

**THE HIGH COURT**

[2021] IEHC 835

**RECORD NO. 2020/807JR**

**BETWEEN  
SUJIT TALUKDER**

**APPLICANT**

**AND  
THE MINISTER FOR JUSTICE**

**RESPONDENT**

**JUDGMENT of Ms. Justice Niamh Hyland delivered on 21 December 2021**

**Introduction**

1. This case concerns a challenge to a deportation order made in respect of a Bangladeshi national who came to Ireland when he was 18. He is now 29. The challenge is based on an alleged failure on the part of the Minister to appropriately apply the statutory criteria in relation to employment when considering the various personal factors identified in s.3(6) of the Immigration Act 1999 ("the 1999 Act"), as amended, and an alleged failure to provide adequate reasons for the decision.
2. I have concluded the reasons are adequate, in part because they are in the same form as those upheld in *G.K. v Minister for Justice* [2002] 2 IR 418. and in *Meadows v Minister for Justice* [2010] IESC 3. However, I conclude the Minister failed to apply the statutory criteria relating to employment prospects in s.3(6)(f) correctly by identifying the lack of permission of the applicant to work/remain as a negative counterweight to his employment prospects. This had the effect of wholly undermining the statutory criteria identified under s.3(6)(f). This is because a lack of permission to work/remain, if a permissible consideration under this factor, would always inevitably trump even the most glowing prospects of future employment of an applicant, notwithstanding that, in the words of Burns J. in *MAH v Minister for Justice* [2021] IEHC 302, if a person had 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.

**Factual Background**

3. The applicant is a citizen of Bangladesh who arrived in the State in December 2010 and shortly thereafter made an application for asylum which was refused. He appealed to the RAT and the negative first instance decision was affirmed. This was the subject of judicial review proceedings which resulted in the matter being remitted back to the RAT for a fresh consideration.
4. In the meantime, the applicant met and formed a relationship with a citizen of Hungary whom he married on 23 January 2014. The applicant was granted a residence card on the basis of this marriage on 14 August 2014.
5. In or around 18 September 2018 the applicant wrote to the Minister informing him that his wife had departed the State and that he could not be confident that she intended to return. In the intervening period the applicant's asylum claim had been re-heard before the RAT and was rejected in 2016 but no further steps arose in that regard as the applicant had been granted a residence card as identified above.

6. By letter dated 15 November 2018 the respondent wrote to the applicant informing him that, in light of the facts regarding his marriage, it was proposed to revoke his residence card. By letter dated 10 December 2018 the applicant, through his solicitor, replied, stating that he himself had brought the factual aspects of his marriage to the Minister's attention, that he accepted that his marriage had ended and that therefore he would not be making any representations regarding the revocation of his residence card.
7. Ultimately, the applicant's residence card was revoked on 13 August 2019 and a finding was made that he had contracted a marriage of convenience. The applicant's solicitors wrote stating that he rejected that finding and enquiring as to what further steps the Minister proposed to take. However, no appeal was taken by the applicant against that decision.
8. By letter of 17 October 2019 the applicant was issued with a proposal pursuant to s.3 of the 1999 Act as amended. On 14 November 2019, supplemented by way of a further letter of 19 December 2019, the applicant's solicitor made extensive representations on his behalf setting out, *inter alia*, the details of his immigration history, employment and integration in the State.
9. A deportation order was made in respect of the applicant on 16 September 2020 and he was informed of this under cover of letter dated 25 September 2020.

#### **Procedural History**

10. The applicant sought and was granted leave by Burns J. on 9 November 2020. The Statement of Grounds of 30 October 2020, grounded upon an affidavit of Mr. Talukder sworn 29 October 2020, identifies the following grounds at paragraphs 1 to 5;
  - "1. *The Minister failed to have sufficient regard to the specific representations made on the Applicant's behalf as to why a deportation order should not be made in respect of him. These representations related, inter alia, to the duration of time that he had resided in the State and his employment record whilst living here. The consideration lacked specificity and failed to take into account the full impact the making of a deportation order has on the Applicant.*
  2. *In considering the Applicant's employment prospects, the Respondent noted the fact that the Applicant had been engaged in employment over an extensive period during which he had no permission to reside here. In breach of s. 3(6) of the Immigration Act, 1999, as amended the Respondent failed to arrive at any assessment of the Applicant's employment prospects in the event that he was permitted to remain in the State.*
  3. *The Respondent's finding that he is not entitled to grant permission in order to enable a person to take up employment is an unlawful tautology that is devoid of logic.*
  4. *The Respondent failed to give due weight to the duration of the Applicant's residence in the State and his age.*

