

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

DECISION

Application no. 64337/14
Daniel NEGASSI
against the United Kingdom

The European Court of Human Rights (First Section), sitting on 23 May 2017 as a Committee composed of:
Kristina Pardalos, *President,*
Ksenija Turković,
Pauliine Koskelo, *judges,*
and Renata Degener, *Deputy Section Registrar,*
Having regard to the above application lodged on 23 September 2014,
Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,
Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Daniel Negassi, was born in Eritrea in 1975 and currently lives in London. He is a naturalised British citizen. He was represented before the Court by Mr J. Packer of Duncan Lewis Solicitors, a firm of solicitors practising in London.
2. The British Government ("the Government") were represented by their Agent, Ms M. Valchero of the Foreign and Commonwealth Office.

A. The circumstances of the case

3. The facts of the case, as submitted by the parties, may be summarised as follows.

1. Article 11 of Council Directive 2003/9/EC laying down minimum standards for the reception of asylum-seekers

4. Council Directive 2003/9/EC laying down minimum standards for the reception of asylum-seekers ("the Reception Directive") permitted asylum-seekers to enter the labour market if a decision at first instance had not been taken within one year of the presentation of the asylum application (see paragraph 27 below).

5. In the United Kingdom Article 11 had been implemented by paragraph 360 of the Immigration Rules which permitted asylum-seekers to apply to the Secretary of State for permission to take up employment (not including self-employment or a business or professional activity) if a decision at first instance had not been taken on the their asylum application within one year of the date on which it was recorded (see paragraph 28 below).

6. The Secretary of State for the Home Department had taken the view that the right to work contained in Article 11 only applied to a first application for asylum and not to a failed asylum-seeker who had made fresh representations (see the Home Office Enforcement instructions on "Fresh Claims" at paragraph 29 below). However, on 20 May 2009, in the case of *R (ZO (Somalia)) and (MM (Burma)) v. Secretary of State for the Home Department* [2009] EWCA Civ 442, the Court of Appeal held that a person who made a second application for asylum after the first application had finally been rejected was entitled to the benefits conferred by Article 11 of the Reception Directive. The Secretary of State was granted leave to appeal to the Supreme Court but that appeal was dismissed unanimously on 28 July 2010 (see paragraphs 30-33 below).

7. Following the Supreme Court judgment, paragraph 360 was amended to provide that employment could only be taken up in a post which was, at the time an offer of employment was accepted, included on a list of shortage occupations published by the United Kingdom Border Agency (see paragraph 34 below).

2. The background to the present complaint

8. The applicant claims to have entered the United Kingdom on 6 September 2005 using a false name and passport. He claimed asylum the following day. His claim was refused on 27 January 2006. His appeal against that decision was dismissed and his appeal rights were exhausted on 30 March 2006.

9. On 12 December 2007 the applicant submitted further representations in support of his contention that he was entitled to refugee status.

10. The applicant's solicitors wrote to the Secretary of State on 11 October 2008. In that letter they threatened to challenge the legality of the delay in reaching a decision on the further representations. They further

asserted that the applicant should be granted employment rights while awaiting a decision.

11. On 21 October 2008 the Secretary of State wrote to the applicant's solicitors, confirming that his case was being dealt with as a "legacy" case by the Case Resolution Directorate (see paragraph 26 below). The letter indicated that the Home Office aimed to resolve all "legacy" cases by July 2011. With regard to the grant of employment rights, it stated that the applicant was no longer entitled to work in the United Kingdom because he had exhausted his appeal rights.

12. On 18 June 2009, following the judgment of the Court of Appeal in *ZO*, but pending the hearing before the Supreme Court (see paragraphs 30-33 below), the applicant's solicitors again requested that he be granted permission to work pending a decision on his outstanding representations. No response was received and on 7 September 2009 a letter before action was sent.

13. On 1 December 2009 the applicant lodged an application for judicial review, challenging the refusal of permission to work and seeking both expedition and an immediate order directing the Secretary of State to grant him permission to work.

14. In January 2010 the applicant was offered employment in a store but he could not accept the position as it was conditional on his possessing a work permit.

15. The applicant was granted indefinite leave to remain on 10 March 2010. Thus, there was no longer any barrier to his obtaining employment in the United Kingdom.

16. In May 2013 he became a naturalised British citizen.

3. Judicial review proceedings

17. The application for judicial review was heard on 15 and 16 February 2011. As the applicant had already been granted indefinite leave to remain, the only live issue was a claim for damages. In view of the fact that there were a large number of potential claimants, the case was heard as a test case to decide in principle if damages could be awarded and, if so, in what circumstances and on what basis an award could be made.

