**THE COURT OF APPEAL**

**Appeal No. 2017/416**

**Baker J.**
**Costello J.**
**Kennedy J.**

**BETWEEN/**

**A. A.**

**APPELLANT**

**- AND -**

**THE MINISTER FOR JUSTICE AND EQUALITY**

**RESPONDENT**

**JUDGMENT of Ms Justice Baker delivered on the 29th day of October, 2019**

1. This is an appeal against the order of O'Regan J. made on 26 July 2017, following delivery of a written judgment, *A. A. v. Minister for Justice and Equality* [2017] IEHC 491, by which she refused judicial review by way of *certiorari* in respect of a decision of the respondent, the Minister for Justice and Equality ("the Minister"), refusing the appellant a certificate of naturalisation under s.15A of the Irish Nationality and Citizenship Act 1956 as amended ("the 1956 Act").

2. The appellant was born in Sudan and came to Ireland and applied for asylum here in 2006. The decision of the Refugee Applications Commissioner in 2007 refusing her application for asylum was unsuccessfully appealed to the Refugee Appeals Tribunal (the "RAT"), but the decision of that body was quashed by order of the High Court made on 24 November 2008 and remitted for re-hearing by the RAT before different tribunal members.

3. In the meantime, on 3 August 2007, the appellant married her husband, also from Sudan, who had at that time been granted refugee status in Ireland. The appellant's husband was granted a certificate of naturalisation on 26 April 2010. In those circumstances, and because she was granted a right of residence in the State on 29 January 2009 based on the fact of her marriage, the appellant withdrew her appeal from the naturalisation decision on 11 December, 2009.

4. The appellant and her husband have two children born in 2008 and 2011 respectively, both Irish citizens.

5. The appellant applied for a certificate of naturalisation on 30 September 2010, and her application was refused some six years later, on 3 June 2016. Some of the delay arose from questions and enquiries made regarding the background facts, but much of the delay is unexplained, or is partly explained by resource difficulties and the burden of work in the Office of the Minister. The possible consequence of the delay is a factor in my reasoning, as will later appear at para 61 *et seq*.

6. The application for judicial review was commenced on 15 August 2016 on the pleaded ground that the Minister's decision was irrational, unreasonable, "unlawfully opaque", and wrong in law, that the applicant was held to a standard of good character which was unreasonable, and that her rights to fair procedure were breached. The alternative, but overlapping, ground is that the Minister either failed to weigh all relevant factors or did not sufficiently identify her reasons for rejecting the positive factors which supported the application including that the appellant had been lawfully resident in the State for ten years, had been married for nine years to an Irish citizen, a recognised refugee from his own country of origin, and that the couple had two Irish born children. It is also asserted that the decision failed to recognise that the matters on which the Minister relied had occurred more than ten years ago, before the appellant married her husband and settled in Ireland, and when she was a young woman in difficult personal circumstances. Finally, there is a plea that the Minister erred in not considering whether to exercise her statutory power under s. 16 of the 1956 Act to waive the conditions for the grant of a certificate of naturalisation.

7. By order of 20 October 2016, Humphreys J. granted leave to apply for judicial review on the grounds pleaded.

8. The respondent served a statement of opposition on 31 March 2017. The application is opposed, *inter alia*, as being out of time (but this plea was not advanced at trial or on appeal) and substantively that the provisions of the 1956 Act give the Minister an absolute discretion regarding the assessment of applications for a certificate of naturalisation. It is pleaded that a certificate of naturalisation is a privilege and not a right and the criteria to be applied are entirely a matter for the Minister, and that fair procedures were afforded to the appellant in the course of the correspondence leading up to the decision. It is pleaded that the decision is not opaque and is reasonable, just, and appropriate.

**The impugned decision**

9. The decision sought to be impugned was communicated to the appellant by letter from the Irish Naturalisation and Immigration Service (INIS) on 3 June 2016. It was accompanied by a recommendation set out in a short memorandum signed by three persons, being the Assistant Principal, an Executive Office and a Higher Executive Officer of the LSR team and whilst the formal decision does not say so, the Minister relied on and accepted the recommendation that a certificate of naturalisation not be granted. In those circumstances it is possible to discern two bases on which the Minister came to her decision.

10. The first basis expressly mentioned is the reliance by the Minister on what she describes as her "absolute discretion". The second basis must be understood to be the reasons set out in the recommendation contained in the memorandum from the LSR team, that the appellant lacked credibility and that she was, therefore, not "of good character".

