[2024] IEHC 548

THE HIGH COURT

JUDICIAL REVIEW

[2023/122JR]

BETWEEN:

HAESEO YOON

APPLICANT

AND

THE MINISTER FOR ENTERPRISE, TRADE AND EMPLOYMENT

RESPONDENT

Judgment of Mr. Justice Barry O'Donnell delivered on the 18th day of September 2024.

INTRODUCTION

1. In these judicial review proceedings, the applicant seeks to challenge a decision made by an officer of the respondent pursuant to the provisions of the Employment Permits Act 2006, as amended, and regulations made pursuant to that legislation. In the decision, an earlier initial refusal of a general employment permit to work as a tattoo artist was reviewed, and the refusal upheld.

2. The applicant made two main arguments. First, that the officer acting for the respondent fettered her discretion, or failed to recognise her discretion, by not engaging properly with the

substance of the reasons why the applicant said she was entitled to the permit. Second, it was argued that the officer erred by not providing adequate reasons for the decision. A third ground was argued, albeit with an acceptance that it was not the strongest point, that the decision was unreasonable.

3. For the reasons set out in this judgment the court has concluded that the applicant is entitled to relief sought.

LEGISLATIVE BACKGROUND

4. At the hearing of the application, the parties were in agreement that the core issues concerned the operation of s.12(3) of the Employment Permits Act 2006, as amended (*the 2006 Act*) and S.I. 95 of 2017, the Employment Permits Regulations 2017 (*the 2017 Regulations*).

5. The underlying legislative scheme is reasonably detailed, and some aspects of that scheme ought to be set out in order to contextualise and explain the task that the respondent's officer was required to carry out. It should be noted that the applicant is a citizen of the Republic of Korea, and this is not a case involving skills or occupations that have been identified by the government as necessary for the labour market.

6. Section 2 of the 2006 Act amends s.2 of the Employment Permits Act 2003 by substituting subsections which make it clear that a foreign national is not entitled to enter employment or to be employed in the State, except "*in accordance with an employment permit granted by the Minister under section 8 of the Employment Permits Act 2006 that is in force.*"

7. The overall purposes for which employment permits may be granted are set out in s.3(A) of the 2006 Act. In broad terms, the purposes are to ensure that appropriately skilled foreign nationals can be employed where their skills are required for certain identified sectors where it is not possible to recruit appropriately skilled persons or where there is a shortage of such workers.

8. Section 8(1) provides the Minister with a discretion to grant an employment permit. The manner in which that discretion is to be exercised and the factors to be considered are set out in detail at various points in the legislation. In addition to setting out the criteria to be considered in deciding whether an employment permit should be granted and the process by which such an application must be made, the 2006 Act expresses the legislative intention that there are situations where an employment permit must not be granted.

9. According to s.12(3), the Minister *must* refuse to grant an employment permit if the granting of it would contravene regulations made under s.14 of the 2006 Act. If such a refusal is made, the Minister is required to notify, in writing, the applicant of the decision and the reasons for it.

10. The 2017 Regulations came into force on 3 April 2017 and set out detailed regulations for applications for the grant of an employment permit among other matters. The Regulations distinguish between various categories of employment permit. Part 6 of the 2017 Regulations addresses "*General Employment Permits*". Regulation 29 makes it clear that the occupations for which a General Employment Permit may be granted are employments which meet certain criteria set out in that regulation, *other than the employments listed in schedule 4*.

11. Reading Regulation 29 in connection with s.12(3) of the 2006 Act, if an employment is listed in schedule 4 of the 2017 Regulations, the Minister must not grant an applicant a General Employment Permit for that category of employment. Hence, the overall task of the Minister – as conducted by the relevant officers – is (a) to determine whether the class of occupation in respect of which an application has been made for a General Employment Permit is listed in schedule 4, (b) if there is such a determination then the application must be refused and (c) if the determination is that the occupation is not listed, then the application must be considered by reference to the other criteria in the legislation. Viewed in that light, the matters in respect of which some element of determinative judgment or decision is required relates in the first instance to whether the occupation is listed in schedule 4 or not.

