[2020] IEHC 393

THE HIGH COURT
JUDICIAL REVIEW

[2018 No. 76 J.R.]

BETWEEN

DEIRDRE BRENNAN

APPLICANT

AND

MINISTER FOR EMPLOYMENT AFFAIRS AND SOCIAL PROTECTION

RESPONDENTS

JUDGMENT of Ms . Justice Creedon delivered on the 5th day of August, 2020

1. In this application for judicial review the applicant seeks an Order of *Certiorari* quashing the decision of the respondent made on the 7th November, 2017 wherein the respondent used the full value of the monthly mortgage repayments made by the applicant's ex-partner in assessing her means for the purposes of determining the amount of her One Parent Family Payment. This case was heard together with the case of *Margaret Bracken v. Minister for Employment Affairs and Social Protection* [2018] 165 J.R. This Court will issue a separate judgment in respect of that case.

2. The applicant is a homemaker and has two young children with her ex-partner from whom she is separated. She is in receipt of a One Parent Family Payment amounting to €190 a week from the respondent. She is a nurse by training but is not currently in employment.

3. The applicant resides with her two young children in a home jointly purchased by herself and her ex-partner. The applicant's ex-partner pays €1,161.36 per month by way of annuity mortgage repayment in respect of a mortgage taken out on that property jointly purchased by them. The applicant makes no contribution to the mortgage.

4. The applicant applied for One Parent Family Payment and by decision dated 2nd of February 2015, it was determined that the full monthly mortgage repayment of €1,161.36 should be taken into account in assessing the means of the applicant. On review, this decision was upheld.

5. The applicant brought an appeal to the Social Welfare Appeals Office and as part of that appeal relied on a previous decision of the Chief Appeals Officer dated the 31st July, 2015, hereinafter referred to as "the precedent decision". In that case a similar applicant was assessed with only 50% of the mortgage repayment being taken into account by the Chief Appeals Officer. In that decision, the Chief Appeals Officer stated that;

> *"I am of the view that given the joint ownership of the property and liability of both parties to discharge the debts/bills on the property it is reasonable that half the mortgage and associated payments should be disregarded."*

6. The applicant's appeal to the Social Welfare Appeals Office was decided by decision dated 26th July, 2017 and the reason was set out as follows;

"I have noted the case put forward by Citizens Information as a precedent for this case. However, while it is important that as far as possible there is consistency in the decisions made by the Appeals Office each case must be treated on its own merits. In this case the legislation outlined above provides for the assessment of housing costs paid by the liable relative. I have sympathy with the arguments put forward by the appellant and Citizens Information. However, in my view the legislation does not allow the payments being made to be qualified in such a way as to discount from the means assessment the benefit which the ex-partner derives from those payments. In the circumstances the full value of the mortgage payments being made must be used in assessing the appellant's means. Having reviewed that assessment, I am satisfied it has been done correctly and in accordance with the legislation as it stands. Accordingly, I very much regret that this appeal cannot succeed."

7. On foot of that decision the applicant appealed further to the Chief Appeals Officer who gave her decision on the 7th of November 2017. It is this decision which the instant judicial review proceedings seeks to impugn. In giving her decision on 7th November 2017 the Chief Appeals Officer stated that;

"While previous decisions do not create precedents the appeals office endeavours to be consistent in its decision making. Having reviewed the decision that I am now referred to I am of the view that while I gave the benefit of a more favourable calculation in that particular case there was in fact no precise rule which allowed for that more favourable treatment. While that decision was made by me in good faith I do not consider that in the absence of a specific rule in the governing legislation permitting the application of a more favourable calculation it would be appropriate for me to apply the same consideration in Ms . Brennan's case."

She then declined to revise the decision of the Appeals Officer.

The Legislative Provisions

8. The relevant legislation in this matter is the Social Welfare Consolidation Act, 2005, hereinafter termed as" the 2005 Act", together with S.I. No. 142 of 2007 being the Social Welfare (Consolidated Claims Payments and Control) Regulations, 2007, hereinafter "the 2007 Regulations". The rules as to calculation of means are set out in Schedule 3 to the 2005 Act. Part 1 of Schedule 3 sets out definitions and defines "housing costs" as follows;

"housing costs" means rent or repayment of a loan entered into solely for the purpose of defraying money employed in the purchase, repair or essential improvement of the residence in which the person is, for the time being, residing".

9. The rules governing the assessment of maintenance and non-cash benefits for the purpose of deciding an applicant's rate of One Parent Family Payment are set out in Rule 1 Schedule 3 Part 5 of the 2005 Act as follows;

"(2) all income in cash (including, in the case of widow's (non-contributory) pension, widower's (non-contributory) pension, surviving civil partners (non-contributory) pension, guardian's payment (non-contributory) and one-parent family payment, the net cash value of such non-cash benefits as may be prescribed), and the income received by a qualified child or qualified children

(ii) in the case of blind pension, widows (non-contributory) pension, widower's (non-contributory) pension, surviving civil partners (non-contributory) pension, or one-parent family payment, any moneys received by way of a maintenance payment (including maintenance payments made to or in respect of a qualified child) insofar as they do not exceed the annual housing costs actually incurred by the person subject to the maximum amount that may be prescribed, together with one half of any amount of maintenance payment in excess of the amount disregarded in respect of housing costs actually incurred (if any)."

10. Regulation no. 142, of Chapter 6 of the 2007 Regulations provides that the non-cash benefits prescribed for the purposes of Rules 1 (2) of Part 2, 1 (2) of Part 3 and 1 (2) of Part 5 of Schedule 3 to the principle 2005 Act shall be:

"(a) the net cash value to the person of his or her annual housing costs actually incurred and paid by liable relative insofar as the cash value exceeds €4,952 per annum".

11. In respect of maintenance arrangements, Regulation 143 (1) states that

"subject to sub article (2) the maximum amount prescribed for the purposes of Rules 1 (2) (b) (ii) of Part 2, Rule 1 (2) (b) (i) of Part 3 and Rule 1 (2) (b) (ii) of Part 5 of Schedule 3 to the principle Act shall be €4,952."

Applicant's Pleaded Case

12. In her Statement of Grounds, the applicant asserted *inter alia* as follows;

The respondent had used the full value of the monthly mortgage repayments made by her ex-partner. She maintained that as the house is in joint names, her partner derives significant benefit from those payments and therefore, at most, only half the repayments should have been taken into account in the assessment. She stated that repayments made by her ex-partner directly to the mortgage bank do not come within the meaning of a non-cash benefit to her and that in any event, she is not the sole beneficiary of the payment as her ex-partner being a joint owner of the property. These repayments are made directly by him to the bank on foot of obligations under the mortgage document and she had no control over the allocation of the repayment.

13. She further asserted that there are a number of interpretations of how the "non-cash benefits" could be assessed. She argued that it could be apportioned on a 50/50 basis, or, it could be assessed as nil given the joint owner of the property may be regarded as benefiting wholly from the payments. She asserted that whatever interest is being paid

may be regarded as a "non-cash benefit" in issue and that when the property is to be sold in the future, the applicant's partner will have paid the mortgage entirely on his own and may legitimately seek to maintain a claim in this regard. She asserted that to ignore the joint owner's beneficial interest in the property is irrational and arbitrary. Additionally, no explanation or any reasoning of this has been provided by the respondent thus far.

14. She stated that the impugned decision failed to properly set out the reasons why the applicant should be assessed based on a 100% of the mortgage repayments made by her ex-partner as opposed to 50% or less, as decided by the Chief Appeals Officer in the precedent decision of the 31st July, 2015. She asserted that the impugned decision is inconsistent with the precedent decision of the respondent and that it is indistinguishable from the applicant's case.

15. In the alternative, the respondent has failed to provide adequate reason or reasons for departing from the precedent decision, or to provide reasons that are rational, understandable and expressed in such a fashion as would allow the applicant seek appropriate legal advice for the purposes of considering the possibility of challenging same as incorrect in point of law. She further stated that she had a legitimate expectation that if an interpretation of the legislation is previously given, she should also receive the benefit of same unless it be suggested that the previous decision be incorrect in point of law. She argued that the impugned decision is arbitrary, irrational and lacking in proportionality.

16. The applicant by way of affidavit, dated the 12th November, 2018 averred *inter alia* that the capital and interest payments on the mortgage are not her housing costs and instead relate to the cost of receiving a mortgage and the repayment of the loan. Resultantly, she averred these costs were incorrectly taken into account by the respondent when assessing the "net cash value "of her annual housing costs.

17. She averred that if she were a tenant residing in a property under a lease, neither she, nor her liable relative, would have to pay any of the interest or insurance payments required under a mortgage. She further averred that the actual mortgage repayments being made by her ex-partner are subject to an interest rate, which may increase or decrease and that these fluctuations have no relationship to the cost of housing and instead relate solely to the cost of borrowing money in the form of a loan secured by a mortgage.

18. She further averred that her ex-partner can increase or reduce the amount of mortgage repayments if he wishes, without the applicant's knowledge or consent and that the respondent has arbitrarily decided that the entire mortgage repayments, inclusive of interest payment and the net cash value of her housing costs, are one and the same. She averred that this approach is irrational and provided an example in her affidavit that if the applicant and her ex-partner entered into a lease agreement for the property, that they could agree that she would rent the property at 50% of the mortgage costs. Resultantly, in those circumstances, under the respondent's interpretation of the legislation, her net housing costs would be immediately reduced by 50%. The applicant averred that this

highlighted a clear lacuna in the rationale of the respondent in how it determines an applicant's net housing costs.

19. A further affidavit was opened on behalf of the applicant which was sworn by Ms . Elizabeth Rogers, chartered accountant, in which she averred *inter alia* that in her expert opinion, an annuity or repayment mortgage and the net cash value of a person's annual housing costs are two separate and distinct matters. Ms Rogers further stated that one consists of a partial repayment of capital borrowed, together with an amount of interest to cover the cost of borrowing money and the other relates to the cost of housing. She also averred they are not the same thing and there is usually no direct relationship between the two. She averred that it is her professional opinion, the "net cash value of a person's annual housing costs" and the gross mortgage repayment made by the liable relative are entirely separate concepts and that these amounts could never be the same amount, save by coincidence or happenstance.

