

**THE HIGH COURT  
JUDICIAL REVIEW**

[2021] IEHC 755  
[2020 No. 808 JR]

**BETWEEN**

**PAUL KIONGERA AND TRIONA SHEEHY**

**APPLICANTS**

**AND**

**THE MINISTER FOR JUSTICE**

**RESPONDENT**

**Judgment of Mr. Justice Cian Ferriter delivered this 1st day of December 2021**

**Introduction**

1. In this judicial review application, the applicants seek to quash a specific part of a decision of the Respondent dated 23rd June, 2020 refusing the first named applicant visa pre-clearance under an *ex gratia* scheme established by the Minister for granting visa pre-clearance to non-EEA State *de facto* partners of Irish citizens, being that part of the decision which precluded him from making any further pre-clearance applications for five years from the date of the original refusal decision (“the 5-year preclusion condition”).

**Background**

2. The material background to the matter is as follows. The first-named applicant (for ease, the “Applicant”) is a citizen of Kenya who was born on 10th November, 1988. He first met Triona Sheehy, the second-named applicant (“Ms Sheehy”), in the summer of 2012. This occurred in circumstances where Ms Sheehy’s father founded a charity in Kenya and the Applicant was involved in assisting that organisation in his capacity as a football player. It seems that the Applicant is an accomplished football player, who plays football professionally in Kenya and who represented Kenya internationally at under 20 level.
3. The Applicant says that he remained in regular contact with Ms Sheehy following her return to Ireland in 2012. She returned to Kenya the following summer, 2013, and the relationship developed further. In total, she spent four summers in Kenya with the Applicant.
4. In August 2016, Ms Sheehy moved to Kenya where she worked in a primary school in Nairobi. The Applicant came to visit her in Ireland in December 2017 on foot of a temporary visa (which, as we shall see, was obtained on foot of false passport information provided to the Irish authorities at the time).
5. Ms Sheehy’s mother passed away from cancer in April 2019. The Applicant was granted a temporary visa to travel to Ireland for Ms Sheehy’s mother’s funeral but he could not attend owing to his commitments as a professional footballer. Ms Sheehy returned briefly to Kenya following her mother’s funeral, but returned to Ireland at the end of July 2019. The Applicant came to Ireland in August 2019 for 6 weeks, returning to Kenya in September 2019, when his visa for that visit expired.
6. At this point, the couple’s plans were for the Applicant to seek to come and live more permanently in Ireland. The Applicant applied for a visa in September 2019, which was granted to him for the period 17th November, 2019 to 10th February, 2020.

7. It appears that the Applicant arrived in Dublin Airport, on foot of this latter visa, in or around 17th/18th November, 2019 but that he was denied entry upon discovery of the fact that the passport he was travelling on had different details to those which appeared on a previous visa application.
8. According to Ms Sheehy's affidavit sworn in support of this judicial review application, the Applicant was informed by an immigration officer on his arrival in Dublin Airport on 18th November, 2019 *"that he was being refused leave to land because the records showed that he had been in Ireland not too long before this and was known to have travelled previously on a different passport."*
9. In October 2019 (prior to being refused entry to Ireland at Dublin airport in November 2019) the Applicant completed a "Pre-clearance Application Form - *De Facto* Partner of an Irish National" and submitted it to the Minister's Department ("the Department").
10. In the concluding section of the form, the Applicant signed a declaration which included the following paragraph:

*"I understand that any false or misleading information, or false supporting documentation, may result in the refusal of my application without the option to appeal, and that this may result in me being prevented from making further Preclearance applications for a period of up to 5 years."*
11. Among the questions asked of the Applicant on this form were (question 1.3) *"are there any other names by which you are or have been known?"* to which the applicant replied "no". This answer was false in circumstances where the Applicant had provided as part of a previous, successful visa application to Ireland a false Kenyan passport citing a variation of his true name ("Raphael Nuigai Kiongera") and an incorrect date of birth of 14th June, 1993 (his correct date of birth being 10th November, 1988).
12. The Applicant was also asked on the form (at question 1.30) *"is this your first passport?"* to which he replied "no" stating *"Previous passport was destroyed on advice. Identity theft is a major issue in Kenya as well as theft of documents."* This answer was incorrect in circumstances where the Applicant did in fact retain a copy of his previous, irregular passport.
13. Counsel on behalf of the Applicant emphasised at the hearing of this judicial review that the Applicant was extremely sorry for his reliance on a false passport and for having given misleading information in his prior visa applications and on the application form in relation to his application for preclearance under the scheme. It was submitted however that there were mitigating circumstances. How those circumstances were addressed by the Minister in the decision under review lies at the heart of this judicial review challenge.

