



AN CHÚIRT UACHTARACH
THE SUPREME COURT

S:AP:IE:2025:000012

[2026] IESC 35

O' Donnell C.J.

O' Malley J.

Hogan J.

Murray J.

Collins J.

BETWEEN

AM

Appellant/Applicant

AND

THE MINISTER FOR ENTERPRISE, TRADE AND EMPLOYMENT,

THE MINISTER FOR JUSTICE, IRELAND

AND THE ATTORNEY GENERAL

Respondents

JUDGMENT of Mr. Justice Maurice Collins delivered on 18 June 2026

PRELIMINARY

1. The essential issue presented in this appeal is whether the European Communities (Reception Conditions) Regulations 2018 (SI No 230/2018) (“*the 2018 Regulations*”) impermissibly restrict the entitlement of applicants for international protection in the State to seek employment here while waiting for a decision on their applications.
2. That, in some circumstances at least, such applicants may have a right to seek employment (or, as it is also put, a right “*to access the labour market*”) is not in dispute. In *NHV v Minister for Justice and Equality* [2017] IESC 35, [2018] 1 IR 246 (“*NHV*”), this Court held that in certain circumstances applicants for protection enjoy a constitutional right to seek employment. Separately, as a matter of EU law – specifically Article 15 of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (in this judgment “*the Reception Conditions Directive*” or “*the 2013 Directive*”) – Member States have a duty to ensure that applicants for international protection “*have access to the labour market*” while waiting for their applications to be determined. Ireland decided to “*opt-in*” to the 2013 Directive in 2017 and the 2018 Regulations were made for the purpose of giving effect to it in Irish domestic law.
3. In each case, however, the right is qualified. *NHV* makes it clear that the constitutionally-derived right of protection applicants to seek employment in the State differs significantly from the right enjoyed by citizens and that the State is entitled to impose significant restrictions on it. The EU right is also qualified. In the first place, it

applies only if “*no later than 9 months*” from the date of the application a first instance decision has not been made (and subject to the *proviso* that “*the delay cannot be attributed to the applicant*”): Article 15(1) of the 2013 Directive.¹ Secondly, and more significantly, Member States are competent to “*decide the conditions for granting access to the labour market*”, subject to “*ensuring that applicants have effective access to the labour market*”: Article 15(2). What constitutes “*effective access*” for this purpose, how that question is properly to be assessed and whether or not the 2018 Regulations ensure “*effective access*” are central questions in this appeal.

4. The material facts can be briefly stated. AM is a national of a Middle East state. He holds a primary degree in pharmacy from his country of origin, as well as a Master’s degree in healthcare management from the Royal College of Surgeons in Ireland in Bahrain. He worked for many years as a pharmacist, latterly specialising in “*public health sector pharmacy*.”
5. AM came to Ireland in early January 2023 and immediately applied for international protection under the International Protection Act 2015 (“*the 2015 Act*”). When eligible to do so, AM applied for a *Labour Market Access Permission* (LMAP) under the 2018 Regulations and a permission issued to him with effect from 30 August 2023.
6. Reflecting Regulation 11(9)(a) of the 2018 Regulations, that LMAP included a condition prohibiting AM from seeking or taking up employment with any of the bodies specified in Schedule 6 of the Regulations. The bodies specified in Schedule 6 include

¹ As will become apparent, the Irish implementing regulations have shortened that waiting period to 6 months.

core organs of the State such as the Civil Service of the Government (para (a)) and the Civil Service of the State (para (b)), local authorities (para (c)), the Defence Forces (para (k)) and An Garda Síochána (para (l)) but also include (*inter alia*) “any other entity established by or under any enactment (other than the Companies Acts), statutory instrument or charter or any scheme administered by a Minister of the Government” (para (d)); “an entity established or appointed by the Government or a Minister of the Government” (para (g)) and any “entity on which any functions are conferred by or under any enactment (other than the Companies Acts), statutory instrument or charter” (para (i)). Certain publicly funded institutions of higher education are also included (para (j)). Collectively, the Schedule 6 bodies effectively encompass the civil service and much if not all of the wider public service and public sector (including commercial “semi-states”).

7. For the purposes of these proceedings, the most notable concrete effect of the Regulation 11(9)(a) prohibition was that it excluded AM from seeking or obtaining employment – in any capacity – in many of the major hospitals in the State (and in pharmacies in such hospitals), including hospitals operated by the Health Service Executive (established by the Health Act 2004) or by Children’s Health Ireland (established by the Children’s Health Act 2018) and hospitals established by charter or established by order made under the Health (Corporate Bodies) Act 1961.² It also

² Many hospitals throughout the State were established by an order made under the 1961 Act, including St James’s Hospital, the hospital that AM had dealings with and by whom he says he was offered a job interview before it realised that it could not employ him because of the conditions attaching to his LMAP: see St James’s Hospital Board (Establishment) Order 1971 (SI No 187/1971).

prohibited AM from providing services to any such hospital as a self-employed contractor.

8. While AM's LMAP issued for a 12-month period, in the event he was granted a declaration of refugee status in October 2023 (effective from 19 October 2023). By virtue of section 53 of the 2015 Act, from that point AM has had an unqualified entitlement "*to seek and enter employment*" and "*to engage in any business, trade or profession ... in the like manner and to the like extent in all respects as an Irish citizen*" and he was no longer subject to any restrictions arising under the 2018 Regulations.
9. The relevant period for the purposes of these proceedings is therefore the period between 30 August 2023 (when an LMAP issued to him) and 19 October 2023 (when he was declared a refugee) — a period of seven weeks. In that period AM was free to seek employment (subject to the conditions of the LMAP) and he was, in fact, successful in obtaining a job as a pharmacy technician in a retail pharmacy and was working in that position at the time that he initiated these proceedings. However, AM was excluded (on pain of committing a criminal offence) from seeking employment in any public sector hospital or pharmacy, the area in which he wished to find employment.
10. Pointing to that exclusion as a concrete illustration of the effect of Regulation 11(9)(a) and Schedule 6 of the 2018 Regulations, AM claims that these provisions operate to unlawfully restrict access to employment for international protection applicants, both by reference to the constitutional right of such applicants to seek employment recognised by this Court in *NHV* and to the right of such applicants under the 2013

Directive to access the labour market and the State's corresponding obligation to ensure that such access is "*effective access*". Those claims failed in the High Court, for the reasons set out in that court's judgment of 20 November 2024 (Barry O' Donnell J) ([2024] IEHC 660). AM now appeals that judgment.

11. For the reasons set out below, I would dismiss AM's appeal and affirm the judgment and order of the High Court. This judgment also explains why I do not consider that it is necessary to make a reference to the Court of Justice of the European Union (CJEU) under Article 267 TFEU for the purpose of determining this appeal.

HIGH COURT PROCEEDINGS AND JUDGMENT

12. These proceedings were initiated at the end of September 2023, at which point AM's application for international protection was still being considered. On 4 December 2023 the High Court (Hyland J) directed a "*telescoped hearing*" and the papers were then served on the State Respondents ("*the State*"). The State opposed the application for judicial review.
13. AM's Statement of Grounds seeks largely declaratory relief, including a declaration that the "*prohibition*" in Regulation 11(9)(a) and Schedule 6 "*is disproportionate, unlawful and ultra vires*" (Statement of Grounds, §D(a)), a declaration that such prohibition is a breach of the 2013 Directive (which, it is said, the State has failed to adequately transpose) and a breach of AM's rights under the Constitution and/or EU law (§D(b)) and a declaration pursuant to section 5 of the European Convention on Human Rights Act 2003 that Regulation 11(9)(a) is incompatible with Articles 8 and 14 of the European Convention on Human Rights (ECHR) (§D(c)). The section 5 declaration was not pressed before the High Court and was not pursued in this Court. AM also sought damages (§D(f)) but before the High Court the parties sensibly agreed that the damages issue should be deferred pending the determination of the substantive issues. As a result, it was not debated before the High Court or before this Court on appeal.³

³ In practical terms, the claim for damages appears to be the gist of AM's claim: none of the declaratory reliefs would appear to be of any concrete benefit to him at this stage, given that he is now a recognised refugee and, as such, enjoys the same employment entitlements as an Irish citizen. AM's Statement of Grounds also asserted that

14. In his pleaded case, AM’s fundamental contention was that Regulation 11(9) – characterised by him as a “*blanket prohibition*” or “*blanket ban*” on public sector employment – constituted a disproportionate and unjustified limitation on his access to the labour market and therefore denied him the “*effective access*” to the labour market guaranteed by Article 15(2) of the 2013 Directive. He also asserted that the prohibition on accessing public sector employment breached his rights under the Constitution (Articles 40.1 and 40.3) and under various provisions of the Charter of Fundamental Rights of the European Union (“*the Charter*”), with particular reference to Article 15 (*Freedom to choose an occupation and right to engage in work*) and Article 18 (*Right to asylum*)
15. Although a number of affidavits were sworn by AM and his solicitor, the evidence put before the High Court on his behalf was in a number of important respects very limited. In his own affidavit (sworn on 22 September 2023, some 3 weeks after an LMAP had issued to him), AM states that he had been offered two jobs in the private sector and that he was then employed as a pharmacy technician. But (he continued) that job was “*at a considerably lower level*” than should have been the case given his particular experience and qualifications and, while the job paid €22 per hour, AM stated that he would have “*expect[ed] to earn €40-€50 per hour if working at the appropriate level.*”⁴

the prohibition on employment in the public sector could not properly be enacted by Ministerial Regulation and required enactment by the Oireachtas (i.e., by primary legislation): §E(f). However, that ground does not seem to have been relied on before the High Court and it certainly was not advanced before this Court on appeal.

⁴ §10. AM goes on to refer to the fact that he was waiting for his “*PSI licence*”, which he had applied for in February 2023 but explains that he was “*qualified to work as [a] medication and patient safety specialist in the public sector pending the issue of the licence*”: §11.

That is the limit of AM's evidence as to his actual experience of the labour market as an applicant for international protection. He does not suggest that his earnings as a pharmacy technician were insufficient to support himself financially or to provide him with a dignified standard of living nor does he suggest that his employment in that capacity otherwise gave rise to any injury to his dignity or self-respect. In fact, AM says nothing at all as to his financial and living circumstances in that period.⁵

16. Furthermore, beyond the (limited) evidence of his particular experience as an applicant for international protection, AM did not present any evidence of how the LMAP regime actually operates in practice. There was no evidence before the High Court as to how long eligible applicants generally have to wait for the issue of an LMAP, what proportion of LMAP holders obtain employment and/or how long that process usually takes, the nature of the employment generally obtained by protection applicants or as to the conditions of such employment. Nor was any evidence put before the High Court as to the average time it takes for applications for international protection to be determined at first instance. All of these matters would appear to be important considerations in any assessment of how access to the labour market actually functions for applicants for protection in the State.

⁵ AM's affidavit is silent as to where he resided while awaiting a decision on his application or what allowance (if any) may have been payable to him in that period. A weekly payment, known as the *Daily Expenses Allowance*, is payable to international protection applicants. The rate of payment depends on whether the applicant is in accommodation provided by the International Protection Accommodation Services (IPAS) or not (and it appears from the papers that AM was in IPAS accommodation). While the Daily Expenses Allowance is subject to means-testing after 12 weeks, that would not have affected AM in the circumstances here given the brevity of his period of employment as an international protection applicant.

17. Moreover, while AM averred as to the effect of Regulation 11(9)(a) and Schedule 6 of the 2018 Regulations on his capacity to obtain a job in his preferred employment sector position (already subject to significant restriction in any event pending Pharmaceutical Society of Ireland (PSI) recognition of AM's professional qualifications) there was no evidence before the High Court as to the effect of those provisions on labour market access in the State generally. What *is* clear from the evidence, however, is that AM was issued with an LMAP in a timely way, that he was as a matter of fact able to access employment without any significant delay (and in the pharmacy sector, though not in a position commensurate with his particular expertise and experience), at a rate of pay well in excess of the statutory minimum wage, and that his application for international protection was determined reasonably quickly (within a period of 9½ months). AM's only specific complaint about his employment is essentially financial, namely that he would have expected to earn considerably more than he did if he had been able to obtain employment at an "*appropriate level*."⁶
18. In the absence of such evidence, there is inevitably a somewhat abstract quality to AM's case, effectively involving a claim that the exclusion of employment in the public sector – an exclusion that affected AM only for a very short period of time – is *per se* an infringement of the Constitution and/or a breach of the Article 15 right of "*effective access to the labour market*." On any view, however, the 2018 Regulations appear to provide for broad access to the labour market given that, as a matter of fact, most

⁶ §10 of AM's Affidavit sworn on 22 September 2023.

employment in the State is in the private sector.⁷ The public health sector is a significant employer⁸ but, as AM accepted in argument, the great majority of pharmacists operate in the private sector.⁹ In addition to employment in community pharmacies (the sector in which AM obtained employment), employment in industry and employment in certain hospitals (such as private hospitals) is open to LMAP holders with appropriate qualifications (and here it will be recalled that, until his pharmacy qualifications were recognised, AM could not work as a pharmacist in any event, either in the public or private sector: that limitation is not challenged by AM nor does he make any complaint as to the manner in which his application for recognition was dealt with by the PSI).

19. It might be thought that any assessment of whether the right to seek employment given by the 2018 Regulations satisfies *NHV* and/or amounts to “*effective access*” to the labour market for the purposes of Article 15 of the 2013 Directive (or not) necessarily involves an overall assessment of the degree of access granted by the Regulations, the conditions to which such access is (and/or might have been) subject and the practical impact of those conditions. However, that was not the approach of AM here. Instead, he seeks to have the relevant provisions of the 2018 Regulations condemned on the basis that they operated to prevent him from seeking his preferred employment in the

⁷ According to the Institute of Public Administration, public service employment accounted for approximately 15% of total employment in 2023: Boyle et al, ‘Public Sector Trends 2023’ (IPA, December 2023) at Figure 8 (page 18).

⁸ *ibid.*

⁹ See Pharmaceutical Society of Ireland, *Pharmacy Workforce Survey Analysis Report* (September 2023), page 14.

