UNAPPROVED

THE COURT OF APPEAL

Record Number: 2023/14
Neutral Citation Number [2024] IECA 57

Faherty J.
Haughton J.
Butler J.

BETWEEN/

A.A., W. M. AND M.A. (A MINOR SUING BY HIS FATHER AND NEXT FRIEND, A. A.)

APPLICANTS/ APPELLANTS

- AND -

THE MINISTER FOR JUSTICE

RESPONDENT

JUDGMENT of Ms. Justice Faherty delivered on the 13th day of March 2024

Background

1. Mr. A. (hereinafter "*the appellant*") is an Egyptian national who on 20 July 2020 secured an offer of employment from E-Businesssoft Technologies Ltd. ("E-Businesssoft") which has its registered offices at 20 Harcourt Street, Dublin 2.

2. The appellant was offered permanent employment as a "*Software Application Developer*" commencing 1 November 2020. The job description reads as follows:

- Business Application Software Development using Full Microsoft Web Stack.

- Perform complex analysis, designing and programming to meet business requirements.
- Maintain, manage and modify all software systems and applications.
- Define specifications for complex software programming applications.
- Interface with end-users and software consultants.
- Develop, maintain, and manage systems, software tools and applications.
- Resolve complex issues relating to business requirements and objectives.
- Coordinate and support software professionals in installing and analysing applications and tools.
- Analyse, develop and implement testing procedures, programming and documentation.
- Train and develop other software analysts.
- Analyse, design and develop modifications and changes to existing systems to enhance performance.

3. On 4 September 2020, the appellant was granted a Critical Skills Employment Permit by the Minister for Business, Enterprise and Innovation on foot of the employment offer from E-Businesssoft. The permit was valid from 1 November 2020 to 31 October 2022. It has since expired. The letter from the Employment Permits Section of the Department of Business, Enterprise and Employment which accompanied the Critical Skills Employment Permit advised that the permit *"relates to employment only and it is not a residence permit or a permission to enter Ireland"* and that nationals of visa-required countries (of which Egypt was one) were required to apply for a visa. The appellant was advised that in the visa application he would be *"required to submit evidence of [his] professional qualifications, if required, as well as evidence of previous work experience, if required."*

4. On 9 September 2020, the appellant, his wife (the second appellant) and his child (the third appellant) applied for visas to enter the State so that the appellant could take up his offer of employment in the State. On 6 October 2020, the Minister for Justice (hereinafter "the respondent") refused the visa application (hereinafter "the first instance decision"). The reasons for the refusal were expressed as follows:

> *"I.D.: Insufficient documentation submitted in support of the application: - please see link to 'Document Required' as displayed on our website -www.inis.gov.ie*
>
> *OC:- Observe the conditions of the visa – the visa sought is for a specific purpose and duration:- the application has not satisfied the visa officer that such conditions would be observed."*

5. No further narrative accompanied those "codified" or "shortform" reasons save that the appellant was advised that he could appeal in writing *"fully addressing all the reasons for refusal"* within 2 months of the date of the decision.

6. By letters dated 12 and 13 and 14 October 2020, the appellant lodged appeals on his and his child's behalf against the first instance decision. On 12 and 13 October 202, the second appellant lodged her appeal.

7. The appellant's appeal letter advised the Visa Appeals Officer that the purpose of his applying for a long stay employment visa was to travel to and work in Ireland as *"Software Engineer at E-business Technologies Ltd."*. Addressing the issue of insufficient documentation (*"ID"*) as advised in the first instance decision, he queried what documents were missing on the basis that he had *"supplied all possible supporting documents and much more"*. He stated that he had consulted the website again to find that *"the travel insurance and Accommodation proof only are missing"* even though travel insurance was not mentioned as a requirement. He went on to advise that he had booked himself and his family *"initial accommodation"* for the first two weeks in Ireland, at a named hotel in

Dublin, and that thereafter he would be responsible for and would secure *"a well-prepared permanent family accommodation in Dublin"* before the end of the two-week period. He also stated that he had arranged the required travel insurance for himself and his family members, to commence on 15 November 2020. The appellant attached his revised *"Signed Applicant (sic) Letter including all [adequate] and needed details"* (a reference to his initial application letter) and his *"current Saudi Sponsor letter"* (a reference to his then employer in Saudi Arabia).

8. As regards the statement in the first instance decision that he had not satisfied the Visa Officer that the conditions of the visa would be observed (*"OC"*), the appellant advised that he had called and e-mailed the Embassy in Abu Dhabi and in Riyadh but that *"nobody wished to help me or clear the confusion of such reason"*. He stated:

> *"I have been officially granted a Critical Skills Employment Permit…to work legally in Ireland for Two years…and* [the] *permit was submitted with my* [visa] *application. My employment contract, qualifications, trainings, courses, certificates and IELTS have been submitted to and approved by the Department of Business, Enterprise and Innovation and I also submitted all to my application with sponsor invitation letter."*

9. The appellant went on to state that he would use his best skills and knowledge and experience to serve his employer and carry out his duties and tasks professionally and honestly. He undertook that he and his family would not be a burden on the State *"under any circumstances"* and that he had enough funds to bear all necessary fees and expenses and that his work benefits and salary would serve to avoid his being a burden on the State during his tenure in Ireland. Furthermore, he was committed to observing and obeying all visa and residence conditions.

10. Thereafter, the appellant outlined his employment history in Saudi Arabia since April 2014 and details of his travel to third party countries, stating that he had observed all travel and visa conditions in those regards.

11. An (undated) letter from E-Businesssoft which accompanied the appellant's appeal confirmed that he would be joining the company from 15 November 2020 and that *"[h]e will be working as software engineer. He will receive a gross salary of 65,000 EUR per year.* ***We will cover his medical insurance****"* (emphasis in original). A contact number and address were included.

12. The letter from his Saudi employer confirmed that the appellant was working in *"Specialised Marine Services Company"* since 8 April 2014 as *"Engineering Manager"* at a monthly salary of 17,086 SAR.

13. A further letter from E-Businesssoft dated 12 October 2020 addressed to the Visa Appeals Officer gave details of the appellant's travel and accommodation arrangements and made reference to the basis upon which the offer of employment was made to the appellant. I will refer to this letter in more detail later in the judgment.

14. By decision dated 15 February 2021 (hereinafter *"the refusal decision"*), the respondent affirmed the refusal of the appellant's visa application. The bases for the refusal were set out in three shortform reasons, as follows:

> *"ID:- Insufficient documentation submitted in support of the application:- please see link to 'Documents Required as displayed on our website- www.inis.gov.ie*
>
> *INCO:- Inconsistencies e.g. contradictions in the information supplied*
>
> *OC:- Observe the conditions of the visa: the visa sought is for a specific purpose and duration:- the application has not satisfied the visa officer that such conditions would be observed."*

15. The letter continued:

> *"A Critical Skills Employment Permit was issued to you for the role of 'Software Application Developer' at E-Businesssoft Technologies. A detailed job description for the role of "Software Application Developer" in E-BUSINESSSOFT TECHNOLOGIES LTD. was submitted in your application. A letter from your employer submitted on appeal lists the job as 'Software Engineer'. You have not provided any evidence that you have sufficient work history or qualifications to be able to do the specific job for which this work permit issued. There appears to be some confusion as to what exactly your role will be in E-Businesssoft Technologies but you have not shown any evidence of having worked or gained qualifications in any aspect of software engineering or development…".*

I will refer to this paragraph as *"the additional narrative".*

Judicial Review

16. On 19 April 2021, on foot of an *ex parte* application for leave for judicial review grounded on the appellant's affidavit and accompanied by a statement of grounds, the High Court (Burns J.) granted the appellants leave to bring judicial review proceedings in respect of the refusal decisions. A notice of motion was issued returnable on 10 May 2021. The respondent's Statement of Opposition was filed on 13 July 2021. The matter was heard by Hyland J. on 24 March 2022.

