THE HIGH COURT

JUDICIAL REVIEW

[2025] IEHC 67

RECORD NO. 2023/664JR

BETWEEN

DD

APPLICANT

AND

MINISTER FOR JUSTICE

RESPONDENT

Judgment of Mr. Justice Mark Heslin delivered on the 6th day of February 2025

Introduction

1. The applicant seeks an order of *certiorari* in relation to the respondent's decision of 15 March 2023 refusing her application for naturalisation pursuant to the Irish Nationality and Citizenship Act 1956 (as amended) ("the 1956 Act"). "*Naturalisation*" is dealt with in Part III of the 1956 Act, and ss. 15 and 16 are of particular relevance.

Section 15

2. Section 15 is headed "*Conditions for issue of certificate*" and, in relevant part, provides:-

> ***15.****(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…-*
>
> *(a) (i) is of full age, or*
> *(ii) is a minor born in the State;*
>
> *(b) is of good character;*
>
> *(c) has had a period of one year's continuous residence in the State immediately before the date of the application and, during the eight years immediately*

preceding that period, has had a total residence in the State amounting to four years;

(d) intends in good faith to continue to reside in the State after naturalisation; and

(e) has, before a judge of the District Court in open court, in a citizenship ceremony or in such manner as the Minister, for special reasons, allows-

(i) made a declaration, in the prescribed manner, of fidelity to the nation and loyalty to the State, and
(ii) undertaken to faithfully observe the laws of the State and to respect its democratic values.

(2) The conditions specified in paragraphs (a) to (e) of subsection (1) are referred to in this Act as conditions for naturalisation." (emphasis added).

Section 16

3. Turning to s. 16, which is headed *"Power to dispense with conditions of naturalisation in certain cases",* it provides: -

*"**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;

(b) where the applicant is a parent or guardian acting on behalf of a minor of Irish descent or Irish associations;

(c) where the applicant is a naturalised Irish citizen acting on behalf of a minor child of the applicant;

(d) …

(e) …

(f) where the applicant is or has been resident abroad in the public service;

(g) where the applicant is a person who is a refugee within the meaning of the United Nations Convention relating to the Status of Refugees of the 28th day of July, 1951, and the Protocol Relating to the Status of Refugees of the 31st day of January, 1967, or is a Stateless person within the meaning of the United Nations Convention relating to the Status of Stateless Persons of the 28th day of September, 1954.

(2) For the purposes of this section a person is of Irish associations if –

(a) he or she is related by blood, affinity or adoption to, or is the civil partner of, a person who is an Irish citizen or entitled to be an Irish citizen, or

(b) he or she was related by blood, affinity or adoption to, or was the civil partner of, a person who is deceased and who, at the time of his or her death, was an Irish citizen or entitled to be an Irish citizen." (emphasis added).

Relevant facts

4. Having touched on the statutory backdrop, it is useful to note certain relevant facts which emerge from a consideration of the evidence. These including the following.

5. The applicant was born in Brazil, in January 1995, and is a citizen of that country.

6. The applicant came to Ireland on 5 August 2006, at the age of 11.

7. From 2006, the applicant resided in this State, lawfully, as a dependent of her father, who, by virtue of a work permit, had permission to remain in Ireland. The applicant's father subsequently became a naturalised citizen (in October 2012).

8. The applicant's 2 paternal uncles, a paternal aunt, and 2 cousins are Irish citizens, residing in the State.

9. The applicant lived in the State continuously for 6 years, completing part of her primary education and all of her secondary education in Ireland.

10. In March 2011, the applicant registered for residence in her own right. The Garda National Immigration Bureau has confirmed (by letter dated 20 December 2018) that the applicant had a 'Stamp 3' permission to reside, lawfully, in the State from 13 March 2011 to 8 June 2011; and from 3 July 2011, to 3 September 2012.

11. The applicant returned to Brazil, in June 2012, after completing her Leaving Certificate. Other than "*to stay with an aunt*", no reason is given for the applicant leaving the State.

12. It is common case that the applicant's father could have made an application for her naturalisation when she was a minor (under s. 16 (1) (c) of the 1956 Act). However, no such applicant was ever made and no reason for this is given.

13. The applicant has lived in Brazil since June 2012.

14. From 12 May 2015, to 20 April 2016, the applicant was employed as an English teacher in Brazil, according to her naturalisation application.

15. At some unidentified point following her return to Brazil, the applicant met her husband and they were married in Brazil in January 2017.

16. The plaintiff and her husband had their first child, in December 2017, in Brazil.

17. In July 2017, the applicant visited the State for a month, on foot of a visitor permission.

18. On 9 October 2018, the applicant made another visit to Ireland, having been granted a 90-day non-renewable temporary visitor permission ("visitor permission"), which expired on 7 January 2019.

19. On 8 January 2019, the applicant, through solicitors, applied for a temporary extension of the visitor permission, in order to facilitate the preparation of supplementary applications for a long-term permission.

