THE HIGH COURT

[2021] IEHC 152

[Record No. 2020/494 JR]

BETWEEN

MD LITON HOSSAIN

APPLICANT

AND

THE MINISTER FOR BUSINESS ENTERPRISE AND INNOVATION

RESPONDENT

JUDGMENT of Mr. Justice Barr delivered electronically on the 3rd day of March 2021

1. Introduction

1. The central issue in these proceedings can be summarised in the following way: The applicant is a national of Bangladesh. He was married to a UK citizen in England and they came to Ireland in November 2015. The applicant was issued with what is known as a Stamp 4 immigration permission on the basis that he was married to an EU citizen who was exercising her right to free movement within the EU. The marriage broke down and the applicant's wife returned to the UK. His Stamp 4 permission is due to expire on 2nd November, 2021.

2. The applicant applied for an employment permit from the respondent pursuant to the Employment Permits Acts 2003-2020. His application was refused by the respondent on the basis that the Minister had no jurisdiction to grant an employment permit as the applicant already had a right to work by virtue of holding a valid Stamp 4 permission.

3. The essential question therefore is whether the respondent is correct in his contention that he cannot issue an employment permit to a person who already has a right to work in the State by virtue of the immigration permission held by them; in particular, the fact that they are the holder of a current Stamp 4 permission.

2. Background

4. The facts in this case are not in dispute. The following are the relevant dates for the purposes of this application:-

31/5/2013	Applicant is married to a UK citizen in London.
November 2015	Applicant and his wife come to Ireland.
2/11/2016	Applicant is granted a Stamp 4 permission to be in the country on the basis that he is married to an EU citizen who is exercising her right to free movement within the EU.
February 2017	The applicant's marriage breaks down.
September 2017	The applicant's wife returns to the UK. She has since filed for divorce before the courts in England and Wales.
October 2019	The applicant informs the Irish Naturalisation and Immigration Service of his change in circumstances.

25/11/2019	Applicant applies for an employment permit. At para. 16 of the application form, the applicant stated "*Applicant is currently on Stamp 4 EU Fam, however his EU citizen spouse has left the jurisdiction and accordingly he has no entitlement to this permission going forward, though same remains valid. He has updated the EU Treaty Rights Unit in this regard.*"
February 2020	The applicant is offered a further contract by his employer, which is the owner of a hotel in Kilkenny, to work as Chef de Partie for a period of two years commencing on 22nd February, 2020.
28/2/2020	A decision on the applicant's application is issued by Ms. Lynch. This is said to have been issued in error and gives an erroneous reason for the refusal of the application.
2/3/2020	A second decision is issued by Ms. Lynch, which also refuses the applicant's application for an employment permit. The reason given is: *"It appears from the information submitted that the foreign national is the current holder of a Stamp 4 from the Minister for Justice and Equality which allows him to work without the requirement for an employment permit. In these circumstances an employment permit cannot be issued in this case."*
23/3/2020	The applicant, through his solicitor, submits a request for a review of the decision further to s.13 of the Employment Permits Act 2006 (as amended). In that letter, the applicant's solicitor points out that, while the applicant was the holder of a Stamp 4 permission, that permission was likely to be cancelled or withdrawn imminently due to the change in his marital circumstances. It stated that his circumstances therefore made it necessary for him to hold an employment permit. It stated that the applicant did not want to run the risk of a gap in permission which would result in his being present in Ireland without permission from the Minister for Justice and Equality. Nor did he wish to run the risk of becoming unemployed due to a temporary gap in permission. The letter further stated that the applicant was willing to formally surrender his Stamp 4 permission in the event that he was granted an employment permit.
20/4/2020	A decision on the review was given by the reviewing officer, Mr. Dermot Kavanagh. He upheld the decision made by Ms. Lynch on 2nd March, 2020. The reason for his decision was stated as follows: *"I understand the application was refused on the basis*

that it appears from the information submitted that the foreign national is the current holder of a Stamp 4 from the Minister for Justice and Equality which allows him to work without the requirement for an employment permit. In these circumstances it was not possible to issue an employment permit".

The decision went on to state that having reviewed the documentation submitted in support of the request for a review and having considered all the circumstances of the application, he was satisfied that the decision to refuse an employment permit was the correct decision. Mr. Kavanagh also stated: "*Please note that persons residing in the state must be legally resident and have an up-to-date immigration permission at the date of application from the Minister for Justice and Equality in order to be in or to enter employment. These persons must at the date of the application have a valid certificate of registration (GNIB card/IRP card) namely, holders of Stamps 1, 1A, 2, 2A and 3 immigration permissions."* The letter went on to advise the applicant that he should contact the Department of Justice and Equality and apply for Stamp 1 permission. Once received the respondent could process his application for a new general employment permit. Such an application should comply with the legislative requirements for the particular employment permit type.