17. In essence, the refusal decision was challenged on the basis that:

- Inadequate reasons were provided for the refusal of the visa such that the appellant did not understand the basis for the refusal and could not adequately challenge the refusal.
- No opportunity was afforded to the appellant to address or respond to concerns raised in the refusal decision (which had not been in the first instance decision).

- The irrationality/unreasonableness of the refusal decision.

The High Court judgment

18. Judgment was delivered on 28 April 2022. Hyland J. (hereinafter *"the Judge"*) rejected the appellant's claim that the refusal decision was unlawful, and thus dismissed the application for judicial review on the following bases.

19. The Judge found that adequate reasons were provided for the refusal decision. In so finding, she distinguished *T.A.R. v. Minister for Justice, Equality and Defence* [2014] IEHC 385 and *Mukovska v. The Minister for Justice and the Minister for Foreign Affairs* [2021] IECA 340 (which were relied upon by the appellant) from the case before her. She found that unlike the present case, the reasons for refusal in *T.A.R.* and *Mukovska* had been solely communicated in what the Judge described as *"codified form"*. In the instant case however, in addition to the codified reasons for refusal, there was an additional paragraph (the additional narrative) which, in the Judge's view, *"permits the recipient to understand the basis for the rejection of the application"* (para 12). She found that the reference to the Critical Skills Employment Permit in the additional narrative confirmed that the respondent acknowledged that the appellant had received such a permit for the role of software application developer and that a detailed job description for same had been submitted as part of the application for a visa.

20. As the Judge put it, the Visa Appeals Officer had identified that *"no evidence has been provided to show that the applicant has sufficient work history or qualifications to be able to do the specific job for which the work permit issued"* (para. 13). The Appeals Officer had averted to *"the variable description of that job i.e. software Application development/software engineer but notes that, in either case, the applicant has failed to show any evidence relevant experience or qualifications."* Whilst the appellant might not agree with the view of the respondent in that regard, in the view of the Judge, it was

"perfectly clear why the respondent refused the visa – i.e. she did not believe that the applicant had the qualifications/experience for the job for which a work permit has been given, whether described as a software developor or engineer" (para. 13).

21. Thus, insofar as the codified reasons were concerned, the Judge was satisfied that *"when read with the [additional] detailed paragraph…they add to the reasoning"* (para. 13). She went on to state:

> *"In circumstances where the respondent concluded that there was no evidence of sufficient work history or qualifications, it is clear why she considers that insufficient documentation had been submitted in support of the application ('I.D.'). Next, a condition of the visa sought was that the applicant would work at the job identified in the application. But where the respondent did not believe him to be qualified for that job, the conclusion that the applicant had not satisfied the visa officer that the conditions of the visa would be observed ('OC') is easily comprehensible. Finally, the finding that there were contradictions in the information supplied ('INCO') is understandable, giving the description of the contradictions identified in the substantive* [additional] *paragraph."* (para. 14)

22. The Judge noted that there was some attempt at the hearing by counsel for the appellants to rely *"on the undoubted paucity of reasons at the first stage"* but she did not entertain that argument on the basis, firstly, that no such ground had been pleaded and, secondly, the statement of grounds sought an order of *certiorari* exclusively in respect of the refusal decision, the first appellant not having sought to quash the first instance decision. Thus, the first instance decision could not be prayed in aid when seeking to establish the insufficiency of reasons in the refusal decision. In all of those circumstances, the Judge could not agree that the reasons for refusal were inadequate.

23. She next addressed the argument that the appellant was not afforded an opportunity to address or respond to concerns the Visa Appeals Officer had raised for the first time in the refusal decision. The appellant had sought to rely on *Singh v. The Minster for Business, Enterprise and Innovation* [2018] IEHC 810 but the Judge distinguished that case on the basis that the process under consideration there was a review process provided for by statute whereby the person seeking a review could make representations in writing in relation to the matter. That was not the position in the present case where the process was not one governed by statute.

24. The Judge noted that the appellant's core argument appeared to be that he was given an insufficient opportunity to understand the difficulties with his application, thus preventing him being afforded an effective appeal. Albeit not explicitly stated by the appellant as such, the Judge regarded this as a fair procedures argument. In the court below the appellant argued that when the respondent became aware of the inconsistent material provided by the putative employer *i.e*. the original description of the job having been given as *"software developer"* and then, in the context of the appeal from the first instance decision, *"software engineer"*, she ought to have contacted the appellant and asked him to explain and/or resolve the inconsistency. However, relying on *Khan v. Minister for Justice Equality and Law Reform* [2017] IEHC 800 (paras. 83-85), the Judge did not consider that what the appellant advocated for represented the current state of the law.

25. Nor did the Judge agree with the appellant's submission that a statement by McDermott J. in *T.A.R.* imposed such an obligation. In this regard, the Judge was referring to a remark made by McDermott J. at the end of his judgment to the effect that a letter or phone call from the decision maker's office indicating that a particular document was missing might have avoided the unhappy chain of events which led to the proceedings in

T.A.R. and might have addressed and resolved the respondent's concerns in that case. On the Judge's reading of *T.A.R.*, this was *"an obiter observation as to how matters might have been handled differently, rather than a finding that the employer (sic) had an obligation to contact an applicant in those circumstances".* In her view, this *obiter* view *"cannot be relied on in support of the proposition that there is a positive obligation on the respondent to seek further information to resolve inconsistencies".* (para. 20) Thus, in those circumstances, there was no positive obligation on the respondent to identify the lack of consistency in the job description and draw it to the appellant's attention.

26. The Judge went on to consider whether a new reason or reasons for refusal could be identified by the respondent at appeal stage and, if so, *"whether any procedural guarantees are required".* The respondent's position was that the new matter (the inconsistency in the job description) had only come to light at the appeal stage and therefore could not have been identified in the earlier decision. It was also argued that the Minister had not committed herself to any particular procedure at the appeal stage and thus was not precluded from considering new information.

27. The Judge noted that in the first instance decision, the appellant had been informed that the decision could be appealed within two months *"fully addressing all the reasons for refusal".* Moreover, his appeal could include *"additional supporting documents".* No commitment had been given by the respondent that only information provided at the first stage would be considered in the context of the appeal. She stated that *"arguably such an approach would work to the considerable disadvantage of applicants, given that new material is often sought to be put in by applicants, often because of the reasons given at first stage or because they perceive it would be helpful to them"* (para. 23). She considered that the appeal process provided for *"appears to be a genuine de novo hearing, where applicants are given a fresh opportunity to have their application considered on whatever*

material they identify". That led *"to the inevitable conclusion that the Minister must be entitled to decide on the application based on all the material provided, including material not provided at the first stage"* (para. 23). Accordingly, *"that must carry with it the possibility that the reasons for refusal will not necessarily be the same as those provided at first instance"* (para. 23).

28. The next question which arose was *"whether the Minister ought to have put steps in place to alert the applicant to the fact that she was going to consider new material, that the new material was likely to be adverse to the applicant, and that this would likely be reflected in the decision".* The Judge noted that in certain situations, *"fair procedures may require that a draft decision be provided in advance so that the applicant in question can make submissions on the matters arising"* (para. 24). However, the respondent had not committed to any such procedure in the present case. Nor was such a procedure adopted at first instance. Nor was it argued by the appellant that such a process was required at first instance. The Judge went on to state:

> *"It is difficult to see the rationale for requiring a more elaborate process at appeal stage. By submitting new material at appeal stage, the applicants are inviting the respondent to take a different view of their application. It is difficult to see why, in those circumstances, the respondent is required by fair procedures to give a preview of the decision to a visa applicant to vindicate their right to be heard, particularly since as discussed above the case law establishes that there is no obligation on the Minister to seek further information to resolve inconsistencies".* (para. 24)

29. The Judge also considered that the appellant had not explained why, on his case, it was unfair for the respondent to take into account the inconsistency that had arisen in the appeal process. She stated:

> *"The applicant himself submitted the letter from his employer. He could have identified the inconsistency in the material and addressed same. He did not do so. In all the circumstances, I think the process here was sufficiently unlike that in Singh, such that the finding in Singh that the Minister was obliged to identify the proposed reasons in advance to allow submissions on same is not applicable here."* (para. 25)

30. She thus rejected the argument that fair procedures required the respondent either to ignore the new material showing inconsistencies, or to draw the appellant's attention in advance of her intention to rely upon that new material.

