

BETWEEN/

NISAR ALI

APPLICANT/APELLANT

- AND -

THE MINISTER FOR JOBS, ENTERPRISE AND INNOVATION

RESPONDENT/RESPONDENT

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 26th day of February 2016

1. This appeal from the decision of the High Court concerns the interpretation of a number of overlapping provisions of the Employment Permits Act 2006 ("the 2006 Act"). As will shortly be seen, the issues of statutory interpretation presented on this appeal are not straightforward.

2. The background to the present appeal is as follows: the applicant, Mr. Ali, seeks an order quashing the decision of the respondent Minister for Jobs, Enterprise and Innovation dated 13th May 2014 as refused to grant him an employment permit under the 2006 Act. The applicant contends that his application for a permit was refused by reference to criteria which, had the Minister wished to utilise them, could only have been specified by the means of a statutory instrument under s. 14(1)(d) of the 2006 Act and not, as was in fact done, by means of an administrative scheme.

3. The applicant is a Pakistani national who has been lawfully resident in the State as a student since August 2007. His student status entitles him to what is known as a stamp 2 visa which permits him to work during college term for a period of 20 hours per week and during vacation time, for 40 hours per week. Mr. Ali is married with one child and his wife and child reside in Pakistan. His stamp 2 visa does not permit them to enter the State and reside with him. If, on the other hand, Mr. Ali could secure an employment permit under the 2006 Act would entitle him to work for 40 hours a week throughout the year and, furthermore, to bring his wife and child to Ireland to reside with him.

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

"I am directed by the Minister for Jobs, Enterprise and Innovation to refer to your application for an employment permit under the Employment Permits Act, 2006. I wish to inform you that the granting of a permit in this case is being refused under the Employment Permits Act, 2006. Reasons for refusal in this case are: The Employment Permits Acts 2003 and 2006 require the Minister, having regard to an application for an employment permit, to consider the extent to which a decision to grant the permit would be consistent with the government's economic policy and whether the granting of the permit would be in the public interest in terms of protecting the labour market. Current government policy promotes, in the first instance, employment growth through the filling of vacancies from the existing labour market especially in employments requiring lower skills levels as there is a sufficient supply of labour in the labour market currently.

Reasons for refusal in this case are: It appears from the information received that the position on offer is one of the occupations currently ineligible for an employment permit. Certain occupations are not deemed eligible for employment permits where it is considered that there is already a sufficient supply of labour in the labour market for the filling of such vacancies. This includes occupations for which an adequate supply of skilled labour exists or occupations which do not require high levels of skill and experience or which, therefore, can be filled by the existing supply of labour. Hence applications for ineligible positions are generally refused, as government policy promotes, in the first instance, the filling of vacancies from the existing labour market. It appears from the documentation submitted that the employee will not receive the minimum remuneration of €30,000 per annum required and so does not meet the required criteria. The level of remuneration is a key indicator of the skills and experience required for a job and assists the Minister in determining the necessity for employing a foreign national. Therefore, in order to satisfy the Minister that the granting of an employment permit would be in the public interest and in line with the current economic policy of the Government and not contrary to Sections 12 (1) (d) and 12 (1) (f) of the 2006 Act, new employment permit applications are normally only considered where it is established that a minimum salary of €30,000 per annum is on offer based on a 39 hour week and where the position is not one of those currently deemed ineligible. This government policy has been formed in view of the very high levels of unemployment currently pertaining in the Irish labour market and the availability of qualified Irish and EU workers to fill low skilled jobs.

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

5. Before considering in any detail the legal issues presented by this appeal, it is, however, necessary to set out in some details the relevant provisions of ss. 8, 11, 12, 14 and 15 of the 2006 Act.

6. Section 8(1) of the 2006 Act provides:

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

7. Section 11 of the 2006 Act provides:

"(1) In considering an application for an employment permit, the Minister shall have regard to:-

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

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

(i) the applicant, or

(ii) in the case of an application by a foreign national, the person who has made the offer referred to in section 4(3) to the foreign national, are necessary for, or relevant to, that employment,

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

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

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

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

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

8. Section 12 of the 2006 Act provides:

"(1) The Minister may refuse to grant an employment permit if:-

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

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

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

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

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

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

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

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

(g) a material misrepresentation in respect of the application has been made by the applicant,

(h) a forged or fraudulent document has been submitted in respect of the application,

(i) the foreign national concerned lands or has landed, or is or has been, in the State without permission,

(j) the remuneration to be paid to the foreign national concerned in respect of the proposed weekly hours of work (whatever they may be) is less than the standard working week remuneration, or

(k) the skills or qualifications specified to be required for the employment concerned, that is to say, specified to be so required by—

(i) the applicant, or

(ii) in the case of an application by a foreign national, the person who made the offer referred to in section 4(3) to the foreign national, are not necessary for, or relevant to, that employment.