27/7/2020	The applicant obtained leave from the High Court to challenge the review decision dated 20th April, 2020.
[Date unknown]	In the applicant's written submissions it is stated that since the commencement of the proceedings, the applicant's apprehensions have been realised, as he has been served with correspondence from INIS indicating their proposal that the applicant's immigration permission be revoked on the basis that his wife has left the country. The court does not have any further information in relation to this correspondence.

3. The Core Issue

5. The central issue that arises for determination in these proceedings is whether the fact that the applicant is the holder of a Stamp 4 permission, which permits him to work without the need to hold an employment permit; he is therefore excluded from the category of persons who can apply for and be granted an employment permit. In essence, it is submitted on behalf of the applicant that, while that would ordinarily be the case, in the particular circumstances of the applicant's case, where it is clear that a Stamp 4 permission is likely to be revoked imminently, or at the very latest, will expire on 2nd November, 2021, it is reasonable that he should seek to protect himself and his employer from falling into the trap that he may be working without a valid legal authority to do so, by obtaining an employment permit that will cover him if and when his Stamp 4 permission is revoked or lapses. It was submitted that there is no provision in the legislation which prevents the respondent from issuing an employment permit in such circumstances.

6. The respondent's position can be stated succinctly. The respondent states that as the applicant is the current holder of an extant Stamp 4 permission, which of itself gives him a right to work in the State, the respondent simply does not have jurisdiction to grant an employment permit to him.

7. The respondent argues that the Minister does not have jurisdiction to grant the employment permit having regard to the following facts:-

   (i) The applicant was the holder of a Stamp 4 permission to remain in the State as the qualifying family member of an EU citizen and was entitled to take up employment in the State pursuant to that permission.

   (ii) The applicant was excluded from the requirement to obtain an employment permit by s.2(10)(d) of the EPA 2003, which provides that non-nationals who are permitted to remain in the State pursuant to a condition of that permission, that the person may be employed in the State without an employment permit.

   (iii) The respondent had no power to grant an employment permit to the applicant as a person who is excluded from the requirement to obtain an employment permit by s.2(10)(d) of the EPA 2003.

8. The respondent's position was summarised in the following way at para. 48 of the written legal submissions filed on behalf of the respondent:-

   "48. The applicant is excluded by s.2(10)(d) of the EPA 2003 from the requirement to obtain an employment permit by virtue of his status as the qualifying family member of an EU citizen which permits him to work in the State. The applicant is not eligible for an employment permit and the discretion conferred on the respondent to grant or refuse such permits does not arise. Consequently the applicant has no entitlement to the reliefs sought in the notice of motion."

4. Section 2 of the Employment Permits Act 2003 (as amended)

9. As s.2(10)(d) of the Act is central to the respondent's argument, it is appropriate to set out the salient parts of s.2:-

   "2.(1) A foreign national shall not (a) enter the service of an employer in the State, or (b) be in employment in the State, except in accordance with an employment permit granted by the Minister under s.8 of the Employment Permits Act 2006 that is in force.

   […]

   2.(10) Without prejudice to the other provisions of this Act, this section does not apply to a foreign national…(d) who is permitted to remain in the State by the Minister for Justice, Equality and Law Reform and who is in employment in the State pursuant to a condition of that permission that the person may be in employment in the State without an employment permit referred to in sub.(1), …".

5. The Applicant's Submissions

10. The core argument made on behalf of the applicant has already been set out and need not be repeated. The applicant accepts that he is the current holder of a Stamp 4 permission, which entitles him to work in the State without an employment permit. However, as has been clearly set out by the applicant in his affidavit sworn on 16th July, 2020, he is fearful that, given the change in his marital circumstances and in particular, the fact that his wife has returned to the UK, his Stamp 4 permission is likely to be revoked imminently, or at the latest, it will expire on 2nd November, 2021, with the consequence that he will no longer be able to work in the State without an employment permit. He is anxious to avoid a situation occurring whereby his continuation in employment would expose both him and his employer to criminal sanction, as he would be working without an employment permit and they would both therefore be committing an offence contrary to s.2 of the EPA.

11. The applicant submits that the respondent's reliance on s.2(10)(d) of the EPA is misconceived for two reasons. Firstly, that section is not referred to in either of the decisions, being the second decision of Ms. Lynch issued on 2nd March, 2020, or the review decision of Mr. Kavanagh issued on 20th April, 2020. It was submitted that the particular subsection was not mentioned in either decision and was therefore not a reason that can be relied upon in these proceedings as the basis for their decisions to refuse the applicant's application.

12. Secondly, even if the court were to hold that the decisions of the deciding officer and the review officer were in fact based on s.2(10)(d); that subsection does not preclude the Minister from granting an employment permit to the applicant in the particular circumstances of his case. It was submitted that when read as a whole, s.2 of the EPA is a penal section which essentially sets out the requirement in s.2(1) that a foreign national must hold a valid employment permit to work in the State. The section goes on to make it an offence for both the employee and the employer to employ a foreign national without holding a valid employment permit. The section also contains provisions in relation to the carrying out of searches of work premises by the gardaí; the putting of questions by the gardaí to people on the premises and also gives them a power of arrest in certain circumstances.