5. *The Respondent failed to provide adequate reasons for his decision, and in particular for as regards the weight given to the matters listed in s.3(6) of the 1999 Act.*"
11. At the hearing the applicant identified that the grounds at paragraphs 6 to 8 were not being proceeded with.
12. It seems to me that in substance the case can be divided into two parts. The first relates to the alleged failure on the part of the Minister to treat the applicant's employment record and prospects correctly, and to give adequate weight to his age, length of residence and the impact of refusal upon him. The second is a reasons argument i.e. that the respondent failed to provide adequate reasons for his decision. I will deal with those arguments in turn.

**Employment Record of the Applicant and his Future Prospects**

13. Section 3(6)(f) refers to the "*Employment (including self-employment) Prospects of the Person*". The entry in the examination of the file under this heading is as follows;

*"Sujit Talukder states that his employment prospects are good because he has a strong work record in the State, a strong work ethic and good English-language skills.*

*Sujit Talukder is currently working in the State in a petrol station. However, Sujit Talukder 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 permission to remain in the State in order to facilitate his employment/self-employment in this State."*

14. The applicant criticises this entry on the basis that there was a failure on the part of the Minister to discharge his obligation under s.3(6) to correctly assess the applicant's employment prospects. He also argues the Minister's observations in relation to permission to work and lack of obligation to grant leave to remain are an unlawful tautology devoid of logic. I am not sure if that latter argument is correct: one definition of a tautology is a phrase or expression in which the same proposition is repeated twice over in different words. The statement is not tautologous: rather the author of the document is making an observation that (a) the applicant has no permission to reside or work and (b) there is no obligation on the Minister to grant permission to remain to facilitate employment prospects. Neither of these statements are factually incorrect. Nonetheless, accuracy does not resolve the question of legality in this context and I discuss that further below.
15. Turning to the substance of how the respondent addressed the applicant's employment record, it is noted in the examination of file that representations were made that the applicant had been self-sufficient during his time in Ireland and intended to remain so, that he had worked as a chef for 2 to 3 years and for Mór Oil petrol station in Galway for the past four years. The applicant had put forward a letter from Mór Oil of 18 November

2019, stating that he was a full-time employee, was an excellent staff member and got on well with his work colleagues, was always very helpful and had excellent customer service skills.

16. It is argued by the applicant that the Minister failed to properly engage with the reality of his situation, to properly assess his employment prospects as required and that permission to remain may well have been granted had the Minister properly considered the employment prospects of the applicant.
17. Undoubtedly, the Minister was clearly aware of the applicant's past employment record and the fact that he currently had a job. Specific reference is made to the letter from Mór Oil of 18 November 2019 and to the payslips submitted for four months from that employer. In that regard, the position is not like that in *Lin & Ors v Minister for Justice* [2017] IEHC 745 where the decision was quashed because of the Minister's failure to properly consider and assess the employment prospects of the adult applicant. There, the file suggested that the employment prospects of two applicants were to be assessed in terms of paid employment. However, in that case the applicants in question were in fact effectively self-employed and therefore Humphreys J. found that there was an error in circumstances where the applicants' position was not properly considered. No such error arises here. The applicant's employment history and employment prospects are correctly identified.
18. I turn now to the issue that may be considered as being at the heart of the applicant's case. In short, the applicant makes the argument that the reference to the applicant being unable to work or reside in the State under the heading relating to prospects of employment indicates that the Minister incorrectly negatively evaluated the applicant's future employment prospects. Counsel for the applicant pithily expresses the problem as being that the Minister "turned a positive into a negative".

