to begin employment. He had, it seems, been offered a part-time job in a retail shop. On 10 March 2010 the claimant was granted indefinite leave to remain (ILR). Thus there was no longer any barrier to his obtaining employment and so he had achieved what he sought in the claim subject only to a claim for damages resulting from his unlawful exclusion from access to employment.

8. Paragraphs 360 and 360A of the Immigration Rules did not in terms limit asylum applications to first applications. Mr Eicke submitted that read with Paragraphs 327 and 353, that was implicit. Paragraph 327 defines an asylum applicant as a person who makes a request to be recognised as a refugee under the Geneva Convention or otherwise makes a request for international protection. Paragraph 353 deals with fresh claims. It states that when an asylum or human rights claim has been dismissed, the decision maker will consider any further submissions and, if they are rejected, whether they amount to a fresh claim. Paragraph 353A, which came into force on 1 December 2007, provided that consideration of further submissions would be subject to the procedures set out in the Rules. These Paragraphs do not establish that Paragraph 360 is limited to first applications.

9. The limitation to first applications resulted from enforcement instructions issued by the Home Office. These provided under the heading Fresh Claims:-

> "If a failed asylum seeker makes a fresh asylum claim then provided it is accepted as a fresh claim the procedures set out above should be followed i.e. the claimant will be entitled to apply for PTW provided he satisfies the

> criteria in Paragraph 360 of the Rules, otherwise an request for PTW would be a mandatory refusal. If the new asylum claim is not accepted as a fresh claim the person will have no entitlement to apply for PTW."

10. Article 26 of the Reception Directive deals with transposition and provides:-

> "Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 6 February 2005. They shall forthwith inform the Commission thereof."

It is clear that the enforcement instruction amounts to an administrative provision. While Mr Eicke at one stage appeared to argue that it was not, he did not pursue such an argument: it was obviously bad. Thus there was, submits Mr Wilson, a failure to transpose the provisions of Article 11 of the Directive in accordance with its requirements.

11. There are a very large number of persons who have been denied access to employment who would have been covered by Article 11 if a correct view had been taken of its application to those who made subsequent applications for asylum. This is because of the substantial numbers of those applicants which has meant that very few could be dealt with within the 12 month limit. This claim has therefore been heard as a test case to decide whether in principle damages can be awarded and, if so, on what basis and in what circumstances awards can be made. In addition, if persuaded that damages can be awarded, I have to consider whether this claimant is entitled to any award on the facts of his case and, if so, what are the limitations (if any) upon what could be awarded. I am, of course, concerned only with liability and not with quantum, but I must indicate what matters should be taken into account if quantum is to be decided.

12. Mr Wilson, Q.C., submits on the claimant's behalf that he is entitled to an award of damages on two separate bases. Because there was a failure to transpose the Reception Directive properly so that the exclusion of subsequent applicants was unlawful, there is state liability for breach of Community Law. Further or in the alternative, he submits that the unlawful exclusion of the claimant from the Reception Directive amounts to a breach of Article 8 of the ECHR, that the claimant is a victim of that breach and is entitled to damages pursuant to Section 8 of the Human Rights Act 1998.

13. Mr Eicke submits that there is no liability to compensate those who have wrongly been excluded in general and the claimant in particular. He denies that Article 8 is in play at all but, if it is, the court could not be satisfied that an award of damages was necessary to afford just satisfaction to claimants if they could not obtain an award under the principle of state liability. Thus failure on the ground of state liability would mean failure under Article 8. In the light of that submission, it is convenient to deal with state liability first.

14. The principle applicable to deciding whether, given a breach of EU law, there is state liability to award damages to one who has as a result suffered are clear. They stem from the decision of the court in *Francovich v Italian Republic* [1995] I.C.R. 722 and *Brasserie du Pêcheur v Germany* [1996] QB 404. The right to compensation is subject to three conditions. First, the rule of Community Law breached must have been intended to confer rights on individuals. Secondly, the breach must have been sufficiently serious in that the Member State has manifestly and gravely disregarded the limits on its discretion. Thirdly, there has been a direct causal link between the breach and the damage sustained. The same conditions apply where there is no discretion in relation to the breach in question: see *R v HM Treasury ex p British Telecommunications* [1996] QB 615. Thus if a Member State incorrectly transposes a Community Directive into national law, its liability to compensate is subject to the same conditions although there may be no discretion to exercise (see p.655 paragraph 40). Normally, it is for the domestic court to decide, applying the relevant principles, whether there was a sufficiently serious breach. In the BT case at paragraph 43 the Court accepted that the relevant Article of the Directive which had not been properly transposed was imprecisely worded and was reasonably capable of bearing the interpretation given to it by the United Kingdom in good faith and 'on the basis of arguments which are not entirely devoid of substance'. And in Paragraph 44 (p.655A) the court said this:-

