

**THE HIGH COURT
JUDICIAL REVIEW**

[2021] IEHC 227

RECORD NO: 2020/1004JR

BETWEEN:

CHAIN WEN WEI

APPLICANT

AND

THE MINISTER FOR JUSTICE

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENTS

JUDGMENT of Ms Justice Tara Burns delivered on the 23rd March, 2021

General

1. This judgment is being delivered in conjunction with a related case of *Ting v. Minister for Justice and The Commissioner of An Garda Siochana* (Unreported, High Court, Burns J., 23 March, 2021).
2. Very similar legal issues arose in these cases and the judgment of the Court in *Ting* governs the legal issues which arose in this case. Oral evidence was given in the *Ting* case arising from a factual dispute which arose on the affidavits filed which did not arise in the instant case. Another point of distinction is that there was an additional plea in the instant case, to the effect that the s. 4(4) notice was defective. I will return to the details of this challenge later
3. The Applicant is a national of Malaysia, and accordingly visa exempt, who sought permission to land and enter the State through Cork Airport on 12 December 2020 in order to undertake an English Language course which was to commence on 4 January 2021. She travelled with another Malaysian national, Ms Ting, who was also intending to partake in this course. Whilst these women did not know each other, the common link is that Ms Ting is the girlfriend of the Applicant's cousin, who resides in Ireland.
4. The Applicant was refused permission to land by the immigration officer on duty on the day in question, as the English Language course which she was intending to undertake would not take place in person, but rather would be conducted online.

Government Policy regarding Online Courses

5. Guidelines issued by the Government on 27 October 2020 relating to English Language courses, having regard to the COVID 19 pandemic stated:-

“[D]ue to new public health restrictions under Level 5 of the Government Framework for Restrictive Measures in Response to COVID-19, English Language Providers have been directed to move all tuition modules online. This is an exceptional and short term and temporary measure due to COVID-19 pandemic. Once restrictions return to Level 3 or lower the standard ILEP criteria of in-person tuition will reapply. Prospective students seeking to enter the State should wait until in-person tuition has been resumed. Failure to do so may result in students

being refused leave to land and refused registration. Providers have been requested to bring this to the attention of prospective students.”

6. The direction to move all classes to an online format, had a particular significance. In January 2011, the Irish National Immigration Service (hereinafter referred to as “INIS”) issued a New Immigration Regime for Full Time Non-EEA Students. This scheme governs the conditions applying to a student partaking in an English language course. The scheme specifies that:-

“It is not permissible for a student to come to Ireland to undertake a ... distance learning course.”

7. In August 2020, with respect to the entry into the State of students intending to commence an English Language Course, each Immigration officer in the State received an email in the following terms:-

“Re: Students seeking to enter the State to pursue online courses

In recent weeks, the Garda National Immigration Bureau has received a number of enquiries from International students regarding the above mentioned matter. Specifically, clarification has been sought as to whether it is permissible for a non-EEA student to enter the State to enrol in an online course of study. Immigration Officers at points of entry to the State should be aware that, under existing student guidelines, which were issued by the [INIS] in 2011, non-EEA students are not permitted to enter the jurisdiction to undertake part time or distance-learning courses.

...

It is noted that, in response to the public health emergency, the INIS has granted certain exemptions to students, one of which is that they may take their classes online if their schools/colleges are closed. This exemption, however, applies only to students who are already resident here. It does not extend to persons who are seeking to enter the State to pursue their studies.

To reiterate, it is not permissible for a non-EEA student to come to Ireland to undertake an online course. Individuals should not be permitted entry for this purpose and should not be registered on the basis of an online course.”

8. The Applicant was served with a notice pursuant to s. 4(4) of the Immigration Act 2004 (hereinafter referred to as “the 2004 Act”) setting out the grounds as to why she was being refused permission to land which were stated to be that “her entry into, or presence in, the State could pose a threat to national security or be contrary to public policy”. The Applicant was also served with a notice pursuant to s. 14 of the 2004 Act requiring her to remain at the Four Seasons, Kanturk on the night in question, to surrender her passport, and to report to the Information Desk at Cork Airport the next morning at 11.30am and a document setting out the provisions of s. 12 of the 2004 Act.

9. Contact was made with a solicitor after the women left the airport. An urgent application seeking leave to apply by way of Judicial Review for orders of certiorari of the decision to refuse the Applicant permission to land and the s. 14 notice together with an injunction prohibiting the Applicant's removal from the State was brought before the High Court later that night. The leave application was adjourned to the next day and subsequently to the 21 December when leave was granted.

