Neutral Citation: [2017] IEHC 620

THE HIGH COURT

[2014 No. 149 J.R.]

BETWEEN

BLESSING PFAKACHA

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

[2014 No. 150 J.R.]

BETWEEN

TAKUDZWA MICHAEL NYAZEMA

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Ms. Justice Faherty delivered on the 19th day of July, 2017

1. These are telescoped proceedings, in which the applicants seek, *inter alia*, orders of *certiorari* by way of application for judicial review to quash the decisions of the respondent not to vary their respective permissions to be in the State as notified to the applicants in letters dated 13th January, 2014.

Extension of time

2. An extension of time is required for the issuing of the within proceedings. They were instituted on 7th March, 2014, some seven weeks or so after the impugned decisions issued. The respondent submits that the applicants have wholly failed to comply with the requirement to institute any judicial review proceedings within fourteen days (as then applied), and the respondent submits that no information has been deposed to by the applicants to justify or explain the delay in instituting the proceedings.

3. The explanations tendered by the applicants for the delay is that following receipt of the decisions on 17th January 2014, they contacted their solicitor several days later and advised him that they wished to challenge the decisions. After being briefed their counsel had several queries in relation to the papers and was not in a position to draft and return proceedings until 25th February, 2014. According to the applicants, the 6th March, 2014, was the earliest date they could meet with their legal representative in order to complete the papers.

4. On balance, the court is satisfied to extend the time for the issuing of proceedings. While there was undoubtedly delay the applicants have explained same to a sufficient extent. I also note that in the two years or so preceding the hearing of the substantive proceedings, the respondent did not seek to strike out the proceedings on the basis of delay.

Background

5. The applicants are nationals of Zimbabwe who have resided in the State since in or around 23rd March, 2011. They are step brother and step sister, both with a date of birth in 1988. The applicants entered the State on foot of a permission to remain on a "Stamp 3" basis, whereby they are not entitled to enter employment or engage in any business or profession in the State. The applicants were granted this permission for the purpose of joining their parents both of whom were ill and needed help with caring for their other children. The applicants' family unit in the State comprises:

- L.P., the first applicant's step mother and the second applicant's natural mother who was naturalised as an Irish citizen on 14th June, 2012;
- A.P., the first applicant's natural father and the second applicant's step father who is also a naturalised Irish citizen since 2010;
- J.P., the applicants' brother born 15th June, 1991 who was naturalised as an Irish citizen in January, 2014 and who was at the time of the institution of the proceedings in full time third level education;
- M.P., the applicants' brother born 11th March, 1997, who is an Irish citizen having been naturalised in 2013; and
- T.P., the applicants' brother who is an Irish national with a date of birth of 4th August, 2004.

6. Some months after their arrival in the State, A.P. recovered from his medical illness and abandoned the family unit.

7. The applicants' mother is in full time employment. She suffers from rheumatoid arthritis which requires medication indefinitely. Their younger brother, M.P., suffers from Hypophosphatemic Rickets, which has necessitated numerous serious surgical procedures.

8. Both applicants were over eighteen years of age when they first arrived in the State. They were permitted to enter as an exceptional measure on the basis of their parents' respective illnesses and that their assistance was required in order to help look after their other siblings, as well as give help to their ill parents.

9. Four months after their arrival in the State, in July, 2011, the applicants applied for a change in their permission to remain pursuant to s. 4(7) of the Immigration Act 2004 ("the 2004 Act"). They sought permission to work. This request was refused in 2011. No challenge was brought against this refusal.

10. On 26th June, 2012 and 26th July, 2012, respectively, both applicants again applied for a change in their permission, again to permit them to work. These applications were refused in respect of the first applicant on 10th May, 2013 and in respect of the second applicant on 18th September, 2012. Again, no challenge was brought to either of the said refusals.

11. On 20th May, 2013, a third application for a change in the applicants' permission to remain was made, with further documents in support of this application submitted on 27th May, 2013. It is the refusal of these applications which is the subject of the within challenge.

12. The case made for Stamp 4 permission for the applicants can be summarised as follows:

- Their mother had become an Irish citizen in 2012;

- The applicants wished to help end the financial burden on their mother as the sole bread winner in the family. While their mother was working full time her circumstances, particularly her illness, required financial assistance from the applicants so that she could continue to provide for her family. The applicants' mother was on constant pain killers and dependent on injections to help with her rheumatoid arthritis. As she was only paid for the hours she worked she was not in a position to take time off work even when in extreme pain and the nature of her work was very physical. Her employers were willing to offer both applicants employment if they had permission to work in the State. The employer's letter was enclosed with the application. Medical reports outlining the mother's medical difficulties and her ongoing reliance on medication were also enclosed with the applications.

- Both applicants looked after their younger siblings, took them to school and were effectively rearing them.