18. The applicant contended that he was entitled to damages on two separate bases: for a breach of the Reception Directive and for the consequent interference with his rights under Article 8 of the Convention. He claimed non-pecuniary damages on the ground that he had become depressed on account of not being able to support himself and pecuniary damages based on lost earnings.

19. In respect of the alleged breach of the Reception Directive, the Administrative Court judge held that in a case which concerned the mistaken construction of a Directive rather than a deliberate breach, a remedy in damages should only be provided where the mistake was based

on arguments which were entirely devoid of merit. The hurdle to be overcome was therefore a high one and, although the present case could be described as "borderline", in the circumstances the breach could not be described as manifestly and gravely unlawful.

20. In any event, the judge did not consider that a causal link had been established between the breach and the damage allegedly sustained. Article 11 of the Reception Directive did not require that an applicant should be permitted to work, but rather that he or she should have conditional access to the labour market. At the time the applicant applied for permission to work, the only restrictions were on self-employment and engaging in a business or professional activity (see paragraph 28 below). However, the extension of the scope of the right of access to the labour market brought in many thousands of applicants and, as a consequence, the Immigration Rules had been amended so that applicants were only permitted to take up posts included on a list of shortage occupations published by the United Kingdom Border Agency (see paragraph 34 below). The judge was satisfied that, had the scope of the Reception Directive been correctly appreciated, such restrictions would have applied from the outset. If that had been the case, very few applicants, and certainly not the applicant in the present case (who was not equipped to carry out any of the shortage occupations), would have been able to obtain employment.

21. With regard to Article 8 of the Convention, the judge noted that although there was no positive right to work, an unlawful prohibition on access to the labour market could amount to an interference with the right to respect for private life (see, for example, *Niemietz v. Germany*, 16 December 1992, § 29, Series A no. 251-B and *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, § 47, ECHR 2004-VIII). However, he also noted that in all cases before the Court which raised the issue, the applicant was a national of the country allegedly in breach and so had a right to access employment. In the present case the applicant had no right to access the labour market and as a consequence Article 8 was "not in play". There could therefore have been no interference with his right to respect for his private life. Even if there had been, the judge had no doubt that the interference was proportionate as being in accordance with the law and necessary in the interests of the economic well-being of the country and the rights and freedoms of others. In any event, he was satisfied that even if there had been a breach, in view of the absence of a direct causal link between the breach and any damage caused, it would not have been necessary to award compensation under the Human Rights Act 1998.

4. The Court of Appeal

22. The applicant was granted permission to appeal but the appeal was dismissed on 7 March 2013.

23. The Court of Appeal agreed with the Administrative Court that the United Kingdom's breach of the Reception Directive was not of sufficient seriousness to satisfy the test for State liability for a breach of EU law. It further agreed with the Administrative Court that the applicant could not establish a causal link between the breach and any damage sustained as his claim was a purely speculative one.

24. Finally, the court held that the Secretary of State had not interfered with the right to respect for the applicant's private life required by Article 8 by refusing to grant him permission to work. It was common ground that Article 8 did not embrace a general right to work and, this being so, the protected right to respect for private life did not embrace the right of a foreign national, with no Treaty, statutory or permitted right of access to the domestic labour market, to an entitlement to work.

5. The Supreme Court

25. On 25 March 2014 the Supreme Court refused an application for leave to appeal filed by the applicant.

B. Relevant domestic law and practice

1. "Legacy" cases

26. The Legacy Programme was initiated by the Government in July 2006 to deal with a vast backlog of unresolved asylum claims. These cases were transferred to the Case Resolution Directorate, which had been established to handle the "legacy" cases. As the programme was an operational programme only, the Case Resolution Directorate had to apply the same generally prevailing law and policy which applied to all other immigration and asylum cases.

2. The Reception Directive

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

> "1. Member States shall determine a period of time, starting from the date on which an application for asylum was lodged, during which an applicant shall not have access to the labour market.
>
> 2. If a decision at first instance has not been taken within one year of the presentation of an application for asylum and this delay cannot be attributed to the applicant, Member States shall decide the conditions for granting access to the labour market for the applicant.