Respondents' Pleaded Case

20. In their Statement of Opposition, the respondents in the usual way deny all assertions in the applicant's Statement of Grounds and state *inter alia*, that in calculating the applicant's means, the respondent was not required to take into account any benefit that the applicant's ex-partner derives from the mortgage repayments or the fact that such payments are made directly by the ex-partner to a lending institution on foot of obligations under the mortgage documents. The respondent stated that the annual amount of the monthly mortgage repayments of €1,161.36 does come within the meaning of a non-cash benefit to the applicant.

21. Ms Joan Gordon, Chief Appeals Officer, who gave the impugned decision of the 7th November, 2017 gave evidence by way of affidavit. In her first affidavit she set out the background to the case and highlighted in some detail the method of calculating the applicant's One Parent Family Payment in accordance with the provisions of the legislation. In particular, at para 11 she averred that in assessing the means of the applicant, the statutory provisions allow the income in cash and any non-cash benefits which the person or spouse, civil partner or co-habitant may reasonably be expected to receive during the succeeding year whether as contributions to the expenses of the household or otherwise to be taken into account.

22. She averred that the non-cash benefits include the net cash value to the person of his or her annual housing costs actually incurred and paid by a liable relative. Ms Gordon further averred that such payments have a "net cash value" to a claimant because the claimant is living in the house and his or her annual housing costs which he or she would otherwise have to meet are being paid entirely by the liable relative. She further stated that this represented a considerable benefit to a claimant such as the applicant and a monetary value was put on that benefit by it being taken into account in the assessment of means. She further averred that she did not agree that the repayment of the mortgage by the applicant's ex-partner should have been assessed as nil or on a 50/50 basis as suggested by the applicant.

23. Ms Gordon further averred that in relation to her previous decision of the 31st July, 2015, it was not correct to categorise that decision as a precedent decision or a binding authority on either her, or the Appeals Officer, in determining the applicant's case or indeed any future cases. She averred that having considered the decision, she believed that it included an incorrect interpretation of the statutory provisions dealing with the calculation of means in respect of an application for Jobseekers Allowance. In that decision, where the property was jointly owned by the claimant and her former spouse, she stated that she did allow the mortgage payment to be assessed at 50% rather than 100%.

24. Additionally, she further averred that she now believes that she was incorrect in doing so as there is no provision or rule which allows for more favourable treatment. She averred that the benefit which the applicant received is the full repayment of the mortgage, as that is equal to 100% of her annual housing cost. In short, she averred that she believed that her previous decision of the 31st July, 2015 to disregard half of the mortgage payments made by the liable relative was incorrect. She said that she believed that her decision of the 7th November, 2017 being the impugned decision was correct and was a correct application of the relevant provisions of the 2005 Act. She believed that she gave a clear and considered reasons for her decision and she did not accept that there is any defect or deficit in any reasoning or explanation given by her.

25. Ms. Joan Gordon made a further affidavit dated the 2nd of May, 2019. In that affidavit she averred that neither the applicant nor the expert has explained the rationale for apportioning the non-cash benefit either on a 50/50 basis, or, as having a nil value as proposed by them. Ms. Gordon went on to aver *inter alia* that in undertaking an assessment of each applicant, the respondent must attempt to deal with the individual circumstances of the persons requiring support and must do so within the confines of the general rules of the legislative scheme. Accordingly, she averred while the respondent assessed the needs of a claimant and the proper assessment of that claimant's means to support herself or himself and any dependent children, the general rules governing the assessment of means and the appropriate statutory disregards must be observed.

26. She averred that the applicant's ex-partner makes the monthly mortgage repayments of €1,161.36 in respect of a mortgage taken out on the property in which the applicant resides with her two children. Ms Gordon also averred that the applicant and her ex-partner are also jointly and severally liable in respect of that mortgage. Additionally, the applicant pays no rent. Ms . Gordon averred that these were the factual circumstances that fall to be addressed and that the assumptions or hypothesis in the applicant's affidavit and the affidavit of Ms . Rogers lie outside of the facts and circumstances of the applicant's case.

27. Ms . Gordon averred that it is not accepted that mortgage repayments (which may increase or decrease) have no relationship to the cost of housing. She averred that the 2007 Regulations prescribes the non-cash benefits that may be taken into account and provide at para. 142 that:

(a) that the net cash value to the person of his or her annual housing costs actually incurred and paid by a liable relative insofar as the cash value exceeds €4,952 per annum.

28. She averred that in the applicant's case, the annual housing costs incurred and paid by a liable relative are the mortgage repayments. She said that the respondent has considered that the mortgage repayments are assessed as a non-cash benefit and have also allowed for this mortgage repayment to be considered as maintenance. Ms. Gordon stated that this is of considerable benefit to the applicant as it allows under Rule 1 (2) (b) (ii) of Part 5 of Schedule 3 to the Act, for the halving of the value of the maintenance in excess of the prescribed amount of housing costs. She said that the applicant has accepted that the non-cash benefit received by the applicant in the form of mortgage repayments made by the applicant's ex-partner is correctly treated as maintenance.

29. By way of affidavit dated the 25th June 2018, Mr. Ciaran Lawlor, Principal Officer in the Department of Employment Affairs and Social Protection, averred as follows;

(i) That the One Parent Family Payment is a means tested payment that is provided for by Chapter 7 of Part 3 of the Social Welfare Consolidation Act, 2005, as amended. The rules governing the assessment of maintenance and non-cash benefits for the purposes of deciding the applicant's rate of One Parent Family Payment are contained in Chapter 7 of Part 3 and Part 5 of Schedule 3 of the 2005 Act and the Social Welfare (Consolidated Claims Payments and Control) Regulations, 2007 (S.I. 142/2007). Furthermore, Mr Lawlor averred as regards items not to be assessed as means for the purposes of the One Parent Family Payment that are not to be taken into account, that these too are contained in Part 5 of Schedule 3 of the 2005 Act.

(ii) Mr. Lawlor averred that the legislative provisions recognise that in many such cases, another person a liable relative could be paying an applicant's housing costs and the legislation allows the net cash value of such payments to be taken into account in the assessment of the means of the claimant. He said that the non-cash benefits include the net cash value to the person of his or her annual housing costs paid by a liable relative as this represents a considerable benefit to the claimant and a monetary value is put on that benefit by its being taken into account in the assessment of the claimant's means.

(iii) He averred that essentially what is involved is that account is taken of housing costs paid by another person on behalf of the claimant provided the value of those costs exceeds €4,952 per annum and that account is not taken of maintenance monies received if they are less than the housing costs and insofar as they don't exceed €4,952 per annum. He averred further that in the present circumstances, he believed that the Appeals Officer and the Chief Appeals Officer correctly applied the rules contained in Part 5 of Schedule 3 of the 2005 Act in assessing the applicant's means such that the full value of the mortgage repayments made by the applicant's ex-partner (in the sum of €1,161.36 per month) was assessed as a non-

cash benefit and as maintenance. Additionally, he further stated that in assessing the applicant's means in this way, the respondent conformed with the Regional Director's office circular 01/08 entitled "*Mortgage Payments Paid by Liable Relative*" which issued on the 2nd January, 2008.

(iv) He averred that he believed that neither the Appeals Officer or the Chief Appeals Office were required to take into account the benefit which the applicant's ex-partner might derive from the mortgage repayments, or the fact that such repayments are made directly by the ex-partner to a lending institution on foot of their obligations under the mortgage. He averred that these issues did not reflect the purpose of the legislation and should not have been factors taken into account when assessing the means of an individual seeking a social assistance payment under the Act of 2005.

(v) He also averred that the payment of housing costs by a liable relative had net cash value to a claimant because the claimant was living in the house and his or her annual housing costs were being paid entirely by the liable relative. He averred that the manner in which the respondent assessed such payments focusses on the benefit to the claimant arising from the repayment of the mortgage by the third party. He noted that when assessed in this manner, notional liabilities or arbitrary percentages of interest in property or benefits accruing to a third party are not relevant. He averred that the relevant consideration was the non-cash benefit or net cash value of the payment by the third party liable relative.

The Applicant's Arguments

Statutory Interpretation

30. In her written submissions, the applicant referred to the 2005 Act and the 2007 Regulations and, argued that the core issue in the proceedings was the proper interpretation of the phrase "*the net cash value to the (applicant) of her annual housing costs actually incurred and paid by a liable relative insofar as the cash value exceeds €4,952 per annum*." The applicant argued that the use of the terms "cost" and "value" by the legislature within the one provision leads to the clear inference that the Oireachtas was aware of the distinction to be drawn between the possible cost of housing paid by a liable relative and the net cash value to the person of same. She further argued that the respondent sought to equalise these two issues for reasons of administrative convenience.

31. She put forward hypothetical examples of ten couples, living on the same street, in the same type of house and their different financial situations to illustrate why she argued that the net cash value to an individual of housing costs incurred and housing costs simpliciter could not be the same thing. She asserted that the anomalies and inconsistencies demonstrated by these examples illustrated that the means testing system operated by the Minister is not in compliance with the Act and lacking in rational basis. At hearing, the applicants opened the recent decision of the Court of Appeal in Wyatt v D.P.P [2020] IECA 31 and argued that in using these examples they were merely attempting to advance and support the arguments already relied upon as opposed to extending their grounds.

32. Referring to the law on statutory interpretation, the applicant argued that it could not have been the intention of the Oireachtas that whatever the amount of the mortgage repayments or the annual rent provided for in any lease entered into, that that amount would always and precisely equate to housing costs. Additionally, it was argued that the respondent's interpretation of the legislation was therefore so unreasonable as to lead to absurdity. The applicant said that taking account of the full amount of the mortgage as a non-cash benefit in assessing means was wrong and prayed in aid Regulation 142 (b) as it refers to Direct Provision payments and indicated that the wording of that part of the regulation demonstrated that 142 (a) could have been drafted differently. The applicant indicated that "housing costs" are different to "net cash value" and that if there is a difference the respondent must reassess the meaning of "net cash value". The applicant said that she was not asking the Court to address this in any particular way but was instead asking the respondent to address the meaning of "net cash value".

33. The applicant said that Mr. Ciaran Lawlor of the respondent department, in his affidavit, indicated that there must be consistency of decision making and the applicant argued that it was not clear to the applicant whether this assertion was made as a matter of policy or statutory interpretation. If this was a matter of policy, the applicant argued that the respondent department must allow for exceptions. The applicant argued that the Court must know which it is addressing, that is whether the respondent is saying that the interpretation of the statute is a matter of law, or, a matter of ministerial policy. The applicant said that if the legislation is inconvenient to administer, then the Minister must seek to enact new legislation or regulations but cannot seek to ignore or amend legislation by way of circular. The applicant said that administrative convenience cannot be engaged when considering the correct interpretation of the law.