#### **The Scheme**

14. It appears that the scheme pursuant to which the Applicant applied for visa pre-clearance ("the Scheme") was introduced by the Minister in August 2019. A press release was

issued on behalf of the Minister at that time headed "*new preclearance process to be introduced to help non-EEA de facto partners of Irish citizens live and work in Ireland*".

15. A section of the press release stated as follows:

*"from 1 November 2019 anyone seeking to join their Irish national de facto partner in Ireland for a period of greater than 90 days must obtain a preclearance letter before arrival in the State. This applies to both non-visa required and visa required nationals. Prior to arriving at this stage, the de facto partner of an Irish national will apply to the Department of Justice and Equality for a preclearance approval letter... The preclearance letter, along with the relevant Visa, if applicable, allows the holder to travel to Ireland only. It does not grant permission to enter the country; an immigration officer at border control can refuse entry even if a previous letter has been obtained in advance. On registering with the immigration service, a stamp 4 immigration permission will be issued to the applicant. This permission will allow the holder to access the labour market without delay. Previously, an application for recognition of the de facto relationship could only be made on arrival in the State and the de facto partner could not access the labour market pending a decision on their application."*

16. It was common case that a "Stamp 4" immigration permission was the most generous permission which could be granted by the State to a non-national as such permission allows the subject of it to access the labour market without any further permission or requirements.
17. Among the materials put before the court on the judicial review application was a document headed "*Non-EEA de facto partners of Irish Nationals Immigration Preclearance Process*" ("the Scheme document"). The Scheme document notes, under the heading "background", that "*the intention of INIS when considering De Facto Partnership of an Irish citizen application is to allow genuine long-term relationships to continue. It is intended to provide a means by which couples who are already living together in a committed relationship and one of whom is an Irish citizen, to live in Ireland on this basis*".
18. There is no specific reference in the Scheme document to the consequences of a false declaration though the document does contain a paragraph (in the section headed "*who can apply?*") stating "in some cases it may be necessary to interview both the applicant and the sponsor. Applicants must be of good character and be in compliance with Irish law."

### **First Instance Decision**

19. The Applicant's application for pre-clearance under the Scheme was dealt with by a decision at first instance of 20th January, 2020. This decision refused the pre-clearance application on a number of grounds, including those of "*insufficient documentation submission*", "*relationship history*" (the requisite conditions of the Scheme, in the decision

maker's view, not having been fulfilled), "finances" and "inconsistency/contradictions in the information supplied".

20. In respect of the latter part of the decision of 20th January, 2020, it was stated as follows:

- " - *under application form, you have answered 'no' to question 1.3 'are there any other names by which you are or have been know?' However, you applied for an Irish visa on 25/09/2017 using the name Raphael Kiongera.*
- You state in question 1.4 of your application from [sic] that your date of birth is 10/11/1988. The date of birth shown on your passport is 10/11/1988. However, you applied for an Irish Visa on 25/09/2017 stating your date of birth is 14/06/1993.
- *You signed a declaration in the application form that the information you have provided is true and complete.*
- *You have further declared that you understood that the provision of false or misleading information, or false and misleading documentation may result in you being prevented from making a pre-clearance application for a period of up to five year [sic].*
- *You have provided documentation with your application which is deemed to be false. You are therefore not permitted to make any further Pre-clearance applications for a period of five years. The period of five years will commence from the date of this refusal, 20/01/2020."*

### **The Applicant's Appeal**

21. The Applicant submitted an appeal against that decision, to the Visa Appeals Division of the Pre-clearance Unit of the Department's Immigration Service Delivery, by a lengthy and detailed letter of appeal of 24th February 2020 lodged on the Applicant's behalf by his solicitor.
22. Some three pages of this appeal letter were addressed to an appeal against the 5-year pre-clearance preclusion condition aspect of the first instance decision.
23. It was emphasised in the appeal letter that the terms of the Scheme are such that the Minister retains a discretion as to whether the refusal will involve a term preventing the applicant from making a further pre-clearance application at all and then a further discretion, if the Minister decides to impose such a preclusion, as to the period of such preclusion, the Scheme providing for "a period of up to five years".
24. The appeal letter contended that the Minister had erred "*in fact, and in law and in principle in failing to inform [the Applicant] of the reason for the restriction of five years being applied to him.*"

