

THE HIGH COURT

[2020 No. 182 JR]

BETWEEN

JAIMEE MIDDELKAMP

APPLICANT

– AND –

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 22nd July 2021.

SUMMARY

This is a successful application for an order of *certiorari* in respect of the Minister's decision of 2nd January 2020 to refuse an application made by Ms Middelkamp under s.4(7) of the Immigration Act 2004 for a variation of the permission (visa) pursuant to which she presently resides lawfully in Ireland. This summary forms part of the court's judgment.

Background

1. Ms Middelkamp is a Canadian national. Her husband, Mr Paul, also a Canadian national, is a graduate entrant to the dentistry course in UCC. Mr Paul's studies are costing husband and wife a lot of money. But as a couple they have taken the view that dentistry is what Mr Paul wants to do in life, and they have clearly decided that over the course of their married life Mr Paul's career in dentistry will more than meet the costs that they are currently 'racking up' in Ireland. Ms Middelkamp is working as a legal secretary in Cork; however, on her own account her primary focus for now is looking after the couple's everyday/workday needs so that Mr Paul can focus on passing his exams and becoming a dentist. They are like countless couples around the world, pulling together to make the best possible life that they can jointly achieve for themselves. And, good to know, both of them have been enjoying their time in Ireland – or mostly, anyhow, for a problem has unfortunately arisen that has led to these proceedings. That problem is described hereafter.

2. Mr Paul started his course in the autumn of 2018. It is a four-year course so he is now on the 'home stretch' in terms of completing it. Mr Paul has a student visa to be here for the duration of his course. Ms Middelkamp came to Ireland on a different visa. She entered on a two-year visa that issued in August 2018 and which states itself to be non-renewable. So it was due to expire in August 2020. As it happens, the Covid pandemic intervened and Ms Middelkamp's visa has been extended up to September 2021 as part of a general extension, which explains why she has not yet left the State but remains lawfully here (and she does not want to be *un-lawfully* here). However, the court understands that the visa will not be extended beyond September 2021, with the result that in the next couple of months, unless things change somehow, Ms Middelkamp will have to leave Ireland. And there is the rub: Ms Middelkamp is young, married, in love with her husband, supporting him so that he gets through his studies at UCC, and does not want to go back to Canada while Mr Paul is still here. Not only would such a separation place an inevitable emotional strain on both parties but it will also place a heavy financial strain on them, and they have already indebted themselves to a fairly eye-watering amount to get to Ireland and pay for Mr Paul's studies.

3. Ms Middelkamp has, of course, known all along that her visa is a two-year visa. So back in December 2019 she made an application under s.4(7) of the Immigration Act 2004 for a variation of her visa ("*permission*" is the term employed in s.4(7)), such that following the

expiration of the 24-month period of the visa she would have an extended entitlement to be in Ireland (essentially until Mr Paul is done with his studies, at which point the couple will face a decision as to whether they want to return to Canada or try their luck in a jurisdiction other than Canada, with Mr Paul then armed with his valuable degree in dentistry). (Under s.4(7) “*A permission under this section may be renewed or varied by the Minister, or by an immigration officer on his or her behalf, on application therefore by the non-national concerned*”). Although the Minister contended that what is at issue in these proceedings is not a ‘point of exit’ decision, in practical terms it was: the application made by Ms Middelkamp was that the ‘point of exit’ was rushing fast in upon her and (sensibly) she wanted to deal with it before it arrived.

4. In passing, there is a hint in the documentation before the court, and the point was also touched upon by the Minister in argument at the hearing (though it appears nowhere in the impugned decision) that it may be that Ms Middelkamp and Mr Paul might wish to remain in Ireland after Mr Paul gets his dentistry degree. Maybe they will – who knows what the future will bring? – but if the Minister saw something objectionable to present in this possibility then it fell to her to address it in the impugned decision and this she did not do. It is, with respect, an elementary principle of judicial review, though a point that will, regrettably, fall repeatedly to be made in this judgment (and which falls to be made in all too many judgments), that it is a decision that was actually made that falls to be reviewed in judicial review proceedings, not some imaginary decision that the decisionmaker might now like to have made, and not the decision that was made coupled with whatever additional reasons a decisionmaker thinks to cobble together after judicial review proceedings have commenced.