20. On 15 January 2019, the respondent stated that "*The nature of extension of visitors conditions is that they are short-term immigration permission for exceptional changes in circumstances. The purpose of such applications is not to seek temporary permission in order to make further applications."* The Irish naturalisation and immigration service gave notice that the applicant should make arrangements to leave the State on or before the expiration of her visitor permission; provide evidence of departure; and if such evidence was not received by the relevant date, a proposal to deport would issue.

21. On 18 January 2019, the applicant's solicitors sought permission under section 4 (1) of the Immigration Act 2004 and the discretionary powers of the respondent ("the s.4(1) application").

22. Correspondence was exchanged between the respondent and the applicant's solicitors, on 24 January and 1 February2019, in relation to further information concerning the s. 4(1) application.

23. On 24 January 2019, the applicant applied for naturalisation, under the 1956 Act. The respondent acknowledged this application by letter dated 31 January 2019.

24. It is common case that the applicant, who returned to live in Brazil in 2012, did not meet the section 15 (1) (c) requirement (of a year's continuous residence in the State immediately prior to applying, together with four additional years during the preceding eight), but is of "*Irish associations*" as a consequence of which she is entitled to make an application, pursuant to s. 16.

25. On 18 February 2019, the applicant's solicitors wrote to the respondent in relation to the applicant's residency in the State, from 2006, and enclosed further documentation.

26. It is common case that the applicant remained in the State for over 8 months after the expiry of her temporary visitor permission.

27. Whilst in Ireland, the applicant learned that she was pregnant with her second child and made the decision to leave Ireland and to return to Brazil before receiving a decision on her s.4(1) residency application.

28. On 26 July 2019, the applicant's solicitor wrote to the respondent giving notice that the applicant, her husband, and their minor child intended to return to Brazil. The reasons given were because the applicant was expecting her second child and her husband was due to sit his final exams for a chemistry degree at a university in Brazil. This letter stated *inter alia* that: "*The family intend to return to Ireland in the spring of 2020 and are worried that, because they overheld on their initial visit visa whilst they made applications to the Minister, they may run into difficulty in re-entering the State".*

29. A proposal to deport the applicant issued and, on 2 August 2019, the applicant's solicitor wrote to the respondent giving notice that the applicant would be voluntarily leaving the State, on 14 August 2019, and requesting confirmation that the applicant would be permitted to lawfully enter the State in the future.

30. The applicant returned to Brazil, on 14 August 2019, at which point her residency application 'fell away', but her naturalisation application remained to be decided.

31. On 20 August 2019, the applicant's solicitor wrote to the respondent, giving notice that the applicant had left the State, on 14 August 2019, and confirming that the applicant wished to continue to pursue her naturalisation application.

32. From 22 to 27 August 2019, further communication passed between the applicant's solicitors and the respondent in relation to proof that the applicant had departed Ireland and returned to Brazil.

33. On 2 September 2019, the respondent sought details of the applicant's address in Brazil. The applicant's solicitor furnished this by letter dated 10 September 2019.

34. On 13 January 2021, the applicant's solicitor wrote to the respondent, stating that the applicant's husband graduated from university in Brazil in December 2019; confirming that the applicant had given birth to a daughter in Brazil in November 2019; enclosing documents concerning the foregoing; and noting that the outcome of her naturalisation application was awaited.

35. The applicant, through her solicitors, requested updates in respect of her naturalisation application, by letters dated 1 March; 20 May; and 1 December 2022. In a letter dated 18 January 2023, the applicant's solicitors gave notice of their *"instructions to seek an order of mandamus compelling a decision forthwith."* Replies from the respondent, dated 9 March; 24 May 2022; and 30 January 2023, referred *inter alia* to delays caused by the Covid 19 healthcare crisis.

36. The respondent's decision of 15 March 2023 ("the decision") stated that the application for naturalisation had been refused on the basis *inter alia* that due to a "*lack of exceptional and compelling reasons for the applicant not being able to meet the residency condition, the Minister is not persuaded to grant waiver of this condition under section 16".*

The applicant's case

37. Briefly put, the applicant contends that:

(i) the test applied by the respondent in refusing her application was an unpublished extra-statutory test, which had not been notified to the applicant before she made her application;

(ii) the decision contained insufficient reasons; and/or

(iii) the decision discloses irrationality.

The respondent's case

38. The respondent denies the foregoing and contends that the decision was made within jurisdiction; in accordance with fair procedures; and based on all relevant circumstances, considerations, and information available to her relation to the application. The respondent characterises this case as a challenge to the merits of the decision and pleads *inter alia* that*:*

> *"The policy of exceptionality applied to the contested decision is not inflexible or indiscriminate and it could be adjusted to take account of changing circumstances. It is a policy capable of amendment and flexibility as a matter of discretion in appropriate cases."* (Statement of Opposition; para. 4).