State for the relatively short period (7 weeks) during which his right to seek employment was governed by those Regulations.

20. In any event, in response to AM's proceedings, the State maintained that it was in principle entitled to restrict access to the labour market for protection applicants, subject always to its obligation to ensure "*effective access*". The State was, it said, entitled to exclude access to employment in the public sector in circumstances where applicants had "*unimpeded access*" to private sector employment. In this regard, the State said that it was entitled to have regard to the fact that "*large numbers*" of applications for international protection are unsuccessful and it suggested that the temporary status of international protection applicants was inconsistent with employment in the public sector which (the State says) "*is based on the provision of permanent positions*". The State also suggested that "*unimpeded access*" to the labour market in Ireland could operate as a "*pull factor*" (a factor making the State a relatively more attractive place in which to be an applicant for asylum, thereby inducing persons to come to the State to apply for asylum here). Finally, the State relied on the fact that other EU Member States also impose significant restrictions on access to their respective labour markets under the 2013 Directive and it put in evidence a considerable amount of comparative information directed to that issue, some of which is referred to further below.
21. In essence, the State's position was that, notwithstanding the conditions imposed by Regulation 11(9)(a) and Schedule 6, the nature and extent of the labour market access granted by the 2018 Regulations is more than sufficient to satisfy both the Constitution and the 2013 Directive.

High Court Judgment

22. (Barry) O’ Donnell J’s judgment is admirably clear and comprehensive. He noted that there were certain areas of conflict on the affidavits. One was whether AM had actually been offered an interview for a pharmacist position in an excluded hospital (AM said he had but O’ Donnell J did not consider the evidence to go that far). Another was whether the restrictions/exclusions on his employment had had any concrete adverse impact on AM, given that in the relevant period AM had not yet obtained PSI recognition of his pharmacist qualification. Ultimately, the Judge took the view that the evidence demonstrated that AM was qualified for, and had sought employment in, the public health pharmacy sector and it was “*common case*” that during the relevant period AM had been “*prohibited from seeking employment in the public sector*” (Judgment, §42; also §84). As the 2018 Regulations had affected AM’s ability to access the labour market, the Judge considered that he was entitled to challenge their validity. That finding was not challenged in this appeal.
23. O’ Donnell J was satisfied that the State had “*established ... a concern about creating pull factors*” and that such concerns were “*borne out by historic experience.*” He was also satisfied that the evidence established “*that a large number of applicants for international protection do not succeed in achieving protection, whether by a grant of refugee status or other forms of protection.*” Even if there was some dispute as to precisely what was revealed by the statistics before the court, “*the core point made by the [State] ... [was] supported by the evidence*” (§43). On the other hand, the Judge was not convinced that “*[the] fact that most employment in the public sector is of a*

permanent nature” assisted “*in considering the nature of the [2018] Regulations*”; “*the effect of the 2018 Regulations [was] to prohibit all employment – whether permanent or temporary – in a very wide range of job sectors that fall under the description of public services in Schedule 6*” (my emphasis) (§44).

24. The Judge addressed the EU law issue first. He noted that AM had in fact accessed the labour market and that once he had obtained an LMAP he had been “*entitled to access a broad range of potential employments*” and had obtained employment in the private pharmacy sector. AM’s concern was not, therefore, about accessing the labour market *per se* but with obtaining access to “*his preferred type of employment.*” That was, in the Judge’s view, “*a different proposition*” and one which did not constitute a basis for successfully impugning the 2018 Regulations (§55).
25. After a detailed discussion of the CJEU’s decision in Joined Cases C-322/19 and C-385/19 *KS v The International Protection Appeals Tribunal* ECLI:EU:C:2021:11 (“KS”), the Judge stated that Article 15(2) made it clear that it was “*a matter for Member States to ‘decide on the conditions for granting access...’*”, subject always to the need to ensure “*effective access*”. Member States were also entitled to give priority to EU citizens, European Economic Area nationals and lawfully resident third-country nationals [this is expressly provided for in Article 15(2) of the 2013 Directive]. In his view, “[t]he primary purpose of allowing” labour market access was “*to promote the dignity of applicants for international protection by enhancing their self-sufficiency*” with the limitation of secondary movement of applicants (movement from one Member

State to another) – reflected in recital (12) of the 2013 Directive – being a secondary purpose (§§67-68).

26. In the Judge’s view, the literal and purposive readings of Article 15 coincided. He was satisfied that “*effective access*” encapsulated “*a dual requirement (a) that the access is effective in the literal sense: it must be real and not illusory, and (b) schematically, that the type of access provided for must be capable of bringing about a level of self-sufficiency and a dignified standard of living*” (§69). He considered that there was nothing either “*in the text of Article 15 or [in] the overall context of the 2013 Directive to suggest that [its] purpose*” was “*to provide for a right on the part of applicants for international protection to access a particular or preferred sector within the labour market*” (§70; original emphasis). On that basis, the Judge was not persuaded that Regulation 11(9)(a) and Schedule 6 operated to infringe AM’s “*right to effective access*”. Different Member States had adopted different approaches. AM had been able to access the labour market here and there was no evidence that he had not been able to provide for himself: his complaint was that he had not been “*able to access his preferred sector of employment*” but such access was not what the Directive was concerned to protect (§71). Neither was the Judge persuaded that the restrictions imposed by the 2018 Regulations were disproportionate. The right of access was “*not freestanding*” or “*unqualified*”: restrictions could be imposed provided they did “*not impede effective access*” and applicants for international protection in Ireland who had obtained an LMAP were entitled to seek any form of employment in the private sector and AM had in fact “*succeeded in accessing such employment*” (§72). That point was strengthened by the fact that, as a matter of EU law, Member States could exclude nationals of other

Member States from certain areas of the public sector under Article 45(4) TFEU (§73). AM's EU law claim therefore failed.

27. Turning to the constitutional argument, the Judge closely analysed this Court's decision in *NHV*, noting that it had concluded that the operation of an absolute prohibition on seeking work for a prolonged (and uncertain) period of time could not be justified. That finding was, he observed, "*firmly rooted in a finding that*" such an absolute prohibition caused "*damage to the individual's self-worth and sense of [self]*" (§87). He did not read *NHV* as establishing that an asylum seeker had a personal right to work *simpliciter*. In his view, the *NHV* right was best understood "*as a freedom to seek work and the necessary analysis [required] the court to consider whether a restriction on that freedom [was] substantially justified*" (§88).
28. The Judge observed that, in clear contrast to the position in *NHV*, there was "*no indefinite blanket prohibition*" on employment under the 2018 Regulations: "[t]he holder of a LMAP" was permitted to "*work, subject to certain restrictions.*" In considering whether such restrictions amounted to a breach of the rights of applicants for international protection, the Judge considered that the "*starting position*" was that non-citizens had no right to come to the State to seek employment (§§89-91). The State was entitled to draw "*significant distinctions*" between citizens and non-citizens in the area of employment and it was only "*where the effect of a restriction on the freedom to ... work*" implicated "*the core constitutional value of the dignity of the individual*" that the court might interfere with the judgement of the legislature and (where appropriate) of the executive (§§94-95). Here, there was no basis for suggesting that the restrictions

imposed by the 2018 Regulations infringed the right to dignity of applicants (§101) and it could not be said that the Regulations impermissibly curtailed or burdened a freedom that was “*already quite limited*” (§105). In the Judge’s view, the State had “*substantially justified*” the restrictions on employment “*as achieving ends ... proportionate to the public interest*”, while permitting applicants “*effective access to the labour market, inter alia to achieve a degree of self-sufficiency*” and, in the short period between the grant of an LMAP and the declaration of refugee status AM had been in a position to access the labour market and obtain employment in the private pharmacy sector (*ibid*).

29. AM’s application therefore failed and as a result the issue of damages did not arise.

APPEAL TO THIS COURT

Grant of Leave

30. AM sought leave for a direct appeal to this Court from the judgment and order of the High Court. The Court granted leave ([2025] IESCDET 46), considering that the issue of whether the blanket prohibition on public sector employment in the 2018 Regulations was consistent with the obligation under the 2013 Directive to ensure “*effective access*” to the labour market was an issue of general public importance. In its Determination the Court also noted that AM contended that it might be necessary to make a reference to the CJEU.

Arguments on Appeal

31. The fundamental point of difference between the parties on the EU law issue is how the question of “*effective access*” is properly to be assessed and in particular whether or not the State is required to justify and/or demonstrate the proportionality of the restrictions on the right of access that follow from the impugned provisions of the 2018 Regulations.
32. In argument, AM appeared to accept that Article 15 of the 2013 Directive does not oblige Member States to permit applicants for international protection unimpeded access to the labour market (though he did seem to contend that such ought to be the starting or default position) and that, at least at the level of principle, Member States are entitled to impose conditions on such access and that the power to do so may extend to the exclusion of applicants from specific sectors of the labour market. AM’s fundamental argument was that Member States were required to justify any such

exclusion and demonstrate that it was proportionate. Proportionality is (so AM argues) inherent in the concept of “*effective access*” and the exclusion of the entire public sector is arbitrary, unjustified by any rationale offered by the State and therefore disproportionate, thus going beyond what is permitted by Article 15 of the Directive. Furthermore (so AM says), he was not given “*effective access*” to the labour market in circumstances where he was excluded from seeking employment in the specific area where he wanted to work. In those circumstances, while AM had been allowed *access* to the labour market, such access was not *effective access*, such as might conform with the right to dignity underlying his right to seek employment. The right to “*effective access*” was, AM said, a right for each applicant, not one to be assessed to applicants as a category and it was no answer for the State to say to AM that (as counsel put it in argument) “*you can take any old job*”. If “*effective access*” falls to be assessed *subjectively* – as this argument seems to imply – it is difficult to see how any Member State could in practice impose any meaningful conditions on such access or exclude applicants from any sector of the labour market.

33. In his submissions, AM referred extensively to both the Opinion of the Advocate General (Richard de la Tour AG) and the CJEU’s judgment in *KS* and also relied on Article 15 of the Charter.
34. The State articulated a very different conception of what is required and permitted by Article 15 of the 2013 Directive. According to the State, the rationale for that provision was a practical concern with self-sufficiency and the preservation of the dignity of applicants for international protection and it was concerned with giving such applicants

an opportunity to obtain employment, rather than conferring a right to pursue their chosen professions or careers (and in this context the State said that there was – appropriately – a sharp distinction between the employment rights of applicants for international protection and of those to whom such protection has been granted). The State did not accept that any restrictions imposed by a Member State on labour market access were properly to be viewed as derogations from a general right of access, thus requiring specific justification. The requirement of Member States was to ensure “*effective access*” and what constituted “*effective access*” was to be assessed practically and realistically: the key question was whether applicants could in practice access employment or whether the impugned restrictions made it impossible or excessively difficult in practice for them to do so. Here, it was said, the 2018 Regulations permitted broad access to the labour market, including to the entire private sector (and it was common case between the parties that the majority of pharmacy jobs are in the private sector) and AM had in fact been able to access employment that was more than adequate to meet his objective needs (as counsel for the State observed, the hourly rate payable to AM as a pharmacy technician was a multiple of the statutory minimum wage).¹⁰ In concrete terms, that amounted to “*effective access*”. The State also laid considerable emphasis on the approach adopted in other Member States, many of which also imposed significant restrictions on labour market access under the 2013 Directive, without (so the State said) any apparent objection or challenge from the European Commission.

¹⁰ Which in 2023 was €11.30 per hour.

35. As for the constitutional law issue, the arguments largely covered the same ground, albeit framed by reference to this Court’s decision in *NHV* rather than the provisions of the 2013 Directive (though AM did emphasise the fact that the State had decided to implement *NHV* by opting into the Directive). AM says that, even allowing for the fact that the constitutional right identified in *NHV* is not absolute, and that the right to earn a livelihood does not confer any right to obtain “*employment in a particular field*”, “*the blanket ban on public sector and semi state sector work*” is overly broad and constitutionally impermissible. In response, the State emphasised that the right identified in *NHV* is different to, and ought not to be conflated with, the right arising under Article 15 of the Directive. *NHV* does not (so the State says) impose any requirement to grant “*effective access*” to international protection applicants; rather the *absolute exclusion* of applicants from the labour market for an indefinite time may breach their constitutional rights. However, AM had not been excluded from the labour market and therefore the High Court had been correct to dismiss the constitutional claim.

DISCUSSION

The Right of Non-Nationals to Work in the State

36. From the establishment of the State, it has been the law that non-nationals (“*aliens*”) had no general entitlement to work in the State and could enter the State for the purposes of taking up employment only with an appropriate permission: Aliens Order 1925 (SI No 2/1925), Article 1(2)(b). The provision was re-enacted in the Aliens Order 1935 (SI No 108/1935), one of the first Orders made under the newly-enacted Aliens Act 1935. The employment of non-nationals is now governed by the Employment Permits Act 2024 (“*the 2024 Act*”), section 7(1) of which contains a general prohibition on “[a] *foreign national*” (defined by section 2(1) as “*a non-national within the meaning of the Immigration Act 1999*”, which in turn refers back to the definition of “*alien*” in the Aliens Act 1935) entering the service of an employer, or being in employment, in the State otherwise than in accordance with an employment permit issued under that Act.
37. The distinction between nationals and non-nationals in this context is a sharp one. The power to regulate (and to prohibit) the entry of non-nationals seeking to come to the State for the purposes of employment, and the power to regulate (and to prohibit) the entry of non-nationals into employment within the State, is an essential aspect of the State’s control over non-nationals and a fundamental incident of its sovereignty: *Osheku v Ireland* [1986] IR 733 (“*Osheku*”); *Laurentiu v Minister for Justice* [1999] 4 IR 26 (“*Laurentiu*”); *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360; *Sivsivadze v Minister for Justice and Equality* [2015] IESC 53, [2016]

2 IR 403 and *Gorry v Minister for Justice and Equality* [2020] IESC 55, [2024] 1 IR 666.

38. In *Osheku*, Gannon J stated (at 746):

“The control of aliens which is the purpose of the Aliens Act, 1935, is an aspect of the common good related to the definition, recognition, and the protection of the boundaries of the State. That it is in the interests of the common good of a State that it should have control of the entry of aliens, their departure, and their activities and duration of stay within the State is and has been recognised universally and from earliest times. There are fundamental rights of the State itself as well as fundamental rights of the individual citizens”

This statement has been cited with approval by this Court on many occasions, including in *Laurentiu* and in the *Illegal Immigrants (Trafficking) Bill 1999*.