13. It was submitted that s.2(10)(d) merely provides that foreign nationals, who by virtue of their immigration permission had a right to work within the State, were relieved of complying with the requirement provided for in sub.s.(1) of holding an employment permit.

14. It was submitted that s.2 of the EPA was purely a penal section, that had nothing to do with the discretionary power of the Minister to grant employment permits pursuant to s.8 of the Act, the salient provisions of which are in the following terms:

> *"8.(1) Subject to sections 3A, 10, 10A, 12, 14, 20A and 20B and s.2(11) of the Act of 2003, the Minister may on application made to him or her, grant an employment permit."*

15. It was submitted that it was clear from s.8(1) that the Minister had a wide discretionary power to grant employment permits. That power was only circumscribed by the various provisions that were mentioned in s.8, which set out certain conditions that had to be fulfilled, such as the proviso that at least 50% of the employees in the particular workplace had to be EU citizens. Section 12 set out the grounds on which an employment permit may be refused. It was submitted that none of the provisos to the general discretionary power provided for in s.8(1) precluded the Minister from granting an employment permit to someone who already had a right to work in the State by virtue of their immigration permission. It was submitted that there was no provision either in the Act (as amended), or in the regulations made thereunder, which precluded the Minister from having jurisdiction to consider an application from a person in the circumstances in which the applicant finds himself. Accordingly, it was submitted that the respondent had acted *ultra vires* in holding that he could not consider the applicant's application as he lacked jurisdiction to grant an employment permit under the provisions of the Act.

16. It was submitted that the discretionary power enjoyed by the Minister under s.8 is a very wide discretion, which has to be exercised fairly, having regard to all the circumstances in the case. The Minister was given the power to grant an employment permit even where some of the negative factors which may lead to a refusal of a permit were in existence. In this regard the applicant referred to the decision in *Ling and Yip Limited v. Minister for Business, Enterprise and Innovation* [2018] IEHC 546.

17. It was submitted that while the applicant comes within the provisions of s.2(10)(d) of the Act, that merely relieved him of the requirement to hold an employment permit while he was the holder of a Stamp 4 permission. However, it was submitted that it had no effect on the jurisdiction or power of the Minister to exercise his discretion to grant an employment permit to a person in the applicant's circumstances pursuant to s.8 of the Act. It was submitted that as the right to work was an unenumerated Constitutional right, s.2(10)(d) should be construed strictly, as being limited in its application to s.2 of the Act of 2003 and as having no effect on the power to grant employment permits under s.8 of the Act of 2006: see N.*V.H. v. Minister for Justice* [2017] IESC 35, where the right to work was recognised as being applicable to non-citizens as well as to citizens.

18. The applicant also relied on the maxim of statutory interpretation "*expressio unius est exclusio alterius*" as providing that the power of the Minister to grant a permit under s.8, was only restricted to the extent specified in the various sections set out in s.8 itself. In this regard it was submitted that it was noteworthy that s.2 of the Act of 2003 was not listed in full, but only a single subsection thereof, s.2(11), was specified in the list of restrictions to the grant of employment permits. It was significant that s.2(10) was not referred to as one of the provisions circumscribing the exercise of the Minister's power under s.8 of the Act. It was submitted that where the legislature had chosen to expressly list such matters in s.8(1), it had to be implied that other matters not listed therein, were deliberately and intentionally excluded by the draughtsman from having application in that context: see *O'Connell v. An tArd Chlaraitheoir* [1997] 1 I.R. 377.

19. In summary, it was submitted that s.2(10)(d) merely provided that the applicant could not be penalised for failing to have an employment permit once he held a permission which gave him a right to work in the State; the subsection did not prohibit him from applying for an employment permit.

20. It was submitted that the particular reason for the refusal given in this case ignored the fact that s.12 of the Act set out an exhaustive list of the matters with reference to which the respondent may refuse to grant an employment permit. Instead, the Minister had adopted a policy to exclude consideration of applications for employment permits from people who already had a permission to work in the State. It was submitted that this constituted a blanket policy which was being adopted by the Minister, but was not sanctioned either by the Act, or by the regulations made thereunder. It was submitted that the Minister had no jurisdiction to adopt such a policy as a reason for refusing to consider the applicant's application. Counsel referred to the decision in *Ali v. Minister for Jobs Enterprise and Innovation* [2016] 1 I.L.R.M. 400, where the Minister had adopted a policy of refusing applications for employment permits unless the applicant had a salary in excess of €30,000. The court held that such a policy was *ultra vires* the powers of the Minister and could only be put in place by means of regulation made under the provisions of the Act. It was submitted that the policy adopted by the Minister in this case, was not sanctioned by either the Act, or the regulations and therefore was *ultra vires* his power under the Act.

