

**APPROVED**

**[2023] IEHC 332**



**THE HIGH COURT  
JUDICIAL REVIEW**

**Record No.: 2021/223 JR**

**BETWEEN:**

**BALJEET SINGH**

**Applicant**

**-and-**

**THE MINISTER FOR BUSINESS, ENTERPRISE AND INNOVATION**

**Respondent**

**Record No.: 2021/224 JR**

**BETWEEN:**

**JUNAID AHMAD**

**Applicant**

**-and-**

**NO REDACTION REQUIRED**

**JUDGMENT of Mr. Justice Rory Mulcahy delivered on the 23<sup>rd</sup> day of June 2023**

**Introduction**

1. In these judicial review proceedings, which were heard together, the Applicants seek Orders of *certiorari* quashing the decisions of the Minister for Business, Enterprise and Innovation (“**the Minister**”) in their respective cases refusing their applications for a Critical Skills Employment Permit.
2. Under the Regulations, Critical Skills Employment Permits are available in respect of certain classes of employment. Although the Applicants each plead that inadequate reasons were given for the decision, at the hearing of the action it was made clear that the decisions were being challenged on the sole basis that the decision-maker acted irrationally in concluding that the jobs, in respect of which the Applicants had applied for work permits, fell into a category for which Critical Skills Employment Permits were not available.

**Legislative Background**

3. The statutory scheme governing the grant of employment permits is contained in the Employment Permits Act 2006 (as amended) (“**the 2006 Act**”). Section 4 of the 2006 Act provides for the making of an employment permit application. Section 12 provides for the conditions under which the Minister can refuse an employment permit application. The basis of the Minister’s refusal in the present cases is section 12(3):

*Subject to sections 20A(5) and 20B(5), The Minister shall refuse to grant an employment permit if the granting of it would contravene regulations under section 14 in force at the time the decision on the application for the permit is made.*

4. Section 14 of the 2006 Act provides that the Minister may make regulations providing for different classes of employment permits and imposing different requirements in respect of each.
5. The Employment Permits Regulation 2017 (S.I. 95/2017) (as amended) (“**the 2017 Regulations**”) are made under section 14 of the 2006 Act. The decisions in this case reach turned on the question of whether the Applicants satisfied the requirements of Regulation 18(1) which provides:

*18. (1) The employments for which a Critical Skills Employment Permit may be granted are—*

*(a) the employments listed in Schedule 3 for which the minimum annual remuneration is €32,000 and in respect of which the minimum hourly rate of remuneration is €15.78, and*

*(b) all other employments, other than the employments listed in Schedule 4, for which the minimum annual remuneration is €64,000 and in respect of which the minimum hourly rate of remuneration is €31.56.*

6. The schedules to the Regulation contain different occupational codes that are used to classify occupations and determine which schedule they fall under and, hence, whether they fall within Schedule 3 for the purpose of Regulation 18(1)(a). The Standard Occupational Classification 2010 (“**SOC**”) forms the basis of these codes, and this contains a more detailed description of the occupational descriptions. The list of jobs which at any given time are eligible for a Critical Skills Employment Permit is described in the Respondent’s decisions as the Critical Skills Occupation List.
7. Where an applicant for an employment permit is unsuccessful under section 12, they are entitled to a review of the Minister’s initial refusal under the appeal mechanism provided for under section 13 of the 2006 Act.

## **Factual Background**

8. Both judicial review applications concern Critical Skills Employment Permit applications that were for positions which fell below the income threshold in Regulation 18 of €64,000. Accordingly, in order to satisfy the requirements for a permit, it was necessary that the employment position was listed in Schedule 3 to the Regulations.