11. The recommendation was that naturalisation be refused and it is useful to set out the entire short text:

> "The appellant arrived in the State as an asylum seeker and that she has since returned to Sudan along with the fact that refugee status was refused indicates a lack of credibility of her asylum claim. She has admitted that her passport [PASSPORT NUMBER] was issued based on incorrect information. These are matters that go to character. I am not satisfied that the appellant is of good character. I would not recommend that the Minister grant a certificate in this case."

12. The factual basis for the conclusion that the appellant lacked credibility was the fact that she returned to Sudan to visit her family in November 2010 for almost two months and later in August 2013 for a little over two weeks, suggesting a lack of credibility in the matters relied on in her application for asylum based on the political conditions in that country in 2006.

13. The other factual basis concerned the application made to the Sudanese authorities for a passport. A passport had previously issued in the name of the appellant and had been used in her application for a UK visa in 2006, but the appellant asserted that she had not applied for that passport, knew nothing of it having issued, and suspected that her identity was used by the gang of people smugglers who had assisted her in escaping from Sudan. It seems that a friend of hers who used to work for the Sudanese immigration authority had wrongly and, it seems, for reasons of convenience, reported it as lost and had cancelled it before herself making the application for a new passport on behalf of the appellant. These circumstances led to the conclusion in the recommendation from the LSR team that the passport on which the appellant relied to ground her application for naturalisation "issued based on incorrect information".

**The decision of the High Court**

14. Having reviewed the relevant authorities and the arguments of the parties, O'Regan J. came to the conclusion, in reliance, in particular, on the judgment of Humphreys J. in *A. M. A. v. Minister for Justice & Equality* [2016] IEHC 466, at para. 60, that the decision maker "is not obliged in the naturalisation process to give advance notice to an appellant of an adverse consideration of which the appellant is already aware". She concluded on the facts that the appellant was "well aware" of the reasons for the rejection of her application and that the Minister regarded her submissions to be internally inconsistent. O'Regan J. held that the Minister was entitled to make a finding of a lack of veracity and the fact that a mere eleven months had elapsed from the time when the appellant withdrew her application for asylum and her first return to Sudan to visit her family constituted a reasonable, rational, and factually correct basis for the decision. She held that the appellant had not made out a case that the Minister had acted in an arbitrary, capricious, or autocratic manner.

15. She also took the view that the reasons given, while "brief", were factually correct and sustainable, and expressly followed the case law regarding the detail to be given to satisfy those requirements that a reason be given: The decision of the Supreme Court in *Mallak*

*v. Minister for Justice Equality and Law Reform* [2012] IESC 59, [2012] 3 IR 297, and the decision of Stewart J. in *A. A. v. Minister for Justice and Equality* [2016] IEHC 416.

16. She also, again in reliance in the judgment of Humphreys J. in *A. M. A. v. Minister for Justice*, held that a decision to reject an application on particular grounds did not require that the decision maker separately and expressly go on to consider whether to exercise her jurisdiction to waive the statutory tests. She also found that proportionality is a matter entirely for the Minister having regard to the discretionary nature of the power to grant naturalisation.

**Grounds of appeal**

17. The notice of appeal sets out nine numbered grounds of appeal which may be usefully summarised as follows, although the arguments overlap:

    (1) the reasonableness grounds: That the decision did not flow from the material on which the decision maker relied, and failed to have regards to all of the material facts;

    (2) the fairness grounds: That the trial judge erred in coming to the conclusion that the Minister had given sufficient reasons for her decision and had no obligation to give the appellant an opportunity to comment upon, explain or adduce further evidence on the matters to which she had regard;

    (3) the waiver grounds: That the trial judge erred in her approach to the discretionary power of the Minister in s. 16 of the 1956 Act to waive any of the statutory conditions.

18. The respondent opposes the appeal on grounds of fact and law and argues that the trial judge came to a determination of fact, which is to be respected on appeal, that the appellant was "well aware" of the alleged inconsistencies in her application and that the Minister was entitled to make an adverse credibility finding when the information put before her is likely to be incorrect. It is also argued that the application for asylum must, by its nature, have asserted a claim of persecution, in the light of the legal meaning of "refugee".

