



THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 255

Record Number: [2018/130]

**McGovern J.
Kennedy J.
Donnelly J.**

BETWEEN/

**ADRIANA BORTA (A MINOR)
SUING BY HER MOTHER AND NEXT FRIEND
NADEJDA BORTA**

RESPONDENT

- AND -

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT/APPELLANT

JUDGMENT of the Court delivered by Ms. Justice Donnelly on the 14th day of October 2019

Introduction

1. The issue in this case is set out by the trial judge at para. 2 of his judgment as follows: -

“The applicant (“Ms Borta”) seeks an order of *certiorari* quashing the decision of the respondent (“the Minister”), dated 16 May 2017, refusing to grant her a certificate of naturalisation under s.16 of the Irish Nationality and Citizenship Act 1956, as amended (“the Act of 1956”), because, while the Minister acknowledges that Ms Borta is a person with “Irish associations”, as that term is defined under s.16(2) of the Act of 1956, the Minister does not consider those associations sufficiently strong to warrant the exercise in Ms Borta's favour of the Minister's absolute discretion to grant a certificate of naturalisation.”

2. In the present case, Ms. Borta's mother made an application on her behalf to the Minister for naturalisation on the basis of Ms. Borta's Irish associations. Her mother and father were Moldovan citizens by birth but her mother had become a naturalised Romanian citizen. Ms. Borta, a minor, lived with her parents in Ireland since August 2012. She claimed Irish association by being the sister of an Irish citizen, who was born on 6 October 2014. At the time of the application for naturalisation, Ms. Borta's sister was aged about twenty-six months.
3. The trial judge rejected Ms. Borta's application for judicial review. This is her appeal against his decision.

The appeal

4. Section 16 of the Act of 1956 (as amended) provides as follows: -

“16.—(1) The Minister may, in his absolute discretion, grant an application for a certificate of naturalisation in the following cases, although the conditions for naturalisation (or any of them) are not complied with:

- (a) where the applicant is of Irish descent or Irish associations.”
 - (2) For the purposes of this section a person is of Irish association if –
 - (a) he or she is related by blood, affinity or adoption to, or is a civil partner of, a person who is an Irish citizen or entitled to be an Irish citizen [...]”
- 5. Ms. Borta lodged a notice of appeal and submissions but was granted leave to file an amended notice of motion and submissions in due course. The following issues arise in this appeal: -
 - (1) Is the Minister permitted to measure the relative strength of Ms. Borta’s Irish associations?

(if so, Ms. Borta argues that it follows that the Minister had regard to irrelevant considerations);
 - (2) Did the Minister give adequate reasons? Did the Minister provide adequate reasons for holding that Ms. Borta’s Irish associations “were not strong enough to warrant to exercise of the Minister’s absolute discretion in her favour”? Was the High Court correct in finding that the Minister gave sufficient detail to “disclose the essential rationale on foot of which the decision was taken”?;
 - (3) Rationality: Did the learned judge err in finding that the impugned decision was not “rational and/or unreasonable”?
 - (4) Discrimination: Did the learned High Court Judge err in his consideration of illegality, breach of natural and constitutional justice and/or fair procedures, and/or unlawful discrimination in circumstances where the Minister has granted naturalisation to other siblings of Irish nationals?
- 6. The gravamen of Ms. Borta’s submissions is that once the Minister made the decision concerning Irish associations, it was unlawful for him to then deny naturalisation on the sole ground that he did not consider “such associations to the State as sufficiently strong to be considered for naturalisation.” She submits that the essential rationale for rejecting her naturalisation application cannot arise from her Irish associations: this is a pre-condition to be satisfied under s.16(2) of the Act of 1956 and is not a matter for discretionary consideration.
- 7. Ms. Borta submits that this is contradictory and circular reasoning and therefore irrational and, in those circumstances, the Minister has not provided any cogent reason to deny naturalisation. In circumstances where no reasons were provided that the associations with the State are not sufficiently strong to be considered for naturalisation, it was submitted that no reasons had been provided for the denial of naturalisation. She submitted that she had manifestly satisfied the statutory condition precedent. In her

submission, that statutory condition was not as the trial judge had phrased it a, "gateway" but a necessary and important statutory filter.

