THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 605 J.R.]

BETWEEN

AHMED ELMEBAYAD

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr Justice David Keane delivered on the 7th June 2019

Introduction
1. This is the judicial review of a decision made on appeal by the Minister for Justice and Equality ('the Minister') on 9 June 2017 to refuse the applicant Ahmed Elmebayad a visa authorising him to enter the State.

Background
2. Mr Elmebayad is a male Egyptian national born in 1983.

3. On 24 September 2015, the Minister for Jobs, Enterprise and Innovation [the MJEI] wrote to Mr Elmebayad's proposed employer, Sparks Café & Bistro Limited ('Sparks'), to inform that company that he had been granted an employment permit under s. 8 of the Employment Permits Act 2006, as amended ('the Act of 2006').

4. The employment permit granted to Mr Elmebayad recites on its face that it was valid from 24 September 2015 to 23 September 2017. It identifies Mr Elmebayad's proposed employer as Sparks and his proposed job as that of 'Middle Eastern Halal Chef.'

5. On 10 January 2017, the Embassy of Ireland in Cairo, Egypt, wrote to Mr Elmebayad to inform him that his application for an Irish visa had been refused by the Irish Naturalisation and Immigration Service ('INIS'). The reasons given for that refusal were as follows:

> 'ID:- Authenticity of documents – the documents you submitted regarding your previous work experience and education are poor quality photocopies. It would be beneficial if you submitted originals.
>
> ID:- Insufficient documentation submitted in support of your application:- please see link to "Documents Required" as displayed on our website – www.inis.gov.ie – you have not submitted a copy of your employment contract. You have not submitted a letter from your employer in Ireland confirming details of the job being taken up and the salary being offered. In addition, it is noted that you are allegedly a halal chef. In this regard it is noted that the proposed place of employment does not serve any halal food whatsoever; rather on the contrary it serves non-halal food including pork and alcohol. Therefore it does not seem plausible that an alleged halal chef would work in such a place.
>
> IH:- Immigration history of applicant – according to our records you were previously in Ireland in 2006 however it is unclear when you actually left the State and this requires clarification and documentary proof e.g. by submitting a copy of all previous passports/household bills/bank statements/employment history/educational history etc. Indeed a full-account of your immigration history/whereabouts since you entered Ireland in 2006 would be beneficial.
>
> OC:- Observe the conditions of the visa – the visa sought is for a specific purpose and duration:- the applicant has not satisfied the visa officer that such conditions would be observed – Based on the information & documentation provided, you have not demonstrated that you would observe the conditions of the visa sought.
>
> PF:- The granting of the visa may result in a cost to public funds – Based on the information and documentation provided, you have not demonstrated that you would observe the conditions of the visa sought.
>
> PR:- The granting of the visa may result in a cost to public resources – Based on the information & documentation provided, you have not demonstrated that you would observe the conditions of the visa sought.'

The letter went on to inform Mr Elmebayad that he could appeal the decision within 2 months of the date of that letter, and that all additional documents should be submitted with his appeal.

6. Mr Elmebayad's solicitors wrote to the INIS to appeal that refusal on 22 February 2017, endeavouring to address each of the six reasons that were provided for it.

7. On 9 June 2017, the INIS wrote to Mr Elmebayad to inform him that his appeal had not been successful. The reasons provided for the refusal of a visa on appeal were as follows:

> 'ID:- Insufficient documentation submitted in support of your application:- please see link to "Documents Required" as displayed on our website – www.inis.gov.ie
>
> - You have not submitted a copy of your employment contract with your prospective Employer in Ireland with your appeal. The letter from the prospective employer is dated November 2015 and no up-to-date letter has been submitted.
>
> IH:- Immigration history of the applicant – You have not submitted any documentation clarifying when you actually left the State in 2006.
>
> OC:- Observe the conditions of the visa – the visa sought is for a specific purpose and duration:- the applicant has not

satisfied the visa officer that such conditions would be observed – Based on the information & documentation provided with your appeal, you have not demonstrated that you would observe the conditions of the visa sought.'

Procedural history
8. By order made on 24 July 2017, O'Regan J granted the applicant leave to seek judicial review of the deportation order. The application is based on a statement of grounds, dated 21 July 2017 and filed on the same day, and is subtended by an affidavit sworn by Mr Elmebayad almost one week earlier on 15 July 2017. In accordance with the order of O'Regan J, a notice of motion issued on 21 August 2017, returnable on 6 November 2017. The Minister's statement of opposition, dated 24 November 2017, was filed on the same day.