**The arguments**

19. The appellant's primary argument is that the finding that her application lacked credibility did not reasonably flow from the facts or could not reasonably be inferred therefrom. It is argued that the description of the appellant as "a failed asylum seeker" is incorrect, as her application for asylum had not been refused, but had been withdrawn after she had married her husband and obtained residency rights. It is argued that, in those circumstances, it is not correct to infer from the sequence of events that the appellant was not of good character or that her application for asylum was not credible. It is argued that, because the Minister did not have the full refugee application file before her, the decision she made was not based on sufficient information.

20. With regard to the passport, the appellant argues that the threshold imposed by the Minister imposed too high a burden on her as the facts surrounding that incident were properly to be viewed in the context of the circumstances by which the appellant came to Ireland.

21. The respondent argues that, as a matter of law, the appellant was refused refugee status. The respondent also points to the fact that correspondence passed between the appellant and the Office of the Minister regarding the correct spelling of her name and other matters which were dealt with to the satisfaction of the Minister and that, on the facts, the correspondence shows sufficient engagement with the facts and afforded a sufficient opportunity to the appellant to be heard.

22. In response, the appellant points to the fact that there was no evidence before the High Court that the Minister had sight of the asylum file and that O'Regan J. was incorrect to substitute her reasoning for that of the Minister in her conclusion that there was an inherent inconsistency, as an application for asylum is predicated on fear of persecution.

**The legislation**

23. Part III of the 1956 Act, as amended, provides for the grant by the Minister of a certificate of naturalisation. The application relied on s. 15A of the 1956 Act, inserted by the Irish Nationality and Citizenship Act 2001, and substituted by s. 33 of the Civil Law (Miscellaneous Provisions) Act 2011, which provides for the grant of a certificate of naturalisation to a non-national spouse or civil partner of an Irish citizen. The section provides that the grant of a certificate is made by the Minister "in his or her absolute discretion" and goes on to provide certain matters of which the Minister is to be satisfied. These are set out in subparagraphs (a) to (h) of s. 15A(1) of the 1956 Act.

24. The appellant has been married to an Irish citizen for not less than three years and has, for a period of one year, been in "continuous residence" on the island of Ireland, and thus satisfied the gateway provisions. The matter which gave rise to the Minister's decision to refuse a certificate is that set out in s. 15A(1)(b) of the 1956 Act, namely that the Minister be satisfied that an appellant be "of good character".

25. That the discretion conferred on the Minster which is described in the 1956 Act as "absolute" is amenable to judicial review is now conclusively determined, and the issue for determination in the appeal is the standard of review applicable. The respondent argues that, having regard to the established authorities, as the conferring of naturalisation on an applicant is a privilege, and not a right, the standard and scope of review is limited. I propose to consider that question first.

**Standard of review**

26. Since the decision of the Supreme Court in *Mallak v. Minister for Justice* it can scarcely be argued that the determination of the Minister of an application for naturalisation under the 1956 Act is not amenable to judicial review. That case involved an application for a certificate of naturalisation and the Supreme Court allowed the appeal from the decision of Cooke J. and, in reliance on established principles of judicial review, held that, while the statutory scheme provided that the Minister made the decision in his or her absolute

discretion, the rule of law required that the decision maker act fairly and rationally and give reasons for or an explanation of either the decision or the decision making process. As Fennelly J. said, giving the judgment with which the other members of the Supreme Court agreed, fairness is achieved when reasons accompany a decision, and the Supreme Court rejected the argument that there might be issues of public policy which would lean against the giving of reasons. The decision in *Mallak v. Minister for Justice* has been followed in a myriad of later cases, but it must be pointed out at this junction that it concerned the requirement that reasons be given and not the adequacy of those reasons or the manner by which one might be notified of any adverse matters that the Minister might have concerning good character.

27. The underlying objective is the attainment of fairness; the mere provision of reasons or the mere explanation of the decision will not always meet the test of fairness, openness and transparency. The reasons must be sufficient to enable the person receiving a decision to understand the basis on which it was made and whether grounds existed to appeal or review see also *Connelly v. An Bord Pleanála* [2018] IESC 36.

28. Recently, in *A. P. v. Minister for Justice and Equality* [2019] IESC 47, the Supreme Court allowed an appeal from a decision of Stewart J., *A. P. v. Minister for Justice and Equality* [2016] IEHC 408, upheld by the Court of Appeal, *A. P. v. Minister for Justice and Equality* [2018] IECA 112, and came to consider the broader question as to the information to which an appellant was entitled to understand the reasons why a certificate of naturalisation was refused.