> *"In this case, the applicant fails to satisfy the respondent that it was appropriate to grant the privilege of a certificate of naturalisation in this case. These proceedings involve an unwarranted attempt to appeal the respondent's decision to this Honourable Court on its merits. Judicial review does not exist as an appeal against the merits of the respondent's decision."* (Statement of Opposition; para. 9).

"a missed opportunity"

39. As touched on earlier, the applicant points out that she was still a minor when her father became a naturalised citizen, in 2012. Therefore, an application *could* have been made under s.16 (1) (c) before the applicant attained her majority. The respondent takes no issue with the foregoing, other than pointing out that, had such an application been made, the outcome is unknown; and no such application was ever made. The applicant describes the failure to make a s. 16 (1) (c) application as *"a missed opportunity".* That may well be so but, without intending any disrespect it is not due to any failure on the part of the respondent; and no reason or explanation has been given for why the opportunity was missed.

24th January 2029 Application for naturalisation – 'Form 8'

40. The 24 January 2019 application for naturalisation involved the completion of a "*Form 8 - Irish nationality and citizenship act 1956, Application by a person of full age for naturalisation as*

an Irish citizen." Exhibit 'TC5' to the affidavit sworn by the applicant's solicitor, Mr Thomas Coughlan, on 8 June 2023, comprises a copy of the applicant's 'Form 8'', section 12 of which same makes clear that the application was based on Irish associations. The details of same were set out in section 12, as follows:

"Please see other letter. Ms [DD] *has a long association with Ireland. She completed the entirety of her secondary education in* [a named location], *Co.* [named]. *Her father* [R] *with whom family currently reside, is a naturalised Irish citizen. Ms* [DD]*'s paternal uncles & aunt are Irish citizens and are currently residing in the State, as are her two cousins."*

24th January 2019 – Submission

41. The completed 'Form 8' was accompanied by submissions in the form of a letter, also dated 24 January 2019, from the applicant's solicitors to the Dept. of Justice & Equality. The said letter began by outlining the applicant's most recent immigration history and referred *inter alia* to the 90 day temporary visitor permission, granted on 9 October 2018, which had expired earlier that month. Reference was also made to the unsuccessful application for a temporary extension to the visitor permission; and to a further application for a 'Stamp 4' permission. The letter proceeded to state the following:-

> *"Ms.* [DD] *has a long association with Ireland. She arrived in the State from Brazil on 5th August 2006 and completed the entirety of her secondary education in* [named school, town and county]. *Please find enclosed school letters, reports, and junior and leaving certificate results in this respect. Prior to this, Ms.* [DD] *had completed one year of primary education in* [named] *primary school,* [named town] *in 2002 before returning to Brazil. Prior to this month, Ms.* [DD] *has at all times resided in the State on a lawful basis. During her studentship, Ms.* [DD] *was the dependent of her father,* [R]*, a valid work permit holder, and whom has now been naturalised as an Irish citizen. The applicant's paternal uncle,* [H]*, was naturalised as an Irish citizen on 15th December 2012 and currently resides in* [named town and county]*, with his wife,* [R] *and two children* [named] *(being the applicant's and-in-law cousins, respectively), who are also Irish citizens. Ms.* [DD]*'s other paternal uncle* [O] *currently resides as an Irish citizen in* [named town and county] *and her paternal aunt* [R] *resides as an Irish citizen in* [named town and county]. *Ms.* [DD] *has strong Irish associations and wishes this to be considered when determining the application.*
>
> *Ms.* [DD] *resided in the State on a continuous basis from 5th August 2006 until June 2012, at which time she completed her leaving certificate and returned to Brazil to stay with an aunt. She returned to Ireland for the duration of a month in July 2012. Please find enclosed copy An Garda Siochána record of entry on register of non-nationals in respect of the applicant. Kindly note that this record does not accurately reflect the entirety of Ms.* [DD]*'s residence in the State. Prior to the dates outlined on this record, Ms.* [DD] *was registered under stamp 3 conditions under her father's registration as his dependent. In*

this respect we have written to the Garda National Immigration Bureau requesting Mr. [R]*'s records and will forward same to this Department immediately upon receipt. On 20th January 2017, Ms.* [D.] *married* [CD]. *On 3rd December 2017, the couple had a child together* [JD]. *Ms.* [DD] *and her family returned to the State on 9th October 2018 pursuant to a 90 day temporary visitor permission. The family reside with Ms.* [DD]*'s father at* [address]. *The* [SD] *family are the dependents of Ms.* [DD]*'s father, who works as a meat de-boner at* [company name and address] *In this respect please find enclosed copies of Mr.* [R]*'s bank statements for the past year.*

The [DS] *family have no convictions, nor are any charges pending against any member of this family in the State or abroad. Concerns of public security do not arise…"*

42. The letter went on to enclose documentation in support of the application including the solicitor's authority to act on behalf of the applicant; the completed 'Form 8'; the relevant application fee; photographs; birth certificates; passport details; bank statements; school reports and documentation concerning the applicant's father.

