Neutral Citation [2015] IEHC 638

THE HIGH COURT

[2014 No. 529 J.R.]

IN THE MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000 (AS AMENDED)

BETWEEN

QINGZHOU LI AND HUIMIN WANG

APPLICANTS

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 21st day of October, 2015

1. Can the Minister for Justice and Equality lawfully impose on a visa applicant the condition that they apply for the visa from outside the State? That is the principal question posed in this application.

2. The applicants in this case are Chinese nationals who are married with an adult daughter. Their daughter married an Irish citizen in May 2011 and obtained Irish residency following that marriage.

3. In 2012 the applicants obtained a 90 day visitor's visa to come to Ireland to visit their daughter. They returned to China immediately prior to the expiry of that visa in July of that year.

4. The applicants more recently applied for a further 90 day visitor's visa, which was also granted. They arrived in Ireland on 20th March, 2014. During this visit, however, they decided to endeavour to seek an extension of their visa to enable them to live in Ireland on a more permanent basis with their daughter. The applicants' solicitors, Gallagher and Co., who had dealt with the daughter's application for residency in 2011, wrote a letter to the Department of Justice and Equality dated 6th June, 2014, setting out *"an application on behalf of both Qingzhou Li and Huimin Wang for leave to remain in the State as dependents of Mr. Thomas McNally and Mrs. Michelle Yao McNally"* (being their son in law and daughter respectively).

5. The letter stated that Mr. and Mrs. McNally had offered them a place to reside in Ireland "*of course, subject to being granted leave to remain in the State*". The letter noted that the applicants' daughter would be applying for a certificate of naturalisation, and I am informed by counsel that this was in fact granted subsequent to the issue of the proceedings.

6. The letter did not, however, set out any case that the applicants were, or would be, unable to pursue an application for long-term residence from their home in China, nor did it allege that refusal of the application would constitute a serious infringement of the constitutional or Convention rights of the applicants by reason of any special circumstances of dependency or inability to continue to live in China.

7. Furthermore, the letter did not purport to be an application under any particular statute, regulation or administrative scheme. The legal basis for the application was not specified in the letter.

8. No basis for alleging any dependency or inability to live in China has been established or even alleged, nor has any basis for contending that the applicants could not have applied for long-term residency from China.

9. The Minister has adopted a policy statement, published on the web, which in general requires non-EEA long term family reunification applications by parents to join children in the State to be pursued from the applicant's home country. The allegation in the pleadings that the policy was "unpublished" was sensibly not pursued at the hearing.

10. The Minister's reply is of some importance in the case. It took the form of a letter from the Department to Gallagher and Co. Solicitors dated 25th June, 2014, enclosing "*decision letters*" addressed to the applicants. The covering letter stated:-

> *"As they are Visa required nationals they must apply for the appropriate Visa from outside the State."*

Each decision letter stated that:-

> *"Following consideration of the individual circumstances of this case including all of the matters known to us and which were adverted (sic) in your application your position does not warrant an extension of visitor permission".*

It went on to say that:-

> *"In the light of the above, the application for an extension of visitor permission in respect of you is refused. Applications for permission to remain in the State as retirees with independent means or as dependents under the Non-EEA Family Reunification Policy Document as detailed on our website, must be made from country of origin for individuals who are Visa required to enter the State."*

11. The statement in the letter that all circumstances were considered was supported by affidavit evidence, which I accept, filed on behalf of the Minister.

12. Following receipt of this letter by applicants' solicitors on 26th June, 2014, their solicitors delivered a copy of the letter by hand to the applicants' address on the same day. The applicants could not read or speak English and, therefore, did not read the refusal correspondence at that time. Their daughter and son in law were away on holidays between 20th June and 15th July, 2014, so the applicants did not become aware of the refusal until the latter date. (The initial affidavit filed on behalf of the Applicant mis-stated the date of the holiday as commencing on 28th June 2014 but I accept the correct date is that mentioned in a later affidavit, namely the 20th).

13. Their daughter became aware of the refusal slightly earlier by a matter of one or two days prior to 15th July by reason of an email sent and from the applicants' solicitors which she picked up while abroad. Shortly after 15th July, contact was made with both

solicitors who then sought the advice of counsel. Counsel sought further instructions which were then provided.

14. Papers were then sent to counsel for the purpose of drafting pleadings, which were returned by counsel on 11th August, 2014. I was informed by Ms. Rosario Boyle S.C. for the applicants that the long vacation appears to have hindered the progress of the matter and the notice of motion that was ultimately issued is dated 2nd September, 2014, and has a High Court stamp which appears to be dated 5th September, 2014 in the version that was handed to me.

15. It is accepted that the applicants' solicitors were generally aware of the right of internal appeal of a visa decision and that no such appeal was lodged. It is also noteworthy that the decision letters did not make reference to the right of internal appeal.

16. It is important that I record that at no time following the refusal letters and prior to the institution of the proceedings did the applicants or anyone on their behalf write a pre-action letter to the Minister complaining about the refusal decision or requesting further or any reasons for it.

17. It is also important to record that despite what I find to be the clear impression created by the applicants' instructions to their solicitors as conveyed, in good faith, by their solicitors to the Minister, the Applicants did not leave the State as they were obliged to do upon or prior to the expiry of their visitors' visa, and were present in the State without permission on the date of institution of the proceedings and at all material times thereafter.

18. I also conclude, having particular regard to the evidence in this respect adduced by the respondent concerning the reasons for the requirement that applicants for longer term permission must make that application from their home country, that the act of overstaying is not a breach of the law that is without consequence for the rights and interests of others. The visa system depends on substantial compliance by those who benefit from it. Any act of overstaying increases the pressure on the respondent to inquire more rigorously into visitors' visa applications which can only have the effect of creating delay or inconvenience for law-abiding applicants.

