

**THE HIGH COURT
JUDICIAL REVIEW**

[2021] IEHC 589
RECORD NO. 2020/212JR

BETWEEN

ANA

APPLICANT

-AND-

**THE MINISTER FOR JUSTICE
RESPONDENT**

JUDGMENT of Ms. Justice Tara Burns delivered on 15 September 2021

General

1. The Applicant is a national of Pakistan who unsuccessfully applied for international protection in the State on 23 January 2015.
2. On 5 December 2019, the Respondent made a Deportation Order against the Applicant. In a letter to the Applicant on 28 January 2020, notifying him of the making of the Deportation Order, it was stated:-

"Having regard to the factors set out in section 3(6) of the Immigration Act 1999 (as amended), the Minister is satisfied that the interests of public policy and the common good in maintaining the integrity of the asylum and immigration systems outweigh such features of your case as might tend to support your being granted leave to remain in the State."

This reflects a document headed "Recommendation of file under Section 3 of the Immigration Act 1999", which stated:-

"Section 3(6) of the Immigration Act 1999, as amended:

I have considered all of the facts arising in this case, as outline in the attached submission. Having done so, it is concluded that the interests of public policy and the common good in maintaining the integrity of the asylum and immigration system outweigh such features of this case which might tend to support a decision not to make a deportation order in respect of [Mr. A]."

3. Leave to apply by way Judicial Review seeking an order of *Certiorari* of the Deportation Order was granted by the High Court on 27 May 2020 on the grounds that the Respondent had failed to consider the duration of residence in the State of the Applicant; humanitarian considerations; and representations made on behalf of the Applicant, as required by s.3 of the Immigration Act 1999, as amended (hereinafter referred to as "the 1999 Act").
4. At the hearing before this Court, the grounds argued on behalf of the Applicant related to the alleged failure of the Respondent to consider the duration of the Applicant's residence in the State and the Applicant's employment prospects (which had not been specifically pleaded).

The Legislative Requirements

5. Section 3(6) of the 1999 Act requires the Respondent to consider certain specified matters when considering whether to make a Deportation Order. It provides:-

“In determining whether to make a deportation order in relation to a person, the Minister shall have regard to—

- (a) the age of the person;
- (b) the duration of residence in the State of the person;
- (c) the family and domestic circumstances of the person;
- (d) the nature of the person’s connection with the State, if any;
- (e) the employment (including self-employment) record of the person;
- (f) the employment (including self-employment) prospects of the person;
- (g) the character and conduct of the person both within and (where relevant and ascertainable) outside the State (including any criminal convictions);
- (h) humanitarian considerations;
- (i) any representations duly made by or on behalf of the person;
- (j) the common good; and
- (k) considerations of national security and public policy, so far as they appear or are known to the Minister.”

The Respondent’s consideration of s.3 matters

6. An “Examination of file under Section 3 of the Immigration Act 1999, as amended” document was included with the letter notifying the Applicant of the decision. It examined the various requirements which the Respondent is mandated to consider when determining whether to issue a Deportation Order. Relevant portions of that examination were as follows:-

“Section 3(6)(b) – Duration of Residence in the State of the Person

It is submitted that Mr. [A] arrived in the State on 19th January 2015 and applied for asylum on 23rd January 2015. It was submitted by Mr. [A], in a personal letter received by the Minister on 18 September 2019, that he has resided in Ireland for 4½ years. As no evidence of his arrival in the State, by way of a Passport or Immigration Landing Stamp, has been submitted, it is impossible to say, with certainty, how long Mr. [A] has resided in the State at the time of this submission.

Section 3(6)(e) – Employment (including self-employment) Record of the Person

A number of references and certificates, to include a letter from Mr. Edward O'Shaughnessy, Employment and Project Officer, advising that Mr. [A] "started engaging with West Limerick Resources in November 2017 as part of its outreach services for Rural employment service... Taking an objective view [Mr. A] would be very employable for a range of positions and if given the opportunity be a very productive member of society", have been received.

