

**THE HIGH COURT  
JUDICIAL REVIEW**

[2017 No. 992 J.R.]

**BETWEEN****LING AND YIP LIMITED****APPLICANT**

**AND  
THE MINISTER FOR BUSINESS, ENTERPRISE  
AND INNOVATION**

**RESPONDENT****JUDGMENT of Mr. Justice Noonan delivered on the 4th day of October, 2018**

1. In these proceedings, the applicant seeks an order of *certiorari* quashing the decision of the respondent dated 31st October, 2017 refusing the applicant's application for an employment permit.

**Background Facts**

2. The applicant is a limited company which operates a restaurant in Dunboyne, Co. Meath. It formerly employed one Kok Huo Khong as a chef at its restaurant. Mr. Khong is a Malaysian national who entered Ireland as a student in 2013. In April, 2015, the applicant employed Mr. Khong as an assistant chef. He was subsequently promoted to head chef and the applicant applied for and was granted an employment permit for one year on the 27th July, 2016. This permit expired on 26th July, 2017. The information furnished by the applicant to the respondent, which is recorded in the permit, included a description of Mr. Khong's employment as a head chef and that his remuneration was €600.00 per week.

3. On 3rd August, 2017, eight days after this permit had expired, the applicant applied for a renewal of the permit. This application was refused by the respondent's department on 15th September, 2017. Two reasons were given. The first was that the applicant was in the State without current immigration permission from the Minister for Justice, Equality & Law Reform. This appears to have arisen because Mr. Khong's permission to remain in the State lapsed with his employment permit. The second reason was that the documentation submitted with the renewal application showed that Mr. Khong had received less than the annual remuneration stated on the previous employment permit and fell below the minimum required by Employment Permits Act, 2006 (as amended).

4. The applicant instructed solicitors to appeal this decision by seeking an internal review in the respondent's department by letter of 11th October, 2017. That letter was accompanied by a form completed by a director of the applicant, Mr. Yuk Man Ling. This form *inter alia* set out the basis for seeking a review. In response to the two reasons given by the department official, Mr. Ling submitted with regard to the first that the decision was disproportionate because the application was submitted in a timely manner. With regard to the second reason, Mr. Ling said the following:

"The Minister erred in fact and law regarding the second reason. The correct remuneration was paid to the foreign national as evidenced by the payslips furnished since January, 2017. There was a delay in registering the applicant with the local Immigration Office as Mr. Ling, Director and owner of the applicant, was absent from the State due to a family bereavement. The foreign national was always paid pursuant to the contract of employment."

5. The reviewing officer issued her decision on 31st October, 2017 refusing the appeal. In the course of her letter she said:

"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. As the previous permission had expired on 26th July and the application for its extension was submitted on 3rd August, Mr. Khong did not have the required immigration permission at the time of the employment permit application. Therefore, under s. 12(1) (i) of the Employment Permits Act, 2006, (as amended) an employment permit cannot be issued.

The weekly remuneration specified on the payslips for Mr. Khong does not match the amounts specified on the previous permit. The P60 submitted for 2016 shows total pay of €11,916.40 for a 53-week period. As neither the payslips nor the P60 confirmed that Mr. Khong received the remuneration specified on his previous permit, in line with s. 20(8A)(b) of the Employment Permits Act, 2006, (as amended), an employment permit cannot issue."

**The Applicant's Case**

6. The applicant claims that in making her decision, the respondent misapplied the relevant provisions of the Employment Permits Act, 2006, as amended, which confer a discretion on her to grant or refuse an employment permit even in the presence of the two identified circumstances and the respondent misconstrued her powers under the Act in concluding that she could not issue a permit in the presence of those circumstances. Alternatively, the respondent unlawfully fettered her discretion by determining that she could not issue a permit in the relevant circumstances. The applicant further submits that the respondent failed to examine and consider the particular circumstances of its case.

**The Employment Permits Act, 2006**

7. The Act of 2006, (as amended), provides in relevant part ss. 12 and 20 as follows:

"12. - (1) The Minister may 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,"

8. Section 20(8A)(b) of the 2006 Act as amended by the Employment Permits (Amendment) Act, 2014 provides as follows:

"(8A) In addition to, pursuant to subsection (8), the grounds specified in section 12 for refusing an application for renewal, the Minister may refuse to renew an employment permit if—

...

(b) in the opinion of the Minister, the remuneration paid to the foreign national, during the period for which the employment permit has been in force, is less than the remuneration stated, pursuant to section 9(2), in the employment permit or the deductions referred to in section 9(2), and stated, pursuant to that section, in the employment permit, were different to the deductions made by the employer,”

## **Discussion**

9. As is immediately evident from the use of the word “may” in ss. 12 and 20, the Minister has a discretion to grant or refuse an employment permit even in the presence of the circumstances identified in those sections. The permissive rather than mandatory language adopted by the Oireachtas places a duty upon the Minister to act fairly and judicially in exercising the power conferred by the statute. That much is evident from the authorities going back to the locus classicus, *East Donegal Co-Operative Livestock Mart Limited v. Attorney General* [1970] I.R. 317.

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. An applicant may have arrived in the State unlawfully and worked here unlawfully for a lengthy period. In contrast, Mr. Khong entered the State lawfully and worked here lawfully for several years but his employer was eight days late in applying for a new permit. The two situations are not comparable but both fall within the range of circumstances that the Minister must have regard to in the exercise of her discretion.

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. The same considerations perforce apply to the second reason given which again is legally erroneous. The applicant furnished an explanation for the fact that between July and December, 2016, Mr. Khong was not paid the correct salary identified on the work permit. That was however corrected from January onwards. Although it was pointed out in the course of submissions at the trial that this meant that over the full period of the permit, Mr. Khong’s remuneration fell short by something of the order of €10,000, the applicant undertook to the court that that would be rectified.

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.

## **Conclusion**

13. I am satisfied that in making the decision under challenge here, the respondent fell into error in concluding that she had in fact no discretion to grant the permit. Even if it could be said that the respondent’s statement amounted to the adoption of a policy to refuse applications in the presence of the two circumstances identified, here again it is clear from the case law that the respondent is not entitled to adopt a fixed and inflexible policy which effectively does not admit of the exercise of any discretion or have regard to the circumstances of the individual case under consideration.

14. I am further satisfied that the failure of the respondent to engage in any meaningful way with the explanation offered by the applicant or to give any reasons as to why it was not acceptable renders the decision fatally flawed.

15. For these reasons therefore, I propose to quash the decision and remit the matter to the respondent to be reconsidered in accordance with the terms of this judgment.