12. That task may not be quite as straightforward as appears. This is because, for understandable reasons, it is not possible to list each and every possible occupation in respect of which a person may seek employment. Schedule 4 sets out in tabular form an extensive list of categories of employment. In some cases, it will be reasonably clear that an employment falls within those categories, for instance, employment permits cannot be granted for dispensing opticians. In other cases, it may not be immediately apparent whether or not the employment falls within one of the categories for which employment permits may not be granted. That issue is addressed by using as guidance a further form of classification: the Standard Occupational Classification system, known as *SOC 2010*. That is a form of classification system operated by the United Kingdom Office of National Statistics. The SOC 2010 classifies roles into occupational categories in which there are major groups broken down by sub-major groups followed by minor groups and unit groups.

13. Schedule 4 of the 2017 Regulations sets out the employments in respect of which "*an employment permit shall not be granted*". Schedule 4 is set out in tabular form and the column headings including '*SOC – 3*', '*Categories of Employment*', '*SOC – 4*' and '*Employment*'. The Regulations make clear that "*SOC – 3*" and "*SOC – 4*" refer to applicable sub-groups in SOC 2010. A large number of categories of employment are listed in schedule 4, and for the purposes of this case, the relevant section can be set out as follows:-

SOC – 3	**Categories of Employment**	**SOC – 4**	**Employment**
622	Hairdressers and related services	6221	Hairdressers, Barbers and related occupations
		6222	Beauticians and related occupations

14. Finally, by way of explaining the legal background, the parties at the hearing agreed that the court should be furnished with a document from the UK Office of National Statistics setting out a breakdown of SOC-4 code 6222 – *Beauticians and related occupations*. That document sets out under the heading "*Job description*": "*Beauticians and related workers give facial and body beauty treatments, apply cosmetics and dress wigs.*" Under the sub heading "*Entry requirements of this job*" – the document sets out "*there are no minimum academic requirements for entry, though some colleges require candidates to possess GCSE's/S grades. NVQ's/SVQ's in beauty therapy are available at levels 1, 2 and 3. Professional qualifications*

are also available." Under the sub-heading "*Tasks required by this job include;*", the following is set out:-

- *discusses clients requirements, analyses and advises client on appropriate skin care, and applies treatments to the face or body;*
- *massages scalp, face and other parts of the body and carries out spray tanning;*
- *uses waxing, threading, sugaring and other epilation techniques to remove any unwanted body hair;*
- *cleans, shapes and polishes finger and toe nails, applies nail extensions;*
- *applies make-up to hide blemishes or enhance facial features and advises clients on skin care and makeup techniques;*
- *performs specialist treatments for conditions such as acne, applies skin rejuvenation therapies;*
- *recognises problems and refers clients to medical practitioners if appropriate;*
- *advises clients on diet and exercise to assist in weight loss and slimming;*
- *maintains clients records, sells and advises on cosmetic products and services, and ensures appropriate health and safety issues are addressed."*

15. Of most significance to the issues in the case, the following is set out in the final part of the document under the heading "*Jobs related to this code*": -

- *Beautician*
- *Beauty Therapist*
- *Nail Technician*
- *Tattooist*

16. Therefore, it can be seen that the granting of employments permits is a highly regulated area, and for persons in the position of the applicant there is no prima facie entitlement to an employment permit. The applicant, however, is entitled to be satisfied that her application is considered properly and that a proper determination is made in respect of her application. Likewise, the respondent is required to consider the application properly and, where there is an apprehension that a particular job falls into a category for which a permit cannot be granted, to make a determination as to whether that, in fact, is the case. The court in an application for judicial review is not concerned with the merits of the decision but rather whether the decision was reached lawfully.