Further Certificates, Awards and letter of support were submitted in support of Mr. [A]'s case under cover of 13th September and 14th November 2019.

Section 3(6)(f) – Employment (including self-employment) Prospects of the Person

A letter from Mr. Raj BIR, R and Joy Pizza Express Ltd Apache Pizza, dated 17th April 2019, advises that he "is pleased to offer [Mr. A] job (sic) as a full time Chef. We trust that your skills and experience will be among our most valuable assets" and requested a copy of a valid GNIB card and PPS number.

Mr. [A] would appear to have a work history, albeit asserted to be through a "volunteering program through Limerick Volunteer Centre and personal Development Program" and I note the view of Mr. O'Shaughnessy that "he would be employable for a range of positions if he is given the opportunity. I note the submission by Sarah Ryan Solicitor that Mr. [A] "does not enjoy good health at all times, however, he instructs that this will not act as an obstacle to him obtaining employment. He has good English language skills, and a strong work ethic and instructs that he therefore, will be able to obtain employment and not be a burden on the State". I note that Mr. [A]'s application for access to the labor market was refused on 30th April 2018.

I note that Mr. [A] has an offer of job in the State, however, he does not have the permission of the Minister to reside or work in the State at this time and there is no obligation on the Minister to grant him a permission to remain in the State in order to facilitate his employment in the State.

Section 3(6)(i) – Representations made by or on behalf of the Person

All representations attesting to the excellent character of Mr. [A] have been received in response to the notification of the Minister's proposal to make a deportation order pursuant to section 3 of the Immigration Act 1999 (as amended), dated 24th April 2017, and all have been read and fully considered herein. In addition, all documentation and information on Mr. [A]'s file have been read and fully considered.

I have duly considered the representations from and on behalf of Mr. [A] to support his integration in the State since his asserted arrival in January 2015, almost 5 years ago."

Failure to consider Duration of residence in the State

7. The Applicant complains that the Respondent did not properly consider his duration of residence in the State; that as the Applicant was residing in direct provision during the period when his international protection claim was being considered, it is definitive how long he has been within the State since he made his asylum claim.
8. The Applicant's complaint in this regard is misconceived. The issue which the Respondent correctly raised in the examination of file is the Applicant's date of entry into the State. As a matter of fact, this is unknown to the Respondent as there is no record of entry provided by the Applicant. The Respondent, in her considerations, in fact gives the Applicant the full benefit of the time which the Applicant asserts he has been in this jurisdiction (about which there was some uncertainty), as is evidenced by the portion of the Examination of File document quoted above. Accordingly, this ground of challenge has not been established.
9. In the Applicant's representations to the Respondent prior to the issue of the Deportation Order, and in the course of the submissions before this Court, reference was made to recommendations made in the Mahon report to the effect that persons in direct provision for over five years should be granted permission to remain in the Country. This was not a ground on foot of which relief was granted, nor did it feature in the Applicant's written submissions, nor did it feature in a proposed draft Amended Statement of Grounds which the Applicant sought liberty to file, but which was refused by the Court. Furthermore, the Deportation Order was issued prior to the Applicant being in direct provision for 5 year. In light of these matters and in light of the fact these recommendations do not have the force of law, the Court will not consider submissions made regarding this issue.

Failure to Consider the Applicant's Work Prospects

10. The Applicant also complains that the Respondent did not properly consider his employment prospects and that her decision is vitiated by the matters which she took into account.
11. Unfortunately, the argument before the Court in this regard proceeded on an incorrect factual basis. The argument made on behalf of the Applicant was that he had two job offers at the time of the deportation decision, which he had notified to the Respondent, and that the Respondent had failed to have regard to one of the job offers. This was a factual error on the part of Counsel for the Applicant. The position actually was that only one job offer was before the Respondent for her consideration. While a second job offer was received by the Applicant, it was submitted to the Respondent after the Respondent had determined the deportation analysis. Accordingly, the argument that the Respondent had failed to consider a second job offer had no factual basis.
12. The Respondent quite clearly considered the fact that the Applicant had a job offer in a pizza delivery business as a full-time chef. She also took account of his work history, although as a volunteer; that he did not always enjoy good health; and that he was refused access to the Labour market in April 2018.

