

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 307 JR]

BETWEEN:

NISAR ALI

APPLICANT

AND

MINISTER FOR JOBS, ENTERPRISE AND INNOVATION

RESPONDENT

JUDGMENT of Mr. Justice Noonan delivered the 15th day of April, 2015

Introduction

1. In the within proceedings, the applicant ("Mr. Ali") seeks an order of *certiorari* quashing the decision of the respondent of the 13th of May, 2014 refusing to grant an employment permit to the applicant. The applicant further seeks various ancillary declaratory reliefs, in particular relating to the operation by the respondent of a scheme comprising various criteria for the grant of employment permits.

Background Facts

2. The applicant has been lawfully resident in the state since August, 2007 as a student. His status entitles him to what is known as a stamp 2 visa which permits him to work during college term for a period of 20 hours per week and during vacation time, for 40 hours per week. Mr. Ali is married with one child and his wife and child reside in Pakistan. His stamp 2 visa does not permit them to enter the state and reside with him.

3. Three applications by or on behalf of Mr. Ali have been made to the respondent ("the Minister") for an employment permit pursuant to the provisions of the Employment Permits Act 2006 ("the Act"), all of which have been unsuccessful. All three refusals, including that of the 13th of May, 2014, the subject matter of these proceedings, have been the subject of judicial review proceedings. An employment permit, if granted to Mr. Ali, would entitle him to work for 40 hours a week throughout the year and further to bring his wife and child to Ireland to reside with him.

4. Since his arrival in the state, Mr. Ali has completed an MSc degree in computing and thereafter, he enrolled for a business degree at Eden College, Dublin. Unfortunately that college appears to have closed unexpectedly in April, 2014.

5. On or about the 10th of April, 2014, Mr. Ali applied for an employment permit, having been offered a full-time position as sales support assistant with his employer at an annual salary of €18,000. The application was refused by letter of the 13th of May, 2014 from the Minister and Department, which stated as follows:

"I am directed by the Minister for Jobs, Enterprise and Innovation to refer to your application for an employment permit under the Employment Permits Act, 2006.

I wish to inform you that the granting of a permit in this case is being refused under the Employment Permits Act, 2006. Reasons for refusal in this case are:

The Employment Permits Acts 2003 and 2006 require the Minister, having regard to an application for an employment permit, to consider the extent to which a decision to grant the permit would be consistent with the government's economic policy and whether the granting of the permit would be in the public interest in terms of protecting the labour market. Current government policy promotes, in the first instance, employment growth through the filling of vacancies from the existing labour market especially in employments requiring lower skills levels as there is a sufficient supply of labour in the labour market currently.

Reasons for refusal in this case are:

It appears from the information received that the position on offer is one of the occupations currently ineligible for an employment permit. Certain occupations are not deemed eligible for employment permits where it is considered that there is already a sufficient supply of labour in the labour market for the filling of such vacancies. This includes occupations for which an adequate supply of skilled labour exists or occupations which do not require high levels of skill and experience or which, therefore, can be filled by the existing supply of labour.

Hence applications for ineligible positions are generally refused, as government policy promotes, in the first instance, the filling of vacancies from the existing labour market.

It appears from the documentation submitted that the employee will not receive the minimum remuneration of €30,000 per annum required and so does not meet the required criteria. The level of remuneration is a key indicator of the skills and experience required for a job and assists the Minister in determining the necessity for employing a foreign national.

Therefore, in order to satisfy the Minister that the granting of an employment permit would be in the public interest and in line with the current economic policy of the government and not contrary to Sections 12 (1) (d) and 12 (1) (f) of the 2006 Act, new employment permit applications are normally only considered where it is established that a minimum salary of €30,000 per annum is on offer based on a 39 hour week and where the position is not one of those currently deemed ineligible.

This government policy has been formed in view of the very high levels of unemployment currently pertaining in the Irish labour market and the availability of qualified Irish and EU workers to fill low skilled jobs.

I conclude therefore, that in light of the above and taking account of the current economic policy of the government that the grant of an employment permit would not be consistent with that economic policy. I am of the view that the grant of an employment permit in this case would not be in the public interest and would be contrary to s. 12 (1) (f) of the Employment Permits Act, 2006 and would be manifestly inconsistent with the economic policy of the government and

therefore contrary to s. 12 (1) (d) of the Employment Permits Act 2006. The application is therefore refused for those reasons.