39. The State has of course entered into various agreements and arrangements the effect of which is to give particular categories of non-nationals the right to work and/or establish a business in the State. By reason of the arrangements commonly referred to as the *Common Travel Area*, citizens of the United Kingdom were exempted from the application of the Aliens Act 1935 and for the purposes of the Immigration Acts are deemed not to be “*non-nationals*”, with the result that they are not required to obtain an employment permit in order to take up employment here. Following Ireland’s accession to the European Economic Community (as was) in 1973, nationals of other Member

States are entitled to come to the State for the purposes of looking for or taking up employment or establishing a business and similar rights now extend to nationals of non-EU Member States in the EEA and to Swiss nationals.

40. Subject to those – significant – qualifications, it remains the general position under Irish law that third-country nationals do not have any right to enter the State for the purposes of seeking employment here, or to enter into employment in the State, or to establish a business here, without first obtaining an appropriate permission and then subject to whatever conditions may be imposed on such permission.

Asylum Seekers, Refugees and the Decision in NHV

41. Article 14(1) of the *Universal Declaration of Human Rights* adopted by the United Nations General Assembly in 1948, recognised as fundamental the right of “[e]veryone ... to seek and to enjoy in other countries asylum from persecution.” That Declaration was adopted in the immediate aftermath of the Second World War, in which (as the Preamble to the Declaration recites) “disregard and contempt for human rights [had] resulted in barbarous acts which have outraged the conscience of mankind” and which had resulted in the forcible displacement of millions of persons. There was also a recognition of a widespread failure to offer protection to nationalities and groups that had suffered persecution before and during the Second World War, particularly (but not solely) European Jews.¹¹

¹¹ Ireland was one of the States that attended the Evian Conference in 1938, convened to address the issue of German and Austrian Jewish refugees wishing to flee persecution by Nazi Germany. Ireland’s representative, Francis T Cremins, explained to the Conference that, while the Irish Government had “been happy to accept the

42. Three years later, in 1951, the United Nations adopted the *Convention relating to the Status of Refugees*. The Convention was limited in scope to persons fleeing events occurring before 1 January 1951 (the Second World War and its aftermath), within Europe. However, in 1967 the *Protocol relating to the Status of Refugees* was adopted by the UN General Assembly, removing those temporal and geographic limitations. In this judgment, I shall refer to the 1951 Convention, as amended and extended by the 1967 Protocol, as the “*Refugee Convention*” or the “*Geneva Convention*”.
43. Chapter III of the Refugee Convention contains a number of provisions relating to “*Gainful Employment*”. Article 17(1) provides that, “*as regards the right to engage in wage-earning employment*”, “[t]he Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to [foreign] nationals ... in the same circumstances”. Article 17(2) provides that “*restrictive measures imposed on aliens or the employment of aliens for the protection of the national labour market*” should not be applied in certain circumstances, including where the refugee “*has completed three years’ residence in the country*”. Finally, Article 17(3) provides that “*Contracting States shall give sympathetic consideration to assimilating the [employment] rights of all refugees ... to those of nationals*”.

invitation extended to them in order to demonstrate their sympathy,” they were “not, to their great regret, in a position to make any substantial contribution to the solution” given Ireland’s small size and population and its largely agricultural economy (Kennedy et al (eds), *Documents on Irish Foreign Policy: Volume V 1937-1939* (Royal Irish Academy 2006) (Doc No 200 NAI DFA 243/67)). The Conference was an abysmal failure.

44. Article 19 deals with the “*Liberal professions*” and provides that “*Contracting State[s] shall accord to refugees lawfully staying in their territory who [have relevant professional diplomas] ... treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.*”
45. Finally, Article 24 (“*Labour legislation and social security*”) provides that “*Contracting States shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of [employment conditions and social security]*”.
46. These (and other) provisions of the Refugee Convention draw a distinction between refugees “*lawfully in*” the territory of a Contracting State and refugees “*lawfully staying in*” such territory. According to one leading commentator, although “*lawfully staying*” does not necessarily imply the “*grant ... of permanent residence, or establishment of domicile*”, it does require presence in a state that “*is ongoing in practical terms.*” While “*a formal declaration of refugee status*” may not be necessary to establish “*lawfully staying*” – refugees in receipt of temporary protection who are *de facto* settled in the territory of a Contracting State may be “*lawfully staying*” – “*rights which require lawful stay do not accrue to refugees awaiting the results of a formal process of status verification, as the purely provisional nature of such persons’ presence in the host state is at odds with the Convention’s reservation of these more integration-oriented rights for those who are expected to remain in the state party for a significant period of time*”: Hathaway, *The Rights of Refugees under International Law* (2nd ed; 2021), page 925.

47. To the same effect is Hathaway and Foster, *The Law of Refugee Status* (2nd ed; 2014) where Articles 17, 19 and 24 are identified as rights that “*inhere only once the refugee is ‘lawfully staying’ ..., usually consequent to formal recognition of refugee status*”: page 26.
48. Goodwin-Gill and McAdam, *The Refugee in International Law* (4th ed; 2021) also make it clear that these Articles apply only to refugees lawfully resident in the Contracting State, namely “*those who are, as it were, enjoying asylum in the sense of residence and lasting protection*”: pages 595-597. On that basis, being permitted to remain in the Contracting State solely for the purpose of the determination of an application for asylum would not constitute a refugee as “*lawfully staying*” for the purposes of Articles 17, 19 or 24.
49. The United Nations High Commissioner for Refugees (UNHCR) also appears to interpret “*lawfully staying*” in the Refugee Convention as referring to refugees recognised as such: see *Decent Work for Refugees: UNHCR Guidelines on International Legal Standards Relating to Decent Work for Refugees* (July 2021), §§7 & 15 (as well as footnote 54).
50. That said, other commentators do make the case that asylum seekers have – or ought to have – the right to work under international law, at least in certain circumstances. That asserted right is frequently located in Article 6 of the International Covenant on

Economic, Social and Cultural Rights (ICESCR).¹² However, other international instruments such as the Universal Declaration of Human Rights, and (in Europe) the European Social Charter are also invoked in this context.¹³ Whatever the merits of such claims – and they certainly do not (at least yet) appear to command general support in State practice¹⁴ – it follows from Article 29.6 of the Constitution that the Refugee Convention and the other international instruments invoked in this debate have the force of law in the State only to the extent expressly provided for by the Oireachtas (or, to the extent that such instruments are incorporated into EU law, by the EU legislator). While Ireland has ratified both the Refugee Convention and the ICESCR, it has not yet taken steps to incorporate the ICESCR into Irish domestic law, whereas the Refugee Convention has been part of Irish law for many decades.

¹² For a discussion of Article 6 and the expansive way in which it has been interpreted by the UN Committee on Economic, Social and Cultural Rights see the discussion in Hathaway, *The Rights of Refugees under International Law*, page 931 and following. In his judgment in *NHV*, O’ Donnell J refers to a comment of the Committee on Economic, Social and Cultural Rights in 2005 emphasising the importance of the right to work both to the realisation of other human rights and as “*an inseparable and inherent part of human dignity*” (§17). Notably, he did not refer to, less still endorse, any of the statements of the Committee to the effect that such a right to work applies to everyone regardless of legal status, including those whose presence in the state concerned is “*irregular*”.

¹³ For a discussion of the right to work of asylum seekers more generally see, for instance, Costello and O’ Cinnéide, ‘The Right to Work of Asylum Seekers and Refugees’ (ASILE, 10 May 2021). Reference may also be made in this context to ‘The Michigan Guidelines on the Right to Work’ (2010) 31(2) Michigan Journal of International Law 293.

¹⁴ As indeed the UN Committee on Economic, Social and Cultural Rights acknowledges: see the commentary referenced in Hathaway, *The Rights of Refugees under International Law* at page 935, where it states that “*the concrete reality [is] that most states impose labour market restrictions on foreigners; they do so because they believe international law entitles them to do so; and most states have not sought to formally interpret or reserve their Article 6 obligations because it is not understood as requiring them to guarantee the right to work to any non-citizen.*”

51. Ireland acceded to the Refugee Convention in 1956 and to the 1967 Protocol in 1968. Its accession to the Convention was expressly subject to a number of declarations and reservations including, with regard to Article 17, a statement that “*the Government of Ireland do not undertake to grant to refugees rights of wage-earning employment more favourable than those granted to aliens generally.*” Post-ratification, no immediate steps were taken to incorporate the Refugee Convention into Irish domestic law. Even so, in *Fakih v Minister for Justice* [1993] 2 IR 406 and *Gutrani v Minister for Justice* [1993] 2 IR 427, the State was held to have bound itself to examine applications for asylum in accordance with the Refugee Convention on the basis that it had given an explicit commitment to the UNHCR to do so. However, it was not until the enactment of the Refugee Act 1996 (“*the 1996 Act*”) that the Refugee Convention was comprehensively given effect to in Irish law.
52. Subject to certain qualifications which for present purposes can be disregarded, the 1996 Act gave persons seeking asylum or protection in the State (whether arriving “*at the frontiers of the State*” or already in the State) the right to enter and remain in the State pending the determination of their applications: sections 8 and 9. Sections 15 and 16 are the equivalent provisions in the 2015 Act, section 16(1) providing that an applicant for international protection “*shall be given ... a permission that operates to allow the applicant to enter and remain or, as the case may be, to remain in the State for the sole purpose of the examination of his or her application, including any appeal*

to the Tribunal in relation to the application.”¹⁵ A permission given under section 16(1) is “*valid until the person to whom it is given ceases ... to be an applicant*”: section 16(2). A person whose application is refused, and who is not otherwise given a permission to remain in the State, will cease to be an applicant for the purposes of that provision and will in principle be liable to removal from the State: section 3(2)(f) of the Immigration Act 1999 (as amended).

53. The right to remain in the State enjoyed by an applicant for international protection is therefore (in Hathaway’s language) “*provisional*”. It is also precarious. As a matter of international, EU and Irish domestic law, such an applicant has the right to remain – to be “*lawfully in*” – in the State only for the purpose of having his or her application for protection determined. If that application is refused, *prima facie* that person has no further right to remain in the State and will be liable to removal (in practice, some unsuccessful applicants are given some form of permission to remain in the State). While there was some conflict on the affidavits as to the proportion of applications for protection that succeed, it is unnecessary to engage with the detail of that dispute here: the High Court Judge expressly found “*that a large number of applicants for international protection do not succeed in achieving protection*” and that finding is not challenged on appeal (§43). The fact that a “*large number*” of applicants for international protection (who are permitted to remain in the State solely on the basis

¹⁵ The language of section 16(1), and in particular the reference to “*sole purpose*”, differs somewhat from the language in the 1996 Act and appears to reflect Article 7(1) of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (“*the Procedures Directive*”). Article 7(1) also states that the right to remain does not confer an entitlement to a residency permit. Ireland has also “*opted in*” to the Procedures Directive.

that they have applied for such protection) are subsequently determined not to be entitled to it (and who therefore lose their right to remain in the State) is a very relevant consideration in this context and was recognised as such by this Court in *NHV*.

54. On the issue of access to employment, the 1996 Act drew a very sharp distinction between the position of applicants for asylum and those recognised as refugees. Section 9(4)(b) prohibited applicants for asylum from “*seek[ing] or enter[ing] employment or carry[ing] on any business, trade or profession during the period before the final determination of [their] application*”. In contrast, the 1996 Act took a maximalist approach to the employment rights of recognised refugees, with section 3(2)(a)(i) providing that, once declared as such, refugees were, without more, “*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 to the like extent in all respects as an Irish citizen*”. That provision went a good deal further than was required by the Refugee Convention, not least because it became operative immediately on recognition and also because it gave recognised refugees exactly the same employment and self-employment rights as citizens, without qualification or limitation.¹⁶

55. Similarly, section 53(a) of the 2015 Act gives “[*a*] *qualified person*” (a person in respect of whom either a refugee or subsidiary protection declaration is in force) the entitlement “*to seek and enter employment, to engage in any business, trade or profession and to*

¹⁶ Save for the exceptional power of the Minister to make an order under section 17(2)(a)(i) of the 1996 Act excluding the application of section 3 “*in the interest of national security or public policy* (*‘ordre public’*)”.

have access to education and training in the State in the like manner and to the like extent in all respects as an Irish citizen”.

56. EU law also draws a sharp distinction between applicants for asylum and recognised refugees for employment purposes. Successive directives have given applicants for asylum a highly conditional entitlement to access the labour market. In contrast, those recognised as refugees must be authorised “*to engage in employed or self-employed activities subject to rules generally applicable to the profession and to the public service, immediately after the refugee status has been granted*” (Qualification Directive, Article 26(1)).¹⁷ Beneficiaries of subsidiary protection have a similar entitlement but may be subject to labour market prioritisation measures “*for a limited period ... in accordance with national law.*” The Recast Qualification Directive, in Article 26, assimilates the position of beneficiaries of subsidiary protection with recognised refugees.¹⁸ Regulation (EU) 2024/1347, which repeals the Recast Qualification Directive essentially re-enacts its provisions on employment.

57. The distinction in this context between applicants for asylum/international protection and those whose applications for protection have been assessed and determined to be well-founded is not technical or incidental. Applicants for international protection in

¹⁷ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

¹⁸ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).

the host country are permitted to enter and remain in the host country solely by reason of making a claim to such protection and for the purposes of having such claim appropriately assessed. Their presence while that claim is assessed is conditional, contingent and provisional. As the Judge here found, many such claims turn out, on assessment, to be unfounded (though that was clearly not the case in respect of AM's claim). In the employment context, the position of such applicants cannot be equated with (and as a matter of domestic, EU and international law is not equated with) those who have been granted international protection and who as a result have an entitlement to reside long-term in the host country. Allowing unqualified access to the labour market to beneficiaries of international protection reflects their particular status and that long-term entitlement to remain.

