

**THE HIGH COURT  
JUDICIAL REVIEW**

[2021] IEHC 494  
**Record No. 2020/544/JR**

**BETWEEN**

**BASIT ALI**

**APPLICANT**

**-AND-**

**MINISTER FOR JUSTICE**

**RESPONDENT**

**JUDGMENT of Ms. Justice Tara Burns delivered on 16 July 2021**

**General**

1. The Applicant is a citizen of Pakistan. He works as a *chef de partie* in a successful restaurant in Pakistan. In 2019, he was offered a similar position with an established Pakistani restaurant in Bray, County Wicklow.

**Application for a Work Permit**

2. An application was made to the Department of Business, Enterprise and Innovation, pursuant to the Employment Permits Act 2006 (hereinafter referred to as "the 2006 Act"), for a work permit for the Applicant with respect to this prospective employment. The fee to make this application is €1,000. At the hearing before the Court, it was initially asserted that the Applicant had paid this fee, which is a significant sum of money for him representing half of his annual earnings. However, it was pointed out by Counsel for the Respondent that the application form for the work permit reveals that the owner of the restaurant in Ireland in fact paid this application fee. Counsel for the Applicant accepted his error in this regard, although raised the scenario that this money may have to be repaid to the owner of the restaurant. No evidence in relation to this issue was placed before the Court. It is unfortunate that this error was made in light of the emphasis which was placed on this incorrectly asserted fact throughout the hearing.
3. The application for the work permit was successful and a General Employment Permit was issued to the Applicant permitting him to work as a *chef de partie* for a two year period from 30 August 2019 in the specified restaurant employed by the proprietor of the restaurant. The letter notifying the Applicant of the grant of the permit specifies that it "relates to employment only and it is not a residence permit". It further states:-

"You must also have at all times

  - (a) Current appropriate permission from the immigration authorities which allows you to enter, reside and undertake employment in the State."
4. The Court notes that the intention of the Minister for Business, Enterprise and Innovation in granting such a permit is that the Applicant would remain in the employment of the specified restaurant for at least one year and that a new application may not be made by him, except in exceptional circumstances, for a period of twelve months. Further, if the applicant ceased to be employed, for any reason, by his employer, during the two year period which the permit was issued for, the permit must be returned to the relevant Department.

### **Application for a Work Visa**

5. In light of the condition attaching to the grant of the work permit requiring the Applicant to have appropriate permission from the immigration authorities allowing him to enter, reside and undertake employment in the State, and in light of the fact that the Applicant hails from Pakistan which is a country which the Respondent has by statutory order required its citizens to have a visa to enter Ireland, the Applicant applied to the Respondent for an employment visa on 24 September 2019. This application was refused on 27 November 2019. The reasons for the refusal were stated to be:-

"ID - Insufficient documentation submitted in support of the application – please see link to "Documents Required" as displayed on our website.

The credibility of the overall application has been diminished due to the failure to provide sufficient supporting documentation in the following areas;

Financial documents.

Employment documents payslips.

Qualifications.

Previous passport not submitted.

The quality of supporting documentation submitted by you in the following areas has diminished the overall credibility of your application.

Application letter – More information needed about job applied for in Ireland.

The visa officer has examined the evidence submitted by you in support of your application and has found insufficient evidence that you possess the required skills or experience to undertake the proposed employment. The following information has been considered as part of this decision;

Your qualifications – not submitted

The relationship between your proposed employment and your previous employment and qualifications.

F:- Finances. Evidence submitted is deemed insufficient or incomplete.

No personal financial documentation has been submitted.

OC:- Observe the conditions of the visa – the visa sought is for a specific purpose and duration:- the applicant has not satisfied the visa officer that such conditions would be observed.

As the visa officer is not satisfied of the credibility of your proposed employment in Ireland there is no evidence of a genuine reason for this visa to be granted. The visa officer is therefore not satisfied that you will observe the conditions of this

visa, namely that you will undertake the proposed employment and no other activities. The visa officer has considered the evidence supplied, however this has not been sufficient to satisfy the visa officer, on the balance of probabilities, that you are likely to observe the conditions of any visa granted.

The INIS website has all of the information you will need to make an application for a visa. Before appealing this decision, please check the INIS website to ensure you have included all of the relevant documents.