Grounds of challenge

10. The grounds of challenge in respect of the decision to refuse the Applicant permission to land and the s. 14 notice are that the purported s. 4(4) notice failed to comply with the requirements of the 2004 Act as it failed to record the factual reasons for the refusal; in the alternative that the Respondent failed to provide reasons for the decision to refuse permission to land; in the alternative that the refusal on grounds of public policy was not established in this case having regard to the meaning of public policy with the 2004 Act; or, in the alternative the notice was defective for lack of specificity by referring to both national security and public policy.

Section 4 of the 2004 Act

11. Section 4 of the 2004 Act provides, inter alia:-

- “(2) A non-national coming by air or sea from a place outside the State shall, on arrival in the State, present himself or herself to an immigration officer and apply for a permission.
- (3) Subject to section 2(2), an immigration officer may, on behalf of the Minister, refuse to give a permission to a person referred to in subsection (2) if the officer is satisfied—
- (a) that the non-national is not in a position to support himself or herself and any accompanying dependants;
 - (b) that the non-national intends to take up employment in the State, but is not in possession of a valid employment permit (within the meaning of the Employment Permits Act 2003);
 - (c) that the non-national suffers from a condition set out in the First Schedule;
 - (d) that the non-national has been convicted (whether in the State or elsewhere) of an offence that may be punished under the law of the place of conviction by imprisonment for a period of one year or by a more severe penalty;
 - (e) that the non-national, not being exempt, by virtue of an order under section 17, from the requirement to have an Irish visa, is not the holder of a valid Irish visa;
 - (f) that the non-national is the subject of—
 - (i) a deportation order (within the meaning of the Act of 2004),
 - (ii) an exclusion order (within the meaning of that Act), or
 - (iii) a determination by the Minister that it is not conducive to the public good that he or she remain outside the State;

- (g) that the non-national is not in possession of a valid passport or other equivalent document, issued by or on behalf of an authority recognised by the Government, which establishes his or her identity and nationality;
 - (h) that the non-national—
 - (i) intends to travel (whether immediately or not) to Great Britain or Northern Ireland, and
 - (ii) would not qualify for admission to Great Britain or Northern Ireland if he or she arrived there from a place other than the State;
 - (i) that the non-national, having arrived in the State in the course of employment as a seaman, has remained in the State without the leave of an immigration officer after the departure of the ship in which he or she so arrived;
 - (j) that the non-national's entry into, or presence in, the State could pose a threat to national security or be contrary to public policy;
 - (k) that there is reason to believe that the non-national intends to enter the State for purposes other than those expressed by the non-national.
 - (l) that the non-national —
 - (i) is a person to whom leave to enter or leave to remain in a territory (other than the State) of the Common Travel Area (within the meaning of the International Protection Act 2015) applied at any time during the period of 12 months immediately preceding his or her application, in accordance with subsection (2), for a permission,
 - (ii) travelled to the State from any such territory, and
 - (iii) entered the State for the purpose of extending his or her stay in the said Common Travel Area regardless of whether or not the person intends to make an application for international protection.
- (4) An immigration officer who pursuant to subsection (3) refuses to give a permission to a non-national shall as soon as may be inform the non-national in writing of the grounds for the refusal.”

Is the s. 4(4) notice defective?

12. It is submitted on behalf of the Applicant that the s. 4(4) notice is defective as it does not set out the reasons for refusing the Applicant permission to land. On the face of the document, the grounds for refusing the Applicant permission to land are set out, namely “that the non-national’s entry into or presence, in the State could pose a threat to national security or be contrary to public policy”. However, the reasons for these grounds are not stated.
13. Counsel for the Applicant submits that this is not in compliance with s. 4(4) of the 2004 Act and that the factual reasons on which this ground is based must also be stated.
14. Counsel for the Respondents submits that s.4(4) of the 2004 Act only requires that the grounds of refusal pursuant to s. 4(3) be stated and does not require that the reasons for the grounds be set out in writing. It is further submitted that the Applicant was fully

aware of the reasons for the decision to refuse her permission to land in light of her conversation with Detective Garda O'Mahony.

15. Reliance has been placed, by the Applicant, on *Deerland Construction Ltd v. The Aquaculture Licences Appeal Board* [2008] IEHC 289 with respect to a statutory duty to give written reasons for a decision.
16. The statutory requirement to give written reasons and the context of the decision at issue in *Deerland* could not be more different from the instant case. The statutory requirement at issue in *Deerland* was s. 40(8)(a) of the Fisheries (Amendment) Act 1997, as inserted by s. 10 of the Fisheries (Amendment) Act 2001 which provides:-

"A determination of an appeal under this section, (including an appeal to which section 52 refers) and the notification of that determination shall state the main reasons and considerations on which the determination is based."