**Case Law on Application of s.3(6)(f)**

19. This issue has already been considered by the High Court on at least two occasions – in *MAH v Minister for Justice* [2021] IEHC 302 and *ANA v Minister for Justice* [2021] IEHC 589.
20. In the first of these cases, *MAH*, the applicant was a Somalian doctor who was challenging a deportation order. In the examination of file, it was stated that her employment prospects would have to be deemed reasonable in the current economic climate. A formulation identical to that used in the current case appeared, to the effect that she did 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 her permission to remain in the State to facilitate her employment in this State. The entry went on to say:

*"It would, of course, be open to a prospective employer to apply for a Work Permit in respect of MAH from outside the State. The process provided for under section 3 of the Immigration Act 1999 (as amended) is clearly not the means by which Ireland's labour market needs should be met".*

21. Burns J. held that it was inappropriate to have regard to the fact that the applicant did not hold a work visa nor had permission to remain in the State under this subheading. She set out at paragraph 28 as follows;

*"28. 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).*

22. Turning now to the case of *ANA*, a similar formula was used in the examination of file under the heading employment prospects to the effect that the applicant in that case did not have permission to reside or work and there was no obligation on the Minister to grant a permission to facilitate his employment. It is, I think, fair to say that the applicant in that case had a less impressive employment history and prospects than the applicant in this case. The only work experience he had in Ireland was through a volunteer program with the Limerick volunteer centre and personal development programme, he did not enjoy good health at times, and he had an offer of a job as opposed to being in the position of the applicant here i.e. actually employed.
23. Burns J. noted that the respondent clearly considered the fact that the applicant had a job offer in a pizza delivery business as a full-time chef and took account of his work history. A challenge was made to the decision on the basis that a formula was included, identical to that in the instant case, and that the inclusion of same meant that the respondent did not have proper regard to the job offer.
24. Burns J. observed that the statements included in the formula were not inaccurate and the respondent was entitled to consider them in the overall balancing exercise. Commenting upon her judgment in *MAH*, she concluded as follows:

*"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."*

**Were Impermissible Considerations taken into account under s.3(6)(f)?**

25. In this case, counsel for the applicant argues that given his work history and future, he was entitled to a positive determination under the heading of future employment prospects and that reference to the lack of permission to work or reside was impermissible and renders the overall decision unlawful.
26. Counsel for the respondent says that there cannot be an obligation on the Minister to arrive at a determination under each one of the statutory headings, in addition to a consideration of the matters in an overall balancing approach. It is further argued that it was correct to state that there was no obligation on the Minister to grant a permission to remain in the State to facilitate employment in the State, given that this was only one factor amongst the eleven matters listed at s.3(6). It is pointed out there are no errors in the evaluation of the applicant's personal circumstances and that the respondent considered the applicant's representations and the fact that the applicant was in full time employment.
27. The case of *ANA v. Minister for Justice* was relied upon in support of the argument that the Minister was entitled to consider the question of permission to remain/work as part of the balancing exercise. The case of *MAH v. Minister for Justice* was distinguished on the basis that there was an additional factor not present in this case or indeed in the case of *ANA*, i.e. that the respondent had noted that the process provided by s.3 of the 1999 Act was not the means by which Ireland's labour market needs should be met and it was this additional consideration that rendered the decision unlawful.
28. To resolve this issue, it is necessary to consider the nature of the Minister's obligation. Section 3(6) requires that: "*In determining whether to make a deportation order in relation to a person, the Minister shall have regard to ...*" the eleven statutory factors in sub-section 6. The phrase has been considered on various occasions, most recently by Humphreys J. in *Cork County Council v The Minister for Housing and Ors* [2021] IEHC 683 where he referred back to the case of *G.K.* (cited by the parties in this case), which considers the term in the context of s.3(6) of the 1999 Act. Humphreys J. observes that the obligation "*to have regard to*" is treated in *G.K.* as a synonym for "*considering*" such factors. He notes that the approach taken by the Supreme Court in *G.K.* is essentially that where the decision maker says it has had regard to certain matters, there is an evidential onus on the applicant to be overcome to displace that assertion.
29. To interpret the words "*have regard to*" to be synonymous with an obligation to carry out an individual analysis and conclusion in respect of each of the 11 statutory guidelines would be a serious error, whether one considers the matter from the standpoint of the natural and ordinary meaning of the words "*to have regard to*" or by reference to the jurisprudence on the correct interpretation of that phrase. I therefore reject the applicant's argument that the Minister was under any obligation to arrive at and identify a discrete conclusion in relation to the employment prospects of the applicant, that would then be fed into the overall assessment.
30. However, the Minister is not absolved from the obligation to have regard to, or consider, each of the statutory factors individually. Here, I have a real concern that the reference

by the Minister to the applicant's inability to work in the State means that the Minister was in fact treating the statutory criteria incorrectly. Given the statutory context i.e. the making of a deportation order in respect of a person who fulfils any of the categories in s.3(2), there is a strong possibility that the person will not have a right to work and/or reside in the State, although that will not always be the case.

