THE HIGH COURT

[2021] IEHC 609

[2020 No. 370 JR]

BETWEEN

P

APPLICANT

– AND –

THE MINISTER FOR BUSINESS, ENTERPRISE, AND INNOVATION

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 30th July 2021.

SUMMARY

This is a successful challenge brought by Mr P, a third-country national, against a review decision made by the respondent refusing Mr P a general employment permit. This summary forms part of the court's judgment.

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1. Mr P is a chef and a third country national who is currently present in Ireland. In the past he sought a general employment permit so that he could take up a job as a head chef here in

Ireland. This application was followed by a decision and then by a review decision. The within application seeks to quash the review decision of 30th March 2020.

2. A brief summary chronology may assist the reader in understanding the judgment that follows:

01.08.2015.	On or about this date, Mr P enters the State.
09.05.2016.	Mr P makes an EUTR application to be treated as a permitted family member.
09.06.2016.	Following on the EUTR application, Mr P is granted a temporary permission to remain.
05.01.2017.	By decision of this date, the EUTR application is refused.
25.01.2017.	Mr P seeks a review of the refusal of his EUTR application.
17.02.2018.	A review decision issues affirming the initial EUTR refusal. By letter of the same date, the Minister proposes to deport Mr P.
03.05.2018.	Mr P makes a fresh application to be treated as a permitted family member. (The court understands that this was because of a changed understanding of the applicable law following on certain case-law).
28.05.2018.	Fresh EUTR application fails.
12.06.2018.	Mr P seeks a review of the decision indicating the refusal of his fresh EUTR application. The court understands that it continues to be the case that this review has yet to be determined. It follows that Mr P did not at the time when this application was heard hold a current immigration permission to remain in the State.
02.08.2019.	Mr P applies to the respondent for a general employment permit to allow him to take up a job as a head chef in a restaurant. As will be seen later below, this application was made on the express basis that

	the respondent was being asked to exercise his discretion to grant the application notwithstanding Mr P's then/current immigration status.
04.02.2020.	Respondent refuses Mr P's application for a general employment permit.
19.02.2020.	Mr P seeks a review of (commences an appeal against) the respondent's refusal to grant him a general employment permit.
30.03.2020.	Respondent issues the review decision (this is the impugned decision) affirming the refusal of the general employment permit.
24.06.2020.	Within application commenced.
27.07.2021.	Within application heard.

3. Mr P, per his statement of grounds, claims as follows in respect of the impugned review decision:

> "*1. The Respondent erred in law in unlawfully fettering her discretion and/or failing to recognise that she had a discretion to exercise pursuant to s.12(1)(i) of the Employment Permits Act 2006, as amended, to grant the Application for a General Employment Permit, notwithstanding the fact that the Applicant is in Ireland without a current immigration permission from the Minister for Justice and Equality.*
>
> *PARTICULARS OF ERROR*
>
> *i.* *The Respondent, in her decision of the 30th March 2020, refused the application on the following basis:*
>
> 'I am directed by the Minister for Business Enterprise and Innovation to refer to your submission requesting a review of the decision to refuse the granting of an employment permit under s.13 of the Employment Permits Act, as amended.

I understand the application was refused on the basis that it appears from the information submitted that the foreign national is in the State with current immigration permission from the Minister for Justice and Equality. In line with s.12(1)(i) of the Employment Permits Act 2006, as amended, it was not possible to issue an employment permit.

I have reviewed the information you have submitted in support of the request for a review and I am satisfied that having considered…the circumstances of the application that the decision to refuse and employment permit is the correct decision and I confirm that decision under s.13(4)(a) of the Employment Permits Act 2006, as amended.'

The fact that the Applicant was in the State without a current immigration permission was brought to the attention of the Respondent by the Applicant. Nowhere in the above rationale does the Respondent acknowledge that she had discretion to ignore her policy concerning the grant of employment permits to persons within the State. The policy is merely stated and the first instance decision affirmed on the basis of the policy as stated. In inflexibly adhering to the said policy and in failing to recognise that the Respondent is free to depart from that policy the Respondent fell into error in the manner in which she reached the impugned decision.

ii. *Section 12(1) of the 2006 Act as amended provides '(1) The Minister <u>may</u> refuse to grant an employment permit if – …'. It is clear from the foregoing that the Respondent is not required to refuse an application under s.12 but may choose to do or not to do so. The Respondent may but it is not obliged to refuse an application for an employment permit where the Applicant is in the State without a current immigration permission and*

in circumstances where the application was made on the basis that the Respondent was being asked to exercise this discretion the Respondent fell into error in unlawfully fettering that discretion and/or failing to recognise that she had a discretion to exercise in arriving at the impugned decision.