8. In arguing that no reasons were provided, Ms. Borta submitted 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.
9. The Minister submitted that the primary issue is Ms. Borta's original ground of appeal, namely that the Minister was not entitled to assess the strength of the associations of an applicant for naturalisation. The Minister's submission was that Ms. Borta was seeking to circumscribe radically the Minister's absolute discretion by asserting that once she had Irish associations the Minister was not entitled to look at the strength and nature of those associations in determining whether to exercise absolute discretion. The Minister relied upon the finding of the High Court that: -

"Furthermore, Irish associations, whether it is through blood relationship, affinity, adoption or civil partnership, are merely the gateway to the exercise of the Minister's absolute discretion under s.16".

Is the Minister entitled to consider the strength of Irish associations?

10. Ms. Borta's primary submission was that once she satisfied the test of having Irish associations as defined under s.16, the Minister had no power to assess the relative strength of those associations. Counsel on her behalf was careful to submit that this did not trammel the Minister's absolute discretion, but instead submitted that this was merely giving recognition to the intention of the Oireachtas in the wording of s.16 of the Act of 1956. In that section, counsel submitted, the Oireachtas had set a test and Ms. Borta had met the test.

11. Counsel for Ms. Borta referred to the marginal note of s.16 which was as follows: -

"Power to dispense with conditions of naturalisation in certain cases."

That heading, or the use of the word "dispense" was not referred to in s.16 of the Act.

Counsel compared the use of the language in s.15 which stated at ss.(1): -

"Upon receipt of an application for a certificate of naturalisation, the Minister may, in his absolute discretion, grant the application, if satisfied that the applicant [...]"

12. Although not central to his argument, counsel for Ms. Borta submitted that the only criteria for naturalisation under s.15 that she did not fulfil was that she was not of full age or was not a minor born in the State. He submitted that where a person fulfilled the criteria in s.15, which included good character, the Minister was obliged to grant a certificate of naturalisation unless there was another reason absent that criteria. Counsel submitted that in the usual manner the issues that would arise may be whether the applicant for naturalisation had met the test of good character. Counsel submitted that

this was in fact an acknowledgment that there was a test and it had to be met in that manner.

13. Counsel for Ms. Borta submitted that it was impermissible circular reasoning on the part of the Minister to accept on the one hand that a person met the test of Irish associations, but to reject the application on the basis of the lack of strength of those associations. In counsel's submission, the Oireachtas had laid down the test as to what constitutes Irish associations and did not provide for any conditions as to the strength of those associations. It was not permissible for the Minister to have a policy which set aside those associations.
14. Counsel could not identify any particular authority that supported his case, as regards the s.15 or s.16 criteria. Counsel submitted that it was implicit within the decision in *Mallak v. Minister for Justice, Equality and Law Reform* [2012] 3 I.R. 297. as set out in the judgment of Fennelly J. that once the statutory conditions had been met, the Minister could go on to consider his discretion. Counsel submitted that the permissible recourse by the Minister to "absolute discretion" must be in respect of other matters outside the criteria laid down by the Oireachtas. The discretion had to relate to other matters. Any consideration of the strength of the Irish associations is a legally irrelevant consideration.
15. Counsel on behalf of the Minister submitted that Ms. Borta was seeking to circumscribe radically the Minister's absolute discretion by asserting that once she had Irish associations, the Minister was not entitled to look at the nature and strength of those associations in determining whether to exercise his absolute discretion. Counsel submitted that this flew in the face of the express language of s.16 and was plainly wrong. The Minister submitted that the High Court had been correct to state that the Irish associations were merely the gateway to the exercise of the Minister's absolute discretion under s.16 of the Act of 1956.
16. The Minister submitted that the reasoning had not been circular. The Minister did not refuse the appellant because she of her Irish associations, rather the Minister exercised discretion against naturalising the appellant because, whilst accepting that she had Irish associations, same were not sufficiently strong to warrant the exercise of discretion. This was a perfectly proper exercise of the Minister's powers under the Act of 1956.
17. Counsel for the Minister submitted that a literal interpretation of the Act demanded this interpretation. Even if the Court was against that proposition, a purposive interpretation of the Act would also lead to the same interpretation.
18. Counsel for the Minister also relied upon the observations of Stewart J. in *M.A.D. v. Minister for Justice and Equality* [2015] IEHC 446 in which she stated at para. 37: -

"In this instance, that which is under review is the exercise of an executive power. It is clear that the minister has been bestowed by statute with an absolute discretion in relation to this matter. While such a decision does certainly fall within the scope of judicial review, courts should be reluctant to intervene where the

applicant might seek to achieve precision in the form of guidelines, especially where this would result in a fettering of the discretion conferred upon the minister by the statute.”