31. The Judge next turned to the alleged irrationality/unreasonableness of the refusal decision. The appellant's argument in the court below was that the respondent gave no proper consideration to his submissions, or the documents he provided. In this regard, the appellant had pointed to the record of certain courses he took at undergraduate level at university, as well as a certificate in Programmable Logic Control and an International Computer Driving Licence ("ICDL") certification. He claimed that given the material that had been put before the respondent, it was unreasonable for the decision-maker to conclude that he had not displayed evidence of his qualifications.

32. The Judge addressed these arguments by noting that the burden of proof fell upon the appellant to demonstrate that the respondent had acted irrationally. The appellant had sought to discharge that burden by identifying the material that he said supported his claim to have adequate qualifications and/or experience for the employment offered to him. The respondent on the other hand pointed to the entire absence of any relevant qualifications or experience on the part of the appellant for a job either as a software application developer or software engineer.

33. The Judge was satisfied that *"a reasonably cursory analysis of the relevant material provided to the Minister…demonstrates that there was an adequate basis for the respondent's decision and that she was perfectly entitled to conclude that the applicant had not submitted any documentation in support of his qualifications or experience for the job in question."* (para. 28)

34. She considered that the job description as identified in the letter of offer of 20 July 2020 suggested that *"the holder of the post will have appropriate qualifications/experience in respect of the tasks identified".* She noted that the material upon which the appellant relied in relation to his qualifications/experience comprised the following:

- A letter from his employer in Saudi Arabia identifying that he worked in a company called Specialised Marine Services Company as an engineering manager.
- His affidavit evidence, where he described himself as an engineer and that he qualified by obtaining an engineering degree from Kafr El-Sheikh University in June 2010.
- A copy of the appellant's engineering degree from the faculty of engineering, which stated that he was awarded a bachelor's degree in engineering with specialisation in electrical power and machines engineering. A minority of the modules of the undergraduate degree referred to computer programming and associated courses.
- A certificate from the Egyptian electricity holding company in respect of a programmable logic control course which appeared to have lasted 13 days in 2009.
- An ICDL Certificate from 2011.

35. The Judge noted that the above was the totality of the evidence submitted by the appellant in support of his qualifications and experience. In those circumstances she considered that *"it is difficult to see how the applicant can credibly argue that the respondent acted unreasonably in concluding that he had not submitted any evidence of sufficient work history or qualifications to do the specific job for which the work permit issued. The applicant has provided no evidence that he is a qualified software engineer or software developer or has experience in those areas. In those circumstances it seems that the applicant has fallen far short of the burden of proof of establishing that there was no basis for the decision of the respondent".* (para. 31)

36. The appellant had also advanced the argument that the fact that he had obtained a Critical Skills Employment Permit ought to have been considered as material relevant to the question of the sufficiency of his qualifications and experience. The Judge considered that argument in the context of the interaction between the scheme for providing work permits and the scheme for providing visas. She opined that the appellant's arguments boiled down to one core point, namely *"that the question of the applicant's experience and skills could not be revisited by the respondent in circumstances where he had already obtained a critical skills employment permit"*. (para. 33)

37. The Judge, however, did not accept that argument, in the face of the material which had been provided to the appellant which had made clear that an application for an employment permit was *"quite distinct"* from an application for a visa, and that in each case a separate evaluation of the material would be carried out by the relevant Minister. She opined that *"success in one area is irrelevant to success in the other".* She noted that the separate and distinct nature of the two regimes had been upheld in recent caselaw, namely the decision of Keane J in *Akhtar v Minister for Justice* [2019] IEHC 411 as endorsed by Burns J in *Basit Ali v Minister for Justice* [2021] IEHC 494. In those

circumstances, the proposition that the respondent was trespassing on the function of the Minister for Business, Enterprise and Innovation in arriving at her own independent decision based on the material before her was *"fundamentally misconceived"* (para. 37). The Judge considered that the respondent was *"entitled to require evidence of the applicant's professional qualifications and experience and to consider same independently of any decision made in the context of a work permit application. The interaction between the two statutory schemes is clear – success in obtaining an employment permit is largely irrelevant to the success or failure of a visa application"*. (para. 37)

38. The Judge continued:

> *"The argument that a favourable decision in respect of an application for a work permit must inevitably be either determinative or very significant in the context of a visa application must be founded either upon statute or very clear precedent. There is no such statutory basis."* (para. 38)

39. The Judge found that no inference could be drawn that the respondent was precluded from carrying out her own independent investigation of the appellant's experience and skills just because the Minister for Business, Enterprise and Innovation is obliged to consider such matters when deciding whether or not to grant a critical skills employment permit. She stated that it was well established that the respondent enjoys significant discretion in the context of visa applications (citing *Laurentiu v Minister for Justice* [1999] 4 IR 26). Thus, for that discretion to be trammelled by the exercise of a different statutory scheme would require to be clearly provided for by legislation, which was not the case here.

40. The Judge noted that the appellant sought to argue that the decision of Barrett J in *Ashraf v Minister for Justice & Equality* [2018] IEHC 760 supported his approach and that, rather than following *Akhtar*, the Judge should follow *Ashraf*. The salient facts in *Ashraf*

were as follows: the applicant for a visa had submitted a critical skills employment permit in support of his application. His visa application was refused at first instance and on appeal. In his very short judgment, Barrett J observed that the respondent did not consider all the evidence before him and did not appreciate certain evidence for what it was. On that basis, he granted an order of *certiorari*.

41. The Judge, however, distinguished *Ashraf* from the present case on factual grounds. She found that *"in sharp distinction to Ashraf, here the respondent considered the work permit decision. Indeed, each forms an important plank of the reasoning of the respondent whereby she identified the nature of the permit granted and the job in respect of which the permit was granted and compared it to the skills and qualifications presented by the applicant. The permit was therefore front and centre of the respondent's considerations. It is as far as one can get from the situation in Ashraf where the court found the respondent failed to consider the permit at all."* (para. 41) Thus, to read into *Ashraf* that the respondent was in some way precluded from carrying out her own evaluation of the skills and experience of a person where a work permit has been granted would be to *"misread the decision in Ashraf"* (para. 41). On the basis, the Judge did not belief that there was any conflict between the decision in *Akhtar* and *Ashraf* that needed to be resolved because the proposition established by *Ashraf* was very limited in its nature and there was no breach of that proposition in the instant circumstances.

The appeal

42. Having regard to the appeal grounds and the parties' submissions, I consider that the following issues arise for consideration:

(1) Whether the reasons provided for the refusal decision were adequate.

(2) Whether the refusal decision was arrived at in breach of fair procedures.

(3) Whether the respondent erred in law in the manner in which she treated the grant of the Critical Skills Employment Permit**.**

It should be noted at this juncture that the respondent's position is that the entire premise of the appellant's application for judicial review and this appeal is misconceived and that the Judge was correct in law in relation to her findings in all respects.