34. The decision of *Howard v Comm for Public Works* [1994] 1 L.R was opened to the Court wherein Blayney J. adopted the position of Craies on Statute Law 7th Ed., (1971) at p.65 when considering interpretation of legislation/statutes, the passage reads as follows;

> *"The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the lawgiver."*

35. The applicant also opened *D.B v Minister for Health* [2003] 3. I.R. 12 at pp.49-50 McGuinness J noted that:

> *"It may, I think, be safe to sum up the judicial dicta in this way. In the interpretation of statues, the starting point should be the literal approach - the plain ordinary meaning of the words used. The purposive approach may also be of considerable assistance, frequently, but not invariably, where the literal approach leads to ambiguity, lack of clarity, self-contradiction, or even absurdity. In the interpretation of a section it is also necessary to consider the Act as a whole. As*

was stated by Keane J (as he then was) in Mulcahy v. Minister for the Marine (High Court 4th Nov 1994):

> *"While the Court is not, in the absence of a constitutional challenge, entitled to do violence to the plain language of an enactment in order to avoid an unjust or anomalous consequence, that does not preclude the Court from departing from the literal construction of an enactment and adopting in its place a teleological or purposive approach, if that would more faithfully reflect the true legislative intention gathered from the Act as a whole."*

36. The Court was briefly referred to the recent decision of *A.W.K (Pakistan) v. The Minister for Justice and Equality, Ireland and the Attorney General* [2020] IESC 10 as counsel for the applicant believed it was the most recent Supreme Court judgment on statutory interpretation at time of hearing and restates the approach that courts should take. Paragraphs 31-35 of that decision were opened to this Court and state as follows;

> *"31. The essential issue in this case is one of statutory construction: it is whether the decision of the Minister to refuse permission to remain, taken on review, should be regarded as a decision within s. 49(4)(b) of the Act, or whether it is a decision separate and distinct from that. If the former, then any challenge is captured by s. 5 of the 2000 Act, with the result that the proceedings are out of time. As no extension was sought or argued for, it would follow that the action must fail on this basis.*
>
> *32. This interpretative issue involves a discussion on the literal approach, and what factors may be considered as part of that principle. Secondly, the focus of the parties on what I describe as a purposive approach centred on the application or not, as the case may be, of s. 5(1) of the 2005 Act. Even though I am satisfied that the issue can be resolved by a consideration of the text used, when correctly contextualised by reference to the subject matter of the legislation as a whole, I should however make some observations on this statutory provision, as some of the comments in particular relating to Kadri, are said to influence even the common law position.*
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> *33. The main elements of a literal approach are now so well described that individual authority for what follows is hardly necessary. The most basic obligation of such an exercise is to determine the intention of parliament, to assess what the legislative wishes are. Whilst some may say that even such phraseology is in itself ambiguous, at least one aspect of any uncertainty in this respect, can be immediately resolved. It is that which the court is searching for, to identify the objective intention of the legislature as a whole, and not any subjective intention which it, or its members may have. (The State (O'Connor) v. O'Caomhanaigh [1963] I.R. 112, and Crilly v. T&J Farrington Limited [2001] IESC 60, [2001] 3 I.R. 251).*
>
> *34. The most appropriate way to achieve this objective is by reference to the words used by the Oireachtas itself: when given their ordinary and natural meaning, the*

outcome should best reflect the plain intention of that body. The text published is the basic material involved because it is the most pre-eminent indicator of intention. As stated by the Law Reform Commission, in a publication later referred to (para. 45 infra), this approach remains the primary method of construction. Regard to alternative means, by reference to the various and multiple subsidiary rules, which 23 collectively are called aids to interpretation, are resorted to only where this primary approach lacks the capacity to resolve the issue or is otherwise found wanting. This method of construction is variously described as the literal method or, as giving the words their original meaning or their ordinary and natural meaning. There is no difference in effect between any of these descriptions. They all entail the same substantive drivers in the exercise undertaken.

35. As part of this approach however, it has always been accepted that context can be critical. It is therefore perfectly permissible to view the measure in issue by reference to its surrounding words or other relevant provisions and, if necessary, even by reference to the Act as a whole. Furthermore, it is presumed that the legislature did not intend any provision enacted by it to produce an "absurd" result. That rule, admittedly in a different context, was put as follows in Murphy v. G.M.; Gilligan v. Criminal Asset Bureau [2001] 4 I.R. 113, "A construction leading to so patently absurd and unintended a result should not be adopted unless the language used leaves no alternative: see Nestor v. Murphy [1979] I.R. 326" (Keane C.J. at 127 of the report). Accordingly, whilst not in any way trespassing upon a purposive approach, certainly not that as provided for by s. 5 of the 2005 Act, I believe that it is permissible to have regard to the underlying rationale for the provision(s) in question. On this basis, I propose to examine meaning."

Reasons

37. The applicant once again referred to the "precedent decision" and argued that this created a legitimate expectation for her and that she was entitled to reasons for the respondent's change of approach. She said that she is not arguing that there cannot be a different decision but that she was entitled to reasons. The applicant said that the requirement for reasons alone means that the impugned decision must go back to the Chief Appeals Officer for a fresh decision. The applicant argued that her ability to challenge the validity of an administrative decision on "reasonableness" or "proportionality" grounds depended on the extent to which the decision maker was required to explain the rationale underlying its decision and unless the decision maker is so required it may not be possible for the court to exercise its supervisory jurisdiction.

38. Counsel for the applicant opened *Connelly v. An Bord Pleanala & Ors* [2018] IESC 31, in that decision the Supreme Court considered the obligation to give reasons and reasons behind decisions. They cited the unanimous decision judgment of Clark C.J. at paras 6.1-6.11:

"6.1 As noted above, what the Court is concerned with here is the criteria by reference to which a court should assess whether the reasons given are adequate in any

particular case. It seems to me that it is possible to identify some key principles from the recent case law in this area.

6.2 *Mallak v. Minister for Justice, Equality and Law Reform [2012] IESC 59; [2013] 1 I.L.R.M. 73 concerned a refusal by the relevant Minister to grant a certificate of naturalisation to the appellant, a Syrian refugee residing in the State. The Minister's decision did not give any reason for the refusal beyond simply stating that the Minister had exercised his absolute discretion under the relevant legislation.*

6.3 *Delivering the decision of this Court, Fennelly J. engaged in a review of the sometimes-conflicting jurisprudence in this area. He cited the decision of Barron J. in the High Court in State (Daly) v. Minister for Agriculture [1987] I.R. 165; [1988] I.L.R.M. 173 which concerned a civil servant on probation whose appointment was terminated pursuant to s. 7 of the Civil Service Regulation Act 1965. Regarding the failure of the Minister to give reasons for reaching this decision, Barron J. stated: -*

> *"Such powers may only be exercised in conformity with the Constitution. The view of the Minister must be seen to be bona fide held, to be factually sustainable and not unreasonable. If no reasons have been given for the exercise of the power, then this court cannot review the exercise of the power in the light of these criteria.*
>
> *The court must ensure that the material upon which the Minister acted is capable of supporting his decision. Since the Minister has failed to disclose the material upon which he acted or the reasons for his action there is no matter from which the court can determine whether or not such material was capable of supporting his decision. Since the Minister continues to refuse to supply this material, it must be presumed that there was no such material."*

6.4 *Fennelly J. also referred to the decision of the High Court (Blayney J.) in International Fishing Vessels Ltd. v. Minister for the Marine [1989] I.R. 149 which concerned the refusal by the respondent Minister to grant a licence. Blayney J. held that in this context reasons must be provided (at p.155): -*

> *"It is common case that the Minister's decision is reviewable by the court. Accordingly, the applicant has the right to have it reviewed. But in refusing to give his reasons for his decision the Minister places a serious obstacle in the way of the exercise of that right. He deprives the applicant of the material it needs in order to be able to form a view as to whether grounds exist on which the Minister's decision might be quashed. As a result, the applicant is at a great disadvantage, firstly, in reaching a decision as to whether to challenge the Minister's decision or not, and secondly, if he does decide to challenge it, in actually doing so, since the absence of reasons would make it very much more difficult to succeed."*

6.5 *Fennelly J. stated as follows at paras. 64 and 65 of his judgment in Mallak: -*

"In the present case, the applicant points to the effective invitation to the appellant to "reapply for the grant of a certificate of naturalisation at any time." That statement might reasonably be read as implying that whatever reason the Minister had for refusing the certificate of naturalisation was not of such importance or of such a permanent character as to deprive him of hope that a future application would be successful. While, therefore, the invitation is, to some extent, in ease of the appellant, it is impossible for the appellant to address the Minister's concerns and thus to make an effective application when he is in complete ignorance of the Minister's concerns.

More fundamentally, and for the same reason, it is not possible for the appellant, without knowing the Minister's reason for refusal, to ascertain whether he has a ground for applying for judicial review and, by extension, not possible for the courts effectively to exercise their power of judicial review."

(Emphasis added)

6.6 Importantly, Fennelly J. stated at para 66: -

"In the present state of evolution of our law, it is not easy to conceive of a decision-maker being dispensed from giving an explanation either of the decision or of the decision-making process at some stage. The most obvious means of achieving fairness is for reasons to accompany the decision. However, it is not a matter of complying with a formal rule: the underlying objective is the attainment of fairness in the process. If the process is fair, open and transparent and the affected person has been enabled to respond to the concerns of the decision-maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded."

6.7 In a useful and elucidating analysis of the judgment in Mallak, O'Donnell J., writing in an academic context, has described this preceding paragraph as the "core" of Fennelly J.'s decision in Mallak. (see, O'Donnell, "Mallak and the Rule of Reasons" in Bradley, Travers and Whelan (eds.) Of Courts and Constitutions: Liber Amoricum Honour of Niall Fennelly, (Hart 2014) at p. 228)

6.8 Following the above quoted statement at pp. 322/96 of Mallak, Fennelly J. stated that there are: -

"Several converging legal sources [which] strongly suggest an emerging commonly held view that persons affected by administrative decisions have a right to know the reasons on which they are based, in short to understand them." (Emphasis added)

6.9 Therefore, Fennelly J.'s decision in Mallak points to at least two purposes served by the provision of reasons by a decision maker being, first, to enable a person

affected by the decision to understand why a particular decision was reached, but secondly, to enable a person to ascertain whether or not they have grounds on which to appeal the decision where possible or seek to have it judicially reviewed.

