THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 768 J.R.]

BETWEEN

GURSANGAT SINGH

APPLICANT

AND

THE MINISTER FOR BUSINESS, ENTERPISE

AND INNOVATION

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

JUDGMENT of Mr. Justice Meenan delivered on the 21st day of December, 2018

Background

1. The applicant in this case is a national of India who arrived in Ireland on 27 January 2008 on foot of a student visa. In May 2011 he married a Latvian national who was an EU citizen exercising her freedom of movement rights. As the spouse of an EU national, the applicant was granted a Stamp 4 permission pursuant to the terms of the European Communities (Free Movement of Persons) Regulations and was therefore permitted to reside and work in the State for a period of five years on similar terms to an EU national.

2. A Stamp 4 is a limited permission to enter and reside in the State for a specified period, subject to conditions, which by definition does not include any restriction on engaging in any business, trade or profession. This means that the holder of a Stamp 4, much like a citizen, has no need for any employment permit to take up work in the State.

3. Unfortunately, the applicant's marriage was unsuccessful and ended in a decree of divorce in July 2014 and his former spouse returned to live in Latvia.

4. Notwithstanding the breakdown of his marriage, the applicant wished to remain in Ireland so he made an application to the second named respondent for the retention of his residence card due to his status as the former spouse of an EU citizen. This application was unsuccessful and the applicant applied to have it reviewed.

5. The decision of the second named respondent and the subsequent review of that decision inevitably took a considerable amount of time and over the course of same the applicant was granted several interim permissions to regularise his immigration status while the process was ongoing. He continued to attend at his local immigration office for the purpose of having this status renewed. This was granted on 2 November 2016 (valid until 2 April 2017) and on 22 March 2017 (followed until 22 July 2017). The Stamp 4 status may not or may not have been renewed.

6. In circumstances where the initial application for the retention of his Stamp 4 permission was refused and was then under review he thought it prudent to apply for an employment permit to remain and work in the State. It must be noted that the applicant still retained his Stamp 4 permission at this point.

7. Whilst resident in Ireland the applicant has worked in the restaurant business and wishes to continue to do so. On 10 May 2017 a prospective employer made an application to the first named respondent pursuant to the Employment Permits Act 2006 (the Act of 2006) for an employment permit for the applicant.

8. By letter, dated 11 July 2017, the first named defendant refused the application for an employment permit. The stated reason for the refusal being that:

> "[I]t appears from the information submitted that the foreign national's current immigration permission from the Minister for Justice and Equality precludes them from entering employment in the State. In line of s. 12(1) (i)(c) of the Employment Permits Act, 2006 (as amended) an employment permit will not be issued."

9. The applicant instructed his solicitors to have this decision reviewed under the Act of 2006 and the first named respondent's attention was drawn to the fact that the applicant had Stamp 4 status which commenced on 22 March 2017 and would continue until 22 July 2017.

10. The first named respondent issued her review decision on 25 August 2017. This decision contained the following:

> "It is the policy that all new first time applicants for employment permits should normally make their application while resident outside the State. However, the Department of Justice and Equality has agreed to the removal of various restrictions on applicants from within the State with affect from 10 April 2013. As of that date certain categories of non-EEA immigration permission holders, who have been offered employment in an eligible occupation will be allowed to apply for an employment permit, whilst already legally resident in the State. They *must* currently hold a valid certificate of registration (GNIB card) and (b), namely, holders of stamp 1, 1A, 2, 2A, and 3 immigration permissions. Holders of a stamp 4 or an EU FAM stamp 4 come within the provisions of s. 2(10) (d) of the Employment Permits Act 2003 (as amended) and as such have no requirement for an employment permit."

11. The decision of the first named respondent, dated 25 August 2017, made no reference to s. 12(1) (i)(c) of the 2006 Act referred to in the first decision of 11 July 2017. It was accepted by both parties that the July 2017 decision was in error as the applicant enjoyed Stamp 4 status at the time.

Application for judicial review
12. On 23 October 2017 the High Court (Noonan J.) granted the applicant leave to apply for judicial review for the following reliefs:

> 1. An order of *certiorari* in respect of the decision of the first named respondent communicated to the applicant by way of letter dated 25 August 2017 wherein it was confirmed that the applicant would be refused an employment permit.
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> 2. An order of *mandamus* compelling the respondent to grant the employment permit sought by the applicant pursuant to s. 13(4) (b) of the Employment Permits Act 2006.
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> 3. A declaration that the promulgation of a policy prohibiting the holders of stamp 4 immigration permission from applying for an employment permit was *ultra vires* the second named respondent and/or unlawful.
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> 4. A declaration that the first named respondent, its servants or agents, acted unlawfully and/or *ultra vires* in applying the said policy as a basis for refusing to grant the applicant an employment permit.
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> 5. Further, or in the alternative, a declaration that the applicant, as the holder of a stamp 4 immigration permission was not thereby precluded from applying for, or receiving an employment permit.