Procedural issues
19. There are two initial procedural issues that warrant mention.

20. Firstly, the applicants have referred in their Statement of Grounds to the Minister for Justice and Equality by her incorrect, pre-2011 title. As it is more appropriate that the Minister's correct title should be used, I would be prepared to permit amendment of the title of the proceedings.

21. Secondly, although the Court has ordered that present hearing be conducted on a telescoped (or what is referred to in England as a "rolled-up") basis (where the leave application and the substantive judicial review are being heard together), the respondent has not filed a Statement of Opposition but delivered a document entitled "*intended statement of opposition*". As a matter of logic there can be no meaningful "*intention*" to deliver a statement of opposition because no such opportunity will arise prior to the determination of the proceedings. Ms. Sinead McGrath B.L. for the Minister informed me that the practice was that if leave was granted, a Statement of Opposition would be filed at that point. However in view of the fact that the grant of leave would co-incide with the end of the case as far as this Court is concerned, this suggested procedure strikes me as only adding to the oddity of what appears to be the current practice. Given that the purpose of pleadings is to define the issues to be addressed at a hearing, it is a strange form of pleading that can only be filed after the case has been determined.

22. To my mind, the practice of delivering an "*intended*" statement of opposition derives from an over-literal adherence to the semantics of O. 84. An intended statement, as opposed to its more formal counterpart, is not a pleading, and under the current practice, I am informed, is not accepted for filing by the Central Office. As it is not a pleading, the question of whether and on what basis it could be amended would seem to be a matter for debate. In addition it seems inappropriate in view of the central importance of equality of arms in the legal context to require one party to formally file a pleading and allow the other party to deliver an informal pseudo-pleading with no clear legal basis.

23. It seems to me that the proper way to make sense of the requirements of O. 84, as it applies to a telescoped hearing is that upon the making of an order by the court that the leave hearing is to be treated as the substantive hearing or telescoped with it, the respondents thereupon become obliged to file and serve a statement of opposition, given that the hearing thereby fixed will be a final determination of the issues.

24. I will now turn to what seem to me to be the principal legal questions raised in this application.

Does section 5 of the 2000 Act apply to refusal of a Visa renewal?
25. There seems to be at least a flicker of doubt about this question in the mind of the applicants as it was submitted to me that they were taking a "cautious" approach by assuming that the section does apply, but to my mind the issue is beyond argument. Section 5 of the Illegal Immigrants (Trafficking) Act 2000, as amended by the Employment Permits (Amendment) Act 2014, makes clear that the restrictions on applying for leave, including shorter time limits, apply to a "*refusal*" under s. 4 of the Immigration Act 2004. The word "*refusal*" is clearly wide enough to include both the refusal of an original permission and the refusal of a renewal (which as I will discuss later is itself a species of permission). Indeed, this was the Minister's position, which I think I can reasonably take as at least mild tacit acceptance by the Minister that it would be irrational to treat applications for visas fundamentally differently from application for their renewal. This is a point to which I will return. I have no doubt that refusal of a visa renewal or of a visa extension is subject to section 5 of the Illegal Immigrants (Trafficking) Act 2000.

Extension of Time
26. The applicants in this case brought their proceedings approximately ten weeks from the date of the decision rather than the two weeks which at the time was the period prescribed by the Act of 2000. That period has since been extended to four weeks by the Act of 2014. The applicants have put an explanation for the delay on affidavit, at least insofar as the time at which proceedings were drafted is concerned. The period thereafter fell during the long vacation, which is something I should have regard to as Ms. Boyle, for the applicants, has submitted. In this case, the respondent is not objecting to an order extending time and states that it is a matter for me. Indeed, even if the Minister was objecting, no prejudice whatever arises to her. As far as the delay after 11th August is concerned, I think that a court should generally be open to the contention that the institution of proceedings cannot be achieved as swiftly as might otherwise be the case during court vacations. (Indeed Peart J. appears to have had regard to this factor in extending time in *Marshall v. Arklow Town Council* [2004] 4 I.R. 92.) However, again at the level of generality, this would only furnish grounds for an extension of time if there is no significant prejudice to the respondent or any other person. If, for example, the matter concerned a criminal trial where the rights and interests of injured parties could be affected by the ultimate grant of relief, I would not regard delay caused by a vacation as constituting good and sufficient reason for an extension of time. However, in all the

circumstances of the present case, having regard to the facts as stated above in relation to the delay, the intervention of the vacation, the lack of any prejudice to the Minister and last but not least Ms. McGrath's very fair stance of non-objection, I hold that there is good and sufficient reason for an extension of time and will make an order accordingly.

Do the provisions of section 4 that apply to the grant of a visa also apply to its extension?
27. The Act of 2004 was introduced as something of an emergency measure following the decision of the High Court (Finlay Geoghegan J.) in *Leontjava v. D.P.P* [2004] 1 I.R. 591 which held that elements of the statutory scheme including subordinate legislation were found wanting in certain respects which I will advert to further. Having regard to that background I am of the view that a primary purpose of the Act was to provide a clear statutory basis for the powers of the Minister to control immigration, given that the High Court had taken the view in *Leontjava* that the secondary legislation in this regard was in certain respects invalid. In addition the Court held that s. 5(1)(h) of the Aliens Act 1935 lacked principles and policies and was therefore unconstitutional. One must conclude that an additional primary purpose of the Act was therefore to provide clear principles and policies by which the Minister would be guided.

