

THE HIGH COURT
JUDICIAL REVIEW

[2021] IEHC 821

[2019 No. 541 JR]

IN THE MATTER OF THE EMPLOYMENT PERMITS ACT, 2006 (AS AMENDED)

BETWEEN

MD YEASIN

APPLICANT

AND

THE MINISTER FOR BUSINESS, ENTERPRISE AND INNOVATION

RESPONDENT

JUDGMENT of Mr. Justice Meenan delivered on the 13th day of December, 2021

Background

1. The applicant was born in the Peoples Republic of Bangladesh on 3 July 1984. He entered the State on a student visa, which was issued by the Minister for Justice and Equality on or about 23 February 2007. The student visa permission was renewed from time to time and remained valid until the applicant was granted a residence card as a qualifying family member of his EU citizen spouse. The applicant had married a Hungarian national on 14 November 2014. The applicant applied for, and was granted, a residence card on foot of his said marriage on 20 May 2015.

2. In or around 2018, unhappy differences arose in his marriage which caused the relationship to irretrievably break down and his wife returned to Hungary permanently. Arising from the breakdown of his marriage, the applicant instructed his then solicitors to write, by way of letter of 7 June 2018, to the Minister for Justice and Equality seeking a change in his

immigration status to allow him to continue to reside in the State. This application was refused by letter dated 8 November 2018.

3. By a decision of letter dated 12 December 2018, but received by his then solicitors on 14 December 2018, the Minister for Justice and Equality revoked the applicant's residence card on the basis, *inter alia*, that his marriage was one of convenience. However, prior to the said revocation of residence, the applicant had directed his then solicitors to submit an application for a Critical Skills Employment Permit to allow him to take up a job offer to work as an accountant. Since the applicant had arrived in the State, he qualified as a Chartered Accountant and was employed in that capacity. This application was submitted to the respondent on 14 December 2018, prior to the receipt of the said aforementioned revocation decision by the Minister for Justice and Equality.

4. Once the applicant became aware of the said revocation decision, he directed his solicitors to write to the respondent, by letter dated 18 December 2018, setting out his immigration history and status in the State and asking the respondent to exercise her discretion to grant the application for a Critical Skills Employment Permit, notwithstanding the fact that the applicant did not have a current immigration permission to reside in the State. This letter stated, *inter alia*: -

“We are aware that the usual policy is to refuse an application made by a person who is in the State without a permission, on the basis of Section 12(1)(i) of the Employment Permits Act 2006 as amended (“the Act”). However, the Minister is empowered under the Act to waive this policy in appropriate circumstances. In this regard we refer to the recent decision of Mr. Justice Noonan in *Ling & Yip Ltd -v- The Minister for Business, Enterprise and Innovation* which stated:

We submit that the facts of this case are such that the Minister’s discretion should be exercised to grant this permit.”

Decision of the respondent

5. The respondent refused the application, by letter dated 8 March 2018, on the basis, *inter alia*, that the applicant did not have a current immigration permission from the Minister for Justice and Equality to reside in the State pursuant to s. 12(1)(i) of the Employment Permits Act 2006 (as amended) (“the Act of 2006”). On 21 March 2019, this decision was appealed by the applicant.

6. By letter, dated 1 July 2019, the respondent refused the applicant’s request for a review/appeal of the refusal. The terms of the said refusal were: -

“I understand that the application was refused on the basis that it appeared 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 section 12(1)(i) of the Employment Permits Act 2006 as amended it was not possible to issue an employment permit.

It is the policy that all first-time applications for employment permits should normally make their application while resident outside the State. However, non-EEA citizens with a valid Certificate of Registration (GNIB card) or Irish Residence Permit (IRP), and who are the holders of Stamps 1, 1A, 2, 2A and 3 immigration permissions, and who have been offered employment in an eligible occupation, are allowed to apply for an employment permit following all the legislative procedures whilst already legally resident in the State.

Based on the information received by the Employment Permits Section, it is noted that your permission to remain in the State was revoked by the Irish Naturalisation and

Immigration Service of the Department of Justice and Equality on the 12th of December 2018, and this application for a Critical Skills Employment Permit was made on 14th of December 2018. I have viewed 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 the decision under Section 13(4)(a) of the Employment Permits Act 2006 as amended.”

Application for judicial review

7. By Order of the High Court, 29 July 2019 (Noonan J.), the applicant was granted leave to seek the following reliefs: -

- (i) An order of *certiorari* of the respondent’s decision of 1 July 2019, received by the applicant on 3 July 2019, to refuse the applicant’s application for a Critical Skills Employment Permit pursuant to s.12(1)(i) of the Act of 2006 as amended; and
- (ii) An order remitting the impugned decision of the respondent back for reconsideration by a different officer of the respondent.

8. In the applicant’s Statement of Grounds, it is maintained that 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 Act of 2006, notwithstanding the fact that the applicant was in the State without a current immigration permission from the Minister for Justice and Equality.