THE PLEADINGS AND EVIDENCE

17. These proceedings were commenced by way of an ex parte application made to the court initially on 14 February 2023. By order dated 24 April 2023, the court granted the applicant leave to apply for judicial review. The following reliefs are sought: -

> "*1. An order of certiorari of the respondent's decision of the 19th of November 2022 to refuse the applicant application on review of the initial refusal for a general employment permit pursuant to section 12 (3) of the Employment Permits Act 2006 as amended.*
>
> *2. An order remitting the impugned decision of the respondent back for reconsideration by a different officer of the Respondent*".

18. The basis upon which the applicant seeks the relief is set out in a statement of grounds dated 10 February 2023 and an affidavit sworn by the applicant. In her grounding affidavit, the applicant explains that she first came to Ireland on a student permission in September 2019 and subsequently obtained permission to remain until May 2020. As allowed by the terms of

her student permission, she found work with Wildcat Ink Limited in Dublin. After the expiration of her student permission, she obtained a working holiday permission and continued to work for Wildcat. She was offered a permanent position as a tattoo artist, which required a work permit under the Employment Permits Act 2006, as amended.

19. In February of 2022, the applicant applied for a General Employment Permit to allow her to take up the job offer as a tattoo artist. The application was accompanied by a relatively detailed letter setting out submissions. One of the matters raised in the letter of submissions attached to the application was a contention that the position of tattoo artist is not one that appears on the "*ineligible*" list of employments as set out in the 2017 Regulations. Nevertheless, the applicant was aware that it carried in it the SOC 2010 code 6222.

20. The submission was that the identification of "*tattooist*" under code 6222 was not sufficient to render it included in the "*ineligible*" category, when the occupation itself was not expressly stated to be ineligible in the Regulations. The submission referred extensively to a decision of the High Court in *Rodriguez v The Minister for Business Enterprises and Innovation*. The submission then went on to submit that the occupation coding tool on the website of the U.K. Office for National Statistics effectively described code 6222 as referring to jobs falling under the description "*Beauticians and related workers give facial and body beauty treatments, apply cosmetics and dress wigs*". The submission was that those roles in substance were very different to the role of a tattoo artist, whose work requires a particular level of skill and is permanent in nature; and in that regard it was suggested that a tattoo artist is better described by the ONS description of artist (code 6411). In addition, the submission noted that the only other applicant for the job when it was advertised was a Turkish resident who required also an employment permit to work in the state.

21. On 8 June 2022, the respondent refused the application for reasons to do with the applicant's working holiday authorisation. On 1 July 2022, the applicant sought a review of the decision, and submissions were made which repeated the submissions that had been made in February of 2022. That application was treated by the respondent as an initial application, and on 7 September 2022 the respondent refused the application for a General Employment Permit. The stated basis was that the respondent was of the view that the position of tattoo artist was on the list of ineligible categories of employment permits. The notification stated that the applicant was entitled to seek a review of the decision pursuant to s.13 of the Employment Permits Act 2006, as amended. The reasons stated in the decision were as follows:-

> "*Reasons for refusals in this case are:*
>
> - *It appears from the information received that the position on offer is for an employment specified in regulation 29(1) and Schedule 4 of the Employment Permits Regulations 2017 (S.I. No. 95 of 2017) for which a General Employment Permit shall not be granted. Please note that the occupation in question is on the list of ineligible categories of employment for employment permits. In line with section 12(3) of the Employment Permits Act 2006 (as amended) an employment permit cannot be issued.*"

22. On 4 October 2022, the applicant's solicitor sought a review of the 7 September 2022 decision. Similar submissions to those submitted in February and June of 2022 were repeated in that application.