58. Returning to the 1996 Act, however, a notable feature of it was the absolute prohibition on employment for asylum applicants in section 9(4)(b), a prohibition that was not subject to any qualification or time-limitation and that continued to apply until the final determination of the application for asylum, regardless of how long that process took (and, in practice, it could take many years). The absolute and indefinite exclusion of *any* possibility of *any* form of employment clearly had a real potential to impact adversely on asylum seekers, not just in material/financial terms but also in terms of negative social and psychological effects.¹⁹ That had been recognised at EU level, first

¹⁹ Costello and O' Cinnéide (see footnote 13 above) capture the dual aspect of the value of the right to work very well: "[t]he right to work has both instrumental and intrinsic value. Its instrumental value lies in the fact that work enables individuals to participate in social, economic, and political life, and crucially to earn a livelihood. Work is also intrinsically valuable, as people derive dignity and self-worth from their engagement with their

in the provisions of Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (“*the 2003 Directive*”) and then in the 2013 Directive which repealed and replaced it, each of which imposed on Member States an obligation (albeit in significantly qualified/conditional terms) to permit applicants for asylum/international protection access to the labour market.

59. The Directives are considered in more detail later in this judgment but, for present purposes, it is enough to observe that those Directives (and their *travaux préparatoires*) explicitly acknowledge the significance of access to work for the dignity, self-sufficiency and social inclusion of applicants for asylum/international protection. However, the 2003 Directive never applied to Ireland and Ireland did not participate in the adoption of the 2013 Directive and it did not apply to the State prior to 2018 when, in response to *NHV*, the State resolved to “*opt-in*” to it.²⁰

environments and others through work.” Under the various iterations of the Reception Conditions Directives, the material needs of applicants for international protection must be provided for by the host Member State and in this State such material needs are intended to be provided for through the direct provision system (which also makes provision for the payment of a small weekly monetary allowance to applicants). The right to seek access to the labour market is not therefore the primary means – or at least not the sole means – for ensuring that the material needs of applicants are met. But that does not appear to me to take away from the broader point being made by Costello and O’ Cinnéide (footnote 13) as to the value of work in this context (a point also recognised by the Court of Appeal and by this Court in *NHV*).

²⁰ The 2003 Directive was adopted pursuant to Title IV (Article 63) TEC. The 2013 Directive was adopted by the EU pursuant to Title V of Part Three TFEU (area of freedom, security and justice), specifically Article 78(2)(f) in Chapter 2. Ireland did not participate in the adoption of the 2003 Directive and never “*opted-in*” to it. Accordingly, the 2003 Directive never applied to Ireland (Protocol 4 TEC). As regards the 2013 Directive, Ireland did not participate in its adoption and was not initially bound by it (Protocol 21 TFEU). However, in the aftermath of this Court’s decision in *NHV*, the State decided to “*opt-in*” to the 2013 Directive as provided for in Article 4 of Protocol 21 (Article 4 refers to the “*accept[ance]*” of a Title V measure). That decision was approved by the Houses of the

60. *NHV* began life as a challenge to section 9(4) of the 1996 Act. Sometime after the commencement of the proceedings the 1996 Act was repealed and replaced by the 2015 Act. However, section 16(3)(b) of the 2015 Act re-enacted in materially identical terms the prohibition on asylum-seeker employment in section 9(4)(b).
61. The applicant (NHV) was a Burmese national who had applied for asylum in the State in 2008.²¹ Five years on, his application had still to be determined and section 9(4)(b) continued to exclude him from the labour market. He was then offered a job in the direct provision facility in which he was residing but he was refused permission to take up the job. He challenged that refusal, as well as challenging the validity of the statutory prohibition. That challenge was unsuccessful in the High Court (McDermott J) ([2015] IEHC 246) and before the Court of Appeal (Ryan P and Finlay Geoghegan J; Hogan J dissenting) ([2016] IECA 86, [2018] 1 IR 246) but succeeded in this Court ([2017] IESC 35, [2018] 1 IR 246).
62. In the High Court, McDermott J held firstly that, given the terms of the section 9 prohibition, it was not open to the Minister for Justice and Equality to grant any employment permission to an asylum applicant (a finding upheld by the Court of Appeal and by this Court on appeal). As regards the validity of that prohibition,

Oireachtas and the Minister for Justice and Equality then made the 2018 Regulations. Protocol 21 is discussed in more detail in my judgment in *NS v Minister for Justice and Equality* [2025] IESC 48.

²¹ NHV was originally one of two applicants, pursuing separate applications for judicial review which were heard together in the High Court. The applicant in the other application, FT (a national of Cameroon) did not pursue an appeal from the High Court.

McDermott J was satisfied that asylum seekers had no right to work or to earn a livelihood under Article 40.3 of the Constitution (Judgment, §31). But, even if they had such a right in principle, the State had a very broad power to regulate its “*scope and exercise*” (§32). Applying the proportionality test articulated by Costello J in *Heaney v Ireland* [1994] 3 IR 593 (“*Heaney*”) (at 607), McDermott J was not satisfied that the restrictions on employment imposed by the section were disproportionate (§§34-35). McDermott J went on to consider and reject arguments advanced by the applicants based on EU law and on Article 8 ECHR. I will consider the EU law argument further when discussing the judgment of Hogan J in the Court of Appeal.

63. The Court of Appeal (by a majority) dismissed NHV’s appeal. For Finlay Geoghegan J (with whose judgment Ryan P agreed), NHV’s status “*as an applicant for asylum*”, who had been granted leave to enter and remain in the State solely for the purpose of his application for asylum being determined, was central to assessing whether he had any constitutionally-protected right to work or earn a livelihood (§§25-26). In her view, the right to work or earn a livelihood was “*inextricably linked to a person’s status within the State*” and Article 40.3 could not be construed as giving such a right to applicants for asylum (§§27-28). Insofar as a right to earn a livelihood formed “*part of the personal rights of [the] citizen protected by Article 40.3 [and] capable of enforcement against the State,*” that flowed “*from the social contract between the citizen and the State and [was] intimately connected with the [fundamental] entitlement [of the citizen] to live in the State*” (§29). NHV therefore did not have any such constitutionally-protected right and the issue of whether section 9(4) was repugnant to the Constitution did not arise (§§30-31).

64. Hogan J differed on that issue (Finlay Geoghegan J agreed with his judgment on all other issues, including the EU law issue). While in his view the authorities were somewhat unsatisfactory, Hogan J considered that they clearly established that the right to earn a livelihood is a personal right protected by Article 40.3.1° of the Constitution, as well as an aspect of the property rights protected by Article 40.3.2° (§92). In principle, “*non-citizens ... enjoy[ed] the rights guaranteed by the fundamental rights provisions ... of the Constitution*” (Articles 40-44) “*in much the same ... manner as citizens*” (§137), though there might be cases where non-citizens would not be permitted to invoke those provisions or where at least claims to do so would “*be viewed with circumspection*” (§138) and, generally, “*the State’s capacity to regulate or restrict the fundamental rights of non-citizens [was] ... greater where*” such non-citizens were present in the State “*for reasons which [were] fleeting, accidental, temporary or conditional*” (§139). As regards whether a non-citizen could invoke the constitutional right to earn a livelihood, certain categories of employment were or might reasonably be linked to citizenship (reflected in the provisions of Article 51 TFEU) and it could be envisaged that the State might reserve certain categories of public service to citizens (§141) but that was not the case so far as the majority of employment was concerned (§142) and, in Hogan J’s view, it followed “*that non-citizens should in principle be permitted to rely on the constitutional right to earn a livelihood*” (original emphasis) (§143). The dignity flowing from gainful employment was an important consideration in that context (*ibid*).

65. Hogan J then turned to the question of whether section 9(4)(b) of the 1996 Act met constitutional standards. In his view, “[t]he exclusion of non-nationals from the labour market ... serve[d] important State goals” and, in principle, a legislative measure entirely excluding non-nationals “from the labour market for even a period of years would not ... be unconstitutional” (§149). However, it was clear from *Heaney* that a legislative measure restricting a constitutional right must preserve “the essence of the constitutional right in question” (§150). Here, “the open-ended and indefinite exclusion” of applicants for asylum from the labour market contained in section 9(4)(b) – which had by then applied to NHV for over 7 years – struck “at the very substance of” NHV’s constitutional right to earn a livelihood and, for that reason, failed the *Heaney* proportionality test (§155). Hogan J would therefore have granted a declaration that section 9(4)(b) was unconstitutional in its current form. He emphasised that qualification — the key issue was not the exclusion of asylum applicants from the labour market *per se* but that such exclusion was “of indefinite duration [and] capable ... of applying for very many years” to individual applicants such as NHV (§157; also §§168-169). That, Hogan J observed, sapped applicants’ “autonomy and self-respect” and compromised the “key constitutional objective of preserving the essential dignity of the individual” leading ultimately to psychological difficulties and, in certain instances, psychiatric disturbance (§151).
66. Hogan J rejected NHV’s other grounds of challenge. In his view, nothing in the jurisprudence of the European Court of Human Rights suggested that the ECHR protected “a substantive free-standing right to earn a livelihood” (§§160-161). As regards NHV’s contention that section 9(4)(b) was incompatible with EU law, given

that Ireland had elected to opt-out of the Reception Conditions Directive, legislation enacted by the Oireachtas regulating the right to work of asylum applicants could not be said to involve the implementation of EU law and therefore did not fall within the scope of the Charter (§77). However, Hogan J went on to consider the effect of the Charter in any event. Given that Ireland subsequently opted into the Reception Conditions Directive, this part of his analysis (with which the other members of the Court of Appeal agreed) is worthy of particular note. Its “*apparently broad language*” notwithstanding, Hogan J was not persuaded that Article 15(1) of the Charter (which provides that “[e]veryone has the right to engage in work and to pursue a freely chosen or accepted occupation”) conferred a right to work on everyone “*who happen[s] to be within the territory of the [EU]*”, including third-country nationals. Any such suggestion was inconsistent with Article 15(3) of the Charter (which provides that “[n]ationals 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”). It was clear from Article 15(3) that third-country nationals such as NHV needed to be *authorised* to work and in the absence of any such authorisation, Article 15(3) could not assist NHV. That conclusion was supported by the approach taken by the Administrative Court in *R (Rostami) v Secretary of State for the Home Department* [2013] EWHC 1494 (Admin), [2014] Imm AR 56 (§§78-84).

67. This Court gave leave for a further appeal by NHV. Subsequent to the grant of leave, NHV was granted refugee status but the Court nonetheless decided to allow the appeal to proceed. O’ Donnell J (as the Chief Justice then was) gave the sole judgment on the appeal. That judgment dealt very briefly with the non-constitutional issues, O’ Donnell

J agreeing that the Minister had no power to give NHV permission to work in the State (§§9-11) and that no issue arose under the Charter or the ECHR (§11). Addressing the constitutional question, he emphasised the blanket nature of the prohibition on employment that followed from section 9(4) (§14). It had, he said, to “*be recognised that work is connected to the dignity and freedom of the individual which the Preamble tells us the Constitution seeks to promote*” (§16) and, in that context, he cited with approval (though without necessarily endorsing every aspect of it) an extract from General Comment No 18 on the right to work adopted by the UN Committee on Economic, Social and Cultural Rights (24 November 2005) emphasising the importance of the right to work to human dignity and to the realisation of other human rights (§17). It followed, in his view, “*that a right to work at least in the sense of a freedom to work or seek employment [was] a part of the human personality and,*” having regard to Article 40.1 of the Constitution, could not “*be withheld absolutely from non-citizens*” (§18).

68. However, O’ Donnell J accepted that there were clear differences between citizens on the one hand and non-citizen asylum applicants on the other which justify a “*significant distinction in the field of employment*” and “*a number of legitimate considerations ... permitting a policy of restriction on [the] employment*” of non-citizens who were asylum seekers. That was “*precisely the type of judgement which the Government and Oireachtas [was] required to make, and ... courts should be extremely slow to second guess [such a judgement], even by reference to a proportionality standard*” and, in his view “*[e]ven if some employment [was] permitted after some time, it [did] not follow*

that any employment should be permitted: it may be legitimate to limit that to defined areas of the economy, perhaps where there is a demonstrated need” (§§18-19).

69. However, section 9(4) did “*not merely limit the right [to seek employment] severely: it remove[d] it altogether.*” If a right to seek employment was available in principle, it was not “*an appropriate and permissible differentiation between citizens and non-citizens, and in particular between citizens and asylum seekers, to remove the right for all time from asylum seekers*” (§20). Given that NHV had, at that point, been in the asylum system for more than eight years, during which time he had been prohibited from seeking any form of employment, the point had been reached when “*the legitimate differences between an asylum seeker and a citizen*” could no longer be said “*to justify the exclusion of an asylum seeker from the possibility of employment.*” The consequential “*damage to the individual’s self worth, and sense of themselves*” – which was borne out by “[t]he affidavit evidence of depression, frustration and lack of self-belief” in NHV itself – was “*exactly the damage which the constitutional right*” (the right to seek employment) sought “*to guard against*” (§21). In principle, therefore, O’ Donnell J was “*prepared to hold that in circumstances where there is no temporal limit on the asylum process, then the absolute prohibition on seeking employment ... is contrary to the constitutional right to seek employment*” (§22).

70. Denham CJ and Clarke, MacMenamin, Laffoy, Charleton and O’ Malley JJ agreed with O’ Donnell J’s judgment. Having given judgment, the Court initially adjourned consideration of the order to be made for a period of 6 months but ultimately made an

order declaring unconstitutional section 9(4) of the 1996 Act, as re-enacted in section 16(3)(b) of the 2015 Act ([2017] IESC 82).

71. As noted already, in response to the decision in *NHV* the State decided to opt-in to the 2013 Directive and for that purpose the Minister for Justice made the 2018 Regulations. In argument, counsel for AM appeared to suggest that, in these circumstances, the constitutional right identified in *NHV* and the employment rights of applicants for international protection under the 2013 Directive should be treated as co-extensive. In my view, that is clearly not so. The scope of the *NHV* right to seek employment is a question of Irish constitutional law, unaffected by the provisions of EU secondary law and the issue of whether the labour market access regime established by the 2018 Regulations (as amended) is consistent with the Constitution is distinct from, and independent of, any question of its compatibility with EU law.

