



**AN CHÚIRT UACHTARACH
THE SUPREME COURT**

S:AP: IE: 2023:000131

[2024] IESC 58

**O'Donnell C.J.
Woulfe J.
Hogan J.
Murray J.
Donnelly J.**

BETWEEN/

CHAIN WEN WEI

APPLICANT

AND

**MINISTER FOR JUSTICE AND THE COMMISSIONER OF AN GARDA
SIOCHANA**

RESPONDENTS

AND

TANG TING TING

APPLICANT

AND

**MINISTER FOR JUSTICE AND THE COMMISSIONER OF AN GARDA
SIOCHÁNA**

RESPONDENTS

JUDGMENT of Mr. Justice Gerard Hogan delivered the 19th day of December 2024

Introduction

1. The appellants in this case are two Malaysian nationals who were refused leave to enter the State on 12th December 2020. At the time of their arrival, Malaysian nationals were visa exempt for the purposes of entry into the State. The appellants had both entered the State in order to pursue a full-time English language course which was due to commence on 4th January 2021. Due to the exigencies of the Covid-19 pandemic this course was being held at that time on-line and not in person. At the time official guidelines (the details of which I will presently consider) sought to restrict the entry of non-nationals into the State to pursue an on-line teaching course of this nature.
2. The applicants were, however, refused entry to the State by immigration officers pursuant to s. 4(3)(j) of the Immigration Act 2004 (“the 2004 Act”). This sub-section provides that permission may be refused if the officer is satisfied 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.” It is accepted that the students posed no threat to national security. It is said, however, that the grant of leave to land was justified on the ground that their presence in the State would be contrary to public policy. The present appeal accordingly turns on the proper interpretation of the words “contrary to public policy” as it appears in the sub-section.
3. The entry of students wishing to pursue language courses in Ireland had previously been governed by Guidelines issued by the Irish National and Immigration Service in October 2011. These Guidelines provide that it was not possible for students to come to Ireland “to undertake a part-time course or a distance learning course.” While the English language course which the appellants sought to pursue did not originally fall into this category, due

to the exigencies of the Covid-19 pandemic, the organisers of the course were obliged to offer it on-line for much of the calendar year 2020. At this point, the 2011 Guidelines had been supplemented by further Guidelines published by the Government on 27th October 2020. These Guidelines had provided that entry into the State for those seeking to pursue English language courses was being restricted by virtue of the pandemic. It expressly stated that "...prospective students seeking to enter the State should wait *until in-person tuition has been resumed.*" (Emphasis supplied). The two applicants were refused leave to land by virtue of this particular policy. It is not suggested that these 2020 Guidelines had any particular statutory foundation.

4. The applicants then immediately sought leave to apply to judicial review of this decision. The decisions to refuse leave to land were upheld by Burns J. in two complementary judgments delivered on 23rd March 2021. In her judgments Burns J. considered two earlier High Court judgments which had arrived at differing conclusions on the meaning of this phrase in s. 4(3)(j) of the 2004 Act. She declined to follow the first of these decisions (a decision of mine delivered as a judge of the High Court in *Ezenwaka v. Minister for Justice, Equality and Reform* [2011] IEHC 328) on the basis that this decision had not had sufficient regard to the use of the word "or" in the sub-section. She concluded that the reference to public policy should be regarded as separate and distinct from the reference to national security. The judge accordingly rejected the suggestion that the phrase should bear a narrower interpretation which had been adopted in *Ezenwaka* as being a variation of national security, albeit perhaps one which was "somewhat more flexible in its scope and reach than national security properly so called."
5. As the applicants had been refused entry by reference to public policy as reflected in the published guidelines of 27th October 2020, Burns J. found that the refusal was lawful for the purposes of s. 4(3)(j) of the 2020 Act. Burns J. nevertheless granted leave to appeal to

the Court of Appeal pursuant to s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000 on the issue of the proper construction of the meaning of the phrase “public policy” in s. 4(3)(j) of the 2004 Act.