28. I should perhaps mention that while Ms. McGrath raised an objection during the hearing to Ms. Boyle relying on the principles and policies issue, it is clear to me that this was being done as part of the legislative background but that no challenge to the constitutionality of any particular legislative provision arose in this case. The principles and policies issue is however an important element of the legislative background to the Act and therefore something to which I am having regard in that context only.

29. Section 4(1) allows the Minister (through an immigration officer) to give a non-national a permission to be in the State, referred to in the marginal note to the section as "permission to land". The subsection does not, within its own terms, set out the procedure, conditions, criteria or grounds for such a decision.

30. Section 4(3) sets out a list of grounds for refusal of a permission, and s. 4(10) sets out a series of issues that an immigration officer, on behalf of the Minister, must consider in deciding on conditions attached to a permission.

31. Section 4(7) states that:-

> *"A permission under this section may be renewed or varied by the Minister or by an immigration officer on his or her behalf, on an application therefor by the non-nationals concerned."*

32. Some debate at the hearing took place on the question of whether this subsection on permission renewals is subject to the other provisions of section 4 which relate to permissions. Ms. McGrath for the Minister argued, essentially semantically, that s. 4(7) did not specifically incorporate those other provisions. The Minister was, on her case, if not quite at large, then at least given a wider level of discretion to deal with renewals. The Minister's written submission referred to her discretion as "full and unfettered" although I did not understand Ms. McGrath in oral argument to go quite this far.

33. To my mind, Ms. McGrath's submission that the Minister in deciding on a permission renewal is not bound by the general provisions of section 4 relating to the original grant of a permission is not well founded for a number of reasons:

> (i) This approach is somewhat at variance with the Minister's anxiety to treat permissions and renewals identically for the purposes of s. 5 of the 2000 Act.
>
> (ii) In terms of the object and purpose of the 2004 Act there is no apparent logical justification for treating visa renewals differently from the original applications. To her credit Ms. McGrath did not seek to advance any such justification.
>
> (iii) The background to the enactment of the 2004 Act was a decision by the High Court that s. 5(1)(h) of the Aliens Act 1935 lacked principles and policies and was therefore unconstitutional. It would therefore have been unlikely for the Oireachtas to have intended that a power given to the Minister in relation to renewals of visas would be entirely freed from the restraints and conditions applying to the granting of permissions generally.
>
> (iv) Most fundamentally of all, a renewal can only deal with a period after the original permission has expired – otherwise it is unnecessary. At that point, the non-national is not in possession of a permission to be in the State as occurred in this case, so what may be called the renewal or extension of the visa must itself constitute a "permission" to be in the State. In short, a permission to be in the State is not any less of a permission simply because it follows on from the expiry of a previous permission.

34. For these reasons, all of the provisions of s. 4 relating to "*permissions*" must also apply to the permission that is constituted by a decision to renew or extend a previous permission.

35. One of those provisions is the power of the immigration officer under subsection (6) to attach conditions to the permission. Subsection (10) provides that the immigration officer must "*have regard to all the circumstances of the non-national concerned known to the officer or represented to the officer by him or her*", including a number of specified matters. I note for the purposes of this case that the specified matters particularly include any family relationships of the applicant.

36. For the reasons set out above, I have no hesitation in holding that s. 4 generally and, of particular relevance for the purposes of this case, subsections (3), (6) and (10), apply to a decision on renewal for extension of a visa.

37. Thus, in deciding to grant or refuse such an extension, the Minister must consider all the circumstances of the non-national as they appear at that time, including any family relationships and the other matters as set out in section 4(10).

38. In addition such a renewed permission is also subject to the terms of section 4(3) regarding grounds for refusal.

Can the Minister reject a visa application (including an extension application) for reasons not set out in section 4(3)?
39. Section 4(3) provides that an immigration officer on behalf of the Minister may refuse to give a permission to a non-national on a number of listed grounds in eleven subparagraphs set out at (a) to (k), on the basis of any one or more of which an immigration officer, on behalf of the Minister (or indeed the Minister herself), can lawfully refuse an application for permission.

40. Counsel for the Minister, Ms. McGrath, submitted, having regard to the Minister's role in the control of immigration and the discretion this must necessarily involve, that independently of subsection (3), the Minister had a separate discretion to refuse an application for a reason not set out in the subsection.

41. She relied on the inherent executive power to control the admission of non-nationals, as referred to in *A.O. v. Minister for Justice, Equality and Law Reform* [2003] 1 I.R. 1 and *In re Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360.

42. While I of course take it as read that the State does enjoy an inherent power to control the admission of non-nationals, this power, like other powers inherent in or conferred on public bodies, subject to such statutory regulation as the Oireachtas may see fit to enact from time to time. The issue is not whether the State has a power to control the admission of non-nationals, which of course it has. The issue is whether that power has been affected by section 4(3) of the 2004 Act such that it is the intention of the Oireachtas that a refusal decision should be framed within one or more of the specific grounds for refusal set out in that provision.