19. In my view, when interpreting s.16 it is necessary to revert to the wording of s.15 of the Act of 1956. This is because the phrase “although the conditions for naturalisation (or any of them) are not complied with” contained in s.16 can only be understood by reference back to s.15 of the Act of 1956. Section 15(2) states that “the conditions specified in (a) to (e) of subsection 1 are referred to in this Act as conditions for naturalisation.”
20. The wording of s.15(2) in combination with s.16 establishes in the first place that s.15 is the predominant pathway towards a certificate of naturalisation. That is because s.15 itself sets out the conditions for naturalisation. It is when those conditions are met that the Minister is entitled in his or her absolute discretion to consider whether to grant a certificate of naturalisation. Section 15(a) goes on to discuss the naturalisation of spouses of Irish citizens. Section 16 then goes on to deal with the situation where the conditions for naturalisation set out in s.15(1)(a) – (e) have not been met. Even where those conditions for naturalisation are met, the Act of 1956 in both s.15 and s.16 gives the Minister absolute discretion whether to grant a certificate of naturalisation.
21. Ms. Borta has submitted that the phrase “absolute discretion” is circumscribed. She relied on the dicta of Fennelly J. in *Mallak* when he stated with regard to absolute discretion that “it could scarcely ever justify a decision maker in exceeding the limits of his powers under the legislation, in particular, by taking account of a legally irrelevant considerations.” Fennelly J. went on to state that: -

“Once it is accepted that there must be a reason for a decision, the characterisation of the Minister's discretion as absolute provides no justification for the suggestion that he is dispensed from observance of such requirements of the rules of natural and constitutional justice as would otherwise apply.”

Fennelly J. went on to say “[i]n this connection I agree with the following remarks of Hogan J., regarding the provision under consideration in this case, in his judgment in *Hussain v. Minister for Justice* [2011] IEHC 171,...at para 17:-

“This description nevertheless cannot mean, for example, that the Minister is freed from the obligations of adherence to the rule of law, which is the very “cornerstone of the Irish legal system”: *Maguire v. Ardagh* [2002] IERSC 21, [2002] 1 I.R. 385 at 567, per Hardiman J. Nor can these words mean that the Minister is free to act in an autocratic and arbitrary fashion, since this would not only be inconsistent with the rule of law, but it would be at odds with the guarantee of democratic government contained in Article 5 of the Constitution.”

22. The decision in *Mallak* did not identify precisely what may amount to a legally irrelevant consideration. Indeed, the decision is primarily based upon the requirement to give reasons. Although a decision may be made at the absolute discretion of the decision

maker, this does not mean the decision maker is permitted to have no reason for making the decision. To permit that to happen would be to permit a decision maker to exercise the decision arbitrarily or capriciously.

23. As counsel for the appellant has freely conceded, there is no authority for the point that he seeks to make. Counsel's point is essentially that it is legally irrelevant to consider the strength of the Irish associations in circumstances where the legislature has set such relationships as, in essence, a pathway to seeking a certificate of naturalisation. This is so particularly, in circumstances where the Oireachtas has not placed any restriction on the strength of that association.

24. Ms. Borta called in aid a number of canons of statutory interpretation. In particular, she relied on *Rodis v. Minister for Justice* [2016] IEHC 360 in which it was held by Humphreys J. that: -

"Section 16A of the 1956 Act, expressly sets out particular categories of persons who are deemed not to be resident despite their presence in the State. Persons in the applicants' situation are excluded from those exemptions. The principle of *expressio unius* applies."

25. The maxim *expressio unius exclusio alterius* is applied in circumstances where the statute in question caters expressly for particular matters and could have included other matters but did not in order to give rise to an inference that such omissions are deliberate and that such matters are intended to be excluded from the provision. In my view, this canon of interpretation does not assist in any way in the present circumstances. It is most appropriate where the legislature has set out a list which is connected by a common theme but has omitted certain things from that list. Indeed, that was the situation in s.16A in which certain residences were expressly excluded. The point at issue in the present case is whether, having provided the gateway for considering a grant of certificate of naturalisation, the Minister's discretion is fettered to the extent that he or she must grant citizenship unless there is a reason unrelated to the conditions of naturalisation not to grant citizenship. In other words, once the conditions of naturalisation are met, refusal may only be based upon a factor unrelated to those grounds.