> "Moreover, no guidance was available to the United Kingdom from case law of the Court as to the interpretation of the Provision at issue, nor did

> the Commission raise the matter when the Regulations of 1992 were adopted."

Mr Eicke relies on this since, he submits, there was no case in the European Court and the Commission has not indicated concern about the United Kingdom's interpretation of the scope of the Reception Directive.

15. In the circumstances of this case, there was no question of the exercise of any relevant discretion in transposing the Directive. Either it did on its true construction apply to subsequent asylum seekers or it did not. Thus the exclusion of a person such as the claimant was a breach of the Directive. Mr Wilson relies on the lack of discretion since, as he submits, the Court of Justice has made clear that a failure to transpose a Directive or any provision of a Directive properly can of itself without more constitute a sufficiently serious breach to result in state liability. He relies in particular on *Dillenkofer v Germany* [1997] QB 259 and *Rechberger v Austria* [2000] CMLR 1. In the *Dillenkofer* case, Germany had failed to transpose into domestic law the relevant Directive within the period laid down for that purpose. No material excuse was proffered for the failure. The court's decision is encapsulated in Paragraph 26 of its judgment (p.293A of the report) where it said this:-

> "26. So while as in *Francovich* a Member State fails, in breach of the third paragraph of Article 189 of the treaty, to take any of the measures necessary to achieve the result prescribed by a Directive within the period it lays down, that Member State manifestly and gravely disregards the limits on its discretion.
>
> 27. Consequently, such a breach gives rise to a right to reparation on the part of individuals of the result prescribed by the Directive entails the grant of rights to them."

16. *Rechberger v Austria* concerned the same Directive as *Dillenkofer* which dealt with inter alia package holidays and the need to provide for those organising such holidays to have sufficient security so that those who paid in advance should not suffer loss if the holiday could not take place. While Austria transposed the Directive in time, it provided that the relevant Article, which was Article 7 requiring an organiser of a package holiday to provide evidence of security for the return of money paid and reparation in the case of insolvency, was only to come into force 4 months after the transposition. In Paragraphs 51 to 53 of its judgment, the Court said:-

> "51. In the present case it must be held that neither Article 7 nor any other provision of the Directive may be interpreted as conferring a right on the Member State to limit the application of Article 7 to trips taken on a date later than the time-limit taken on a date later than the time-limit prescribed for transposition of the Directive. The Member State in question here enjoyed no margin of discretion as to the entry into force, in its own law, of the provisions of Article 7. That being so, the limitation of the protection prescribed by Article 7 to trips with a departure date of 1 May 1995 or later is manifestly incompatible with the obligations under the Directive and thus constitutes a sufficiently serious breach of Community Law.
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> 52. The fact that the Member State has implemented all the other provisions of the Directive does not alter that finding.
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> 53. In view of the foregoing then answer to the fourth question must be that transposition of Article 7 of the Directive in a way which limits the protection prescribed by that provision to trips with a departure date four months or more after the expiry of the period prescribed for transposing the Directive constitutes a sufficiently serious breach of Community Law, even where the Member State has implemented all the other provisions of the Directive."

17. Mr Wilson argues that this principle applies in this case since there was a failure to implement Article 11 so that it covered all who applied for asylum. Because there was no discretion and because it was not properly implemented, the breach is manifestly incompatible with the United Kingdom's obligation under the Reception Directive. The problem with this submission is that it means that whatever the reason for the failure to implement any provision of a Directive properly, at least where there is no discretion involved, the failure will automatically be sufficiently serious to sound in damages. In neither *Dillenkofer* or *Rechberger* was any material excuse or error of construction of the Directive relied on. But in this case an error as to the scope of the Directive is raised. In my view it is necessary to consider in any particular case the reason why the failure to implement properly occurred. Only if that reason is insufficient to avoid a finding that the breach was sufficiently serious will a claim for damages exist.