6.10 It is possible to cite further recent decisions of this Court in this context to similar effect.

6.11 In Meadows v. Minister for Justice [2010] 2 I.R. 701; [2011] 2 I.L.R.M.157, Murray C.J. stated : -

> *"An administrative decision affecting the rights and obligations of persons should at least disclose the essential rationale on foot of which the decision is taken. That rationale should be patent from the terms of the decision or capable of being inferred from its terms and its context.*
>
> *Unless that is so then the constitutional right of access to the courts to have the legality of an administrative decision judicially reviewed could be rendered either pointless or so circumscribed as to be unacceptably ineffective."*

39. The decision of Barrett J. in *Murtagh v. Judge Kevin Kilrane & Ors* [2017] IEHC 384 was briefly opened to the Court by the applicant. The applicant argued that that decision highlighted obligations on respondents to give explanations, amongst them being the obligation to "play with all cards on the table." The applicant highlighted that contrary to the principles set out in this decision, neither Ms Gordon or Ms Lawlor have explained if the circular was the reason for the departure from the approach taken in the precedent decision. Additionally, counsel for the applicant also argued it was unclear if the circular was replied upon at all and that they have fettered their discretion. They said there is opacity in the affidavit of Mr Lawlor, in that that he raised the circular in his affidavit but never explained its relevance or impact on the impugned decision.

40. *R.(Ermakov) v. Westminster City Council* [1996] 2 All E.R at 302 was opened by counsel for the applicant where it was noted that when there is a judicial review, there is a duty to give reasons and that new reasons cannot be provided in replying affidavits. In this decision, the Court of Appeal approved the observations of Schiemann J. *in Rv. Tynedale DC ex parte Shield* (1987) 22 HLR 144 where he said the following:

> *"It is not permissible for the Court, in my judgment, to go behind [the decision in letter form] and hear evidence as to what the reasons were. This is consistent with the general procedure adopted by the Courts in relation to administrative decisions in cases where the decision maker is obliged to give reasons for his decision. One of the purposes of requiring the decision maker to state his reasons is to give the recipient of the decision the opportunity of challenging it."*

41. P. 315 of R. (*Ermakov) v. Westminster City Council* [1996] 2 All E.R. at 302 was also opened to the Court where Hutchinson L.J noted that;

> *"The Court can and, in appropriate cases, should admit evidence to elucidate or, exceptionally, correct or add to the reasons: it should …be very cautious about doing so. I have in mind cases where, for example, an error has been made in transcription or expression, or a word or words inadvertently omitted, or where the language used maybe in some way lacking in clarity. These examples are not intended to be exhaustive but rather reflect my view that the function of such evidence should generally by elucidation not fundamental alteration, confirmation nor contradiction."*

42. Counsel for the applicant said that this is further buttressed by the Fennelly J in *Mallak v. Minister for Justice Equality & Law Reform* [2012] IESC 59 when he noted that it would be hard to think of an administrative decision where there was not an obligation to provide reasons and that applicants are entitled to challenge decision for completeness or inadequacy on a variety of grounds and if that argument is upheld the decision is quashed.

43. Counsel for the applicant asked the Court to note the decision of Charleton J. *City of Waterford Vocational Educational Committee v. The Secretary General* [2011] IEHC 278 where the underlying principle held that reasons cannot be added to by a respondent. They asserted that it was in this decision that *Ermakov* was first adopted in this jurisdiction. The last part of paragraph 12 was opened to the Court:

> *"Reasons are to be stated there and then, not added later upon challenge. Where reasons stated within a written decision are shown to be manifestly flawed, these cannot be supplemented by better reasons, or correct reasons, at any stage after the decision is made. Sometimes evidence can be admitted to elucidate a reason which is laconically expressed or, exceptionally, where a mistake occurs, to correct a mistake. Elucidation may, in guarded circumstances, be accepted but not alteration; R. v. Westminster City Council, ex parte Ermakov [1996] 2 All ER 302."*

44. Continuing the argument in respect of reasons counsel for the applicant opened *Coffey, O'Brien & A.B v. Kerry Council County* [2020] IEHC 176, they said this provided a very recent summary of the ultimate obligation to give reasons. In that decision, Heslin J. set out recent case law on obligation to give reasons at paragraphs 63-67 where he considered the process of a County Council in deciding on housing applications based on a policy of suspending applications for social housing when anti-social behaviour arose, para 67 of that decision noted as follows;

> *"…There may or may not be reasons and such reasons may or may not be satisfactory. I am satisfied, however, that none are given, other than what amounts to a further statement of respondent's attitude, as opposed to a reason which would enlighten the applicants, namely "there is nothing which would warrant overturning a previous decision made by the respondent (something the applicant's solicitor was obviously arguing for) and makes clear that the respondent takes the view that nothing submitted on behalf of the applicants would warrant what the respondent describes as ignoring council policy in this area."*

45. Counsel for the applicant then opened the case of *Irfan v. Minister for Justice and Equality* [2020] IECA 135 which arose out of judicial review proceedings after the High Court had refused to grant an Order of *Certiorari*. The appellant in that decision had applied for a certificate of naturalisation but was refused on the basis he was not of good character as he had committed certain offences under the Road Traffic Acts. Paras 60 & 61 of that decision were opened to this Court:

> *"60. Counsel for the appellant relied on two recent decisions of this court in which the obligation to give reasons for refusing naturalisation was considered. In A.A. Baker J referred to the Supreme Court decisions in Mallak and A.P., and summarised the obligation to give reasons: "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."*
>
> *61. In Borta v MJE [2019] IECA 255 the applicant sought naturalisation based on "Irish Associations" (s.16 of the 1956 Act). The reasons given for refusing a certificate were brief and vague – the Minister acknowledged that the applicant had Irish associations but did not consider them sufficiently strong to warrant the exercise of the Minister's discretion in her favour. It was argued that if the Minister was permitted to consider the strength of the associations he must provide reasons as to how and why the accepted associations are not sufficiently strong; in the absence of any such reasons, the essential rationale of the decision was not disclosed. Donnelly J agreed that the Minister had not identified which factors had gone towards the strength of the Irish associations, and stated –*
>
> > *"40. …If the reason is that she needed a longer period of Irish association then the passage of time might raise an expectation of naturalisation in the future. There may be other reasons but those are for the Minister to state. It goes without saying that a clear statement of reasons would permit Ms . Borta to challenge them if she believed there were good grounds to do so.*
> >
> > *41. I do not accept that requiring these kind of reasons amounts to a fettering of a discretion on the part of the Minister or indeed amounts to requiring guidelines to be given by the Minister…*
>
> *62. Counsel for the appellant submitted that these observations, and the approach taken by the High Court in G.K.N., following Lang J in Hiri, apply to the instant case where the decision turned on the "nature of the offences", yet the Submission does not set out any facts, analysis or reasoning related to the circumstances of the offences/charges.*
>
> *63. Counsel for the Minister argued that the trial judge was correct in finding no inadequacy in the reasons provided, and that the rationale was capable of being*

inferred from the terms and context of the decision. Counsel relied particularly on the statement in the Submission that "This applicant has a history of non-compliance with the laws of the State. The relevant information is attached to this submission." It was submitted that there was sufficient information to enable the appellant to ascertain whether there existed a ground for seeking judicial review, and to enable the court to exercise its power of judicial review.

64. There is an obvious overlap between the question of reasons and the earlier question of whether the decision maker considered all relevant material. If not all relevant explanations were considered, then the Minister cannot have carried out the analysis that could lead to a decision based on the "nature of the offences". In that I have formed the view that the decision maker did not consider all relevant material it follows that the reason given based on the "nature of the offences" cannot be upheld.

65. If I am wrong in this, and all relevant material was considered, then the Minister's rationale for deciding that the "nature of the offences" meant the appellant was not of 'good character' is not apparent from the Submission. It can readily be inferred that the "history of non-compliance" refers to the two convictions in 2011 (for offences that occurred in 2009 and 2010) and the no insurance charges in 2017, but there is no analysis of why road traffic offences that are so far apart in time constitute a history that amounts to the appellant not being of "good character".

46. Counsel for the applicant then opened para 68 of the same decision which stated;

"I would therefore allow the appeal on this second ground and determine that the decision should be quashed because the Minister failed in all the circumstances to give reasons and in particular failed to express his rationale for deciding that the "nature of the offences" meant that the appellant was not a person of "good character".

47. The Applicant argued that this recent case highlighted the importance of knowing why the respondent made their decision and again asserted they did not know why the respondent had decided this case in the manner in which they did.

Failure to treat similar applicants equally

48. The applicant returned to the examples given of ten different couples and their varying financial positions. They said that these examples highlight the arbitrary system used by the respondent which failed to treat similar applicants equally. The applicants cited the decision of Kenny J. in *Murphy v. The Attorney General* [1982] IR 241 at page 283:

"The mere fact that a heavier financial or other burden falls on some defined person or persons does not of itself constitute a repugnancy to Section 1 of Article 40. Having regard to the second paragraph of Article 40 Section 1, an inequity will not be set aside as being repugnant to the Constitution if any state of facts exists which may reasonably justify it."

49. Counsel for the applicant opened *Brennan & Ors. V. A.G.* [1983] I.L.R.M. 449 was a decision arising as a result of a challenge to the land valuation acts. Page 480 of that decision was opened to the Court and stated as follows;

> *"Following these principles, the Courts have stressed that Art. 40 does not require identical treatment of all persons without recognition of differences in relevant circumstances. It only forbids invidious discrimination. See O'Brien v. Keogh [1972] IR 144 and Launders v. Attorney General (1975) 109 ILTR 1*
>
> *There is a sense in which to legislate is to discriminate. The legislature in its efforts to redress the inequalities of life or for other legitimate purposes may have to classify the citizens into adults and children, employers and workers, teachers and pupils and so on. Pringle J. stated in O'Brien v. Manufacturing Engineering Company Limited [1973] IR 334 that such division of the citizens into different classes was envisaged by the second sentence of Art 40.1. He then added;*
>
> > *"Therefore it would appear that there is no unfair discrimination provided every person in the same class is treated in the same way." (at 341)*
>
> *No doubt this is true, but it might be prudent to express, what is perhaps implied in it, that the classification must be for legitimate legislative purpose, that it must be relevant to that purpose, and each class must be treated fairly."*

50. The Applicant also referred to the *Blake v. A.G.* [1982] I.R. 117 where the Supreme Court struck down the Rent Restrictions Act 1946. Counsel for the applicant highlighted that the Supreme Court struck down the legislation as it restricted the rights of one group of citizens to the benefit of another group and did so without having regard to the financial capacity of either group, without making provision for compensation. They further highlighted that one of the reasons given by the Supreme Court as to why the Rent Restrictions Act was unconstitutional was because the legislation contained no power to review the rents fixed by law "*irrespective of changes in conditions" and this was itself "a circumstance of inherent injustice which cannot be ignored*" see [1982] I.R. 117,139, per O'Higgins C.J.