The grounds of challenge
9. In the written submissions made on his behalf, the applicant contends: first, that the Minister's decision was unreasonable in that irrelevant considerations were taken into account; second, that the Minister failed to put Mr Elmebayad on notice of the Minister's concern that Mr Elmebayad had failed to provide an up to date contract of employment; third, that the decision was irrational; and fourth, that the Minister failed to provide reasons for the decision.

Argument and Analysis
i. the executive power of the Minister to control immigration

10. In *Bode (a minor) v Minister for Justice* [2008] 3 IR 663 (at 689-690), Denham J explained:

> '[60] In this case one of the fundamental powers of a state arises for consideration. In every state, of whatever model, the state has the power to control the entry, the residency, and the exit of foreign nationals. This power is an aspect of the executive power to protect the integrity of the State. It has long been recognised that in Ireland this executive power is exercised by the Minister on behalf of the State. This was described by Costello J. in *Pok Sun Shun v. Ireland* [1986] I.L.R.M. 593 at p. 599 as:-
>
> > "In relation to the permission to remain in the State, it seems to me that the State, through its Ministry for Justice, must have very wide powers in the interest of the common good to control aliens, their entry into the State, their departure and their activities within the State."
>
> [61] The special role of the State in the control of foreign nationals was described by Gannon J. in *Osheku v. Ireland* [1986] I.R. 733 at p. 746. He stated at p.746: -
>
> > "That it is in the interests of the common good of a State that it should have control of the entry of aliens, their departure and their activities and duration of stay within the State is and has been recognised universally and from earliest times. There are fundamental rights of the State itself as well as fundamental rights of the individual citizens, and the protection of the former may involve restrictions in circumstances of necessity on the latter. The integrity of the State constituted as it is of the collective body of its citizens within the national territory must be defended and vindicated by the organs of the State and by the citizens so that there may be true social order within the territory and concorde maintained with other nations in accordance with the objectives declared in the preamble to the Constitution."'

11. More specifically, on the grant or refusal of visas, in *RMR & Anor. v Minister for Justice & Ors* [2009] IEHC 279, (Unreported, High Court (Clark J), 11th June, 2009), the position was summarised in the following way.

> '24. […] It is for the Minister to determine the conditions under which foreign nationals enter, remain and leave the State- this has been stated on many occasions by the courts (see e.g. *Pok Sun Shum v. The Minister for Justice, Equality and Law Reform* [1986] ILRM 593; *Osheku v Ireland* [1986] I.R. 377; *In re the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360, *F.P. v. The Minister for Justice, Equality and Law Reform* [2002] 1 IR 164; *A.O. and D.L. v. The Minister for Justice, Equality and Law Reform* [2003] 1 IR 1; *Bode (a minor) v. The Minister for Justice, Equality & Law Reform & Ors*. [2008] 3 IR 663).
>
> 25. It is clear that the Minister is under no legal obligation to grant a visa - the grant or refusal of visas is entirely within his discretion and it is for the visa applicant to convince the Minister that he or she should be granted a visa. Government policy determines which foreign nationals require visas to visit or transit the State and whether they can work in the State. The inherent executive power and responsibility of the Government to formulate immigration policy is supplemented by statutory provisions including the Aliens Act and the Immigration Acts. There is at present no statutory framework for issuing visas.'

ii. reviewing the exercise of executive powers

12. In *Murray v Ireland* [1991] ILRM 464, in the context of the executive powers to grant temporary release to a person sentenced to life imprisonment and to regulate prison conditions, Finlay CJ stated (at 473):

> 'The exercise of these powers of the executive is of course subject to supervision by the courts which will intervene only if it can be established that they are being exercised in a manner which is in breach of the constitutional obligation of the executive not to exercise them in a capricious, arbitrary or unjust way.'

13. More recently, in the context of the executive power to grant enhanced remission of a prison sentence, Ní Raifeartaigh J surveyed the relevant law in *Bradley v Minister for Justice* [2017] IEHC 422 (Unreported, High Court, 26th May, 2017), concluding (at para.10):

> 'It is therefore clear from the authorities that the scope for review by the court of the discretion to grant enhanced remission is very narrow. That said, it is not the case that there is no scope at all for review. The test is whether the decision was "arbitrary, capricious or unjust." Rare though such cases may be, the Court has an obligation to determine whether this has occurred in any particular instance brought before it for adjudication. I note the comments of O'Donnell J. delivering the judgment of the Supreme Court in *Murphy v. Ireland and Ors* [2014] 1 I.R. 198, albeit in the different context of the degree to which reasons must be given by the DPP in relation to the grant of a certificate that an accused

should be tried in the Special Criminal Court. O'Donnell J. referred to an argument made on behalf of the plaintiff that a decision of the DPP was in effect unreviewable and pointed out that a review of the decided cases over the previous 15 years showed that the DPP's decisions were reviewable both in theory and in fact, and that challenges had succeeded on three occasions. He said:

> "Thus, the courts have rejected any contention that a decision of the Director is unreviewable and have, in exceptional but real and justifiable cases, been prepared to review and if necessary quash such a decision. The fact that a jurisdiction is for good reason narrow, does not mean that it should be dismissed as non-existent. On the contrary such an outcome should direct attention to the considerations limiting review. In these cases a careful balance has been struck between a general principle restricting review and specific circumstances in which it will be permitted."

It seems to me that, similarly, although the scope for judicial review of decisions on applications for enhanced remission is, for good reasons related to the constitutional separation of powers, limited in scope, this does not mean that such review is non-existent. However, the Court should be careful not to overstep the boundaries and the underlying good reasons for the narrow scope of the zone of reviewability must at all times be borne in mind.'

14. In his written legal submission, Mr Elmebayad relies on the following passage from the decision of Faherty J in *KN v MJE* [2017] IEHC 527, (Unreported, High Court, 20th June, 2017) (at para. 60):

> 'Of course the exercise of ministerial discretion is subject to review by the courts. Accordingly, the legality or otherwise of the respondents' decision to refuse the applicants' visa application is to be considered in the context of relevant administrative law principles: whether the decision has been arrived at on the basis of correct facts; whether it is in accordance with fair procedures; and whether it has been reasonably and rationally arrived at. Furthermore, the basis for the refusal of the visas must be clear or patent from the decision.'

However, insofar as it might be suggested that this statement provides support for proposition that the scope of judicial review of the Minister's exercise of the executive power of the State is as broad as that which applies to the review of administrative decisions generally, it is important to recognise that none of the jurisprudence discussed above appears to have been drawn to the attention of the court in that case.

15. I am satisfied that the approach identified by Ní Raifeartaigh J is the correct one to adopt to any review of the exercise of the executive power to control immigration.

v. fair procedures

16. There is no qualified, much less absolute, right to a visa and no other recognised right – such as the right to apply for international protection, the right to free movement under EU law, or the right to respect for family or private life – is engaged in this case. It is true that, even in the exercise of a broad executive power, the Minister is not at large. No discretion is absolute; see, for example, *AMS v Minister for Justice* [2016] IESC 65, (Unreported, Supreme Court, 20th November, 2014) (per Clarke J at para. 6.1).

17. In *Mallak v Minister for Justice* [2012] 3 IR 297, Fennelly J explained (at 300):

> '[3] The phenomenon that is the modern law of judicial review, though rooted in history, has witnessed extraordinary development over the past thirty years. At its heart it insists that, to adapt the language of this court in *The State (Lynch) v. Cooney* [1982] I.R. 337, any administrative decision, in that case an opinion of a minister which enabled him to make an order prohibiting broadcasts, must be "*bona fide* held and factually sustainable and not unreasonable". The underlying principles of judicial review are universal. Courts of the common law have developed and expanded the historic rules of natural justice, in more recent times with inspiration from international human rights instruments such as the European Convention on Human Rights 1950 and, in this jurisdiction, from the Constitution. The Court of Justice of the European Union speaks of a "complete system of legal remedies" as set out in *Les Verts v. Parliament (Case 294/83)* [1986] E.C.R. 1339 at para. 23. The rules are composed of a number of interrelated features, the underlying fundamental presumption being that those to whom discretionary powers are entrusted will exercise them fairly insofar as they may affect individuals. Where fairness can be shown to be lacking, the law provides a remedy. The right of access to the courts is an indispensable cornerstone of a state governed by the rule of law.'

18. Nonetheless, it is well established that the requirements of natural and constitutional justice and fair procedures will vary depending on the nature and extent of the rights or interests at stake; see, for example, *Flanagan v University College Dublin* [1998] I.R. 724.

19. Mr Elmebayad complains that he was not provided with an opportunity to address the matters of concern to the Minister prior to the Minister's decision on appeal. I reject that submission. In *Khan & Ors. v Minister for Justice and Law Reform* [2017] IEHC 800 (an EU law 'permitted family members residence permission' case), Faherty J accepted (at paras. 83-85) that it was incumbent on the applicants to put their best foot forward and to present such relevant facts and evidence as may be necessary to support their application; the Minister could not be criticised for the condition of the applicants' own proofs. In reaching that conclusion, Faherty J cited the following dictum of Hedigan J in *AMY v Minister for Justice* [2008] IEHC 306, (Unreported, High Court, 9th October, 2008) (at para. 22): 'There is no onus on the Minister to make enquiries seeking to bolster an applicant's claim. It is for the applicant to present the relevant facts.'

vi. unreasonableness or failure to give reasons, or both

20. I am satisfied that the Minister did not fail to give adequate reasons for his decision. The reasons given have been set out earlier in this decision and I can identify nothing inadequate in them.