This decision can be appealed within 2 months of the date of this letter. An appeal must be submitted in writing, fully addressing all the reasons for refusal to [address].

All additional supporting documents should be submitted with your appeal....”

6. The Applicant appealed this decision on 11 December 2019 and submitted some further documentation to the Respondent. On 25 May 2020, the Respondent notified the Applicant that the original decision to refuse him a visa had been upheld. The reasons for the refusal were stated to be:-

“As elaborated in the initial refusal correspondence to you dated 27/11/19, you have not submitted the supporting documentation for this visa application. You have not provided your documentary evidence of your qualification for the employment. You have provided payslip from your employment with your claim of being paid by cash had not been supported by the documentary evidence, whereas a letter from your employer alone is insufficient.

The bank statement from HBL have been submitted in the appeals. However, there are no entries for the period from 07/11/2016 to 19/02/2019, which have not been explained.

You have failed to demonstrate with sufficient supporting evidence, the claimed link between you and your sponsor. It is not clear to myself on how you are known to your sponsor.

I am not satisfied with information supplied by you concerning your personal, economic and family circumstances has been sufficient that you would observe the conditions of the visa granted”.

#### **Challenge to the Review Decision**

7. Leave to apply by way of judicial review seeking an order of *Certiorari* of the Respondent’s review decision was granted by the High Court on 5 October 2020.
8. The grounds of challenge to the Respondent’s decision are that the Respondent erred in fact and/or acted unreasonably and/or irrationally in refusing to grant an employment visa on the basis that the Applicant had not supplied documentary evidence of his qualifications; provided insufficient evidence that he is paid in cash; failed to explain why

there were no entries in his bank account statements between 7 November 2016 and 19 February 2019; and failed to demonstrate the link between himself and his sponsor. It furthermore is alleged that the Respondent's finding that the Applicant would not comply with the conditions of the employment visa was unreasonable and/or irrational and was a finding in respect of which reasons were not given.

**Test to be Applied by this Court when reviewing the Respondent's decision**

9. The question has arisen as to what test the Court should apply when reviewing the Respondent's decision having regard to the fact that the issuance of a visa falls within the Respondent's executive discretion.
10. In *KN v. Minister for Justice and Equality* [2017] IEHC 527, Faherty J. held that the legality of the respondent's decision to refuse a visa was to be considered in the context of the relevant administrative law principles: namely whether the decision had been arrived at on the basis of correct facts; whether fair procedures were observed; whether it was a rational decision; and whether the basis for the refusal was patent from the decision.
11. However in *Elmebayad v. Minister for Justice* [2019] IEHC 412 and *Akhtar v. Minister for Justice and Equality* [2019] IEHC 411, Keane J. held that the appropriate test, when reviewing the exercise of executive discretion in refusing to issue a visa, was whether the Respondent had acted in a capricious, arbitrary or unjust manner, this test having been adopted in cases reviewing the executive exercise of power with respect to the temporary or early release of prisoners.
12. Counsel for the Applicant asserts that this test in effect is the same as the test in *O'Keefe v. An Bord Pleanála* [1993] 1 IR 39 and *The State (Keegan) v. Stardust Compensation Tribunal* [1986] IR 642, in light of *Kinahan v. Minister for Justice, Equality and Law Reform* [2001] IESC 16, namely whether the decision in question is at variance with fundamental reason and common sense. Counsel for the Respondent demurred from this interpretation of *Kinahan* drawing the Court's attention to the fact that the reference in the judgment of Hardiman J. to the test in *Keegan* and *O'Keefe* was with reference to what had been submitted to the Court rather than forming part of the *ratio decidendi* of the Court. Whilst Counsel for the Respondent is correct in the observation regarding the reference being to a submission, rather peculiarly, the submission was made on behalf of the same party which Counsel is representing in these proceedings. Counsel for the Respondent makes the admission that the difference in practice between the two tests may not, in effect, be real.
13. Having considered the judgment in *Kinahan*, I agree with Counsel for the Applicant that the test in *O'Keefe* and *Keegan* amounts to the same test of "arbitrary, capricious or unjust". Hardiman J., having set out the submission of the Respondent Minister that the *Keegan/O'Keefe* test applied, did not proceed to disagree with this analysis but rather referred to the test in *Murray v. Ireland* [1991] ILRM 465 which is "arbitrary, capricious or unjust". Had Hardiman J. been in disagreement with the Respondent Minister, one would have expected that he would have set out his reasons for same having set out the