- The applicants could not afford third level education and accordingly if they could obtain stamp 4 permission they would be in a position to better themselves and become an asset to the State. The applicants were also finding it difficult to raise the €300 it took to renew their respective permission to be in the State each time it fell to be renewed;

- The applicants were at all times self-sufficient; their mother paid taxes, paid for their rented accommodation and contributed to the Irish economy in a positive fashion by being habitually resident in the State. Hers and the applicants' (if their obtained stamp 4 permission) circumstances would be such that they would not be a burden on the State;

- If granted Stamp 4 permission the applicants would take out private health insurance. This could be made a condition of any decision by the respondent to upgrade their status;

- The role played by the applicants in caring for their younger siblings could not be over emphasised especially as their father had left the family, and given their mother's serious medical complaints and the serious illness from which their younger sibling M.P. suffered. His circumstances were such that he required a specific diet which the family could not afford because of financial constraints and this was causing a detrimental effect on his health.

Accompanying the letter of 20th May, 2013, were, inter alia, emails from the applicants to their solicitor wherein they outlined particular concerns regarding their younger siblings and the pressure their mother was under in trying to provide for the family, together with an email from L.P. outlining her efforts to take care of her five children (which included the applicants) and the financial and medical difficulties she was encountering.

13. In the respective refusal letters dated 13th January, 2014, the respondent advised that the applicants' individual circumstances, including all matters known to the respondents and which were averted to in the applications, were considered but that their position did not warrant a change in their immigration status. They were advised that if they wished to enter into employment in the State, a prospective employer must first obtain a work permit in respect of them. They were advised that the issuing of work permits was a matter for the Work Permits Division of the Department of Jobs, Enterprise and Innovation. Additionally, the first applicant was advised that if she wished to study in the State, non-EEA nationals who have permission to reside in the State as students are entitled to take up casual employment (defined as up to 20 hours per week during school term and up to 40 hours per week during school holidays) for the duration of their permission.

14. The departmental analyses which accompanied each of the refusal letters set out in summary form the representations made by the applicants. Thereafter, the analyses largely replicated the contents of the refusal letters. They stated as follows:

- Because the applicants entered the State over the age of eighteen they were not entitled to a stamp 4 permission as a family dependent of an Irish citizen;

- If they wished to work in the State a perspective employer must apply for and obtain a work permit on their behalf; and

- In respect of the first applicant, if she wished to study in the State, a student permission could be applied for which permits casual work.

15. The analyses had specific regard to the fact that applicants were allowed to enter the State "over the age of 18 on a join parent visa as an exceptional measure at the time [their] parents were ill and needed help in looking after the other children. The fact is that [the applicants] entered the State over the age of 18 which means that [they are] not entitled to a Stamp 4 as a family dependent of an Irish Citizen."

16. The decision maker also concluded that:

- The refusal of the applications pursuant to s.4(7) of the 2004 Act did not interfere with any rights that may arise under the Constitution or Article 8 of the European Convention on Human Rights;

- If there was any interference "it would not be disproportionate"; and

- Those rights would fall to be considered, along with an assessment of the issue of dependency, any medical condition and possible humanitarian considerations, in the context of a further application if necessary. It was well established that the s. 3 process of the Immigration Act 1999 was sufficiently wide ranging for the respondent to consider those rights.

Grounds of challenge
17. In summary, the decisions are challenged on the following grounds:

> 1. The respondent adopted a inflexible policy whereby a non-national was precluded from applying to vary their permission to remain to permit them to work without first obtaining a work permit, and that the respondent had thereby unlawfully fettered her discretion to determine the applications;
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> 2. The respondent adopted an inflexible policy in refusing to permit a non-national over the age of eighteen having joined their citizen parent in the State, from applying to vary their permission to remain, and that the respondent had unlawfully fettered her discretion in this regard;
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> 3. The respondent failed to consider the applicants' individual circumstances when deciding to refuse the applications to vary the permissions;
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> 4. The respondent failed to consider the application to vary the permissions in light of her general and unfettered discretion contained in s. 4(7) of the 2004 Act;
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> 5. The respondent failed to provide any or any adequate reasons for the decisions; and
>
> 6. The respondent's decisions breached fair procedures and were *ultra vires*.

The relevant statutory provisions

18. In relevant part s. 4 of the 2004 Act provides:

> " (1) Subject to the provisions of this Act, an immigration officer may, on behalf of the Minister, give to a non-national a document, or place on his or her passport or other equivalent document an inscription, authorising the non-national to land or be in the State (referred to in this Act as "a permission").
>
> …
>
> (6) An immigration officer may, on behalf of the Minister, by a notice in writing to a non-national, or an inscription placed on his or her passport or other equivalent document, attach to a permission under this section such conditions as to duration of stay and engagement in employment, business or a profession in the State as he or she may think fit, and may by such a notice or inscription at any time amend such conditions as aforesaid in such manner as he or she may think fit, and the non-national shall comply with any such conditions.
>
> (7) A permission under this section may be renewed or varied by the Minister, or by an immigration officer on his or her behalf, on application therefore by the non-national concerned.
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> …
>
> (10) In performing his or her functions under subsection (6), an immigration officer shall have regard to all of the circumstances of the non-national concerned known to the officer or represented to the officer by him or her and, in particular, but without prejudice to the generality of the foregoing, to the following matters:
>
> > (a) the stated purpose of the proposed visit to the State,
> >
> > (b) the intended duration of the stay in the State,
> >
> > (c) any family relationships (whether of blood or through marriage) of him or her with persons in the State,
> >
> > (d) his or her income, earning capacity and other financial resources,
> >
> > (e) the financial needs, obligations and responsibilities which he or she has or is likely to have in the foreseeable future,
> >
> > (f) whether he or she is likely to comply with any proposed conditions as to duration of stay and engagement in employment, business or profession in the State,
> >
> > (g) any entitlements of him or her to enter the State under the Act of 1996 or the treaties governing the European Communities within the meaning of the European Communities Acts 1972 to 2003."