### *The first-mentioned proceedings*

9. The Applicant in the first proceedings (Record No.: 2021/223 JR), Mr Baljeet Singh, (“**the first Applicant**”) is an Indian national who has resided in Ireland on a student permission on a stamp 1 visa permission since February 2013. He received an offer of employment from KPR Pizza Limited trading as Apache Pizza Leixlip for the position of Business and Financial Project Manager in Leixlip, County Kildare on a fixed-term two year contract with a gross salary of €32,500.
10. In early October 2020, an application was made by an agent for the first Applicant to the Respondent seeking a Critical Skills Employment Permit. In his application form, the ‘main functions’ of the job were described as:

*“Review financials to ensure they are being delivered on time, making budget and financial plans. Review and manage project budgets. Manage and analyze all financial and investment risks, Advise of Company expansion plans and budgetary. Cash flow management and assess the quality of financial plans Financial reports.”*

11. By e-mail dated 9 November 2020, that application was refused by a staff member in the Employment Permits Section of the Minister’s department, described on affidavit as the initial processor. The initial processor recorded in the refusal that:

*“It appears from the information received that the minimum annual remuneration under €64,000 and the category of employment is not one of the employment’s [sic] specified in regulation 18(1)(a) and Schedule 3 of the Employment Permits Regulations 2017 (S.I. No. 95 of 2017) (as amended) eligible for a Critical Skills Employment Permit with this level of remuneration. Please note that the occupation is not on the Critical Skills Occupation List. In*

*line with section 12(3) of the Employment Permits Act 2006 (as amended) an employment permit cannot be issued.”*

12. The refusal of 9 November 2020 recorded that an applicant may request a review within 28 days under section 13 of the Employment Permits Act 2006 (as amended). The first Applicant availed of that review on 11 November 2020 and made a submission to the reviewing officer that the application should be considered under SOC number 2424 which is described as “Business and financial project management professionals specializing in finance and investment analytics, risk analytics, credit, fraud analytics or related and relevant specialist skills, qualifications or experience”. That submission also addressed issues which do not arise for consideration on this application.
13. By e-mail dated 23 November 2020, a Reviewing Officer in the Employment Permits Section, Dermot Kavanagh refused the review:

*“I understand the application was refused on the basis that it appears from the information received that the minimum annual remuneration is under €64,000 and the category of employment is not one of the employment’s [sic] specified in regulation 18(1)(a) and Schedule 3 of the Employment Permits Regulations 2017 (S.I. No. 95 of 2017) (as amended) eligible for a Critical Skills Employment Permit with this level of remuneration. Please note that the occupation in question “Business and Financial Project Manager” appears to fall under soc code 3534 finance and investment analysts and advisers where financial adviser, financial analyst and financial consultant are some of the jobs related to this soc code and therefore the role is not on the Critical Skills Occupation List. In line with section 12(3) of the Employment Permits Act 2006 as amended, it was not possible to issue an employment permit.*

*[...]*

*Please be advised in general, occupations connected to restaurants and take-aways are currently ineligible for Critical Skills, General, Intra-Company Transfer and Contract for Services Employment Permits”*

14. At this juncture, it is useful to pause to explain the codes assigned and the detail for same provided in SOC 2010, in respect of SOC code 2424 (Business and Financial

Project Manager), that the first Applicant suggests is the most appropriate category for his occupation, the following description is found:

*2424 BUSINESS AND FINANCIAL PROJECT MANAGEMENT PROFESSIONALS*

*Job holders in this unit group manage and oversee major projects across all sectors of modern industry, commerce and the public sector, in areas such as e-commerce, business analysis, finance, product development, marketing, human resources.*

*TYPICAL ENTRY ROUTES AND ASSOCIATED QUALIFICATIONS*

*Entry may be via a degree or postgraduate qualification in project management or a subject relevant to the particular sector or via significant relevant work experience in that sector.*

*TASKS*

- *finds out what client or company wants to achieve;*
- *agrees timescales, costs and resources needed;*
- *draws up a detailed plan for how to achieve each stage of the project;*
- *selects and leads a project team;*
- *negotiates with contractors and suppliers for materials and services;*
- *ensures that each stage of the project is progressing on time, on budget and to the right quality standards;*
- *reports regularly on progress to the client or to senior managers.*

*RELATED JOB TITLES*

*Chief knowledge officer*

*Contracts manager (security services)*

*Project manager*

*Research support officer*

15. SOC code 3534 is the following:

*3534 FINANCE AND INVESTMENT ANALYSTS AND ADVISERS*

*Job holders in this unit group advise customers, who may be individuals, companies or specialist groups, on the purchase of investments, insurance, mortgages, pensions and other financial services and products.*