18. Thus a mistaken view of the construction of a Directive should only provide a remedy in damages if, to follow the language in the BT case, it is based on arguments which are entirely devoid of merit. Thus decisions on the part of the National courts are clearly relevant. It might have been thought that a favourable finding by any court and in particular by the court adjudicating at last instance would show that the arguments relied on were not entirely devoid of merit. However, in *Köbler v Austria* [2004] QB 848 the Court of Justice decided that even then the breach could be (but in *Köbler* was not) sufficiently serious to entitle the applicant to damages. The approach to be adopted is sufficiently set out in the headnote. The breach has to be manifest and, in so deciding, the factors to be taken into account included the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Community institution, and non-compliance by the court in question with its obligation to make a reference for a preliminary ruling.

19. In *Cooper v Attorney General* [2008] EWHC 2178 Plender J analysed the effect of and the court's approach to a case in which the *Köbler* principle was relied on. As the Court said in *Köbler* itself (Paragraph 53) state liability in such cases could only be incurred in exceptional cases. It is noteworthy that, while accepting the possibility of an award of damages in such a case, the court has not found in favour of an applicant who has relied on that possibility. This emphasises that only in exceptional circumstances should such liability exist.

20. This claim does not engage the *Köbler* principle directly, since the Supreme Court decided that there was a breach of the law in the failure to include all asylum seekers. Mr Wilson relies on the view of the Supreme Court in *ZO* [2010] 1 WLR 1948 in refusing to make a reference to the Court of Justice. Lord Kerr, giving the judgment of the Court, said this (Paragraphs 50 and 51 on p.1964):-

> "50. In support of the application for a reference to the Court of Justice of the European Union under article 267 of TFEU, the appellant relied on *CILFIT (Srl) v Ministry of Health* (Case C-283/81) [1982] ECR 3415. At paragraph 16 of its judgment in that case, the Court of Justice said:
>
> The correct application of Community Law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other member states and to the Court of Justice. Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it.
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> 51. This sets what appears at first sight to be a very high standard. The national court must not only be convinced that there is no reasonable doubt as to how the question should be answered but must also be of the unequivocal view that its opinion would be shared by courts in all the member states and the Court of Justice. But I do not believe that this passage was meant to convey to national courts the need to conduct an analysis of how the matter might be approached in all of those other courts. Rather, it seems to me that what is required is for the national courts to conduct a careful examination of the reasoning underlying any

> contrary argument ranged against the view that it has formed. If, having done so, the court is of the opinion that such an argument, on any conventional basis of reasoning, could not be accepted, a reference should not be made. Having anxiously assessed the appellant's arguments against this yardstick, I have come firmly to the view (particularly in light of the legislative history of the Reception Directive and the Procedures Directive) that a reference is not required in this case and I would therefore also dismiss the appellant's application under article 267 FEU."

21. This must mean, Mr Wilson submits, that the Court was of the view that the contrary argument put forward by the Home Secretary which appealed to HHJ Mackie was bad beyond reasonable doubt. Mr Eicke, while having to accept the robustness of the judgment, submits that the arguments cannot properly be regarded as entirely devoid of substance. There was no Court of Justice decision on the question and, in compliance with its obligations under Article 26, the United Kingdom had notified the Commission of its transposition. Mr Wilson suggests that there is no evidence that the Commission was made aware of the limitation since Paragraphs 360 and 360A of the Immigration Rules do not suggest such a limitation. The report from the Commission dated 26 November 2007 on the application by Member States of the Reception Directive did not, in recording Member States' application of the Directive, refer to the limitation in the United Kingdom (see Paragraph 3). I have no evidence whether any other Member State adopted the same approach. And in considering Article 11, the Commission, recognising that the entitlement was only to conditional access to the labour market, recorded no major problems. There was, it was said, separate material submitted to the Commission on their decisions. The Reception Directive had to have been implemented for over 2 ½ years and, as it seems to me, it would be extraordinary if the Commission was unaware of the limitation imposed by the United Kingdom.