Discussion and Decision

43. Before embarking on a consideration of the issues in the appeal it is, I believe, worth recalling that this is not a "rights" case but rather the exercise by the respondent of the sovereign power of the State to permit a non-national to enter the State. In *AP v. Minister for Justice and Equality* [2019] IESC 47, Clarke C.J. explained that the nature of a decision such as that in issue here impacts on the extent to which the decision requires to be rationalised. He stated:

> *"It should, of course, be emphasised that the precise application of the… right to be given reasons can, as previously noted, be dependent on the nature of the decision concerned. In particular, the precise extent of [this] entitlement may be influenced by whether the decision involves rights and obligations, on the one hand, or a benefit or privilege, on the other."* (para. 4.10)

He went on to state, at para. 5.9:

> *"[I]t is clear from the Mallak case law that there may well be situations where it is not, in practice, possible to give any detailed reasons for the administrative decision concerned may involve the exercise of a very broad discretion by the decision maker which may not, by nature of the decision itself, be susceptible to detailed reasoning. Where the decision itself is based on a broad general discretion, then it may be that the reasons which can be given are themselves broad and general".* (para. 4.10)

44. It follows from the foregoing that the respondent's reasons do not need to be as precise or detailed as may perhaps be required of a tribunal or board or other body exercising a statutory power, particularly if the exercise of that power resulted in making a decision which affects persons' rights.

45. More recently, in *Basit Ali v Minister for Justice* [2021] IEHC 494, Burns J. alluded to the very wide discretion of the respondent in exercising the power to grant a visa. The corollary of that is that the scope for challenging a decision to refuse a visa in the exercise of the State's executive power is thus narrower than applies to a challenge to a statutory or other administrative power in which the decision-maker is bound by the particular *vires* deriving from the relevant statutory scheme. As to the standard of review to be employed, in *Basit Ali,* overall, Burns J. was satisfied that the applicable standard was whether the decision sought to be impugned "*equates to a decision which flies in the face of fundamental reason and common sense"* (para. 14) (i.e. the test set out in *O'Keeffe v. An Bord Plenala* [1993] 1 IR 39 (*"O'Keeffe"*) and *The State (Keegan) v. Stardust Compensation Tribunal* [1986] IR 642) (*"Keegan"*). Burns J. also considered that in conducting a review of an executive decision, *"a significant amount of deference must be afforded to the decision maker."* I agree with the views expressed by Burns J. but would add that all of this, of course, pre-supposes that a decision- maker will have provided a reason or reasons for the decision that, in the first place, are easily discernible and comprehensible. Here, the first limb of the appellant's appeal is that the Judge erred in finding that the reasons provided for the visa refusal were clear and comprehensible to the appellant, the argument to which I now turn.

Issue 1: Adequacy of reasons

46. The appellant submits that the respondent had not provided any adequate reasons for the refusal decision. He contends that the additional narrative in the decision, which is

provided over and above the shortform or codified reasons *"ID", "INCO"* and *"OC,"* is insufficient in its explanation of the codified reasons. He argues that the additional narrative does not explain either the shortform *"ID"* and *"OC"* reasons, and, in fact, cannot be said to relate to the *"ID"* and *"OC"* reasons, and so, is insufficient for him to adequately understand the basis for the visa refusal. It is said that the absence of clarity is particularly evident in the finding that the appellant would not observe the conditions of any visa issued to him.

47. While it is accepted that the additional narrative may relate to the *"INCO"* finding (*i.e.*, the employer's reference to software development is a material inconsistency such that it somehow renders the job offer of software engineer of no significance), it is said by the appellant that does not assist in clarifying the *"ID"* and *"OC"* reasons for refusal which are not *"clear"* by reference to the standard enunciated by McDermott J. in *T.A.R.*

48. The respondent's position, insofar as the shortform reasons *"ID", "INCO"* and *"OC"* are concerned, is that the additional narrative sufficiently explains those reasons. Counsel submits that when viewed against the test set out by Clarke J. in *A.P.*, the reasons given by the respondent here were entirely adequate and that it was clear to the appellant why he was being refused a visa.

49. Essentially, the respondent contends that the appellant knows the reasons for the refusal of the visa, namely that he had not shown sufficient qualifications or work experience to do the particular job in respect of which the Critical Skills Employment Permit issued, and that inconsistent information was furnished by the appellant regarding the exact job offer being offered to him. This, counsel says, is referenced in the refusal decision when the appellant is advised that he has *"not provided any evidence that you have sufficient work history or qualifications to be able to do the specific job for which this work permit issued".* He was also advised that he had not shown *"any evidence of having*

worked or gained qualifications in any aspect of software engineering or development". Moreover, he was alerted to the perceived inconsistency by the decision-maker's reference to *"some confusion as to what exactly your role will be in E-Businessoft…".* The respondent also says that it is clear from the documentation he furnished, that the appellant's qualifications related to mechanical and electrical engineering. It is not, thus, sufficient that the appellant's degree course included a module on computer science. A qualification means what it says, counsel stresses. The salient question here is what does the refusal decision mean. It is submitted that the wording of the decision is directed to the actual evidence supplied by the appellant with his visa application.

50. Given that I consider that the shortform reasons in the refusal decision *of themselves* add little to the understanding of why the appellant was refused a visa, it is first necessary to interrogate each of the shortform reasons against the backdrop of the additional narrative in order to ascertain (if indeed same can be ascertained) what was sought to be conveyed by each of the codified reasons as appear in the refusal decision, and whether, with the benefit of the additional narrative, the intended rationale of all or any of the shortform reasons was clear to the appellant.

51. It will be recalled that the *"OC"* reason was expressed as follows *"OC:- Observe the conditions of the visa: the visa sought is for a specific purpose and duration:- the application has not satisfied the visa officer that such conditions would be observed",* which was, essentially, the mirror image of what was said in the first instance decision.

52. The appellant maintains that none of the references in the additional narrative can be said to relate to the *"OC"* reason. On the other hand, the respondent contends, insofar as it is maintained that the refusal decision contains no explanation or reasons for the *"OC"* condition, that if the Visa Appeals Officer was satisfied (as appears he/she was) that the appellant did not have the qualifications or experience for the job offered, then the *"OC"*

condition could not be observed, the respondent's point being that that must have been self- evident to the appellant upon reading the refusal decision.

53. The adequacy of shortform or codified reasons such as the *"OC"* reason in issue here was considered in *T.A.R.* There, the shortform reasons offered for the visa refusal were expressed as follows:

> *"OB: obligations to return to home country have not been deemed sufficient;*
>
> *OC: - condition - the applicants may overstay following a proposed visit"*

Unlike here, no further narrative accompanied the reasons.

54. McDermott J. had to consider, *inter alia*, whether the reasons furnished were adequate in the circumstances, and/or whether the decision itself was unreasonable and/or irrational in that there was no reasonable, rational, lawful or evidential basis upon which the respondent could have reached the decision that the applicants had neither sufficient obligation to return to Iraq following the visit, or that they might overstay. Firstly, he concluded that the attempts by the respondent in the judicial review proceedings to explain the evidential shortcomings underlined *"the inadequacy of the reasons furnished to the applicants in the refusal"* (para. 23). He considered that the *"shortness of the reasons given render it difficult for the court to understand the basis for the decision and, therefore, to exercise its jurisdiction as to whether the determination was unreasonable within the meaning of the Keegan test"* (para. 23). He found that *"[t]here is no evidence available from the decision-maker as to how or why the extensive evidence advanced on behalf of the applicants fell short of proof on the balance of probabilities that they would return home after their visit. Attempts to identify potential inadequacies that may have formed part of that decision highlight the lack of clarity in the reasons given and render it extremely difficult for the court to exercise its jurisdiction to determine whether the decision was unreasonable or irrational"*. (para. 24)

55. McDermott J. noted that it was *"well established that the reasons given for a particular decision must be clear and cogent"* and must enable applicants to consider whether they have a reasonable chance of success on appeal. This was essentially a question of fairness (*Mallak v. Minister for Justice, Equality and Law Reform* [2012] IESC 59, Fennelly J. at paras. 64-66). He went on to state:

> *"27. I am satisfied that though reasons were given, it is not possible to determine accurately what the reasons meant in the context of the particular case. It was not possible for the applicants to readily determine from the terse nature of the reasons or the materials submitted in the course of the application why it had been refused. Undoubtedly, there are cases in which a brief reason, which may even be described as formulaic may be adequate, in particular where a large number of persons apply, on individual facts, for the same relief, and the nature of the authority's consideration and the form of grant or refusal may be similar or identical. (F.P. v. Minister for Justice [2002] 1 I.R. 164). However, I do not consider this to be such a case because, as emphasised by the respondent, the very many applications for visas may involve widely differing facts and histories which require individual consideration. Many such decisions may adequately be conveyed in a short or terse expression of the reasons. However, in the circumstances of this case the decision was not so susceptible. The reasons given were inadequate for the purposes of judicial review and any further application for a visa by the applicants.* (emphasis added)

56. *T.A.R.* was endorsed by this Court in *Mukovska v Minister for Justice* [2021] IECA 340, Hunt J. (writing for the Court) opining that *"the approach of McDermott J. to the reasons given in that case illustrates the correct approach to assessment of the efficacy of reasons where they are given"* (para. 30). In *Mukovska*, a *"CP"* reason in the visa refusal

decision in issue was expressed as *"Need to undertake the course in this State not demonstrated or warranted"*. Hunt J. held that the *"CP"* shortform reason was deficient as it placed the applicant in an unfair position. He noted that the first time that the fact that *"need"* was an important consideration was disclosed was on the refusal of the initial application. That refusal did not reveal the essential rationale of the decision because the precise sense in which this criterion was applied did not emerge until after the applicant sought judicial review. He stated that *"the initial refusal letter gave no clarity as to the applicable standard"*. He further noted that: *"the identical reason given for a refusal of [the] appeal left the appellant none the wiser, and understandably puzzled at the result"*. (para. 41)

57. Hunt J. opined:

> *"What is now crystal clear is that the reason given on both occasions did not properly communicate the essential rationale of either decision. Just as in the case of the applicants in TAR, she did not know how or why the extensive evidence submitted fell short of establishing the necessary need in this context. The "CP" reason furnished on both occasions is insufficient to enable a proper exercise of the power of judicial review in the precise context of this case."* (para. 41)

58. There was also an *"OC"* reason in *Mukovska*, expressed as follows: *"OC:- Observe the conditions of the visa- the visa sought is for a specific purpose and duration:-the applicant has not satisfied the visa officer that such conditions would be observed"* (similar to the present case). One of the grounds of appeal concerned the failure of the trial judge to consider the *"OC"* reason. Notwithstanding the Minister's assertion that *"the decision had to be read as a collective…if there is no need (established) the Minister might take the view that (the applicant) might overstay"*, Hunt J. was not satisfied to find that it followed that a conclusion that *"an applicant who fails to meet a very narrow concept of*

need in the 'CP' field can be used to justify a further inference that such an applicant will necessarily turn into an overstayer or will breach some other visa condition". In Hunt J.'s view that was *"a defective chain of reasoning".*

59. Ultimately Hunt J. concluded that the *"OC"* reasons were *"manifestly unreasonable and irrational, having regard to the thrust of the evidence and material submitted, the entirely inappropriate reliance on non-possession of a departure stamp to justify those conclusions, and the suggestion that a risk of overstay and non-compliance necessarily followed from a conclusion that a visa applicant failed to meet a narrow conception of 'need' in their application."* (para. 65)

60. The brevity of reasoning in a visa refusal decision was again considered in *S. v Minister for Justice* [2022] IEHC 578. The decision in that case identified the following reasons for refusal: (i) insufficient documentation, (ii) inconsistencies, (iii) observe the conditions of the visa and (iv) the applicant's failure to furnish evidence. Commenting on the brevity of the refusal decision Bolger J. stated:

> *"Whilst brevity in a decision may well be praiseworthy, the recipient of a decision is entitled to understand the decision and reasons for it such as to inform themselves whether and if so how it can and should be challenged; Connolly v an Bord Pleanála [2018] ILRM 483, approved more recently by the Supreme Court in Náisiúnta Leictreach (NECI) v Labour Court [2021] IESC 36. The format of the decision at issue here rendered it very difficult for the applicant (and indeed for this Court) to understand why and on what basis the decision was made. As well as its brevity the decision suffers from providing three reasons followed by a narrative containing multiple purported bases for those reasons. The reasons and narrative provided are so interlinked that I do not consider that they can be severable in the*

event that some, but not all, are found to be vitiated by an error of law or fact or both". (para. 28)

61. Adopting the *dicta* of McDermott J. at para. 24 in *T.A.R.*, Bolger J. found (with regard to the "ID" reason) that neither the application process nor the appeal process had identified what documentation was missing from the applicant's application. She held that it was not reasonable for the decision-maker to condemn the applicant for not providing documentation on the basis, *inter alia*, of *"the Minister's failure to advise the applicant of the need for the form in spite of their solicitor's appeal letter listing off all the documents they have identified on the visa office's website and their request that the Minister advise them of any further documents required".* This was a reference to the fact that the applicant's solicitor's three-page submission had raised a number of points including the insufficiency of reasons which were not engaged with by the Minister in the appeal decision.

62. Bolger J. also found the decision to dismiss the applicant's two work references unreasonable for the reasons set out at para. 31 of the judgment. She further found that it was not clear from the decision what the inconsistencies were upon which the Minister relied.

63. Commenting on the decision that the applicant would not observe the conditions of the visa (the "OC" reason (also in issue here)), Bolger J. stated:

"The Minister's decision states that the applicant had not satisfied the Visa Officer that the conditions would be observed. There are no reasons or explanation for this and the conditions that the decision maker seemed to consider might not be observed by the applicant are not identified." (para. 34)

64. She went on to find also:

> *"Even that requirement of broad and general reasons is not satisfied in the impugned decision which contains nothing at all to explain how the applicant had not satisfied the Visa Officer that the conditions of the visa would be observed. The only source of anything resembling a reason or an explanation for this aspect of the Minister's decision is to be found in Ms. Brennan's affidavit where the absence of a supplementary form is highlighted, which the deponent says would contain details of his family in India. In so far as this is the Minister identifying reasons subsequent to the decision, there is ample authority to confirm this cannot be done…"* (para. 35)

65. As summarised in her *"Conclusion"* Bolger J. determined, *inter alia,* that the appeal decision was legally flawed in that *"it fails to properly identify sufficient reasons for the decision and a basis for same …"* and *"it fails to rationalise the findings that the applicant would not observe the conditions of his visa, or that the applicant had not provided sufficient evidence that he had appropriate skills, knowledge or experience for taking up this position in Ireland"*.

66. Turning now to the present case, by reference to *T.A.R., S v. Minister for Justice* and the decision of this Court in *Mukovska*, patently, the *"OC"* reason given in the refusal decision here is flawed, for essentially the reasons outlined in the jurisprudence just discussed. In essence, no reasons or explanation for the conclusion are given (and none are to be found in the additional narrative), and the conditions that the decision-maker considered might not be observed by the appellant are not identified in any part of the decision. As Baker J. observed in *V.K. & Ors v. Minister for Justice & Equality* [2019] IECA 232:

> *"109. "...A person receiving correspondence communicating a decision is entitled to know the basis for the decision…*

110. Further, it appears to me that the application of the test must be done in a rational manner and the decision maker must give reasons that are transparent and involve an objectively reasonable engagement with the facts."

67. Furthermore, I consider that it is not sufficient for the respondent to justify the absence of reasons for how the *"OC"* conclusion was arrived at by reference to the decision-maker's findings on the *"ID"* field. I agree with Hunt J., in *Mukovska,* that the attempt to do so constitutes *"a defective chain of reasoning"*, in the absence of *any* explanatory narrative in the refusal decision explaining why it was considered that the conditions of the visa would not be observed, and for reasons which are set out below following my consideration of the *"ID"* reason.