5. In any event, by letter of 2nd January 2020, the Minister refused Ms Middelkamp’s application. The letter is short. The relevant reasoning is shorter, stating:

“Having considered the full facts of your case, all your personal circumstances and representations provided and all rights arising, it is concluded that the interest of public policy and the common good in maintaining the integrity of the immigration system outweigh such features of your as might tend to support a decision to vary permission under section 4(7) of the 2004 Act.”

6. On a practical level, the decision seems rather disobliging. But is it lawful? Ms Middelkamp thinks not. (She is right, as it happens, but it will take a few more pages to explain why).

II

Reliefs Sought

7. In the within proceedings, Ms Middelkamp seeks the following principal reliefs: (i) an order of *certiorari* quashing the Minister's decision of 2nd January 2020; and (ii) such declaration(s) of the legal rights and/or legal position of Ms Middelkamp and/or persons similarly situated as the court considers appropriate.

8. In passing, the court notes that: (i) the impugned decision in respect of which relief is now sought was clearly made under s.4(7) of the Act of 2004; (ii) the powers that the Minister enjoys under that provision are broad (an example of their breadth is afforded by *Hussein v. Minister for Justice, Equality and Law Reform* [2015] IESC 104); and (iii) in determining an application under s.4(7) the Minister is subject to s.3 of the European Convention on Human Rights Act 2003.

III

Statement of Grounds

9. Ms Middelkamp's statement of grounds identifies the following basis as the legal deficiencies that present in the Minister's refusal:

"1. In determining the application the Respondent erred in law and acted unreasonably and/or irrationally and breached the principles of fair procedures and natural and constitutional justice in failing or refusing to consider the private and family life rights of the Applicant which derive from Article 8 ECHR and therefore failed to perform his functions in a manner compatible with the State's obligations under the Convention provisions thus breaching the provisions of s.3 of the European Convention on

Human Rights Act 2003. Insofar as the Respondent justifies the failure to consider the said rights on the basis that they are not currently being interfered with the Respondent fell into error in that the said rights were clearly engaged and therefore there was an obligation to consider them.

2. *In determining the application the Respondent erred in law and acted unreasonably and/or irrationally and breached the principles of fair procedures and natural and constitutional justice in failing to provide reasons for the decision.”*

IV

Inadequate Reasons

10. It will be recalled that the reasons offered by the Minister in the letter of 2nd January 2020 comprise the following:

“Having considered the full facts of your case, all your personal circumstances and representations provided and all rights arising, it is concluded that the interest of public policy and the common good in maintaining the integrity of the immigration system outweigh such features of your as might tend to support a decision to vary permission under section 4(7) of the 2004 Act.”

11. At least six criticisms, it seems to the court, can be made regarding the notably limited reasoning offered by the Minister in the impugned decision.

12. First, the court respectfully agrees with the following general remarks made at the hearing by counsel for Ms Middelkamp in respect of the above-quoted reasoning:

“I am not entitled to discursive reasons or long-winded reasons...but I am, of course, entitled to the essential reasons. I am entitled to the core reasons, and they cannot be so broad as to be meaningless. ‘The

immigration system demands that you don't get it [the extension]'...[W]hat does that mean? How is anyone supposed to deal with that? Is that intelligible? No. That is a basis, rather than a reason."