The NHV Constitutional Right to Seek Employment and the 2018 Regulations

72. *NHV* is a significant decision. It identifies the “*essential equality of the human person*” as the foundation on which the Constitution is set (per O’ Donnell J at §16), thus recognising, as *Quinn’s Supermarket v Attorney General* [1972] IR 1 had previously recognised, “*the radical equality that underlies our inherent value as human beings*”.²² That recognition in turn provides the conceptual foundation for a coherent framework for addressing the application to non-citizens of the rights and freedoms protected by

²² See my judgment in *Doe v Commissioner of An Garda Síochána* [2025] IESC 44, §10, citing Binchy, ‘Dignity as a Constitutional Concept’ in Carolan and Doyle (eds) *The Irish Constitution: Governance and Values* (2008) at 317.

the Constitution. *NHV* is also significant for its recognition of the strong connection between work and “*the dignity and freedom of the individual*” which the Constitution in its Preamble explicitly seeks to promote. It was on that basis that the Court concluded that the right to seek employment was part of the human personality and thus within the scope of Article 40.1 of the Constitution and therefore could not properly be absolutely withheld from non-citizens (§18). But the Court also made it clear that, in this context, the rights of non-citizens could not properly be assimilated to the rights of citizens. To the contrary, *NHV* expressly acknowledges that there is a “*significant distinction*” between citizens and non-citizens in the area of employment. As a result, the Executive and the Oireachtas are permitted to impose significant restrictions on the employment of asylum seekers and, as the branches of government to which such matters are assigned, the courts should give “*considerable latitude*” to their judgement (§§18-19).

73. Although he did so by a slightly different analytical route (which did not go *via* Article 40.1) Hogan J in the Court of Appeal reached essentially the same end point as this Court. He was also of the view that the State has broad powers to restrict the employment of non-nationals, even within the framework of *Heaney* proportionality, provided only that the “*essence*” or “*core*” of the constitutional right was respected and not negated. While O’ Donnell J did not use precisely that language, he clearly considered that the State enjoyed a broad regulatory power in this area, subject to ensuring an irreducible minimum of access such as to safeguard and preserve the “*essential dignity*” of asylum seekers and their “*self worth, and sense of themselves*”. For both Hogan J and this Court, the fundamental problem with section 9(4)(b) was that it absolutely prohibited *all* employment *indefinitely*.

74. In my view, it cannot plausibly be suggested that the restrictions on the employment of international protection applicants in the 2018 Regulations, and in particular the exclusion of employment in the public sector, negate the “*essence*” or “*core*” of their constitutional right to seek employment or otherwise fail to satisfy the constitutional standard articulated in *NHV*.
75. The 2018 Regulations provide for a very significant degree of labour market access for such applicants, provided only that they have been waiting for at least six months for a first instance decision on their application. That threshold condition is itself significant, contrasting as it does with the period for which *NHV* had been excluded from employment by the time his appeal came before this Court. Far from being “*open-ended*” or “*indefinite*”, the period of exclusion under the 2018 Regulations is both defined and relatively short. Ireland did not elect to give labour market priority to EU citizens, EEA nationals and/or legally resident third-country nationals (as it could have done under Article 15(2) of the 2013 Directive). Regulation 14(6) does prohibit an employer from employing the holder of an LMAP unless at least 50% of its employees are EEA nationals (and/or Swiss nationals) but that is a significantly less restrictive condition than full employment priority to EU/EEA nationals would involve (and it is not, in any event, challenged by AM; that is unsurprising given that there is no evidence of AM being affected by it). Another important feature of the labour market access regime is that it is not employment-linked. The grant of an LMAP is not dependent on the applicant having received an actual job offer and is not employment-specific. Subject to Regulation 11(9)(a), the holder of an LMAP is free to seek any employment and is free to change employer and/or employment without any requirement to obtain

a new permission (the 2018 Regulations do impose certain *notification* requirements on both employee and employer but no requirement to obtain any further *authorisation*). In that respect the LMAP system differs significantly (and, from the perspective of the LMAP holder, advantageously) from the employment permit system that operates under the 2024 Act. The 2018 Regulations also permit self-employment, subject to the prohibition on contracting with any of the bodies listed in Schedule 6 and subject also to Regulation 11(10) (which prohibits an LMAP holder from “*employ[ing] any person or carry[ing] on a business in partnership with another person*”). Furthermore, LMAP holders in employment are entitled to the benefits and protections of Irish employment law in the ordinary way (though certain statutory protections – such as the protection from unfair dismissal – apply only to those with a certain minimum level of continuous service, which in practice may exclude protection applicants).

76. These important aspects of the regime established by the 2018 Regulations were barely acknowledged in AM’s submissions. AM effectively invites the Court to focus solely on the exclusion of employment in the public sector and, in particular, on the effect of that exclusion on his ability to obtain employment in his preferred area (as a “*medication and patient safety specialist*”) and to adjudicate (and condemn) the 2018 Regulations on the basis of that blinkered focus. In my view, that is not the correct approach. The question of whether the right to access employment given by the 2018 Regulations is such as to meet the requirements of *NHV* must be assessed *objectively* and in the round. The parameters of the *NHV* right are not to be determined by reference to the *subjective* preferences of individual applicants. Otherwise, the State’s regulatory competence in this area would effectively be set at nought.

77. Notwithstanding the exclusion of the public sector, the 2018 Regulations provide for broad access to employment in the State, both generally and with specific reference to the pharmacy sector. There is no evidence on which this Court could properly conclude that the exclusion of employment in the public sector has the effect of frustrating the right of access recognised in *NHV* or undermining its objectives. All the (limited) evidence is the other way: AM was able to obtain employment, as a pharmacy technician in a community pharmacy, at a reasonable wage, in the period prior to the determination of his international protection application. That was not “*any old job*” as was rather dismissively suggested in argument: it was a responsible and well-paid position that, on its face (and there was not a whit of evidence to the contrary) more than met the objectives of dignity, socialisation and social inclusion, financial independence and self-sufficiency and self-worth which the right to seek employment identified by this Court in *NHV* was intended to promote and secure.
78. The High Court Judge considered that the effect of the impugned provision of the 2018 Regulations was “*not to breach a constitutionally protected right but to operate as a restriction on a freedom which itself has been found to be highly qualified in the case of applicants for international protection*” (Judgment, §104). He also emphasised that “*the policy considerations that underpin the restriction are matters very firmly located in the executive and legislative spheres and which must be afforded a considerable margin of appreciation*” (*ibid*). Viewed in that light, he was satisfied that the 2018 Regulations provided effective access to the labour market and that the restrictions to which such access was subject were “*substantially justified ... as achieving ends ...*

proportionate to the public interest in regulating and managing the activities of persons who are permitted to remain on the territory of the State” (§105).

79. AM at all times bore the burden of establishing that Regulation 11(9) and Schedule 6 of the 2018 Regulations amounted to an impermissible restriction of his constitutional right to seek employment as an applicant for international protection. That burden did not shift merely because AM sought to make the case that those restrictions offended the principle of proportionality: *O’ Doherty v Minister for Health* [2022] IESC 32, [2023] 2 IR 488. It is also clear that the proportionality principle allows significant scope for policy judgements: *ibid*, §57.
80. I agree with the Judge that the restrictions on access to employment at issue here fall well within the bounds of what is constitutionally permissible. The starting point for assessment is that, as a matter of Irish law, non-nationals generally have *no* right to seek or take up employment in the State. Applicants for international protection constitute a limited, and conditional, exception to that general rule. It is clear from *NHV* that the State is not required to give such applicants a right to access employment equivalent to that enjoyed by citizens. Such applicants have only a provisional and precarious right to be in the State in the first place, and there is a real prospect that many of them will be unsuccessful in their applications and therefore become liable to involuntary removal. *NHV* makes it clear that the State is entitled to have regard to those considerations in formulating policy in this area and that significant latitude is to be afforded to the judgement of the legislature and of the executive (involving the exercise of delegated legislative powers by it) even within the framework of applying a

proportionality test. The restrictions on access that apply under the 2018 Regulations have a rational basis, serve important State goals (as to which see the observations of Hogan J in *NHV*, §149) and do not impair the essence of the right to seek employment recognised in *NHV*, a right that is inherently highly qualified and conditional.

81. In particular, AM has not established that the exclusion of employment in the public sector restricts the right to such an extent as to undermine it or render it ineffective. There are obvious differences between public and private employment and the State has a broad competence in fixing the terms and conditions, including conditions of eligibility and access, in respect of employment in the public sector. *NHV* cautions that courts should be slow to second-guess the judgements made by the State in this area – such as the judgement made in adopting the 2018 Regulations – and in my view neither the arguments advanced nor the evidence produced by AM here come close to providing a basis for concluding that the exclusion of public sector employment impermissibly restricts the right to seek employment that applicants for international protection enjoy under the Constitution.
82. AM’s constitutional challenge therefore fails. That leaves for consideration AM’s EU law-based challenge to Regulation 11(9) and Schedule 6.

Are Regulation 11(9) and Schedule 6 incompatible with EU law?

83. The essential question presented by this aspect of AM's proceedings is whether the 2018 Regulations ensure "*effective access*" to the labour market for applicants for international protection in the State. In order to address that question, the relevant provisions of the 2013 Directive and the background to those provisions must be considered, as well as the jurisprudence of the CJEU, and in particular the opinion and judgment in *KS*. Article 15 of the Charter must also be considered.

The Background to the 2013 Directive

84. In 1999 the Union agreed to work towards the establishment of a *Common European Asylum System* (CEAS) based on the principles set out in the Refugee Convention. The EU then adopted a number of directives for that purpose including, the 2003 Directive.
85. The 2003 Directive was based on a Commission Proposal of 2001 (Commission, COM (2001) 181 final). The Explanatory Memorandum accompanying that Proposal explained the proposed employment provision (which differed in a number of respects from the text ultimately adopted in 2003 but which similarly envisaged that Member States should determine "*the conditions for the access to the labour market*") in the following terms:

"This Article is about access to the labour market. To leave complete discretion on whether or not to grant the right to work would not favour the similarity of national systems and would be against both the general

aims of this proposal and the conclusion on reception conditions adopted by the Council on 30 November and 1 December 2000. This Article seems a reasonable compromise that meets the mandate of the Council (some harmonisation on this issue) as well as the need of applicants for asylum and their accompanying family members to lead a normal life, without imposing on Member States the obligation to grant the right to work. Member States remain, therefore, in full control of the internal labour market, as they can decide the kind of work asylum applicants may apply for, the amount of time per month or per year they are allowed to work, the skills they should have, etc. ...” (my emphasis).

86. The primary focus of the 2003 Directive was on *material* reception conditions (housing, food, clothing and a daily expense allowance) but Article 11 (“[e]mployment”) was undoubtedly an important element also. Article 11(1) provided that Member States should determine a period of time, starting from the date of the application for asylum, during which an applicant would *not* have access to the labour market and Article 11(2) provided that where a decision at first instance had not been taken within one year of the making of an application for asylum (and provided the delay was not attributable to the applicant) “*Member States shall decide the conditions for granting access to the labour market for the applicant.*” Article 11 did not contain the language of “*effective access*”. Article 11(4) as adopted also provided that, “[f]or reasons of labour market policies, Member States [could] give priority to EU citizens and nationals of States parties to the [EEA] and also to legally resident third-country nationals.”

87. The recitals to the 2003 Directive emphasised the objective of “*ensur[ing] full respect for human dignity*” and promoting the application of Article 1 (respect for and protection of human dignity) and Article 18 (right to asylum) of the Charter (recital (5)) – no reference was made to Article 15 of the Charter – with the intent that asylum seekers should have “*a dignified standard of living and comparable living conditions in all Member States*” (recital (7)) and the desire “*to limit the secondary movements of asylum seekers*” (recital (8)).
88. As already noted, many States – including Ireland – gave recognised refugees the right to take up employment and the right of those granted asylum or subsidiary protection to access employment is also reflected in EU secondary law.²³ However, the adoption by the EU legislator of a specific and express obligation to provide for access to the labour market for applicants for asylum/international protection, even if in qualified terms, was on any view an important development.²⁴
89. However, Ireland did not participate in the adoption of the 2003 Directive and never opted into it.
90. In 2008, and again in 2011, the Commission proposed the recasting of the 2003 Directive. The 2008 Proposal (COM (2008) 815 final) proposed the amendment of

²³ First in Article 26 of the Qualification Directive and then in Article 26 of the Recast Qualification Directive, the provisions of which have already been referred to. Ireland opted into the Qualification Directive but not the Recast Qualification Directive.

²⁴ See Costello and O’ Cinnéide (footnote 13) as well as, generally, Hathaway, *The Rights of Refugees under International Law*.

Article 11(2) so as to provide that “*Member States shall decide the conditions for granting access to the labour market for the applicant, in accordance with their national legislation, without unduly restricting asylum seekers’ access to the labour market.*” The Explanatory Memorandum accompanying the 2008 Proposal explained that “*access to employment for asylum seekers could prevent exclusion from the host society, and therefore facilitate integration*” and “*would also promote self-sufficiency among asylum seekers.*” The proposal therefore aimed “*to facilitate access to the labour market*” by providing, firstly, that asylum seekers should be able to access employment after 6 months had elapsed after lodging their application (a proposal which was not ultimately adopted) and, secondly, by stipulating that “*the imposition of national labour market conditions shall not unduly restrict access*”. The rationale behind that proposed amendment was “*to better underline the objective of the current Article which [was] to ensure that asylum seekers are provided with fair opportunities to access employment in Member States.*”

91. The Commission issued a revised proposal in 2011 (COM (2011) 320 final). Article 15(2) of the proposal reflected what is now Article 15(2) of the 2013 Directive, with its language of “*effective access*”. The Commission also proposed the deletion of the provision permitting Member States to give priority to EU citizens. The Explanatory Memorandum again referred to the prevention of exclusion from the host society and the promotion of self-sufficiency, as well as observing that mandatory unemployment imposes costs on the host Member State. Thus, it was said, “*facilitating access to employment [was] beneficial both for asylum applicants and the host Member State.*” Later in the legislative process, in a Communication to the European Parliament on the

Council's position at 1st reading (COM (2013) 415 final), the Commission noted that the common position that had been adopted by the co-legislators was in some respects "*more restrictive*" than the Commission had proposed but observed that it had retained "*the obligation included in the commission proposal for Member States to ensure that while conditions on access to employment may be imposed, in practice they shall not be so restrictive as to effectively prevent access to employment*" (my emphasis).