2. *The Respondent erred in law and in fact and/or in a mixture of law and fact in failing to give any reasons or any adequate reasoning as to why she would not exercise her discretion pursuant to s.12(1)(i) of the Employment Permits Act 2006, as amended, to grant the Applicant's application for a critical skills permit.*

PARTICULARS OF ERROR

i. *The Respondent in her decision of the 30th of March 2020, did not mention the existence of her power pursuant to s.12(1)(i) of the 2006 Act to grant an application notwithstanding that an Applicant is in the State without a valid immigration permission nor did the Respondent give any or adequate reasons why she would not exercise the said discretion in the case at bar and in so doing the Respondent fell into error.*

ii. *The Application was made on the basis that the Respondent ought to exercise his discretion to grant the employment permit sought notwithstanding the fact that the Applicant did not have a current immigration permission, therefore by failing to give reasons for the exercise or refusal to exercise that discretion the Respondent fell into error.*"

4. Exhibited among the documentation before the court is the original, detailed application, which included, for example, a contract of employment, personal details and references, *etc*. Mr P avers in his affidavit that this application documentation was followed up within a couple of weeks by a letter from his solicitor arising from the particular circumstances that presented by virtue of his not having an immigration permission; a copy of this document (a letter of 16th

August 2019 from Abbey Law Solicitors to the Department of Business, Enterprise and Innovation) has been exhibited in these proceedings. Although this document highlighted that Mr P did not have an immigration permission, it also set out the particular circumstances presenting which Abbey Law was asking the respondent to take account of in this regard. The court pauses here to quote certain elements of that letter (none of which it notes in passing was engaged with at the initial decision-stage):

> "*The Employee's Immigration Status*
>
> *It is acknowledged that the employee presently has no immigration status.*
>
> [Court Note: As one can see, straightaway the respondent is expressly advised that Mr P has no immigration status; as will be seen, he asks the respondent to exercise his discretion in this regard.]
>
> *This is due to no fault of his own. He has a pending application with the EU Treaty Rights Unit of INIS for a residence card as the household and/or dependent family member of an EU national exercising EU Treaty rights in Ireland.*
>
> *This application has been held up in litigation over the meaning of, and the proofs required to establish 'household membership' and 'dependency' for the purposes of the Treaty. Our client has been sorely prejudice by the Minister for Justice's failure to implement recent court judgments which went in favour of the Applicants while these judgments are appealed. Like many of the others, our client is still stuck in a limbo state in Ireland where he cannot be removed, as his case is formally under consideration; he cannot leave voluntarily or else, post-Brexit, he will lose his rights under the Treaty; and yet he is not permitted to put his considerable skills to work in the Irish economy.*
>
> [Court Note: When the Executive enjoys an entitlement or, in appropriate circumstances, is given leave to appeal, it is perfectly

entitled to bring that appeal, get a fair hearing, and have the appeal point/s decided. But it is important for the Executive to note that the mere fact of lodging an appeal does not in and of itself render a declaration of the High Court as to applicable law wrong or ineffective or place it in abeyance. This was the subject of what the court found to be the following helpful exchange in the course of these proceedings:

> "JUDGE – *Can I just ask you a question there? When the High Court gives a judgment, and that judgment is appealed, the High Court judgment is law for the time being isn't it?*
>
> COUNSEL – *It is. That has always been the case. So if the High Court declares something to be the law, that is the law. If the High Court grants some sort of order, there can be a stay on the order. So, if the High Court decides to grant a mandatory injunction there can be a stay on that….But when the High Court declares the law to be something, you can't get a stay on a declaration as to what the law is. That is standard jurisprudence. Now, of course…if there are other cases pending, you can apply to adjourn them and that is a matter for discretion that can be exercised by another judge in another case, but unless the High Court's determination of law is overturned, it* is *the law.*"

Clearly, the Executive needs to proceed carefully in this regard and to ensure that it does all that is proper to ensure that following on, for example, such a declaration, it does not place itself in a position where it breaches the law; that would be an affront to the rule of law.]

As you will know, s.12(1)(i) of the Employment Act 2006 (as amended) grants the Minister discretion to issue an employment permit notwithstanding the Applicant's presence in the State without an immigration permission. This interpretation was affirmed by the High Court in Ling and Yip Limited v. Minister for Business, Enterprise and Innovation [[2018] IEHC 546]. *The Minister is therefore required to consider the particular facts of the case before coming to a conclusion as to whether or not to exercise her discretion.*

[Court Note: The respondent's position in these proceedings was that he was not disputing the above description of what *Ling and Yip* says. So in these proceedings there is an acknowledgement that there is a discretion on the part of the respondent. (That, of course, does not answer the question as to whether the decision reached in this case was lawful).