21. It was further submitted that the Minister had fettered his discretion under the Act because the decision at first instant stated "*an employment permit cannot be issued*" and the review decision stated "*in these circumstances it was not possible to issue an employment permit*". It was submitted that the language employed by the respondent was indicative of the existence of a strict rule and/or policy against the grant, or even consideration of granting an employment permit, for a person currently holding an immigration permission allowing them to work, regardless of circumstances. It was submitted that the review decision did not directly engage with any of the submissions that had been made on behalf of the applicant by his solicitor in his letter dated 23rd March, 2020. The Minister had in effect essentially accepted the premise of the applicant's assertion of a fixed rule being applied against him; but claimed it to be a matter of law rather than policy.

22. It was submitted that by operating a blanket rule or policy against the grant or consideration of employment permits for persons holding a Stamp 4 permission, the respondent had neglected his duty when exercising a discretionary power to consider and engage with the particular circumstances of the applicant. In this regard counsel referred to the decision in the *Ling and Yip Limited* case, where it was held that in exercising the discretionary power, the Minister had a duty to consider the individual facts of each case as they arose.

23. It was further submitted that the decision failed to give any or any adequate reasons for the decision that had been reached by the decision makers both at first instance and on

review. It was submitted that the review decision did not identify the letter from the applicant's solicitor of 23rd March, 2020, nor did it engage with the contents thereof, or demonstrate any consideration of the applicant's submissions. It was submitted that it was well settled at law that an applicant was entitled to a decision which showed that his submissions had been engaged with and which set out the reasons why the decision maker had reached the particular decision. It was submitted that that had not been done in the two decisions issued in this case and in particular in the review decision of 20th April, 2020.

24. It was submitted that the refusal letter and the review decision were both irrational, unreasonable and/or disproportionate in that they had failed to take account of the fact that the applicant's Stamp 4 permission was due to expire during the course of the proposed period of employment. It was submitted that the respondent's reasoning that because he was the holder of an extant Stamp 4 permission, which entitled him to work without a permit, he could not be issued with an employment permit, was reasoning that was flawed or irrational. In particular, where the applicant was in a position to commence the two-year employment contract the subject of the application, but would necessarily be unable to lawfully complete that contract without an employment permit, due to the fact that his permission would expire during the course of the contract, it was irrational in these circumstances to find that an employment permit was unnecessary for the applicant. Alternatively, it was submitted that the outright refusal to consider the grant of an employment permit was disproportionate.

25. Counsel referred to the decision in *Singh v. Minister for Business, Enterprise and Innovation & Ors*. [2018] IEHC 810, where an applicant had applied for an employment permit in circumstances very similar to the circumstances that arose in this case. In that case, the applicant's wife had returned to Latvia. While the *ratio* of the decision turned on the fact that the review decision had been given on grounds that had not been specified in the first instance decision and therefore the applicant had not a chance to comment on those reasons and was therefore unfair and unlawful; the court had also made an *obiter dictum* in relation to the allegation that the applicant's application for a permit was "*frivolous and vexatious*" having regard to the fact that he already had an extant permission to work in the State, at the time when his application was submitted. In relation to that contention Meenan J. had stated as follows:-

> *"The statement of opposition of the respondents contends that these proceedings were frivolous and vexatious as the applicant had 'never explained why he needed an employment permit'. By letter dated 14th July, 2017 the solicitor for the applicant set out the reasons for the review and informed the first named respondent that Stamp 4 status had been granted until 22nd July, 2017 and thus was soon to run out. This clearly put the applicant at risk and was the basis for his application for a work permit. Therefore, I do not accept that these proceedings are frivolous and vexatious and/or do not disclose a maintainable cause of action."*

26. It was submitted that while those comments were *obiter dictum*, they indicated that applications such as that being made by the applicant in this case, were not without merit.

27. It was submitted that in the circumstances of this case, the applicant's application for an employment permit was a reasonable application; he was not precluded by the provisions of the statutes or the regulations made thereunder from being granted an employment permit; in these circumstances, the refusal of the respondent to even consider the application on the basis of s.2(10)(d) of the Act, or on the basis that the applicant already had a permission to work in the State by virtue of the fact that he was the holder of a Stamp 4 permission, was both incorrect as a matter of law and was unreasonable. It was submitted that the applicant was entitled to the reliefs sought in the notice of motion, being an order of *certiorari* in respect of the decision dated 20th April, 2020 and a declaration that the applicant was not precluded from applying for, or receiving, an employment permit by sole reason of his possession of a Stamp 4 permission to reside within the State.

6. The Respondent's Submissions

28. Ms. Gleeson BL commenced by stating that it was accepted that neither the refusal decision, nor the review decision, specifically referred to s.2(10)(d) of the Act. However, she submitted that it was clear from the wording of the decision in each case, that the reason why the application was refused was under the provisions of that subsection. She stated that the decisions made it absolutely clear that the Minister did not have jurisdiction to exercise his discretion to grant an employment permit when the applicant was already the holder of an immigration permission, which of itself gave him permission to work in the State. It was submitted that in these circumstances, it was clear that the impugned decisions had been based on the provisions of s.2(10)(d).