13. In her submissions, the Minister has rolled out several of the 'old reliables' in terms of reasoning, including, for example, *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701, *Connelly v. An Bord Pleanála* [2018] IESC 31 and *YY v. Minister for Justice and Equality* [2017] IESC 61, and she has contended that, to borrow from the written submissions, "[I]t is clear from the terms of the decision that the Applicant knows in general terms why the decision was made". With respect, this is not at all clear. What have been provided in the decision are anodyne utterances. How one might ask (for the impugned decision offers no insight in this regard) could letting one married woman stay in Ireland pursuant to an application lawfully made under s.4(7) of the Act of 2004 manage to upset public policy, the common good, and the integrity of the immigration system, not least though not only when the making of such application and the potential for exceptional variation of a permission pursuant to same has expressly been contemplated by the Oireachtas as part of the immigration system that it has established? And if Ms Middelkamp's being allowed to remain here *would*, in the Minister's opinion, have such startling effects, then the Minister ought to have spelled out in plain terms how this could be so. What the Minister has done in the impugned decision, to borrow from counsel for Ms Middelkamp, is to offer the briefest of reasoning which manages, despite its brevity, to be "*so broad as to be meaningless*".

14. In passing, the court notes that in the context of the reasoning dimension of matters, the court was also referred by counsel for Ms Middelkamp to *Gorry v. Minister for Justice and Equality* [2020] IESC 55. The court respectfully does not see that *Gorry* is a 'reasons' case.

15. Second, as already touched upon, it is not open to the Minister to come to court and seek, as she has sought here, to add to the reasoning that she has given in her original decision. As the court observed, just a few weeks ago, at para.3 of its judgment in *A.B. v. Minister for Justice and Equality* [2021] IEHC 439, another case where the Minister came to court and sought to add to the reasoning in her original decision:

"[W]hether pithy or prolix in her decisions, when the Minister is brought to court in judicial review proceedings she is 'stuck' with

whatever decision she has made. She cannot seek, as she has sought in these proceedings, to expand an impugned decision. An impugned decision, to use a colloquialism, must stand or fall 'on its own two feet' in any ensuing judicial review proceedings".

16. Here, for example, by way of logic that the court does not quite understand, it is *now* belatedly suggested, quite remarkably, that if the Minister had said 'yes' to Ms Middelkamp that could have caused difficulties as regards Ireland's future actions under international arrangements with far-away nations such as Argentina and Chile. Quite how a decision to allow a non-EU/EEA wife who is already present in Ireland to continue to stay for a limited time in Ireland with her non-EU/EEA husband who is also already present in Ireland could cause any difficulty as regards Ireland's actions pursuant to international arrangements is entirely unclear to the court. But if one of the reasons for refusing Ms Middelkamp's application was that one married woman's continuing for a limited period to remain in Ireland with a husband who will be staying for a time in Ireland would upset certain of Ireland's international dealings (and the court admits to struggling to believe that such a possibility actually presents) then that should have been stated in the impugned decision. As it happens, this international relations reason features nowhere in the impugned decision – and, again, it is that flawed decision which was actually made and the limited reasons which it in fact contains that fall now to be reviewed, not that decision coupled with whatever reasons the Minister now thinks to volunteer.

17. It is also *now* belatedly suggested that if Ms Middelkamp succeeds in this case this could create more work for the Department of Justice. The court has no desire to create extra work for doubtless busy officials; however, any notion that the court should determine, interpret and/or apply the law of Ireland by reference to the workload of the Department of Justice need only be stated to see just how inappropriate it is – and it is notable that having made the point, the Minister immediately retreated from it by observing that of course she will do as the law requires, which rather begs the question as to why the point was raised. Again, as with the international relations reason, this Departmental workload reason features nowhere in the impugned decision – and, again, it is that flawed decision which was actually made and the limited reasons which it in fact contains that fall now to be reviewed, not that decision coupled with whatever reasons the Minister now thinks to volunteer.

18. Third, although the impugned decision refers to “*all rights arising*”, it gives no indication as to what rights were considered and how they were weighted.

19. Fourth, in the absence of any meaningful reasoning it is not at all clear how none of the “*all rights arising*”, which presumably included individual rights (though one cannot be sure of this – the decision offers no guidance as to what the “*all rights arising*” were) could prevail over such vague generalities as “*the interest of public policy and the common good in maintaining the integrity of the immigration system*”, whatever exactly this last-quoted woolly text means.