19. Section 5 provides:

> "(1) No non-national may be in the State other than in accordance with the terms of any permission given under the Act before the passing of this Act, or a permission given under this Act after such passing, by or on behalf of the Minister..."

The applicants' submissions
20. Principally, counsel for the applicants submits that s. 4 of the 2004 Act does not impose a requirement that non-nationals who entered the State over the age of eighteen cannot be granted permission to work. Nor does the section impose a requirement that in order to be permitted to work a non-national must have a work permit. It is submitted that those restrictions are imposed as a matter of policy by the respondent.

21. While no dispute is taken with the adoption by the respondent of a policy in this regard, it is submitted that she fettered her discretion in applying her policy as set out in the Policy Document on Non-EEA Family Reunification ("the Policy Document") in a rigid and unyielding manner.

22. The applicants' entry into the State, and the basis upon which they were given permission to remain, was on foot of the

respondent's departure from the guidelines set out in the Policy Document. As reflected in that that document, non-EEA national adult children of Irish citizens do not fall within the definition of "immediate family" save that para. 13.3 of the Policy Document provides that:

> "A person aged 18 years of age would be permitted to apply where he/she is dependant on the care of the parent sponsor, directly or indirectly, due to a serious medical or psychological problem which makes independent life in the home country impossible."

23. Paragraph 14.1 of the Policy Documents sets out the criteria by which the dependency for such purposes is assessed, namely:

> "For the purposes of this policy document, "Dependency" means that the family member is (i) supported financially by the sponsor on a continuous basis and (ii) that there is evidence of social dependency between the two parties. The degree of dependency must be such as to render independent living at a subsistence level that the family member in his/her home country impossible if that financial and social support were not maintained."

24. It is accepted that the applicants' circumstances in 2011 did not qualify them for the exception provided for in para. 13.3. Counsel for the applicant concedes that it was not the applicants' dependency on their parents (as provided for in the Policy Document as an exceptional basis upon which to grant permission to enter and reside in the State) that necessitated their being granted permission in 2011. Rather, it was their parents' particular circumstances at the relevant time that prompted the exercise of the respondent's discretion to admit them.

25. As reflected in para. 22.1 of the Policy Document, immediate family members of Irish citizens who are granted immigration status through the family reunification process are entitled to work without employment permits and to establish or manage/operate business in the State. The Policy Document reflects ministerial policy that "they should receive a Stamp 4 immigration".

26. Para. 22.2 of the Policy Document reflects ministerial policy with regard to the non-immediate family of Irish citizens, namely that if granted immigration permission, they continue to be subject to the employment permit requirements operated by the Department of Jobs, Enterprise and Innovation. As adult children, and therefore non-immediate family of L.P., the applicants were found to fall within the confines of para. 22.2 whereby they were subject to "the employment permit requirements as operated by the Department of Jobs, Enterprise and Innovation" and were "entitled to apply for immigration status in their own right under the various channels available (student, work permit, business permission etc)". (It should be noted that there are two paragraphs numbered 22.2 in the Policy Document. All references in the judgment are to the second para. 22.2 unless otherwise indicated).

27. Counsel states that, as envisaged by para. 10.3 of the Policy Document, the applicants had sought to "upgrade" their permission status by reference to the circumstances which prevailed as of May 2013. Counsel referred to paragraph 23.2 of the Policy Document which provides that "the possibility to apply for a change of status is currently facilitated…on a case by case basis", and the "changed status" which may be granted to the family member "will depend on that family member's new situation…and the circumstances of the change". I note that the provisions of this paragraph refer to specific events (not on their face applicable to the applicants' present circumstances) as factors which may necessitate a change of status in the permission which was granted to family members upon family reunification. However, it has not been suggested in this case that because the applicants did not meet any of the requirements listed in para. 23.2 their application could not be considered. Nor could such an argument have been maintained given the discretion vested in the respondent pursuant to s.4(7) of the 2004 Act.