68. I turn next to the *"ID"* and *"INCO"* reasons. The appellant does not dispute that the additional narrative contains an explanation for the decision-maker's *"INCO"* conclusion. Furthermore, albeit his counsel commenced his oral submissions to the Court on the premise that the *"ID"* reason was not explained by the additional narrative, in exchanges with the Court counsel conceded that the reference to the appellant not having shown any evidence of having worked or gained qualifications in any aspect of software engineering or development could perhaps speak to the *"ID"* shortform reason, as well as the *"INCO"* reason. Nevertheless, he maintained that the additional narrative ought to be read only in the context of the additional letter that the putative employer had furnished to the Visa Appeals Officer on 12 October 2020 (i.e. the additional narrative explained only the *"INCO"* reason).

69. I am satisfied, however, that the additional narrative is referrable to the *"ID"* reason as well as the *"INCO"* reason and that that was discernible by the appellant from a reading of the refusal decision in its entirety. That of course begs the question whether the conclusions arrived at in relation to the appellant's work experience and qualifications can

be said to reasonably and rationally derive from the information that was before the decision-maker. The information the appellant adduced in his visa application regarding his work experience was his work as a marine services engineer in Saudi Arabia. As regards the appellant's qualifications, what was put before the respondent was, firstly, that the appellant had completed a five-year degree in engineering. Secondly, as the documentation submitted with his visa application again showed, he had completed several modules relating to computing during his five-year degree course. In those circumstances the appellant argues that the Judge fell into error in finding that he had no qualifications at all relating to software, when one has regard to the individual components of the appellant's engineering degree course which included a module in computer programming and computer hardware (1st year) and applications of computer in electrical power systems (4th year). Moreover, the appellant had also completed an ICDL certificate. As his counsel acknowledged, however, the appellant did not have a software engineering degree.

70. Overall, I am satisfied that the information the appellant supplied relating to his work and experience on its face contained little that could be said to be directly connected to what would ordinarily be understood as requisite qualifications or experience either as a software engineer or a software developer. Thus, on foot of the information supplied, the decision-maker could not be expected to assume that the appellant was either qualified as or proficient in software engineering and/or development when he was in fact working as a marine services manager.

71. Looking at the *"INCO"* reason and the *"ID"* reason in conjunction with the additional narrative, I am satisfied that there was sufficient clarity in the refusal decision for the appellant to discern both that the respondent had found an inconsistency in the documents provided by E-Businessoft at different times, and that the respondent considered, from a perusal the appellant's third level degree documents and the description

of his current employment as a marine services engineer, that the appellant did not have the requisite qualifications or work experience for the job being offered to him. On that basis, it cannot be suggested that the decision-maker's assessment on those issues had not been made sufficiently clear to the appellant, or that *on its face* the refusal decision was irrational or unreasonable in the *O'Keeffe/Keegan* sense. However, as the relevant jurisprudence shows (see *Mallak*), the Court's assessment of the rationality or reasonableness of a decision cannot be divorced from the consideration of the fairness or otherwise of the process leading to the decision.

72. Thus, the question which remains to be answered is whether, in all the circumstances of the case, it can be said that the respondent's assessment of the appellant's qualifications and experience for the job of software engineer or software developer was in fact fairly or reasonably arrived at. This is the nub of issue 2.

Issue 2: Fair procedures

73. The first argument the appellant canvasses under the canopy of fair procedures is that he should have been afforded an opportunity to address the alleged inconsistency in his application, especially in circumstances where the existence of the inconsistency might result in a refusal of his application. This is particularly so, his counsel says, when the inconsistency arises at the appeal stage and the appellant has had no prior occasion to address any such issue. He argues that he cannot reasonably have been expected to identify what the respondent might potentially highlight as an inconsistency and seek to address same by way of explanation in advance. It is also argued that insofar as the respondent highlighted an inconsistency, there was in fact no inconsistency and that the alleged dichotomy was just a different way of referring to what was in essence the same job.

74. The appellant also says that the additional narrative went beyond a mere elaboration of the reasons provided at first instance and in fact constituted entirely new reasons such that the appellant did not have the opportunity to address issues raised in respect of his visa application which, accordingly, rendered his appeal of the first instance decision ineffective. It is also said that the respondent could have telephoned or emailed the appellant and asked him to clarify the inconsistency that had been identified. In aid of his argument, the appellant relies on the dictum of McDermott J. in *T.A.R.,* as follows:

> *" The court notes that in this case, a letter or phone call or email from the decisionmaker's office indicating that a particular document, for example, concerning land certification was missing or that some further documentation concerning income would be of assistance might have avoided the unhappy chain of events which led to these proceedings and might, indeed, have addressed and resolved the respondent's concerns in respect of the applicants."* (at para. 28)

75. The respondent contends that there is no basis in law for the argument that the appellant ought to have been notified in advance of the refusal decision that the decision-maker considered the letter submitted by the putative employer (and which described the position being offered to the appellant as that of software engineer) was inconsistent with the earlier description of his position as a software developer. Contrary to the appellant's assertion that what the employer was referring to what was *"in essence the same job",* that was not the interpretation of the respondent who, it is argued, was entitled to find that the change in the job description signified some confusion as to the exact role the appellant would have with E-Businessoft.

76. I agree with the Judge that the respondent was entitled to comment on the inconsistency in the job description contained in the two pieces of correspondence which the appellant adduced from the putative employer without reverting to the appellant since

the inconsistency would have been apparent to the appellant himself from a reading of the relevant correspondence. Hence, it did not fall to the respondent to alert the appellant to the inconsistency in advance of the refusal decision. In any event, I am also of the view that the *"INCO"* reason is not the salient issue in this case. As counsel for the respondent remarked, what the appellant takes issue with was no more than an observation by the Visa Appeals Officer which did not have any material effect on the essential issue in this case, namely the decision-maker's conclusion that the appellant had not submitted any evidence of having worked or gained qualifications in any aspect of software engineering or development.

77. Insofar as the appellant takes issue with the respondent's treatment in the refusal decision of his qualifications and experience for the job being offered to him, the respondent's position is that there is no obligation on the part of a decision-maker to advise an applicant in advance of the decision of the views reached in the determinative process. It is pointed out that not only did the appellant have an opportunity to submit further documentation on appeal, but he also candidly accepted in his appeal letter that he had no further documentation.

78. Relying on *Khan v. Minister for Justice, Equality and Law Reform* [2017] IEHC 800, the respondent says that it is for the applicant to put his or her best foot forward in the context of an application for a visa, and on appeal from a first instance refusal. It is also argued, insofar as the appellant relies on the *dictum* of McDermott J. in *T.A.R.,* that McDermott J. did not say that there is a legal obligation to revert to an applicant. The point is also made that the appellant has not in these judicial review proceedings pointed to any particular factor that he would have relied on by way of engagement on the issue of his qualifications and experience, had it been made clear to him in advance of the refusal decision that this issue was the basis of the respondent's concern. It is submitted that even

if there was a practical basis as to why the respondent should have reverted to the appellant, it would not in any event have made any difference given the appellant's lack of qualifications and skills for the job to which the Critical Skills Employment Permit related.

79. As a matter of principle, I agree with the submission that there is no obligation *per se* on the respondent to give advance warning to an applicant about perceived deficiencies or contradictions in the documents submitted with a visa application. I said as much in *Khan v. Minister for Justice, Equality and Law Reform* [2017] IEHC 800 at para. 83, and went on to state, at para. 85:

> "*...As stated in A.M.Y. v. Minister for Justice [2008] IEHC 306, ' there is no onus on the Minister to make inquiries seeking to bolster an applicant's claim; it is for the applicant to present the relevant facts'".*

I also agree that the words of McDermott J. in *T.A.R.*, upon which the appellant relies, do not suggest that there is an absolute obligation on the respondent to forewarn a visa applicant of perceived frailties in the application.