Minister's submissions. I am confirmed in my view of the *ratio decidendi* of the case in light of the headnote which reflects this interpretation. Furthermore, while Keane J. in *Akhtar* and *Elmebayad*, referred to the test as being "arbitrary, capricious or unjust, he in fact applied the *Keegan* test in *Akhtar* at paragraph 51 when reviewing the decision at issue in that case.

14. In any event, it seems to the Court that "arbitrary, capricious or unjust" equates to a decision which flies in the face of fundamental reason and common sense and accordingly, this is the standard of review which the Court will apply. The Court adds to that test that in conducting this review of an executive decision, a significant amount of deference must be afforded to the decision maker.
15. The Applicant seeks to rely on an asserted Constitutional right to work having regard to *NHV v. Minister for Justice and Equality* [2017] IESC 35, coupled with the fact that he had a work permit issued to him. The Court fails to see how a citizen of Pakistan, who is resident in Pakistan, engages a constitutional right to work in this jurisdiction simply because he was granted a work permit (which he did not pay for himself), when such work permit was conditional on a work visa being granted to him, to be exercised. Accordingly, the issue of proportionality pursuant to *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 IR 701 does not arise for the Courts consideration.

#### **The Purpose of a Work Permit**

16. The 2006 Act describes, in its long title, one of its objects as being:-

"[T]o provide for the grant of employment permits to certain foreign nationals for the purpose of permitting them to be in employment in the State."

17. The purpose for which the Work Permit in the instant case was granted to the Applicant was specified to be pursuant to s. 3A(2)(c) of the 2006 Act which provides:-

"(2) The purposes for which an employment permit may... be granted are:

(c) where the Minister [for Business, Enterprise and Innovation] is satisfied that a person in the State has been unable to recruit an employee for a vacancy for an employment, to provide for the recruitment of a foreign national who has the required knowledge and skills for the employment and, where appropriate, the qualifications and experience as may be required for that employment...."

18. In *Akhtar v. Minister for Justice and Equality* [2019] IEHC 411, Keane J. considered the object of the 2006 Act with regard to work permits issued pursuant to s. 3A(2)(c). He stated at paragraph 29 of his judgment:-

"29. It is thus apparent that, as one might expect, the employment permit process is focused on the regulation of the labour market and, in that context, is intended to ensure that foreign nationals should only be recruited where vacancies cannot otherwise be filled. The process is, at best, only incidentally concerned with

whether a particular foreign national recruited to fill such a vacancy has the required knowledge, skills, qualifications or experience to do so.

30. Section 6 provides, in material part:

“6. – An application for an employment permit shall –

- (b) provide information in respect of the qualifications, skills, knowledge and experience that are required for the employment concerned,
- (c) provide information and, where required, any relevant documents in respect of the qualifications, skills, knowledge or experience of the foreign national concerned...”

31. Section 10A of the Act of 2006, which applies to an application for an employment permit of the kind at issue here, i.e. one for the purpose specified in s. 3A(2)(c), prohibits the grant of such a permit unless the [Minister for Business, Enterprise and Innovation] is satisfied that certain steps have been taken to offer the job concerned to a citizen or qualifying foreign national by first advertising it in the manner prescribed by that section.

32. Section 11(1) states:

“11. – (1) In considering an application for an employment permit, the [Minister for Business, Enterprise and Innovation] shall have regard to—

- (a) the extent to which a decision to grant the permit would be consistent with economic policy for the time being of the Government,
- (b) whether the knowledge and skills and, where appropriate, the qualifications and experience referred to in section 6(b) are required for, or relevant to, the employment concerned,
- (c) such of the other matters referred to in section 6 as are relevant to the application,
- (d) if any of paragraphs (a) to (j) of section 12(1) fall to be applied in relation to the application, any matters that, in the opinion of the [Minister for Business, Enterprise and Innovation] are material to the application of such a paragraph or paragraphs, and
- (e) the different purposes, specified in section 3A(2) for which an employment permit may be granted.”