29. The two judgments of the Supreme Court, that of Clarke C.J. and O'Donnell J., came to the same conclusion, albeit by somewhat different routes. Counsel for the respondent argues that the decision is not material to the present appeal as it is "unusual", in that it concerned a "difficult conundrum" and balancing of rights in the light of the national security interest which formed the background to the decision of the Minister in that case.

30. In my view, the Supreme Court must be seen to have endorsed a general proposition that sufficient and intelligible reasons must be given, reasons capable of being understood by the person receiving them, and which flow from facts before the decision maker of which the recipient is aware, and that the requirement would not be met by the furnishing of reasons in form and not in substance, and where the "underlying rationale" was not known. It cannot be said that the reasoning is to be limited in its application on account of its unusual background facts, as the Supreme Court directed disclosure of potentially sensitive information or matters which could impact on national security, albeit managed in the manner proposed.

31. The case law supports the general proposition that the nature of the review is "necessarily limited by the very broad discretion which is afforded to the Minister by statute", *per* O'Donnell J., at para. 41 of his decision in *A. P. v. Minister for Justice*. But the observations of Humphreys J. in *A. M. A. v. Minister for Justice*, at para. 27, that, as the power vested in the Minister under the 1956 Act is discretionary and executive in nature (the executive nature of the power having a long history), it would be inappropriate to

apply an “exacting standard of review”, and, at para. 28, that the discretion vested in the Minister is “as absolute as it is possible to be in a system based on the rule of law”, may not fully reflect the nature of the power and the nature of the review to which it is amenable, especially as Humphreys J. relied on the judgment of *Pok Sun Shum v. Ireland* [1986] ILRM 593, expressly not followed by the Supreme Court.

32. The appeal was not argued on the ground that the Minister did not have to give reason but that brief reasons may suffice which are open to limited scrutiny only. For the reasons stated, I conclude that the decision of the Minister is open to review and that whether it falls for lack of sufficiently clear reasons is to be determined on the facts. There is no *ex ante* rule that limits the reasons and whether they are sufficiently clear is a matter of fact in all cases, such that the test is whether fairness to the recipient is achieved.

**Application to the facts**

33. The reasons why the appellant was refused a certificate of naturalisation were not so broad and general as to be incapable of being examined or enunciated in detail. The test is whether they are sufficiently clear to enable the appellant to understand them and to consider an appeal or review, or to frame a response to the concerns of the Minister in a fresh application for naturalisation.

34. I have regard to the observation of McDermott J. in his second judgment in the High Court in *A. P. v. Minister for Justice (No. 2)* [2014] IEHC 241 at para. 31, quoted by O’Donnell J. in his judgment in *A. P. v. Minister for Justice* and described, at paras. 11 and 12, as “the careful and indeed rigorous application of the existing law”:

> “It is important that this matter be reconsidered in accordance with these legal principles. The refusal of a certificate of naturalisation on the basis of "good character" is a matter of considerable importance to the applicant in any future application. It is essential that he be given to understand as fully as possible the precise basis and context of that refusal. It is common case between the parties that the applicant has no prior convictions. He is the father of two Irish citizen children born in 1994 and 1997. He has resided for 23 years in the State and has made five applications for naturalisation, all of which have been refused in 1997, 2004. 2008, 2010 and 2013. He is now 48 years old. It is important in any future application that he be given the opportunity to address as far as possible the reasons for the refusal if he is to make a meaningful application. I do not consider that the respondent adequately complied with the obligation to furnish the reason for the refusal in this case notwithstanding the exigencies under which the respondent must operate. The respondent is, of course, entitled to withhold material on the basis of public policy as recognised in *Mallak* and this court's decision on the disclosure application, but should make the earliest possible disclosure of reasons underlying the decision consistent with that duty. It may well be that a letter setting out the factors of which the court is now aware following the initiation of these proceedings would be sufficient to meet the case but it is essential to the fairness of the process that the withholding or furnishing of reasons

is determined carefully with due regard to the facts and requirements of each case."

35. McDermott J. noted the importance of a finding of lack of "good character" for any further applications for a certificate when an adverse decision was made on character, and that an appellant be given an opportunity to address the reasons for refusal if he or she were to make a meaningful future application.