29. It was submitted that s.2(10)(d) was a threshold provision, which effectively governed the applicability of the employments permits system to non-nationals. The section made it clear that that process had no application to the applicant.

30. It was submitted that insofar as it had been argued by the applicant that the only grounds on which an application for an employment permit could be refused, were those set out in s.12 of the Act, that was a misconstruction of those grounds. The grounds set out in s.12 were concerned with those applicants, who had not in the first instance been excluded from the requirement to obtain an employment permit by virtue of a pre-existing right to work pursuant to s.2(10)(d) of the EPA 2003. It was submitted that the provisions mentioned in s.8 of the Act, which limited or circumscribed the Minister's power to grant employment permits, or provided grounds on which he might refuse to grant same, did not concern applicants who already had a right to work. They related purely to people who required an employment permit in order to enable them to work in the State. It was submitted that s.2 of the Act, made it clear that those who were already entitled to work, had no requirement for an employment permit and those applicants therefore were not eligible for such a permit. It was submitted that it would be a tautology to state as one of the grounds of refusal of an employment permit (which grounds are set out in s.12 of the

Act) that an employment permit may be refused, where the applicant is already entitled to work, as this was clear from s.2(10)(d) of the Act.

31. It was submitted that on a proper construction of the Act, s.2(10)(d) excluded persons such as the applicant who were already entitled to work, from the requirement to obtain an employment permit and hence from the operation of s.8 of the Act, such that the discretion concerned simply did not arise. The discretion existed in respect of applications for employment permits by those persons who at the date of application, were required to have an employment permit in order to work lawfully in the State.

32. Counsel stated that the respondent fully accepted the existence of the discretion to grant an employment permit notwithstanding the presence of so called negative circumstances, which are set out in s.12; however, the respondent does not enjoy a discretion to grant an employment permit to those who are already permitted to work.

33. It was further submitted that s.2 of the Act, was not solely a penal provision. The interpretation contended for on behalf of the applicant, ignored the fact that the principal purpose of the section was to impose a requirement on those non-nationals who sought to work in the State to obtain an employment permit to do so and required that such application must be in accordance with s.8 of the Act, subject to certain exceptions, such as the exception provided for in s.2(10)(d).

34. It was submitted that while the applicant had contended that there was no indication of any legislative intent that the general power to grant employment permits under s.8 of the Act should be restricted by the content of s.2(10)(d); an analysis of s.2 revealed that that was precisely what the legislature must have intended. It was submitted that the wording of s.2(1), which provided that a foreign national shall not enter or be in employment in the State except in accordance with an employment permit granted by the Minister in accordance with s.8 of the Act, on its face this incorporated the s.8 application process into the requirement to obtain an employment permit. Section 2(10)(d) then provided that the requirement to obtain an employment permit did not apply to persons such as the applicant, who already enjoyed the right to work. It was submitted that the applicant's contention that by enacting s.2(10)(d) of the Act, the legislature did not intend to stop those with a pre-existing right to work from seeking employment permits, ran counter to the plain and ordinary meaning of the text of s.2 of the Act.

35. In relation to the *Ling and Yip Limited* case, it was submitted that that decision, which acknowledged the discretion which the Minister enjoyed to grant or refuse an employment permit, did not have a bearing on the present case, because it did not address a situation such as the one which arose in the present case, where an applicant was already entitled to work in the State. It was accepted that the respondent enjoyed a discretion in respect of the grant of employment permits, but this discretion was limited to those cases where the applicant required an employment permit to work in the State at the date of the application.

36. In relation to the N.*V.H. v. Minister for Justice* case, it was submitted that that case was distinguishable from the present case, due to the fact that in that case the applicant had been offered a job, but was prohibited from taking the job due to a complete ban on the employment of asylum seekers, whereas in the present case the applicant was entitled to work at the date on which he sought an employment permit and no breach of his right to work under Art. 40.3 could be said to have occurred.

37. Ms. Gleeson BL pointed out that if the applicant were permitted to obtain an employment permit in the circumstances of this case, that would have a consequence of effectively divorcing his employment permit applications from his immigration status. It was further submitted that the interpretation of s.8 of the Act as contended for by the applicant also undermined the purpose and effect of Directive 2004/38/EC of the European Parliament and of the Council of 29th April, 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states. Article 23 of the Directive provided that irrespective of nationality, the family members of a Union citizen who have a right of residence or the right of permanent residence in the member state, shall be entitled to take up employment or self-employment there.

38. It was pointed out that the applicant had been the beneficiary of this right to take up employment pursuant to Art. 23 of the Directive for the last five years by virtue of his marriage, which according to the applicant, broke down almost four years ago. The applicant's assertion that he was entitled to be granted a right to take up employment, which he already enjoyed by virtue of the Directive, was an absurd construction of the terms of s.8 of the Act. It was submitted that it was a construction which was fundamentally at odds with the rights conferred by the Directive.