51. Counsel for the applicant also extracted the following from *Kelly v Minister for the Environment* [2002 No.172 J.R. and S.C. No. 168 of 2002]:

> *"…the State must…ensure that with any provision passed into the law to guarantee of equality as contained in Article 40, section 1 of the Constitution will be respected. It could not, therefore, by any provisions of a statute, or by the manner and way in which it might implement such a provision, cause unjustified advantage to accrue to one person, class or classes of the community as against or over and above, another person or class of that same community."*

52. The applicant highlighted that in *Dillane v. Ireland* [1980] ILRM 167 T 169 the following was noted;

> *"When the State, whether directly by statute of mediately through the exercise of a delegated power of subordinate legislation, makes a discrimination in favour of, or against, a person or a category of persons, on the express or implied ground of a difference in social function, the courts will not condemn such discrimination as being in breach of Article 40.1 if it is not arbitrary, or capricious, or otherwise not reasonably capable, when objectively viewed in light of the social function involved, of supporting the selection or classification complained of."*

53. The applicant argued that if the Court was to accept the respondent's interpretation of the legislation it would fall foul of the test in *Brennan and Blake*.

Fixed and Inflexible Policy

54. The applicant also argued that the respondent's scheme of implementation was inflexible given that regardless of the cost of borrowing money under the terms of a mortgage, the respondent equated this to the precise amount for the cost of housing always and without ever a mechanism for review. She further asserted that the impugned decision of the 7th of November 2017 was arbitrary, as no assessment was undertaken by the respondent as to how the mortgage repayment actually related to the cost of housing and further that the respondent as a public body, vested with a discretionary power, cannot operate the scheme in such a fixed and inflexible manner regardless of issues of proportionality and common sense.

55. The applicant opened the case of R (*Alconbury Developments Ltd) v. Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23. In that case the House of Lords noted that;

> *"The formulation of policies is a perfectly proper course for the provision of guidance in the exercise of an administrative discretion. Indeed, policies are an essential element in securing the coherent and consistent performance of administrative functions. There are advantages both to the public and the administrators in having such policies. Of course there are limits to be observed in the way policies are applied. Blanket decisions which leave no room for particular circumstances may be unreasonable. What is crucial is that the policy must not fetter the exercise of discretion. The particular circumstances always require to be considered. Provided that the policy is not regarded as binding and the authority still retains a free exercise of discretion the policy may serve the useful purpose of giving a reasonable guidance both to Applicants and decision makers."*

56. Counsel for the applicant also opened the case of *Danibye Luximon v Minister for Justice and Equality* [2015] IEHC 227 wherein Barr J. cited the judgment of Lord Dyson in the Supreme Court of the United Kingdom on the requirements of public policy in the immigration area in *Walumba Lumba v. The Secretary for the Home Department* [2011] UKSC 12, the following positions were accepted as being a correct statement of law in respect to a particular policy. Paragraph 20 of that judgment Lord Dyson stated as follows;

"First, it must not be a blanket policy admitting of no possibility of exceptions. Secondly, if unpublished, it must not be inconsistent with any published policy. Thirdly, it should be published if it will inform discretionary decisions in respect of which potential object of those decisions has a right to make representations."

57. At paras 34 to 35, he stated as follows: -

"The rule of law calls for a transparent statement by the executive of the circumstances in which the broad statutory criteria will be exercised. Just as arrest and surveillance powers need to be transparently identified through the immigration rules, so too the immigration detention powers need to be transparently identified through formulated policy statements.

The individual has a basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute… there is a correlative right to know what that currently existing policy is, so that the individual can make relevant representations in relation to it."

58. At para 38 he stated: -

"The precise extent of how much detail of a policy is required to be disclosed was the subject of some debate before us. It is not practicable to attempt such an exhaustive definition…What must, however, be published is that which a person who is affected by the operation of the policy needs to know in order to make informed and meaningful representations to the decision maker before a decision is made."

59. Counsel for the applicant further highlighted the inflexibilities they claimed were followed by the department in applying the policy by raising the decision in *Carrigaline Community Television Broadcasting Company Limited v Minister for Transport, Energy and Communications* [1997] 1 I.L.R.M. 241, and recently adopted by Whelan J. in *Jones v. Justice and Equality* [2019] IECA 285 at para 64 which stated:

"…The adoption by the licensing authority of a policy could have the advantage of ensuring some degree of consistency in the operation of the regime, thus making less likely decisions that might be categorised as capricious or arbitrary. But it is also clear that inflexible adherence to such policy may result in a countervailing injustice. The case law in both this jurisdiction and the United Kingdom illustrates the difficulties in balancing these competing values."

60. Counsel for the applicant also referred to the judgment of Clark J. in *Mohammed v. Minister for Justice, Equality and Law Reform* [2013] IEHC 68 when he stated that:

"The Minister's agents must have a benchmark or standard by which the determination on dependency is made. Without such standard the determination

must be considered arbitrary. If there are no guidelines for Applicants, perhaps it can be assumed that the Minister himself has no guidelines."

61. In that regard the applicant referred to para 63 of her written submissions wherein she argues that the impugned decision implies a blanket policy regardless of value or rational connection to the cost of housing. Furthermore that any unpublished policy must be consistent with any published policy and that the change in policy wherein no offset was allowed as against the mortgage was never published by the respondent and that it should be published if it will inform discretionary decisions in respect of which the potential object of those decisions has a right to make representations. The applicant said she was never given an opportunity to make representations regarding her application as evidenced by the impugned decision. The respondent's position was that since there was no specific rule allowing an offset, it was unable to do so.

62. Counsel for the applicant highlighted that in matters such as this, the view of the Minister must be seen to be *bona fide* held and reasonable and the respondent's opposition is "distinctly ambiguous" in this regard. The applicant said she must know if the respondent is interpreting Regulation 142 or applying a policy. If it was the former, the applicants concede that the case law opened to this Court is obviously of much less relevance. If it was the latter, then the applicant claims that para 18 of Mr Lawlor's affidavit is of relevance where he avers that it is important that the respondent achieve a measure of consistency in the application of statutory formulae across different areas of social assistance.

63. In summary, the applicant claimed that her case is a matter of the statutory interpretation of Regulation 142. The applicant said that ministerial policy cannot be an aid to its interpretation. The applicant repeated that she is not challenging the Act or the regulations, but was challenging the interpretation given to the words. She reiterated again that "housing costs "and" net cash value" are different concepts and if she was correct in that, then there has been a failure by the respondent to distinguish between the two. Counsel for the applicant stated that there has been no application to cross examine her expert so that the evidence of her expert is now uncontroverted evidence and reminded the Court of the expert's evidence that an annuity or repayment mortgage and the "net cash value" of a person's annual "housing costs" are two separate and distinct matters. It was asserted that the difference has not been addressed by the respondent in its decision.

64. The applicant asserted that she was not attacking the constitutionality of the Act or the *vires* of the Regulation and that her argument is with the interpretation being put on this and that a proper interpretation of Regulation of 142 would not raise the *vires* of the Minister. She said that her challenge is to the particular decision made by the Chief Appeals Officer and she is seeking an Order of *certiorari* quashing that decision as there was an error in law underpinning the impugned decision.

65. Counsel for the applicant said that they do not understand the respondent's reliance on *Cahill v. Sutton* [1980] I.R 269. Counsel for the applicant opened the headnote of that

decision to contextualise the respondent's claim to this Court. They said that the plaintiff's action in that case was based solely on the absence of statutory provisions which if present would not be applicable to her and on that basis, she had failed to establish *locus standi.* They said that in the instant case, nothing could be further from the facts.

The Respondents Arguments

66. The respondent replied by asserting that whilst the applicant claimed that she was not mounting any attack on the Act of 2005 or the Regulations of 2007, the applicant has in fact been criss-crossing between attacking on the one hand, the decision taken and on the other, the statute and Regulations in all of the arguments that she has made.

67. The respondent argued that the nub of the case was set out in para. 4 and 5 of the applicant's Statement of Grounds and that the applicant is tied to this issue. The respondent said that the difference in factual circumstances between this case and the proceedings in *Margaret Bracken v. Minister for Employment Affairs and Social Protection* (Record no. 2018 165 JR) heard simultaneously is irrelevant. The respondent said that the nub of the case is how mortgage payments are to be treated and that this is not an abstract unanchored point.

68. Counsel further asserted that authorities such as *Madigan v Attorney General* [1986] ILRM 136 and *Brennan & Ors v A.G* [1983] ILRM 449 all consider the strength of legislation. The respondent opened para 54 of *Blake v A.G* [1982] I.R. 117 and argued that the strength of legislation was the basis for that line of authorities and that the applicants were now attempting to deploy it in order to overturn the decision of the Chief Appeals Officer. They argued that this points to absolute category confusion and that the applicant cannot invite this Court to quash a decision of the Chief Appeals Officer which was made in accordance with the legislation.

69. Moreover, counsel also argued that whilst those authorities concerned constitutional challenges, they were partially relevant in that they illustrated that the Oireachtas must be afforded a considerable level of latitude when giving decisions. They furthered this argument by stating that there typically would not have been many cases where social welfare legislation has been impugned and if the Court would admit this type of challenge it would be virtually impossible to implement a social welfare system.

70. Counsel for the respondent said that a statutory scheme for the provision of social welfare to the claimants under various headings must necessarily be formulated at a particular level of generality and it may not be administratively possible to take account of every variation of individual circumstance.