20. Fifth, notwithstanding that Ms Middelkamp’s extensive (near-200 page) application puts the question of Art 8 ECHR-derived rights (specifically the issue of spousal separation) directly in issue, the Minister’s decision notably makes no express mention of same, an aspect of matters to which the court returns later below.

21. Sixth, although this point was not touched upon at hearing, the court could not but recall when reading the impugned decision the observation in *Balz v. An Bord Pleanála* [2020] 1 I.L.R.M. 367, para.57, yes in a planning context but the point holds good generally, that:

“It is a basic element of any decision-making affecting the public that relevant submissions should be addressed and an explanation given why they are not accepted, if indeed that is the case. This is fundamental, not just to the law, but also to the trust which members of the public are required to have in decision-making institutions if the individuals concerned, and the public more generally, are to be expected to accept decisions with which, in some cases, they may profoundly disagree, and with whose consequences they may have to live.”

22. The principles in *Balz* have recently been approved by the Supreme Court in *Náisiúnta Leictreach Contraitheoir Éireann v. The Labour Court & Ors.* [2021] IESC 36. Yet, as touched upon in the fifth point above, the detail of Ms Middelkamp’s extensive (near-200 page) application and, in particular, the question of Art 8 ECHR-derived rights (specifically the issue

of spousal separation) is simply not engaged with in any meaningful sense in the impugned decision.

V

Article 8 ECHR

23. The fact that there was no consideration of Art.8 ECHR-derived rights (specifically the issue of spousal separation) in the impugned decision appears to have been deliberate. Thus, in a letter of 30th January 2020, following on correspondence from Ms Middelkamp’s lawyers, an official at the Department of Justice wrote a letter that included the following observation:

“In regards to the assertion in your correspondence that ‘there must be a full consideration...to include the applicant’s Article 8 ECHR-derived rights, as outlined in the decision letter issued on 02/01/2020, the decision to refuse to vary your client’s permission by the Minister does not interfere with any rights arising in respect of her under Article 8 ECHR....[T]he decision [that] issued on 02/01/2020 to refuse to vary her permission does not infringe on any rights your client currently holds.”

24. It might not infringe them but it certainly alters how Ms Middelkamp stands positioned. Prior to making her s.4(7) application, Ms Middelkamp had three paths open to her, (i) to leave in accordance with her visa requirements, (ii) illegally to overstay (an option of sorts but not much of an option; Ms Middelkamp, a law-abiding person, rightly wants to do right by law), and (iii) to invoke her right to seek a variation of her visa pursuant to s.4(7). By the decision of 2nd January 2020, the Minister closed off option (iii) so there has been a change in how Ms Middelkamp is legally positioned. To mangle Frost, if three roads diverge in a yellow wood and a forester puts a barrier across one of them then technically three roads remain; however, most people would likely accept that there has been a significant change in how the person at the point of divergence stands positioned.

25. It is clear from the above-quoted text from the letter of 30th January 2020 and indeed the argument before the court that *excluded* from the “*all rights arising*” that were stated in the

impugned decision to have been considered by the Minister were any Article 8 ECHR-derived rights (which were a central plinth of Ms Middelkamp’s application). The court cannot but recall in this regard the observation of MacMenamin J. in *Luximon and Balchand v. Minister for Justice and Equality* [2018] 2 I.R. 542, para.[46], that:

“As Barr J. pointed out in his High Court judgment in Appeal A...the applicants, under s.4(7) of the 2004 Act, might never even enter into the s.3 process because in order to do so, they would have to place themselves in the position of ‘remaining on’ illegally in the State. The applicants would then have to elect to make representations from within the State with the attendant risk that, should they be unsuccessful, they would be subject to a deportation order which would place a bar on their re-entering the State and could affect their ability to enter other EU states....Counsel for the applicants characterise this choice as being a ‘Catch-22’, where, to choose the preferred or optimal course of action would unavoidably put the chooser in the wrong. I accept this submission.”