43. It was further confirmed that the applicant's original birth certificate was retained by the registry office in Brazil where she was married and that Ms. [DD] was in the process of having same returned to her. It was confirmed that the applicant's original birth certificate would be provided immediately upon receipt. The 3rd and final page of the 24 January 2019 letter contained the following submission by the applicant's solicitors:

"Pursuant to Section 16 of the Irish Nationality and Citizenship Acts 1956-2004, the Minister may, in his absolute discretion, grant an application for a certificate of naturalisation where the applicant is of Irish descent or Irish associations, although the conditions for naturalisation (or any of them) are not complied with. <u>While Ms</u> [DD] *<u>does not fulfil the residence requirements as set out the</u>* (sic) *<u>citizenship Acts, we respectfully request that the Minister uses discretion to allow the application of</u>* [DD] *<u>to be assessed as an application based on strong Irish associations</u>. Ms* [DD] *has lived in the State for a significant period of time. The years she spent in the State during her childhood represented the majority of her maturing years and her connections to the State are very strong. I think it is worth noting that she could have applied for naturalisation years ago as a dependent of her naturalised father. That was a missed opportunity. However, Ms* [DD] *spent her teens in Ireland and her father, cousins, aunts and uncles are naturalised. She went to Brazil to stay with an aunt after secondary school and the trip was elongated as she fell in love, married and had a child. Her family connection to Ireland remained and she is deeply rooted in* [name of location in Ireland] *where she grew up. This* (sic) *are all matters which we ask you to consider in the context of this application. The applicant relies on Articles 40 and 41 of the Constitution and Article 8 of the European Convention on human rights and fundamental freedoms."* (emphasis added).

Exception

44. As can be seen from the foregoing, the applicant was, in substance, asking the Minister to make an *exception* (i.e. to grant naturalisation under s. 16, in exercise of her absolute discretion, even though the applicant did not meet the conditions for naturalisation set out in s.15, specifically, residence requirements). The submission stressed the applicant's "*strong Irish associations*" comprising of the applicant's relationship to Irish citizen family; her time spent in Ireland from 2006 – 2012; and "*connections to the State*" described as "*very strong*".

"a strong case for naturalisation"

45. The foregoing was echoed in subsequent correspondence from the applicant's solicitor which was sent prior to the decision: -

> "*Ms* [DD] *grew up in Ireland and spent much of her life here"*
>
> (see 26 July 2019 letter from the applicant's solicitors);

> "*Ms* [DD] *has a strong case for naturalisation as an Irish citizen through Irish associations. She has an Irish citizen father and grew up in Ireland and spent much of her life here."*
>
> (see 2 August 2019 letter from the applicant's solicitors);

> *"… our client's application is based on Irish associations"; "The family plan to return to Ireland in early Spring with their newborn baby. The family's longterm plans to live permanently in Ireland remains unchanged.* [DD]*'s Irish Citizen father resides in* [name of town] *Co.* [name of County] *and the family wish to remain close to him. Ms* [DD] *grew up in Ireland and spent her childhood in* [name of location]. *She is looking forward to returning home for good in the near future."*
>
> (see 20 August 2019 letter from the applicant's solicitors);

> *"Our client has a long association with Ireland, her family of origin reside here and have been naturalised as Irish citizens themselves. She grew up here."*
>
> (see 13 January 2021 letter from the applicant's solicitors).

46. The facts set out in the application, and referred to in her solicitor's submissions to the Minister, are echoed in the averments contained in the applicant's grounding affidavit, sworn on 9 June 2023: *"I say that I have extensive ties to Ireland through my father* [R] *who is a naturalised Irish citizen. I further say that my paternal uncles* [H] *and* [O], *my paternal aunt* [R] *and my 2 cousins are all Irish citizens residing in Ireland. I say that I resided in Ireland from 2006, when I was 11 years old, until 2012 when I had finished my Leaving Certificate."* Having looked at the facts relied on by the applicant and the submissions made by her solicitors, it is appropriate to turn to the decision which the applicant challenges.

The decision of 15 March 2023

47. The decision comprised of a letter to the applicant's solicitors, which enclosed a 5-page document detailing the consideration of the application. The latter includes headings and sub-headings, beginning with "*Statutory background".* This was followed by a section entitled "*Details of Irish descent or Irish associations*", the final paragraph of which stated: -

> *"Section 16 of the Act confers broad discretionary powers on the Minister in the context of granting a certificate of naturalisation. It is Ministerial policy that these powers should be used sparingly and only in exceptional and compelling circumstances, particularly where the predominant pathway to naturalisation under section 15 is unavailable to an applicant under the act, and/or in cases where the applicant will find it difficult to meet the section 15 criteria."*

48. This was followed by "*Application Commentary*", which dealt with "*a) Residency Status*" and quoted from the submissions made by the applicant's solicitor, followed by a section addressing "*b) Proof of Identity*". It is not suggested that the respondent's analysis contains any errors of fact. The next section is entitled *"Recommendation"* and begins by stating *inter alia* that "*…the applicant does not fulfil the statutory residency conditions for naturalisation set out in section 15 (1) (c)…"* which is, of course, correct. This is followed by an analysis of the applicant's reckonable residence in the State for the purpose of naturalisation, after which appears: -