23. On 19 November 2022, the respondent's review officer upheld the refusal of the application for a general employment permit. As required by s.12(4) of the 2006 Act, the decision was in writing and set out the reasons for that decision. The manner in which the refusal was set out is central to these proceedings and is relatively short, so it is helpful to set it out in full:-

> "*I have reviewed the information you have submitted in support of the request for a review and I am satisfied that having considered all the circumstances of the application that the appropriate decision has been taken and that under section 13 (4)(a) of the Employment Permits Act 2006 (as amended), I confirm the decision to refuse an employment permit.*
>
> *I understand the application was refused on the basis that it appears from the information received that the position on offer is for an employment specified in regulation 29 (1) and Schedule 4 of the Employment Permits Regulations 2017 (S.I. no. 95 of 2017) for which a General Employment Permit shall not be granted. Please note that the occupation in question is on the List of Ineligible Categories for Employment for Employment Permits.*
>
> *At review stage the job title and job description were re-examined, and the decision of the processor was upheld. Unfortunately, the role of 'Tattoo Artist, or Tattooist' currently falls under SOC 6222 "Beauticians and Related Occupations" . SOC 6222 is currently on the illegible list of occupations for an employment permit, and for that reason it was not possible to issue an Employment Permit.*"

24. In the statement of grounds, the applicant contends that the review decision should be quashed on three principal grounds. First, it is contended that the respondent erred by fettering his discretion and/or failing to recognise that he had a discretion to exercise in concluding that

the applicant's proposed employment was included in the list of occupations for which an employment permit may not be granted by determining that question by reference to the U.K. SOC 2010, instead of examining whether the occupation ought to be considered ineligible for the grant of an employment permit on its merits. Second, it was argued that the conclusion that tattoo artist fell under the category of "*beauticians and related occupations*" was irrational or unreasonable. As noted above, the irrationality argument was not pursued with any force at the hearing of the case. Third, it was argued that the respondent failed to comply with the duty to give reasons or failed to give adequate reasons for the impugned decision and as part of that argument failed to engage with the submissions made by the applicant.

25. The respondent's statement of opposition was dated 21 September 2023. The respondent noted that government policy is to meet Ireland's labour market needs primarily through the employment of Irish and EEA nationals. Employment permits can be granted to non-EEA nationals where there is a labour or skills shortage which cannot be filled by Irish or EEA nationals. It was stated that the legislative framework under which the employment permits system operates is designed to facilitate that underlying policy and in that regard the Department maintains a critical skills occupations list and an ineligible occupations list. The ineligible occupations list sets out occupations for which employment permits may not be granted. It was noted that in the U.K., the equivalent authorities utilise the SOC 2010 system. Those classifications are not adopted by the Department but rather are utilised as a useful tool in considering employment permit applications. In that sense, the SOC classifications from the U.K. are not in themselves determinative and it was contended that the Department carries out an individual assessment of each application.

26. In the case of the application made by the applicant, the determination made by the officials dealing with the initial decision and the review decision was that the nature of the work proposed to be performed by the applicant was in the nature of '*beautician and related occupation*'. That determination was said to be *supported* by the fact that the occupation of "*tattooist*" currently falls under code 6222 in the SOC. It was stated that there was no labour market or skills shortage for persons in the beauticians and related occupations field.

27. The respondent contended that the officials who considered the application gave consideration to the submissions made on behalf of the applicant – that the employment that the applicant wished to take up should be treated as that of an "*artist*", falling under code 3411.

28. The statement of opposition was verified by Mr. Gerard Curran, who is a Higher Executive Officer in the Employment Permits Section of the respondent's department. At the hearing of the application there were a number of objections to certain averments made by Mr. Curran. This was because he was not the officer that conducted the review decision but nonetheless purported to make comments about how that review decision was considered and treated by the review officer. I will deal with those objections below.