39. Counsel further submitted that the applicant's reliance on the case of *Ali v. Minister for Jobs Enterprise and Innovation* was misplaced. It was submitted that the application of the principle that general words in a later statute are not to be taken as overriding the earlier specific provisions, unless an intention to do so was clearly expressed, demonstrated that the inclusion of the word "*may*" in s.12 of the EPA 2006, which listed grounds of refusal of a permit and which was indicative of the discretion of the respondent in respect of such refusals, did not override the specific exclusion of those with a right to work from the requirement to obtain a work permit, which was encompassed in the earlier statutory provision of s.2(10)(d) of the EPA 2003.

40. In relation to the alleged inadequacy of reasons, in the refusal decision and in the review decision, counsel stated that the reason for the decision in each case was clearly stated and could not have given rise to any doubt or confusion on the part of the applicant as to why his application had been refused. It was submitted that it was well established in Irish law that as long as the reasons were clear and enabled the person affected to know what decision had been reached by the decision maker and why it had been reached, so that he or she would properly understand the reasoning for the decision and, more importantly, would be in a position to decide whether to appeal or challenge the decision by way of judicial review; that was sufficient. It was submitted that those requirements

had been met in this case and therefore the decisions complied with the obligation to give reasons as set down in Irish law: see *F.P. v. Minister for Justice, Equality and Law Reform* [2002] 1 I.R. 164; *Connolly v. An Bord Pleanála* [2018] 2 I.L.R.M. 453 and *Olaneye v. Minister for Business Enterprise and Innovation* [2019] IEHC 553.

41. It was submitted that in this case the respondent had not applied any fixed policy to refuse an employment permit to the applicant. In fact the refusal was not a matter of policy, but was a matter of law because the respondent did not have jurisdiction to grant such permits to those who were already entitled to work, as was made clear by s.2(10)(d) of the Act.

42. It was submitted that the decision was not unreasonable or irrational. The decisions had set out clearly the basis on which they had been taken. Insofar as they referred to the applicant possibly applying for a different immigration status, that had merely been suggested to him as a possible solution to the problem. He was told that he could apply to change his current immigration permission from a Stamp 4 to a different Stamp in order to be eligible to apply for an employment permit if he so wished, but he had failed to do so.

43. Finally, it was submitted that the *Singh* case was not of great relevance to the applicant's application, due to the fact that the portion of the judgment on which he sought to rely, was clearly an *obiter dictum* on the part of the trial judge. Furthermore, that *dictum* only went so far as to state that the contention put forward by the applicant in that case was not "*frivolous or vexatious*"; as such, it merely expressed the opinion that the argument had crossed a very low threshold of not being frivolous or vexatious, rather than any concluded opinion that it was of substance.

44. In summary, it was submitted that the applicant was excluded by the provisions of s.2(10)(d) of the EPA 2003 from the requirement to obtain an employment permit by virtue of his status as the qualifying family member of an EU citizen which permits him to work in the State. The applicant was not eligible for an employment permit and the discretion conferred on the respondent to grant or refuse such permits did not arise. Accordingly, it was submitted that the applicant had no entitlement to the reliefs sought in the notice of motion.

7. Conclusions

45. Having considered the papers in this matter, together with the very able and helpful submissions of counsel and the authorities referred to therein, I have come to the conclusion that the applicant is entitled to the reliefs sought in the notice of motion.

46. Before coming to the substantive reasons for my decision, it is necessary to first determine a preliminary objection that was raised in the course of submissions by Mr. O'Dwyer SC on behalf of the applicant. He submitted that as the first reference to s.2(10)(d) of the Act, was in the statement of opposition filed on behalf of the respondent on 27th November, 2020, and as that section had not been referred to at all in either the refusal decision, or in the review decision, the respondent was not entitled to rely on

same as a reason for the decision that had been reached to refuse to consider the applicant's application for an employment permit.

47. It is certainly the case that where a decision has been reached on stated grounds, it is not open to the decision maker to subsequently advance additional reasons when that decision is challenged in judicial review proceedings. In *F.P. v. Minister for Justice*, Hardiman J made that clear when he stated as follows at p.170:-

> *"I also agree, however with the immediately following observation of the trial judge: 'Where one of a number of reasons is given by the Minister he cannot afterwards rely on any other uncommunicated reasons to defend his compliance with the subsection".*

48. Ms. Gleeson BL on behalf of the respondent conceded that there was no reference in either of the decisions to s.2(10)(d), but submitted that it was clear from the reasons given in the decisions, that the decision makers had reached the conclusion that the Minister was precluded from issuing an employment permit due to the fact that the applicant was already the holder of a Stamp 4 permission, which incorporated within it a right to work in the State. As such, she submitted that it was clear that the decision makers were relying on the particular subsection in the Act, although they had not specifically identified it by number, nor had they quoted its provisions.

49. Having regard to the wording of the refusal decision and of the review decision, I am prepared to allow the respondent the benefit of the doubt and hold that, while the decisions did not specifically refer to the subsection by number and did not quote from it precisely, it was clear from the decisions handed down that they were proceeding on foot of that statutory provision.