25. It was contended that the fact that the Applicant had (as was by then accepted by him) provided false or misleading information was not of itself sufficient within the decision-making process to justify the 5-year preclusion condition. The appeal letter called upon the Minister to engage with the full explanation, and circumstances of mitigation, advanced on behalf of the Applicant as to the genesis of the false passport. It was submitted on the Applicant's behalf, in that connection, that the Minister should take into account the gravity of the consequences of the refusal of the application and to "*assess the level of culpability of [the Applicant] in the procurement of the passport with false details.*"
26. The Applicant's case in this regard was that the false passport had been procured for him by the administrators and management team of the Kenyan under 20 soccer team, in circumstances where those running the Kenyan under 20 national team wished to have the Applicant play in the World Under-20 Football Cup where, at the date of that tournament, the Applicant was 22. While accepting that it was wrong for him to have subsequently relied on a false passport, the Applicant prayed in aid as relevant mitigating circumstances the fact that he was not the person who had obtained the passport and that he was not the person who devised the idea and brought it to finality with the issuing of the passport.

### **The Appeal Decision**

27. The next step in the process was a decision of the Appeals Officer handed down on 23rd June, 2020 ("the Appeal Decision" or "the Decision"). It is the 5-year preclusion condition aspect of the decision which is under challenge in these judicial review proceedings.
28. There was some discussion at the hearing of the judicial review as to whether the appeal involved a "*de novo*" review or whether it was a more restricted form of review. However, it was ultimately agreed that nothing in particular turned on the precise characterisation of the appeal process. It appears clear from the format and content of the Appeal Decision that the Appeals Officer did engage with the various headings, and the structure of analysis, followed by the first instance decision maker.
29. The Appeal Decision states under the heading "*Insufficient documentation*" on the first page that: "*you have not provided a full copy of your previous passport*" and goes on to state that:

"Your letter of appeal, from your legal representative, Sarah Ryan Solicitors, states that full copies of all relevant passports were submitted. However, in your application form, at question 1.30 you state that your previous passport was destroyed on advice as identity theft is a major issue in Kenya as well as theft of documents. It is not clear to the Preclearance Appeals Officer as to what previous passport you are referring to, you have not provided any previous passport number/s on your application form, as you have previously been issued a passport under a different name and date of birth.

*It is not clear to the Preclearance Appeals Officer if you have had previous passports issued under the name and date of birth, provided with your Preclearance application, Paul Mungai Kiongera, 10/11/1988."*

30. The Appeal Decision under the heading "*Inconsistencies/contradictions in the information provided*" went on to address the Applicant's appeal against the first instance decision as follows:

*"INCO – Inconsistencies/contradictions in the information supplied*

*There is a number of inconsistencies noted between the information provided with your application at first instance and information provided with your appeal. They are as follows:*

- *At question 4.2 on the application form, "Date of commencement of relationship", you answered 28/08/2016. In your letter of appeal, your legal representative states "Triona and Paul have been together for eight years." Whilst it is noted you state that you met your sponsor in July 2012, you state in your application form that you did not commence your relationship until 28/08/2016.*
- *In your letter of appeal your legal representative states "Paul travelled here on the 18th of November, 2019... Unfortunately, at that time he was not permitted leave to enter the State." However, you travelled to Ireland on 17/11/2019, when you were refused leave to land. Your visa was then revoked on 19/11/2019*
- *On your application for you answered "No" to question 1.3 "Are there any other names by which you are or have been known?" However, you applied for an Irish visa on 25/09/2017 using the name Raphael Kiongera*
- *You state in question 1.4 of your application form that your date of birth is 10/11/1988. The date of birth shown on your passport is 10/11/1988. However, you applied for an Irish visa on 25/09/2017 stating your date of birth is 14/06/1993.*
- *You signed a declaration on your application form that the information you have provided is true and complete.*
- *You further declared that you understood that the provision of providing false or misleading information, or false or misleading documentation may result in you being prevented from making a Preclearance application for a period of up to five years.*
- *You have provided documentation with your application that is deemed to be false. You are therefore not permitted to make any further Preclearance applications for a period of five years. The period of five years will commence from the date of this refusal, 20/01/2020.*