29. As originally formulated, Mr. Curran asserted that the review process was carried out by a reviewing officer, who is a more senior official than the official who made the initial determination, and that it was a "*completely fresh, de novo consideration of the matter.*" Mr. Curran contended that the applicant's submissions were fully considered by the reviewing officer, who also gave consideration to the available information provided by the applicant and the prospective employer. Mr. Curran contended that there was no fettering of discretion as alleged by the applicant because the department carries out individual assessments of each

employment permit application having regard to all relevant information. It was contended that there was no failure to provide reasons, and that the applicant was in a position to understand the basis upon which the decision was made and the rationale for same. The review decision was argued to be a reasonable and rational one "*based on an appropriate assessment of all available information (including the information provided by the Applicant and that contained in the SOC). It was made lawfully and in accordance with the published procedures made available to the applicants.*"

30. With regard to the overall situation, Mr. Curran noted that:-

> "*18. While it will often arise that a particular occupation could arguably fall within different code classifications, the decision to accept the particular coding classification of beauticians and related occupations as being an appropriate one for the occupation of tattooist is an entirely reasonable and rational one. It was a reasonable and rational decision to reject the submission that the occupation of tattooist should be considered as an artist.*"

RELEVANT CASE LAW

31. In considering the legal issues in this case, the parties each referred to a number of relatively recent decisions of the High Court. In *Rodriguez v The Minister for Business, Enterprise and Innovation* [2020] IEHC 174, the applicant sought to quash a decision by the respondent to refuse her an employment permit in respect of the position of trainee accountant.

32. As noted by Heslin J. in his judgment, as a matter of fact there was no explicit provision in the 2017 Regulations pursuant to which the entirety of SOC 2010 is adopted, and the court was satisfied that there was no provision in those regulations which stated that SOC 2010 as

applied in the United Kingdom is binding in respect of applications for work permits brought in this jurisdiction pursuant to the 2017 Regulations. As the court noted, the purpose behind the U.K. SOC 2010 was to attempt to create a standardised system for categorising thousands of job titles and the complexity associated with such a task was apparent from the contents of an 18 page document exhibited in that case. The court also noted that there were differences between the categorisation and classification of various types of employment in SOC 2010 and the list of job titles and corresponding codes contained in the 2017 Regulations. The court was satisfied that there was no authority suggesting that the Minister's powers under the 2017 Regulations and under the 2006 Act were fettered in any way by the existence in another jurisdiction of the SOC 2010 index or by the manner in which that is interpreted or applied by the U.K. Office of National Statistics or indeed that the Minister had any obligation to abide by advices or opinions that the U.K. Office of National Statistics might give.

33. In *Singh v The Minister for Business, Enterprise and Innovation* [2023] IEHC 332, the court was concerned with two related cases involving a refusal of an application for a critical skills employment permit. As noted above, the current case is not concerned with critical skills employment permits but rather general employment permits, which are provided for at regulation 29 and which, in turn, makes clear that certain categories of employment cannot be the subject of general employment permits.

34. In the *Singh* case, Mr. Singh had applied for a position of a business and financial project manager. The application for a permit was refused on the basis that the minimum annual renumeration criteria had not been met and that the category of employment was not one of the employments specified in the regulation and schedule. The Minister found that the occupation was not on the Critical Skills Occupation List. That refusal was reviewed pursuant

to s.13 of the 2006 Act and the applicant contended that the application should be considered under SOC classification 2424. The review officer refused the review on the basis, *inter alia*, that the occupation in question, in respect of which the permit was sought appears to fall under SOC code 3534 and that the code 3434 occupation was not on the critical skills list.

35. As noted by the court in *Singh*, 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. In that regard, the court referred to the comments made by Clarke J. (as he then was) in *Sweeney v District Judge Fahy* [2014] IESC 50, a case which concerned a judicial review of a criminal conviction. In that judgment, Clarke J. noted 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.*"

36. In considering the decision under question in *Singh*, the court agreed with the proposition that it was for an applicant seeking a permit to satisfy the Minister that the position for which the permit is sought is on the Critical Skills Occupation List. The court noted that where there was a finding that a position was not on the Critical Skills Occupation List, the respondent was not obliged to "*assign*" an alternative SOC code to a position for the purpose of deciding whether the position was on the list.