6. The appeals were dismissed by the Court of Appeal in a comprehensive judgment delivered by Faherty J. on 2nd June 2023: see *Wen Wei v. Minister for Justice and the Commissioner of An Garda Siochana* [2023] IECA 138. In her judgment, Faherty J. concluded (at 93) that this was not a case where the principle of *noscitur a sociis* was properly to be applied, saying that the “two expressions are far from synonymous with one another or naturally sequential”. She added (at 94) that “each of these concepts is entirely capable of being seen as a separate and distinct concept and not requiring the application of the maxim *noscitur a sociis*.” She also stressed (at 95) the fact that neither concept had been defined in the 2004 Act and where both concepts were separated by the word “or”.
7. Before proceeding any further, I should state that I entirely agree with the comments of O’Donnell C.J. regarding the form of the stay order which was originally granted by the High Court in this case. This stay order effectively amounted to an open-ended *ex parte* interlocutory injunction restraining the deportation of the applicants.
8. For all the reasons expressed by Collins J. and myself in our respective judgments in *MD v. Board of Management of A Secondary School* [2024] IESC 11 I consider that the practice of granting open-ended stays of this kind in judicial review applications should cease. If a stay is going to be granted, the same general practice governing the granting of interlocutory injunctions should be followed so that in particular any party affected by the stay is entitled to be heard before such an order is made. As the Chief Justice has observed in this case and as I remarked in *MD*, it may be that the actual wording of Ord. 84(2)(b) of the Rules of the Superior Courts has contributed to this confusion given that it appears – on at least one reading of this provision – expressly to permit the granting of stay orders of

this kind. If so, it may be that the wording of this sub-rule might with advantage be reconsidered by the Superior Court Rules Committee.

The interpretation of section 4(3)(j) of the 2004 Act

9. At the heart of the present appeal lies the question of whether s. 4(3)(j) provides for two separate and distinct concepts, namely, national security or public policy. Are these concepts inter-linked in some way or are they (as the High Court and the Court of Appeal considered) two separate and distinct concepts? The applicants can succeed only if they established that the former interpretation is indeed the correct one.

Admission into the State

10. In examining this question, one may start by saying that while admission into the State is partly governed by obligations imposed by both EU law and international law, any decision regarding entry into the State is at its heart an executive function for the purposes of Article 28.2 of the Constitution, albeit that these executive powers are themselves also regulated by legislation enacted by the Oireachtas. The 2004 Act is itself an example of such legislation.
11. As a matter of strict law, only Irish citizens have a legal and unquestioned entitlement to be in the State. While the vast majority of EU citizens (and, by extension, citizens of the EEA) come and go from the State without let or hindrance, in strictness the exercise of these free movement rights is subject to certain exceptions prescribed by the provisions of Article 20 TFEU and Article 21 TFEU and Article 27 of the Citizenship Directive (Directive 2004/38/EC). This is reflected in a variety of statutory instruments.
12. The key point here is that the term “public policy” when used in this context (i.e., the admission of EU?EEA citizens) is used in the narrower sense of being an adjunct to that of national security and not in the wider stand-alone sense which commended itself to the

High Court and the Court of Appeal in the present case. Thus, Article 27(1) and Article 27(2) of the Citizenship Directive provide as follows:

“(1) Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

(2) Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on the considerations of general prevention shall not be accepted.”

- 13.** Special arrangements have also made by statute for UK citizens: see s. 11(5) of the 2004 Act (as inserted by s. 114 of the Withdrawal by the United Kingdom from the European Union (Consequential Provisions) Act 2020) (“the 2020 Act”). The same is true in respect of Swiss nationals: see s. 1(1)(a) and s. 2 of the European Communities and Swiss Confederation Act 2001. The effect of this complex legislative regime is that special admission rules apply to EU nationals, EEA nationals and Swiss citizens (see s. 11(2)(a) of the 2004 Act) and to British citizens (see Part 17 of the 2020 Act) and this State’s legal entitlements to restrict the admission and presence of such nationals have been correspondingly curtailed.
- 14.** In the case of other third country nationals, admission to the State is governed by the provisions of the 2004 Act. While these non-nationals have no entitlement to be admitted

to the State as of right, as befits a democratic state governed by the rule of law, they nonetheless have an entitlement to see that their admission into the State is governed by clear and non-arbitrary standards. Taken in isolation, the wider words “public policy” have no precise and fixed meaning and, should they be taken to bear an open-ended construction, it would mean that applicants for permission to enter the State could be refused entry for ill-defined and vague reasons. For my part, I do not think that the general context of s. 4(3)(j) bears out this construction.

The rule as to context

15. Section 4(3) deals with leave to land. As the law stood in December 2020, s. 4(3) provided as follows:

“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—
... (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; ...”

16. In my view, the rule as to context suggests that the word “or” is used in the conjunctive and not in the disjunctive sense. I say that for the following reasons.