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

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

3. Implementation of the Reception Directive

28. The Reception Directive was implemented in domestic law by paragraphs 360 and 360A of the Immigration Rules HC 395 (as amended), which, at the relevant time, provided that:

"360. An asylum applicant may apply to the Secretary of State for permission to take up employment which shall not include permission to become self-employed or engage in a business or professional activity if a decision at first instance has not been taken on the Applicant's asylum application within one year of the date on which it was recorded. The Secretary of State shall only consider such an application if , in his opinion, any delay in reaching a decision at first instance cannot be attributed to the applicant.

360A. If an asylum applicant is granted permission to take up employment under Rule 360 this shall only be until such time as his asylum application has been finally determined."

29. Enforcement instructions issued by the Home Office provided, under the heading "Fresh Claims":

"If a failed asylum-seeker makes a fresh asylum claim then provided it is accepted as a fresh claim the procedures set out above should be followed i.e. the claimant will be entitled to apply for [permission to work ("PTW")] provided he satisfies the criteria in Paragraph 360 of the Rules, otherwise a request for PTW would be a mandatory refusal. If the new asylum claim is not accepted as a fresh claim the person will have no entitlement to apply for PTW."

4. R (ZO (Somalia)) and (MM (Burma)) v. Secretary of State for the Home Department *[2009] EWCA Civ 442*

30. ZO and MM were failed asylum-seekers who had made fresh representations to the Secretary of State which they contended amounted to fresh claims for asylum. While they were waiting for the Secretary of State to decide whether to treat their submissions as a fresh claim, they applied for permission to work. They Secretary of State refused their applications and they sought permission to judicially review these decisions.

31. ZO and MM's applications for judicial review were dismissed by the Administrative Court, which accepted that where an asylum-seeker makes a second application for asylum after his first application has been finally rejected, he is not entitled to the benefits conferred by the Reception Directive.

32. However, on 20 May 2009 ZO and MM's appeals against those dismissals were allowed by the Court of Appeal, which held that persons in

their position should be entitled to the benefits conferred by the Reception Directive.

33. The Secretary of State appealed to the Supreme Court, arguing that the clear purpose of the Reception Directive was to devise minimum standards for those who were "received" by Member States for the first time as asylum-seekers and therefore the provisions of the Directive did not extend to subsequent applications for asylum. On 28 July 2010 the Supreme Court dismissed the appeals. In doing so, it noted that the Reception Directive was one of a package of Directives setting minimum standards for States dealing with persons in need of international protection. The definition of "applicant for asylum" in the Procedures Directive was virtually identical to that in the Reception Directive, except that there was no doubt that subsequent applications for asylum came within the definition in the Procedures Directive. The Supreme Court therefore found it to be "indisputably clear" that it had always been intended not only that the definitions of "applicant for asylum" in both Directives should be congruent with one another but also that an application should not be regarded as having been subject to a final decision until all possible remedies had been pursued and determined. This could only mean that subsequent applications would fall within the purview of the definitions of "applicant for asylum" and "asylum seeker" in the Reception Directive.

5. Amendment of the Immigration Rules

34. Following the Supreme Court judgment in *ZO*, the Immigration Rules were amended, with effect from 20 August 2010, to provide that employment could only be taken up in a post which was, at the time an offer of employment was accepted, included on the list of shortage occupations published by the United Kingdom Border Agency.

COMPLAINTS

35. The applicant contended that the refusal of his request for permission to work was in breach of Article 8 of the Convention.

36. In addition, the Court asked the parties to comment on whether the applicant had been treated differently from asylum-seekers making their first claim for asylum, in breach of Article 14 of the Convention read together with Article 8.

THE LAW

A. Article 8 of the Convention

37. The applicant complained that the refusal of his request for permission to work constituted an interference with his private life under Article 8 of the Convention which, in view of the findings of the Court of Appeal and the Supreme Court in *R (ZO (Somalia)) and (MM (Burma)) v. Secretary of State for the Home Department*, was not in accordance with the law.

38. Article 8 provides as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

1. The parties' submissions

39. The Government submitted that the applicant had not suffered a "significant disadvantage" within the meaning of Article 35 § 3 (b) of the Convention. First of all, from 10 March 2010, when he was granted indefinite leave to remain, he had enjoyed a wholly unconditional right of access to the labour market. Secondly, in respect of the period running from 12 December 2008 (being one year from the date on which his fresh submissions were "recorded" – see paragraph 28 above) to 10 March 2010, the applicant was unable to establish any pecuniary or non-pecuniary loss. As the national courts found, if the Secretary of State had appreciated the full scope of Article 11 of the Reception Directive from the outset, paragraph 360 of the Immigration Rules would always have contained the additional restriction introduced following the Supreme Court judgment in *ZO* (see paragraph 34 above). Had this been the case, between 12 December 2008 and 10 March 2010 the applicant would not have been able to satisfy the conditions for being granted permission to work (see paragraph 20 above).