In passing, s.12 of the Act of 2006, as amended (and as referenced above) provides, *inter alia*, as follows: "*(1) The Minister may* [not shall] *refuse to grant an employment permit if – …(i) the foreign national concerned lands or has landed, or is or has been, in the State without permission*". As is clear from the just-quoted text, the respondent is not required to refuse an application under s.12; rather the respondent may choose to do so or not. Support, if needed, for the proposition that the foregoing (obvious) reading of s.12(1) is correct is to be found in *Ling and Yip Ltd* v. *Minister for Business, Enterprise, and Innovation* [2018] IEHC 546, para.9. Various of the other observations in *Ling and Yip* are also of interest, Noonan J. observing, *inter alia*, as follows:

> "*10. In exercising this discretionary power, the Minister has a duty to consider the individual facts of each case as they arise. For example, in the context of an applicant being in the State without permission, a wide range of circumstances could arise….*

> *11.* *In the present case, it seems to me clear that the Minister abdicated her responsibility to exercise the discretion so clearly conferred upon her by concluding that the mere fact that Mr. Khong was technically in the State without permission at the material time meant that an employment permit 'cannot be issued'. That statement is, as a matter of law, manifestly incorrect….*
>
> *12.* *It seems to me that the respondent's duty to act fairly in exercising her powers under the 2006 Act includes an obligation to engage with and consider the explanation offered by the applicant for non-compliance with the terms of the previous permit. The respondent might of course in the exercise of her discretion come to the conclusion that the explanation offered is not acceptable but if she were to arrive at that conclusion, she would have to give reasons for so doing. The judgments of the Supreme Court in* Meadows v. Minister for Justice, Equality & Law Reform & Ors. *[2010] 2 I.R. 701 and* Mallak *v.* Minister for Justice, Equality & Law Reform *[2012] IESC 59 make clear that public bodies exercising discretionary powers which affect the rights of individuals are required to give reasons for exercising the power in a particular way so that the party affected may understand the rationale for the decision and if necessary challenge it.*"]

We submit that this would be an appropriate case for an employment permit. The employee is evidently qualified for the position. Should this permit be refused, the restaurant will experience great difficulties finding a suitable replacement given the well-documented chef shortage in Ireland. [Court Note: There is a footnoted reference to a relevant

newspaper article at this point]. *The employee's status arises from a dubious policy decision of the Department of Justice* [not to implement a High Court decision] *and is not of his own making*."]

5. The above-mentioned letter from Abbey Law, coupled with the earlier application materials, comprised Mr P's application to the respondent.

6. The first instance decision issued from the Department issued on 4th February 2020. It contains a number of what might be described as '*pro forma*' paragraphs. The kernel of the decision runs as follows:

"*Reasons for refusal in this case are:*

– It appears from the information submitted that the foreign national is in the State without current immigration permission from the Minister for Justice and Equality. In line with s.12(1)(i) of the Employment Permits Act 2006, as amended, an employment permit will not be issued.

[Court Note: Although the attentions of this Court are obviously focused on the impugned review decision, again the court cannot but note in passing that this underlying decision does not engage with the application, in particular the Abbey Law letter, as detailed *in extenso* above. Thus, Mr P has expressly drawn the respondent's attention to the fact that he is in the State without an immigration permission, *i.e.* it is not just a passive case of "*It appears that…*", and he has adverted to the reasons why the respondent should exercise his discretion in Mr P's favour and there is simply no engagement with this.]

– It appears from the documents you have enclosed that an advertisement for the employment was not placed with the Department of Social Protection/EURES for 14 days during the 90 days preceding this application as is required under Regulations 31(1) and 44(1) of the Employment Permits Regulations 2017 (S.I. No. 95 of 2017) as the case

may be. In line with s.10A(2) of the Employment Permits Act 2006 as amended, an employment permit cannot be issued, (more than 90 days preceding this application)."

[Court Note: As will be seen, the review decision is silent on this aspect of matters, presumably because the Department realised that, regrettably (as detailed herein) it had just got matters plain wrong in this regard.]

7. The next step in the process, following on this decision, was that Mr P sought an internal review of same, *inter alia*, for the following reasons:

"*Refusal Ground One: the Applicant's Immigration Status*

In our submissions which accompanied the application, it was acknowledged that the employee was presently without an immigration permission. It was argued, however, that the particular circumstances of this case rendered it inappropriate for the Minister to exercise the discretion granted to her under s.12(1)(i). The decision-maker appears to have had no regard to those circumstances, and instead simply applied a blanket rule based upon a rigid policy that permits will not be issued in such cases.