Should you wish this decision to be reviewed the applicant may do so in accordance with s. 13 of the Employment Permits Act, 2006, within twenty one (21) days from the date of this letter. Any such submission, (addressed to the Appeals Officer, Employment Permits Section, Department of Jobs, Enterprise and Innovation, Davitt House, Adelaide Road, Dublin 2) will be considered on the basis of the evidence available to this department and any further information of relevance which you may wish to submit.

Yours faithfully,

Michael Byrne

Employment Permit Section."

The Employment Permits Act 2006

6. Insofar as relevant to the issues that arise in these proceedings, the Act provides as follows:

"8.—(1) Subject to *sections 10, 12 and 14* and *section 2(11)* of the Act of 2003, the Minister may, on application made to him or her, grant an employment permit...

11.—(1) In considering an application for an employment permit, the Minister shall have regard to—

(a) the extent to which a decision to grant the permit would be consistent with economic policy for the time being of the Government,

(b) whether the skills or qualifications specified to be required for the employment to which the application relates, that is to say, specified to be so required by—

(i) the applicant, or

(ii) in the case of an application by a foreign national, the person who has made the offer referred to in *section 4(3)* to the foreign national,

are necessary for, or relevant to, that employment,

(c) such of the other matters referred to in *section 6* or, as the case may be, *section 7* as are relevant to the application, and

(d) if any of paragraphs (a) to (j) of *section 12(1)* fall to be applied in relation to the application, any matters that, in the opinion of the Minister, are material to the application of such a paragraph or paragraphs.

(2) In considering an application for an employment permit, the Minister may take such steps as he or she considers necessary to establish the accuracy or authenticity of the information provided in respect of the application.

(3) This section is subject to the provisions of any regulations under *section 14* that apply in relation to the application concerned.

(4) Accordingly, nothing in this section authorises the Minister to make a decision on an application for a grant of an employment permit which he or she would not be authorised to make by reason of the operation of those regulations.

12.—(1) The Minister may refuse to grant an employment permit

if—

(a) the applicant for the permit (the "applicant") has failed to provide any information required by or under this Act in respect of the application for the permit (the "application"),

(b) the applicant has failed to furnish the prescribed fee with the application,

(c) the applicant has been convicted of an offence under this Act or the Act of 2003, or an enactment specified in *Schedule 1*, during the period of 5 years ending on the date of the application,

(d) in the opinion of the Minister, the granting of the permit would be manifestly inconsistent with economic policy for the time being of the Government,

(e) the following 2 conditions are satisfied, namely—

(i) a period (being a period ending on the date of the application) of less than 12 months has elapsed since the foreign national concerned first commenced employment in the State, and

(ii) there is already in force, on the date of the application, an employment permit granted to the foreign national,

(f) in the opinion of the Minister, it is in the public interest to do so,

- (g) a material misrepresentation in respect of the application has been made by the applicant,
- (h) a forged or fraudulent document has been submitted in respect of the application,
- (i) the foreign national concerned lands or has landed, or is or has been, in the State without permission,
- (j) the remuneration to be paid to the foreign national concerned in respect of the proposed weekly hours of work (whatever they may be) is less than the standard working week remuneration, or
- (k) the skills or qualifications specified to be required for the employment concerned, that is to say, specified to be so required by—

- (i) the applicant, or

- (ii) in the case of an application by a foreign national, the person who made the offer referred to in section 4(3) to the foreign national,

are not necessary for, or relevant to, that employment.

(2) *Subsection (1)* is without prejudice to *section 10(2)* and *subsection (3)*.

(3) The Minister shall refuse to grant an employment permit if the granting of it would contravene regulations under *section 14* in force at the time the decision on the application for the permit is made.

(4) Where the Minister refuses to grant an employment permit, the Minister shall notify, in writing, the applicant of the decision and the reasons for it.

(5) Where an application for an employment permit is refused, the Minister shall return to the applicant such portion, as may be prescribed, of the fee that has been submitted in respect of the application.