28. In any event the Policy Document recognises that executive discretion is retained by the respondent. The document notes that "it is not intended that family reunification decisions merely become a box-ticking exercise where decisions are made automatically". This is reiterated at para. 1.6 which states:-

> "The purpose of the document is not to circumscribe Ministerial discretion, which will of course remain but rather to locate it in the overall framework where the elected Government of the day determines immigration policy and then sets out how that policy might apply in individual cases. In other words, the Minister's discretion will be largely exercised through setting down overall policies and parameters with some margin of appreciation retained by decision makers in exercising their professional judgment on the Minister's behalf."

29. At para. 1.12, it is provided that:-

> "While this document sets down guidelines for the processing of cases, it is intended that decision makers will retain the discretion to grant family reunification in cases that on the face of it do not appear to meet the requirements of the policy. This is to allow the system to deal with those rare cases that present an exceptional set of circumstances, normally humanitarian, that would suggest that the appropriate and proportionate decision should be positive."

30. It is submitted that the respondent has not considered the applicants' application for Stamp 4 permission in the context of an exercise of her discretion, as she should have. Counsel contends that the respondent was on inquiry as to the humanitarian circumstances which arose within the applicants' family and upon which they based their application for Stamp 4 status. Copies of emails furnished by the applicants and the applicants' mother to their solicitor were attached to the applications made on their behalf to the respondent. Other than reciting the facts set out in the submissions and the attachments, the respondent did not engage with the contents of the said documents. Rather, as evidenced by the respective decisions, the respondent merely justified her decision not to grant Stamp 4 permission on the basis that as the applicants had entered the State over the age of 18 years, they were "not entitled to a stamp 4 as a family dependent Irish citizen" and that if they wished to enter the workplace any prospective employer must first obtain a work permit in respect of them. It is submitted that there was no consideration of the particular factors upon which the applicants relied in aid of a positive exercise of the respondent's discretion.

31. It is further submitted that the respondent's discretion under s. 4(7) of the 2004 Act was not limited or trammelled by the provisions of the Employment Permits Act 2003, as amended ("the 2003 Act").

32. Counsel argues that given the particular circumstances in which the applicants received permission to enter the State, it is difficult to see any inherent reason why the respondent would rely on the Policy Document to deny them a Stamp 4 permission.

33. At the time of their respective applications for Stamp 4 permission, the applicants had both received job offers, albeit for work in respect of which a work permit would not ordinarily issue pursuant to the provisions of the 2003 Act, as amended. It is submitted, however, that this should have no bearing on the respondent's consideration given that the application for the variation of the applicants' permission was consistent with the purpose for which they entered the State in the first place, namely to provide

assistance and care to their family. Their respective applications were based upon a material change in their family's circumstances. Accordingly, the refusal of their applications without any effective consideration as to whether the circumstances put forward by the applicants were such as might justify a departure from the restrictions imposed on the applicants in 2011 was contrary to the respondent's own policy to consider applications for variation "on a case by case basis."

34. By applying a fixed policy to the determination of the applicants' application whereby the decisions contained no acknowledgement that exceptions may apply to the general rule, or to the restrictions imposed on the applicants since their arrival in the State, the respondent unlawfully fettered the discretion that fell to be exercised under s. 4 of the 2004 Act. In this regard, counsel cites *Dike v. Minister for Justice* (Unreported, High Court, Faherty J., 23rd February, 2016).

35. It is further contended that the decisions are unlawful on the basis that no or no adequate reasons were provided for the refusal to grant stamp 4 permission. It is submitted that despite the material placed before the respondent, and, in particular, in circumstances where that the applicants were granted residency for reasons other than those set out in the Policy Document, the respondent provided no cogent reasons as to why the applicants' individual circumstances did not warrant a variation in their permission to reside in the State. Counsel cites *Breen v. Minister for Defence [*1994] 2 I.R. 34 and *Mallak v. Minister for Justice* [2012] 3 I.R. 297 in support of his arguments in this regard.

The respondent's submissions

36. It is acknowledged that the respondent enjoys a full discretion pursuant to s. 4(7) of the 2004 Act, as enunciated by Hardiman J. in *Hussein v. Minister for Justice* [2015] IESC 104. However, counsel submits that in the present case, the respondent exercised her discretion, having fully considered the facts as presented. Accordingly, she was fully and properly entitled to determine that the applicants should first comply with the 2003 Act if they wanted to work within the State.

37. It is submitted that the restrictions on the rights of non-nationals to work in the State are not a matter of policy imposed by the respondent in the exercise of her discretion, as contended for by the applicants. The provisions of the 2003 Act, as amended, are not merely guidelines or an administrative policy or a set of non-statutory rules. Where the Oireachtas has clearly legislated in regard to a particular matter, namely the employment of non-nationals in the State, it is submitted that the respondent, in exercising any power delegated to her pursuant to s. 4(7) of the 2004 Act, is fully entitled to take such requirements into account when making any decision under that provision. In requiring the applicants to first obtain a work permit, the respondent was in no way fettering her discretion under s. 4(7) of the 2004 Act but rather taking a proper and legitimate matter fully into account in reaching her decision. Accordingly, there was nothing arbitrary or capricious or inflexible in the manner in which the respondent dealt with the applicants.