31. In this case, the Minister had identified in the letter of 17 October 2019 setting out the proposal to deport the applicant that his permission to remain had been revoked as he had failed to show he was a family member of an EU citizen, that he had no current permission to be in the State and that he was therefore a person whose deportation would, in the opinion of the Minister, be in the common good i.e. a person coming within s.3(2)(j). He was a person with no right to work and/or reside in the State.
32. Nonetheless, the statutory criteria require consideration to be given to the employment prospects of the person. I cannot interpret that provision as meaning that only persons who already have a right to reside and work in the State at the time of the proposed deportation are entitled to the benefit of that consideration. There is no such limitation in the wording of s.3(6). If the statute provided that the Minister "may have regard to", then the position might be different. But that is not what s.3(6) identifies.
33. The Minister is not entitled to address a statutory factor in such a way as to negate its effect. Unfortunately, the approach of the Minister here did just that. Identifying the lack of permission to work/remain as a counterweight to employment history or prospects has the effect of wholly undermining the statutory criteria identified under s.3(6)(f), since a lack of permission to work/remain, if a relevant consideration, would inevitably wholly trump even the most glowing prospects of future employment, and prevent any weight at all being given to same.
34. Accordingly, the consideration of a person's employment prospects must be exercised without reference to the lack of permission to work and reside in the State. As observed by Burns J. in *MAH*, taking issues of permission to work/reside into account at this stage is inappropriate. As she observed at paragraph 29: "*These issues are separate to an applicant's employment prospects: they should not be utilised in a compartmentalised determination regarding her employment prospects simpliciter. This was an error on the Respondent's part*". Contrary to what was submitted by counsel for the respondent, I do not read the decision in *MAH* as being premised on the fact that the decision recorded the unsuitability of meeting Ireland's labour needs through s.3. Rather, it seems to me that, read as a whole, *MAH* indicates that permission to work/reside should not be taken into account when considering s.3(6)(f).
35. That the reference to lack of permission to work/remain was intended to be set against the applicant's work record in this case is confirmed in my view not only by its inclusion under the s.3(6)(f) considerations but also by the word "however": i.e. "*Sujit Talukder is currently working in the State in a petrol station. However, Sujit Talukder does not have the permission of the Minister to reside or work in the State at this time...*". The practical

effect of the Minister taking the lack of permission into consideration at this stage was to negate the applicant's positive work record and prospects in this case.

36. Separately, the reference to the Minister having no obligation to grant the applicant permission to remain in the State in order to facilitate his employment in the State is also problematic, not because it is tautologous, but because it tends to suggest, albeit implicitly, that the Minister has singled out a particular statutory criteria as being worthy of comment in respect of the limitations of same, despite the fact that that comment could arguably be made equally validly in respect of all of the so-called "personal" grounds under s.3(6). It is an accurate statement as far as it goes but it is difficult to understand why the Minister has considered it necessary to make that observation only in respect of s.3(6)(f).
37. Finally, I must address the *ANA* decision. In that case, the trial judge held that the inclusion of the same formula was not utilised to make a determination that the applicant does not have reasonable work prospects. Rather it is noted as a fact to be considered as part of the balancing exercise to which the Court referred in *MAH*. Each case turns on its own facts and that is clearly a fact specific finding in that case. As noted above, the applicant's work record in that case was significantly weaker than that of the applicant in the instant case and that may have been a relevant issue in the consideration of the Court.
38. In this case, for the reasons I set out above, I consider that the inclusion of the impugned paragraph was in fact utilised to determine that the applicant did not have reasonable work prospects, and as such, made it impossible for any appropriate weight to be given to that statutory factor.
39. For those reasons, I am of the view that the applicant is correct in arguing that the inclusion of the impugned paragraph means that the Minister failed to have regard to the applicant's employment prospects as she is obliged to do under s.3(6)(f).

**Weight to be Given by the Minister to Statutory Factors**

40. Grounds 1 and 4 of the Statement of Grounds are a challenge to the weight given by the Minister to the following factors – the duration of the applicant's residence in the State, his age, his employment record and the impact that the making of a deportation order would have on the applicant. It is quite clear from the examination of file that the Minister was aware of the applicant's age and the length of his residence, his employment record and, from the extensive summary of the submissions made under the heading s.3(6)(h) – humanitarian considerations – the impact of a deportation order on the applicant. The examination of file summarises the submissions made by the applicant in relation to his links with the community in which he lives in Barna and the fact that society and culture in Bangladesh do not lend themselves to a way of life that he has come to know during his time in the State. It recites that the applicant is of the view that he would not have the same opportunities in Bangladesh as he does in Ireland.