37. However, the legal problem in that case was that the court found that the decision was entirely premised on a conclusion that a particular alternative code applied, and the court found there must be a rational basis for concluding that that code applied. The court in *Singh* therefore went on to consider whether it was possible to identify a basis for the conclusion that the positions fell within any particular code. In considering the decision, the court noted at para. 44 that it did not seem to him 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.*"

38. In *Singh*, it was notable that the actual decision-maker had acknowledged on affidavit that there was a more appropriate SOC code for the positions in question than the alternative code noted in the refusal decision. Thus, the court found that the conclusion in relation to the major premise – that the jobs were not on the list – flowed from the irrational minor premises – that the jobs fell under SOC code 3534. The decisions therefore were vitiated by that irrational premises and were quashed.

39. Finally, and particularly in relation to the question of whether proper reasons were given, the respondent placed reliance on the decision of the High Court (Donnelly J.) in *Olaneye v. Minister for Business, Enterprise and Employment* [2019] IEHC 553. That case involved a challenge to a refusal of a Critical Skills Employment Permit to the applicant who was seeking a permit to be employed as an IT Systems Administrator. The application for a permit was refused, *inter alia*, on the basis that the occupation was not on the Critical Skills Occupation list, which is set out at schedule 3 to the 2017 Regulations. The applicant challenged the refusal on the basis that the reasons given were inadequate: the respondent set out only the conclusion reached and not the reasons for reaching that conclusion.

40. Relying on the relevant caselaw, particularly *Connelly v. An Bord Pleanála* [2018] IESCD 31 and *F.P. v. Minister for Justice* [2002] 1 I.R. 164, the court found that the reasons given were adequate in that case. The court accepted that the extent of the reasons that were required to be given in any given scenario were case specific, and that the court could take account of the fact that the application process in that case showed that the applicant was familiar with the issues that had to be determined. The applicant knew that his application was refused on the basis that the occupation did not fall within schedule 3 of the 2017 Regulations and was aware of the use of the SOC 2010 classification system. The court was satisfied in that case that there was no need to provide any narrative reasoning for the decision and that the reasons were clear and adequate in the particular circumstances.

THE AFFIDAVIT ISSUE

41. The applicant objected to the fact that in his affidavit, Mr. Curran attributed some views to the officer who made the refusal decision. The objection was that this evidence was hearsay and also amounted to an *ex post facto* attempt to provide additional material support for the

decision. The respondent asserted that it was in order for the deponent to give evidence as he was the senior official with responsibility for reviews of employment permit applications and therefore was best placed to explain how the review process operated. It was also observed that he had reviewed the relevant files and records before swearing his affidavit.

42. The applicant relied on the principles from *R v. Westminster City Council, ex parte Ermakov* [1996] 2 All E.R. 302, which were adopted by the Court of Appeal in Ireland in *M.N.N. v Minister for Justice and Equality* [2020] IECA 187. The essential rationale of *Ermakov* is that when a court is presented with stated reasons for a decision it may not conduct an *ex post facto* rationalisation. In essence, when considering a decision, the respondent must confine itself to the words of the decision delivered although later correspondence may clarify and provide more context insofar as this may assist a reader in evaluating its fairness or transparency (*see Tierney v. Garda Siochána Ombusdman Commission* [2024] IEHC 197).