43. I reject the State's argument that the Minister is at liberty to refuse an application on a ground not specified in s.4(3) for a number of reasons:-

> (i) There is no basis in the section to such independent freestanding basis to decide on a permission otherwise than in accordance with section 4.
>
> (ii) The grounds in subsection (3) are in wide terms and in particular, para. (j) insofar as it refers to "*public policy*", is, in the widest possible terms. This provision dovetails with s. 3(2)(i) of the Immigration Act 1999, which allows a person to be deported if the Minister is of opinion that their deportation is "conducive to the common good". Clearly, the Act of 2004 and the Act of 1999 must cohere, because it would be illogical for a person to be liable to permission refusal, but immune from deportation. Or indeed for a person to be liable to deportation but immune from a permission refusal. The 1999 Act does not allow deportation on any freestanding grounds not listed in that Act. Having regard to the object, purpose and context of the two Acts I hold that "public policy" in the 2004 Act and "common good" in the 1999 Act are equivalent concepts.
>
> (iii) In my view, the grounds for refusal on the grounds of the basis of public policy are as wide as they can or need be and it is hard to see anything that the Minister could do on the alleged "*freestanding*" ground of refusal that she could not lawfully do under the heading of public policy.
>
> (iv) In the language of Article 35.5.1° of the Constitution, I am obliged to "*uphold*" the laws of the State, and I consider that I would be depriving s. 4(3) of meaning if I were to hold that independently of that provision, the Minister could refuse a permission on any basis or in any terms she thought fit. Such an analysis would deprive s. 4(3) of any clearly discernible function.
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> (v) The section would be drafted quite differently if it were not intended to be an exhaustive list of grounds for refusal. It would commence with wording along the lines that the Minister may refuse an application on any grounds she thought fit including the following, making clear that the specific grounds were illustrative only, or alternatively it would conclude with a final catch-all subparagraph that the Minister could refuse the application on any basis she thought fit.
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> (vi) Given that the background to the Act of 2004 was the uncertainty created by providing for statutory controls in secondary legislation, and the infirmity which the High Court had considered existed in that respect and in particular in the Aliens Order 1946, it was a primary if not the primary purpose of the 2004 Act to put immigration control on a firm statutory footing. It would run counter to that objective, perhaps fundamentally counter to it, for it to have been intended that in addition to the grounds so meticulously set forth in section 4(3), there were to be other unpublished and unstated grounds of refusal of permission to land, not only not set out in any statute but not set out even in a statutory instrument.

44. While not in any sense determinative, I understand that the form of a detention warrant where a person has been refused permission to land lists each of the paragraphs in section 4(3) separately for the purpose of enabling the appropriate applicable grounds to be ticked. There is no catch-all ground set out in that form of warrant for refusal of permission on any ground other than those set out in the section. I do not rely on this as a ground for rejecting the Minister's submission as such but I note it as it suggests that the practice observed by her immigration officers is not consistent with the submission of the Minister as to the existence of an alleged further or additional ground of refusal.

45. I therefore hold that in refusing an application for a permission (including a renewal), the Minister is confined to expressing her decision in terms of one or more of the subparagraphs of section 4(3). While this is certainly a limitation as to form, it is essential to note that this does not meaningfully impinge on the substantive scope of the Minister's powers.

46. As alluded to above, section 4(3)(j) provides that one ground of refusal is:-

> *"that the non-national's entry into or presence in, the State could pose a threat to national security or be contrary to public policy."*

47. The reference to national security alongside public policy is perhaps unhappy as a matter of drafting, but I am of the view that having regard to the object and purpose of the Act, this reference does not dilute or qualify the scope of the "public policy" ground. That ground confers an extremely wide discretion on the Minister to determine whether, in her view, the presence of a particular non-national in the State is contrary to public policy, as determined by her. Of course, such determination is subject to the usual criteria of constitutionality and legality but subject to that, the formulation of public policy in relation to immigration control is exclusively a matter for the Minister for Justice and Equality, who is responsible to Dáil Éireann in that regard.

48. It is important to appreciate that the determination of whether the presence of a non-national in the State is contrary to public policy can only be made by reference to a particular fact situation and a particular time period, specifically that for which the permission is sought. Thus, it is perfectly open to the Minister to hold that it is not contrary to public policy for a particular non-national to be in the State for a limited period, say 90 days, but that it would be contrary to public policy for that person to be in the State for a longer period. It is also open to the Minister under para. (j) to take the view that it would be contrary to public policy for a particular applicant to be in the State for the purposes of making an application for permission to land, and that such permission should be sought from outside the State. There is no contradiction in this approach because it is entirely reasonable and legitimate for the Minister to adopt a conception of public policy which requires particular categories of application to be made from the applicant's home country. Indeed, the Minister has given a convincing basis in this case why this should be so, namely that if persons who came on 90 day visitor visas were entitled to apply for longer term permission to remain, without first returning to their home countries, this would necessitate a greater degree of scrutiny of applications for visitor visas which, in turn, would have a knock on effect which would act to the detriment of persons who genuinely wish to visit for short periods.

49. In concrete terms this would mean that, for example, a person who comes to Ireland on a visitor visa and applies for an extension while in the State may legitimately be told by the Minister that his or her presence in the State is contrary to public policy and that the application is, therefore, refused; but the same person, after they return to their country and make a similar application, may, if the Minister so decides, be told that their presence in the State would now not be contrary to public policy, because they have complied with conditions that the Minister has laid down in accordance with her legitimate conception of what constitute the requirements of such public policy. The fact situations and circumstances of the two applications are fundamentally different for the reasons I have given.

50. Ms. Boyle, for the applicants, argued that as s. 4 does not make reference to conditions the Minister does not have any power to impose them. And it is true that the section is not drafted on the sort of lines, evident in a number of other statutory provisions, whereby express provision is made requiring an application to be made in a prescribed place, form or manner, or in accordance with conditions specified by the Minister or regulations prescribed by her.

51. However, the fundamental reason why such conditions are permissible even if not expressly provided for is that the Minister is conferred with a broad discretion to determine public policy by virtue of subsection 3(j). In accordance with that exceptionally wide power, she is perfectly entitled to form the view that public policy would be promoted by the imposition of conditions on a visa application and therefore that, at least in the absence of exceptional circumstances to the contrary, an application not in accordance with those conditions should be refused. The reason I refer to exceptional circumstances is that given the language of s. 4(10) which requires the Minister to consider all of the circumstances of the case, I do not think that a condition such as a requirement to apply from outside the State could, in absolutely all circumstances be imposed regardless of particular exceptional conditions shown by an applicant. However, as long as the Minister is prepared to consider those circumstances and put them in the balance, she is then acting entirely lawfully if at the end of that consideration she decides that they are insufficiently exceptional to displace her policy view that the condition must nonetheless be imposed and that the application should be refused because the applicant has not left the State as required.