71. The US Supreme Court decision of *Callifano v. Jobst* 434 U.S. 47 (1977), was also opened which concerned social security and in general terms, held that general rules will, from time to time produce arbitrary consequences. Counsel for the respondent reiterated their earlier argument that as the legislation was not being challenged, the applicant was left with "fatal difficulties" and that unless the applicant can show that the decision of the Chief Appeals Officer has been taken *ultra vires* the Act, then the applicant cannot invite

this Court to quash the decision in terms that would cast a constitutional shadow over the legislation or regulations.

72. The respondent opened *Cahill v Sutton* [1980] IR 269 which concerned the constitutionality of the statute of limitations arising from personal injuries. They quoted a passage from p.280 of that decision and argued that the decision held that the applicant in that case was not entitled to invoke the circumstances of another person as it did not affect her at the time.

73. Counsel for the respondent stated that the case of *Wyatt v D.P.P* [2020] IECA 31 is not relevant as the applicant's quarrel is with statute and with the definition of housing costs, not with the decision of Ms Gordon. They say that the respondent is attempting to rely on a precedent decision which Ms. Gordon has now come to view as incorrect. In addition, the respondent asserted that the decision was not invidiously. discriminatory against either of these applicants.

74. The respondent referred to para 12 of *City of Waterford Vocational Educational Committee v. The Secretary General* [2011] IEHC 278, which was opened to the Court by the applicant and contended that the degree to which a decision has to be elaborated upon will depend on the nature of the decision being given. They further said that if it is a difficult or technical argument, then reasons need to be given and cannot be supplemented afterwards, however the respondent argued that sometimes occasions will arise where reasons already given can be supplemented to elucidate on a decision.

75. Referring to the decision of R. (*Ermakov*) *v. Westminster City Council* [1996] 2 All E.R. at 302, the respondent said that the applicant sought to rely on this decision in support of their argument. Resultantly, the respondent has wrongly sought to elaborate on reasons already given and that on foot of this case and that the respondent is muzzled in setting out what the statutory scheme is and the context of the decision. They argued that this is simply not the case.

76. *Omotayo Mobolaji Olaneye v. Tine Minister for Business, Enterprise and Innovation* [2019] IEHC 553 was then opened by the respondent wherein they highlighted the following paragraphs:

> *"31. The applicant objected to Mr. Harrington's affidavits being used or the purpose of the retrospective creation of reasons relying on Humphries J. in PS Consulting Engineers Ltd. V. Kildare County Council [2016] I.E. H.C 113. The Minister submitted that these affidavits were not sworn for that purpose of explaining the circumstances. It was submitted that the minister had to be entitled to put before the Court the context for the decision.*
>
> *32. I am satisfied that the minister is not entitled to rely upon the subsequent affidavits to provide reasons that were not provided (either expressly, or by necessary implication) at the time of the decision. I am also satisfied that the minister must be entitled (and to a certain extent is obliged) to put before the Court the*

background to the decision that has been taken. This is particularly important where the specialist decision-making has taken place. The High Court must be able to assess the position, taking into account the knowledge that the parties will have had of the issues involved."

77. Counsel for the respondent argued that the above case trumped anything argued by the applicants concerning the *Ermakov* principle and that in the above case, supplemental affidavits were filed to provide background as opposed to new reasons. Counsel for the respondent argued that the High Court must be able to assess the situation taking into account the knowledge the parties would have on the issues involved.

78. Referring to the evidence of the expert given by way of affidavit, the respondent said that rental value and the cost of a mortgage may not always overlap, but claimed that the difficulty for the applicant in this matter is that their argument is with the statutory provisions and not with the decision. The respondent said that the applicant has not challenged the Act or the Regulations. Additionally they said that the if decision flowed from the legislation, which the respondent says it does, then it cannot be the subject of a judicial review. The respondent asserted that the applicant has borrowed constitutional arguments to impugn the decision.

79. The respondent argued that housing costs are defined in the legislation and opened the relevant provisions. The respondent said that in responding to the applicant's argument, the definition of housing costs in the legislation does in fact include purchase, repair or essential improvements to the property and the respondent is bound by the Act. The respondent says that under the applicant's argument what "net cash value" means is that it is incumbent on a Deciding Officer in assessing what the benefit is to the person seeking the payment to subtract or "net out" any benefit to the liable relative. The respondent said that to argue that the meaning of "net cash value" was to say that any benefit to a liable relative be deducted was a very ambitious argument.

80. The respondent asserted that what is meant by an assessment of means is what is the impact to the person of the benefit. The respondent argued that putting forward that this should be dealt with on a 50% or nil basis is not a coherent argument. The respondent said that there is no compelling logic to a judicial review on this point. The respondent argued that the legislation does not allow for the setting off of some notional benefit to a liable relative as part of the means assessment. The respondent also argued that the legislation does not allow for the benefit to Ms. Brennan to be reduced by a collateral benefit of capital appreciation. They argued that this is a weak argument both in terms of statutory interpretation, and, as a matter of ordinary logic.

81. The respondent then asked why it was an affront to reason or fairness that the assessment of the net cash value should be focused on the person receiving the benefit, disregarding a benefit deriving to the person making the payment (who isn't the person seeking the benefit). The respondent argued that the absence of a coherent argument as to why the legislation is an affront to human reason or fairness has been met instead with the ten examples or anomalies put forward by the applicant. They claimed these

examples are in fact an attack on the legislation in the guise of attacking the decision and they argued that the applicant is not entitled to do this.

82. The respondent addressed the appeals mechanism under Part 10 of the legislation in particular s.318. The respondent asserted that the Chief Appeals Officer was carrying out a review under s.318. The respondent opened the case of *Olaneye* and indicated that the Chief Appeals Officer is entitled to take another view and that it cannot be said that she has an enhanced reasons obligation. The respondent said that the Chief Appeals Officer does not have a discretion to disregard the legislation and in those circumstances the argument of fixed policy or fettering of discretion falls away. The respondent asserts that the legislation does not allow a decision maker to net out a third-party benefit and that the applicant cannot impugn a decision of the Appeals Officer for doing anything permitted by the legislation.

83. The respondent said the true issue is with the 2005 Act and the 2007 Regulations and that this can only be pursued by way of a constitutional challenge. On this basis the respondent challenged the relevance of *Brennan and Madigan* being opened by the applicant.

Discussion and Decision

The Facts

84. The Court finds the following to be the facts which, in any event, are not in dispute between the parties.

85. The applicant is a homemaker who has two children with her ex-partner from whom she is separated. She is in receipt of One Parent Family Payment of €190 per week. Her ex-partner pays the full amount of the mortgage in respect of the property in which the applicant resides with the two children and which property was purchased by the applicant and her ex-partner jointly. The amount of the monthly mortgage repayments is €1,161.36.

86. The applicant applied for One Parent Family Payment and by written decision of a Deciding Officer dated 2nd of February 2015 it was determined that the full monthly mortgage repayment of €1,161.36 should be taken into account in assessing the means of the applicant. That decision set out the calculation by which the means were assessed giving the total means assessed and the bands under which means are applied.

87. The applicant sought a review of that decision which was conducted by a Social Welfare Inspector who gave their decision on that review on the 26th of July 2017. As part of that appeal the applicant relied on a previous decision of the Chief Appeals Officer dated the 31st July, 2015 ("the precedent decision") wherein a similar applicant was assessed with only 50% of the mortgage payment being taken into account by the Chief Appeals Officer. In that case the Chief Appeals Officer stated that;

"I am of the view that given the joint ownership of the property and liability of both parties to discharge the debts/bills on the property it is reasonable that half the mortgage and associated payments should be disregarded."

88. The decision of the 26th of July 2017 sets out the "Question at Issue", the "Relevant Legislation" and the "Reasons for the Decision".

89. The "Question at Issue" was set out as follows: "*In assessing the means of the appellant the Department has used the full value of the mortgage payments made by her ex-partner. The appellant maintains that as the house is in joint names and as her partner therefore derives a benefit from these payments that only half of the payments should be used in the assessment*".

90. The decision then goes on to correctly identify the relevant legislation referred to earlier in this judgment and goes on to set out the reasons for the decision as follows:

"I have noted the case put forward by Citizens Information as a precedent for this case. However, while it is important that as far as possible there is consistency in the decisions made by the Appeals Office each case must be treated on its own merits. In this case the legislation outlined above provides for the assessment of housing costs paid by the liable relative. I have sympathy with the arguments put forward by the appellant and Citizens Information. However, in my view the legislation does not allow the payments being made to be qualified in such a way as to discount from the means assessment the benefit which the ex-partner derives from those payments. In the circumstances the full value of the mortgage payments being made must be used in assessing the appellant's means. Having reviewed that assessment, I am satisfied it has been done correctly and in accordance with the legislation as it stands. Accordingly, I very much regret that this appeal cannot succeed".

91. The applicant then sought a review under s.318 of the Social Welfare Consolidation Act 2005. S. 318 provides that: The Chief Appeals Officer may, at any time, revise any decision of an appeals officer, where it appears to the Chief Appeals Officer that the decision was erroneous by reason of some mistake having been made in relation to the law or the facts.

92. The Chief Appeals Officer gave her decision on the 7th of November 2017. It is this decision which these proceedings seek to impugn. This decision sets out that it is a review in accordance with S318 of the 2005 Act and highlights the provisions of section 318. It then sets out the "Grounds for Review", the "Background" which includes a history of the previous decisions and then sets out the decision of the Chief Appeals Officer under the heading "Review".