36. The respondent argues that the appellant did know the reasons why her application was refused. The refusal of the certificate was based on the Minister's view that she was not of good character and the reasons for this were also given, albeit perhaps with less clarity then might have been desirable, as being the facts that she had returned to Sudan only months after she withdrew her application for asylum based on an assertion that it was unsafe for her to do so, and that she had not been truthful or accurate in her application for a passport regarding the issue of her first passport.

37. I consider that the trial judge was correct, and this is not a case in which the decision must fail for absence of reasons. In *A. P. v. Minister for Justice*, at para. 5.9 the Chief Justice considered that "it may be that the reasons which can be given are themselves broad and general", and the reason in the present case do not fall for lack of clarity on account of their brevity or because they were broadly stated.

38. The submission on which the Minister relied and furnished to the appellant contains sufficient detail of the reason for the recommendation that the Minister refuse the application. In passing I note that the same conclusion was arrived at by O'Donnell J. in his judgment in *A.P. v. Minister for Justice*, but that nonetheless the Supreme Court granted an order of *certiorari*, as the reasons offered were based on undisclosed information or that insufficient background information was made available. The case centred on questions of disclosure rather than the standard of review. No such basis can be found in the present appeal.

39. The argument that the process lacked fairness overlaps with this ground which I turn now to examine.

**Alleged absence of fairness in the process: Right to participate**

40. In *A. P. v. Minister for Justice* the Supreme Court confirmed the entitlement of a person potentially impacted by a decision to be heard and the test set out in *The State (Gleeson) v. Minister for Defence* [1976] IR 280 and *Kiely v. Minister for Social Welfare* [1977] IR 267 and *The State (Williams) v. Army Pensions Board* [1983] IR 308, were expressly identified as the source of that principle, which the Chief Justice described as follows, at para. 4.3:

> "[A] person who may potentially be directly and adversely affected by a public law decision is entitled to be heard in the decision making process and, in that context, will ordinarily be entitled to be informed of any material, evidence or issues which it

might be said could adversely impact on their interests in the decision making process."

41. The matter may come down to whether a "proper opportunity" to participate in a decision is afforded, at para. 4.8 of the decision of Clarke C. J. in *A. P. v. Minister for Justice*. A recipient has, according to the Chief Justice, an "entitlement to make representations as to why such a certificate should be granted to him" (at para. 5.7), and the right to reasons of sufficient detail to meet the obligations of fairness.

42. The question of how fair procedures is to be afforded has been considered in a number of subsequent cases, inter alia in the judgment of Cooke J. in *Tabi v. Minister for Justice, Equality and Law Reform* [2010] IEHC 109, relied upon in a number of later decisions. There, Cooke J. had regard to the fact that the decision of the Minister to refuse a certificate of naturalisation did not deprive the appellant of a right or impose a burden or penalty, but rather was given in the context of a discretion to confer a privilege. The decision was not, however, referred to by Hogan J. in his decision some months later in *Hussain v. Minister for Justice* [2011] IEHC 171, [2013] 3 IR 257. In regard to the question of fair procedures, Hogan J. rather relied on another decision of Cooke J. in *Jiad v. Minister for Justice, Equality and Law Reform* [2010] IEHC 187 to come to a view that an appellant was entitled to know, and the Minister, therefore, obliged to put matters to the appellant so that he or she could furnish an explanation where the appellant had come to adverse attention of the Gardaí. In *Hussain v. Minister for Justice*, at para. 26, Hogan J. considered that:

> "[I]f the Minister wished to reach a conclusion adverse to the applicant, he was obliged as a matter of fair procedures to put matters not involving a criminal record or pending civil or criminal proceedings to the applicant for his comments."

43. Keane J. in *Martins v.Minister for Justice and Equality* 2018 [IEHC] 268 also considered the question of fairness of process when he referred to both *Tabi v. Minister for Justice* and *Hussain v. Minister for Justice*, and to a later judgment, *A. M. A. v. Minister for Justice*, in which Humphreys J. reviewed the existing law and concluded that:

> "There is no obligation to correspond with a naturalisation appellant in relation to something of which he or she is already aware. As to whether there is such an obligation at all, insofar as there is a conflict between *Tabi* and *Hussain*, one might be inclined to prefer the *Tabi* approach because the degree of fair procedures required in the context of an absolute discretion in the grant of a privilege must be calibrated at a low level. A court might be reluctant other than in an exceptional case to find an obligation to correspond with a naturalisation appellant or give specific notice", at para. 57.