80. All that being said, I consider that in the particular circumstances of this case, and in order to determine whether the respondent's assessment of the appellant's qualifications and work experience was *fairly* arrived at, it is necessary to parse what actually occurred following the receipt by the appellant of the first instance decision. As we have seen that decision was brief in the extreme, containing as it did only two shortform reasons, *"ID"* and *"OC"*. The refusal of the visa on the basis of the perceived insufficiency of his documentation (*"ID"*) led the appellant, as evidenced by the contents of his appeal letter, to try and ascertain what documents were missing. To this end he consulted the respondent's website and concluded (rightly or wrongly) that proof of accommodation in the State and travel insurance only were missing. Hence, his appeal letter contained assurances that these matters had been attended to and he gave details of the initial

accommodation he had secured for himself and his family in the State. An undated accompanying letter from E-Businesssoft (already referred to) confirmed his yearly salary in the State and that his medical insurance would be covered by the company. A further letter from E-Businesssoft dated 12 October 2020 (also referred to earlier) advised, *inter alia,* that the company were assisting the appellant in securing accommodation, gave details of his travel insurance and stated that the company were covering the appellant's and his family's travel arrangements and tickets. It also stated:

> *"We have interviewed [the appellant] and he showed the satisfied (sic) knowledge, skills and experience to carry out the needed duties professionally.*
>
> *[The appellant's] qualifications, training, certificates, Employment contract and all other supporting documents have been submitted to the department of Business, Enterprise and Innovation.*
>
> *He has been granted a Critical Skills Employment permit…*
>
> *We would like to confirm that [the appellant] will work in our company…as Software Engineer from 15/11/2020, for a contract of two years".*

81. It will be recalled that the letter of appeal further advised, with regard to the *"OC"* reason, that the appellant had made contact with the Embassy in Abu Dhabi and Riyadh to seek clarification as to what the difficulty in this regard might be, to no avail. He further advised that he had been granted a Critical Skills Employment Permit and went on to give assurances regarding observance of the visa conditions.

82. All of the above was done because, as evidenced by the contents of his appeal letter, the appellant had no idea from the first instance decision (because of its brevity and opaqueness) what the exact problem or problems with his documentation or the conditions of the visa, may be. More pointedly, in relation to the *"ID"* reason he was not told in the first instance decision what it was he had not supplied. To a significant extent, therefore,

the opaqueness of the first instance decision (for which no blame can be attributed to the appellant) was front and foremost in the appeal letter and framed the appellant's response to the first instance refusal. His appeal was submitted with his addressing what he thought (after recourse to the respondent's website) were the issues that may be of concern to the respondent.

83. Thereafter, in the undoubted knowledge that the appellant had focused only on his accommodation and travel arrangements (which he believed might be the source of the respondent's concern), the respondent did not, however, make any attempt to disabuse the appellant of his belief that the difficulties with his documentation lay in the realm of accommodation and travel arrangements. Whilst the appellant did not in his appeal letter specifically ask for other required documentation to be identified by the respondent, in my view, his apparently erroneous focus on matters of travel and accommodation (to which, as I have said, he was unwittingly led by the very opaque nature of the first instance decision reasons) constituted in effect a clarion call to the respondent to put the appellant on the right road, which the respondent did not do. To my mind, in the particular circumstances of this case it behoved the respondent to do so.

84. Thus**,** albeit that the respondent now asserts that despite the very lengthy list of documentation submitted by the appellant he did not submit evidence of his qualifications and experience for the position in question and, for the purposes of his appeal, did not submit any further documentation to show any relevant work experience or professional qualifications, in my view this is not sufficient for the Court to uphold the rationale in the additional narrative which opines on the appellant's qualifications and work experience. This is because of the failure of the respondent to make any attempt to correct the appellant's misapprehension of the situation, as I have just explained. Hence, the respondent cannot now reasonably or fairly rely on the contents of the additional narrative

to argue that the refusal decision was properly premised on the appellant's failure to submit sufficient documentation of his qualifications and experience for the job being offered to him.

85. Furthermore, and for the reasons just outlined, I also reject the argument that this appeal should be refused on the basis that the appellant has not in these proceedings furnished evidence of what he did as an engineering manager in marine services when working in Saudi Arabia which, arguably, might demonstrate his qualifications and experience for the job offered by E-Businesssoft and in respect of which he obtained a Critical Skills Employment Permit. The function of the High Court in a judicial review (and of this Court on appeal) is to address the process whereby the respondent reached the impugned decision. It is not for the courts to decide whether the appellant's work experience is capable of demonstrating the necessary qualifications and experience for the job in question and it would certainly not be appropriate for an applicant in judicial review proceedings to contend for the invalidity of a decision by reference to additional material which was not put before the decision-maker. The point here is that the reasons given by the respondent did not enable the appellant to realise that this is the type of material which was required but which was not included in his original application.

86. Also, for the same reasons, I reject the respondent's reliance on the fact that the appellant had been advised on the respondent's website that supporting documentation was required, and that the onus was on him to satisfy the Visa Officer that a visa should be granted. This cannot, in my view, be the deciding factor in this case given the respondent's singular failure to disabuse the appellant of his erroneous belief that the difficulties lay in the information he had supplied in his visa application concerning his travel and accommodation arrangements and to advise him that it was his professional qualifications and experience that were of concern.

Issue 3: The Judge's treatment of the Critical Skills Employment permit

87. The appellant argues that the respondent should have had regard to the fact that he had been granted a Critical Skills Employment Permit and that had she done so, that would have been dispositive of any concerns she harboured regarding his qualifications and work experience. His counsel submits that *Ashraf v Minister for Justice* and *S v Minister for Justice* are authority for the proposition that the respondent, when considering a visa application from someone in possession of a Critical Skills Employment Permit, is required to have regard to that fact, and that the Minister for Employment, Enterprise and Innovation would have already analysed applications for such permits prior to same being granted. It is said that this must surely be a relevant consideration for the respondent in the context of the visa application in issue here. Counsel highlights Bolger J.'s emphasis in *S v. Minister for Justice* on the fact that the visa applicant's experience as a Tandoori chef had been accepted by his prospective employer, and by the Minister for Business, Enterprise and Innovation in granting him a work permit. I note that in *S. v Minister for Justice*, the prospective employer had sworn an affidavit to verify that they were satisfied with the applicant's skill level and knowledge. In the present case, there was no such affidavit.

88. In response to the Court's observation that the visa appeals process was not an interactive one and that the appellant knew that even when he obtained the Critical Skills Employment Permit he would still have to adduce his personal qualifications and work experience to the respondent when applying for a visa, counsel nevertheless submitted that the fact that the appellant had studied computing as part of his engineering degree and had been offered the job in question by his putative employer and granted a Critical Skills Employment permit should not be set at zero. I would observe, in this regard, that there is no evidence that the Critical Skills Employment Permit was ignored by the respondent or otherwise set at zero since it is clearly referred to in the refusal decision.

89. In *S. v Minister for Justice*, Bolger J. was urged by the applicant there to take account of the fact that the work permit in issue there was *"a form of evidence of experience"* as found by Barrett J. in *Ashraf v Minister for Justice and Equality*. Bolger J. noted that according to the applicant, this *"meant that the Minister cannot look behind the grant of the permit or require an applicant for a visa to show that they are qualified to do the job which they were granted that permit"* (para. 36). She noted, however, that a different view had been taken in *Akhtar v Minister for Justice and Equality* [2019] IEHC 411.