21. I am satisfied that Mr Elmebayad was given sufficient information to enable him (alone, or with his legal advisers) to assess the lawfulness of the Minister's decision, particularly in the context of the wide discretion that the Minister was exercising in making it. Thus, the test articulated in *Rawson v Minister for Defence* [2012] IESC 26 (Unreported, Supreme Court, 1st May, 2012), and approved in *EMI Records (Ireland) Ltd v Data Protection Commissioner* [2013] IESC 34, (Unreported, Supreme Court, 3rd July, 2013) has been met.

22. I reject Mr Elmebayad's unsupported assertion that the Minister's decision fails the test of reasonableness under the principle

identified by Henchy J in *State (Keegan) v The Stardust Victims Compensation Tribunal* [1986] IR 642 and subsequently followed and approved innumerable times, most notably in *Meadows v Minister for Justice* [2010] 2 IR 701, *i.e*. that it plainly and unambiguously flies in the face of fundamental reason and common sense. I can find no basis for any such conclusion.

23. Mr Elmeyabad argues that it was 'unfair, irrational and disproportionate' to refuse him a visa on the basis that he failed to provide evidence that he had left the State in 2006 in accordance with the terms of the three-month visitor's visa he had been granted at that time, because the only evidence he was in a position to produce in 2017 was circumstantial evidence concerning his asserted presence in Egypt from March 2007 onwards. The test, of course, is whether it was arbitrary, capricious or unjust to do so in the exercise of the Minister's broad discretion. I am satisfied that it was not.

24. Allowing, for the sake of argument, that the evidential requirement was particularly onerous (and it is better that I should express no view on that point), it was still one squarely within the Minister's discretion. It is not the function of this court to sit at the Minister's elbow, second-guessing his judgments on the nature and extent of the evidence a visa applicant should provide. Proportionality could have no part to play in any such analysis in any event, since there is no right or interest on Mr Elmebayad's side to weigh in the balance; he does not have a right or entitlement to a visa, so there is no question of that right being trenched upon disproportionately.

25. Nor do I accept that there is any irrationality in the Minister's refusal of a visa to a person who has been granted a work permit. The functions and powers of the Minister for Jobs, Enterprise and Innovation to regulate the labour market under the Employment Permits Act 2006, as amended, are quite distinct from the executive power of the Minister for Justice and Equality to control the entry, residence and departure of foreign nationals. While, on occasion, the exercise of those powers might seem to overlap, there is no basis for the suggestion that the existence or exercise of the former in any way ousts or constrains the exercise of the latter; see *Akhtar v Minister for Justice & Equality* (Unreported, High Court (Keane J), 6th June, 2019).

vi. irrelevant considerations

26. Mr Elmebayad argues that the Minister had regard to irrelevant considerations in refusing him a visa, rendering the decision an unreasonable one on the authority of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 K.B. 223 at 230. Differently put, Mr Elmeyabad asserts that the Minister failed the test described by Finlay CJ in *P. & F. Sharpe Ltd v Dublin City and Council Manager* [1989] IR 701 (at 717) in the following terms:

> 'the decision making authority must have regard to all relevant and legitimate factors which are before it and must disregard any irrelevant or illegitimate factors which might be advanced.'

27. Mr Elmebayad submits that the Minister erred in failing to take into consideration a letter that his proposed employer had provided in November 2015, setting out, what Mr Elmebayad describes as, the key terms of his offer of employment, and other documentation setting out certain details of his work history in Egypt from 2007 onwards, and in wrongly taking into consideration Mr Elmebayad's failure to provide an up-to-date offer of employment and an employment contract.

28. I reject that submission. There is nothing to suggest that the Minister did not take into consideration the documentation that Mr Elmebayad did provide, before indicating that he considered it insufficient in the absence of a contract of employment and an up-to-date letter of offer. Once again, that is a matter squarely within the Minister's discretion. Once again, it is not the function of this court to sit at the Minister's elbow, second-guessing his judgments on the nature and extent of the evidence a visa applicant should (or should not have to) provide.

Conclusion

29. The application for judicial review is refused.