The 2013 Directive

92. The 2013 Directive seeks to lay down "*standards*" – no longer "*minimum standards*" – "*for the reception of applicants for international protection ... in Member States*" (Article 1). The recitals are more extensive than in the 2003 Directive. Many of those recitals – and many of the new provisions of the Directive – are concerned with the detention of protection applicants. No issue of detention arises here. Again, there is a reference to laying down reception standards sufficient to ensure applicants "*a dignified standard of living and comparable living conditions in all Member States*" (recital (11)); reference is also made to "*a dignified standard of living for all applicants*" in recital (25) and "*to limit[ing] the secondary movements of applicants*" (recital (12)). Recital (23) refers specifically to labour market access and is in the following terms:

"In order to promote the self-sufficiency of applicants and to limit wide discrepancies between Member States, it is essential to provide clear rules on the applicants' access to the labour market."

Finally, recital (35) states that the “*Directive respects the fundamental rights and ... the principles recognised ... by the Charter*”. In particular, it states, “*this Directive seeks to ensure full respect for human dignity and to promote the application of Articles 1, 4, 6, 7, 18, 21, 24 and 47 of the Charter and has to be implemented accordingly.*” Notably, that list of Charter provisions does not include Article 15 of the Charter.

93. I have already referred to the provisions of Article 15 of the Directive, but it may be convenient to set them out in full at this point:

“1. Member States shall ensure that applicants have access to the labour market no later than 9 months from the date when the application for international protection was lodged if a first instance decision by the competent authority has not been taken and the delay cannot be attributed to the applicant.

2. Member States shall decide the conditions for granting access to the labour market for the applicant, in accordance with their national law, while ensuring that applicants have effective access to the labour market.

For reasons of labour market policies, Member States may give priority to Union citizens and nationals of States parties to the Agreement on the European Economic Area, and to legally resident third-country nationals.

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.”

94. Member States are obliged to report to the Commission “*the extent to which any particular conditions are attached to labour market access for applicants, and [to] describe such restrictions in detail*”: Article 28 and Annex 1(3) of the Directive.
95. Directive (EU) 2024/1346 of the European Parliament and of the Council of 14 May 2024 laying down standards for the reception of applicants for international protection (recast) (“*the 2024 Directive*”) repealed the 2013 Directive with effect from 12 June 2026. Article 17 of that Directive deals with employment and differs quite significantly from Article 15 of the 2013 Directive, including as regards the nature and scope of the restrictions that Member States are permitted to impose on labour market access. One notable feature of the Directive is the provision in Article 17(3) for equal treatment with Member State nationals in relation to terms of employment and related matters, including pay and dismissal (but not extending to access to employment). The 2024 Directive is an element of the EU’s *Pact on Migration and Asylum*. While Ireland did not participate in the adoption of the 2024 Directive (recital (73)) the Government has decided to opt into it and the provisions relating to material reception conditions are reflected in Part 4 of the International Protection Act 2026. To date, however, no change has been made to the labour market access rules in the 2018 Regulations. In any event, the provisions of the 2024 Directive do not bear on the issues in this appeal.

*The 2018 Regulations and the approach to labour market access in other EU
Member States*

96. Some further aspects of the labour market access regime created by the 2018 Regulations (as amended) may be recalled briefly. In the first place, the Regulations provide for labour market access after 6 months, whereas Article 15 of the 2013 Directive requires access to be given “*no later than 9 months*” from the date of application (the 2024 Directive now stipulates a period of 6 months).²⁵ Secondly, as already noted, Ireland did not elect to give labour market priority to EU citizens, EEA nationals and/or legally resident third-country nationals. The option of granting such priority is specifically provided for in Article 15(2) and, depending on the conditions of the labour market in a given Member State, the exercise of that option could, in practice, significantly restrict labour market access for international protection applicants. Thirdly, as already noted, the system of permitting labour market access in the State under the Regulations is not linked to (and is therefore not limited to) any specific employment or job offer. Subject to Regulation 11(9)(a), the holder of an LMAP is free to seek any employment and is free to change employer and/or employment without the need for a fresh authorisation. Fourthly, and finally, the 2018 Regulations permit self-employment.

²⁵ On the facts here, that is of some significance: had Ireland applied the 9-month cut-off (as it was entitled to do as a matter of EU law), the very earliest point at which AM would have been entitled to an LMAP under the 2018 Regulations would have been 6 October 2023, a mere 2 weeks before he was granted asylum.

97. Undoubtedly, the effect of Regulation 11(9)(a) and Schedule 6 is to impose a limitation on labour market access for international protection applicants. However, as I have already noted, most employment in the State is in the private sector. That is as true of employment in the pharmacy sector as it is true of employment generally.
98. In opposing AM's application, the State put in evidence a number of reports giving comparative information about the implementation of the 2013 Directive in the EU (though the reports do not cover every EU Member State). It is evident from that material that in many Member States access to the labour market for applicants for international protection is subject to restrictions and/or exclusions at least as extensive – and, in some instances, considerably more extensive – than is provided for by the 2018 Regulations.
99. One such report was produced by the European Migration Network (EMN) entitled *Integration of applicants for international protection in the labour market* (October 2023). Another was a slightly more recent Policy Paper published by the European Council on Refugees and Exiles (ECRE) on *The Right to Work for Asylum Applicants in the EU* (January 2024).
100. The EMN Report reported that a small number of EMN Member States granted access only after a 9-month waiting period. A significant number of EMN Member States required applicants to obtain a work permit which in many cases could be applied for only by the employer. In some cases evidence of an employment contract or job offer had to be submitted and in five of those countries requiring a work permit, the grant of

a permit was subject to a “*labour market test*”, requiring proof that the position could not be filled by national workers, EU nationals or lawfully resident third-country nationals (pages 20-21). In seven EMN Member States, a new work permit had to be applied for if the applicant wished to change jobs (page 22). The Report went on to note that EMN Member States also “*placed other conditions and restrictions on applicants ... entering the labour market*”, including by “*restricting the type and form of employment that can be accessed*” (Ireland is one of four Member States identified as imposing such restrictions) and, in the case of two Member States (the Netherlands and Luxembourg) “*limiting the hours that applicants can work in a given year*” (page 21). In addition, nine EMN Member States excluded self-employment (page 22).

101. A broadly similar picture is presented by the ECRE Report. Of the 19 Member States covered by the Report, six (including Ireland) are identified as imposing sectoral limitations on employment access, including significant limitations in Austria and Sweden (page 6).
102. One needs to be somewhat cautious about such material. It does not follow from the fact that particular restrictions and exclusions are imposed in other Member States that such restrictions and exclusions are necessarily consistent with Article 15 of the 2013 Directive. Furthermore, any such material simply gives a snapshot of the law and practice in Member States at a given point in time and these are subject to change. For instance, in Austria it appears that decrees limiting employment to specified sectors of the economy only, and to specific time periods in the year, were annulled on procedural

grounds by the Austrian Constitutional Court (Verfassungsgerichtshof) in June 2021.²⁶ However, access for applicants for protection is restricted by the application of a labour market test and applicants must first obtain a work permit which can only be applied for by the prospective employer.²⁷ The position in the Netherlands has also changed. Asylum applicants were previously allowed to work for only 24 weeks per year but in November 2023 the Administrative Jurisdiction Division of the Dutch Council of State (Raad van State), the highest administrative court in the Netherlands, held that such a limitation was incompatible with Article 15 of the 2013 Directive.²⁸ The Rulings of the Raad van State are referred to further below.

103. Nonetheless, this material clearly demonstrates that significant restrictions on access to the labour market apply in many Member States and suggests a common understanding amongst Member States that such restrictions are compatible with their obligation to ensure “*effective access*” to their labour markets. Given that one of the objectives of the 2013 Directive is to limit the secondary movement of applicants due to variations in reception conditions in different Member States (recital (12)), Member State practice is, in this context, of some significance, as is the apparent absence of enforcement action by the Commission.

²⁶ Ruling V 95-96/2021-12 of 23 June 2021. The court considered that the decrees constituted regulations which were required to be promulgated in the Federal Law Gazette. The decrees had not been promulgated and were therefore unlawful: see Ebner, ‘Access to the Labour Market and Labour Market Integration of Asylum-seekers in Austria’ (International Organization for Migration, 2023), page 14.

²⁷ Asylum Information Database (AIDA) and ECRE, Access to the Labour Market Report – Austria (Updated 9 July 2025), as well as Ebner (footnote 27).

²⁸ Rulings 202303122/1/V6 ECLI:NL:RVS:2023:4341 and 202305065/1/V6 ECLI:NL:RVS:2023:4418.

104. This material also emphasises that *practical* obstacles to access – administrative delays in processing applications for permission, language barriers, the requirement to obtain recognition of foreign educational qualifications, difficulties in getting access to banking facilities and in accessing childcare – may have at least as much impact as any formal legal restriction. However, none of those matters featured in debate.

The Advocate General’s Opinion and the CJEU Decision in KS

105. *KS* involved two references from this jurisdiction (one made by the High Court, the other by the International Protection Appeals Tribunal), presenting a number of issues. For present purposes, the critical question was whether “*applicants for international protection whose transfer to another Member State [had] been requested pursuant to [the Dublin III Regulation]*”²⁹ could be *wholly excluded* from access to the labour market pending transfer (Judgment, §2).
106. In his Opinion, the Advocate General considered that “*a literal, systematic and teleological interpretation*” of Article 15, as well as a consideration of the principles identified in the CJEU’s earlier decision in Case C-179/11 *Cimade and GISTI* ECLI:EU:C:2012:594 (“*Cimade and GISTI*”), indicated that Member States were required to grant labour market access to applicants for international protection even

²⁹ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

where a transfer decision has been made in respect of such applicants (§50). Such applicants came within the literal scope of Article 15(1) (they were applicants for international protection whose applications had not yet been the subject of a final decision) (§§51-62). Turning to the general scheme of the 2013 Directive, the Advocate General stressed the right of applicants in respect of whom a transfer decision was made to appeal that decision and “*to remain in the Member State concerned*” pending the outcome of the appeal (§68) and that it was only the actual transfer that brought to an end that Member State’s responsibility for granting the minimum reception conditions, including labour market access (§70).

107. The Advocate General then addressed Article 15(2), observing that it “*provide[d] that Member States are to decide the conditions for granting access to the labour market in compliance with the principle of effectiveness*” (§71). While the EU legislature had set out “*relatively precise*” conditions for “*the granting, reduction or withdrawal of material reception conditions,*” it had left it to “*Member States to decide, in accordance with their national law, the conditions for granting ... access*” to the labour market, subject to “*two reservations*” (§§72-73). First, while Member States could introduce conditions on access, they were nevertheless obliged to “*ensure effective access*” (original emphasis): “*[i]n other words, in the absence of EU rules, the conditions ... for access ... must not render impossible in practice or excessively difficult the exercise of rights conferred by the EU legal order*” (§74). Second, “*while Member States [could], for reasons relating to their employment policy, give priority to certain categories of persons,*” that did “*not justify drawing a distinction*” based on whether applicants were to have their applications examined by the host Member State or by another Member

State under the Dublin III Regulation (§75). It followed, in the Advocate General's view, that “[t]he context and the general scheme of [the 2013 Directive] ... support[ed] an interpretation of Article 15(1) ... according to which a transfer decision [could not] have the effect of depriving the person concerned of [their] status [as] applicant and of the right of access to the labour market conferred ... by that provision” (§76).

108. According to the Advocate General, the aim of the 2013 Directive and the obligation to support fundamental rights supported that interpretation (§77). “[F]undamental rights constitute[d] the reference framework for the standards for the reception of applicants” (referring to recital (35)) and the provisions of Chapter II of the 2013 Directive were “intended to guarantee the effective protection of the applicant in the host Member State by supporting his or her needs ... in a way which respects his or her fundamental rights, in particular his or her dignity, and ensures equal treatment” (§78). “The reception conditions laid down by [the 2013 Directive] concern[ed], above all, making provision for the basic and immediate needs of the applicant” and the CJEU had, in *Cimade and GISTI* (dealing with the 2003 Directive) held that an applicant could not be deprived of such material reception conditions “even for a temporary period”, as that “would be incompatible ... with the purpose of [the 2003 Directive] and the requirements of Article 1 of the Charter, under which human dignity must be respected and protected” (§79). Other reception conditions laid down by the 2013 Directive, while “not intended to meet the applicant’s vital needs,” were nonetheless “aimed at ensuring respect for fundamental rights enshrined in the Charter, [including] ... the right to engage in work (Article 15 of the Charter and Article 15 of [the 2013 Directive])” (§80). He went on to state that “[a]ccess to the labour market ... therefore serve[s] to meet an objective

*need of the applicant during his or her stay on the territory of the host Member State” (ibid) and Member States could not “deprive an applicant of that reception condition without running the risk of disregarding the objectives [of the Directive] and the [applicant’s] fundamental rights” under the Charter (§81). Recitals (11) and (23) of the Directive “clearly express[ed] the EU legislature’s intention to ensure that [an] applicant [for international protection] has a dignified standard of living [while] ... in the host Member State and to promote his or her self-sufficiency” (§82). “The right to work, as enshrined in numerous ... human rights instruments, play[ed] a role not only in the personal development of the individual and in his or her social and economic integration into society, but also in preserving his or her dignity” (§83). The Advocate General then referred to various sources emphasising the link between employment and human dignity, including this Court’s decision in *NHV*. Excluding an applicant from access to the labour market could also have adverse consequences for the applicant’s standard of living and give rise to a risk of infringing the principles in Articles 1 and 4 of the Charter (citing here the decision of the European Court of Human Rights in *AL.K. v Greece* App No 63542/11 (ECHR, 11 December 2014)). There was therefore “no justification for depriving an applicant in respect of whom a transfer decision [had] been [made] from access to the labour market as long as he or she [was permitted] to remain [in] ... the host Member State” (§89). That conclusion was confirmed by the fact that the 2013 Directive was intended to ensure the equal protection of applicants and was “not intend[ed] to introduce a variable-geometry system of rights ... in which there [was] a difference in treatment between third-country nationals whose applications are examined by the host Member State and those whose applications*

[were] to be examined by the Member State designated [under the Dublin III Regulation]” (§93).