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

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

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

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

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

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

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

9. Section 13 goes on to provide for review of decisions to refuse an employment permit. Sections 14 of the 2006 Act provides:

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

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

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

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

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

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

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

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

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

10. Section 15 of the 2006 Act provides:

"(1) The matters mentioned in subsections (1) and (2) of section 14 are—

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

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

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

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

11. It is finally necessary to refer to s. 30 of the 2006 Act which provides:

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

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

12. Ms. Mary Jane Kehoe, an assistant principal officer in the Department of Jobs, Enterprise and Innovation, has filed an affidavit explaining the employment permits system as it is operated by the Minister. The present employment permits system is said to be an instrument of the Government's economic policy which forms part of the *Action Plan for Jobs 2014* and was published by the Taoiseach, the Tánaiste and the Minister on the 27th of February, 2014. Ms. Kehoe's affidavit exhibits two documents published by the Minister on the Department's website which are stated to be the "criteria" applied in relation to applications for employment permits. The first document is entitled "Work Permit Employment Permit" and under the sub heading "Criteria for eligibility", the following appears:

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

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

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

13. The second relevant document published on the Department's website is entitled:

"Ineligible Categories of Employment for Employment Permits" and sets out a list of categories which are considered to be ineligible for employment permits. One such category is "sales staff" which includes all retail sales vacancies, sales representatives, supervisory/specialist sales (with certain exclusions) and thus applies to the position in respect of which Mr. Ali made his application."

The decision of the High Court

14. In the High Court, Noonan J. delivered a reserved judgment ([2015] IEHC 219) dismissing the application. He took the view that the powers conferred on the Minister under s. 12 of the 2006 Act to refuse to grant the application by reference to the economic policy of the Government must of necessity embrace matters which might have – but were not in fact – the subject of regulations made under s. 14 of the 2006 Act:

"The Act clearly confers upon the Minister the power to grant employment permits whether or not regulations are made under s. 14..... the power of the Minister to grant an employment permit is here significantly circumscribed by s. 11 of the Act, which obliges him to have regard to, inter alia, economic policy for the time being of the Government. Consistent with that, s. 12 entitles the Minister to refuse to grant an employment permit if in his opinion, the granting of the permit would be manifestly inconsistent with such economic policy or, if in the opinion of the Minister, it is in the public interest to do so. In that latter regard, s. 1(1) of the Act defines "public interest" as including the need to protect the labour market. It must follow in my view from the foregoing that in considering applications for employment permits under the Act, the Minister is obligated to have regard to the policy of the Government in relation to the protection of the labour market in considering whether to grant or refuse an employment permit. It is impossible to conceive how the Minister could comply with these statutory duties without having regard to matters of the kind that are referred to in s. 14 as being potentially the subject matter of regulations. For example, it is difficult to see how the need to protect the labour market could be addressed if the Minister were to be precluded from having regard to relevant categories of employment and remuneration levels. Yet the applicant's case is in effect that he is precluded from doing so unless he makes regulations."

Construing the relevant provisions of s. 12 and s. 14 of the 2006 Act

15. It is clear that the reason why the Minister refused permission was because the proposed salary on offer to Mr. Ali did not attract a salary of at least €30,000. The fundamental question, therefore, is whether in the circumstances the Minister is entitled to prescribe such a condition by virtue of what amounts to an administrative scheme. At its heart, therefore, the question is one of the proper construction of the relevant provisions of s. 12 and s. 14 of the 2006 Act and the manner in which these provisions should be considered to interact.

16. As Noonan J. correctly pointed out, there is an overlap between the provisions of s. 12(1)(d) ("the granting of the permit would be manifestly inconsistent with economic policy for the time being of the Government") on the one hand and s. 14(1)(d) ("the minimum amount of remuneration....that shall be payable in respect of an employment as a condition for the grant of an employment permit in respect of it") on the other. I also agree with Noonan J. that it is difficult to see how the Minister could have regard to the present economic policy of the Government without "having regard to matters of the kind that are referred to in s. 14 as being potentially the subject matter of regulations", at least where – as is the case at present – Government policy is to require prospective employees to be offered a minimum level of remuneration by their employers to be. As the trial judge pointed out, the Minister's duty to protect the labour market could scarcely be addressed if the Minister "were to be precluded from having regard to relevant categories of employment and remuneration levels."