26. The other maxim that the appellant called in aid was that of *generalia specialibus non derogant*. This maxim is understood as meaning a general provision in a statute does not derogate from a special one. Henchy J. in *DPP v. Grey* [1986] I.R. 317. at pp 326-327 explained this maxim in the following terms: -

"There is therefore brought into application the rule of statutory interpretation that when Parliament has provided specifically by statute for a limited set of circumstances, there is a presumption that general words in a later statute are not to be taken as overriding the earlier specific provisions, unless an intention to do so is clearly expressed. The presumption to that effect is encapsulated in the maxim '*generalibus specialibus non derogant*'."

27. Ms. Borta relies on the case of *Ali v. Minister for Jobs, Enterprise and Innovation* [2016] IECA 55 in terms of the applicability of that provision to what appeared to be two opposing sections contained within the Employment Permits Act, 2006. In that case, the Court of Appeal held that the maxim applied in the context of an examination of whether two different sections of the same Act were potentially overlapping and even conflicting in their operation.
28. Neither the situation in *DPP v. Grey* nor the situation in *Ali* applies in the present case. This case concerns the interpretation of a particular section of an Act, namely s.16 of the Act of 1956. That section, together with its subsections, must be construed together as a whole and an interpretation given to it. In so far as it refers back to s.15, that section must be read and interpreted together as a whole. Section 16 is not overlapping with s.15 as it is providing for a further pathway to citizenship not set out in s.15 of the Act of 1956. The discretionary aspects of the Minister's decision making powers are set out by means of the words "may" and "absolute discretion". They are listed at the beginning of the section and it is that discretion that may be operated where, and it appears only where, certain conditions set out in s.16 are met. This of course takes place in circumstances where the conditions set out in s.15 are not met. In those circumstances, there is simply no question of the maxim *generalius specialibus non derogant* applying.
29. A simple answer to Ms. Borta's submission is that it fails to take into account why the Oireachtas used the word "may" and the phrase "absolute discretion" within the section. Those words, especially when taken together, do not amount to a prohibition on the Minister considering whether to grant a certificate of naturalisation, even where the particular condition within s.16 is met.
30. Indeed, what Ms. Borta contends for would require this Court to read the section as follows: -

"The Minister shall, grant an application for a certificate of naturalisation in the following cases, although the conditions for naturalisation (or any of them) are not complied with

(a) Where the applicant is of Irish descent or Irish association;

(b) [...]

(c) [...]

Unless the minister has reason to the contrary based upon considerations that do not touch or concern (a), (b) or (c) above."

When phrased like that, it is apparent that there is no construction that can be placed upon the section as enacted that requires or even permits the interpretation advanced by Ms. Borta.

31. On the simple question of whether the Minister is entitled to consider relative strength of Irish associations, it can be seen that there is no restriction on that power. In those circumstances, the Minister's reasoning cannot be said to be circular, or indeed it cannot be said that the Minister has taken into account an irrelevant consideration.
32. In respect of the issue of discrimination, it was quite properly conceded by Ms. Borta's counsel at the oral hearing that this was in the circumstances of the case not a strong point and certainly not his core point. In the absence of any evidence on which to found this part of the claim, it is neither necessary nor appropriate to consider that point any further.

Were the reasons given adequate?

33. The remaining point is whether the reasons given by the minister were adequate in the circumstances. This arises where Ms. Borta submits that the simple statement that the Irish associations were not strong enough is insufficient. There has been significant case law on the giving of reasons in administrative law generally and applications for citizenship generally in recent years. A leading case is that of *Mallak* referred to above.
34. In opposing the appeal, the Minister placed particular reliance on that part of the judgment of the High Court as follows: -

"As far as I can see, Ms Borta's application was based on her four and a half years residence in the State, her participation in full time education here, and her siblingship with an Irish citizen infant. For my part, I cannot accept that, in order to comply with the requirement to give reasons, there was a positive obligation on the Minister, not merely to consider those matters on which Ms Borta sought to rely, but also, having done so, to expressly state that it is possible for an applicant to have resided in the State for a longer period; to have demonstrated a blood relationship with an Irish citizen who has resided in the State for a longer period; to have demonstrated a blood relationship with more than one Irish citizen; to have demonstrated more extensive social, cultural or economic ties with the State, and so on, until every imaginable factor material to the exercise of the Minister's absolute discretion under s.16 had been exhaustively listed. Hence, I reject that argument."