> *"The applicant invokes the Ministerial discretion of Section 16 of the Irish Nationality and Citizenship Act 1956, as amended, that her application by* (sic) *considered on the Irish associations through blood to her father,* [R], *who became a naturalised Irish citizen on 15/10/2012, to her two paternal uncles, her aunt and her cousins, all naturalised Irish citizens residing in the State. The applicant is requesting that the Minister utilises his absolute discretion under Section 16 to consider the particularities of her case."*

49. I pause to say that the foregoing is an accurate summary of the application and discloses no error. The analysis proceeds: -

> *"I have considered the entire of the file, including the applicant's immigration history in the State. Furthermore, the fact that the applicant does not meet the residency requirement under section 15 (1) (c) of the Irish Nationality and Citizenship Act 1956, as amended, was also considered.*
>
> *It is also noted that an application for naturalisation could have been made by her father, a naturalised Irish citizen since 15/10/2012 on behalf of Ms* [DD], *where the applicant is a naturalised Irish citizen acting on behalf of a minor child of the applicant until she attained the age of 18 years. The applicant's solicitors advises, Ms* [DD] *having returned to Brazil after her leaving certificate, fell in love, married and had a child there, while continuing to*

hold deeply rooted ties to her family who reside in [location in Ireland], *where she spent her formative years."*

50. Again, the foregoing is an accurate account of the application, reflecting the submissions made by the applicant's solicitors. The decision proceeded: -

"Taking all those factors on board, I cannot identify sufficient exceptional and compelling reasons attaching to this case which would warrant a recommendation that the Minister would waive the statutory conditions under section 15 of the Irish Nationality and Citizenship Act 1956, as amended, and facilitate an application under Section 16."

This is followed by the *"Reasons for Decision".* Under the sub-heading *"a) Residency Condition",* reference is made to the applicant having 698 days reckonable residency in the State in the context of S. 15(1) of the 1956 Act, of which the decision states *inter alia*: -

"Meeting the conditions of naturalisation under section 15 (1) is the predominant pathway to citizenship by naturalisation, (as recently confirmed by the Court of Appeal (see Borta v Minister for Justice [2019] IECA 255 at paragraph 20). Ms. [DD] *has not provided an explanation or an exceptional or compelling reason as to why the statutory reckonable residency criteria of 1825 (1826) days was not fulfilled at the time of the application. It has been and continues to be the Ministerial policy that any grant under Section 16 of the Irish Nationality and Citizenship Act 1956, as amended, would be in circumstances well outside the norm for the vast majority of applications and it therefore follows that the discretion available to the Minister would be used only in the most exceptional and compelling cases. In order for the Minister to use his absolute discretion to waive the Section 15 conditions for naturalisation, under Section 16 of the Irish Nationality and Citizenship Act 1956, as amended, there must be exceptional and compelling reasons why this condition was not met, or is likely not to be met in the future. As no exceptional and compelling reasons were provided as to why the residency condition was not met at the time of Ms.* [DD]*'s application, I cannot recommend to the Minister that he use his absolute discretion to waive the residency condition in this instance."*

51. Under the subheading *"b) Irish Associations",* it is noted, correctly, that the applicant "*…is invoking the section 16 Ministerial discretion in her application for naturalisation on Irish Associations claimed through blood to her father, her uncles, an aunt and to her cousins, as she does not meet the statutory conditions under section 15 (1) of the Act."* Having referred once more to Court of Appeal's decision in *Borta v Minister for Justice* [2019] IECA 255 and having repeated that compliance with the conditions in s. 15 (1) of the Act is the "*predominant pathway to naturalisation*", the decision proceeded to state:-

"As a result, it is only in rare, exceptional or compelling circumstances that the Minister will waive these conditions under section 16.

The applicant has Irish associations through blood to her father, [R] *who became a naturalised Irish citizen on 15/10/2012, as well as having significant ties to the State in terms of having other family members naturalised and ordinarily resident in the State and her previous educational history in the State."*

52. I pause to say that, once again, the foregoing is an accurate setting out of the facts relied on by the applicant. The decision continued:-

"Correspondence received from the applicant's solicitor, dated 24/01/2019 confirm that Ms [DD]*'s paternal uncle,* [H], *was naturalised as an Irish citizen in December 2012 and resides in the State with his wife and their two children, all of whom are Irish citizens. Her paternal uncle*, [O], *resides as an Irish citizen in* [location in Ireland] *and her paternal aunt* [R] *resides as an Irish citizen in Co.* [named].
However, while meeting the statutory criteria of having Irish associations through blood, affinity, adoption or civil partnership is necessary, it is not sufficient in and of itself to guarantee a waiver under section 16."