43. The issue was framed succinctly in the analogous case of *Olaneye*, where Donnelly J. observed:

> "*32. I am satisfied that the minister is not entitled to rely upon the subsequent affidavits to provide reasons that were not provided (either expressly, or by necessary implication) at the time of the decision. I am also satisfied that the minister must be entitled (and to a certain extent is obliged) to put before the Court the background to the decision that has been taken. This is particularly important where specialist decision-making has taken place. The High Court must be able to assess the position, taking into account the knowledge that the parties will have had of the issues involved.*"

44. Here, the court is satisfied that Mr. Curran was entitled to give evidence of the general practice and approach of the review officers over which he exercised authority and of the general policy considerations that are applied. Likewise, it was in order for Mr. Curran to set out the actual written reasons for the decision that was given. However, I am not satisfied that Mr. Curran was in a position to give evidence of what was actually considered or taken into account by the review officer when she made her decision, where that information is not contained expressly or by implication in the terms of the decision. The court should not approach the decision other than by reference to the terms of the actual decision made and any necessary background material.

DISCUSSION

45. There were three formal grounds for challenging the decision in this case. Properly, the applicant accepted that the contention that the decision was unreasonable was not one to be pressed with any force. In that regard, I am satisfied that, all other matters being equal, there was no basis for contending that the decision was unreasonable in the sense understood in administrative law.

46. The primary issues therefore were whether the respondent fettered his discretion or failed to provide adequate reasons for the decision. In my view, in this case there is a potential interaction between those grounds.

47. In terms of the reasons argument, the applicant contended by reference to well established authorities such as *N.E.C.I. v. Labour Court* [2021] 2 I.L.R.M. 1; [2021] IESC 36, and *Balz v. An Bord Pleanála* [2020] 1 I.L.R.M. 637, that it was not sufficient simply to set out the conclusion of the review process or to state baldly that all matters were considered when a

substantive submission had been made that the applicant's occupation should not be considered under code 6222, but instead should be considered under the code applicable to artists. In that regard, the applicant sought to argue that the *Olaneye* decision – which the respondents relied upon – could be distinguished. The respondent, on the other hand, was adamant that the reasons set out was all that was required. The officer found that the occupation of "*tattooist*" was ineligible as it was a Schedule 4 occupation, and this was supported by its classification under code 6222 of SOC 2010.

48. In relation to the fettering of discretion grounds, the applicant argued that in exercising the power to refuse an Employment Permit, the Minister must look to the substance of the occupation rather than the title. In this regard, the applicant relies on the observations of Heslin J. in *Rodriguez*. As noted above, in that case – as in this – this Minister's position was that the SCO 2010 classifications used by the U.K. Office of National Statistics differed in some respects from the classifications found in the 2017 Regulations, and that the Minister did not fetter his discretion by relying unwaveringly on the SOC 2010 classifications but instead relied on its criteria to determine applications.

49. The applicant contends that the Minister here simply found that the proposed occupation was on the list of occupations for which a permit could not be granted by determining that question by reference solely to the SOC 2010 system instead of considering its own merits. The applicant sought to support that stance by the use of the phrase "*for that reason <u>it was not possible</u> to issue an Employment Permit*" [emphasis added] in the refusal decision.

50. The respondent relied on the provisions of s.12(3) of the 2006 Act, which makes clear that the Minister may not grant an employment permit if that would contravene regulations made pursuant to s.14 of the 2006 Act, being in this case the 2017 Regulations. Schedule 4 to the 2017 Regulations set out the occupations that are ineligible for grants of general employment permits. The argument was that the refusal decision stated that "*the information you have submitted*" had been reviewed and that "*all the circumstances of the application*" had been considered.

51. The respondent stated in submissions that in assessing "*a particular application*" the Department considers matters such as the salary, job title, educational qualifications, description of the duties required for the role and job specification. It was stated that the determination of the review officer was supported by, but not determined, by the fact that the occupation of "Tattoo Artist" fell under code 6222 in the SOC 2010 classifications, which is a code listed in the Ineligible Occupations List.

52. If the court is required to consider only the background materials and the terms of the decision itself, and if the respondent was correct that the reasons given were adequate, then what were the reasons?