Counsel on behalf of Ms. Borta submitted that the duty on the Minister to give reasons had been violated because the impugned decision did not disclose "the essential rationale on foot of which the decision [was] taken" per *Meadows v. Minister for Justice* [2010] 2 I.R. 701. That rationale must be patent from the terms of the decision and capable of being inferred from its terms and its context.

35. Ms. Borta submitted that the essential rationale in the present circumstances, where the statutory test for the exercise of the Minister's discretion had been met, had to explain and relate to the strength of those associations. It was not appropriate, she submitted, to engage in conjecture as to why the strength was insufficient, *e.g.*, was it because her sibling was a minor, because she only had one sibling, or because her sibling was so

young? These were matters that had to be explained so that Ms. Borta would be in a position to apply again for naturalisation or to challenge the substantive decision.

36. Ms. Borta took issue with the Minister's characterisation of his request as being for one of guidance on a general level. Her counsel pointed to para. 21 of the High Court judgment in which the trial judge identified a number of matters that the Minister could go on to consider in his or her absolute discretion. Those matters, which included length of her residence in the State and each blood relation to whom Irish association was claimed, as well as other matters, were identified as possibly relevant. Counsel for Ms. Borta submitted that what had occurred was that the Minister had not identified which factors had gone towards the strength of the Irish associations.
37. In my view, Ms. Borta's submission is correct. The application form provided by the Minister for the purpose of making an application under s.16 requires what appears to be minimal information. In particular, it provides a section for referring to an applicant's Irish associations. Those Irish associations are set out by statute. The impugned decision based upon the submission prepared for the Minister was correctly described as terse in the High Court judgment. The decision, incorporating the submission to the Minister, set out in brief those associations by simply stating under a heading "Details of Irish Descent or Associations": "Adriana Borta is a minor of Irish association through blood as her sister, [X] Borta is an Irish citizen". Under the heading "Other relevant Information" it is stated: "Adriana Borta was born in Moldova in May 2003, and arrived in the State in August 2012. She has been in full time education in the State since her arrival here and is due to sit the Junior certificate in June 2018. Her sister, [X] Borta, is an Irish citizen". The decision then states, under the heading Recommendation: -

"I do not consider such associations to the State as sufficiently strong to be considered for naturalisation in this case. I recommend that the Minister should exercise her discretion and refuse the application for naturalisation on behalf of Adriana Borta".

38. It is noteworthy that the trial judge indicated at para. 21 that: -

"There are several other dimensions to blood relationship including, but not limited to, the duration of any such relationship and the number of such relationships."

The decision by way of the submission made to the Minister had not in fact indicated that her sister, X Borta, was a minor, or that her sister had only been born after Adriana had moved to the State. Although the date of birth of X Borta was set out on the application form, it is unclear if that played any role in the Minister's decision as it is not stated as a reason.

39. In the absence of any indication from any source as to why the strength of the association with her sister was not sufficient for consideration of naturalisation, but in circumstances where that association was sufficient to enable the Minister to exercise discretion to grant

a certificate of naturalisation, it was incumbent on the Minister to explain why the strength of her Irish association was insufficient to grant the certificate to Ms. Borta.

40. Ms. Borta was entitled to know the reasons so that she could address that in the context of a further application for naturalisation. If the reason was that she only had one relative who was an Irish citizen, and this was deemed inadequate, then if that family circumstance has remained unchanged, this will permit her to understand that any further application requiring payment of the statutory application fee would amount to a waste of time and money as it would be refused. 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. On the contrary, where it is uncontested that an applicant has met the statutory condition on its face, the Minister is obliged to clarify with precision the reason why the manner in which the condition has been met meant that the Minister exercised his absolute discretion to refuse to grant citizenship. Nothing has been placed before this Court to demonstrate that a person applying for citizenship would be aware of the approach of the Minister to applications based upon Irish associations. Even the form itself gave limited space for detailing Irish associations. A disappointed applicant was entitled to know the real basis upon which their application was rejected.
42. In all the circumstances I am satisfied that there was a failure to give adequate reasons in this case. In those circumstances, the Court should allow the appeal in part and grant an order of *certiorari* quashing the decision of the Minister as notified by letter dated 16 May 2017 refusing the application for naturalisation in respect of Ms. Borta. The matter should be sent back to the Minister for further consideration.