40. In addition, the Government submitted that the applicant's Article 8 complaint had been fully considered by the national courts at two levels of jurisdiction. Those courts had expressly acknowledged the authorities' failure to give full effect to their obligations under Article 11 of the Reception Directive and the situation had since been remedied.

41. The applicant, on the other hand, submitted that the Government was wrong to assert that he had suffered no "significant disadvantage". The

inability to work had a significant impact not only on his personal life but also on his ability to integrate into the community.

2. The Court's assessment

(a) General principles

42. As pointed out in previous case-law (see *Mura v. Poland* (dec.), no. 42442/08, § 20, 2 June 2016), the purpose of the admissibility rule in Article 35 § 3 (b) is to enable more rapid disposal of unmeritorious cases and thus to allow the Court to concentrate on its central mission of providing legal protection of human rights at the European level (see the Explanatory Report to Protocol No. 14, CETS No. 194, §§ 39 and 77-79). The High Contracting Parties clearly wished the Court to devote more time to cases which warrant consideration on the merits, whether seen from the perspective of the legal interest of the individual applicant or considered from the broader perspective of the law of the Convention and the European public order to which it contributes (*ibid*., § 77).

43. The question whether the applicant has suffered any "significant disadvantage" represents the main element of the rule set forth in Article 35 § 3 (b) of the Convention (see *Adrian Mihai Ionescu v. Romania* (dec.), no. 36659/04, 1 June 2010; see also *Korolev v. Russia* (dec.), no. 25551/05, ECHR 2010-V). Inspired by the general principle *de minimis non curat praetor*, this first criterion of the rule rests on the premise that a violation of a right, however real from a purely legal point of view, should attain a minimum level of severity to warrant consideration by an international court (see *Ladygin v. Russia* (dec.), no. 35365/05, 30 August 2011). The assessment of this minimum level is, in the nature of things, relative and depends on all the circumstances of the case (see *Gagliano Giorgi v. Italy*, no. 23563/07, § 55, ECHR 2012-II (extracts)). The severity of a violation should be assessed taking into account both the applicant's subjective perceptions and what is objectively at stake in a particular case (see *Korolev*, cited above; and *Eon v. France*, no. 26118/10, § 34, 14 March 2013). In other words, the absence of any "significant disadvantage" can be based on criteria such as the financial impact of the matter in dispute or the importance of the case for the applicant (see *Adrian Mihai Ionescu*, cited above). However, the applicant's subjective perception cannot alone suffice to conclude that he or she has suffered a significant disadvantage. The subjective perception must be justified on objective grounds (see, *inter alia*, *C.P. v. the United Kingdom* (dec.), no. 300/11, § 47, 6 September 2016 and *Mura v. Poland*, cited above, §§ 21 and 24).

(b) Application of the general principles to the present case

(i) Has the applicant suffered a "significant disadvantage"?

44. Although it is not necessary, for the reasons set out below, for the Court to reach any firm conclusion on whether Article 8 was in fact engaged in the present case, it would accept that exclusion from the labour market is in principle capable of constituting a "significant disadvantage" for the purposes of Article 35 § 3 (b) of the Convention. However, it finds that there are several factors diminishing the significance of any "disadvantage" suffered by the applicant as a result of the refusal of his request for permission to work.

45. To begin with, it is clear that the core of his Article 8 complaint is that there was an interference with his private life which was not "in accordance with the law", within the meaning of Article 8 § 2 of the Convention, since the refusal of his request for permission to work was in breach of the Reception Directive. Although neither the Administrative Court nor the Court of Appeal accepted that Article 8 was engaged on the facts of the case, both courts addressed the question of "lawfulness" and concluded that there had been a breach of Article 11 of the Reception Directive.

46. That being the case, the Court considers that the principal "disadvantage" suffered by the applicant is to be located in the fact that the national courts did not find that the same failings which had resulted in a breach of the Reception Directive also constituted violation of Article 8 of the Convention.

47. A similar issue arose in the recent case of *C.P. v. the United Kingdom* (cited above). In that case, although the national courts had found that the applicant's exclusion from school had been unlawful under domestic law, they had rejected his claim under Article 2 of Protocol No. 1 on the ground that there had been no restriction on his right to education. Since damages could be awarded for a breach of a Convention right but not for a suspension from school which was unlawful under domestic law, the applicant was unable to claim compensation. Nevertheless, the Court found that in the absence of any evidence before the national courts to suggest that the applicant had sustained actual prejudice as a result of his unlawful exclusion from school, the denial of the opportunity to claim damages for that exclusion did not amount to a "significant disadvantage" within the meaning of Article 35 § 3 (b).