53. First, I am not satisfied that much, if any, weight can be given to the use of terms such as "*all the circumstances of the application*" have been considered. As noted by the Supreme Court in *Balz* and reiterated in the *N.E.C.I.* judgment, that type of language might:

> "*charitably be dismissed as little more than administrative throat-clearing before proceeding to the substantive decision, it has an unfortunate tone, at once defensive and circular. If language is adopted to provide a carapace for the decision which makes*

it resistant to legal challenge, it may have the less desirable consequence of also repelling the understanding and comprehension which should be the object of any decision."

54. I am not suggesting that discursive reasons are required in a situation such as this. As noted in *Olaneye* and elsewhere the nature of the reasons required are case specific. In *Olaneye*, the reasons given for refusing the application for a Critical Skills Occupation permit when considered with the background materials were adequate. The occupation for which the applicant there sought permission to take up was not on the Schedule 3 list. Here, however, the occupation was not expressly listed in Schedule 4; and while the applicant was aware that the U.K. system classified a tattoo artist or tattooist under code 6222, she made submissions as to why the respondent should not follow that guidance. The response from the respondent was that the decision of the processor was upheld:

"*Unfortunately, the role of 'Tattoo Artist, or Tattooist' currently falls under SOC 6222 "Beauticians and related occupations". SOC 6222 is currently on the ineligible list of occupations for an employment permit, and for that reason it was not possible to issue an Employment Permit.*"

55. There was no engagement with the submissions made by the applicant that the classification SOC 6222 was not appropriate to the occupation of tattoo artist; and while the decision maker was not required to engage seriatim with the submissions, one would expect something more than a simple assertion that SOC 6222 implicitly answered that submission.

56. However, even if the court accepted the respondent's arguments that in the circumstances, the reasons, terse as they were, were adequate, in the sense that the applicant

understood the main reasons for the decision, this raises the issue about the exercise of discretion.

57. The respondent strongly argued that the SOC 2010 system was used as guidance but that it was not determinative, in the sense explained by Heslin J. in *Rodriguez*. Hence, the refusal was based on a substantive consideration of the question of whether or not the occupation of "*tattoo artist*" was properly captured by schedule 4 and therefore ineligible for a permit, as required by s.12(3) of the 2006 Act. In that regard, it must be recalled that the occupation of "*tattoo artist*" or "*tattooist*" is not referred to expressly in schedule 4. Instead, it is classified under SOC 2010 under code 6222 – which, on the respondent's own case, is neither binding nor determinative. However, the reasons given do not demonstrate any exercise of judgment or discretion. The only substantial reason given in the decision is that "*SOC 6222 is currently on the ineligible list of occupations for an employment permit, and for that reason it was not possible to issue an Employment Permit.*" If, as I must, take the reasons on their own terms, the only reason given was that, in fact, the guidance was treated as binding and determinative.

CONCLUSION

58. In the premises, I am satisfied that the respondent failed to exercise the limited discretion required in reviewing the refusal decision. I want to be clear that this in no way suggests a finding in this case that any ultimate decision by the respondent that the occupation of tattoo artist was ineligible for a general employment permit would be unreasonable. That is a matter that would have to be considered on its own terms, if the issue arose. This case is concerned with the process by which a decision was reached that had real material consequences for the applicant, and to a lesser extent for her prospective employer. In this case,

the court has concluded that the process was flawed in the sense that if the reasons given for the decision were adequate, they demonstrated a failure to recognise that there was a discretion or judgment to be exercised and/or a failed to set out that the discretion or judgment was in fact exercised.

59. I will therefore make an order of certiorari quashing the respondent's decision of 19 November 2022 which refused the applicant's application on review of the initial refusal of a General Employment Permit and remit the matter back for reconsideration by a different officer of the respondent.

60. As this judgment is being delivered electronically, I express the provisional view that the applicant should be entitled to an order for her costs to be paid by the respondent, such costs to be adjudicated in default of agreement. I will list the matter before me at 10:30am on 10 October 2024 to address any arguments that may be required about the form of final orders. I would, however, invite the parties to seek to come to an agreement in advance of that date on those matters.