38. In making her decisions, the respondent applied clear and unambiguous policies, as fully set out in the Policy Document, and in no way did she fetter her discretion or adopt or any inflexible approach, as alleged.

39. Counsel submits that the policy accords with the test set by Keane J. in *Carrigaline Community Television Broadcasting Company Limited v. Minister for Transport* [1997] 1 ILRM 241. It is submitted that the Court should not interfere given that the policy adopted by the respondent cannot be said to be unreasonable in the sense that phrase is used in *State Keegan v. Stardust Victims Compensation Tribunal* [1986] I.R. 642. Nor was a "rigid policy" adopted as proscribed by *McCarron v. Kearney* [2010] 3 I.R. 302. In that case, Fennelly J. stated, at para. 67:-

> *"…it would be wrong to preclude a decision maker from formulating guidelines by reference to which he makes it clear that he will make his decisions. It would be inimical to good administration and to consistency in decision making to oblige all decision makers to treat each decision entirely on its own, without reference to previous decisions or to criteria designed to serve the public interest."*

40. It is submitted that on the basis of the principles set out in the above jurisprudence, the applicants have failed to demonstrate that the respondent's policy "*plainly and unambiguously flies in the face of fundamental reason and commonsense*" as per Henchy J. in *Keegan*. It is submitted that a normal requirement to obtain a work permit is not unreasonable, especially given the existence of statutory provisions in that regard. The applicants present no evidence that the policy applied was rigid and inflexible, they merely seek to extrapolate such a conclusion from the refusal in their own cases.

41. Furthermore, the evidence put forward by the applicants did not indicate a special humanitarian case or change of status such that it was unreasonable or irrational for the respondent to apply the Policy Document to them.

42. It is clear that the applicants' permission to be in the State was first premised on the basis that they were needed to assist their mother and their siblings, which is the basis upon which they got permission in the first place. The applicants now contend that if they were allowed to work, they could employ a carer for M.P., their ill brother. It appears that the applicants wish to work in order to employ somebody else to fulfil the care requirement which was the very basis for the exercise of the respondent's discretion to permit them to come to the State.

43. The applicants complain that "self evidently" they would not be entitled to a work permit to pursue the work which they have been offered (as cleaning operatives). However, they presented no evidence for this contention. Even assuming that they would not be entitled to work permits on the basis of the employment offers they received from their mother's employer, the nature of the work chosen by the applicants is not sufficient for them to be allowed to bypass the respondent's policy. Nor should the application of the policy be deemed inflexible or rigid merely because it does not accommodate the applicants in their chosen employment. There is nothing to suggest that the applicants could not apply for other categories of employment such as would permit a prospective employer to apply for work permits for them.

44. Contrary to the applicants' submissions, reasons for the refusal of Stamp 4 permission are set out in the decisions. The respondent clearly states that the applicants could and should apply for work permits, or in the case of first applicant, that she could obtain stamp 2 student visa. Insofar as the applicants assert that the respondent failed to engage with their submissions, it is clearly stated by the respondent that all of the matters known to the respondent and adverted to in the applications were considered. Accordingly, the applicants' case cannot be equated with *Mallak*.

Considerations

The nature of the respondent's discretion under s. 4(7) of the 2004 Act

45. How non-nationals obtain permission to be in the State is regulated in s.4(1), s.4(6) and s.4(10) of the 2004 Act, as recited above. Additionally, s.5 of the 2004 Act sets out the overarching basis for the presence of non-nationals in the State.

46. In *Saleem v. Minister for Justice* [2011] IEHC 55, Cooke J., at para. 7, summarised the combined effect of sections 4 and 5, in the following terms:-

> *"Section 5 of the 2004 Act, provides that no non-national may be in the State other than in accordance with the terms of a permission given under the Act by or on behalf of the Minister or given before the passing of that Act. Section 4 provides that an immigration officer may on behalf of the Minister give a non national, either by means of a document or by placing a stamp on his or her passport, an authorisation 'to land or be in the State'. Section 4 does not prescribe any conditions for the grant of such a permission. Subsection (3) does, however, prescribe a series of circumstances in which an immigration officer, on behalf of the Minister, may refuse to give a permission and subsection (6) provides that a permission can be given subject to such conditions as to duration of stay, engagement in employment, business or profession as may be thought fit."*

47. It is acknowledged by counsel for the respondent that pursuant to s. 4(7) of the 2004 Act, the respondent enjoys full discretion to renew or vary a permission previously granted to a non-national, which by definition must mean that it was in the remit of the respondent to grant Stamp 4 permission to the applicants irrespective of the exceptional basis upon which they were first granted permission to enter the State.