48. In the present case, the applicant was able to claim compensation before the national courts, both for breach of the Reception Directive and for breach of Article 8 of the Convention. Although the national courts found that the breach was not sufficiently serious to satisfy the test for State liability under EU law, and Article 8 was not engaged, they clearly found that even if damages had been payable under either head, on the facts of the

case the applicant had suffered no actual prejudice (see paragraphs 20 and 23 above). In this regard, they were satisfied that if the Secretary of State had understood the full scope of Article 11 at the date of entry into force of the Reception Directive, its implementation into domestic law would always have contained the condition, added following the Supreme Court judgment in *ZO*, that asylum-seekers could only take up employment in a post which was, at the time an offer of employment was accepted, included on the list of shortage occupations published by the United Kingdom Border Agency (see paragraph 34 above). The Administrative Court judge found – and the applicant has not disputed – that he was not equipped to carry out any of these shortage occupations (see paragraph 20 above).

49. Consequently, the Administrative Court judge observed that even if he had found a violation of Article 8, it would not have been necessary to award compensation under the Human Rights Act 1998 (see paragraph 21 above). As such, the national courts' finding that Article 8 was not engaged did not prove to be material to the outcome of the applicant's claim for damages, and cannot amount to a "significant disadvantage".

50. Finally, as to the severity of the Convention violation alleged, which is to be assessed by taking into account not only the applicant's subjective perceptions but also what is objectively at stake (see paragraph 43 above), it is material that by the date of his application to the Court – and, in fact, by the date of the hearing before the Administrative Court – the breach of the Reception Directive had been acknowledged and remedied (see paragraphs 30-33 above) and the applicant had been granted indefinite leave to remain in the United Kingdom (see paragraph 15 above).

51. In the light of the foregoing considerations, the Court cannot discern objective grounds to hold that in the circumstances of the case at hand the applicant suffered a "significant disadvantage" in the sense of important adverse consequences by reason of the refusal of his request for permission to work.

(ii) Does respect for human rights compel the Court to examine the case?

52. The second element contained in Article 35 § 3 (b) compels the Court to examine the case in any event if respect for human rights so requires. This would apply where a case raises questions of a general character affecting the observance of the Convention, for instance whether there is a need to clarify the States' obligation under the Convention or to induce the respondent State to resolve a structural deficiency.

53. However, the national courts, both in *ZO* and in the present case, have expressly acknowledged that the United Kingdom authorities had failed to give full effect to their obligations under Article 11 of the Reception Directive, and this failure has since been remedied.

54. Consequently, the Court concludes that respect for human rights as defined in the Convention and its Protocols does not require it to examine the present case.

(iii) Has the case been "duly considered by a domestic tribunal"?

55. Finally, the third criterion under Article 35 § 3 (b) does not allow the rejection of an application if the case has not been "duly considered by a domestic tribunal". The purpose of this criterion is to ensure that every case receives a judicial examination whether at the national level or at the European level, in other words to avoid a denial of justice (see *Korolev* (dec.), cited above).

56. In the present case, the applicant's legal challenge to the refusal of his request for access to the labour market was examined by the national courts at two levels of jurisdiction. That being so, the Court concludes that the applicant's case was "duly considered by a domestic tribunal" within the meaning of Article 35 § 3(b).

(iv) Conclusion

57. The three stated criteria for inadmissibility therefore being present on the facts of the case, the applicant's Article 8 complaint must be declared inadmissible pursuant to Article 35 §§ 3 (b) and 4 of the Convention.

B. Article 14 of the Convention

58. The Court also asked the parties to comment on whether the applicant had been treated differently from asylum-seekers making their first claim for asylum, in breach of Article 14 of the Convention read together with Article 8. Article 14 of the Convention provides as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

59. The Government submitted that this complaint should be rejected for failure to exhaust domestic remedies since it was not raised by the applicant before the domestic courts.

60. The applicant did not contest this assertion.

61. Accordingly, the Court considers that the Article 14 complaint based must be rejected pursuant to Article 35 § 1 of the Convention for failure to exhaust domestic remedies.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 15 June 2017.

Renata Degener Deputy Registrar	Kristina Pardalos President