17. First, the application of s. 4(3) is expressly made subject to the provisions of s. 2(2). Section 2(2) provides that “nothing in this Act shall derogate from” the general obligations of the State under EU law. Accordingly, in the case of an EU national (or, by extension, an EEA, UK or Swiss national) the reference to “public policy” in s. 4(3)(j) of necessity takes on meaning which has some affinity with the term “national security” (or, to use the language of Article 27 of the Citizenship Directive, “public security.”) As the Court of Justice observed in *Commission v. The Netherlands* (C-50/06: EU:C:2007:325) (at 43):

“According to settled case-law, reliance by a national authority on the concept of public policy presupposes, in any event, the existence, in addition to the

perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat to one of the fundamental interests of society.”

18. While I appreciate that the legal context is different in the case of such EU nationals (and, by extension, EEA, Swiss and UK nationals) who for all practical purposes may be said to have something approaching a *prima facie* entitlement to enter the State, it would nonetheless be strange if the words “public policy” in s. 4(3)(j) were to have a distinct and separate meaning in the case of such non-EU nationals. This is especially true given that this statutory provision potentially applies to *all* non-Irish citizens, irrespective of whether they are EU/EEA Swiss or UK nationals or nationals from third countries. Given the consistent case-law of the Court of Justice, it is clear that the word “public policy” as used in s. 4(3)(j) would have to take on a meaning approximating to that of national security in cases involving EU/EEA nationals, albeit perhaps one which was, to adopt my own language in *Ezenwaka*, is “somewhat more flexible in its scope and reach than national security properly so called.” Yet, if the construction favoured by a majority of the Court is correct, it would mean that the word “public policy” could have an entirely separate, free-standing meaning divorced from such considerations when applied to third country nationals such as the appellants.

19. Second, it is true that, as MacMenamin J. observed in *Bederev v. Ireland* [2016] IESC 34, [2016] 3 IR 1 at 31, the word “or” is “one which is very apt to mislead in interpretation.” This, however, is not a case where the words in question are antithetical and disjunctive to each other. Particularly when used in its narrower sense, the slightly wider concept of public policy is linked to – and may even be said in some circumstances to subsume – references to national security. In these circumstances, the word “or” is more properly

regarded as conjunctive. It is conjunctive in the same sense as when a tourist in a foreign city inquires as to where the nearest café or restaurant is to be found.

20. Given its range of possible meanings, the words “public policy” accordingly take their meaning from the companion words. The term “public policy” is thus used in its narrower and more defined sense: see the comments of MacMenamin J. in *Bederev v. Ireland* [2016] 3 IR 1 at 32. And, contrary with respect to the views expressed by Faherty J. in the Court of Appeal, I consider that while the words “public policy” and national (or public) security are not necessarily synonymous, one could point to a variety of examples from the general realm of asylum, immigration, and citizenship legislation to show that these words are nonetheless naturally sequential and are, accordingly, generally understood in a conjunctive sense. One example may be found in Article 27(2) of the Citizenship Directive:

“Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned.”

21. Another may be found in s. 54(3)(a) of the International Protection Act 2015. This provides that the grant of subsidiary protection “shall be renewable unless compelling reasons of national security or public order (‘ordre public’) otherwise require.” (As used in its legal context, the French term *ordre public* corresponds to our sense of public policy.)

22. Third, all of this is also reflected in the wording and structure of the sub-section itself. Here one finds ten separate self-contained grounds by reference to which leave to land may be refused. Had it been intended that the reference to public policy should be interpreted in its broader sense, quite divorced from the narrower meaning (which narrower meaning is itself linked to national security), one would have expected that the words “or be contrary to public policy” would have been hived off and placed in a separate self-contained sub-section of its own.

Conclusions

- 23.** As I have already indicated, this appeal turns entirely on whether the words “public policy” should bear the narrower meaning (so that these words would be regarded as closely linked to the concept to “national security”) or whether they should be given the wider free-standing interpretation which is divorced from these companion words of national security. For the reasons I have given, I consider that the words should bear the narrower meaning so that the reference to public policy in s. 4(3)(j) of the 2004 Act should be understood as referring to personal conduct which, in the language of the Court of Justice in the *Netherlands* case, is one which poses a “genuine and sufficiently serious threat to one of the fundamental interests of society.”
- 24.** It is not really disputed but that – should the narrower interpretation of these words prevail – the appellants do not and did not pose such a threat. Since I consider that it is the narrower interpretation of s. 4(3)(j) of the 2004 Act which is the correct one, I would accordingly grant an order of *certiorari* quashing the decision of the immigration officer refusing both appellants leave to land in this State.