26. Despite the just-quoted point being made clear to the Minister in *Luximon* by both the High Court and the Supreme Court, the Minister continues in the face of that express reasoning to consider it appropriate and lawful to postpone any consideration of Ms Middelkamp’s Art. 8 ECHR-derived rights until she is set to be deported from Ireland – which, in effect, means that they will never be considered – despite Ms Middelkamp having raised them in her application – because Ms Middelkamp, patently from the manner in which she has approached seeking permission to stay on in Ireland for as long as Mr Paul is here is a law-abiding woman who does not wish to act illegally, to overstay, to face the risk of deportation and to expose herself to the consequential problems that arise upon deportation from one European Union member state and to which MacMenamin J. refers in the above-quoted extract from his judgment in *Luximon*. The court does not for a moment accept that MacMenamin J. meant that the ‘Catch 22’, which he identified in *Luximon* as being objectionable, could nonetheless be acceptable in a factually different case.

27. The Minister’s position of postponing any consideration of Ms Middelkamp’s Art.8 ECHR-derived rights (in particular, the issue of spousal separation) until the Minister proposes

(following any, if any overstay) to deport Ms Middelkamp is not in accordance with law. Rather, it is an attempt to apply precisely the two-stage process of consideration of rights to which the Supreme Court took objection in *Luximon* (see, for example, the judgment of MacMenamin J. at para.37). Here Art.8 ECHR (and, more particularly, the issue of spousal separation) was raised, relevant and fell to be considered, even if only to identify why, in the Minister's opinion, consideration of this issue fell to be deferred.

28. In passing, the court does not see that the decision of the Court of Appeal in *Chen v. Minister for Justice and Equality* [2021] IECA 99 assists the Minister. That was a settled migrant case and raises different issues to those presenting here. Yet the observations of Power and Murray JJ., at para.58 of their judgment in *Chen*, seem to highlight the very aspect of *Luximon* which Ms Middelkamp rightly points to as being supportive of her case, viz. the 'Catch 22' situation in which she finds herself of having to leave in breach of spousal separation rights that she believes herself to possess or, alternatively, to overstay illegally, with all the legal difficulties that raises, so that she can have the Art.8 ECHR-derived rights (spousal separation) issue considered. That is precisely the situation against which the Supreme Court set its mind in *Luximon* and what makes the decision in that case applicable, *mutatis mutandis*, to the case at hand.

29. There are, of course, distinctions between *Luximon* and this case. There the parties were unlawfully in the State; here Ms Middelkamp has at all times been lawfully present in the State and gives every impression of wishing to comply at all times with the laws of the State, including not overstaying on her visa. But, more significantly, in *Luximon* it was not being asserted that some sort of spousal separation would occur and it is, as counsel for Ms Middelkamp put matters at the hearing, "*ECHR 101*" that separation of spouses engages Art.8 ECHR *ipso jure*. There is no case, certainly none has been proffered in argument, to gainsay that last-stated proposition. Indeed, it was a notable feature of the Minister's case at the hearing of this application that the issue of spousal separation was never addressed, just as the impugned decision failed to do so, despite its being the key issue in the application made.

30. In passing, the court accepts the point made by counsel for Ms Middelkamp that there did seem to be some suggestion at the hearing of the within application that there may in fact have been some consideration of the Art.8 derived rights (spousal separation) issue by the Minister prior to the issuance of the impugned decision. If the issue was considered, there is not a whiff

of such consideration in the impugned decision. And, as counsel for Ms Middelkamp noted at the proceedings, this suggestion placed him in considerable difficulty in knowing what to argue as he was left in the position of having no idea what had or had not been done in this regard – which is precisely why the courts require adequate decisions to be given by decision-makers because, amongst other matters, it avoids the occurrence of quandaries of the sort in which counsel for Ms Middelkamp found himself placed in these proceedings. But leaving aside these concerns of counsel it seems to the court that there is in any event something of a ‘Morton’s Fork’ presenting for the Minister in this regard: if she did consider matters from an Art.8 ECHR derived rights (spousal separation) perspective, then the impugned decision fails for want of adequate reasoning; and if she did not consider matters from an Art.8 derived rights (spousal separation) perspective, then the impugned decision fails because she should have.