- *In your letter of appeal, your legal representative, states 'Our clients must acknowledge that a false passport was relied on in an application by Paul at some stage over the last few years...Our client instructs that the passport with the incorrect biographical information was purchased for him and not by him.' Your appeal letter further states 'Our client was over-age for a tournament that the management and officials of the national team wanted Paul to play in. The way that was found for Paul to be able to line out for the national team was for a passport to be produced that placed him within the eligible age bracket... our client was not the person who obtained this passport and by this we mean that he is not the person who devised this idea and brought it to finality with the issuing of this passport.'*
- *Your letter of appeal states that your correct date of birth is 10/11/1988, and this information was changed on the passport containing a different name and date of birth, B157527, so that the date of birth appearing on this passport would be 14/06/1993, in order for you to play on the under-20 team.*
- *However, you applied for an Irish visa, 32200832, in September 2017, under the name and date of birth on this passport containing different biographic information, Raphael Kiongera, 14/06/1993. You stated in this visa application that you were coming to Ireland for a 'Visit'. This visa was issued on 16/10/2017, and as stated in your letter of appeal you travelled to the State in December 2017.*
- *Furthermore, you applied for an Irish visa in July 2019 and October 2019, under the name and date of birth, Paul Kiongera, 10/11/1988. You failed to declare, in both of these visa applications, that you had previously travelled to Ireland on a passport using a different name and date of birth. You also failed to declare this information on your Preclearance application.*
- *Your legal representative states, in your appeal, 'The Minister must also, in our respectful submission and given the gravity of the consequences of the refusal of this application take into account and assess the level of culpability of our client in the procurement of the passport with false details. It would be unfair, unjust and a breach of natural justice requirements to hold our client responsible entirely if that were not the case. Our client instructs that this is not the case, and that the passport was procured for him, and given to him to use as directed.'*
- *However, you willingly and knowingly applied for an Irish visa and travelled to Ireland using a fraudulent document.*
- *The Preclearance Appeals Officer has fully considered all the material submitted in the initial application, and the additional material submitted at appeal. The Preclearance Appeals Officer is not satisfied that the applicant and the sponsor meet the criteria as per the published policy document for the De Facto Partner of an Irish National scheme."*

31. It might be noted that the Decision contained other reasons, not related to the 5-year preclusion condition, for refusing the appeal. The other reasons are not the subject of challenge in this judicial review.

### **Applicant's Submissions**

32. The Applicant's submissions in support of his application for judicial review relief can be summarised as follows.
33. It is accepted that the Applicant has no constitutional or convention rights which he can pray in support of his application and it is further accepted that no Article 8 rights arise in the circumstances. It is further accepted that the Minister is entitled, in exercise of her executive powers, to establish an ex gratia, extra-statutory scheme of the nature of the Scheme in question.
34. However, the Applicant submitted that, in accordance with the Supreme Court decision in *Mallak v Minister for Justice* [2012]3 IR 297 ("*Mallak*"), the Minister is still obliged to engage with the Applicant's appeal grounds and to give reasons for rejection of same. In particular, it was submitted that the Minister is under a particular obligation to give reasons for the exercise of her discretion to impose a preclusion condition, given the prospective nature of same, and given the significant and adverse consequences that can flow for the applicants by reason of same. It was further submitted that the Minister is also required to give reasons as to why the maximum preclusion period of five years was imposed as opposed to some lesser period, particularly in circumstances where the Applicant advanced significant mitigating circumstances to explain the prior provision of false information.
35. In this regard it was submitted that the decision of Peart J. in *Balc v Minister for Justice* [2018] IECA 76 ("*Balc*") was authority for the proposition that there was a self-standing duty to give reasons, in the context of an exclusion-type decision, as to why the particular period of preclusion in question was justified over a lesser period.
36. The Applicant submitted that authorities, such as *Mallak v. The Minister for Justice* [2017] IEHC 403 and *KN v. Minister for Justice* [2017] IEHC 403, which speak to a general duty on the part of a decision maker to let the subject of the decision know the basis for the decision in broad terms, but which do not require the reasons to go any further than that, are distinguishable on the basis that those cases did not involve the imposition of a prospective penal provision such as the 5-year preclusion condition here which, it was submitted, requires a more rigorously reasoned decision.
37. It was submitted on behalf of the Applicant that a decision to impose the 5-year preclusion condition had significant adverse consequences for the Applicant particularly in circumstances where the obtaining of a preclearance permission was essential in order to be in a position to apply for a visa which in turn was an essential precondition to being in a position to satisfy the requirements of s. 4 Immigration Act, 2004 i.e. the provision dealing with the State's power to grant permission to land or be in the State.