33. Section 12(1) of the Act of 2006 deals with the circumstances in which the [Minister for Business, Enterprise and Innovation] may refuse to grant an employment permit. Those circumstances include:

“(l) if he or she is satisfied that the foreign national concerned does not possess the qualifications, knowledge or skills for the employment concerned or the foreign national concerned does not have the appropriate level of experience required for the employment.”

33. Thus, in the Act of 2006, the Oireachtas has chosen to do a number of things. First, a distinction has been drawn between matters of which the [Minister for Business, Enterprise and Innovation] must be satisfied before granting an employment permit and those to which the [Minister for Business, Enterprise and Innovation] *must have regard* in considering an application for one. The matters of which the [Minister for Business, Enterprise and Innovation] must be satisfied all relate to the requirement to offer the job concerned to a citizen or national of a qualifying state by appropriately advertising it before an application for a work permit is made. The matters to which the [Minister for Business, Enterprise and Innovation] *must have regard* include, amongst many others, the information and, where required, relevant documents provided in respect of the qualifications, skills, knowledge or experience of the foreign national concerned. There is no suggestion in the Act of 2006 that the [Minister for Business, Enterprise and Innovation] must be satisfied that the foreign national possesses the qualifications, knowledge or skills, or has the appropriate level of experience, required, for the employment; the [Minister for Business, Enterprise and Innovation] is merely empowered to refuse to grant an employment permit where satisfied that the foreign national concerned does not possess them.”

19. This Court sees no reason to disagree with Keane J.’s analysis of the objectives of the 2006 Act. It is clear from this analysis that the purpose of the Act is to issue a work permit to a non-national in circumstances where it has been established that an employer has been unable to employ a citizen or a national from a qualifying state. The intention of issuing a work permit to a non-national is clearly that the non-national has the required knowledge and skill for the employment at issue, however as noted by Keane J., there is no requirement on the Minister for Business, Enterprise and Innovation to satisfy himself of this issue.

#### **The Purpose of a Work Visa**

20. A non-national who requires a visa to enter the State pursuant to Ministerial Order, is required to apply to the Respondent for such a visa. The power of the Respondent to make Orders declaring that members of specified classes of non-nationals are required to be in possession of a valid visa emanates from s. 17 of the Immigration Act 2004 (hereinafter referred to as “the 2004 Act”) which states that the Minister may by order so declare:-

“for the purposes of ensuring the integrity of the immigration system, the maintenance of national security, public order or public health or the orderly regulation of the labour market or for the purposes of reciprocal immigration arrangements with other states or for the promotion of tourism...”

21. In a situation where a visa required non-national is intending to work and has been granted a work permit from the Department of Business, Enterprise and Innovation, he must apply for a work visa from the Respondent.

22. The function and power of the Respondent in granting such a visa has been considered in many authorities. In *RMR & Anor v. Minister for Justice & Ors* [2009] IEHC 279, Clark J. stated:-

“24. It is for the Minister to determine the conditions under which foreign nationals enter, remain and leave the State-this has been stated on many occasions by the courts (see e.g. *Pok Sun Shum v. The Minister for Justice, Equality and Law Reform* [1986] ILRM 593; *Oshetu v. Ireland* [1986] I.R. 377; In re the Illegal Immigrants (Trafficking) Bill 1999 [2000] 2 IR 360, *F.P. v. The Minister for Justice, Equality and Law Reform* [2002] 1 IR 164; *A.O. and D.L. v. The Minister for Justice, Equality and Law Reform* [2003] 1 IR 1; *Bode (a minor) v. The Minister for Justice, Equality & Law Reform & Ors.* [2008] 3 IR 663).

25. It is clear that the Minister is under no legal obligation to grant a visa - the grant or refusal of visas is entirely within his discretion and it is for the visa applicant to convince the Minister that he or she should be granted a visa. Government policy determines which foreign nationals require visas to visit or transit the State and whether they can work in the State. The inherent executive power and responsibility of the Government to formulate immigration policy is supplemented by statutory provisions including the Aliens Act 1935 and the Immigration Acts 1999, 2003 and 2004. There is at present no statutory framework for issuing visas.”