93. The "Grounds for Review" are set out in the decision as follows: The review is sought on the basis of errors in fact and law summarised as:

(i) *The Appeal Officers decision makes reference to legislation relevant to the means test for One Parent Family Payment but has not set out an interpretation of same as applied to the circumstances of Ms Brennan's case.*

(ii) *Given the clear similarities in Ms Brennan's circumstances with that of another case which was the subject of a s.318 review, Ms McHale, on behalf of Ms Brennan, considers that there has been an error of fact and law in the Appeal Officers decision.*

(iii) *Ms McHale, on behalf of Ms Brennan, requests that if I am of the view that the legislation does not allow the relevant mortgage repayments to be assessed in such a way as to discount from the means assessment the benefit which Ms . Brennan's ex-partner derives from those payments that substantive legal grounds be set out by the Social Welfare Appeals Officer at this time.*

94. Under the heading "Review", the Chief Appeals Officer correctly identified the relevant legislation and stated as follows:

> *"I note that the Appeals Officer has correctly identified the legislation governing Ms Brennan claim. However, Ms McHale on behalf of Ms. Brennan contends that the Appeals Officer has not set out an interpretation of same as applied to the circumstances of Ms. Brennan's case. From my review of the file, the weekly maintenance payment of €268 outlined above was calculated by reference to a monthly mortgage payment of €1,161.36 that being the amount verified by a notification on file dated January 2015 from the relevant financial institution. The calculation was made as follows: €1,16136 x 12 ÷52 = €268. The weekly disregard of €95.38 {€4,952÷52 = €95.23} was applied in accordance with Article 142 of the 2007 Regulations and the assessable amount of €172.77 was halved in accordance with the provision contained in Rule 1(2)(b)(ii) of Part 5 of Schedule 3 of the 2005 Act to arrive at weekly means of €86.39.*
>
> *Ms McHale on behalf of Ms Brennan requests that if I am of the view that the legislation does not allow the relevant mortgage repayments to be assessed in such a way to discount from the means assessment the benefit which Ms Brennan's ex-partner derives from those payments that substantive legal grounds be set out by the SWAO at this time. In this respect I am referred to a review carried out by me where in somewhat similar circumstances I allowed such calculation. While previous decisions do not create precedents the appeals office endeavours to be consistent in its decision making. Having reviewed the decision that I am now referred to I am of the view that while I gave the benefit of a more favourable calculation in that particular case there was in fact no precise rule which allowed for that more favourable treatment. While that decision was made by me in good faith I do not consider that in the absence of a specific rule in the governing legislation permitting the application of a more favourable calculation it would be appropriate for me to apply the same consideration in Ms . Brennan's case. For the reason I have outlined I consider the Appeals Officer's decision is correct and in accordance*

with the governing legislation as outlined in his decision. In the circumstances I must decline to revise the decision of the Appeals Officer"

Interpretation

95. The applicant emphasised and reiterated on numerous occasions in the course of the hearing that she is not challenging the constitutionality of the act of 2005 or the vires of the Regulations of 2007 but rather is challenging the interpretation of the legislation by the respondent as being irrational and arbitrary. She argued that the interpretation of the legislation by the respondent failed to treat similar applicants equally and was demonstrative of a fixed and inflexible policy. She argued that there is no adequate interpretation provided by the respondent of the difference between "housing costs" and "net cash value".

96. Accordingly, the essential issue in the case is one of statutory construction and the proper interpretation of the phrase "*the net cash value to the (applicant) of her annual housing costs actually incurred and paid by a liable relative insofar as the cash value exceeds €4,952 per annum*" and whether the decision of the respondent taken on review was taken within the proper meaning of Regulation 142 of the 2007 Regulations.

97. The Court notes the authorities opened to it on statutory interpretation referred to above which it will not traverse in full again here, however the Court will refer again to the case opened of *D.B v Minister for Health* [2003] 3. I.R. 12 at paras.49-50 in which McGuinness J. noted that:

> *"It may, I think, be safe to sum up the judicial dicta in this way. In the interpretation of statutes, the starting point should be the literal approach - the plain ordinary meaning of the words used. The purposive approach may also be of considerable assistance, frequently, but not invariably, where the literal approach leads to ambiguity, lack of clarity, self-contradiction, or even absurdity. In the interpretation of a section it is also necessary to consider the Act as a whole. As was stated by Keane J (as he then was) in Mulcahy v. Minister for the Marine (High Court 4th Nov 1994):*
>
> > *"While the Court is not, in the absence of a constitutional challenge, entitled to do violence to the plain language of an enactment in order to avoid an unjust or anomalous consequence, that does not preclude the Court from departing from the literal construction of an enactment and adopting in its place a teleological or purposive approach, if that would more faithfully reflect the true legislative intention gathered from the Act as a whole."*

98. As stated in the Supreme Court judgment in *A.W.K (Pakistan) v. The Minister for Justice and Equality, Ireland and the Attorney General* [2020] IESC 10:

> *"The main elements of a literal approach are now so well described that individual authority for what follows is hardly necessary. The most basic obligation of such an exercise is to determine the intention of parliament, to assess what the legislative*

wishes are. Whilst some may say that even such phraseology is in itself ambiguous, at least one aspect of any uncertainty in this respect, can be immediately resolved. It is that which the court is searching for, to identify the objective intention of the legislature as a whole, and not any subjective intention which it, or its members may have. (The State (O'Connor) v. O'Caomhanaigh [1963] I.R. 112, and Crilly v. T&J Farrington Limited [2001] IESC 60, [2001] 3 I.R. 251).

34. The most appropriate way to achieve this objective is by reference to the words used by the Oireachtas itself: when given their ordinary and natural meaning, the outcome should best reflect the plain intention of that body. The text published is the basic material involved because it is the most pre-eminent indicator of intention."

99. The definition of "Housing Costs" is defined Part 1 of Schedule 3 of the 2005 Act "housing costs" as follows;

"housing costs" means rent or repayment of a loan entered into solely for the purpose of defraying money employed in the purchase, repair or essential improvement of the residence in which the person is, for the time being, residing".

100. The rules governing the assessment of maintenance and non-cash benefits for the purpose of deciding an applicant's rate of One Parent Family Payment are set out in Rule 1 Schedule 3 Part 5 of the 2005 Act as follows;

(2) all income in cash (including, in the case of widow's (non-contributory) pension, widower's (non-contributory) pension, surviving civil partners (non-contributory) pension, guardian's payment (non-contributory) and one-parent family payment, the net cash value of such non-cash benefits as may be prescribed), and the income received by a qualified child or qualified children

(ii) in the case of blind pension, widows (non-contributory) pension, widower's (non-contributory) pension, surviving civil partners (non-contributory) pension, or one-parent family payment, any moneys received by way of a maintenance payment (including maintenance payments made to or in respect of a qualified child) insofar as they do not exceed the annual housing costs actually incurred by the person subject to the maximum amount that may be prescribed, together with one half of any amount of maintenance payment in excess of the amount disregarded in respect of housing costs actually incurred (if any).

101. Regulation no. 142 of Chapter 6 of the 2007 Regulations provides that the non-cash benefits prescribed for the purposes of Rules 1 (2) of Part 2, 1 (2) of Part 3 and 1 (2) of Part 5 of Schedule 3 to the principle 2005 Act shall be *"(a) the net cash value to the person of his or her annual housing costs actually incurred and paid by liable relative insofar as the cash value exceeds €4,952 per annum*". In respect of maintenance arrangements, Regulation 143 (1) states that "*subject to sub article (2) the maximum*

amount prescribed for the purposes of Rules 1 (2) (b) (ii) of Part 2, Rule 1 (2) (b) (i) of Part 3 and Rule 1 (2) (b) (ii) of Part 5 of Schedule 3 to the principle Act shall be €4,952."

102. The applicant, in her pleaded case, argued that the mortgage repayments do not come within the meaning of "non- cash benefit" to her. She argued that there are a number of interpretations as to how "non- cash benefit" could be assessed and that it could be apportioned either on a 50/50 basis or as nil, given the joint ownership of the property. The applicant further argued that to ignore the joint owners beneficial interest in the property is irrational and arbitrary and that no explanation or reasoning for this approach has been provided.

103. The phrase "net cash value" is not specifically defined in the legislation. The applicant has argued against the respondent's interpretation of that phrase on a number of grounds as set out above. Central to the applicant's argument is that it could not have been the intention of the Oireachtas that whatever the amount of the mortgage repayments or the annual rent provided for in any lease entered into, that that amount would always and precisely equate to "housing costs" and that the respondent's interpretation of the legislation was therefore so unreasonable as to lead to absurdity. In support of this argument the applicant put forward the expert opinion of Ms. Elizabeth Rogers chartered accountant and set out the examples of the different financial circumstances of 10 couples residing in 10 similar houses on the same street.

104. In considering this argument, the Court looks again at the definition of "housing costs set out in the legislation as "*means rent or repayment of a loan entered into solely for the purpose of defraying money employed in the purchase, repair or essential improvement of the residence in which the person is, for the time being, residing*".

105. Engaging with the literal approach to statutory interpretation and giving these words their plain and ordinary meaning, this clearly encompasses rent, repayment of a mortgage entered into for the purchase of a property and repayment of a mortgage entered into for the repair or essential improvement of a property. The legislative intention in defining "housing costs" is clear. The mortgage repayments being made by the applicant's ex-partner clearly come within the definition of "housing costs".

106. Regulation 142 provides that "the non- cash benefits" prescribed shall be "(a*) the net cash value to the person of his or her annual housing costs actually incurred and paid by liable relative insofar as the cash value exceeds €4,952 per annum*". Accordingly, the Court finds that the mortgage repayments do come within the definition of "housing costs" and within the meaning of "*non -cash benefit*" as set out in regulation 142.

107. Turning then to the rules governing the assessment of maintenance for the purpose of deciding an applicant's rate of One Parent Family Payment as set out in Rule 1 Schedule 3 Part 5 of the 2005 Act and regulation 42 of the 2007 Regulations and the phrase "net cash value". The Court looked to the plain and ordinary meaning of these words and to the wording of these provisions as a whole to determine the meaning of the words used. Rule 1 Schedule 3 Part 5 of the 2005 Act and regulation 142 of the 2007 Regulations,

when read in in their entirety, set out how maintenance is to be assessed by calculating the income of the applicant in accordance with the terms of the provisions. The legislation clearly sets out the categories of income to be considered.

108. The respondent in the impugned decision decided that in calculating the "net cash value" to the applicant of her annual housing costs actually incurred and paid by a liable relative insofar as the net cash value exceeds €4,952, the full amount of the mortgage repayments had to be taken into account and it was this sum which was used by the respondent in assessing the means of the applicant. The applicant argued that the use of the terms "cost" and "value" by the legislature in the one provision leads to the clear inference that the Oireachtas was aware of the distinction to be drawn between the possible cost of housing paid by a liable relative and the net cash value to the person of same. She argued that the respondent sought to equalise these two issues for reasons of administrative convenience. She argued that "housing costs" and "net cash value" are different and that if there is a difference the respondent must reassess the meaning of "net cash value".