53. The foregoing is accurate both as to the claim made by the applicant and the nature of s. 16 of the 1956 Act. The decision proceeded:

"As is Ministerial policy, the applicant's case must exhibit exceptional and compelling reasons as to why the section 15 (1) conditions were not met, and a Section 16 waiver can be granted under the Minister's absolute discretion. Due to the lack of exceptional and compelling reasons for the applicant not being able to meet the residency condition, the Minister is not persuaded to grant waiver of this condition under Section 16."

In the foregoing manner, the respondent considered the material before her and came to a decision in exercise of the absolute discretion conferred upon her by the Oireachtas. She did so by reference to a policy of requiring *"exceptional and compelling reasons".* The decision concluded as follows: -

"<u>Concluding Remarks</u>
It is entirely appropriate that the majority of naturalisation applicants must satisfy the relevant criteria under section 15. The applicant's asserted Irish associations are beyond question in this case. However, the applicant has provided no exceptional and compelling reasons to explain why the section 15 (1) (c) residency criteria has not been fulfilled, and that a Section 16 (1) (a) waiver should be exercised in the Minister's view.
In addition, the applicant has stated that far from not being able to meet the Section 15 (1) (c) residency conditions in the future, it is in fact the applicant's stated long-term plan to live permanently in Ireland and as such she will be able to apply for naturalisation using the predominant Section 15 pathway. All things considered, although the applicant has Irish associations through blood, I do not believe that there are exceptional or compelling

circumstances in relation to this application to persuade the Minister to waive the Section 15 conditions in the exercise of his absolute discretion under Section 16.
Therefore, I do not recommend the Minister exercise his absolute discretion under Section 16 of the Irish Nationality and Citizenship Act 1956, as amended, to waive the statutory residency conditions in this case under Section 15 of the Act or to grant this application for a certificate of naturalisation…"

54. It seems to me that, read as a whole, the essence of the decision is captured by the following extracts from it:-

"…. the discretion available to the Minister would be used only in the most exceptional and compelling cases";

"In order for the Minister to use his absolute discretion to waive the s. 15 conditions for naturalisation, under s. 16 of the…1956 Act...there must be exceptional and compelling reasons…";

"All things considered, although the applicant has Irish associations through blood, I do not believe that there are exceptional or compelling circumstances in relation to this application to persuade the Minister to waive the s. 15 conditions in the exercise of his absolute discretion under s. 16."

Gravamen of the claim

55. As para. 19 of the applicant's written legal submissions in these proceedings makes clear: *"The gravamen of the within proceedings is… that the respondent has purportedly applied a test when refusing to exercise her discretion in this case which is not contained in the 1956 Act; nor was it made known to the applicant at the time of her application."* Paragraph 21 of the submissions states that: *"The applicant takes issue with the Minister's interpretation of the nature of the discretion vested in her under s. 16 of the Act…"* and *"she submits that the Minister is requiring her to meet a test or precondition that does not exist in the section."* Paragraph 26 of the applicant's written legal submissions states: -

"…there are repeated references in the Minister's decision to "waiving" <u>the s. 15 conditions</u> if compelling and exceptional reasons have been demonstrated for not being able to comply with <u>those</u> conditions. Had the Oireachtas intended that the s. 16 discretion would only be exercised in such cases, it could (and, it is submitted, would) have so provided in the section itself. The plain and literal meaning of the section, it is submitted, does not by any interpretation provide for such a test." (emphasis in submissions).

56. Regarding the foregoing, s. 16 gives someone in the applicant's position (i.e. a person with Irish associations) a right to *apply* to the Minister. As noted earlier, the applicant, in substance, asked the Minister to be *exempt* from the 'normal' *"conditions of naturalisation"* (laid down in s.

15), specifically, residence requirements. Whilst questions of law are for this court to resolve, it seems to me that the respondent's interpretation of s. 16 contained at para. 5 of the affidavit sworn on her behalf by Ms. Kenny, Principal Officer is correct, namely:-

> *"People covered by the section–16 discretionary exemptions to the normal section–15 conditions for naturalisation have no right to have an exception made. They are seeking to be exempted from the normal rules."*

57. The applicant submits that there is no provision for the Minister to *"waive"* section 15 conditions. I accept, of course, that the word "waive" is not used in either section 15 or 16. It is also clear that the words *"Power to dispense with conditions of naturalisation in certain cases"* (emphasis added), do not appear in s. 16 (as opposed to being the heading which describes that section). However, s. 16 makes specific reference to the *"conditions for naturalisation"* which are not defined in s. 16. To understand what they are, one must look to s. 15. Furthermore, and significantly, s. 16 makes clear that the Minister *"may"* (not "must") grant naturalisation "*although*" one or more of the "*conditions for naturalisation*" (specified in S. 15 (1) (a) to (e)) "*are not complied with".*

In other words, naturalisation is possible under s. 16, *even though*, or *despite the fact that* the conditions for naturalisation in s. 15, or any of them, "*are not complied with*". Thus, when considering an application brought under s.16, it is open to the Minister to dispense with or *waive* one or more of the s.15 conditions for naturalisation. Indeed, para. 3 of the applicant's written legal submissions makes clear that a *waiver* was precisely what the applicant sought in her s.16 application:-

> *"She accepts that she doesn't meet the residency requirements of s.15 of the…1956 Act in the form in which they apply at the time of her application. She applied for a waiver of the conditions for naturalisation under section 16(1)(a), which grants the Minister absolute discretion to waive any of those conditions where the applicant is of Irish associations…"* (emphasis added).