52. In the present case, the Minister considered all the circumstances of the application and refused it on the basis that it was made from within the State. This is a lawful exercise of her power under section 4(3)(j), although the decision making process can be criticised because the Minister did not conceive of herself as applying that provision but rather as applying a free standing discretion.

53. Ms. McGrath relied on the decision in *G.A.G. v. Minister for Justice, Equality and Law Reform* [2003] 3 I.R. 442 in support of an alleged inherent right to impose conditions, but that was not a case under s. 4 of the 2004 Act and so could not conceivably assist on the interpretation of section 4.

54. She also relied on *K.M. v. Minister for Justice, Equality and Law Reform* [2007] IEHC 234, which was a section 4 visa case, where Edwards J. in reliance on *G.A.G.* and *A.O.* accepted that the Minister had an entitlement to operate a system of pre-clearance in a visa case. Of course I respectfully agree with Edwards J. in this regard. However Edwards J. was not asked to decide whether such conditions could be imposed independently of the section or only as an element of the Minister's discretion conferred by the section. Ms. McGrath has very fairly conceded that it was not argued in the *K.M.* case whether the conditions had to be imposed within one of the grounds set forth in section 4(3) or could be applied inherently and independently of that provision. A point not argued is of course a point not decided: *The State (Ryan) v. Lennon* [1965] I.R. 70 per Ó Dálaigh C.J. at p. 120.

55. Having regard to the foregoing I find that Ms. McGrath's authorities do not in any way establish the position for which she contends.

56. I hold that s. 4(3) is an exhaustive statement of the grounds on which a permission can be refused, but that given the extremely wide terms of s. 4(3)(j), this is no loss to the Minister in terms of the substantive scope of her power to refuse a permission.

Did the Minister fail to consider the substance of the application?
57. Ms. Boyle for the applicants sought to draw distinction between a substantive consideration of her clients' application and what she termed an "*in limine*" rejection of the application on the summary ground that it was not made from outside the State. She contended that in the first instance it was unclear as to which kind of decision the Minister had made.

58. It is evident to me from s. 4(10) that the Act does not contemplate such a thing as an *in limine* rejection. In every case, the Minister is obliged to consider all the circumstances of the applicant. The letter from the Minister in this case clearly states that all circumstances were considered and this is supported by the affidavit evidence filed on behalf of the Minister. No basis has been presented to me to question that statement. Having said that, it would appear from the Minister's stance of challenging Barr J.'s decision in *Luximon*, which I will refer to later, these family circumstances were not considered in the context of Article 8 (or Article 41 of the Constitution) but only on their own merits. This would be a difficulty if Article 8 rights were engaged, as they were for example in the decision of the House of Lords in *Chikwamba v. Secretary of State for the Home Department* [2008] 1 WLR 1420, where it was held that an appeal against removal of failed asylum seekers should not be dismissed routinely on the grounds that the application should be made from abroad. In that case any substantive consideration of those rights would have led to the conclusion that the application of such a policy in the circumstances of that case would have been disproportionate.

59. Subject only to the question of whether Article 8 rights (or rights under Article 41 of the Constitution) are engaged in the present case, I therefore hold that the Minister did consider all relevant matters.

Did the Minister unlawfully fetter her discretion?
60. The applicants alleged in their statement of grounds that the Minister unlawfully fettered her discretion by adopting a policy statement which obliged applications of this nature for an extension of a visitor visa to be made, in general, from outside the State. As I have already said, it seems to me that s. 4(10) of the section precludes the Minister from entirely fettering her discretion because all of the circumstances must be considered. I do not understand the policy document to be in any way in contradiction with this and nor is the decision in this case, which expressly recites that all of the circumstances were considered. Policy documents of the kind at issue here are important for the promotion of the principle of equality before the law, and for bringing about greater certainty and consistency in administrative decisions. Any applicant can approach the visa system with confidence that the decisions will not be made on an arbitrary basis but will be guided by general principles that have been set out clearly in such policy documents, which can only have the effect that similar cases are likely to be treated similarly. This is a core aim of equality before the law. To my mind, it is entirely commendable that the Minister would adopt and publish broad policy statements of the circumstances in which applications will, in general, be favourably considered or otherwise.

The alleged lack of reasons
61. The applicants criticise the decision in this case for failing to set out sufficient or any reasons, including specific reasons relating

to their family circumstances.

62. It is I think possible to say that that the wording of the decision letter, which I have set out above, could be improved from the point of view of its format and sequence, in the sense that it begins by stating that following consideration of the individual circumstances of this case (including all of the matters known to the Minister which were adverted to [the word "to" is missing in the original letter] in the application), their position does not warrant an extension of the visitor permission. In the light of the above, the application for an extension of visitor permission was refused. This is primarily a statement of the decision, rather than of the reasons for it although it could be inferred from the way in which this is worded that the individual circumstances of the case were not as such to persuade the Minister that permission should be granted. The more proximate reason is only set out after this statement of refusal, namely that:-

> *"Applications for permission to remain in the State as retirees with independent means or as dependence under the non-EEA Family Reunification Policy Document as detailed on our website must be made from country of origin for individuals who are Visa required to enter the State".*

63. However, the fact that reason is set out after the decision rather than before it does not in any way deprive it of the status of being a legitimate and valid statement of a reason for that decision.