41. In relation to the weight to be given to the various factors under s.3(6), the law is well settled. In *I.S.O.F. v Minister for Justice* [2010] IEHC 386, Cooke J. observed that it is not enough to simply assert that the Minister ought to have given greater weight to some factors or less to others;

*"The onus of establishing the unlawfulness of the decision lies with the applicant. The duty to balance proportionately the opposing rights and interests of the family on the one hand and the interests the State seeks to safeguard on the other, lies with the Minister. It is the Minister who must assess and decide by reference to all of the matters he is required to consider under the statutes and in light of all of the information and representations put before him, whether the latter interests should prevail or not. Contrary to the implication of the argument made by counsel for the applicants, the High Court is not entitled or obliged to re-examine the case with a view to deciding whether, in its own view, the correct balance has been struck. To do so would be substitute its own appraisal of the facts, representations and circumstances for that of the Minister."*

42. In *Meadows*, Murray C.J., in his consideration of s.3(6) said that s.3 involves *"quintessentially a discretionary matter for the Minister in which he has to weigh competing interests and only the Minister, who has the responsibility for public policy in this area, is in principle in a position to decide where that balance lies"*.
43. It is also well accepted that the weight to be attached to the various factors is a matter for the Minister when applying s.3(6) (see *Lingurar v Minister for Justice* [2018] IEHC 96.)
44. Here, the applicant has not identified any basis for quashing the Minister's decision on this ground save that he, the applicant, considers that greater weight ought to have been given to certain factors. That is not a basis upon which he can succeed as it is not for me to second-guess the Minister's views in this regard. I am not entitled to consider what I would have done had I been in the shoes of the Minister. Rather I am reviewing the decision for evidence of unlawfulness. No such evidence has been put before me in this regard.
45. The situation might be different if the applicant could show that the Minister had failed to consider relevant factors. But that is not the case here. The applicant cannot assert that those factors were not before the Minister, as it is clear from the examination of file that they were considered. In those circumstances the applicant is not entitled to relief on this ground.

#### **Adequacy of Reasons**

46. It is perhaps fair to say that initially relatively little emphasis was placed upon the reasons ground by the applicant. For example, in the legal submissions under the heading "preliminary", various arguments are summarised but there is no reference to an alleged lack of reasons. Nonetheless this ground is identified in the Statement of Grounds and at the hearing was argued with some force. The argument is of course made in a context where s.3(3)(b)(ii) provides that the Minister shall notify the person in writing of his or

her decision and of the reasons for it and, where necessary and possible, the person shall be given a copy of the notification in a language that the person understands.

47. The decision-making process climaxes in a document entitled "Recommendation of file" authored by Mr. O'Riordan, HEO, of 12 August 2020 and approved by a Kenneth Kavanagh PO and Michael Kirrane, Assistant Secretary. That provides in respect of the s.3(6) considerations as follows:

*"I have considered all of the facts arising in this case, as outlined 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. Sujit Talukder."*

48. That document in turn refers to all documentation and information on file and the submissions and explicitly refers to the representations dated 13 March 2020 submitted on behalf of Mr. Talukder by Sarah Ryan Solicitors. There is also a document entitled "Examination of file" authored by Mr. James Daly of 13 March 2020. It is accepted by counsel for the applicant that I am entitled to look at this document when considering whether adequate reasons have been given.
49. The examination of file sets out each of the subsections identified in s.3(6) and underneath each heading identifies various relevant facts in relation to the applicant. Under the heading "Section 3(6)(e) – Employment (including self-employment) Record of the Person", as I have summarised earlier in this judgment, it is noted that the applicant states he has been self-sufficient during his time in the State and he intends to remain so. It refers to him working as a chef for 2 to 3 years and his statement that he has worked at a petrol station for the past 4 years. Reference is made to a letter from his employer of 18 November 2019 which confirms that the applicant is a full-time employee of the said company and payslips from the employer dating from September to December 2019 are also referred to. It is further stated documentation relating to the applicant's employment, tax affairs, finances and residents have been submitted and taken into consideration. I have set out the entry under s.3(6)(f) on employment prospects of the applicant above.
50. Under s.3(6)(g) which refers to the character and conduct of the person both within and outside the State it is noted, *inter alia*, that the applicant made a successful application for an EU residence card as the spouse of an EU citizen which was afforded to him on 14 August 2014 but that this was revoked on 13 August 2019 on the basis of the Minister deeming his marriage to be a marriage of convenience.
51. There is a long entry under the heading relating to s.3(6)(h) – humanitarian considerations. This goes through the applicant's connections with the community and the arguments made by the applicant as to why he ought to remain in the State.