58. I am not satisfied that the applicant has established that the Minister misinterpreted the nature of her s. 16 discretion. In circumstances where s. 16 refers, specifically, to the conditions for naturalisation laid down in s.15, and provides that the Minister *may* grant naturalisation, in her *absolute discretion*, although these conditions are *not* met, and this applicant sough a waiver of the conditions for naturalisation, it seems to me that it was not unlawful for the respondent to consider, in the context of a section 16 application, which of the s. 15 conditions for naturalisation were not complied with, and the reasons why, in the manner the Minister did in this case.

Borta

59. Insofar as the applicant relies on the Court of Appeal's decision in *Borta v Minister for Justice & Equality* [2019] IECA 255 ("*Borta"*), para. 10 of the judgment makes clear that: -

"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."

At para. 31, the court dealt with the matter as follows:-

"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."

60. In *Borta*, the applicant sought to quash the respondent's decision refusing to grant her a certificate of naturalisation under s. 16 of the 1956. Although the Minister acknowledged that Ms. Borta had Irish associations, the Minister did not consider those associations sufficiently strong to warrant the exercise of absolute discretion in her favour. For present purposes, it is helpful to note the Court of Appeal's analysis of ss .15 and 16. From para. 19 of Ms. Justice Donnelly's decision, the learned judge stated: -

"19. In my view, <u>when interpreting s. 16 it is necessary to revert to the wording of s. 15</u> 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 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 made. Even where those conditions for naturalisation are met, <u>the Act of 1956 in both s. 15 and s. 16 gives the Minister absolute discretion</u> whether to grant a certificate of naturalisation." (emphasis added).

61. Later, at para. 28, Ms. Justice Donnelly analysed s. 16 in the following terms:-

"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."

62. The decision evidences the fact that the Minister considered everything before coming to a decision in exercise of the absolute discretion conferred on her by the Oireachtas. The outcome of the Minister's consideration can be summarised as follows: whereas the applicant was seeking an *exception* to the normal conditions for naturalisation, the Minister did not consider the circumstances to be *exceptional;* and whilst the applicant, through her solicitors, submitted that she had a *very strong case,* the Minister did not find the circumstances to be *compelling.* In my view the approach taken by the Minister in the present case is not incompatible with the Court of Appeal's analysis of ss. 15 and 16, in *Borta*. Nothing in the Court of Appeal's decision suggests that it was unlawful for the Minister, when addressing a s. 16 application, to consider which of the s. 15 conditions for naturalisation (in this case, residence requirements) were not complied with and the reasons proffered.

Generous / less onerous

63. It was contended on behalf of the applicant that the Minister has essentially re-written s. 16 by inserting a pre-condition into it, whereas the "*generous*" intention of the Oireachtas was to create a 'stand-alone' route for persons unable to meet s. 15 conditions and who are "*not expected to comply"* with same. Submissions were also made to the effect that there is no obligation in s. 16 to dispense with s. 15 conditions or to require reasons, still less exceptional or compelling reasons. At para. 12 of the applicant's legal submissions, it is stated that: *"It is evident from the 2 sections, when read together, that section 16 is intended to provide an alternative, less onerous, pathway to naturalisation for certain categories of persons who already have established ties to Ireland, including those recognised here as refugees under international law."* (emphasis added).

'Pathways' under ss. 15 / 16

64. Without intending any disrespect, I do not believe that terms like "*generous*" or "*less onerous*" are of meaningful assistance and, in my view, their use has the capacity to detract from the relevant analysis. I say this because the s. 16 'pathway' could only be regarded as generous or less onerous in a very particular and limited sense, as follows. S.15 requires an applicant to comply with all the "*conditions for naturalisation*" before the point is reached where the Minister exercises their "*absolute discretion*". By contrast, in a s. 16 application, an applicant will not have satisfied the (s. 15) conditions for naturalisation at the point when the Minister exercises their absolute discretion. However, nothing in either section gives a s. 16 applicant the *right* to a waiver of the conditions for naturalisation, specified in s. 15. Nor is there anything in either section which suggests that, in exercising their absolute discretion, the Minister is obliged to treat section 16 applicants more *favourably* than s.15 applicants. Furthermore, a decision under *either* section is, according to the explicit wording used by the Oireachtas, an exercise of the *absolute discretion* of the respondent Minister. In light of the foregoing, it does not seem to me that the s. 16 pathway is truly less onerous, or more generous. Compared to a s. 15 applicant, a s-16 applicant is not

conferred with additional rights. Applicants under either section have no more than the right to *apply*.