22. Mr Eicke relies too on the absence of any challenge before *ZO* in late 2007 since there were undoubtedly many in the same position as the claimant who had been waiting for over 12 months for a decision when the Reception Directive was implemented. All the circumstances show, he submits, that despite the robustness of the Supreme Court judgment the contrary argument could not be dismissed as manifestly wrong or entirely devoid of substance.

23. It is not necessary to go to the judgment of HHJ Mackie or of Stanley Burnton J who refused permission, taking the view that the claim was unarguable. Both were wrong.

24. Mr Wilson submitted that the breach was made the more serious since it amounted to discrimination against a whole class of people, namely subsequent applicants for asylum. I do not think that this is material since, on the view taken of the scope of the Reception Directive, it did not apply to subsequent applicants. That being so, to categorise it as discriminatory and therefore more serious is a non sequitur. He submitted that there was a clear violation of fundamental rights of asylum seekers. The difficulty with that submission is that the only fundamental right which can be said to exist (since there is no right to work so far as a non-national outside the EU or EEA is concerned) is that of non-discrimination. But there was as I have said no unlawful discrimination involved, merely a mistaken view of the scope of the Reception Directive. Accordingly, I reject this submission.

25. In my view, this is a borderline case. I recognise the force of Mr Wilson's submissions based on the judgment of the Supreme Court. But the hurdle to be overcome by a claimant who seeks damages is a high one. This was an error of construction, not a deliberate intentional breach of the obligations imposed by the Reception Directive. While such an error is capable of being sufficiently serious to found a claim for damages, a court should be slow to support such a claim. The test set out in the authorities and in particular in the BT case is deliberately put at a high level. In all the circumstances, I am persuaded that Mr Eicke's submissions prevail and that, despite the Supreme Court's judgment, the breach was not manifestly and gravely unlawful.

26. Thus I think the claimant fails the second test for liability. But, if I am wrong about that, I must consider whether there is a direct causal link to the damage suffered to entitle a claim to be made. It is important to bear in mind what rights accrue from Article 11. It does not require that an applicant shall be permitted to work, merely that he should have conditional access to the labour market. It is for the Member State to decide what conditions are

applicable and, as Article 11.4 shows, priority may be given to its own citizens, EU and EEA nationals and legally resident third-country nationals. In this context, it is, I think, obvious that those who seek asylum are not to be regarded as legally resident while their claims are being considered. Now that he has indefinite leave to remain, the claimant is legally resident but was not before he was granted indefinite leave to remain.

27. Mr Wilson submits that under Paragraphs 360 and 360A, which were in force at the material time, the only restrictions were on self-employment or engaging in a business or professional activity. That being so, he submits that there was no bar to employment of any sort (except self-employment) and so the claimant and others in his position have lost the opportunity to be employed. He accepts that damages must be based on the loss of an opportunity but if (as in the claimant's case) a person can show that he had been offered employment, that can be relied on and the loss will amount to what he would have received from that employment. He also relies on the decision to grant ZO and MM employment rights. But that was done because they were claimants who had succeeded and cannot be regarded as an indication that all others would receive the same benefit. He further accepts that any payments received for example under s.4 of the Immigration and Asylum Act 1999 as amended or from whatever other source must be taken into account since only the net loss can be recoverable.

28. The conditions applicable based on the mistaken view of the scope of the Reception Directive cannot in my judgment be regarded as the proper basis for any causal effect of the breach. The extension of the scope brought in many thousands of applicants. This has meant that the conditions have now been amended and have been made far more extensive in the Statement of Changes in Immigration Rules which came into effect on 9 September 2010 following the decision of the Supreme Court in *ZO*. Now, Paragraphs 360A (which applies to first-time applicants) and 360C (which applies to subsequent applicants), both of which are in identical terms, provide the restrictions. Paragraph 360D gives details:-

> "(i) employment may only be taken up in a post which is, at the time an offer of employment is accepted, included on the list of shortage occupations published by the United Kingdom Border Agency (as that list is amended from time to time);
>
> (ii) no work in a self-employed capacity; and
>
> (iii) no engagement in setting up a business."