Prior to the decision of the High Court in Ling and Yip*…the paragraph accompanying decisions in such cases stated that 'an employment permit cannot be issued'. While the standard wording has now been changed, it is not enough merely that the Minister no longer explicitly denies that she has a discretion when she is still taking an absolutist approach to the decision-making process. In* Pfakacha & Anor. v. Minister for Justice, Equality and Law Reform *[2017] IEHC 620, a case concerning the discretionary power of the Minister for Justice under s.4(7) of the Immigration Act 2004, the High Court (Faherty J.) stated:*

> 54. Having appraised the contents of the respective decisions in the within proceedings, I am satisfied that what effectively occurred in this case was a bald application by the decisionmaker of the policies set out at para.22.2 of the Policy Document [on non-EEA Family Reunification]. This amounts to a fettering of the discretion vested in the respondent by s.4(7) of the 2004 Act. While the Policy Document itself acknowledges the concept of ministerial discretion, the potential exercise of the discretion was fettered, in my view, by the failure of the decisionmaker to acknowledge that the guidelines expressed in the Policy Document were not set in stone, and by the failure to engage in any meaningful sense with the submissions made by the applicants as to why the respondent should see fit to upgrade their status to Stamp 4.

In the present case, the decisionmaker failed to engage in any sense with the submissions made by the applicants as to why the Minister's discretion should be exercised. As in Pfakacha*, therefore, the refusal must be seen as an unlawful fettering of that discretion.*

Refusal Ground Two: Placement of Job Advertisement with EURES

As per the enclosed confirmation email from the Employment Permits Section, the application was submitted on 2nd August 2019. 90 days preceding that date is 4th May 2019. As the enclosed email from jobsIreland confirms, the advertisement did indeed run for at least 14 days during that 90 day period (4th-27th May). Indeed the advert ran for longer than the minimum 14 days and, as the same email shows, not a single application was received. The Employer went above and beyond the bounds of duty to comply with the advertising requirement, and still could not find an EEA national to fill the position or even to apply for the job. [In other words, the Minister simply got matters factually wrong in this regard.]

> *We submit that this provides even greater justification for the Minister to exercise her discretion in relation to the Applicant's immigration status.*"

8. The review decision followed next. Just before turning to same, the court notes that written submissions were put in for Mr P challenging certain affidavit evidence furnished by the respondent, which challenge raised the points that (i) the said affidavit evidence was hearsay evidence (because the relevant deponent had nothing to do with the application), and (ii) offended against the general principle against *ex post facto* reasoning. Belatedly, leave was granted to the respondent to file an additional affidavit that would cure problem (i). However, problem (ii) remains outstanding.

9. In passing, by way of general note (and the court makes no comment whatsoever on any of the lawyers for the respondent in how the within proceedings have been argued and presented; they were most expertly argued and presented, and lawyers act under instruction) the court notes that the focus of judicial review proceedings is necessarily on the decision that was made, not some expanded version of same. Providing context to the court is different from providing additional reasons and is of course allowed; however, that is a different matter from seeking to expand the substance of an impugned decision that was made into a decision that in fact was never made but which might have been made and which, on reflection by a decisionmaker, would have been a legally more resilient decision had it been so made. There are very limited circumstances in which additional reasons can be introduced, but this is not such a case (this Court has yet to encounter such a case). There is nothing in case-law which allows counsel in submissions at the hearing of a case to introduce further reasons for a decision; in point of fact this is not possible. In short, the question for the court in the within proceedings is whether the impugned decision, on its own terms, satisfies the reasoning/fettering rules at law.

10. The impugned review decision states as follows:

> "*I am directed by the Minister for Business, Enterprise and Innovation to refer to your submission requesting a review of the decision to refuse the granting of an employment permit under s.13 of the Employment Permits Act, 2006, as amended.*

I understand the application was refused on the basis that appears from the information submitted that the foreign national is in the State without current immigration permission from the Minister for Justice and Equality. In line with s.12(1)(i) of the Employment Permits Act 2006, as amended, it was not possible to issue an employment permit.

[Court Note: It was legally possible. This is apparent from, *inter alia*, *Ling and Yip*.

Section 13 of the Act of 2006, as amended, indicates how a review of a decision to refuse an employment permit should be conducted, providing as follows:

> "*(1) A decision of the Minister to refuse to grant an employment permit may, in accordance with regulations under s.29(3), be submitted by the applicant therefor to the Minister for review under this section.*
>
> *(2) Such a submission of a decision for review shall be made within 28 days from the date the decision is notified under s.12 to the applicant.*
>
> *(2A) Where – (a) following a decision to refuse to grant an employment permit – (i) the Minister receives information or documents relating to the application for the employment permit concerned, (ii) the information is, or documents are, received within 28 days from the date the decision is notified under s.12 to the applicant, and (iii) the applicant has not submitted the decision for a review, in accordance with ss.(1) and (2), and (b) the Minister, having considered such information or documents, is satisfied that having regard to all the circumstances that it is appropriate to review that decision and to take such information or*

documents into account in such review, the Minister – (i) may direct that the decision to refuse or grant the employment permits concerned be reviewed under this section, and (ii) where he or she so directs, shall notify the applicant of the review.