44. In *G. K. N. v. Minister for Justice and Equality* [2014] IEHC 478 MacEochaidh J. granted an order of *certiorari* because the decision of the Minister to refuse naturalisation was based upon two documents referred to in the submission made to him by his official and omitted reference to mitigating circumstances which were contained in the background

correspondence. That judgment was distinguished by Keane J. in *Martins v.Minister for Justice* in reliance on the judgment of Cooke J. in *A. B. v. Minister for Justice* [2009] IEHC 449, as there was no evidence before him that the Minister did not have all the relevant information.

45. The appellant asserts an absence of fair procedures in the process by reason of the fact that the Minster did not return to her to seek her observations on the two matters that led to the refusal of naturalisation, the circumstances surrounding the issue of the second passport and the return to Sudan to visit family in late 2010.

46. The trial judge held, at para. 25, that the appellant was "well aware" of the matters which the Minster regarded as necessary for consideration, and that the correspondence shows a degree of engagement between the appellant and the Office of the Minister regarding certain details, some of which were clarified to the satisfaction of that Office.

47. The fact that the correspondence did not expressly state that the matters in consideration were regarded as going to character does not seem to me to evidence an absence of fair procedure, and I consider that the trial judge was correct that any reasonable approach by the appellant to the questions asked of her would have led her to understand the reason for the interrogation of the details regarding her travel and the application for the passport.

48. That fair procedures must be engaged is established and means, in general, that a decision maker has an obligation to permit an appellant to present sufficient evidence and to answer queries on matters regarded as important. I accept the argument of the respondent that the requirement of fairness does not mean that the Minster had an obligation to notify the appellant in advance that the two matters that led to the decision to refuse naturalisation were of concern to her and that they could form the basis of a decision on good character. The matters were not so unusual as to warrant prior notification or require further comment, nor could it be said that the fact that the Minister based her decision on the credibility of the appellant on those matters could have come as a surprise. The nature of engagement to which a recipient is entitled will vary and, for the present purpose, I am persuaded by the observation of O'Donnell J. in *Mallak v. Minister for Justice*, at para. 71, regarding the judgment of the Court of Appeal for England and Wales in *R. v. Secretary of State for the Home Department ex parte Fayed* [1998] 1 WLR 763, that it may, in certain circumstances, be sufficient if an appellant knows "the areas of concern which could result in the application being refused".

49. The appellant has not established to my satisfaction that she did not or could not have known that her character was likely to be under scrutiny in the application, and indeed good character is an express statutory criterion which must be met by an applicant. I am equally not satisfied that she could not have known that the circumstances surrounding the passport application in particular might have led the Minster to take a view as to her character. She had ample opportunity to make submissions on precisely those matters and had been asked for further details concerning the background in particular to the passport application.

50. The current state of the law would suggest that the requirement of fairness may be met provided sufficient detail is afforded to an applicant and sufficient opportunity given to permit him or her to engage with concerns or factual matters which might impact upon the ultimate decision of the Minister. On the facts of the present case, the appellant has not persuaded me that the trial judge was incorrect in her approach that she had been afforded an opportunity to comment and explain matters which had given rise to concern on the part of the Office of the Minister. The correspondence shows this, and O'Regan J. so held on the facts.

51. Accordingly, I am not satisfied that the appellant made a case that the trial judge was incorrect in her view that the decision did not fall for absence of fairness.

**Reasonableness**

52. There is considerable divergence between the parties as to the correct test. To argue, as does the respondent, that the lawfulness of the decision was established by the fact that the Minister concluded in her discretion that the appellant was not of good character does not, it seems to me, meet the test established in the authorities. In my view, the correct approach is to consider whether the decision was factually sustainable, not unreasonable, or not made in reliance on irrelevant considerations. The test that found in the dicta of O'Higgins C.J. in *The State (Lynch) v. Cooney* [1982] IR 337, at 361:

> "any opinion formed by the Minister thereunder must be one which is bona fide held and factually sustainable and not unreasonable".