38. In summary, the Applicant submitted that on the facts here, contrary to the applicable legal requirements, there was simply no reason given for imposing the maximum preclusion of five years and that the mitigating factors advanced on the Applicant's behalf were not engaged with at all or at best were engaged with inadequately.

### **Respondent's Submissions**

39. The Minister, for her part, while accepting that the Appeal Decision under the Scheme was amenable to judicial review, submitted that there remained a wide discretion invested in her as to the exercise of her powers under the Scheme. In particular, the Minister's obligation was simply to ensure that the published terms of the Scheme were complied with, and that any discretion under the Scheme was not exercised arbitrarily, capriciously or irrationally.
40. As regards the duty to give reasons, it was accepted that the Minister is under a duty to give some reason for her decision and to disclose such reason or reasons to the subject of the decision. However, it was submitted that the onus was no higher than that and that there was no obligation in law on the Minister to set out a reason why she was rejecting any particular argument or contention of the applicant or to provide reasons as to why the Minister decided to opt for the maximum five-year preclusion period as opposed to some lesser period.
41. The Minister submitted that such duty to give reasons as was imposed on her was more than discharged on the facts here. She emphasises that it is very clear from the face of the decision that the Appeals Officer did engage with the case advanced on behalf of the Applicant in respect of the circumstances of alleged mitigation surrounding the provision of false information and submits that it is very clear that the decision-maker, having quoted excerpts from relevant parts of the Applicant's appeal submission on these issues, then goes on to deal with those submissions and to provide reasons as to why those submissions in essence were not accepted.
42. It is emphasised on behalf of the Minister (as has been borne out in the authorities) that there is real issue in an immigration context with the use of false or fraudulent identities and that it is a very serious matter to provide false information and then to subsequently conceal the provision of that false information in interactions with the State authorities in relation to matters relating to permission to enter, remain and work in the State. The decision to impose a 5-year preclusion condition simply cannot be regarded as arbitrary, capricious, irrational or inadequately reasoned in the circumstances.
43. It was submitted that there is no duty on the Minister to justify why a particular period on the scale of up to five years' preclusion is opted for but that, in any event, on the facts here, there was clearly a rational basis for electing for the five-year maximum and that it was clear that the Appeals Officer believed the facts were sufficiently grave to warrant the imposition of the five-year period. In that regard, it is emphasised that the decision under appeal sets out multiple instances of false information being supplied.

44. It was pointed out that the very declaration signed by the Applicant in a form in which he knowingly provided false information as to prior passports was such as to make clear to him that he could face a 5-year preclusion in the event that it was discovered that he had made a false declaration.
45. It was also pointed out that, for example, if it had been the case that the Applicant had "come clean" in respect of the circumstances of his original false passport at the earliest available opportunity (e.g. when he made his first visa application to the Irish authorities in 2017) that it may be that his position might have been treated more benignly by the authorities although it was accepted that that was, of course, speculation.
46. The submission was also made on behalf of the Minister that, while it is accepted that the Appeal Decision may have significant adverse consequences in the future for the Applicant, it is not the case that he is shut out from seeking to subsequently apply for a different type of visa (e.g. a holiday visa), although it was fairly accepted that the fact of refusal of the pre-clearance application here and the reasons for that refusal may weigh against the Applicant in respect of future applications.