(3) *A review under this section of a decision referred to in subsections (1) and (2A) shall be carried out by an officer of the Minister appointed by the Minister for the purpose, the person so appointed – (a) shall not be the person who made the decision, and (b) shall be of a grade senior to the grade of the person who made the decision.*

(4) *In the case of a review of a decision referred to in subsection (1), the person so appointed having afforded the person who submitted the decision for review an opportunity to make representations in writing in relation to the matter, may – (a) confirm the decision (**and, if the person does so, shall notify in writing the second-mentioned person of the reasons for the confirmation**), or (b) cancel the decision and grant to the foreign national concerned the employment permit the subject of the application to which the review relates.*

(5) *In the case of a review of a decision referred to in subsection (2A), the person so appointed, having taken into account the information or documents referred to in that subsection and afforded the applicant for the employment permit concerned an opportunity to make representations in writing in relation to the matter, may – (a) confirm the decision (**and, if the person does so, shall notify such applicant in writing of the reasons for the conformation**), or (b) cancel the decision and*

> *grant to the foreign national concerned the employment permit the subject of the application to which the review relates.*" [Emphasis added].

It is clear from the foregoing that apart from the general duty to give reasons as a matter of Irish administrative law, there is an express duty to do so in the context under consideration.]

I have reviewed the information you have submitted in support of the request for a review and I am satisfied that having considered all the circumstances of the application that the decision to refuse an employment permit is the correct decision and I confirm that decision under s.13(4)(a) of the Employment Permits Act 2006, as amended.

[Court Note: The reviewing officer must give the reasons in writing for his decision. So the reasons in writing are in the impugned decision and the reasons in writing are that the decision under review was correct – notwithstanding that that decision is possessed of the deficiencies that the court has identified previously above.]

Please note that persons residing in the State must be legally resident and have up-to-date immigration permission at the date of application from the Minister for Justice & Equality in order to be in or to enter employment.

[Court Note: Post-*Ling and Yip* it is obvious that the reference to "*at the date of application*" is simply wrong].

These persons must at the date of application have a valid certificate of registration (GNIB card/IRP card), namely holders of Stamps 1, 1A, 2, 2A and 3 immigration permissions. In order to be eligible to apply for an employment permit I would recommend that you contact the Department of Justice and apply for Stamp 1 permission. Once received we can process your application for a new general employment permit.

[Court Note: It seems reasonable to read into this last line that unless Mr P gets immigration permission, his application for an employment permit cannot be processed. Again, this is wrong, contrary to the Act, and undermines any suggestion that the reviewing officer was exercising some form of discretion based on a substantive engagement with Mr P's circumstances.]

If a fee has been paid in respect of this application, a refund of 90% of any fees paid will be refunded to the applicant on receipt of the completed enclosed electronic funds transfer mandate form."

11. Turning briefly to the statement of opposition in these proceedings, the respondent in that statement of opposition stands over the impugned review decision, stating that there is no fettering of discretion and that adequate reasons have been given. There is also affidavit evidence from the respondent's side which seeks to support these assertions; however, as touched upon above, what the respondent has sought to do in this regard is to put before the court material that is not contained in the impugned decision. The respondent is gently reminded as to what cannot be done in this regard, as touched upon previously above.

12. Counsel for Mr P when treating with this aspect of matters mentioned the recent observations by the Supreme Court in *NECI v. The Labour Court and Ors.* [2021] IESC 36 on the obligation to give reasons, law that in truth is by now well-settled law (of which *NECI* represents but a recapitulation not a variation) but which, for all that it is so well-settled (and it is), requires, unfortunately, to be stated yet again, despite the fact that the Supreme Court in *NECI* is but pointing to longstanding legal obligations that have been extant for years and which have been repeatedly applied by the Supreme Court and all lower courts for years.

13. MacMenamin J. in *NECI* observes as follows in his judgment, at paras. 147-157, under the heading "*Legal Principles: The Duty to Give Reasons*":

"**Connolly v. An Bord Pleanála**

147. In Connolly v. An Bord Pleanála *[2018] ILRM 453, this Court held that it was possible to identify two separate, but closely related, requirements regarding the adequacy of any reasons given by a decision-maker. First, any person affected by a decision should at least be entitled to know, in general terms, why the decision was made. Second, a person was entitled to have enough information to consider whether they can or should seek to avail of any appeal, or to bring a judicial review of a decision. The court held that the reasons provided must be such as to allow a court hearing an appeal, or reviewing a decision, to actually engage properly in such an appeal or review. The court went on to explain that it may be possible that the reasons for a decision might be derived in a variety of ways, either from a range of documents, or from the context of the decision, or some other fashion. But this was subject to the overall concern that the reasons must actually be ascertainable and capable of being determined (see* Connolly*, para. 7.1 to 7.6).*