53. The decision of Hogan J. in *Hussain v. Minister for Justice, Equality and Law Reform* contains a useful analysis of that test. Hogan J. considered that the Minister would be entitled to refuse an application if on the facts it could reasonably be concluded that the appellant was involved in serious criminal wrong-doing, even if he had never been convicted or charged with such offence. The test he preferred is whether the conclusion flowed from the evidence before the Minister and was a correct application of principle to those facts. Of note too is the judgment of Edwards J. in *L. G. H. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 78, where he considered that taking into account the fact that the applicant's two adult sons had relatively minor convictions for motor offences was an "absurd *non sequitur*", since the appellant could not reasonably be held responsible for the conduct of her adult children. That judgment was referred to and relied on by Hogan J. in *Hussain v. Minister for Justice*.

54. Whether a decision is to be considered on review to be unreasonable or irrational was considered in some detail by the Supreme Court in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 IR 701, and at para. 144 Denham J. identified the relevant factors, quoting from the judgment of the Supreme Court in *The State (Keegan) v. Stardust Victims Compensation Tribunal* [1986] IR 642, for the present purposes the important one being whether the decision is "fundamentally at variance with reason and common sense".

55. The appellant argues that the decision of the Minister was irrational and unreasonable in that the Minister failed to have regard to the passage of time between the issue of the passport based on "incorrect information" to her seven years before the Minister's decision in June 2016. It is also argued that the mere fact that the appellant returned to Sudan in late 2010, more than four years after she arrived in the State and applied for asylum, and after she had been granted residence status in Ireland on foot of her marriage to her husband in August 2007, is insufficient to establish lack of credibility and that insufficient weight was given to the fact that she had travelled to Ireland with the assistance of people smugglers whom she had paid to assist her escape her native country, Sudan. It is also pleaded that she had withdrawn her appeal of the decision refusing her asylum because she, by then, had obtained residence status which gave her the same privileges as a refugee and the continuation of the asylum application was therefore unnecessary. That fact is not noted in the recommendation and was not controverted in the evidence before the High Court.

56. With regard to the passport, the appellant had asserted in correspondence that it was likely that a previous Sudanese passport issued in her name had been applied for by those persons she had paid to help her escape Sudan and she positively stated in her letter of 29 April 2013 that she had not applied for that passport. The appellant swore an affidavit verifying, *inter alia*, the entire of para. 5 (iv) of the Statement of Grounds which recited that she did not have sight of the application for the passport which contained the incorrect information. She argued that she could not have travelled to Sudan personally to apply for the passport in 2009 and had not herself made the alleged misrepresentation, and that a wrong statement that a passport was lost so that that passport could be cancelled did not result in "adverse consequences".

**Discussion**

57. I have difficulty with the description in the recommendation to the Minister that the application for asylum of the appellant was "refused". That description is, in my view, unduly prejudicial to her and does not carry the nuance of the circumstances in which this appellant found herself. She successfully sought judicial review of the decision of the RAT on appeal from the refusal to grant her asylum, and the appeal was never determined because she withdrew it, on her own explanation, because she had, by then, obtained residence in the State, and a grant of refugee status would not have afforded her any further privileges.

58. Of more concern, however, is that the Minster relied on the fact that the appellant visited Sudan less than a year after she finally withdrew her appeal. The Minister did not have the asylum file before her, and there is nothing on the documents which were before either the recommending body or the Minster which showed the basis on which asylum was sought or even why it was refused, nor were there any details regarding the conditions on the ground in Sudan in late 2010, of where her family was residing when she went to visit them, whether the fact that she married in the meantime and had small children might have rendered her fear of persecution less well founded. These are only examples, but examples which do bear, to an extent, on the reasonableness of the

conclusion drawn by the Minister and the inference from the facts made by the Minster that because the appellant returned to the country from which she has fled only months after she withdrew her application renders the decision unsafe.

59. No analysis whatsoever seemed to have been had of the reasons asylum was sought in the first place, the basis on which it was refused, whether circumstances in Sudan had changed or might have been considered to have been changed in the intervening years, whether the fact that the appellant was married and had children had any relevance to her return to visit her family, or whether she visited family in a part of Sudan where there was no longer any risk to her safety, to name just a few matters that might be of consequence. The conclusion made by the Minister in May 2016 based on information provided by the appellant in April 2010 is, in my view, open to challenge on the ground of reasonableness if one is, as I believe one must, considering the correctness of the decision at the date it was made rather than of the date of the application.