17. Accordingly, s. 40(8)(a) in fact requires that the reasons and considerations be set out in a notification of a determination on appeal under the Act. Section 4(4) of the 2004 Act makes no such requirement: it simply states that the grounds of the refusal which has been made pursuant to sub-s. 3 of s. 4 be informed to the non-national in writing as soon as may be. A refusal of permission to land must be based on a ground set out in sub-s. 3. Accordingly, it is specification of one of these grounds which sub-s. 4 is referring to, rather than requiring that the reasons why a ground is established be recorded in writing. This requirement makes complete sense in light of the nature of the application for permission to land. Such an application is made orally at the point of entry into the State and must be determined promptly by an immigration officer. This is not a paper based application, nor is it an application which permits of time for extensive reasons to be noted in writing. Accordingly, I do not accept that the reasons for the grounds of refusal are required to be notified in writing pursuant to s. 4(4) of the 2004 Act.
18. However, an obligation to give reasons for the decision to refuse permission to land still obviously exists. In the instant case, in light of paragraph 9 of D/Garda O'Mahony's affidavit, which was not controverted, it is clear that a reason was given to the Applicant as to why this decision had been made, namely that her course would be conducted online.
19. Accordingly, in terms of the purpose for the requirement to give reasons which is to provide an affected individual with such information as is necessary to enable them to consider whether they have a reasonable chance to judicially review a decision, the Applicant was fully equipped to launch court proceedings seeking to challenge this decision, which is indeed evident from the proceedings before me.
20. The requirement to give reasons for the refusal of permission to land was met in this case through a combination of oral communication between the Applicant and Detective Garda O'Mahony and the s. 4(4) notice.

Whether it was established that her presence was contrary to public policy

21. Counsel for the Applicant submits that in light of the reasons given by Detective Garda O'Mahony for refusing the Applicant permission to land, it has not been established that the Applicant's presence in the State was contrary to public policy having regard to its correct meaning within the 2004 Act
22. The Court's attention was drawn to two conflicting High Court authorities which analyse the meaning of "public policy" as referred to in s. 4(3)(j) of the 2004 Act.
23. *Ezenwaka v. MJELR* [2011] IEHC 328 involved a family which had, through an error on the part of visa officers, been granted visas to present at the border to seek entry into the State even though they did not comply with the relevant statutory scheme. They were refused entry on the grounds of public policy. Hogan J. considered the scope of s.4(3)(j) of the 2004 Act and stated at paragraph 13 of the judgment:

"The first issue which arises for consideration is the meaning of the phrase "public policy". The reference to public policy must here be understood in the statutory context in which it occurs: see, e.g., the classic comments of Henchy J. in *Dillon v. Minister for Posts and Telegraphs*, Supreme Court, 3rd June 1981. The very fact that the reference to "public policy" is juxtaposed beside the words "national security" means that the former words take on their traditional and somewhat more restricted meaning in the sphere of immigration law. In that context, the words "public policy" do not simply mean contrary to existing Government policy, but rather connote a situation where that the personal conduct of the immigrant poses a real and immediate threat to fundamental policy interests of the State. In that sense, the concept of public policy at issue here is but another variant of the concept national security, albeit wider and somewhat more flexible in its scope and reach than national security properly so called."

24. *Li and Wang v. Minister for Justice and Equality* [2015] IEHC 638 involved a refusal to accept an application for a long-term permission to remain, made by the parents of an Irish citizen who had come to the State with visitor's visas, based on the Minister's policy which required applicants to make such applications from outside the State. With respect to s. 4(3)(j), Humphreys J. stated:-

"The grounds in subsection (3) are in wide terms and in particular, para. (j) insofar as it refers to "public policy", is, in the widest possible terms....The reference to national security alongside public policy is perhaps unhappy as a matter of drafting, but I am of the view that having regard to the object and purpose of the Act, this reference does not dilute or qualify the scope of the "public policy" ground. That ground confers an extremely wide discretion on the Minister to determine whether, in her view, the presence of a particular non-national in the State is contrary to public policy, as determined by her. Of course, such determination is subject to the usual criteria of constitutionality and legality but subject to that, the formulation of public policy in relation to immigration control is exclusively a matter for the Minister for Justice and Equality, who is responsible to Dail Éireann in that regard."