#### *TYPICAL ENTRY ROUTES AND ASSOCIATED QUALIFICATIONS*

*There are no formal academic requirements although entrants normally possess GCSEs/S grades and a degree in a relevant subject is sometimes required. Training may be undertaken inhouse or entrants may attend courses run by professional institutions. Registration with a regulatory authority is required in some positions.*

#### *TASKS*

- predicts the likely long- and short-term future performance of securities and other financial products and advises upon what will be an appropriate investment for their clients;*
- analyses the financial position of clients, taking into account outgoings, dependents and commitments.*
- advises on the relative merits of pension schemes, insurance policies and mortgages that best meet the needs of clients given their personal circumstances;*
- monitors information on the socio-economic environment and interprets the implications of such information for their clients;*
- prepares summary reports of findings for fund managers;*
- keeps up to date with financial products, legislation and requirements for compliance with the relevant regulatory authority;*
- identifies and attracts new clients by arranging visits and explaining the benefits of financial products.*

#### *RELATED JOB TITLES*

*Financial adviser*

*Financial analyst*

*Financial consultant*

*Mortgage adviser*

*Pensions consultant*

16. The first Applicant sought leave to apply for judicial review on 22 March 2021 of the review decision of the Minister dated 20 November 2020 seeking an order of *certiorari* grounded on an affidavit of the first Applicant. Meenan J directed that the leave application be made on notice to the Respondent. The first Applicant was granted leave to amend his statement of grounds to correct what are described as clerical errors, by order of the Court on 1 February 2022. Following a contested hearing, leave to apply by way of application for judicial review was granted by the Court (Hyland J) on 14 November 2022.
  
17. The Minister filed a statement of opposition on 15 November 2022 grounded on the affidavit of Dermot Kavanagh of the Department of Enterprise, Trade and Employment who was the reviewing officer. In the course of his affidavit, Mr Kavanagh set out the decision-making process and explained that the decision-maker at first instance had considered that the position for which the Applicant sought a permit fell under SOC Code 3545, a business development manager. He stated that “*on reflection this was perhaps a more appropriate SOC code as it described a business development manager*” but pointed out that whether the SOC code he had applied was appropriate, or that chosen by the initial decision-maker, neither were on the Critical Skills Occupation List.

*The second-mentioned proceedings*

18. The second set of proceedings concerns Mr Junaid Ahmad (“**the second Applicant**”) a national of Pakistan residing in Ireland since 2014 on the basis of a stamp 1G visa permission on the basis that he was undertaking a course of study in Ireland. The second Applicant received an offer of employment from RJC Retail Limited for the position of Business and Financial Project Manager in Grand Canal Square, Dublin 2 on a fixed-term two year contract and with a salary of €33,800 per annum.
  
19. In early October 2020, an application was made by an agent for the second Applicant for a Critical Skills Employment Permit to the Respondent. In that application the main functions of the job are described as:



*“Review financials to ensure they are being delivered on time, making budget and financial plans. Review and manage financial projects budgets. Manage and analyze all financial and investment risks, as plans and polices. Review and assess the quality of all financial plans and Preparation of budgets and Financial reports.”*

20. By e-mail dated 9 November 2020, that application was refused by a staff member in the Employment Permits Section of the Minister’s department, described on affidavit as the initial processor. The initial processor recorded in the refusal that:

*“It appears from the information received that the minimum annual remuneration under €64,000 and the category of employment is not one of the employment’s [sic] specified in regulation 18(1)(a) and Schedule 3 of the Employment Permits Regulations 2017 (S.I. No. 95 of 2017) (as amended) eligible for a Critical Skills Employment Permit with this level of remuneration. Please note that the occupation is not on the Critical Skills Occupation List. In line with section 12(3) of the Employment Permits Act 2006 (as amended) an employment permit cannot be issued.”*

21. The refusal of 9 November 2020 recorded that an applicant may request a review within 28 days under section 13 of the Employment Permits Act 2006 (as amended). The second Applicant availed of that review on 11 November 2020 and made a submission that stated the application should be considered under SOC number 2424 that describes “Business and financial project management professionals specializing in finance and investment analytics, risk analytics, credit, fraud analytics or related and relevant specialist skills, qualifications or experience”.