109. The CJEU was also of the view that the 2013 Directive did not permit the wholesale exclusion from the labour market of applicants for international protection who were the subject of a transfer decision but who remained for the time being in the host Member State. The making of a transfer decision did not alter their status as “*applicants*” for the purposes of the Directive (§§64-65). That interpretation was supported by a consideration of Directive 2013/32/EU and of the Dublin III Regulation (§66) and was consistent with the judgment in *Cimade and GISTI* (§67). The court then continued:

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

69 *In the fourth place, recital 11 of Directive 2013/33 states that standards for the reception of applicants that will suffice to ensure them a dignified standard of living and comparable living conditions in all Member States should be laid down. The Court has also stated that respect for human dignity applies not only with regard to asylum seekers present in the territory of the Member State responsible pending the decision on their application for asylum but also to asylum seekers awaiting a decision on which Member State will be held responsible for their application (judgment of 27 September 2012, Cimade and GISTI, C-179/11, EU:C:2012:594, paragraph 43). As the Advocate General observed in point 85 of his Opinion, work clearly contributes to the preservation of the applicant's dignity, since the income from employment enables him or her not only to provide for his or her own needs, but also to obtain housing outside the reception facilities in which he or she can, where necessary, accommodate his or her family.*

70 *In addition, recital 23 of Directive 2013/33 states that one of the objectives pursued by that directive is to 'promote the self-sufficiency of applicants' for international protection. In that regard, it must be borne in mind that, as the Commission pointed out in its Proposal for a Directive of the European Parliament and of the Council of 3 December 2008 laying down minimum standards for the reception of asylum seekers (COM(2008) 815 final), access to the labour market is beneficial both to applicants for international protection and to the host Member State. Simplification of*

access to the labour market for those applicants is likely to prevent a significant risk of isolation and social exclusion given the insecurity of their situation. The self-sufficiency of applicants for international protection, which is one of the objectives of Directive 2013/33, is also thereby promoted.

71 *Conversely, preventing applicants for international protection from gaining access to the labour market is contrary to that objective, in addition to placing costs on the Member State concerned as a result of the payment of additional social benefits. The same is true if an applicant who is the subject of a decision on transfer to another Member State is prevented from accessing the labour market during the entire period between the date of lodging his or her application for international protection and the date of acceptance of his or her transfer to the requested Member State, a period to which is added the period corresponding to the actual examination of his or her application, which may last up to six months from the date of acceptance of the transfer of the person concerned by the requested Member State.”*

Accordingly, the CJEU held, Article 15 of the 2013 Directive had to “*be interpreted as precluding national legislation which excludes an applicant for international protection from access to the labour market on the sole ground that a transfer decision has been taken in his or her regard under the Dublin III Regulation*” (§73).

110. *Cimade and GISTI*, to which *KS* refers, concerned access to material reception conditions under the 2003 Directive, the CJEU holding that Member States were obliged to grant the minimum reception conditions to applicants the subject of a transfer request under Regulation (EC) No 343/2003. Such an interpretation reflected the terms of the 2003 Directive and was consistent with its general scheme and purpose and in particular the objective of ensuring full respect for human dignity and promoting the application of Article 1 (dignity) and Article 18 (right to asylum) of the Charter: §42. The subsequent CJEU decisions in Case C-79/13 *Saciri* ECLI:EU:C:2014:103 and Case C-233/18 *Haqbin* ECLI:EU:C:2019:956 – which were also concerned with access to material reception conditions rather than any issue of access to the labour market – similarly emphasise respect and protection of human dignity as the fundamental objective of the 2003 and 2013 Directives. Applicants must not be deprived of the protection of the minimum standards laid down by those Directives – including a dignified standard of living sufficient to ensure their subsistence – even temporarily: see, in addition to *Cimade and GISTI*, *Saciri* and *Haqbin*, Case C-97/24 *SA and RJ v Minister for Children, Equality, Disability, Integration and Youth* ECLI:EU:C:2025:594.

What constitutes “effective access” for the purposes of Article 15(2)?

111. Here, in contrast to the position in *KS*, there is no question of applicants for international protection, or any category of such applicants, being excluded from accessing the labour market. The 2018 Regulations give all eligible applicants the right to access the labour

market (subject to obtaining an LMAP) and, as has been seen, AM was in fact able to exercise that right of access and to obtain employment.

112. In this context, “*effective access*” clearly means something different to unconstrained access. Under Article 15(2) Member States remain competent to decide “*the conditions for granting access to the labour market for the applicant, in accordance with their national law*” and such conditions may restrict access, subject always to the requirement to ensure that there is “*effective access to the labour market.*” That requirement would make no sense if “*access to the labour market*” in Article 15(1) meant unqualified or unconditional access.
113. The principle of effectiveness is, of course, well-known in EU law. In the EU legal order, the principle of effectiveness (formulated in the terms set out by Advocate General de la Tour in his Opinion in *KS*), alongside the principle of equivalence, operates as a constraint on the procedural autonomy of Member States: Lenaerts et al, *EU Procedural Law* (2nd ed; 2023), §4.06 and following. However, the principle of effectiveness is broader in scope and, in this context, implies that Member States must not impose conditions that could undermine the purpose and effectiveness of Article 15 (its “*effet utile*”): *ibid*, §4.12. Clearly, as the Advocate General observed in *KS*, if the 2018 Regulations had the effect of rendering it impossible or excessively difficult in practice for protection applicants to exercise a right of access to the labour market, that would not constitute “*effective access*” for the purposes of Article 15.

114. KS involved the complete exclusion of any possibility of employment for an entire category of protection applicants. In such circumstances, it was clear that such applicants did not have “*effective access*” to the labour market. The position here is materially different. Once they have obtained an LMAP, eligible applicants enjoy broad access to the labour market in the State. The burden is on AM to establish that such access is not “*effective*” by reason of the exclusion of employment in the public sector. The significant limitations of the evidence presented by AM here have already been identified. AM’s evidence (and case) focuses on the prohibition of employment in the public sector to the exclusion of any consideration of the broader question of the scope of labour market access actually provided for by the 2018 Regulations and then addresses only the impact of that prohibition on him. Even so, the evidence establishes that AM was able to access the labour market and obtain a responsible and relatively well-paying job as a pharmacy technician.
115. I referred above to rulings by the Dutch Raad van State in which that court held that Dutch employment rules limiting applicants for international protection to working for a maximum of 24 weeks within a 52-week period was incompatible with Article 15(2) of the 2013 Directive.³⁰ That restriction affected all protection applicants and, as well as limiting how much work they could undertake in the event that they succeeded in finding employment, operated as a significant barrier to obtaining employment in the first place. The evidence was that the 24-week limit was the major obstacle to protection applicants entering the labour market and that in fact only some 4% of eligible

³⁰ Rulings 202303122/1/V6 ECLI:NL:RVS:2023:4341 and 202305065/1/V6 ECLI:NL:RVS:2023:4418, both given on 29 November 2023.

applicants had obtained a work permit (which had to be applied for by the prospective employer). On the basis of such evidence, it is unsurprising that the court concluded that the effect of the 24-week limit was that protection applicants did not have a fair opportunity to participate in the labour market and that such limit was a measure that undermined the purpose and effectiveness of the 2013 Directive. The relevant provisions of Dutch law therefore prevented “*effective access*” to the labour market for international protection applicants. In light of the evidence as to the very small proportion of international protection applicants that succeeded in obtaining a work permit, and as to the role of the 24-week limit as the “*major obstacle*” to access, that conclusion appears to have been inevitable.

116. The impugned provisions of the 2018 Regulations do not impose any comparable restriction, nor is there any comparable evidence of the impact of those provisions on labour market access here (or, indeed, *any* evidence whatever, save for the evidence of the limited impact on AM). On their face, the 2018 Regulations appear to provide for “*effective access*” to the labour market, access that, in the language of the Judge, is “*real and not illusory*” (§69). Furthermore, the access provided for by the 2018 Regulations appears to be clearly capable of fulfilling the underlying objectives of granting labour market access in the first place, as identified in the *travaux préparatoires* of the 2003 and 2013 Directives and discussed in *KS*. Such access is, as the Judge found, “*capable of bringing about a level of self-sufficiency and a dignified standard of living*” for protection applicants as well as preventing exclusion and facilitating integration.

117. Here, in contrast to the Dutch actions, there is no evidence that the exclusion of employment in the public sector effectively prevents access to employment in the State or deprives protection applicants of a “*fair opportunity*” to access employment in practice. AM’s own experience belies any such suggestion. His complaint is not that he was excluded from seeking or obtaining employment but that he was precluded from seeking or getting a job in his particular (and highly specific) preferred area of employment (public sector pharmacy). Nothing in the language, structure, legislative history or purpose of the 2013 Directive suggests that it was intended to confer on protection applicants a right to access their preferred employment, or any right to access employment that precisely matches their individual qualifications, experience and career aspirations and/or maximises their earning capacity. Such a right would go much beyond what was necessary to give effect to the objectives of the 2013 Directive, as reflected in its legislative history and as explained in *KS* and the other CJEU decisions discussed above.

118. In my view it is clear that, for the purposes of Article 15(2) of the 2013 Directive, the issue of “*effective access*” falls to be assessed objectively, not by reference to the subjective preferences of individual protection applicants. And whether or not access is “*effective*” is the critical issue in this context. Member States are entitled to impose conditions on access and Article 15 neither prescribes nor proscribes any particular condition: the essential question is whether, in any given case, the effect of the conditions imposed is to deny or frustrate “*effective access*” to the labour market.

119. Here, there is no evidence that the labour market access provided for by the 2018 Regulations does not constitute “*effective access*” and the available evidence is in fact the other way. There may be cases where it might be difficult to assess whether access is “*effective*”: however, on the evidence here, this is not a marginal or closely-balanced case. In my view, that is sufficient to dispose of this aspect of AM’s appeal.
120. I am not persuaded that in assessing whether the 2018 Regulations comply with the State’s obligation to ensure “*effective access*” to the labour market, the Court is required to undertake any separate proportionality analysis of the public sector employment exclusion in Regulation 11(9)(a). The obligation to provide labour market access in Article 15 is expressly qualified by the recognition of the general competence of Member States to impose conditions on such access. Article 15 contains its own express limitation on that competence — the requirement that access must be “*effective*”. Effectiveness is therefore the litmus test. In my view, a condition that does not impair or undermine “*effective access*” is not subject to challenge on the basis of a further, free-standing, proportionality analysis. No basis for such an approach is apparent from the terms of Article 15 itself, from *KS* or, indeed, the background material to the 2003 and 2013 Directives (none of which make any reference to proportionality in the context of labour market access).
121. I should note in this context that in its decisions on the validity of the Dutch law limiting asylum applicants to 24 weeks of work in a 52 week period, the Raad van State went on to suggest that access to the labour market was a right that asylum seekers had in principle and was therefore the general rule and that it followed that any limitation to

such a general rule had to be interpreted strictly. The starting point for that aspect of the Raad van State's analysis was §68 of *KS* (which is set out in full above and which, in relevant part, states that access to the labour market is a reception condition within the meaning of the 2013 Directive and, as such, one of "*the rights and benefits conferred by that directive on any applicant for international protection whose application has not been finally determined*"). The Raad van State then referred to two CJEU decisions, neither of which was concerned with the 2013 Directive (one was the familiar decision of the Grand Chamber in Case C-140/20 *GD v Commissioner of An Garda Síochána* ECLI:EU:C:2022:258), as authority for the proposition that any exception to such a "*general rule*" must be interpreted strictly.

122. The Raad van State went on to say that the 24-week restriction could not be justified precisely *because* it did not provide "*effective access*" to the labour market.
123. Insofar as the Raad van State intended to identify a further or different threshold for judicially reviewing the validity of conditions on labour market access that may be imposed by a Member State, one differing from, or in addition to, the threshold of "*effective access*" provided for in Article 15(2) of the 2013 Directive – and that is not entirely clear – I do not, with respect, find this aspect of its rulings persuasive. That the right to access the labour market provided for in Article 15 of the 2013 Directive is a "*reception condition*" (though not a "*material reception condition*") within the meaning of the Directive is clear. It follows that it is indeed one of "*the rights and benefits conferred by [the] [D]irective on [asylum applicants]*". In my opinion, that is all that the CJEU was saying in §68 of *KS*. Nowhere in the CJEU's judgment in *KS* (or in the

Opinion of the Advocate General) is there any indication that labour market access is a general right and/or that the entitlement of Member States to attach conditions to such access is subject to strict scrutiny or to judicial review on any basis other than the express requirement in Article 15(2) that such access must be “*effective access*” and, as I have said, such an argument does not find any support in the language, structure, purpose or legislative history of the 2013 Directive (or its 2003 predecessor). Any right of access to the labour market is qualified by the competence of Member States to impose conditions on access, subject always to ensuring that the access granted is “*effective*”. The test of “*effective access*” ensures that the level of access permitted by Member States is such as to promote and support the objectives of providing for labour market access in the first place, while respecting the competence of Member States to impose conditions on such access.

124. In any event, the application of a proportionality/justification test would make no material difference on the facts here. Even if Article 15 is regarded as conferring a right of access to the labour market, that right is inherently qualified and Member States are given a broad discretion to “*decide the conditions for granting access to the labour market for the applicant, in accordance with their national law*” (subject always to ensuring “*effective access*”). Thus, we are not here concerned with limitations on the exercise of a Treaty right, such as the right of nationals of other Member States to access employment in the State. As a matter of basic principle, conditions on the exercise of the Article 15 “*right*” should not be subject to the same intensity of review as would national limitations on the exercise of a fundamental EU Treaty right. Furthermore, Article 15(2) clearly leaves a significant area of policy choice with Member States and

that also affects the intensity of review: see generally Craig and de Búrca, *EU Law: Text, Cases, and Materials* (8th ed; 2024) (“*Craig and de Búrca*”), pages 581-588.