13. The argument is made that the Respondent did not have proper regard to the job offer as she negated the positive effect of this offer by reference to the fact that the Applicant did not have permission to reside or work in the State and that there was no obligation on the Minister to grant him permission to remain so as to facilitate his employment. However, that is not a misstatement of fact or law by the Respondent or something which the Respondent should not take into consideration in the overall balancing exercise which the Respondent must engage in. It is an entirely accurate summation of the position which the Respondent found himself: he had an offer of work but did not have permission to remain in the country or have a work visa. The reference to not having such permissions did not override the job offer which the Applicant had, as asserted by the Applicant, nor has the Respondent treated them as such.
14. The Applicant seeks to rely on a judgment of this Court in *MAH v. Minister for Justice* [2021] IEHC 302 in support of the proposition that having regard to a lack of permission to remain or work is not an appropriate consideration pursuant to s.3(6)(f) of the 1999 Act. In *MAH*, the Respondent had positively found that that Applicant had reasonable work prospects for reasons which were specified. Having made that finding, the Respondent relied on the fact that the Applicant did not have permission to remain or a work visa to nullify the finding that her work prospects were reasonable. This Court set out at paragraphs 28 and 29:-
- "Section 3(6) clearly places a mandatory onus on the Respondent to consider particular, specified issues when determining whether a deportation order should issue in respect of a proposed deportee. Whilst the Respondent did consider the Applicant's employment prospects, she reversed the clearly positive outcome in respect of that heading by having regard to the fact that the Applicant does not hold a work visa in respect of such employment prospects, nor has permission to remain in the State. These are inappropriate matters to have regard to under this sub-heading. Had the Applicant a work visa or a permission to remain in the State, a consideration pursuant to s.3(6) of the 1999 Act would not arise in the first place. Accordingly, what s.3(6) requires of the Respondent is to initially consider each of the sub-headings on a standalone basis and to then engage in a balancing act to determine whether a deportation order should issue having regard to all issues mandated to be considered pursuant to s.3(6).
29. Incorrectly, the Respondent nullified the separate consideration of the good employment prospects which the Applicant was found to have by reference to her not having a work visa or permission to be in the State. These issues are separate to her employment prospects: they can clearly be taken into account by the Respondent in the balancing exercise which she must conduct but they should not be utilised in a compartmentalised determination regarding her employment prospects simpliciter. This was an error on the Respondent's part."
15. The error which the Respondent fell into in *MAH* did not occur in the instant case. The fact that the Applicant does not have permission to remain or a work visa is noted as a

fact, but it is not utilized to make a determination that the Applicant does not have reasonable work prospects, which was the error which the Respondent made in *MAH*. Instead, it is noted as a fact to be considered as part of the balancing exercise which the Court referred to in *MAH*.

16. Neither is *Lin v. Minister for Justice and Equality (No.2)* [2017] IEHC 745 relevant to the instant matter. In *Lin*, the Respondent made factual errors in the course of her considerations which vitiated the subsequent deportation decision reached. No factual error was made by the Respondent in this matter.
17. An error has not been established in the Respondent's considerations of the Applicant's employment prospects. All relevant material was considered appropriately by the Respondent in that regard.

Conclusion

18. The Respondent clearly considered the various matters which she is required to consider pursuant to s.3(6) of the 1999 Act. The complaints made regarding her consideration of s.3(6)(a) and (f) are not made out. Ultimately, the Respondent determined, having regard to all of the matters referred to in s.3(6), that the interests of public policy and the common good in maintaining the integrity of the asylum and immigration system outweighed such features of the case which might tend to support a decision not to make a deportation order. That was a decision which was open to the Respondent to make and no error has been made out.
19. Accordingly, I will refuse to grant to the Applicant the relief sought and will make an order for the Respondent's costs as against the Applicant.