Meadows v. Minister for Justice

148. In Meadows v. Minister for Justice *[2010] 2 I.R. 701, Murray C.J. stated:-*

> 'An administrative decision affecting the rights and obligations of persons should at least disclose the essential rationale on foot of which the decision is taken. That rationale should be patent from the terms of the decision or capable of being inferred from its terms and its context. Unless that is so then the constitutional right of access to the Courts to have the legality of an administrative decision judicially reviewed could be rendered either pointless or so circumscribed as to be unacceptably ineffective.' *(para 93-94)*

Rawson v. Minister for Defence

149. In Rawson v. Minister for Defence *[2012] IESC 26 Clarke J. (as he then was) stated, on behalf of this Court, that:-*

> 'How that general principle may impact on the facts of an individual case can be dependent on a whole range of factors, not least the type of decision under question, but also, in the context of the issues with which this Court is concerned...the particular basis of challenge.' *(para 6.8)*

EMI Records (Ireland) v. Data Protection Commissioner

150. In EMI Records (Ireland) v. Data Protection Commissioner *[2013] IESC 34, Clarke J. (as he then was) concluded that a party was entitled to sufficient information to enable it to assess whether the decision was lawful and, if there be a right of appeal, to enable it to assess the chances of success, and to adequately present its case on the appeal. The reasons given must be sufficient to meet those ends.*

Oates v. Browne

151. In Oates v. Browne *[2016] 1 I.R. 481, Hardiman J., in this Court, stated that it was a practical necessity that reasons be stated with sufficient clarity so that, if the losing party exercises his or her right to have the decision reviewed by the Superior Courts, those Courts have the material before them on which to conduct such a review. But to this he added:-*

> 'Secondly, and perhaps more fundamentally, it is an aspect of the requirement that justice must not only be done but be seen to be done that the reasons stated must 'satisfy the persons having recourse to the tribunal, that it has directed its mind adequately to the issue before it'. *(para 47.)*

[Court Note: The court would but note that in the case at hand the Abbey Law submissions raised all the issues that they raised (and the Executive's own responsibility for the delay in deciding Mr P's EUTR application, for which there may or may not be a reasonable explanation – one suspects that it is simply a case of a huge volume of work to be done and not a huge number of people to do it, with inevitable delay consequently presenting) but there is simply no engagement with the submissions made.]

Balz & Anor v. An Bord Pleanála

152. Finally, the judgment of this Court in Balz & Anor. v. An Bord Pleanála *[2019] IESC 90 contains a number of observations which strike home in this case.* Balz *concerned a decision on a planning application. The judgment makes the point that the imbalance of resources and potential outcomes between developers, on the one hand, and objectors, on the other, means that an independent expert body, carrying out a detailed scrutiny of an application in the public interest, and at no significant cost to the individual, is an important public function.*

153.Having pointed out that the Board and its inspector had carried out their functions with a high degree of technical expertise, the judgment went on to describe that, on the facts of that case, it was nonetheless unsettling that there should be an absence of direct information on one of the central planning issues which arose. O'Donnell J. stated that this might have occurred as a result of an unfortunate misunderstanding at the time of the appeal, and the Board's decision might have become entrenched in the defence of these proceedings. He allowed that there might be valid reasons why a board, or other decision-making body, might draft its decisions in a particularly formal way, and that, in most cases, interested parties would be able to consult an inspector's report

to deduce the reasons behind the Board's decision. But, on the facts before the court, he observed:-

> 'However, some aspects of the decision give the impression of being drafted with defence in mind, and to best repel any assault by way of judicial review, rather than to explain to interested parties, and members of the public, the reasons for a particular decision.' *(para. 45)*

154. But the judgment in Balz *made clear that when an issue had arisen where it was suggested that the Inspector, and the Board, had not given consideration to a particular matter, it was also unsettling that the issue raised should be met by the bare response that such consideration was given (for a limited purpose) and nothing had been proven to the contrary. Similarly, while an introductory statement in a decision that the Board had considered everything it was obliged to consider, and nothing it was not permitted to consider, might:-*

> '...charitably be dismissed as little more than administrative throat-clearing before proceeding to the substantive decision, it has an unfortunate tone, at once defensive and circular. If language is adopted to provide a carapace for the decision which makes it resistant to legal challenge, it may have the less desirable consequence of also repelling the understanding and comprehension which should be the object of any decision.' *(para. 46)*

155. This last passage has a particular resonance in this case. Balz *makes clear that a decision-maker must engage with significant submissions. The judgment emphasises that it is a basic element of any decision-making affecting the public that relevant submissions should be addressed, and an explanation given why they are not accepted, if indeed that was the case. This is fundamental not just to the law, but also to the trust which members of the public are required to have in*

decision-making institutions, if the individuals concerned, and the public more generally, are to be expected to accept decisions with which, in some cases, they may profoundly disagree, and with whose consequences they may have to live. (para. 57 et seq *of the judgment.)*

The Duty to Give Reasons: Summary of Principles Applicable

156.The questions applicable in this case are, therefore:

(a) Could the parties know, in general terms, why the recommendation was made?