#### **Discussion**

47. It is clear from the Supreme Court's decision in *Mallak* that "*persons affected by administrative decisions have a right to know the reasons on which they are based, in short to understand them*" (at 322).
48. *Balc* was an example of the application of that principle in an exclusion order context. *Balc* was a case dealing with a decision by the Minister pursuant to EU free movement of persons regulations to make a removal order against the appellants directing their removal from the State. In that case, the order was made pursuant to a statutory provision and was made in respect of EU nationals who, of course, had EU law rights. In addition to making the removal order, the Minister imposed an exclusion period of 5 years pursuant to a provision of the relevant regulations meaning that the first-named applicant in that case was unable to re-enter or seek to re-enter the State within the 5-year period.
49. In *Balc*, Peart J held as follows (at paragraph 124):

*"the length of any such exclusion period is at the discretion of the Minister. Where that is the case the Minister must provide reasons for the decision made.. The person affected to such a significant degree is entitled to know why he is excluded for a period of 5 years, rather than some lesser period. Indeed, it is not necessary to include an exclusion period at all. The person is entitled to know why the exclusion order was considered necessary. If he does not know the reasons for these decisions it is impossible for him to challenge their legality."*
50. Quite apart from the fact that *Balc* was a case concerning a statutory decision in relation to an EU national, in my view, the decision in *Balc* does not advance the Applicant's case. The basis of the decision in *Balc* was that the relevant applicant there had been provided with no reasons as to why an exclusion order was considered necessary. The facts here

are wholly different. This is not a case where it is impossible for the Applicant to challenge the legality of the decision because he does not know what the basis for the decision was, or where no reasons at all were given in relation to the upholding of a 5-year preclusion condition or where the case made by the Applicant was ignored or not engaged with.

51. The Applicant signed a declaration which expressly made clear that if he provided false or misleading information or documentation it may result in him being prevented from making a preclearance application for a period of up to 5 years. He was therefore on notice from the outset of the application process of the risk that a preclusion condition of up to 5 years could be imposed in the event that he supplied false information or documentation.
52. As can be seen from its terms (as set out earlier in this judgment), the Appeal Decision expressly cited from that declaration and then quoted from the Applicant's appeal submission to the effect that he was not the person who obtained the passport and he was not the person who devised the idea and brought it to finality with the issuing of the passport i.e. the Decision expressly cited the mitigating circumstances advanced in the appeal on behalf of the applicant as regards the 5 year preclusion condition.
53. The Appeals Officer in the Decision then went on to identify multiple separate instances of false information use by the Applicant.
54. Firstly, the Appeals Officer noted that *"you applied for an Irish Visa 3200832 in September 2017 under the name and date of birth on this passport containing different biographic information"*.
55. Secondly, it was noted that *"you applied for an Irish Visa in July 2019 of October 2019 under the name and date of birth Paul Kiongera 10/11/88. You failed to declare in both of these applications, that you had previously travelled on a passport using a different name and date of birth"*.
56. Thirdly, the Appeals Officer noted that *"You also failed to declare this information on your preclearance application."*
57. The Decision then went on to quote from the appeal submission made on the Applicant's behalf to the effect that it would be unfair to hold the applicant entirely responsible for the false passport in circumstances where the passport was procured for him and given to him to use as directed.
58. The Appeals Officer expressly cites this submission and then states *"however you willingly and knowingly applied for an Irish Visa and travelled to Ireland using a fraudulent document"*.
59. In the circumstances, it simply cannot be said that the Applicant's specific case in relation to the 5-year preclusion condition was not engaged with or that reasons were not provided by the decision-maker for refusing the Applicant's appeal against the imposition of the maximum 5-year preclusion condition. There is no question but that the Appeal

Decision contains a reasoned rejection of the Applicant's appeal grounds relating to the imposition of the 5-year pre-conclusion condition. I do not see that the law on reasons requires the Minister, in the context of an *ex gratia*, non-statutory scheme relating to persons who enjoy no Irish, EU or Convention rights *per se*, to expressly spell out in an appeal decision why a lesser period of preclusion was considered inappropriate on the facts of the case. The substance of the Applicant's case was clearly engaged with and rejected on a reasoned basis in the Appeal Decision.

60. In the circumstances, *Balc* is readily distinguishable and the onus on the Minister to provide reasons for her decision, including in relation to the 5-year preclusion condition, has been more than amply discharged by the reasons in fact given in this case.
61. In the circumstances, I refuse the relief sought.