31. The Minister has advanced in these proceedings various avenues of approach that Ms Middelkamp might adopt if she leaves for Canada just before her visa expires. Obviously, what Ms Middelkamp might do in the future has absolutely nothing to do with the legality of a decision made by the Minister in the past. Moreover, there is no mention of these avenues of approach in the reasoning in the impugned decision and, again, it is that decision, as made and worded, that is under review. The court can only assume, therefore, that these post-departure options have been volunteered to influence how the court will exercise its discretion in these proceedings in terms of the relief to be granted (and relief will be granted). In order to get a sense of just how unreal the Minister’s observations are in this regard, it is worth recalling that (a) Ms Middelkamp is living in Ireland with her husband, (b) the couple’s finances have been stretched to a very considerable extent to finance Mr Paul’s studies in dentistry at UCC, and (c) Ms Middelkamp does not have a qualification that is in short supply in Ireland. Against this background, the Minister, quite remarkably, has suggested that, post-departure for Canada, Ms Middelkamp might (i) pay repeated 90-day visits to Ireland from Canada (very expensive and never applied for), (ii) enrol as a non-EU/EEA student in Ireland (very expensive), (iii) despite not having skills that are in short supply in Ireland, apply for a work permit (very unlikely to succeed; counsel for Ms Middelkamp dismissed this possibility out of hand) or (iv) (this stated possibility, to use a colloquialism, really ‘bites the biscuit’ when one has regard to the actual facts presenting) if Ms Middelkamp is so rich as to be financially self-sufficient and not to require any form of employment then she could apply for a special rich person’s visa (Stamp 0) and live in Ireland for up to a year. It is painfully obvious from all the evidence and pleadings before the court that Ms Middelkamp and her husband are not flush with cash at this stage of

their lives. Indeed, the court must admit that on reading the various just-mentioned, far-fetched alternatives averred to in the evidence before it, it rather wondered whether the Minister had any proper understanding of the factual circumstances presenting in this case. And again none of this consideration of alternatives featured in the impugned decision that is under review.

VI

Conclusion

32. For the reasons identified above, the court will grant an order of *certiorari* quashing the Minister's decision of 2nd January 2020 and remit this matter to the Minister for fresh consideration.

33. As Ms Middelkamp has succeeded in her application, the court proposes to make an order for costs in her favour. If either side objects to the court making this order, they might so advise the court registrar or the court's judicial assistant within 14 days of the date of delivery of this judgment and the court will then schedule a brief costs hearing.

**TO THE APPLICANT:
WHAT DOES THIS JUDGMENT MEAN FOR YOU?**

Dear Applicant

I am always concerned that because applicants in visa application cases are foreign nationals, they should, if possible, be placed by me in a position where they can understand the overall direction of a judgment that has a sometimes great impact on them. I therefore briefly summarise my judgment below. This summary, though a part of my judgment, is not a substitute for the detailed text above. It seeks merely to help you understand what I have decided. The Minister requires no such assistance. So this section of my judgment is addressed to you, the applicant, though copied to all. Your lawyers will explain my judgment more fully to you.

You asked me to look at the Minister's decision of 2nd January 2020 to refuse the application made by you under s.4(7) of the Immigration Act 2004 for a variation of the permission (visa) pursuant to which you presently reside lawfully in Ireland. I have done so and consider that the Minister's decision is so flawed that (i) it should be quashed and (ii) your application should receive fresh consideration.

Yours sincerely

Max Barrett (Judge)