64. It is alleged that by the applicants that no reasons relating to the family circumstances of their extended family are specifically set out in the decision. In their statement of grounds, they make a case based on Article 8 of the European Convention on Human Rights and Article 41 of the Constitution in this respect, and allege that having regard to those family circumstances and rights, a failure to set out detailed reasons as to why refusal of permission would not breach their family rights is contrary to the decision in *Meadows v. Minster for Justice, Equality and Law Reform* [2010] 2 I.R. 701 and *Mallak v. Minister for Justice, Equality and Law Reform* [2012] 3 I.R. 297. I note that the question of whether the Minister is obliged to consider Article 8 of the Convention and Article 41 of the Constitution in the context of a permission decision is an issue that was before Barr J. in *Luximon v. Minister for Justice and Equality* [2015] IEHC 227 which I am informed is under appeal. However independently of *Luximon*, by virtue of a combination of the European Convention on Human Rights Act 2003 and *East Donegal* principles a decision maker is obliged to consider constitutional and Convention rights in every case where they could be affected, and in any event the statute at issue in the present case is explicit that family circumstances must be taken into account by the decision maker. (Thus for example in *O'Leary and Lumiere v. Minister for Justice, Equality and Law Reform* [2012] IEHC 80, constitutional and Convention rights were required to be considered in the context of a visa decision.)

65. However in the present case, there are a number of independent reasons why the applicants have come nowhere near meeting a threshold whereby there would be an obligation on the Minister to engage in a detailed or any narrative analysis of the applicants' family rights:-

> (i) Only limited information as to the family circumstances of the applicants was included in the original letter.
>
> (ii) Whether one takes the original letter from Gallagher Solicitors, or the facts as deposed to on behalf of the applicants in these proceedings; none of those allegations of fact come anywhere near the level of dependency at which Article 8 rights come into play. Of course, the applicants are naturally anxious to spend time with their daughter and son in law and they may well find Ireland a congenial place to do so, but, as the Minister states in her policy document ultimately immigration has to be undertaken without any guarantee that one's parents would be able to follow suit. The fact that the applicants naturally wish to enjoy the company and society of their daughter and son in law is, of course, perfectly human and understandable, but it simply does not create any legal rights to have any decision of any particular nature made by the Minister, or to have any detailed reasons in that regard. The impact of the permission refusal must have consequences of such gravity as to potentially engage the operation of Article 8, which is not the case in the present proceedings (See *Dos Santos v. Minister for Justice and Equality* [2015] I.E.C.A. 210 (Finlay Geoghegan J.)) The relationship between parents and adult children does not engage Article 8 rights absent additional factors of dependence other than normal emotional ties (see for example *Senchishak v. Finland (Application No. 5049/12)*, European Court of Human Rights, 18th November 2014 para. 55). No such significant dependency was alleged or established.
>
> (iii) A further difficulty for the applicants is that, even if dependency had been alleged let alone established, such family life as they have built up in the State has occurred during a period when their presence in the State was, at a minimum, to use the language of the European Court of Human Rights "*precarious*" (see *C.I. v. Minister for Justice, Equality and Law Reform* [2015] I.E.C.A. 210 (Finlay Geoghegan J.) citing *Nnyanzi v. U.K.* (2008) 47 E.H.R.R. 18). In my view, little weight attaches to alleged Article 8 rights that accrue during a period where the presence of the applicant in the country concerned is precarious, and virtually none to a time when the applicant's presence is unlawful, as least as a matter of generality, and that is the conclusion I come to in the present case. The only right or title that the applicants had to be in the State was the slight and transitory one of their entitlement to be here for a period of 90 days and on the expiry of that period they were under a continuing duty to leave the State which they have failed to discharge. Their status therefore went beyond the merely "precarious" (*i.e.,* time-limited in duration and depending on the grant of a further permission) and crossed into the category of "unlawful" (*i.e.*, without any legal basis). I note in passing that the U.K. Immigration Act 2014 s. 19 has endeavoured to supply some statutory guidance in that jurisdiction as to how the Article 8 issue is to be addressed, identifying precarious and unlawful positions separately. The applicants' decision to maintain a continued unlawful presence in the State since June 2014 combined with the claim of a family life within the State made in these proceedings by way of their submission to the Minister and the affidavit evidence filed on their behalf (which shows no basis for a family life going beyond normal emotional ties) might suggest the possibility that future reliance may be placed on Article 8 rights allegedly built up during the period of unlawful presence in the State since June 2014. To my mind virtually no weight can be given to any family life engaged in by the applicants during that period, by reason of its illegality.

66. As far as reasons are concerned, one related issue is whether in making a statutory decision, the decision maker is obliged to specify the particular provision of the statute or statutory instrument under which the decision is made. The core rationale of *Mallak* was that an applicant is entitled to have the appropriate information to enable him or her to decide whether to apply for judicial review, and indeed, to enable the court on such application effectively to conduct the review. It seems to me that even more basic than knowing the decision-maker's factual or legal analysis to such an exercise is knowing what precise power the decision-maker is acting under, or thinks he or she is. It is very hard to contemplate how a court could conduct a judicial review satisfactorily without knowing (preferably from the decision maker, rather than after extensive inquiry and analysis) what precise statutory provision the decision-maker was relying on. I would, therefore, be of the view that, in general, an administrative decision maker must, as well as specifying reasons in the more conventional sense, specify what precise statutory power a decision is made under, if that decision

has a statutory basis.