Relevant statutory provisions
13. Section 13 of the Act of 2006 provides a procedure for the review of a decision to refuse a work permit. In particular s.13(4) provides:

> "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—
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> > *(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."

Issues to be determined
14. It can be seen that the reliefs being sought by the applicant involve a judicial review of two areas:

> (i.) A review of the decision of the first named respondent.
>
> (ii.) A review of the policy which underlined the decision of 25 August 2017.

Consideration of issues
15. It is accepted that the decision of 11 July 2017 was in error. On review under s.13(4) the first named respondent reached the same decision but for different reasons. The question that has to be answered is whether such is permissible under the terms of s.13(4) and to answer this an analysis of s. 13(4) is required.

16. Section 13(4) requires that the person seeking to review the decision be given "an opportunity to make representations in writing in relation to the matter". This is an application of a basic rule of fair procedures, namely that a person be afforded an opportunity to be heard. Once these representations have been considered, the first named respondent has two available options. These options are to either:

> (a) confirm the decision
>
> or
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> (b) cancel the decision and grant the employment permit.

In the instant case, the first named respondent confirmed the decision but gave entirely different reasons from those which were given when the decision was first made. To my mind, there is an obvious problem with this in that the applicant was given an opportunity to make representations in respect of the first decision but there was no such opportunity afforded to him in respect of the reasons given for the reviewed decision. Fair procedures would dictate that if different reasons were going to be given to confirm the first decision on review then the applicant must be afforded an opportunity to be heard. This is what is provided for in s.13(4) and, in my view, is not limited only to the first decision. If the first named respondent is intending to confirm the first decision but for different reasons then the applicant should be afforded an opportunity to make representations on these different reasons before the review decision is taken.

17. In the course of the hearing the Court was referred to a number of authorities to the effect that a decision maker, be it a court or otherwise depending on the relevant statutory provisions, is not confined to the reasons given or the decision made at first instance. In *Adegbuyi v. Minister for Justice and Law Reform* [2012] IEHC 484 the High Court was exercising its statutory appeal jurisdiction under s.21(5) of the Refugee Act 1996 (now repealed) against the revocation of a declaration of refugee status. One of the issues before the court was whether the court might substitute reasons of its own with those made at first instance. The relevant statutory provisions in this case provided:

> "A person concerned may appeal to the High Court against a decision of the Minister under this section and that Court may, as it thinks proper, on the hearing of the appeal confirm the decision of the Minister or direct the Minister to withdraw the revocation of the declaration."

It can be seen that the wording here is similar to that of s.13(4) of the Act of 2006. In giving judgment Clark J. stated at para. 9:

> "The respondent urged the Court to find that in addition or as an alternative to the grounds relied on by the Minister (i.e.

> ss. 21(1) (a), (d) and (e) of the Refugee Act 1996), it is open to the Court to affirm the Minister's decision on the ground set out at s. 21(1) (h) of the Act, i.e. that the appellant furnished false or misleading information to the asylum authorities which was material to the grant of refugee status. The appellant on the other hand contested the right of the Court to affirm the revocation on any other grounds than those outlined by the Minister. However, no authority was cited to support this view. Considering that this is an appeal the Court cannot see any reason why it should not substitute its own reasons for those found by the Minister. This interpretation is in accordance with the terms of s. 21(5) and the interpretation attributed thereto in *Gashi* and *Abramov*, cited above. Essentially, the statute permits the Court to '*confirm the decision of the Minister'* and the Court is at large as to the reasons it may give for so doing."

18. However, it seems to me that though a court, or other body on appeal, may affirm a decision for different reasons than those given at first instance the person affected by the decision must be afforded an opportunity to make representations on those reasons before the decision is made. In *Adegbuyi* both parties were present and represented before the court.

19. In light of my findings on the procedures adopted by the first named respondent in reviewing the decision it is not necessary to consider the policy aspects of the decision. However, the statement of opposition of the respondents contends that these proceedings were frivolous and vexatious as the applicant had "never explained why he needed an employment permit". By letter dated 14 July 2017 the solicitor for the applicant set out the reasons for the review and informed the first named respondent that Stamp 4 status had been granted until 22 July 2017 and thus was soon to run out. This clearly put the applicant at risk and was the basis for his application for a work permit. Therefore, I do not accept that these proceedings are frivolous and vexatious and/or do not disclose a maintainable cause of action.

20. By reason of the foregoing, the applicant is entitled to an order of *certiorari* quashing the decision of the first named respondent communicated by way of letter dated 25 August 2017.

21. Further, under the provisions of s.13(4) as the decision has not been validly confirmed, the decision must be quashed and the matter remitted to the first named respondent for consideration.