9. In her Statement of Opposition, the respondent maintains that she did exercise her discretion, and that she did so correctly. The respondent further states the following: -

- “(i) At the time of making the employment permit application the Applicant’s permission to remain in the State was revoked;

- (ii) On 12th of December 2018 the Minister for Justice and Equality determined that the Applicant's permission to remain (Stamp 4 EUfam) granted on the 20th of May 2015 was obtained through the Applicant's engagement in fraud and a marriage of convenience, and that therefore the Applicant's immigration was deemed never to have been valid, a determination in respect of which the Applicant did not choose to seek a review;
- ..."

Submissions

- 10.** The applicant relies on the following wording of the impugned decision: -

"I understand that the application was refused on the basis that it appeared 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 section 12(1)(i) of the Employment Permits Act 2006 as amended it was not possible to issue an employment permit." (Emphasis added).

The applicant submits that the use of the term "*it was not possible*" indicates, wrongly, that the respondent believed that she had no discretion in making her decision under the said statutory provision. Reliance is placed on the decision of Noonan J. in *Ling and Yip Ltd v. The Minister for Business, Enterprise and Innovation* [2018] IEHC 546 and a subsequent decision of Barrett J. in *P. v. The Minister for Business, Enterprise and Innovation* [2021] IEHC 609.

- 11.** The applicant also submits that there was a failure on the part of the respondent to give reasons for the decision, relying on the following oft cited passage of Murray C.J. in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3: -

"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.”

12. In addition, the applicant submits that the reference to the alleged marriage of convenience referred to in the Statement of Opposition is, in effect, an attempt by the respondent to support the decision by matters which were not referred to in the decision. In support of this submission, the applicant relies upon the following passage from the judgment of Hardiman J. in *FP v. The Minister for Justice, Equality and Law Reform* [2002] 1 I.R. 164 at p. 170: -

“... I also agree, however with the immediately following observation of the trial judge: ‘Where one of a number of reasons is given by the Minister he cannot afterwards rely on any other uncommunicated reasons to defend his compliance with the subsection.’”

13. The respondent submits that the absence of current immigration permission is specifically identified as a ground upon which an employment permit may be refused under the Act of 2006. The respondent submits that the absence of a reference to the discretion enjoyed by the Minister is not evidence of a failure to recognise such discretion. The respondent sought to distinguish the instant case from the facts of *Ling and Yip Ltd v. The Minister for Business, Enterprise and Innovation*. It was submitted that in *Ling and Yip* the applicant’s immigration permission had expired due to the failure of a third party and that in the instant case the applicant’s permission had been revoked on the basis of a finding that permission was obtained by the applicant’s alleged marriage of convenience.

Consideration of issues

14. It does not seem to be in dispute but that the respondent does have a discretion under s.12 (1) of the Act of 2006: -

“12. (1) The Minister may refuse to grant an employment permit if— ...” (Emphasis added)

It is also the case that s. 12 (1) (i), as amended, provides: -

“(i) The foreign national concerned lands or has landed, or is or has been, in the State without permission,

...”

15. It would follow from this that, notwithstanding that the foreign national concerned is unlawfully in the State, the respondent may still grant an employment permit. The wording of the impugned decision that “*it was not possible to issue an employment permit*” where the applicant was unlawfully in the State does seem to indicate that the respondent had no discretion in the matter.

16. In *Ling and Yip Ltd v. The Minister for Business, Enterprise and Innovation*, the relevant wording of the impugned decision was: -

“At the time of the application, it appears that Mr. Khong was in the State without current immigration permission from the Minister for Justice, Equality & Law Reform. [...] Therefore, under s. 12(1) (i) of the Employment Permits Act, 2006, (as amended) an employment permit cannot be issued.” (Emphasis added)

Noonan J. considered the wording of s. 12 of the Act of 2006, referring to the use of the word “*may*”, and stated: -

“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. ...”

17. It seems to me that the wording of the impugned decision in the instant case, namely: “*it was not possible*”, has effectively the same meaning as the words “*cannot be issued*”. Both are inconsistent with the respondent having the discretion which is clearly provided for in the Statute. The fact that the circumstances in the instant case may be different to that in *Ling and Yip Ltd* does not alter this. As I have reached the conclusion that the provision of s.12 (1) of the Act of 2006 was incorrectly applied by the respondent, I do not believe that the issue of “*lack of reasons*” applies.

18. It is also of significance that the impugned decision makes no reference to the applicant’s alleged “*marriage of convenience*”. However, this is expressly relied upon in the Statement of Opposition, which can only undermine the stated reasons which the Minister gave for her decision.

Conclusion

19. By reasons of the foregoing, I am satisfied that the applicant is entitled to an order of *certiorari* in terms of para. 1 of the Notice of Motion. Further, I will remit the impugned decision of the respondent back for reconsideration by a different officer of the respondent. As for costs, my initial view would be that as the applicant has been wholly successful in these proceedings he is entitled to his costs (including reserved costs) to be adjudicated in default of agreement, as per s. 169 of the Legal Services Regulation Act 2015. However, if the respondent wishes to dispute this, I will allow a period of fourteen days for written submissions and list the matter before me for mention on the 13th day of January 2021.