25. The Court of course, is cognisant of the importance of precedence and has had regard to the recent Supreme Court decision in *ASS v. Minister for Justice and Equality* (Unreported, Supreme Court, 8th December 2020). However, the Court has unfortunately been presented with two conflicting High Court decisions with arguments made on each side as to why either case is not binding on me.
26. As a starting point, the long title to the 2004 Act states *inter alia* that it is:-
- “An act to make provision in the interests of the common good for the control of entry into the State....”
27. Of note, neither High Court case cited considered the use of the word “or” contained in s. 4(3)(j) of the 2004 Act, whereby permission to land can be refused by an immigration officer acting on behalf of the First Respondent on the grounds that a non-national’s entry into, or presence in, the State could pose a threat to national security or be contrary to public policy. Having regard to the use of the alternative, the Court, with the greatest of respect, does not agree with Hogan J that public policy is but a variant of national security and that it relates to personal conduct. It seems to me that two different concepts are at play within this sub-section: the first being that a non-national can be refused permission to land if her entry into or presence in the State could pose a threat to national security; and the second being that a non-national can be refused permission to land if her entry into or presence in the State is contrary to public policy.
28. The public policy at issue in this matter is the Government policy since 2011 that students from non-EEA countries are not permitted to enter the State for the purpose of partaking in an English Language course, if that course is being delivered online. The Covid 19 pandemic is the cause for the course being delivered in an online format but it is not the basis for the public policy. The basis for the public policy is to regulate the admission of non-EEA students into Ireland. The question of admission to this State is a matter solely for the First Respondent to be determined in accordance with domestic law as provided for by s. 4(3) of the 2004. EU law has no application in this realm. It is a matter for the First Respondent to regulate the conditions under which persons can be admitted into the State. With respect to non-EEA students undertaking an English Language Course, the First Respondent has adopted a legitimate policy of not permitting a student enter the State if that course is to be conducted online. If such a student sought to enter the State, the First Respondent must be in a position to refuse permission to enter, on an individualised basis, so as to give effect to her function of regulating entry into the State. The list of grounds in respect of which entry can be refused is limited to those set out in s. 4(3) of the 2004 Act. The Oireachtas must have intended that the First Respondent would be empowered to refuse entry for legitimate policy reasons on an individual basis and accordingly, “public policy” as referred to in s. 4(3)(j) must refer to Government policy relating to the regulation of entry into the State as opposed to relating to personal conduct on the part of a non-national which poses a real and immediate threat to fundamental policy interests of the State. Otherwise, the First Respondent would not be in a position to regulate entry into the State and give effect to the purpose of the Act.

29. Therefore, refusing the Applicant permission to land on grounds of public policy having regard to the reason stated by Detective Garda O'Mahony was permitted in this instance.

Defective Notice for lack of specificity

30. As noted above, an additional plea was made in the instant case compared to the Ting case, to the effect that the s. 4(4) notice failed to comply with s. 4(4) of the 2004 Act as it did not specify whether the ground for refusal of permission to land was national security or public policy.
31. The written submissions filed in the matter make no submission with respect to this plea.
32. This challenge was not initially advanced in the oral submissions made by Counsel for the Applicant. It was only at the conclusion of the hearing, in reply to Counsel for the Respondent, who had not raised this issue, that Counsel for the Applicant referred the Court to the fact that this matter had been pleaded.
33. Accordingly, the Court has not received any submissions with respect to this pleading. However, the Court is of the view that the non-specificity of "public policy" as being the ground for refusal of leave to land does not render the notice invalid in light of the use of the alternative "or" within the grounds stated and having regard to the requirement pursuant to s. 4(4) of the 2004 Act to specify a ground contained in s. 4(3) of the 2004 in the s. 4(4) notice. The s. 4(4) notice, in the instant case, appropriately records the wording of s. 4(3)(j) as the ground for refusal. Accordingly, the notice is not defective for failing to specify public policy as the sole ground for refusal. Further, no confusion or difficulty arose in this regard with respect to the institution of proceedings as the Applicant proceeded on the basis that it was public policy which was at issue.
34. Accordingly, the grounds of challenge to the s. 4(4) and s. 14 notices have not been made. I therefore will refuse the relief sought.
35. With respect to costs, further reasons were pleaded by the Respondent in support of the grounds for refusal, which ultimately transpired not to be reasons why permission was refused. In light of this, it is not appropriate that the Applicant should bear the burden of the entire costs in the matter. Accordingly, I will make an order for 70% of the Respondents' costs as against the Applicant to be adjudicated upon in default of agreement.