125. In fact, even as regards the free movement of workers guaranteed by Article 45 TFEU, Article 45(4) provides for an exception for employment in the public service. That exception is undoubtedly narrower in scope than that in Regulation 11(9) of the 2018 Regulations, extending only to positions in the public service that involve the exercise of public law powers: Craig and de Búrca, pages 788-791. That strict approach is justified by the fact that Article 45(4) derogates from fundamental principles of free movement and non-discrimination which are cornerstones of the EU legal order. It simply does not follow that the competence of Member States to impose conditions restricting or excluding access to public sector employment under Article 15 of the 2013 Directive is to be read as subject to an equivalent limitation.
126. Article 45(4) TFEU is nonetheless relevant as recognising a distinction between public service employment and other areas of employment. In the circumstances here, the State was, in principle, entitled to draw that distinction when giving effect to the 2013 Directive, based not only on the fact that many of the public service positions excluded by Regulation 11(9) do, in fact, involve the exercise of public law powers such as would bring them within the scope of Article 45(4) TFEU but also on the fact that, in general, public sector employment is based on permanent – or at least long-term – employment. That is certainly the predominant model of employment in the public sector. No doubt, there may be parts of the public sector where shorter term employment is available but certainty and clarity were also important considerations in this context. Furthermore,

the State was entitled to take the view that the prospect of access to employment in *any* capacity in the public sector might operate as a “*pull factor*” – an entirely legitimate and reasonable reason for such provisions – (as indeed the Judge found) and that past employment in the public sector might, in the event of international protection ultimately being refused, provide a basis for the applicant to seek to resist removal from the State.

127. These were matters for the State to weigh. Proportionality review does not, either as a matter of EU law or Irish law, involve courts making policy judgements. The question for the court is whether the policy judgement made by the State was within permissible parameters. In my view, it is clear that the policy judgement made here, to which effect is given in Regulation 11(9) of the 2018 Regulations, pursues legitimate and important State interests and the means adopted by the State to protect those interests do not go beyond what is necessary for that purpose and do not impose an excessive burden on eligible applicants for international protection, who under the Regulations have “*effective access*” to the labour market for the reasons already set out. Regulation 11(9) is therefore a justified and proportionate limitation of applicants’ rights to access the labour market here.

128. That conclusion is not called into question by Article 15 of the Charter. I agree with Hogan J’s analysis of Article 15 in *NHV*. Article 15 does not confer on applicants for international protection a free-standing right to choose an occupation or engage in work. Insofar as applicants have such a right, it derives from, and is subject to the limitations in, Article 15 of the 2013 Directive. The principles underpinning Article 15 of the

Charter may in a general way inform the interpretation of the Directive but Article 15 does not have the effect of giving what, as a matter of law, is a conditional right arising from a measure of EU secondary law, the status of a Charter right nor does it alter the fundamental question arising under Article 15 of the Directive, namely whether the State here has complied with its obligation to ensure “*effective access*” to the labour market.

Is a Reference to the CJEU necessary?

129. Finally, it is necessary to consider the question of a reference.
130. The proper approach to that question was explained by the CJEU (Grand Chamber) in Case C-561/19 *Consorzio Italian Management* ECLI:EU:C:2021:799 as follows:

“66 ... Article 267 TFEU must be interpreted as meaning that a national court or tribunal against whose decisions there is no judicial remedy under national law must comply with its obligation to bring before the Court [of Justice] a question concerning the interpretation of EU law that has been raised before it, unless it finds that that question is irrelevant or that the provision of EU law in question has already been interpreted by the Court or that the correct interpretation of EU law is so obvious as to leave no scope for any reasonable doubt.”

131. This is, of course, a court “*against whose decisions there is no judicial remedy under national law*”. The question of interpretation of EU law which AM suggests requires to be referred relates to the interpretation of Article 15 and, specifically, whether conditions on access to the labour market imposed by Member States under Article 15(2) are subject to a proportionality test or (as it was also put) whether such a proportionality test is an element of the concept of “*effective access*” in Article 15(2).
132. I have reached a clear view on that question, based on the text and purpose of Article 15, its legislative history and the approach taken by the Advocate General and the CJEU in *KS*. I understand the other members of the Court to agree with that view. In deciding whether to make a reference in any given case, a national court of final appeal (as this Court is) must of course faithfully apply the test articulated by the CJEU in *Conorzio Italian Management* but the actual application of that test is a matter for the national court. In my view, there is no scope for any reasonable doubt as to the correct interpretation of the 2013 Directive in terms of the test that should be applied where it is said that a Member State has failed to comply with the requirements of the Directive in relation to labour market access. That is the test expressly prescribed by the Directive — whether that Member State has ensured “*effective access*”. The application of that test here is, on the evidence, equally clear.
133. Furthermore, and in any event, the question as to whether conditions imposed by Member States in respect of access to the labour market are subject to a distinct and/or additional proportionality review is not ultimately relevant to the resolution of this appeal, as the answer to that question is not, in the circumstances here, capable of

affecting the determination of the appeal. Even if a proportionality test applies, AM's challenge to Regulation 11(9) would fail for the reasons already set out above. The concrete application of such a test on the facts here is, of course, a matter for the national court, not the CJEU, and therefore it is not on any view necessary or appropriate to make a reference.

SUMMARY OF CONCLUSIONS

134. My principal conclusions may be summarised as follows:

(1) The essential issue presented in this appeal is whether, by effectively excluding employment in the public sector, the 2018 Regulations impermissibly restrict the entitlement of applicants for international protection in the State to seek employment in the State while waiting for a decision on their applications.

(2) In some circumstances, applicants for international protection enjoy a constitutional right to seek employment (*NHV v Minister for Justice and Equality* [2017] IESC 35, [2018] 1 IR 246 (“*NHV*”). Separately, as a matter of EU law – specifically Article 15 of the Reception Conditions Directive, to which Ireland “*opted in*” in the aftermath of the decision in *NHV* – Member States have a duty to ensure that applicants for international protection “*have access to the labour market*” while waiting for their applications to be determined.

(3) In each case the right is qualified. *NHV* makes it clear that the constitutionally-derived right of protection applicants to seek employment in the State differs significantly from the right enjoyed by citizens and that the State is entitled to impose significant restrictions on it. The EU right is also qualified. In the first place, it applies only if “*no later than 9 months from the date [of] the application ... a first instance decision ... has not been [made]*” (and subject to the *proviso* that “*the delay cannot be attributed to the applicant*”): Article 15(1) of the 2013 Directive. Secondly, and more

significantly, Member States are competent to “*decide the conditions for granting access to the labour market*”, subject to “*ensuring that applicants have effective access to the labour market*”: Article 15(2). What constitutes “*effective access*” for this purpose, how that question is properly to be assessed and whether or not the 2018 Regulations ensure “*effective access*” are central questions in this appeal.

(4) The evidence put before the High Court by AM was in a number of important respects very limited. Beyond the limited evidence of his particular experience as an applicant for international protection, AM did not present any evidence of how the LMAP regime actually functions in practice for applicants for international protection in the State or as to the concrete effect of Regulation 11(9)(a) and Schedule 6 of the 2018 Regulations (the provisions impugned by AM) on labour market access in the State.

(5) What is clear from the evidence, however, is that AM was issued with an LMAP in a timely way, that he was as a matter of fact able to access employment without any significant delay (and in the pharmacy sector, though not in a position commensurate with his particular expertise and experience), at a rate of pay well in excess of the statutory minimum wage, and that his application for international protection was determined reasonably quickly (within a period of 9½ months). AM’s only specific complaint about his employment is essentially financial, namely that he would have expected to earn considerably more than he did if he had been able to obtain employment at an “*appropriate level*.”

(6) In the absence of such evidence, there is inevitably a somewhat abstract quality to AM's case, effectively involving a claim that the exclusion of employment in the public sector – an exclusion that affected AM only for a very short period of time – is *per se* an infringement of the Constitution and/or a breach of the Article 15 right of “*effective access*” to the labour market. On any view, however, the 2018 Regulations appear to provide for broad access to the labour market given that, as a matter of fact, most employment in the State (including in the pharmacy sector) is in the private sector.

(7) For the purposes of employment, both Irish and EU law (and the Refugee Convention itself) draw a clear distinction between the position of applicants for asylum/international protection and those whose claims to asylum/international protection have been recognised. Applicants for international protection in the host country are permitted to enter and remain in the host country solely by reason of making a claim to such protection and for the purposes of having such claim appropriately assessed. Their presence while that claim is assessed is conditional, contingent and provisional. As the Judge here found, many such claims turn out, on assessment, to be unfounded (though that was clearly not the case in respect of AM's claim). In the employment context, the position of such applicants cannot be equated with those who have been granted international protection and who as a result have an entitlement to reside long-term in the host country. Allowing unqualified access to the labour market to beneficiaries of international protection reflects their particular status and that long-term entitlement to remain.

(8) This Court in *NHV* found that the absolute and indefinite exclusion of asylum applicants from seeking employment in the State was constitutionally impermissible. However, the Court also made it clear that the Executive and the Oireachtas are permitted to impose significant restrictions on the employment of asylum seekers and, as the branches of government to which such matters are assigned, the courts should give “*considerable latitude*” to their judgement.

(9) It cannot plausibly be suggested that the restrictions on the employment of international protection applicants in the 2018 Regulations, and in particular the exclusion of employment in the public sector, negate the “*essence*” or “*core*” of their constitutional right to seek employment or otherwise fail to satisfy the constitutional standard articulated in *NHV*. Notwithstanding the exclusion of the public sector, the 2018 Regulations provide for broad access to employment in the State, both generally and with specific reference to the pharmacy sector. There is no evidence on which this Court could properly conclude that the exclusion of employment in the public sector has the effect of frustrating the right of access recognised in *NHV* or undermining its objectives. All the (limited) evidence was the other way: AM was able to obtain employment, as a pharmacy technician in a community pharmacy, at a reasonable wage, in the period prior to the determination of his international protection application. That was a responsible and well-paid position that, on its face more than met the objectives of dignity, socialisation and social inclusion, financial independence and self-sufficiency and self-worth which the right to seek employment identified by this Court in *NHV* was intended to promote and secure.

(10) As regards AM’s EU law challenge, there is no evidence that the exclusion of employment in the public sector effectively prevented access to employment in the State or deprived protection applicants of a “*fair opportunity*” to access employment in practice. AM’s own experience belies any such suggestion. Nothing in the language, structure, legislative history or purpose of the 2013 Directive suggests that it was intended to confer on protection applicants a right to access their preferred employment, or any right to access employment that precisely matches their individual qualifications, experience and career aspirations and/or maximises their earning capacity. Such a right would go much beyond what was necessary to give effect to the objectives of the Directive, as reflected in its legislative history and as explained in *KS* and the other CJEU decisions discussed above.

(11) For the purposes of Article 15(2) of the 2013 Directive, the issue of “*effective access*” falls to be assessed objectively, not by reference to the subjective preferences of individual protection applicants. Whether or not access is “*effective*” is the critical issue in this context. Member States are entitled to impose conditions on access and Article 15 neither prescribes nor proscribes any particular condition: the essential question is whether, in any given case, the effect of the conditions imposed is to deny or frustrate “*effective access*” to the labour market.

(12) Here, there is no evidence that the labour market access provided for by the 2018 Regulations does not constitute “*effective access*” and the available evidence is in fact the other way. There may be cases where it might be difficult to assess whether access

is “*effective*”: however, on the evidence here, this is not a marginal or closely-balanced case. That was sufficient to dispose of this aspect of AM’s appeal.

(13) In assessing whether the 2018 Regulations comply with the State’s obligation to ensure “*effective access*” to the labour market, the Court was not required to undertake a separate proportionality analysis of the public sector employment exclusion in Regulation 11(9). The obligation to provide labour market access in Article 15 is expressly qualified by the recognition of the general competence of Member States to impose conditions on such access. Article 15 contains its own express limitation on that competence — the requirement that access must be “*effective*”. Effectiveness is therefore the litmus test. A condition that does not impair or undermine “*effective access*” is not subject to challenge on the basis of a further, free-standing, proportionality analysis. No basis for such an approach is apparent from the terms of Article 15 itself, from *KS* or, indeed, the background material to the 2003 and 2013 Directives (none of which make any reference to proportionality in this context).

(14) In any event, the application of a proportionality/justification test would make no material difference on the facts here. Even if Article 15 is regarded as conferring a right of access to the labour market, that right is inherently qualified and Article 15(2) gives Member States a broad discretion to “*decide the conditions for granting access to the labour market for the applicant, in accordance with their national law*” (subject always to ensuring “*effective access*”). In imposing conditions on access, the State was, in principle, entitled to draw a distinction between public and private sector employment. It is clear that the policy judgement made by the State here, to which effect is given in

Regulation 11(9) of the 2018 Regulations, pursues legitimate and important State interests and the means adopted by the State to protect those interests do not go beyond what is necessary for that purpose and do not impose an excessive burden on eligible applicants for international protection, who under the Regulations have “*effective access*” to the labour market. Regulation 11(9) is therefore a justified and proportionate limitation of the applicant’s right to access the labour market here.

(15) That conclusion is not called into question by Article 15 of the Charter. Article 15 does not confer on applicants for international protection a free-standing right to choose an occupation or engage in work. Insofar as applicants have such a right, it derives from, and is subject to the limitations in, Article 15 of the 2013 Directive. Article 15 does not have the effect of giving what, as a matter of law, is a conditional right arising from a measure of EU secondary law, the status of a Charter right nor does it alter the fundamental question arising under Article 15 of the Directive, namely whether the State here has complied with its obligation to ensure “*effective access*” to the labour market.

(16) In the circumstances, it was not necessary to make a reference to the CJEU.

135. AM’s appeal must therefore be dismissed.