50. I also reach this conclusion due to the fact that in the *Singh* case, which involved an application for an employment permit by a man whose wife had left him to return to Latvia, the review decision that had issued on 25th August, 2017, which was quoted at para. 10 of the judgment, specifically referred to s.2(10)(d) of the 2003 Act; therefore, I am satisfied that subsequent decision makers within the department, were likely to reach the same conclusion on the basis of the same statutory provision. Accordingly, I will proceed on the basis that both the refusal decision and the review decision, although made without reference to s.2(10)(d), were in fact reached on the basis of that statutory provision.

51. The next question which arises is whether the respondent is correct in its interpretation of s.2(10)(d). I have come to the conclusion that the respondent's interpretation of s.2 of the 2003 Act (as amended), is incorrect. I accept the submissions made on behalf of the applicant that s.2 of the 2003 Act (as amended) is clearly a penal provision. When one reads s.2 in its entirety, it is clear that it is a detailed, but standalone provision. It begins in sub-s.(1) by providing that a foreign national shall not enter employment, or be in employment in the State except, in accordance with an employment permit granted by

the Minister under s.8. That provision creates a clear obligation on the foreign national to hold an employment permit.

52. The section goes on in sub-s.(2) to provide that an employer shall not employ a foreign national in the State except in accordance with an employment permit granted by the Minister under s.8 of the 2006 Act. Subsection (3) creates certain offences and provides that both the employee and the employer shall be guilty of an offence if the non-national is found to be working without a valid employment permit. The subsection goes on to provide certain defences that may be open to both the employee and the employer in certain circumstances. The section goes on to provide for the issue of search warrants to members of An Garda Síochána and provides that it is an offence to obstruct any member of the gardaí in conducting a search pursuant to a search warrant, or if a person fails or refuses to comply with a requirement under the section, or if they give a name or address which is false or misleading. Subsection (9) gives the gardaí a power of arrest.

53. Subsection (10) is the central subsection in this case. It is not necessary to set out the precise subsection again. It provides that the provisions of s.2 do not apply to a foreign national in certain circumstances, including under sub-para.(d), those who hold a permission to be in the State, which entitles them to work within the State. It is accepted by both parties that a Stamp 4 permission is such a permission.

54. The court is satisfied that on the ordinary and natural meaning of the words set out in s.2(10)(d) the provision merely relieves the person who holds the appropriate permission, such as a Stamp 4, from the requirement to hold an employment permit when working in the State. All the subsection does is to exclude the foreign national from the requirement in s.2(1) to hold an employment permit and by extension, that means that the foreign national and his employer do not commit an offence provided for under the section, when he or she enters into employment without holding an employment permit, as would ordinarily be required under s.2(1) of the Act. The court is satisfied that on a proper construction of sub-s.2(10)(d), it does not exclude or prevent the Minister from issuing a work permit to an applicant, solely on the basis that that applicant already has a permission to work by virtue of the immigration permission which he or she holds.

55. Support for this view, is provided by the provisions of s.8 itself. It provides for a wide discretion in the Minister to grant employment permits, subject only to the provisions of the sections and subsections stated therein. I accept the submission made on behalf of the applicant that in none of those stated provisions, which may be seen as limiting the exercise of the Minister's discretion to grant an employment permit, is there any reference to excluding a person who may already be the holder of an immigration permission which entitles him or her to work within the State.

56. Section 12 of the Act sets out a large number of grounds on which the Minister may refuse to grant an employment permit. It does not include as one of those grounds, the fact that the applicant for an employment permit is already the holder of an immigration permission which gives him or her a right to work in the State.

57. Even where the grounds which might permit the refusal of a permit exist, there is still a duty on the Minister to consider the individual facts of the case when exercising his discretion in the matter. In the *Ling and Yip Limited* case, Noonan J. stated as follows at paras. 10 and 11:-

> *"10. In exercising this discretionary power, the Minister has a duty to consider the individual facts of each case as they arise. For example, in the context of an applicant being in the State without permission, a wide range of circumstances could arise. An applicant may have arrived in the State unlawfully and worked here unlawfully for a lengthy period. In contrast, Mr. Khong entered the State lawfully and worked here lawfully for several years but his employer was eight days late in applying for a new permit. The two situations are not comparable but both fall within the range of circumstances that the Minister must have regard to in the exercise of her discretion.*
>
> *11. In the present case, it seems to me clear that the Minister abdicated her responsibility to exercise the discretion so clearly conferred upon her by concluding that the mere fact that Mr. Khong was technically in the State without permission at the material time meant that an employment permit 'cannot be issued'. That statement is, as a matter of law, manifestly incorrect…"*

58. The court is satisfied that there is nothing in the Acts or in the regulations, which explicitly prohibit the Minister from issuing an employment permit to a foreign national, who already has a right to work by virtue of his or her immigration permission. Of course, if a number of foreign nationals, who did not need permission to work, for example because they are EU nationals, applied for employment permits, it would be open to the Minister to refuse to even consider their applications on the basis that they did not need any permission at all to work in the State and that it would be an inordinate and unnecessary waste of time and money to consider their applications for an employment permit. However, where an applicant has a permission to work by virtue of an immigration permission, which due to a change in circumstances that has occurred, i.e. the departure of his EU citizen spouse, means that his immigration permission under Stamp 4 will either be revoked or will, at the very latest, expire by efflux of time on 2nd November, 2021, it is incumbent on the Minister to adopt a pragmatic and reasonable approach to an application submitted in such circumstances and give it the necessary consideration.