(b) Did the parties have enough information to consider whether they could, or should, seek to avail of judicial review?

(c) Were the reasons provided in the recommendation and report such as to allow a court hearing a decision to actually engage properly in such an appeal, or review?

[Court Note: Here the answer to each of these three questions is 'no'. There is simply no engagement with the submissions made on Mr P's behalf at the appeal stage (and that is apart from the errors that present in such reasons as were given in the impugned decision).]

(d) Could other persons or bodies concerned, or potentially affected by the matters in issue, know the reasons why the Labour Court reached its conclusions on the contents of a projected SEO, bearing in mind that it would foreseeably have the force of law, and be applicable across the electrical contracting sector?

> *157. Obviously, the test must be an objective one. The views of an aggrieved party having recourse to a tribunal may be a consideration. But, when determining whether the reasons given were sufficient, the test must be more dispassionate and detached. In this case, the potential audience is relevant. The Labour Court was engaged in a statutory role, involving compliance with statutory duties to protect rights, where public interest required transparency. The reasons had to be sufficient, therefore, not just to satisfy the participants in the process, but also the Minister, the Oireachtas, other affected persons or bodies, and the public at large, that the Labour Court had truly engaged with the issues which were raised, so as to accord with its duties under the statute.*"

14. Turning next to key aspects of the respondent's case, the court would respectfully observe as follows.

15. First, the court notes that the respondent has at no point sought to address the fact that the review decision states clearly that "[P]*ersons residing in the State must be legally resident and have up-to-date immigration permission* <u>*at the date of application*</u> *from the Minister for Justice & Equality in order to be in or to enter employment*" [emphasis added], and further states that "*I would recommend that you contact the Department of Justice & Equality and apply for Stamp 1 permission.* <u>*Once received*</u> *we can process your application for a new general employment permit*" [emphasis added]. (It seems reasonable to read into this last line that unless Mr P gets immigration permission, his application for an employment permit cannot be processed). These statements/propositions are, unfortunately, just wrong as a matter of law; that this is so is now patently clear as a result of the decision in *Ling and Yip*.

16. Second, certain submissions were made to the court by reference to *DeSmith's Judicial Review* about the existence and application of policy by a decisionmaker. The difficulty, however, with *now* relying on the line of (British) authority referred to therein is that such a policy is nowhere invoked or relied upon in the decision; nor is there even any way of discerning from the decision that any such policy has been invoked or relied upon. Nor is the policy referred to in any pre-application documentation or in the original decision. Nor the court notes is it referred to in the statement of opposition or in the evidence before the court. In point of fact, it was first referred to in submission at the hearing. It is not appropriate that a department

of Government would instruct counsel to advise the High Court by way of submission on the day of a hearing that a policy exists and was applied in circumstances where (a) nobody knows anything about this policy and (b) the existence/application of such policy has never previously been referred to in either the impugned decision or any of the documentation pertaining to the proceedings in which the submission is made. The existence and application of unknown policies is the type of State action that was the subject of adverse comment by Lord Dyson, when delivering the lead judgment for the majority of the UK Supreme Court in *Walumba Lumba v. SSHD* [2011] UKSC 12, observing, *inter alia*, as follows, at paras. 34-38:

> "*34. The rule of law calls for a transparent statement by the executive of the circumstances in which the broad statutory criteria will be exercised. Just as arrest and surveillance powers need to be transparently identified through codes of practice and immigration powers need to be transparently identified through the immigration rules, so too the immigration detention powers need to be transparently identified through formulated policy statements.*
>
> *35. The individual has a basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute: see* In re Findlay *[1985] AC 318, 338E. There is a correlative right to know what that currently existing policy is, so that the individual can make relevant representations in relation to it. In* R (Anufrijeva) v. Secretary of State for the Home Department *[2003] UKHL 36, [2004] 1 AC 604, para 26 Lord Steyn said:*
>
> > 'Notice of a decision is required before it can have the character of a determination with legal effect because the individual concerned must be in a position to challenge the decision in the courts if he or she wishes to do so. This is not a

technical rule. It is simply an application of the right of access to justice.'