48. The nature of the respondent's power under s.4(7) was the subject of consideration in *Hussein*. In that case, Hardiman J. opined:-

> *"19. …There seems to me to be no basis for implying any statutory constraint at all on the Minister's power under s.4(7) other than the very general ones mentioned above. The decisions made in the two cases (under s.4(3) and s.4(7)) are quite different and there is no reason a court should read the criteria laid down for the consideration of one decision, by an immigration officer, into the criteria of the exercise of another decision, of a quite different nature, by the Minister…*
>
> *20. …Secondly it is clear that the decision being addressed by the Immigration officer is of quite different nature to that addressed by the Minister under subsection (7). It is clear especially from the first two phrases set out above that the Immigration officer's decision is one taken in advance of the non-national's first legal entry into the State. This emerges clearly from the use of the phrases "proposed visit to the State" and "intended duration of the stay in the State". On the other hand the Minister's decision relates to a decision as to whether or not to vary the conditions the permission to remain in the State enjoyed by a person who is already established here, in Mr. Hussein's case, for six year."*

49. There is no also dispute as between the parties in this case but that the respondent, either when deciding to admit non nationals such as the applicants into the State or when considering any application to vary a permission previously given, is entitled to have regard to policies formulated by her provided same are reasonable and rational and that such policies are not premised on a mistaken view of the law, to paraphrase Keane J. in *Carrigaline Community Television Broadcasting Company Ltd.*

50. In *Li v. Minister for Justice* [2015] IEHC 638, Humphreys J. had occasion to consider, inter alia, whether the existence of the Policy Document in issue in this case fettered the discretion which s. 4(10) of the 2004 Act vests in the Minister. He stated, at para. 60:-

> *"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."*

I concur with that statement.

51. Counsel for the applicants does not suggest the policies which govern the entry into the State on non-EEA adult children of Irish citizens are inherently irrational or unreasonable. Rather, his essential complaint is that there was no evidence, on the face of the respective decisions, that the respondent acknowledged that pursuant to s.4(7) of the 2004 Act she had discretion to grant Stamp 4 permission to the applicants, or that what was set out in her own Policy Document at para. 22.2 was open to exception. He contends that the respondent effectively applied "*the force of law*" to para.22.2 of the Policy Document, contrary to the *dictum* of Clarke J. in *Crawford (Inspector of Taxes) v. Centime Limited* [2006] 2 I.R. 106. Counsel asserts that what was before the respondent was the potential variation of the discretion she had previously exercised in the applicants' favour. Yet in the impugned decisions the respondent does not advert to or acknowledge that she had any discretion in the matter of granting Stamp 4 permission to the applicants. It is contended that this is evidenced by the statement in the decisions that as the applicants are over eighteen years of age "they are not entitled to Stamp 4 as a family dependant of an Irish Citizen."

52. Accordingly, it is submitted that there was a fettering of the respondent's discretion which is of itself unlawful and does not require the applicants to establish irrationality in the *Keegan* or *O'Keeffe* sense.

53. In *Dike*, this Court, when considering the application of a particular provision of the Policy Document, opined as to the nature of ministerial discretion:

> *"108. At para. 14 of his verifying affidavit, Mr. O'Sullivan deposed that:*
>
> > *'..The Respondent could properly have applied [the provisions of para.18.7] to the application by the First Named Applicant and refused the application on that basis. However, the Respondent applied the most lenient approach generally applicable to applications for family reunification (other than in respect of elderly dependent parents), which was that such applications would only be accepted from within the State where there were special humanitarian considerations. This departure from paragraph 18.7 operated in ease of the First Named Applicant. Nevertheless, the Respondent does not accept that any special humanitarian considerations had been identified by the First Named Applicant in this case.'*
>
> *109. Contrary to what is asserted by the respondent, had a bald application of para.18.7 occurred in the present case, in my view it could not withstand judicial scrutiny giving rise as it would to an effective bar to a consideration of whether there were any circumstances which might justify acceptance of an application from within the State and indeed which*

would be contrary to the respondent's own policy to have regard to humanitarian cases. In as much as the respondent asserts that the provisions in the Policy document on "Elderly Dependent Parents" are somehow excluded from ministerial discretion, that argument is not sustainable.

110. The approach of the courts is succinctly set out by O'Sullivan J. in McDonagh v Clare County Council [2002] 2I.R. 634:

> *'In my opinion a residence or indigenous policy is a proper inclusion by a housing authority in its traveller accommodation programme. But it must not be applied so rigidly that it becomes an effective bar to any consideration by the housing authority of an application for housing by a member of the traveller community. In its letter of the 2nd January, 2002, the respondent effectively did this. There was, as I have held, an application calling upon the respondent as housing authority "to address this situation as a matter of urgency." The letter of the 2nd January, 2002, constitutes a refusal to consider the applicants for permanent traveller accommodation by reference, it is clear, to the indigenous policy.*
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> *This is not to say that the respondent was not entitled to take the view that the applicants were most unlikely to succeed if they were so considered. By refusing to consider the application at all, however, no matter how unpromising, they fell foul, in my opinion, of the principles enunciated by Bankes L.J. in R v. Port of London Authority ex parte Kynock [1919] 1 K.B. 176 and Lord Reid in British Oxygen Ltd. v. Minister of Technology [1971] A.C. 610, both of which were referred to with approval by Keane J. in Carrigaline Community Television Broadcasting Company Ltd v. Minister for Transport Energy & Communications (No. 2) [1997] 1 I.L.R.M. 241. In particular it is worth re-quoting Lord Reid to the effect:-*
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> *"What the authority must not do is to refuse to listen at all.""*