23. In *Bode (a minor) v. Minister for Justice* [2008] 3 IR 663, Denham J. stated:-

“[60] In this case one of the fundamental powers of a state arises for consideration. In every state, of whatever model, the state has the power to control the entry, the residency, and the exit of foreign nationals. This power is an aspect of the executive power to protect the integrity of the State. It has long been recognised that in Ireland this executive power is exercised by the Minister on behalf of the State. This was described by Costello J. in *Pok Sun Shun v. Ireland* [1986] I.L.R.M. 593 at p. 599 as:-

‘In relation to the permission to remain in the State, it seems to me that the State, through its Ministry for Justice, must have very wide powers in the interest of the common good to control aliens, their entry into the State, their departure and their activities within the State.’

[61] The special role of the State in the control of foreign nationals was described by Gannon J. in *Oshetu v. Ireland* [1986] I.R. 733 at p. 746. He stated at p.746:-

‘That it is in the interests of the common good of a State that it should have control of the entry of aliens, their departure and their activities and duration of stay within the State is and has been recognised universally and from earliest times. There are fundamental rights of the State itself as well as fundamental rights of the individual citizens, and the protection of the former



may involve restrictions in circumstances of necessity on the latter. The integrity of the State constituted as it is of the collective body of its citizens within the national territory must be defended and vindicated by the organs of the State and by the citizens so that there may be true social order within the territory and concord maintained with other nations in accordance with the objectives declared in the preamble to the Constitution.'

24. It is abundantly clear that the decision being made by the Respondent with respect to the issuance of a work visa is very far removed from the decision being made by the Minister for Business, Enterprise and Innovation with respect to ensuring that the labour market is supplied with workers. The Respondent is exercising the executive power of the State in determining whether to permit entry to a non-national and the purpose in respect of which entry is permitted. Regulation of the labour market is a matter which is of direct concern to the Respondent having regard to s. 17 of the 2004 Act, as already set out.
25. In exercising the power to grant a visa, the respondent has a very wide discretion. Accordingly, any issue which gives rise to a cause for concern on the part of the Respondent that a visa applicant, if permitted into the State to work, would not abide with his conditions of permission, is a relevant matter for the Respondent to consider when determining whether to grant a visa.

**Onus on an Applicant When Making a Work Visa Application**

26. There is an onus on an applicant for a visa of this nature to make his application with all supporting documentation. No onus arises on the Respondent to advise him on his application with respect to deficient information or material. The Court notes and adopts the dictum of Hedigan J. in *AMY v. Minister for Justice* [2008] IEHC 306 wherein he stated at paragraph 22:-

"[T]here is no onus on the Minister to make enquiries seeking to bolster an applicant's claim. It is for the applicant to present the relevant facts."

27. That this is so, is made abundantly clear in the guidelines issued by the Respondent with respect to visas of this nature. They state:-

"6. Supporting documentation

The documents below are important because they provide information about your person circumstances in the country from where you are applying

The onus is on you to satisfy the visa officer that a visa should be granted for the purpose sought."

**Specific Complaints of the Applicant**

28. The Applicant asserts that the documentation accompanying the application was sufficiently detailed and that the findings made in respect of it by the Respondent were irrational.