In the Explanatory Memorandum to the Statement of Changes at paragraph 7.4, the restrictions in (i) above are said to be 'consistent with wider labour market and immigration policies, ensuring that foreign workers are directed to occupations where a national shortage of skilled labour has been identified and thereby offer the greatest value to the U.K.' This restriction is, it is said, in accordance with Article 11.4, particularly in times where there is rising unemployment.

29. The new statement does not apply to those asylum applicants to whom Paragraphs 360 and 360A of the Statement of Change apply who made applications for employment approval before 9 September 2010. The new 360 and 360A apply only to first applicants and there are transitional provisions applicable to them. Subsequent applicants do not benefit from this so that whenever they applied the new restrictions will apply.

30. I am satisfied that, had the scope of the Reception Directive been appreciated, restrictions such as those now in force would have applied. Certainly there would have been more extensive restrictions than those in existence before 9 September 2010. Very few applicants, and certainly not the claimant, would be or would have been able to obtain employment. Thus I do not think that a direct causal link is established. Any claim would be speculative to such a degree that it should not be regarded as properly brought.

31. I turn to consider whether there is in the circumstances a claim for damages, because of a breach of one of the rights imported into U.K. law by the Human Rights Act 1998. The one relied on is the right to private life contained in Article 8. It is important to bear in mind the

limitation on the remedy contained in s.8 of the Act, which reflects the approach of the ECtHR. The relevant limitation is contained in s.8(3) which provides:-

> "No award of damages is to be made unless, taking account of all the circumstances of the case, including –
>
> (a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and
>
> (b) the consequences of any decision (of that or any other court) in respect of that act,
>
> The court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made."

S.8(4) requires the court to take into account the principles applied by the ECtHR under Article 41 of the Convention (the requirement of just satisfaction).

32. An unlawful exclusion from work could arguably give rise to a claim. But, as I have decided, there can be no claim based on that exclusion: the only possible claim would be based on the lost opportunity, but that loss would not have sounded in damages since the opportunity would not have availed the claimant or, indeed, the vast majority of applicants. It is said that the claimant has suffered non-pecuniary damage in being unable even to try to enter the labour market. I have no doubt that the inability to work and to earn some money from employment, coupled with the opportunity for social intercourse resulting from it, is regarded as very important. Exclusion from the labour market can and very often will lead to depression. A number of studies to which I have been referred note those points and the claimant himself asserts that he has suffered from depression. Most sensibly money has not been spent at this stage on a medical report but I take into account the claimant's own evidence. However, although non-pecuniary damages can be awarded, the claimant is in no better position in that respect that he is in relation to pecuniary damages. I am satisfied that the inability to obtain damages for breach of the Reception Directive means that it would not be necessary to make such an award under s.8 of the 1998 Act to afford just satisfaction.

33. An award of damages could only be made if there was a breach of an Article of the ECHR. As will become apparent, I do not think there was such a breach. But on the assumption that there was, in the circumstances a declaration to that effect would provide just satisfaction.

34. The ECHR does not in terms provide for a right to work. But such a right is dealt with in the Charter of Fundamental rights of the European Union which had effect on the coming into force of the Treaty of Lisbon. Article 15 is the material article. It reads, under the heading '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."

35. This makes the point that the right to work is not absolute in the sense that it can be restricted to nationals of the particular state and EU nationals. Other Conventions are to be read with the same limitations. The right does not extend to work in a third country (unless an EU or EEA national and that third country is a Member State) but is limited to a right to work in a person's own country. It has always been recognised that a state has the right to

protect its own citizens' access to the labour market and so impose restrictions to a greater or lesser extent on the rights of nationals of third countries to enter the labour market.

36. There is no positive right to work within the ECHR but that does not necessarily mean that an unlawful prohibition on access to the labour market is not capable of amounting to an interference with the right to private life. *Niemetz v Germany* (1993) 16 EHRR 97 concerned an unlawful search of a lawyer's office. One issue was whether Article 8 extended to a person's office as well as his home. The court said that it could on the basis that respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings. There was no reason of principle why the understanding of the notion of 'private life' should be taken to exclude activities of a professional or business nature since it was in the course of their working lives that the majority of people had a significant, if not the greatest, opportunity of developing relationships with the outside world (see Paragraph 29). It was not possible to draw a distinction between professional and non-professional activities, particularly as the two might often in individual cases be intermingled.