52. Under the heading in respect of s.3(6)(j) - the common good - it is stated, "*It is in the interest of the common good to uphold the integrity of the asylum and immigration procedures of the State.*"
53. Under s.3(6)(k) and the heading considerations of national security and public policy it is stated;

*"Considerations of public policy have a bearing on this case. Sujit Talukder made a successful application for an EU Residence Card as the spouse of an EU Citizen, which was afforded to him on the 14th day of August 2014. However, this was subsequently revoked on the 13th day of August 2019 on the basis of the Minister deeming his marriage to be one of convenience."*

54. In relation to the prohibition on refoulement, it is noted that no submissions relevant to the prohibition of same have been received, save that the applicant has stated he is relying upon the provisions of s.3(6) of the 1999 Act and not upon the Refugee Act 1996.

#### **Arguments of the Applicant**

55. It was argued that the reasons given in this case are inadequate. It is accepted that the common good and public policy are relevant matters, but that no indication is given as to why a conclusion has been reached that they outweigh such features of the case that may tend to support a decision not to make a deportation order.
56. Counsel for the applicant observes that the applicant arrived in the country at age 18 and he has been here for 10 years, that there is no joinder of those facts with his current position and no weight given to the fact that those years were formative years for the applicant. It is observed that the Minister does not assess what his prospects of employment are in the future and that his individual circumstances must be considered. He accepts that it is for the Minister to give due weight to the various criteria and carry out a balancing exercise and accepts the Minister has discretion in this respect but says that the decision gives no indication that there are positive factors in favour of the applicant. It is argued that the Minister failed to consider the applicant's employment prospects properly and that no reasons were given for the overall recommendation. Counsel identifies that the alleged deficit in reasons is demonstrated by the fact that his employment prospects ought to have been considered explicitly by the Minister and that the Minister ought to have made a positive conclusion that the applicant's future employment prospects must have been good.
57. On the other hand, the respondent argues the reasons are adequate and permit the applicant to understand the basis for the decision and allow him to challenge him. Cases such as *GK, Meadows* and *Mallak v Minister for Justice* [2012] IESC 59 are relied upon.

#### **Relevant Case Law**

58. The applicant relies on cases such as *EMI v DPC* [2013] IESC 34, *Rawson v Minister for Defence* [2012] IESC 26 and *Mulholland v An Bord Pleanála* [2005] IEHC 306. In *Rawson*, Clarke J. observed that a party faced with a decision that affects their rights and obligations must be entitled to assess whether they have a basis for challenging the

lawfulness of the decision in question. He notes that the way in which the general principle may impact on the facts of an individual case can be dependent on a whole range of factors not least the type of decision under question but also the basis of challenge.

59. He observes that in some cases the material on which a challenge might be considered may be obvious but notes that where the basis for challenge is concerned with the decision-making itself, then there is the potential for a greater deficit of ready information as a party would need to know something about the decision-making process itself. On the facts of that case Clarke J. concluded the trial judge was constrained to engage in a hypothesis about the basis on which the relevant superior officers must in his view have approached the matter and that this ought not to have been the case.
60. Having regard to Rawson it is important to consider the context in which this decision is made. The nature of reasons required for a deportation order under s.3 of the 1999 Act and the context in which those reasons are given has been considered on various occasions by the Supreme Court.
61. In *FP v Minister for Justice* [2002] 1 IR 164, discussing s.3(6), Hardiman J. referred to the humanitarian considerations being the personal circumstances of the applicant and the impersonal matters requiring to be considered being the common good and considerations of national security and public policy. He held the Minister was entitled to take into account the reason for the proposal to make a deportation order i.e. in that case that the applicants were in each case failed asylum seekers.