(6) In this section "standard working week remuneration" means the weekly remuneration that the foreign national concerned would receive if he or she were to work 39 hours each week at—

- (a) the national minimum hourly rate of pay, or

- (b) if the hourly rate of pay provided for in an employment regulation order or a registered employment agreement that applies to the employment concerned is greater than the national minimum hourly rate of pay, the hourly rate of pay provided for in that order or agreement..."

7. Section 13 goes on to provide for review of decisions to refuse an employment permit. Section 14 then provides as follows:

"14.—(1) The Minister may, having regard to, and only to, the matters specified in *section 15*, make regulations specifying, for a period not exceeding 2 years ("the appropriate period"), such one or more of the following as the Minister considers appropriate, namely:

- (a) the maximum number of employment permits that may be granted during the appropriate period;

- (b) the maximum number of employment permits that may be granted during the appropriate period in respect of a specified economic sector;

- (c) categories of employment (by reference to the economic sector or sectors into which they fall) which—

- (i) may be the subject of the grant of an employment permit during the appropriate period, or

- (ii) shall not be the subject of the grant of an employment permit during that period;

- (d) the minimum amount of remuneration (being an amount greater than that referred to in *section 12(1) (j)*) that shall be payable in respect of an employment as a condition for the grant of an employment permit in respect of it;

- (e) the qualifications or skills that a foreign national, in respect of whom, or by whom, an application for an employment permit is made during the appropriate period, is required to possess in order for a grant of the permit to be made;

- (f) for the purposes of *section 8(5)*, in relation to an employment permit granted during the appropriate period on foot of an application by a foreign national, a period longer than 2 years beginning on the date of the grant of the permit....

15.—(1) The matters mentioned in *subsections (1)* and *(2)* of section 14 are—

- (a) the qualifications or skills that, in the opinion of the Minister, are required for economic and social development and competitiveness in the period to which the regulations concerned under *section 14* will relate (the "relevant period"),

- (b) the economic sector or sectors that, in the opinion of the Minister, will be involved in the achievement of such economic and social development and competitiveness,

- (c) the qualifications or skills that, in the opinion of the Minister, are required for the proper functioning of such economic sector or sectors in the relevant period, and

(d) if, in the opinion of the Minister, there is likely to be, during the relevant period, a shortage or surplus in respect of qualifications or skills falling within *paragraph (c)*, an estimate as best the Minister may make (and which estimate the Minister is, by virtue of this section, required to make) of what the extent of that shortage or surplus will be...

30.—(1) The Minister may make regulations in relation to any matter referred to in this Act as prescribed or to be prescribed...

(5) Every regulation made under *section 14* shall be laid before each House of the Oireachtas as soon as may be after it is made."

The Criteria Adopted by the Minister for the Grant of Employment Permits

8. In the replying affidavit of Mary Jane Kehoe, an assistant principal officer in the Department of Jobs, Enterprise and Innovation, the employment permits system operated by the Minister is described. It is stated to be an instrument of the government's economic policy which forms part of the Action Plan for Jobs 2014 and was published by the Taoiseach, the Tánaiste and the Minister on the 27th of February, 2014. Ms. Kehoe's affidavit exhibits two documents published by the Minister on the Department's website which are stated to be the "criteria" applied in relation to applications for employment permits. These are described as "rules" by Mr. Ali. The first document is entitled "Work Permit Employment Permit" and under the sub heading "Criteria for eligibility", the following appears:

"The Department of Jobs, Enterprise and Innovation examine a number of criteria when assessing employment permit applications.

As with most employment permits the issue of a work permit employment permit is contingent on a job offer from a bona fide employer registered with the Company Registration Office and Revenue Commissioners and trading in Ireland. Full details of what is required are set out on the relevant application form and include:

- A full description of the proposed employment.
- The employment named is not in an excluded job category under the ineligible categories of employment for employment permits.
- Information in respect of the qualifications and skills or experience that are required for the employment.
- Annual remuneration (generally above €30,000). The department considers applications on an exceptional basis with a remuneration lower than €30,000..."

9. The second relevant document published on the department's website is entitled "Ineligible Categories of Employment for Employment Permits" and sets out a list of categories which are considered to be ineligible for employment permits. One such category is "sales staff" which includes all retail sales vacancies, sales representatives, supervisory/specialist sales with certain exclusions and thus applies to the position in respect of which Mr. Ali made his application.