37. In *Sidabras v Lithuania* (2006) 42 EHRR 6, the applicant had worked for the KGB before Lithuania's independence and, as a result of a law passed in 1998, he was, as a former KGB officer, prevented from continuing in his employment as a tax inspector and prohibited from working in various other capacities until 2009. The court cited paragraph 29 of its judgment in *Niemietz v Germany* and referred to *Smirnova v Russia* (2004) 39 EHRR 22. In that case, the applicant had been deprived of her internal passport in circumstances which had no basis in domestic law. This meant that she was unable to perform such mundane tasks as exchanging currency or buying train tickets and could not find employment or access medical care. This amounted to a continuing interference with her private life. The bar on access to employment in her case was only part of the interference with her private life. In paragraph 47 of the judgment of the majority in *Sidabras* the court said:-

> "… having regard in particular to the notions currently prevailing in democratic states, the Court considers that a far-reaching bar on taking up private sector employment does affect 'private life'."

However, the court did not find it necessary to decide whether there had been a breach of Article 8 on its own but found in favour of the applicant on the ground that there was a breach of Article 14 (prohibition of discrimination in securement of Convention rights) read with Article 8.

38. Mr Wilson relies particularly on a decision of Blake J in *Tekle v Secretary of State for the Home Department* [2009] 2 All ER 193. The claim in that case was based on the excessive delay in dealing with his subsequent claim (he was also an Eritrean national) which was made in April 2004. In *Tekle*, Blake J considered whether the denial of an ability to seek employment engaged Article 8. In paragraph 36 on p.205b, he said this:-

> "36. In my judgment, the positive prohibition on being able to take employment, self employment or establishing a business, when placed alongside the inability to have recourse to cash benefits, restricts the claimants ability to form relations either in the work place or outside it. When such a requirement is imposed on someone who cannot be removed from the United Kingdom and it is maintained against someone who has been physically resident in the United Kingdom since the fresh claim was made four-and-a-half years ago this restriction can thus be said to be an interference with right to respect for private life. As Lord Bingham himself has memorably said in *Huang v Secretary of State for the Home Department, Kasmiri v Secretary of State for the Home Department* [2007] UKHL 11 at [18], [2007] 4 All ER 15 at [18], [2007] 2 A.C. 167 'Human beings are social animals. They depend on others'. The ability to develop social relations with others in the context of employment, as well as the ability to develop an ordinary life when one is in possession of the means of living to permit travel and other means of communication with other human beings is thus an aspect of private life."

39. In *Tekle*, Blake J was not taken to Article 11 of the Reception Directive. Nor does it seem to have been argued on behalf of the defendant that there was in the circumstances no right for such as the claimant to access the employment market. That seems to me to be crucial. If there is no right to work, it is difficult to see how prohibition on working can amount to an interference with private life. In all the cases before the ECtHR which raised the issue, the claimant was a national of the country allegedly in breach and so he had a right to access employment which was interfered with by the prohibition. Accordingly, although I see no reason to dissent from Blake J's observations if a right to work existed, I am afraid I think his decision was wrong in the circumstances.

40. It follows that in my judgment Article 8 is not in play and so there was no interference with the right to private life which could amount to a breach of Article 8. But even if it was applicable, I have no doubt that the interference was proportionate as being in accordance with the law and necessary in the interests of the economic well-being of the country and the rights and freedoms of others.

41. This claim must therefore fail as must all claims seeking to establish a right to damages as a result of *ZO*. Thus it is unnecessary to consider the claimant's individual circumstances in any detail. Suffice it to say that the relevant 12 month period came to an end in December 2008. The claim made before that was bound to fail and the decision on 23 January 2009 refusing it was inevitable. A further claim was not made until 18 June 2009. The defendant was entitled to seek all relevant information before reaching her decision: the time taken between June 2009 and March 2010 was not an unreasonable delay.

42. However and in any event he cannot qualify since he is unable to meet the restrictions in the new Paragraph 360C. Thus he would not have had any access to the labour market even if the defendant had properly applied the Reception Directive. Thus his claim must fail.

43. I would only add that I have been much assisted by the detailed arguments of counsel on both sides. I have not in this judgment referred to all the authorities cited nor have I dealt with every submission in detail. To have done so would have extended this judgment unreasonably.