17. Yet it is also the case that if the High Court's interpretation of the interaction of these provisions were to be upheld, this would have the consequence that in turn this broad interpretation of s. 12(1)(d) would effectively circumvent and by-pass the declared object and purpose of s. 14(1)(d). As I have already pointed out, s. 14(1)(d) allows the Minister to make regulations dealing with the issue of the minimum amount of remuneration. Section 14(1) provides that in making such regulations the Minister may "have regard to, and only to" the matters specified in s.15. In addition, s. 14(1) stipulates that such regulations cannot last for greater than two years. The matters specified in s. 15 include criteria dealing with economic and social development and competitiveness.

18. It is true that the criteria specified in s. 15 happen to conform with the broad economic policy for the time being of the Government, but it must be recalled that this might not always prove to be the case. If, moreover, the Minister could specify minimum levels of remuneration in respect of employment offers which were the subject of employment permit applications, it would mean that the Minister could, for example, by administrative scheme specify minimum wage levels for a longer period than the two years which would have been permitted had he actually made regulations under s. 14(1). These minimum wage levels might furthermore be determined by reference to criteria other than those specified in s. 15 itself.

19. In these circumstances it is clear that, which ever way the matter is looked at, there is a potential conflict, overlap and inconsistency between the practical operation of s. 12(1)(d) on the one hand and s. 14(1)(d) on the other. It is precisely this type of case that calls for the application of the maxim *generalia specialibus non derogant*. This principle was expounded thus by Henchy J. in *Director of Public Prosecutions v. Grey* [1986] I.R. 317, 326-327:

"There is therefore brought into application the rule of statutory interpretation that when Parliament has provided specifically by statute for a limited set of circumstances, there is a presumption that general words in a later statute are

not to be taken as overriding the earlier specific provisions, unless an intention to do so is clearly expressed. The presumption to that effect is encapsulated in the maxim *generalia specialibus non derogant*.”

20. While Henchy J.’s comments were made in the context of an examination of whether two sections of two different Acts could “stand together and be operated separately and independently in appropriate cases”, the same principle applies in the context of two different sections of the same Act which, as here, are potentially overlapping and even conflicting in their operation.

21. Proceeding, therefore, from that premise it is clear in this context that s. 14(1)(d) represents the *lex specialis* and s. 12 is the general provision. This is because s. 14(1)(d) addresses a very specific issue, namely, the minimum level of remuneration, whereas s. 12(1)(d) is concerned with a much broader topic, namely, consistency with Government economic policy. It is true – as Noonan J. pointed out – Government economic policy at present includes the question of the minimum level of remuneration which should be offered to prospective applicants for employment permits, but it is not confined to this issue. It should also be recalled that at some future point Government economic policy might change so that in that situation a minimum level of remuneration of prospective employees no longer featured as an aspect of that policy. In that (admittedly hypothetical) situation there would no longer be a potential overlap between s. 12 on the one hand and s. 14 on the other.

22. The judicial task, therefore, is, as Henchy J. stated in *Gray*, to give these two sections an interpretation which ensures – as far as this is possible – that these provisions can be operated separately and independently of each other. I consider that this can be done by reading s. 12(1)(d), in a manner which embraces matters touching on Government policy other than minimum levels of remuneration, since this is a matter specifically reserved to the Minister by the making of regulations under s. 14(1)(d) only.

Conclusions

23. In the light of this interpretation of these provisions, it follows, therefore, that the Minister had no power to require by means of administrative scheme that prospective employees demonstrate that they would receive a remuneration package in excess of €30,000 should an employment permit be granted. If it were desired to stipulate a minimum remuneration threshold for this purpose, this would have to have been done by means of the making of the appropriate regulations by the Minister under s. 14(1)(d). Such regulations could last only for two years and could only be made by reference to the specific criteria set out in s. 15. Furthermore, any such regulations would have to have been laid before each House of the Oireachtas: see s. 30 of the 2006 Act.

24. Since, however, the essential basis of the refusal decision in the present case was that the applicant could not meet the minimum remuneration criterion stipulated by the Minister otherwise than by means of regulations made under s. 14(1)(d), it is clear that to that extent the Minister acted *ultra vires* the relevant provisions of the 2006 Act as properly construed and understood.

25. I would accordingly allow the appeal from the decision of the High Court and grant an order quashing the decision of the Minister dated 13th May 2014 refusing the applicant’s application for an employment permit under the 2006 Act.