*"If the reason for the proposal had been a different one, he would have been entitled to take that into account as well. He was obliged specifically to consider the common good and considerations of public policy. In my view he was entitled to identify, as an aspect of these things, the maintenance of the integrity of the asylum and immigration systems ... In my view, having regard to the nature of the matters set out at sub-paras. (a) to (h) of that subsection, the decision could be aptly described as relating to whether there are personal or other factors which, notwithstanding the ineligibility for asylum, would render it unduly harsh or inhumane to proceed to deportation. This must be judged on assessment of the relevant factors as, having considered the representations of the person in question, they appear to the respondent. These factors must be considered in the context of the requirements of the common good, public policy, and where it arises, national security".*

62. In *G.K.*, applications were made for asylum and refused. The Minister made a decision to deport the applicants. The letter was in terms identical to the terms of the letter that had been considered in *FP v Minister for Justice* and it provided as follows;

*"The reasons for the Minister's decision are that you are persons whose refugee status has been refused and, having had regard to the factors set out in s. 3(6) of the Immigration Act, 1999, including the representations received on your behalf,*

*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."*

Hardiman J. quoted from his own decision in that case and observed that in light of that decision *"it seems indisputable that the letter was adequate in its form and, in the absence of evidence contradicting what was said in it, must be taken accurately to represent the first respondent's proceedings"*.

63. Some 10 years later, that approach was endorsed in *Meadows*. That case concerned the question of whether leave should be given in respect of a deportation order under the 1999 Act, including in respect of the adequacy of the reasons for the decision. Again, the decision to deport was expressed in the following terms:

*"I am directed by the Minister for Justice, Equality and Law Reform to refer to your current position in the State and to inform you that the Minister has decided to make a deportation order in respect of you under section 3 of the Immigration Act, 1999. ....*

*In reaching this decision the Minister has satisfied himself that the provisions of section 5 (prohibition of refoulement) of the Refugee Act 1996 are complied with in your case.*

*The reasons for the Minister's decision are that you are a person whose refugee status has been refused and, having had regard to the factors set out in section 3(6) of the Immigration Act, 1999, including the representations made on your behalf 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 this state."*

64. Murray C.J., in discussing the Minister's decision under s.3(6), observed that the Minister has been conferred with a broad discretion in this regard:

*"He has to balance, on the one hand, the personal circumstances and other matters referred to in ss. 6 of s. 3 and the common good, public policy including the integrity of the asylum system, on the other. In virtually every case there will be some humanitarian consideration and, unlike s. 5, even if he is of the opinion that there are humanitarian considerations which tend to support a claim that a deportee be permitted to remain, even temporarily, he is not bound to accede to such a request since he has to balance those considerations with broader public policy considerations which may not be personal to the person concerned."*

65. In *Meadows*, Fennelly J. observed at paragraph 77 that there were two distinct aspects to the Minister's decision, the first being refoulement where he concluded inadequate

reasons had been given and the second being the refusal having regard to the factors under s.3(6). In respect of the latter, he observed at paragraph 77 as follows:

*"I am satisfied that the second and more general aspect of the decision falls within the principle of the decision of this Court in F.P. v Minister for Justice, Equality and Law Reform [2002] 1 I.R. 164. The reasons given for the decision of the Minister in that case, which are quoted in the preceding paragraph, were verbatim the same as in the present case. Insofar as the general reasons are concerned, it seems to me clear that the decision in F.P. should be followed. There is no ground for making any distinction between the two cases."*

66. In those circumstances, the appellant was found to have established substantial grounds exclusively in respect of that aspect of the decision which dealt with her complaint of refoulement. Crucially in the context of this application, there was no leave granted in respect of the argument on lack of adequate reasons in respect of the s.3(6) decision.
67. Some 10 years later again, the Minister has employed the same form of words in relation to the deportation of the applicant. That form of words has been accepted as sufficient on at least three different occasions by the Supreme Court. That alone makes it very difficult for the applicant to succeed on this ground.
68. Moreover, in this case, when one looks at the reasons as gleaned from all relevant documentation there is no problem of the sort identified in Rawson whereby the trial judge had to engage in a hypothesis as to how the respondent approached the matter. Here the approach of the respondent is plain. The respondent clearly had regard to the significant amount of material placed before them by the applicant's solicitors in relation to the so called "personal factors". On the other hand, under the s.3(6)(k) heading – considerations of national security and public policy – the respondent referred explicitly to the fact that the applicant's marriage, which had provided a basis for him to obtain a residence card for 5 years, had been found to be a marriage of convenience and no challenge was made to that finding by the applicant. That matter is clearly one that goes to considerations of public policy and the common good. It is hard to avoid the conclusion that the revocation of his residence card because of the marriage of convenience was a significant factor in the refusal of the Minister to give him permission to remain. The fact that the applicant has expressed, in the context of the deportation process, that he does not agree that his marriage was one of convenience is effectively irrelevant in circumstances where he did not challenge that finding and therefore the Minister is entitled to refer to the revocation in this regard.
69. In summary, this is not a case where the reasons were obtuse or difficult to understand in relation to the balancing exercise. When one tests whether the core requirements for the provision of reasons are met i.e. does the applicant know why the decision is made and has he sufficient information to challenge the decision, the answer is in the affirmative. The applicant knows that the Minister considered material in respect of each of the statutory criteria, including those which specifically referred to his own personal circumstances, because it was set out in the examination of file. He is aware the Minister