Submissions

10. Counsel for the applicant, Mr. Shortall BL, submits in essence that the "rules", as he describes them, adopted by the Minister are *ultra vires* the powers conferred on him by the Act. This is so because in adopting ad hoc rules which purport to deal with matters such as the categories of employment and minimum amount of remuneration to which regard will be had in assessing applications for employment permits, the Minister has in effect sought to entirely circumvent the provisions of s. 14 of the Act, which explicitly provides for the making of regulations in relation to such matters. Such regulations, if made by the Minister, must be laid before both houses of the Oireachtas and accordingly, by adopting the non-statutory criteria above referred to, the Minister has avoided the legislative scrutiny mandated by the statute. As such was plainly not the intention of the legislature in enacting the Act, the adoption of the scheme must be *ultra vires*.

11. Counsel further submits that the adoption of these criteria by the Minister infringes Article 15.2.1 and 15.2.2 of the Constitution, which vests the sole and exclusive power of making laws for the State in the Oireachtas.

12. The applicant places particular reliance on the judgment of the Supreme Court in *O'Neill v. Minister for Agriculture and Food* [1998] 1 I.R. 539, which he says is on all fours with the facts of this case. In *O'Neill*, the respondent Minister sought to adopt a non-statutory scheme for the grant of licences under the Livestock (Artificial Insemination) Act 1947, when the Act provided for the making of regulations for the establishment of such a scheme. The court held that the purported adoption of the scheme by the Minister was *ultra vires* the Act of 1947.

13. Counsel for the Minister, Mr. Callanan SC, submitted that the case fundamentally boiled down to an issue of statutory interpretation. The Act empowers the Minister to grant employment permits. In doing so, s. 11 mandates the Minister to have regard to certain matters which include the government's economic policy. Section 12 provides that the Minister may refuse to grant a permit if, *inter alia*, to do so would be inconsistent with the government's economic policy. The Minister may further refuse a permit if he is of the opinion that it is in the public interest to do so.

14. Counsel argues that the Minister has a clear discretion under the Act with regard to the issuing of employment permits and it is perfectly permissible for the Minister to indicate in broad terms how that discretion will be exercised by the publication of appropriate criteria and guidelines for the benefit of the public. The Minister has no obligation to make regulations as the language of s. 14 makes clear.

15. Counsel contends that the Minister, in having regard to economic policy as he is obliged to do in considering an application for an employment permit, must be entitled to consider matters of the type referred to in s. 14 that may be the subject matter of regulations. He says that the applicant's case in effect means that when the Minister comes to consider an application, despite being enjoined to have regard to the government's economic policy, is obliged not to have regard to any matters which may be the subject matter of regulations under s. 14. This cannot have been the intention of the legislature. He distinguishes *O'Neill* on the facts and on the basis that the legislation in issue there was very different as was the radical nature of the scheme sought to be introduced

without reference to the legislative framework for regulations.

Discussion

16. In *O'Neill*, the legislation under consideration was the Livestock (Artificial Insemination) Act 1947. This Act comprises twelve sections in two pages, being described by one member of the court as "skeletal". Section 3(1) of the Act provides that the Minister may make regulations for controlling the practice of artificial insemination of animals to which the Act applies and, in particular, for prohibiting the distribution and sale of semen of animals to which the Act applies except under and in accordance with a licence. Section 7 provides that the Minister may issue licences, may attach such conditions as he thinks fit to a licence and may at any time revoke a licence. Section 10 provides for the laying of regulations before both houses of the Oireachtas.

17. The Minister adopted a licensing scheme which divided the State into nine areas and provided for the grant of only one licence in respect of each area.

18. The Supreme Court held that since the exclusivity scheme was so radical in qualifying limited numbers of persons and disqualifying others who may have been equally competent from engaging in the business of artificial insemination, the Oireachtas, in using general words, could not have contemplated such far reaching intrusion on the rights of citizens and thus, the scheme was *ultra vires* the Act of 1947. The court held that even if the Oireachtas had envisaged the adoption of such an exclusivity scheme, which was open to doubt, it was highly improbable that it intended the scheme to be established by a series of administrative decisions which avoided legislative supervision rather than by way of regulations.