36. *Precisely the same is true of a detention policy. Notice is required so that the individual knows the criteria that are being applied and is able to challenge an adverse decision. I would endorse the statement made by Stanley Burnton J in* R (Salih) v. Secretary of State for the Home Department *[2003] EWHC 2273 at para 52 that* 'it is in general inconsistent with the constitutional imperative that statute law be made known for the government to withhold information about its policy relating to the exercise of a power conferred by statute.' *At para 72 of the judgment of the Court of Appeal in the present case, this statement was distinguished on the basis that it was made* 'in the quite different context of the Secretary of State's decision to withhold from the individuals concerned an internal policy relating to a statutory scheme designed for their benefit'. *This is not a satisfactory ground of distinction. The terms of a scheme which imposes penalties or other detriments are at least as important as one which confers benefits. As Mr Fordham puts it: why should it be impermissible to keep secret a policy of compensating those who have been unlawfully detained, but permissible to keep secret a policy which prescribes the criteria for their detention in the first place?*

37. *There was a real need to publish the detention policies in the present context. As Mr Husain points out, the Cullen policies provided that certain nonserious offenders could be considered for release. The failure to publish these policies meant that individuals who may have been wrongly assessed as having committed a crime that rendered them ineligible for release would remain detained, when in fact,*

had the policy been published, representations could have been made that they had a case for release.

38. *The precise extent of how much detail of a policy is required to be disclosed was the subject of some debate before us. It is not practicable to attempt an exhaustive definition. It is common ground that there is no obligation to publish drafts when a policy is evolving and that there might be compelling reasons not to publish some policies, for example, where national security issues are in play. Nor is it necessary to publish details which are irrelevant to the substance of decisions made pursuant to the policy. What must, however, be published is that which a person who is affected by the operation of the policy needs to know in order to make informed and meaningful representations to the decision-maker before a decision is made.*"

17. Third, insofar as the purported policy of the Department is concerned, it was suggested at the hearing of this application that something exceptional would have to present in circumstances such as those here presenting before a permit would be granted. Again, save for the mention of this at hearing, there is no mention of this policy in the evidence and materials before the court or elsewhere.

18. Fourth, it was contended at the hearing of this matter that the Abbey Law letter of 16th August 2019 was deficient in making vague references to case-law. But nothing of the sort gets mention in the impugned decision, nor is there any mention of this in the statement of opposition or in the replying affidavits. The first mention of this criticism was at the hearing on 27th July (and, as it happens, the court considers it a most unfair criticism; anyone reading the notably comprehensive and cogent submissions of Abbey Law could be in no doubt as to precisely the case that was being advanced by and for Mr P, which case, again, was simply not engaged with by the respondent in the impugned decision (or, indeed, at any time).

19. Fifth, it was submitted for the respondent that the respondent does not think much of the economic issues raised by Mr P. Again, nothing of the sort gets mention in the impugned

decision, nor is there any mention of this in the statement of opposition or in the replying affidavits. The first mention of this criticism was at the hearing on 27th July.

20. Sixth, it was suggested for the respondent that the facts in *Ling and Yip* were strikingly different to those at play in the within proceedings. However, this is not suggested in the impugned decision, nor anywhere in the statement of opposition or the replying affidavits. It was a criticism first made at the hearing of this application. (The court, as it happens, considers that the judgment of the High Court in *Ling and Yip* is of direct application and relevance to the case at hand).

21. Seventh, it was suggested in argument that the fact that a person does not have immigration status was a matter that the respondent could formally rely upon in coming to his decision in this case. It is very difficult not to see in this contention the formal ('tick the box') approach to decision-making to which MacMenamin J. refers in *NECI* (by reference to *Balz*) as being done merely to provide a 'carapace' (a defensive or protective cover) for a decision in the hope of making it resistant to legal challenge.

22. Eighth, as to criticisms now made by the respondent of the substantive submissions put to the respondent on appeal for Mr P, it is not open to the respondent to seek now to criticise them when they were never previously engaged with in any way by the respondent.

Conclusion

23. For the various reasons indicated previously above, the court considers the impugned decision to be thoroughly flawed in terms of the reasoning given. As to the fettering of discretion point, the reasoning in the impugned decision is, with respect, so flawed and wanting in substance (and any evidence as to the Department's contended-for policy and how it was brought to bear so notably absent) that the court considers that it cannot determine properly whether or not there has been a fettering of discretion – which points still further to just how inadequate the reasoning in the impugned decision unfortunately is.

24. As sought in the notice of motion, the court will grant the order of *certiorari* sought, quash the impugned decision and remit the matter to the respondent for fresh consideration.

25. As this judgment is being delivered remotely, the court notes its initial view that Mr P, having succeeded completely in the within application, is entitled to his costs. If either Mr P or the respondent consider that the court should order costs otherwise, they might (given that this judgment is being handed down on the last day of the present term) so advise the court registrar and/or the court's judicial assistant within 14 days of the start of the next term, following which the court will schedule a brief costs hearing. Otherwise, the court will order costs in favour of Mr P.