59. The fact that there may be a small overlap of time within which he may have a double permission to work so to speak, does not appear to me to be any reason as to why the second permission could not issue. Even if that were considered to be some insuperable barrier to the grant of an employment permit, in the circumstances of this case the applicant has, through his solicitor, by letter dated 23rd March, 2020, offered that in the event that he is granted an employment permit, he will immediately surrender his Stamp 4 permission and apply for an alternative permission to remain in the State. It seems to me that the applicant is acting entirely reasonably in that regard.

60. In the course of argument, counsel for the respondent stated that if the applicant were permitted to apply for, and receive, an employment permit at a time when he already held a Stamp 4 permission, the net result of which would be to permit him to extend his entitlement to work in the State beyond the life of his immigration permission, by effectively divorcing his employment permit application from his immigration status; that that would be undesirable and should not be permitted. However, there is already provision in the statutory scheme for the issuance of an employment permit in the absence of an immigration permission. Very often, workers who are outside the State and who have been offered employment within the State, will apply for an employment permit prior to making their application for an immigration permission to enter the State. Once they receive the employment permit, they will then base their application for an immigration permission on the basis that they have already been granted such a permit. Accordingly, it does not seem to me that there is any great objection in principle to holding a permit at a time when one may not hold a permission to be in the State.

61. The court acknowledges that once a foreign worker is within the State and applies for an employment permit, he can only do so once he has an extant permission to be within the State. However, the key point is that there is no objection in principle to divorcing the holding of an employment permit from the holding of an immigration permission. In the present case, the applicant satisfies the relevant criteria, as he is the holder of a Stamp 4 permission, he has an IRP card and earns the requisite level of salary.

62. Furthermore, it is clear from the provisions of s.8(5) that an employment permit can be granted, although it may not come into force until some date specified in the future. Section 8(5) provides that the period specified in an employment permit shall, subject to certain exceptions, not exceed two years beginning on the date of the grant of the permit, or on the date specified in such permit, as being the date on which it is to come into force. It seems to me that this provision might be used to overcome some of the perceived difficulties which the Minister may have in issuing an employment permit in the circumstances of this case.

63. For the reasons stated herein, the court is satisfied that the Minister is not precluded from considering the applicant's application for an employment permit due solely to the fact that he is the holder of a Stamp 4 permission. The court is satisfied that the Minister was in error in concluding that the provisions of s.2(10)(d) of the Act precluded a consideration of the applicant's application. Accordingly, the court will grant *certiorari* of the review decision dated 20th April, 2020.

64. Having regard to the decision reached by the court on the core issue in this case, it is not necessary for the court to determine whether adequate reasons were given by the Minister in the refusal decision, or in the review decision. However, for completeness, the court is satisfied that this is not a reasons case, as ordinarily understood. The Minister reached a decision in this case on grounds that were very clearly stated in the two decisions. Those grounds did not involve an evaluation of the merits of the applicant's application, but instead were a simple determination that the Minister did not have

jurisdiction to grant an employment permit to the applicant due to the fact that he is the holder of an extant Stamp 4 permission. In such circumstances, where there was no effective evaluation of the applicant's application, there was no need to provide further reasons for the decision. The decision makers very clearly stated the grounds on which they were refusing his application. There was no need to say anything more. As such, the decisions cannot be criticised on the basis that inadequate reasons were given.

65. In view of the conclusions reached by the court herein, it is not necessary to consider the additional grounds canvassed on behalf of the applicant at the hearing of the application.

7. Proposed Order

66. In light of the conclusions reached by the court in this judgment, the court would propose to make the following order:

(a) An order of *certiorari* in respect of the decision of the respondent communicated on 20th April, 2020;

(b) A declaration that the applicant is not precluded from applying for, or receiving an employment permit by sole reason of his possession of a Stamp 4 permission to reside within the State;

(c) An order remitting the application back to the deciding officer to be decided in accordance with the terms of this judgment;

(d) An order for costs in favour of the applicant, such costs to be adjudicated upon in default of agreement;

(e) A stay on the order and on the order for costs for a period of 28 days and if a notice of appeal is lodged within the period of 28 days from perfection of the Order, the stay is to continue until the final determination of the matter before the Court of Appeal.

67. If either of the parties disagree with the terms of the proposed order, they will have 14 days within which to submit written submissions, following which a final order will be made by the court.