19. In the course of delivering his judgment, Keane J. (as he then was) considered the issue of the Minister adopting policy considerations in relation to the grant of licences and said (at p. 543):

"As to the legitimacy of the first respondent adopting such policy considerations, I venture to repeat what I said in *Carragaline Co. Ltd. v. Minister for Transport* [1997] 1 I.L.R.M. 241 at p. 284:

'It is clear that, in the case of at least some licensing regimes, questions of policy cannot play any part. This would be the case, for example, with television reception licences and driving licences, provided that in the latter case, certain conditions of eligibility are met. At the other extreme, questions of policy must obviously affect the granting or refusal of planning permission and indeed in that area the authority is obliged by statute to adopt a specific set of policy objectives in the form of a development plan.

The licensing regime established under the [Act of 1926] as amended by subsequent legislation belongs to an intermediate category. In the case of this and similar licensing regimes, the adoption by the licensing authority of a policy could have the advantage of ensuring some degree of consistency in the operation of the regime, thus making less likely decisions that might be categorised as capricious or arbitrary. But it is also clear that inflexible adherences to such a policy may result in a countervailing injustice. The case law in both this jurisdiction and the United Kingdom illustrates the difficulties involved in balancing these competing values.' "

20. Keane J. went on to consider that the Minister, by excluding the possibility of granting any licence that would conflict with the exclusivity scheme, had fettered his discretion. He concluded that the respondent had in fact acted *ultra vires* in adopting the exclusivity scheme, there being nothing in the Act to suggest that the Oireachtas intended the creation of such a scheme. Even if they had, it was inconceivable that the legislature contemplated the creation of such a scheme by the executive. This effectively insulated the scheme from legislative scrutiny.

20. The other judgment of the court was delivered by Murphy J., who considered that the power conferred on a Minister to make law by way of regulation or statutory instrument in any given case is primarily to be determined by the interpretation of the legislation purporting to confer the power. He referred to the test to be applied to the constitutionality of delegated legislation identified by O'Higgins C.J. in *City View Press v. An Chomhairle Oiliúna* [1980] I.R. 381. Murphy J. went on to state (at p. 553):

"The difficulty of applying to the present case the tests enunciated by the former Chief Justice is that the Act of 1947 provides little guidance as to the policy or principles to be implemented by the first respondent or the regulations contemplated by the Oireachtas. It is not merely that the lack of policy or principles deprives the first respondent of suitable guidance but it also fails to provide any significant restriction on the ministerial power. This would be a reason for giving a wide construction to the power conferred on the first respondent and a consequential doubt as to the constitutionality of the statutory delegation."

21. It appears from the foregoing therefore that Murphy J. had considerable misgivings about the constitutionality of the Act of 1947 itself. He was of the view that insofar as the question of *ultra vires* was concerned, the requirement was to look at the legislation with a view to identifying the principles and policies laid down by the Oireachtas for achieving the identified purpose of the legislation. Murphy J. also referred to the presumption that in delegating legislation, parliament did not intend to confer radical powers of a legislative nature and clearly viewed the scheme in issue as at the extreme end of the spectrum. He felt that the power of making regulations was potentially so far reaching that it might well be that it could not be validly delegated by parliament at all.

22. It seems to me that the Act in issue here could not in any sense be equated with the legislation in issue in *O'Neill*. It is comprehensive in setting out a framework for the granting of employment permits. It contains detailed provisions concerning the matters to which the Minister must and may have regard in deciding to grant or refuse an employment permit. It provides a significant level of detail with regard to what may be the subject matter of regulations which may be made by the Minister.

23. The Act clearly confers upon the Minister the power to grant employment permits whether or not regulations are made under s. 14. Unlike the seemingly unfettered power to grant licences conferred on the Minister under the Livestock (Artificial Insemination) Act 1947, the power of the Minister to grant an employment permit is here significantly circumscribed by s. 11 of the Act, which obliges him to have regard to, *inter alia*, economic policy for the time being of the Government. Consistent with that, s. 12 entitles the Minister to refuse to grant an employment permit if in his opinion, the granting of the permit would be manifestly inconsistent with such economic policy or, if in the opinion of the Minister, it is in the public interest to do so. In that latter regard, s. 1(1) of the Act defines "public interest" as including the need to protect the labour market.

24. It must follow in my view from the foregoing that in considering applications for employment permits under the Act, the Minister is obligated to have regard to the policy of the Government in relation to the protection of the labour market in considering whether to grant or refuse an employment permit.