54. Having appraised the contents of the respective decisions in the within proceedings, I am satisfied that what effectively occurred in this case was a bald application by the decision-maker of the policies set out at para. 22.2 of the Policy Document. This amounts to a fettering of the discretion vested in the respondent by s.4(7) of the 2004 Act. While the Policy Document itself acknowledges the concept of ministerial discretion, the potential exercise of that discretion was fettered, in my view, by the failure of the decision-maker to acknowledge that the guidelines expressed in the Policy Document were not set in stone, and by the failure to engage in any meaningful sense with the submissions made by the applicants as to why the respondent should see fit to upgrade their status to Stamp 4.

55. As to whether the respondent should exercise her discretion either in favour or against the applicants a lawful decision on that question could only follow upon a consideration of the factual matrix the applicants presented, to be analysed against the policy considerations outlined in the Policy Document. One of the arguments canvassed by counsel for the respondent in written submissions was that as the applicants had been reunified with their family within the State, they had achieved everything the Policy Document seeks to achieve. Insofar as this argument seeks to suggest that the respondent's exercise of her discretion in the applicant's favour might be considered spent at that juncture, I note that the Policy Document itself envisages situations where the respondent may be called upon to make further decisions in respect non-EEA nationals already in the State, not least where such persons seek to upgrade their immigration status.

56. As part of the respondent's opposition to the applicants' challenge it was submitted that the applicants had furnished no new information such as might have prevailed upon the respondent to upgrade their status in the State. Counsel for the respondent contended that no evidence was put before the respondent that their circumstances had changed. It is asserted that they did not demonstrate a change in their mother's work status or a decrease in her earnings. The respondent contends that while the applicants' father had absconded since their arrival in the State, that circumstance did not change the financial dynamic which was ongoing within the family since 2011, since prior to his departure their father had not been in a position to work due to illness. Similarly, the respondent contends that L.P. had health problems in 2011, as was also the case at the time of the applications to upgrade. It is argued that what was represented to the respondent in May, 2013, concerning L.P. did not constitute a change of circumstance in that regard. It was submitted that what might have constituted exceptional circumstances would have been the loss of their mother's employment due to redundancy or ill health but that was not the case presented by the applicants. It was also contended that if the applicants were to be offered Stamp 4 status, in due course they would be entitled to claim social welfare and health benefits and that while they asserted that a condition of the Stamp 4 permission could be that they obtain private health insurance, there is no guarantee that they would not later resort to public health services.

57. The difficulty the Court has with the arguments put forward by counsel for the respondent is that, while potentially valid factors for consideration by the decision-maker, they were not addressed in the decision, as they ought to have been. The fact that certain elements of the applicants representations were recited in the decisions and that it was stated that all matters were considered cannot suffice, in my view, as a comfort to the Court that the respondent in fact exercised her discretion lawfully in refusing the applications, particularly having regard to the bare assertion in the decisions that the applicants were not entitled to Stamp 4 permission because they were over eighteen years of age. I accept that some of the matters canvassed by the applicants had been alluded to in an earlier decision dated 18th September, 2012, in respect of the second applicant. However, there is no suggestion from the earlier decision that the extent of the family's financial difficulties, or issues surrounding M.P.'s illness or dietary requirements as expressed to the respondent in the May, 2013 submissions were as prevalent in 2011 or 2012. Accordingly, I do not agree that the information conveyed to the respondent on 20th May, 2013 and 27th May, 2013, was necessarily the same information upon which the respondent had exercised her discretion to admit the applicants into the State in 2011, or to refuse applications to upgrade their status in 2012. For example, in her email, L.P. made reference to the difficulties she had in gathering 600 euro on each occasion the applicants' permissions to be in the State required renewal. Similarly, at the time of the application in May, 2013, for a variation of the applicants' permissions, L.P. was paying the second applicant's college fees, which added to her financial strain, of which the respondent was apprised. A lawful consideration of the applications required the decision-maker, who was on enquiry as to the case being made by the applicants, to take account in a meaningful sense of the representations they made.

58. Accordingly, in the absence of any meaningful consideration of the humanitarian considerations which the applicants put forward, such as might warrant a departure from the established policy that non-immediate family members of Irish citizens, if they wished to work, must apply for work permits to the Department of Jobs, Enterprise and Innovation, the respondent fettered the discretion vested in her under s.4(7) of the 2004 Act, contrary to the legal principles set out in the decision of this Court in *Dike*.