22. By e-mail dated 20 November 2020, a Reviewing Officer in the Employment Permits Section, Dermot Kavanagh refused the review:

*“I understand the application was refused on the basis that it appears from the information received that the minimum annual remuneration is under €64,000 and the category of employment is not one of the employment’s [sic] specified in regulation 18(1)(a) and Schedule 3 of the Employment Permits Regulations 2017 (S.I. No. 95 of 2017) (as amended) eligible for a Critical Skills*

*Employment Permit with this level of remuneration. Please note based on the information received with the application and at the appeal stage it appears that the occupation in question “Business and Financial Project Manager” falls under soc code 3534 finance and investment analysts and advisers where financial adviser, financial analyst and financial consultant are some of the jobs related to this soc code and therefore the role is not on the Critical Skills Occupation List. In line with section 12(3) of the Employment Permits Act 2006 as amended, it was not possible to issue an employment permit.”*

23. As in the case of the first applicant, the reviewing officer refused on the basis that he determined that the application had to be refused pursuant to section 12(3) of the 2006 Act.
24. The second Applicant sought leave to apply for judicial review on 22 March 2021 of the review decision of the Minister dated 20 November 2020 seeking an order of *certiorari* grounded on an affidavit of the Applicant. The Application was shortly out of time by that date. Meenan J directed that the leave application be made on notice to the Respondent. The second Applicant was granted leave, on consent, to amend his statement of grounds by order of the Court on 1 February 2022 to correct what were described as clerical errors. Leave to apply by way of application for judicial review was granted by Hyland J on 14 November 2022. The Minister filed a statement of opposition on 15 November 2022 grounded on the affidavit of Dermot Kavanagh of the Department of Enterprise, Trade and Employment who was the reviewing officer.

### **Submissions of the parties**

25. The first and second Applicants accept that the determination of whether the posts which each of them applied for is on the Critical Skills Occupation List is a matter for the Respondent and that they cannot simply ask the Court to say that the Respondent was wrong to conclude that the posts that they applied for were not on the list.
26. Somewhat counter-intuitively, however, they each contend that the Court *can* decide that the decisions are unlawful because the positions they applied for, they say, very clearly do not fall under the SOC Code which the Respondent believed they did. They

argue that the decisions that the positions fell within SOC Code 3534 were irrational in the sense that no reasonable decision-maker could have arrived at those decisions on the basis of the material before the Respondent. As the Respondent's decisions are expressed in terms which suggests that he relied on this incorrect classification in determining that the positions were not on the Critical Skills Occupation list, those decisions should be quashed.

27. The Applicants also argue that the Respondent has not given reasons for his conclusions that the jobs for which they sought permits fell under SOC Code 3534. But if their arguments as to the irrationality of this conclusion are correct, then this adds nothing to their case. A decision that is irrational is one for which, axiomatically, no adequate reasons have been given.
28. The Respondent argues that the Applicants' cases are an invitation to the Court to engage in the merits of the Respondent's decisions. He argues that the determination of which SOC Code a particular occupation falls under is a decision for the Respondent and that, in effect, the Applicants are inviting the Court to participate in a merits-based review of the decisions which is impermissible in judicial review proceedings. He argues that it was open to the Minister to conclude that the positions at issue should be categorised under SOC Code 3534.
29. The Respondent further argues that even if the Respondent was wrong to categorise the positions under SOC Code 3534, that did not affect the lawfulness of the decisions. The decisions were made within jurisdiction and the Respondent was entitled to conclude that the positions were not on the Critical Skills Occupation List and only if *that* conclusion was irrational should the Court interfere. Since the Applicants do not contend that it was irrational for the Respondent to conclude that the positions did not fall within SOC Code 2424 (or any other occupation on the List), the Court should not interfere with the Respondent's decisions.
30. Both parties refer to the decision in **Olaneye v. Minister for Business, Enterprise and Innovation** [2019] IEHC 553 where Donnelly J held that in the light of the extent of information provided by the SOC 2010 and the employment permit information provided on the Minister's website that the reasons provided in that case were sufficient. The Applicants note, however, that Donnelly J did state that it was open to

the applicant in that case to challenge a decision on the basis of the code chosen at paragraph 50 of her judgment:

*“[...] Furthermore, he could have challenged the decision that his job role was not included in the catch-all phrase of SOC 2139 “all other ICT professionals not elsewhere classified” from the information provided to him. The reason why the minister did not give the wide interpretation for which the applicant contended was explicitly set out in the clarification on the website, namely that in SOC 2010, SOC 4 was directed at “professional” occupations and high level management position in corporate enterprises which might normally require a degree and/or substantial work experience. If the applicant considers that an incorrect interpretation, he may challenge it by way of judicial review.”*

## **Discussion**

31. The Respondent’s argument that the Court should dismiss the Applicants’ cases on the grounds that they are ‘merits-based’ challenges is certainly attractive. Any argument that an administrative decision should be quashed on the basis that it is plainly incorrect must necessarily be treated by a Court with a certain scepticism.
32. Clarke J (as he then was) outlines the approach that courts take to judicial review applications that ask the courts to review the substance of the decision in **Sweeney v District Judge Fahy [2014] IESC 50**, a case which concerned a judicial review of a criminal conviction,. He summarises a number of useful principles at para. 3.16:

*“First, judicial review is concerned with the lawfulness rather than the correctness of the decision sought to be challenged. Second, where the jurisdiction of the relevant decision-maker to embark on the process of making the relevant decision is either not challenged or is established, an error by the decision-maker in reaching the necessary conclusions to determine the appropriate decision to be made does not, of itself, necessarily render the decision unlawful. At a minimum, it requires a fundamental error to raise the prospect that the decision is not merely incorrect but also unlawful. It is unnecessary, for the purposes of this case, to attempt any exhaustive examination of what might be said to be the type of error which is sufficiently fundamental to render a decision unlawful in all types of cases. For present purposes, it can at least be said that issues concerning the adequacy of evidence before a decision-maker (as opposed to a complete absence of evidence of a necessary matter) will not render a decision unlawful.”*

33. However, it is clear that there are circumstances in which judicial review is concerned with the merits of the decision. In **NM (DRC) v Minister for Justice, Equality and**

**Law Reform [2017] IECA 217**, Hogan J described the scope of the remedy of judicial review when considering whether it was an adequate remedy for the purpose of protecting rights derived from EU law. He noted the following (at paragraph 53):

*“While the judicial review court cannot review the merits of the decision, it can nonetheless quash for unreasonableness or lack of proportionality (as in Meadows) or where the decision simply strikes at the substance of constitutional or EU rights: see, e.g., S. v. Minister for Justice [2011] IEHC 92; O’Leary v. Minister for Justice [2012] IEHC 80. The court can further examine the conclusions reached and ensure that they follow from the decision-maker’s premises. The court can further quash for material error of fact.”*

34. A decision is unreasonable or irrational where it does not flow from its premises or where there is no relevant material before the decision-maker to support it. **State (Keegan) v. Stardust Victims Compensation Tribunal [1986] IR 642** is authority for the first formulation.

*“I think in any event that it is only a particular aspect of logic that could be applicable in testing the validity of a decision when it is subjected to judicial review on the ground of unreasonableness, namely, whether the conclusion reached in the decision can be said to flow from the premises. If it plainly does not, it stands to be condemned on the less technical and more understandable test of whether it is fundamentally at variance with reason and common sense.”*

35. The “no relevant material” threshold was the formulation preferred in **O’Keeffe v. An Bord Pleanála [1993] 1 IR 39**:

*“I am satisfied that in order for an applicant for judicial review to satisfy a court that the decision-making authority has acted irrationally in the sense which I have outlined above so that the court can intervene and quash its decision, it is necessary that the applicant should establish to the satisfaction of the court that the decision-making authority had before it no relevant material which would support its decision.”*

36. This was expanded upon by Clarke J (as he then was) in some detail in **Sweetman v An Bord Pleanála [2008] 1 IR 277**:

*“...O’Keeffe v. An Bord Pleanála irrationality only arises in circumstances where the decision-maker properly considered all of the matters required to be taken into account and did not take into account any matters which should not. The limitations inherent in the O’Keeffe v. An Bord Pleanála irrationality test, therefore, only arise in circumstances where all, but only, those matters*

*properly considered were taken into account and where the decision-maker comes to a judgment based on all of those matters. It is in those circumstances that the court, by reason of the doctrine of deference, does not attempt to second guess the judgment of the person or body concerned provided that there was material for coming to that decision. In particular the court does not attempt to re-assess the weight to be attached to relevant factors.”*

37. In the recent Supreme Court judgment of **Burke v Minister for Education and Skills [2022] IESC 1; [2022] ILRM 73**, at paragraph 91 of his judgment, O’Donnell CJ confirmed that “[t]here is little doubt that in determining reasonableness a court must apply the *O’Keeffe/Keegan* test”.

38. It was, in my view, open to the Respondent to have concluded, on the basis of the materials before him that the positions in question did not fall under SOC Code 2424, as the Applicants claimed, or were not otherwise on the Critical Skills Occupation List. Had the Applicants contended otherwise in these proceedings, it would have been straightforward to reject their claims. The Respondent argues that it is for an applicant seeking a permit to satisfy the Minister that the position for which a permit is sought is on the Critical Skills Occupation List. I agree. If the Respondent is not so satisfied, then he is entitled to reject an application. On the material before the Respondent in these cases, it would have been open to the Respondent to conclude he was not so satisfied.

39. However, that was not the basis of the Respondent’s decisions in these cases. Rather, as appears from his decisions, he concluded that the positions fell within SOC Code 3534 *and therefore* were not on the Critical Skills Occupation List. Although the Respondent was not obliged to ‘assign’ a SOC Code to a position for the purpose of deciding whether the position was on the List, where the decision is entirely premised on a conclusion that a particular Code applies, there must be a rational basis for concluding that that Code applies.

40. In these cases, it seems to me that the Applicants are correct that the Respondent’s conclusion that the positions in question fell within SOC Code 3534 was irrational. Having considered the evidence before the decision-maker regarding what the positions in question involved and SOC Code 3534, I can identify no basis for the conclusion that the positions fell within that Code, nor is any given by the decision-maker.

41. SOC Code 3534 relates to jobs which involve advising “*customers, who may be individuals, companies or specialist groups, on the purchase of investments, insurance, mortgages, pensions and other financial services and products.*”
42. There is nothing in the description of either position in respect of which the applications for Critical Skills Employment Permits were made which involved the Applicants providing their prospective employers with such advice and no reason has been identified for supposing the positions might involve the giving of such advice.
43. The fact that the actual decision-maker has very fairly and properly acknowledged on affidavit that there was a more appropriate SOC Code for the positions in question merely serves to reinforce the view that there was no material before the decision-maker capable of justifying the conclusion that SOC Code 3534 was relevant.
44. It must be observed that the Minister had contended that the expertise of the reviewing officer must be regarded as that of a specialist decision-maker. With respect to the experience of the civil servant in question, it does not seem to me that a civil servant examining an application and using a code to categorise it, with no technical analysis or discernible expertise added to the mix, is a situation which attracts a particularly high standard of curial deference, still less so, where that decision-maker frankly admits that he has likely erred.
45. Had the Respondent’s decisions that the jobs were not on the Critical Skills Occupation List been arrived at independently of his conclusion that they fell under SOC Code 3534, then I would have accepted the Respondent’s argument that any error in considering that that was the applicable code did not render the decisions unlawful (see **Murtagh v An Bord Pleanála [2023] IEHC 345** for a discussion on the circumstances in which an error in one part of a decision renders the entire decision void).
46. In this case, it is clear that the conclusion in relation to the major premise – that the jobs were not on the list – flowed from the irrational minor premise – that the jobs fell under SOC Code 3534. The decisions are therefore vitiated by that irrational premise and must be quashed.

47. In the circumstances, I propose making Orders quashing each decision and remitting them to different review officers for fresh consideration in light of this judgment.
48. I will list both proceedings for mention on 7 July 2023 for the purpose of addressing any applications in relation to the costs of the proceedings.