60. In those circumstances, I consider that the decision of the Minister is flawed. The finding of absence of "good character" creates a prejudice for an applicant on a second application, such that the absence of reasonableness cannot be readily remedied were the appellant to make a further application, as she is entitled to under the 1956 Act. The decision was based on conclusions drawn from facts which occurred in the past, and the findings were made without sight of the refugee file from which might have been gleaned the reason for which asylum was sought in 2006. The finding could be difficult to displace in a future application as the decision of the Minister is relatively recent.

61. The passage of time and the absence of this information at the time the decision was made makes the conclusions unreasonable and, in my view, the decision is to be quashed on that ground.

**Was the Minister obliged to consider a waiver?**

62. The appellant also appeals on the basis that the trial judge was incorrect in her approach to the question of whether the Minister was obliged to consider waiving the condition of good character where the appellant had Irish citizen children and was married to an Irish citizen.

63. O'Regan J. found that the Minister was not obliged to waive the requirement of good character as the appellant had not sought a wavier and was not now competent to argue that the failure to consider whether to waive the statutory requirement was unlawful.

64. She relied on the decision of Humphreys J. in *A. M. A. v. Minister for Justice*. She also relied on *N. M. v. Minister for Justice, Equality and Law Reform* [2016] IECA 217, [2018] 2 IR 591, but that case does not support the proposition and was concerned more with the question of the nature of the remedy of judicial review and whether it afforded an effective remedy for the purposes of article 39(1) of Council Directive 2005/85/EC on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, O.J. L326/13, 13.12.2005. The question of a waiver of a statutory condition was not an issue.

65. The question of waiver was considered recently by Keane J. in *Martins v. Minister for Justice*. Section 16 of the 1956 Act, as amended, permits the Minister in his or her absolute discretion to grant a certificate in certain circumstances where the statutory conditions in s. 15A are not met, including where the appellant "is of Irish decent or Irish associations", defined in s. 16(2) of the 1956 Act as "related by blood" or by "affinity" to a person who is an Irish citizen. The appellant satisfies this gateway test, as she has Irish children and an Irish citizen spouse.

66. The decision of the Minister does not contain any reference to the statutory power to waive the conditions for naturalisation and it is argued that, arising from the decisions of the Supreme Court, *inter alia*, in *Mallak v. Minister for Justice*, the exercise of this discretionary statutory power must also be subject to the requirements of reasons to be given.

67. The procedure adopted by the appellant in this case was to rely on s. 15A of the 1956 Act and she made no specific submission to the Minister that a waiver of condition be considered. The section in the standard application which mentions s. 16 was actively struck out by the appellant in her application and the respondent argues that the appellant thereby actively chose not to invite the Minister to engage s. 16 of the 1956 Act.

68. In *Okornoe v. Minister for Justice and Equality* [2016] IEHC 100, Humphreys J. rejected the same argument as a "contention that a decision is arguably invalid because the Minister could have decided not to make it on the ground on which it was made", at para. 10. The point was raised again *A. M. A. v. Minister for Justice*. Here, Humphreys J. citing the judgment of Cooke J. in *A. B. v. Minister for Justice*, held that a decision maker is not required to go on separately and expressly to decide whether to waive the grounds.

69. Keane J. in *Martins v. Minister for Justice*, at para. 83, albeit *obiter*, took the view that the decision in *Mallak v. Minister for Justice* did not, in its terms, provide authority for the proposition that an adverse decision under s. 15A of the 1956 Act leads inexorably to an obligation on the part of the Minister to consider the waiver of the conditions and to provide a statement or reasons as to why the waiver was refused. While that *obiter* comment is correct, it is, at least at the level of principle, possible to argue that post-*Mallak v. Minister for Justice*, in a suitable case, a court might engage the question of whether the refusal to exercise the discretionary power was lawful.

70. It seems to me that the question is not fully engaged in the present appeal, and I leave to another case where an appellant has, whether in correspondence or in the application for a certificate of naturalisation, expressly referred to or sought to persuade the Minister to engage the discretion in s. 16 of the 1956 Act. In the present case, because the appellant pursued the application without reference to s. 16 of the 1956 Act, and positively deleted reference to s. 16 in her application, it seems to me that this is not such a case.

71. I would therefore reject this ground of appeal.

**Conclusion**

72. The appellant, in my view, has made out a case that the trial judge was in error in one respect, and the decision of the Minister must be quashed on the grounds that the conclusion to which she came was irrational and did not flow from the facts before her, and was not based on a consideration of the facts necessary to come to the conclusion to which she came.

73. I would allow the appeal on that ground only.