25. It is impossible to conceive how the Minister could comply with these statutory duties without having regard to matters of the kind that are referred to in s. 14 as being potentially the subject matter of regulations. For example, it is difficult to see how the need to protect the labour market could be addressed if the Minister were to be precluded from having regard to relevant categories of employment and remuneration levels. Yet the applicant's case is in effect that he is precluded from doing so unless he makes regulations.

26. This is not a case in which Mr. Ali criticises the Minister for fettering his discretion by the adoption of the guidelines in issue.

27. The legitimacy of the adoption of such guidelines by bodies discharging statutory functions was considered by Clarke J. in *Crawford (Inspector of Taxes) v. Centime Ltd* [2006] I.R. 106 in which he said (at p. 124):

"A second issue arose when I enquired as to the basis upon which the Revenue Commissioners might have an entitlement to impose such criteria in the absence of an express statutory provision. Counsel for the appellant indicated that such an entitlement might derive from the so called "care and management" provisions of the Taxes Acts (see for example s. 849 Taxes Consolidation Act 1997) which placed the care and management of the operating of tax in the hands of the Revenue. As the matter was not fully debated I should not express any concluded view on this issue save to indicate that I would have significant doubt as to whether the care and management provision of the Taxes Acts could be construed in a constitutional manner such as would entitle the Revenue Commissioners to impose absolute criteria, the effect of which might be to require a person to bear tax (or, as in this case, not to obtain a refund) to which they are *prima facie* entitled under the Taxes Acts in the absence of a specific statutory entitlement to impose such criteria which conforms with the requirements of the jurisprudence of the courts in relation to principles and policy. In saying that, however, I would wish to make clear that it is entirely appropriate for the Revenue Commissioners to issue guidelines which make clear to taxpayers the way in which the Revenue Commissioners will exercise any discretion which the law confers as to the manner in which the Taxes Acts may be applied. Such guidelines have the merit of informing taxpayers as to how Revenue Commissioners discretion is likely to be exercised and achieve the desirable end of making it more likely that any discretion which the Revenue Commissioners may enjoy will be exercised in a similar manner in like cases. It is, however, the elevation of any such guidelines to matters which are applied as if they have the force of law that is open to serious question. That is particularly so where, as here, and for the reasons which I have analysed above, the criteria appear, in many respects, to be inconsistent with the law."

28. I respectfully agree with those remarks. Where a statutory discretionary power is conferred on a decision maker, it seems to me that it must be in the interests of those engaging with such decision maker to have access to information as to how that discretion is likely to be exercised in a particular set of circumstances. Whilst of course, the adoption of inflexible rules may always be potentially open to the criticism that the decision maker's discretion is thereby unlawfully fettered, there has to be room for a level of guidance that facilitates the objects for which the power was granted. This is all the more so in cases such as the present where the relevant considerations are almost entirely policy driven.

29. As s. 12 makes clear, it is undoubtedly the Minister's right to refuse to grant an employment permit if he is of the opinion that it would be either inconsistent with the government's economic policy or not in the public interest. Yet, if he confined himself to issuing refusals based solely on these rather sterile and uninformative reasons without more, unsuccessful applicants would be left largely in the dark as to why their applications had failed. Moreover, such a response would likely be open to a reasons-based judicial review challenge in the light of recent decisions such as *Meadows v. Minister for Justice* [2010] 2 I.R. 701 and *Mallak v. Minister for Justice* [2012] 3 I.R. 297.

28. In my view, the legislative and factual background against which *O'Neill* was decided is so different from the present case as to render it of little assistance in determining the issues that arise here. There is a clear benefit in my opinion to be derived from the publication of guidelines or criteria of the kind in issue here for applicants for employment permits, be they prospective employees or employers. When one reads the Act as a whole, I do not believe one could infer that the legislature intended that the Minister could not take account of the matters specified in s. 14 in assessing applications for employment permits in the absence of making regulations.

Conclusion

29. In the event, I am satisfied that the applicant has not made out any of the grounds upon which leave was granted in this case. Although the issue of alternative remedies was canvassed by the parties, in the light of my findings above it is unnecessary to determine that issue.

30. Accordingly, I will dismiss this application.