67. This the Minister did not do in the present case, of course, but the primary reason for that appears to be that the Minister considered that the applicants' failure to comply with conditions of her family reunification policy was something she could use as a basis for rejecting the application independently of s. 4(3), whereas in my view, it is the basis for rejecting the application within s. 4(3)(j), but reformulated as the conclusion that the presence in the State of someone who was applying in a manner not in accordance with the Minister's policy and its conditions was not, for the purposes of assessing whether they should be granted a particular permission of a particular duration, a person whose presence in the State would be in accordance with public policy.

68. Just as the duty to give reasons in the more conventional sense is subject to certain exceptions, I would immediately say that the duty to state expressly the statutory basis of a decision as part of the wider duty to give reasons is also subject to exceptions of which I will mention two.

69. Firstly, like the duty to give any reason, the particulars of the power being exercised may be implicit or may be obvious from the circumstances of the case. If there can be no conceivable doubt as to the precise power being invoked, whether by reference to some documents external to the administrative decision in question, or other circumstances, the decision maker cannot be faulted for making to spell out the obvious.

70. Secondly, a decision which fails to set out its statutory basis, or indeed in some cases which fails to set out any reasons at all, is not necessarily invalid *ab initio*. The invalidity would arise in such a case if the decision maker persisted in a failure to clarify the matter despite a request for reasons or for particulars of the statutory basis of the decision.

71. This is where a pre-action letter is of crucial importance, particularly in reasons-type cases. At the level of generality, an applicant confronted with a decision lacking in reasons should not simply march down to the High Court and apply for judicial review. He or she can normally be expected, prior to seeking judicial review, to inform the decision maker of the alleged shortcoming in the decision in sufficiently clear terms to enable it to be rectified, if the decision maker is willing to do so, and to inform the decision maker that judicial review will be applied for in the absence of such rectification within a reasonable time. A reasonable time may, of course, in certain circumstances be extremely short.

72. In the present case, following the decision of letters dated 25th June, 2014, the applicants' solicitors on their behalf did not write any letter to the Minister complaining about the decision or threatening judicial review. Ms. McGrath informs me that the next the Minister heard from them was upon receipt of judicial review papers. Ms. Boyle for the applicants explained this failure on the basis of the limited time available to the applicants. I have no hesitation in saying that that explanation does not provide a justification for the applicants' failure to make a pre-litigation complaint to the Minister as to the alleged lack of reasons. The applicants took a period of ten weeks from the decision letter to issue their proceedings which would have given ample time for correspondence to be issued and an appropriate letter of claim put before the Minister. While the initial weeks of the ten weeks were ones in which the applicants were not aware of the refusal letter, it is unsustainable to suggest that there was not time for such a letter to be sent having regard to the period overall.

73. Of course in other cases there may be many circumstances in a much more fast moving factual context than the present case where even 24 hours advance notice or possibly less to a decision maker may be appropriate and reasonable notice in the circumstances, and of course there are other cases where it is simply not possible to give notice at all, where in the words of O'Higgins C.J. in *State (Lynch) v. Cooney* [1982] I.R. 337 there is "*no opportunity for debate or parley*" (at p. 365).

74. The reasons for the requirement of the pre-action letter are many. It is clearly better that parties resolve their own differences than that they occupy resources of the High Court, as to do so creates delays for other litigants. Secondly, even if it is inevitable that the matter will be litigated, pre-action clarification of the issues is often of immense importance in terms of defining and possibly narrowing the point on which the court will be asked to decide and in shaping the pleadings in the light of that correspondence in a manner that is helpful to the just resolution of the dispute.

75. The importance of a letter of claim was referred to in *R. v. Horsham District Council*, ex p Wenman [1995] 1 WLR 680 at p. 709. It is now given specific recognition by the English Civil Procedure Rules. Brooke J. described the letter (before the Civil Procedure Rules) in *R. v. Borough of Milton Keyes, ex parte Macklen,* (30th April, 1996, Unreported), as "*the very desirable procedure of seeking to have the dispute resolved by other means"*.

76. Of course a pre-action demand for reasons is not necessary or reasonable in every case in which the applicant intends to complain in that respect. It has a particular relevance where the matter complained of is one that can readily be rectified by the proposed respondent without recourse to the court, for example the provision of reasons by a Minister. It may have much less, if any, relevance to a decision made without jurisdiction, which is not something that can normally be rectified in correspondence (other than by way of a concession by the proposed respondent that this is so – however this concession can just as easily be made immediately on receipt of judicial review papers, so very little of substance in terms of the public interest is lost by a failure to issue a pre-action letter in such a case).

77. Furthermore if the particular procedures of an administrative tribunal do not allow for an applicant to revisit the decision to demand further reasons, then it will not be reasonable to expect this to be done. Nor does the need to request reasons apply to a litigant who intends to challenge a *judicial* decision on the grounds of a lack of reasons. Public policy demands that litigants accept adverse judicial decisions, and while a demand by a disappointed litigant to a judge for reasons may be theoretically distinct from non-acceptance of a decision, it is open to the perception of being just too close to it in practice for that course ever to be required from a litigant as a precondition of judicial review of or appeal from a judicial decision.

78. Even where it is both possible and reasonable to expect an applicant to make a pre-action request, an applicant's failure to do so is not necessarily fatal to their claim but is something a court can consider as a matter of discretion depending on the circumstances.

The discretionary nature of public law remedies

79. It has long been recognised that remedies by way of judicial review are discretionary, in a way that common law relief more generally is not. Why should this be so? That rationale seems to me to relate to the fact that public law actions affect the system and mechanics of government in a way that private law decisions do not. So while a private law decision may have a host of practical consequence for, for example, drivers of motor vehicles, users of publicly owned land, persons injured in accidents of various kinds, and while particular public law decisions may turn on quite narrow areas of fact which may affect only a specialised subgroup of the population, nonetheless the latter classes decision has a capacity to affect how the business of government of the country is carried out to a much greater extent. For that reason it is appropriate that they be discretionary remedies and that the court would be

entitled to hesitate before granting relief significantly affecting the system and business of public administration where there were strong countervailing discretionary factors.