has emphasised the revocation of his EU residence card as the spouse of an EU citizen following a decision by the Minister that his marriage was one of convenience. He knows that the Minister has identified the public policy and common good considerations as outweighing the personal considerations identified by him. He has enough information to challenge the decision.

70. Finally, bound up in the reasons complaint is an argument that inadequate reasons were provided as regards the weight to be given to the matters listed in s.3(6) of the 1999 Act. As identified above, the extent of the duty to give reasons and the nature of the reasons required will vary according to the circumstances of each case, including the nature of the decision and the nature of the complaint made. Here the Minister is exercising an executive function in deciding whether to make a deportation order in respect of a specified person. She is, under s.3(6), obliged to have regard to identified matters when so doing. That is the extent of her obligation. The weight to be given to each factor is a matter within her discretion.
71. In those circumstances, where the complaint is that insufficient weight has been given to a particular factor, the applicant is not entitled to a discursive analysis of why the Minister considered, in relation to each of those factors, that they were outweighed by other factors. Rather the applicant is entitled to know that the Minister considered each of the matters. That obligation has been discharged by the detailed summary of the factors identified by the applicant under each of the headings of s.3(6) in the examination of file document.
72. Moreover, as I identify above, the form of words used in the recommendation is one that has been upheld by the Supreme Court in *Meadows* and in the circumstances, that form of words, together with the detailed identification of the matters considered by the Minister under each of the statutory headings, is a sufficient statement of reasons in respect of the evaluation of the statutory factors.
73. In the premises I consider that the applicant's challenge fails on this ground.

**Exercise of the Court's Discretion to Refuse Relief**

74. The respondent has submitted that even if I consider the applicant has made out a basis for relief, I should refuse same in the exercise of my discretion on the basis that the applicant is a person in respect of whom a decision has been made that he participated in a marriage of convenience. It is said that he is therefore in breach of the duty of candour and that he has disentitled himself to relief in the context of judicial review. It is accepted by the respondent that this jurisdiction must be exercised sparingly in a cautious manner.
75. I think that application is misconceived. As I identify above, the Minister has already taken into account the applicant's marriage of convenience in making the deportation order. The applicant is entitled to judicially review that decision and the conditions governing such a review are established by statute. The statutory provisions do not exclude persons who have concluded marriages of convenience from the remedy of judicial review. Accordingly, I should not deny them access to the remedy by the back

door through an exercise of my discretion. To do so would in effect amount to the Court imposing a restriction on the availability of judicial review to an identified group of people, where the legislature has not sought to do so.

76. The position would of course be different if a person who had entered into a marriage of convenience displayed a lack of candour in the course of a judicial review. Then the normal entitlement of a court to refuse relief in the exercise of its discretion would operate. But here there is no allegation that in the context of these proceedings there was a lack of candour, but rather that the applicant has displayed a lack of candour in his previous actions.
77. In summary, I refuse this application for two reasons. First, the applicant's conduct in entering into a marriage of convenience is part of the reason why he is being deported. He is entitled to review that decision by way of judicial review. Second, there has been no lack of candour in the applicant's conduct in these judicial review proceedings. In the premises, he has not disentitled himself to relief.

**Conclusion**

78. The applicant has succeeded on the sole ground that the Minister failed to have appropriate regard to her obligation to consider the employment prospects of the applicant under s.3(6)(f) for the reasons set out in this judgment.
79. Accordingly, I grant an order of *certiorari* of the deportation order of 16 September 2020 on the basis of the ground identified at paragraph 2 of the Statement of Grounds.
80. I will hear submissions on whether an order of remittal or any other orders are required at a time to be arranged with the parties and will hear submissions on costs.