59. That is not to say that the applicants' contentions should prevail or that their immigration status should be upgraded; that decision is solely for the respondent in the exercise of her statutory discretion. It may well be that the policy considerations as

alluded to throughout the Policy Document may trump the arguments made by the applicants for Stamp 4 status. In particular, the Court does not say that the respondent erred in alluding (albeit without specifically referencing the Policy Document) to her policy that non immediate family members are subject to employment permit requirements if they wish to work in the State. As I have said, the defect in the decision is that there appears to be no recognition that it was within the remit of the respondent, given the provisions of s.4(7), to issue a Stamp 4 permission to the applicants as an exercise of her statutory discretion, over and above any other route the applicants may have had to achieve employment in the State. By the manner of the consideration afforded to the applicants, in particular the failure to take on board whether the factors they relied on could be regarded as sufficient to constitute exceptional circumstances for the grant of Stamp 4 permission, the door was shut to any further potential exercise of that discretion in the applicants' favour, over and above that which was exercised in 2011. That is the frailty which attaches to the present decisions. Grounds 1-4 of the statement of grounds are made out.

Alleged lack of reasons

60. A further ground put forward on behalf of the applicants by way of challenge to the decisions is that the decision-maker erred in law in failing to give any or any proper reasons for the refusals.

61. It is well established as a principle of administrative decision-making that reasons must be given for a decision. In *Mallak*, Fennelly J. observed:-

> *"[47] The fact that a power is to be exercised in the 'absolute discretion' of the decision maker may well be relevant to the extent of the power of the court to review it. In that sense, it would appear potentially relevant principally to questions of the reasonableness of decisions. It could scarcely ever justify a decision maker in exceeding the limits of his powers under the legislation, in particular, by taking account of a legally irrelevant consideration. It does not follow from the fact that a decision is made at the absolute discretion of the decision maker, here the Minister, that he has no reason for making it, since that would be to permit him to exercise it arbitrarily or capriciously. Once it is accepted that there must be a reason for a decision, the characterisation of the Minister's discretion as absolute provides no justification for the suggestion that he is dispensed from observance of such requirements of the rules of natural and constitutional justice as would otherwise apply. In this connection I agree with the following remarks of Hogan J., regarding the provision under consideration in this case, in his judgment in Hussain v. Minister for Justice [2011] IEHC 171, (Unreported, High Court, Hogan J., 13th April, 2011) at para. 17:-*
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> > *'This description nevertheless cannot mean, for example, that the Minister is freed from the obligations of adherence to the rule of law, which is the very 'cornerstone of the Irish legal system': Maguire v. Ardagh [2002] 1 I.R. 385 at p. 567, per Hardiman J. Nor can these words mean that the Minister is free to act in an autocratic and arbitrary fashion, since this would not only be inconsistent with the rule of law, but it would be at odds with the guarantee of democratic government contained in Article 5 of the Constitution.'*
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> *…*
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> *[76] It might be thought unnecessary to call in aid this parallel development of the law in the United Kingdom. The developing jurisprudence of our own courts provides compelling evidence that, at this point, it must be unusual for a decision maker to be permitted to refuse to give reasons. The reason is obvious. In the absence of any reasons, it is simply not possible for the applicant to make a judgment as to whether he has a ground for applying for a judicial review of the substance of the decision and, for the same reason, for the court to exercise its power. At the very least, the decision maker must be able to justify the refusal. No attempt has been made to do so in the present case and I believe it would be wrong to speculate about cases in which the courts might be persuaded to accept such justification."*

62. In the present case, I am not satisfied that there was an absence of reasons in the decision. The basis for the refusal is clearly set out, namely that as the applicants were over eighteen years of age, they were not entitled to Stamp 4 permission as family dependants of their mother, an Irish citizen and that if they wanted to work they would have to go through the procedures provided for in employment legislation. Accordingly, the Court is not prepared to impugn the decision for lack of reasons.

63. As to the adequacy of the reasoning, the Court does not see any necessity to expound on this argument since I have already found that the respondent fettered her discretion in failing to consider whether the matters put forward by the applicants merited a departure from established policy. To my mind, in such circumstances, it logically follows there was an inadequate basis for the refusal decisions.

64. Counsel for the applicants also argues that insofar as the respondent relies on the over eighteen rule in the Policy Document as a reason to refuse the applicants Stamp 4 permission, same was irrational in circumstances where the respondent had already waived that particular rule by permitting the applicants to reside in the State. All in all, I am not persuaded that counsel's argument on this point establishes irrationality in the *Keegan* or *O'Keefe* sense. I so find first because it is accepted that the respondent's policy in itself is not irrational or unreasonable. Secondly, adhering to the said rule would be a perfectly proper exercise of the respondent's discretion once all relevant circumstances as pertained to the applicants were taken into account and it was reasonably found that same did not justify a departure from the respondent's policy. As I have said, the unlawfulness in these cases arose because the decision-maker, in relying on the over eighteen rule, without more, effectively put a constraint on the respondent's discretion.

Summary

65. For the reasons set out above, I am satisfied therefore to grant leave in these case. This being a telescoped hearing, I will grant orders of *certiorari* quashing the respective decisions.