80. The only infirmity I can identify in the Minister's decision making process in this case was that she thought of herself as exercising a freestanding discretion to refuse an application for permission outside of s. 4(3), and in consequence did not frame her decision within the public policy terms of s. 4(3)(j). The secondary consequence was that she did not identify any statutory provision with particularity in the decision letters. However, this is essentially a matter of form rather than substance because s. 4(3)(j) provides a route for the same decision to be arrived under the heading of public policy, as indeed was quite correctly suggested by Ms. McGrath during the hearing.

81. Even if the decision was one which I was otherwise minded to quash by way of *certiorari*, which it is not, there are in this case discretionary factors which would be sufficient to warrant refusal of relief.

82. I do not place weight on the applicants' failure to exhaust their remedies by way of internal appeal. To their credit the applicants' solicitors have candidly accepted that they were generally aware of the option of internal appeal. However, the letter from the Minister did not offer that as an option. I would take the view that where a right of internal appeal or review exists, a decision maker is under a duty, in the letter or instrument setting out the decision, to draw to the attention of the person affected by the decision the existence of that right of recourse. However, in the circumstances of this particular case I infer that it would probably not have been an effective remedy. In another case where the visa decision turned more on the merits of the application rather than the fact that it was made from within the State, and where the right of appeal was specifically drawn to the applicant's attention in accordance with the decision-maker's duty as I have set out above, I would place more weight on an applicant's failure to exhaust remedies.

83. The discretionary factors to which I would have regard are as follows.

84. Firstly as I have said any criticism that can be made of the wording of the decision letters comes down essentially to a matter of form rather than substance.

85. Secondly I have regard to the applicants' failure to write a pre-action letter of claim, which I have already held not to have been satisfactorily explained. In a case where a basic element of the complaint related to the alleged lack of reasons, this has a particular relevance, as reasons can always be clarified if parties are willing to do so, without recourse to the High Court. To my mind the applicants' failure to make any effort to do so disqualifies them from obtaining any relief in that regard from the court in the particular circumstances of this case. In another case, a failure to write a pre-action letter might carry less weight or none at all, for reasons I have touched on.

86. The third factor is the applicants' disregard of the immigration system by being unlawfully in the State at the time these proceedings were instituted and remaining there unlawfully ever since. Ms. Boyle has quite properly not attempted to offer any justification of this disregard of their legal obligations by her clients but she has adverted to their right to have access to the court. This is an important right which the applicants unquestionably enjoy (see *In re Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360 at p.385), and there will be some circumstances in which the effective enjoyment of such a right requires a litigant's presence in the State. However, this is not one of those cases in that nothing has been demonstrated that the applicants could not have pursued this action quite effectively from outside the State. That factor alone distinguishes this case from *O'Leary and Lumiere v. Minister for Justice, Equality and Law Reform* [2011] IEHC 256 and [2012] IEHC 80 where as the Minister puts it in her written submissions, *"there were extensive submissions by the non-national parents of increasing difficulty, in terms of their financial circumstances, their health and their personal security in South Africa"*. The absence of that factor here also reinforces my view as to the minimal to non-existent Article 8 rights that these applicants are capable of claiming.

87. In arguing that I should not have regard to their conduct as a discretionary factor, the applicants rely on the decision of the Supreme Court in *O'Keeffe v. Connellan* [2009] 3 I.R. 643, which was an application for an order of *certiorari* quashing a return for trial and an order of the Circuit Court requiring the applicant to attend for sentencing. That case related to an order made without jurisdiction, and one having "continuing effect" (at p. 654 *per* Hardiman J.), which the Supreme Court held ought to be quashed notwithstanding that Hanna J. in the High Court had found the existence of discretionary reasons to the contrary.

88. The decision challenged here does not seem to me to have "*continuing effects*" in the *O'Keefe* sense. The Minister did not finally determine the position of the applicants. Indeed she indicated that a future application could be made by them from their country of origin.

89. Had the applicants simply returned to China as required by law, they would have been in a position to make their application for longer term residency from there. Had that application been unsuccessful they would have been in a position from time to time to apply for further 90 day visitors' visas for temporary visits as an alternative.

90. I have also had regard to the Supreme Court decision in *Sivsivadze v. Minister for Justice and Equality* [2015] IESC 53 [2015] 6 JIC 2303 in which Murray J. declined to dismiss an appeal on grounds of abuse of process by applicants having regard to "the objective constitutional interests involved, including those of the minor children, and the fact that it involves a challenge to the constitutionality of a provision of an Act of the Oireachtas" (at para. 31). Such considerations do not apply in the present case.

Order

91. For the foregoing reasons, I will order as follows:-

(i) That the title of the proceedings be amended to refer to the Minister for Justice and Equality as respondent.

(ii) That time for bringing the application for leave to be extended up to the date on which it was made.

(iii) That leave to apply for *certiorari* of the Minister's decision be refused.

(iv) That any further or consequential applications be adjourned for a short period to enable the parties to consider this judgment and that any party intending to pursue such an application should give the other party written advance notice of their intention to do so setting out details of the proposed application.

92. At this point, I am not dismissing the application in its entirety simply because in this particular case, reflecting on the specific oral submissions made to me at the hearing, I would like to hear the parties briefly on the question of whether, in the light of the

foregoing findings and the particular circumstances of the positions adopted by the parties in this case, any purpose would be served by granting a declaration as to the legal position. However, I emphasise that any argument before me on this issue must be conducted within the parameters of this judgment.