29. As this Court has said on very many occasions, in exercising its judicial review function, this Court is not an appeal court. It is not determining the question of whether it would have come to the same conclusion on the basis of the material before it. The complaint at issue in the present proceedings is that in light of the material submitted, the decision made was irrational in that it flies in the face of fundamental reason and common sense.
30. In the instant case, the Respondent determined in essence that, on the basis of the documentation provided, the Applicant's application for a work visa for this job was not credible because he did not provide evidence of his qualifications for the employment; his claim of being paid in cash in his current employment had not been supported by sufficient documentary evidence; not utilising his bank account in excess of two years had not been explained; and the connection between the Applicant and the prospective employer had not been explained.
31. With respect to the Applicant's qualifications, the Applicant submitted a short paragraph setting out his account of his history of working as a Chef from 2014. Two references from his employers in Pakistan had been submitted at the initial application stage. The Respondent's view of this information was that it did not amount to documentary evidence of his qualification for his employment. This was a finding which was open to the Respondent to make in light of the information/documentation submitted. An error of fact is not apparent: the references and the applicant's submission did not detail his qualification for the proposed employment.
32. Counsel for the Applicant submits that the fact that the Minister for Business, Enterprise and Innovation granted the work permit to the Applicant establishes that this finding of the Respondent is irrational. That is not the case. For the reasons already discussed, the Minister for Business, Enterprise and Innovation is not actually required to satisfy himself that a non-national has the necessary qualifications and skills: this is an incidental matter in the grant of a work permit. Accordingly, the fact that the work permit issued in favour of the Applicant does not establish an irrationality in this regard. I am supported in this view by a similar finding by Keane J. in *Elmabayad* at paragraph 25 of his judgments wherein he states:-
- "Nor do I accept that there is any irrationality in the Minister's refusal of a visa to a person who has been granted a work permit. The functions and powers of the Minister of [Business, Enterprise and Innovation] to regulate the labour market under the Employment Permits Act 2006, as amended, are quite distinct from the executive power of the Minister for Justice and Equality to control the entry, residence and departure of foreign nationals. While, on occasion, the exercise of those powers might seem to overlap, there is no basis for the suggestion that the existence or exercise of the former in any way ousts or constrains the exercise of the latter."
33. With respect to the Applicant's claim that he was being paid in cash, the Respondent's view was that the payslips, and the letter from his employer confirming that he was paid in cash, were insufficient to establish this issue. In light of the fact that this money was

not lodged into his bank account, it was reasonable for the Respondent to expect that the Applicant could produce other documentary evidence which would support his claim of being paid in cash. Accordingly, it was open to the Respondent to make this finding.

34. In relation to him failing to explain not using his bank account for a period in excess of two years, whilst at first glance being paid in cash might be an explanation of that, the bank evidence shows a contradiction in relation to that assertion as lodgments of cash appear to have made at earlier stages. Accordingly, again, the Respondent's findings in this regard were also open to it to make.
35. It is a fact that the Applicant failed to explain any connection between himself and his prospective employer in the application for a work visa. While there had been an explanation regarding this issue in the application form to the Minister for Business, Enterprise and Innovation, this information was not provided to the Respondent. Furthermore, having regard to the nature of the executive power which the Respondent is exercising in this regard and the considerations which inform that exercise, the connection between the Applicant and his prospective employer is a significant matter in this regard.
36. Ultimately, this was a decision which was open to the Respondent to make on the basis of all of the evidence submitted to her by the Applicant. The lack of information/documentation which the Respondent points to are matters which quite properly may give rise to a concern on the part of the Respondent, when exercising the executive power of the State to permit a non-national enter the State. They are matters which could raise a rational concern as to whether the Applicant was credibly going to exercise the work permit. Perhaps the Respondent is incorrect with respect to her concerns, but her concerns and her findings do not fly in the face of fundamental reason or common sense; are not unjustified; and are matters which in her discretion she was entitled to have regard to.
37. The final challenge to the decision is that reasons were not provided for the finding that the Respondent was "not satisfied with information supplied by you concerning your personal, economic and family circumstances has been sufficient that you would observe the conditions of the visa granted."
38. Counsel for the Applicant complained that it was unknown what conditions of the visa were being referred to in this finding. That complaint is not made out when one considers the work permit issued in this matter and the guidelines relating to an application for a work visa. As already set out, the work permit issued permits the Applicant to work in a specified role, in a specified restaurant, employed by a specified person, for a specified period of time. In the guidelines relating to the issuance of a work visa, under the heading "Activities not permitted with this Visa" it is stated:-

"You are not permitted to take up any form of employment other than that for which you have already been approved."

Accordingly, quite clearly, the conditions of the work visa are the conditions of the work permit.

39. I do not agree that the reason for this finding is not patent from the decision when read as a whole and having regard to the earlier decision which this review decision indicates it upholds. The reason for the finding is clearly that, on the basis of the lack of information/documentation already discussed, the Respondent was not satisfied that the Applicant would engage in the work which he has received a work permit for. Furthermore, this was a finding which was open to the Respondent to make in light of the lack of information/documentation with respect to the relevant matters which had already been identified.
40. Accordingly, the grounds of challenge to the Respondent's decision have not been made out. I will therefore refuse to grant the relief sought and will make an order for the Respondent's costs as against the Applicant.