109. In considering this argument, the Court looked to the wording of Rule 1 Schedule 3 Part 5 of the 2005 Act and regulation 42 of the 2007 Regulations and engaging with the literal approach to statutory interpretation and gives these words their plain and ordinary meaning. This Court has already determined that the mortgage repayments come within the definition of "housing costs" and within the meaning of non-cash benefit for the purposes of determining income. Ascribing the words "net cash value" their ordinary meaning, the Court is satisfied that the respondents interpretation is the correct one and that the full amount of the mortgage payments was correctly used in the assessment of maintenance and non-cash benefits for the purpose of deciding the applicant's rate of One Parent Family Payment are set out in Rule 1 Schedule 3 Part 5 of the 2005 Act. The Court is of the view that this literal approach does not, in the words of McGuiness J. in *D.B. v. Minister for Health* [2003] 3 I.R. 12 "…*lead to any ambiguity, lack of clarity self-contradiction or even absurdity*".

110. The Court goes further and finds that when these provisions are read as a whole, with the purpose of the provisions in mind, that is to determine income for the purpose of assessment of maintenance, the Court is further satisfied that the respondent's interpretation is the correct one. There is nothing in the legislation which allows the decision maker to set off any purported benefit to the "liable relative" based on their joint ownership of the property or on any other basis. Given the Court's finding that the respondent has correctly interpreted the legislation, the Court agrees with the respondent that the arguments that the respondent has engaged in an arbitrary system of implementation which fails to treat similar applicants equally or that the respondent in its interpretation is engaging with a fixed and inflexible policy or basing its interpretation on administrative convenience falls away.

Reasons

111. The Court has set out the history of the respondent's decisions and the wording of those decisions earlier in the judgment. While the only impugned decision is that of the Chief

Appeals Officer of the 7th of November 2017, the Court considers the entire history important in considering the adequacy of the reasons provided.

112. When the applicant sought a review of the first decision of the Deciding Officer dated the 2nd of February 2015 she relied on the "precedent decision" and the question at issue was articulated as:

> *"In assessing the means of the appellant the Department has used the full value of the mortgage payments made by her ex-partner. The appellant maintains that as the house is in joint names and as her partner therefore derives a benefit from these payments that only half of the payments should be used in the assessment".*

113. In the responding decision of the 26th of July 2017, the Social Welfare Officer gave her decision by stating inter alia:

> *"However in my view the legislation does not allow the payments being made to be qualified in such a way as to discount from the means assessment the benefit which the ex-partner derives from the payments. In the circumstances the full value of the mortgage payments being made must be used in assessing the appellant's means. Having reviewed that assessment, I am satisfied that it has been done correctly and in accordance with the legislation as it stands".*

114. On receipt of that decision the Respondent sought a review by the Chief Appeals Officer in accordance with s.318 of the 2005 Act and the Grounds for Review have been set out in this judgment at paragraph 96. The resulting decision being the impugned decision is set out in full at paragraph 97.

115. The Chief Appeals Officer conducted a review pursuant to s. 318 of the 2005 Act which provides that:

> *"The Chief Appeals Officer may, at any time, revise any decision of an appeals officer, where it appears to the Chief Appeals Officer that the decision was erroneous by reason of some mistake having been made in relation to the law or the facts."*

116. It is clear from the Grounds for Review that the respondent again specifically challenges the respondent's interpretation of the legislation in taking into account the full amount of the mortgage repayments when assessing maintenance in accordance with the terms of the legislation. Again the "precedent decision" is referenced. In the impugned decision of the 7th of November 2017, the Chief Appeals Officer states inter alia:

> *"Ms McHale on behalf of Ms Brennan requests that if I am of the view that the legislation does not allow the relevant mortgage repayments to be assessed in such a way to discount from the means assessment the benefit which Ms Brennan's ex-partner derives from those payments that substantive legal grounds be set out by the SWAO at this time. In this respect I am referred to a review carried out by me where in somewhat similar circumstances I allowed such calculation.*

While previous decisions do not create precedents the appeals office endeavours to be consistent in its decision making. Having reviewed the decision that I am now referred to I am of the view that while I gave the benefit of a more favourable calculation in that particular case there was in fact no precise rule which allowed for that more favourable treatment. While that decision was made by me in good faith I do not consider that in the absence of a specific rule in the governing legislation permitting the application of a more favourable calculation it would be appropriate for me to apply the same consideration in Ms Brennan's case.

For the reason I have outlined I consider the Appeals Officer's decision is correct and in accordance with the governing legislation as outlined in his decision. In the circumstances I must decline to revise the decision of the Appeals Officer"

117. The law on the requirement to give reasons was extensively opened to the Court and referred to earlier in this judgment. The Court will not traverse it again here but considers it useful to set out again what was said in the case of *Meadows v. Minister for Justice* [2010] 2 I.R. 701; [2011] 2 I.L.R.M.157, wherein Murray C.J. stated : -

"An administrative decision affecting the rights and obligations of persons should at least disclose the essential rationale on foot of which the decision is taken. That rationale should be patent from the terms of the decision or capable of being inferred from its terms and its context.

Unless that is so then the constitutional right of access to the courts to have the legality of an administrative decision judicially reviewed could be rendered either pointless or so circumscribed as to be unacceptably ineffective."

118. Opening further the jurisprudence on reasons in particular whether reasons can subsequently be elaborated upon or as counsel for the applicant put it whether a decision maker can subsequently "fill in the gaps" in reasons already given the case of *R. (Ermakov) v. Westminster City Council* [1996] 2 All E.R. at 302 was opened.

119. Counsel for the applicant asked the Court to note the decision of Charleton J. in *City of Waterford Vocational Educational Committee v. The Secretary General* [2011] IEHC 278 where the underlying principle held that reasons cannot be added to by a respondent. They asserted that it was in this decision that *Ermakov* was first adopted in this jurisdiction. The last part of paragraph 12 was opened to the Court:

"Reasons are to be stated there and then, not added later upon challenge. Where reasons stated within a written decision are shown to be manifestly flawed, these cannot be supplemented by better reasons, or correct reasons, at any stage after the decision is made. Sometimes evidence can be admitted to elucidate a reason which is laconically expressed or, exceptionally, where a mistake occurs, to correct a mistake. Elucidation may, in guarded circumstances, be accepted but not alteration; R. v. Westminster City Council, ex parte Ermakov [1996] 2 All ER 302."

120. In this regard, it was urged on the Court that the applicant could not rely on the reasons as elaborated upon by Ms Gordon or Mr Lawlor in their subsequent affidavits.

121. An issue was raised by the applicant in respect of the Regional Directors office circular 01/08 entitled "*Mortgage Payments Paid by a Liable Relative*" which issued on the 2nd of January 2008. This was raised by Ciaran Lawlor in his affidavit and it was argued by the applicant that she did not know if this circular had been considered by the respondent when making the impugned decision and whether her discretion had been fettered by the circular. Counsel for the applicant stepped back from this "fettering of discretion" argument when closing his case and he indicated that he was not pursuing that aspect. That circular conformed with the Chief Appeals Officer's interpretation of the statute and so with the Court's finding that the CAO interpretation is correct.

122. In assessing the adequacy of the reasons given when examined against the jurisprudence opened the Court looks to the wording of the impugned decision.

123. The impugned decision was given on foot of a review pursuant to s.318 of the 2005 Act. The Grounds for Review were clearly set out and were the same as those grounding the previous appeal to the Appeals officer. The applicant again challenged the respondent's interpretation of the legislation in taking account of the full amount of the mortgage repayments being made by her liable relative in assessing her means and references the "precedent decision".

124. The Chief Appeals Officer was the decision maker in the "precedent decision". In the impugned decision she addresses the "precedent decision" and said that whilst that decision was made by her in good faith, that the legislation does not allow for the calculation she used in the "precedent decision." Resultantly, she could not accordingly adopt that approach in the applicant's case. She then confirmed that for that reason, she considered the Appeals Officer's decision to be correct and in accordance with the governing legislation as outlined in his decision. She declined to revise the decision of the Appeals Officer.

125. The decision of the Appeals officer had earlier confirmed to the applicant that:

> *"However in my view the legislation does not allow the payments being made to be qualified in such a way as to discount from the means assessment the benefit which the ex-partner derives from the payments. In the circuMs tances the full value of the mortgage payments being made must be used in assessing the appellant's means. Having reviewed that assessment, I am satisfied that it has been done correctly and in accordance with the legislation as it stands".*

126. The Court looked to the jurisprudence opened and in particular to what was set out in the case of *Meadows v. Minister for Justice* [2010] 2 I.R. 701; [2011] 2 I.L.R.M.157, where Murray C.J. stated: -

> *"An administrative decision affecting the rights and obligations of persons should at least disclose the essential rationale on foot of which the decision is taken. That rationale should be patent from the terms of the decision or capable of being inferred from its terms and its context.*
>
> *Unless that is so then the constitutional right of access to the courts to have the legality of an administrative decision judicially reviewed could be rendered either pointless or so circumscribed as to be unacceptably ineffective."*

127. The Court is satisfied that the respondent adequately set out the rationale for its decision namely, that the legislation provides that the full amount of the mortgage repayments being made by the liable relative in this case has to be taken into account in the assessment of the applicants means. Additionally, that the "precedent decision" was not in accordance with the provisions of the legislation and accordingly the Appeals Officer's decision was not being revised.

128. Accordingly, the Court finds that the respondent had correctly interpreted the statute and did not engage in an arbitrary system of implementation which failed to treat similar applicants equally, or that the respondent in its interpretation engaged with a fixed and inflexible policy or basing its interpretation on administrative convenience.

129. The Court further finds that the reasons given are adequate, factually sustainable, and allows the Court to exercise its supervisory jurisdiction. The Court in reaching this decision has looked at the decisions given. The Court has considered the subsequent affidavits of Ms Gordon and Mr Lawlor in so far as they give background to the decisions only as elucidated *in Omotayo Mobolaji Olaneye v. Tine Minister for Business, Enterprise and Innovation* [2019] IEHC 553.

130. The Court therefore refuses the relief sought being an Order of *Certiorari* by way of Judicial Review quashing the decision of the Respondent made on the 7th of November 2017.

131. The attention of the parties is drawn to the Practice Direction issued on the 24th of March 2020in respect of the delivery of judgments electronically as follows:

> *"The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."*

132. The parties are requested to correspond with each other on the question of the appropriate form of Order, and on the question of costs. In default of agreement between the parties on these issues, short written submissions should be filed in the Central Office within 21 days of today's date.