90. In concluding, effectively, that the grant by the Minister for Business, Enterprise and Innovation of a Critical Skills Employment Permit did not delimit the executive power of the respondent to grant or withhold a visa to a person who holds such a permit, Keane J. first observed in *Akhtar* that *" [t]he purpose for which Mr Akhtar was granted a work permit under s. 8 of the Act of 2006, was then specified under s. 3A(2)(c) of the Act of 2006."* Section 3A(2)(c) provides:

> *"(2) The purposes for which an employment permit may… be granted are:*
>
> *….*
>
> *(c) where the [MJEI] is satisfied that a person in the State has been unable to recruit an employee for a vacancy for an employment, to provide for the recruitment of a foreign national who has the required knowledge and skills for the employment and, where appropriate, the qualifications and experience as may be required for that employment…."*

91. From his reading of the subsection, Keane J. considered that *"it is thus apparent that, as one might expect, the employment permit process is focused on the regulation of the labour market and, in that context, is intended to ensure that foreign nationals should only be recruited where vacancies cannot otherwise be filled. The process is, at best, only incidentally concerned with whether a particular foreign national recruited to fill such a*

vacancy has the required knowledge, skills, qualifications or experience to do so." (para. 29)

92. Keane J. next considered s.6 of the 2006 Act. It provides, in material part:

"6. – An application for an employment permit shall –

…

(b) provide information in respect of the qualifications, skills, knowledge and experience that are required for the employment concerned,

(c) provide information and, where required, any relevant documents in respect of the qualifications, skills, knowledge or experience of the foreign national concerned…."

93. He noted that s. 10 of the 2006 Act prohibits the grant of such a permit provided for in 3A(2)(c) unless the relevant Minister is satisfied that certain steps have been taken to offer the job concerned to a citizen or qualifying foreign national by first advertising it in the manner prescribed by that section. Keane J. next had regard to s.11(1) which provides:

"11. — (1) In considering an application for an employment permit, the [MJEI] shall have regard to—

(a) the extent to which a decision to grant the permit would be consistent with economic policy for the time being of the Government,

(b) whether the knowledge and skills and, where appropriate, the qualifications and experience referred to in section 6(b) are required for, or relevant to, the employment concerned,

(c) such of the other matters referred to in section 6 as are relevant to the application,

(d) if any of paragraphs (a) to (j) of section 12(1) fall to be applied in relation to the application, any matters that, in the opinion of the [MJEI] are material to the application of such a paragraph or paragraphs, and

(e) the different purposes, specified in section 3A(2) for which an employment permit may be granted."

94. Section 12(1) of the Act of 2006 deals with the circumstances in which the Minister for Business, Enterprise and Innovation MJEI may refuse to grant an employment permit, including:

"(l) if he or she is satisfied that the foreign national concerned does not possess the qualifications, knowledge or skills for the employment concerned or the foreign national concerned does not have the appropriate level of experience required for the employment."

Noting this, Keane J went on to opine, as follows:

"Thus, in the Act of 2006, the Oireachtas has chosen to do a number of things. First, a distinction has been drawn between matters of which the MJEI must be satisfied before granting an employment permit and those to which the MJEI must have regard in considering an application for one. The matters of which the MJEI must be satisfied all relate to the requirement to offer the job concerned to a citizen or national of a qualifying state by appropriately advertising it before an application for a work permit is made. The matters to which the MJEI must have regard include, amongst many others, the information and, where required, relevant documents provided in respect of the qualifications, skills, knowledge or experience of the foreign national concerned. There is no suggestion in the Act of 2006 that the MJEI must be satisfied that the foreign national possesses the qualifications, knowledge or skills, or has the appropriate level of experience,

required, for the employment; the MJEI is merely empowered to refuse to grant an employment permit where satisfied that the foreign national concerned does not possess them." (para. 34)

95. I would observe that s. 6 of the 2006 Act appears to support the view taken by Keane J. that the 2006 Act is concerned with or directed to skills in the abstract rather than the identity of the person in respect of whom the work permit is being sought. Keane J. arrived at his view after a detailed consideration of the provisions the 2006 Act, something that was not engaged in by Barrett J. in *Ashraf.* I find no basis upon which to disagree with Keane J.'s analysis. It follows, therefore, that the respondent was free to consider whether the person applying for a visa has the requisite qualifications and experience. The function of the Minister for Business, Enterprise and Innovation under the 2006 Act is wholly separate from the role of the respondent in the granting of visas to enable non-nationals (*i.e*. those from visa-required third countries) to apply to enter the State. In the exercise of the respondent's discretion to grant visas, where the purpose of the person entering the State is to take up a particular employment, the qualifications of that person for the role is one element of the assessment to be carried out. As already stated, the appellant was advised of this by the Minister for Employment, Enterprise and Innovation when he obtained his Critical Skills Employment Permit.

96. Thus, in *S v. Minister for Justice*, adopting the approach of Keane J. in *Akhtar*, Bolger J. did not consider the work permit *"constitutes the type of prima facie evidence that is contended for by the applicant"* (para. 37). However, neither did she accept that it could be ignored. She was satisfied that the permit had been taken into account since the decision-maker had asserted that the decision was arrived at having taken all documentation and information into account. As Bolger J. put it, *"[t]hat assertion is to be*

accepted as having occurred unless it is reasonable to believe otherwise, in line with the dicta of Hardiman J. in GK v Minister for Justice [2002] 2 I.R. 418". (para. 37)

97. The same applies here, in my view. As I have said, the Employment Skills Permit was taken into account by the respondent. Insofar as the appellant contends that no proper account was taken of the fact that he obtained such a permit, I cannot agree that the permit requires to be viewed in the way for which counsel contends. Once it was taken account of, that is sufficient, to my mind. At the risk of repetition, the fact of a Critical Skills Employment Permit having been granted does not usurp or delimit the exercise of the respondent's discretion. That was made clear to the appellant in the correspondence dated 4 September 2020 from the Minister for Business, Enterprise and Innovation enclosing the Critical Skills Employment Permit.

98. This case concerns a non-EA visa required national – who was not permitted to work in the State save by permit. In order to work in the State, the appellant had to obtain a visa. The grant of a visa is a distinct function of the respondent. On the other hand, the 2006 Act is directed towards the filling of jobs to skills in the abstract rather than the identity of the person in respect of whom the work permit is being sought, a view which is, as I have said, underscored by s. 6 of the 2006 Act. Based on the reasoning of Keane J. in *Akhtar*, with which I agree, it was entirely within the remit of the respondent to find that the appellant did not possess sufficient qualifications and experience for the job to which the Critical Skills Employment Permit related. (Of course, in this case, I have concluded, for the reasons already set out above, that that determination was not fairly arrived at.) Thus, insofar as the appellant relies on the decision of Barrett J. in *Ashraf* to assert that the Critical Skills Employment Permit *"is a form of evidence of experience",* the position of Keane J. in *Akhtar* is to be preferred, in my view.

99. My conclusion that the appellant has not made out the ground of appeal pertaining to the respondent's treatment of the Critical Skills Employment Permit is, of course, not sufficient to uphold the refusal decision. This is because of the frailties which attach to that decision, to which I have already alluded, namely the inadequacy and effective unreasonableness of the *"OC"* reason, and regarding the *"ID"* reason, in the very particular circumstances of this case the failure of the respondent, prior to issuing the refusal decision, to highlight (when effectively invited by the appellant to do so) the deficiencies in the appellant's qualifications and work experience in relation to the post being offered to him, be that software engineer or software developer, thus thereby depriving the appellant of any real or effective opportunity to address those perceived inadequacies.

Summary

100. For the reasons set out above, I would allow the appeal and remit the matter to the respondent for consideration by a different decision-maker. I would allow the appellant a period of four weeks from the date of delivery of this judgment to adduce (should he wish to do so) to the decision-maker such documentation as he may rely on which speaks to his qualifications and experience for the job the subject matter of the letter of offer of 20 July 2020 from E-Businesssoft.

Costs

101. The appellant has succeeded in his appeal. It would seem to follow that he should be awarded his costs to be adjudicated by a legal costs adjudicator in default of agreement. In the event that any party wishes to seek some different costs order to that proposed, the Court proposes to list the matter for a short cost hearing at 9.00am on Wednesday 20 March 2024. If, however, the parties agree the Court's presumptive costs order without the need for a hearing, then acceptance of same should be communicated to the Court by 1pm

Tuesday 19 March 2024. Upon receipt of such communication, the order of the Court, including the proposed costs order, will be drawn and perfected.

102. As this judgment is being delivered electronically, Haughton J. and Butler J. have indicated their agreement therewith.