Test

65. At paragraph 19 of the applicant's written submissions, it is asserted that the respondent *"has purportedly applied a test when refusing to exercise her discretion in this case which is not contained in the 1956 Act"* (emphasis added). Similarly, at para. 26, it is asserted on behalf of the applicant that *"the Minister is requiring her to meet a test or precondition that does not exist in the section".* With respect, these criticisms seem misguided.

Policy

66. The 1956 Act does not lay down any statutory test for the exercise of discretion. Rather than imposing any test, the evidence discloses that the Minister chose, as a matter of *policy*, that a s. 16 applicant must have an exceptional and compelling case for a favourable decision.

May 2022 - Policy of exceptionality

67. Recalling that the decision under challenge issued on 15 March 2023, para. 42 of the applicant's written submissions states *inter alia* that "*…the Respondent, on 20 May 2022, published on her website a statement regarding the 'Minister's discretion in cases of Irish descent or Irish associations'…this statement referred to a requirement for 'exceptional and compelling reasons'…"* (emphasis added).

68. In light of the foregoing, it seems uncontroversial to say that, some 10 months *before* the decision issued, the Minister published a policy of requiring "*exceptional and compelling reasons*" (otherwise "policy of exceptionality" or "policy"). Whilst it is submitted on behalf of the applicant that there is no evidence that she or her solicitor were aware of the Minister's policy of exceptionality, the burden of proof in this application rests with the applicant. That being so, the state of the evidence before me is that neither the applicant nor her solicitor have averred that they were unaware of the Minister's policy.

Exercise of absolute discretion

69. Bearing in mind that the Oireachtas has conferred *absolute discretion* on the Minister with regard to granting an application for naturalisation under s. 16, I take the view that it was open to the Minister to apply this policy of exceptionality. Indeed, the Minister's decision to apply such a policy would seem to be, itself, an exercise of the absolute discretion conferred on her by s.16.

Rational

70. The applicant has not directed me to any authority to the effect that the Minister was not free to adopt a rational policy with respect to the exercise of her discretion. Nor has the applicant established that the Minister's policy of exceptionality was anything other than rational. Given that, in reality, the applicant was asking the Minister to make an *exception* i.e. to grant naturalisation

even though the conditions for naturalisation set out in s. 15 (specifically, as to residency) were not met, it seems to me to be rational, indeed logical, in objective terms, to expect *exceptional* reasons to be given for why the conditions were not satisfied.

Fixed rules

71. Paragraph 29 of the applicant's written submission states *inter alia*:-

> "In *Mishra v Minister for Justice* [1996] 1 I.R. 189, Kelly J. held that *"the use of a policy or a set of fixed rules must not fetter the discretion which is conferred by the Act"* in the context of applications for naturalisation where the respondent Minister had a policy of refusing certificates to non-national doctors on the basis that they would use same as a means of obtaining work abroad: see pg. 205 of the report*."*

Policy to guide the implementation of discretion

72. However, earlier in the same decision, the former President also stated:-

> *"In my view, there is nothing in law which forbids the Minister upon whom the discretionary power under s. 15 is conferred to guide the implementation of that discretion by means of a policy or set of rules."*

Fettering of discretion

73. It seems to me that the applicant asserts, but has not established, a fettering of discretion. On the contrary, the following averments made on behalf of the respondent, by Ms Maeve-Anne Kenny, Principal Officer in the respondent's 'Civil Policy and Legislation Division', comprise uncontested evidence:-

> *"5. The Oireachtas, in choosing a new section 16 of the Irish Nationality and Citizenship Act 1956 by means of section 5 of the Irish Nationality and Citizenship Act 1986, expressly chose to confer an absolute discretion on the Minister as to whether to waive any of the conditions for naturalisation. The Minister considers that it is open to her to choose a policy of waving those conditions for a person of naturalisation only in exceptional cases. People covered by the section-16 discretionary exemptions to the normal section-15 conditions for naturalisation have no right to have an exception made. They are seeking to be exempted from the normal rules. It makes sense that they might be expected to demonstrate something exceptional. Although the requirement of exceptionality is expressed in different ways in the contested decision, it basically boils down to requiring particularly good reasons for disapplying the normal section-15 criteria. It is the Minister's position that the policy adopted requiring exceptionality was taken in the national interest and the common good.*
>
> *6. The <u>policy of exceptionality applied to the contested decision is not inflexible or indiscriminate. It could be adjusted to take account of changing circumstances. It is a policy capable of amendment and flexibility as a matter of discretion in appropriate cases</u>."* (emphasis added).

74. The applicant has not established, in evidence, that there was any fettering of discretion on the part of the respondent or that the policy, averred to be flexible, was or is other than that. The evidence in the present case allows for a finding that the policy chosen by the respondent Minister is not inflexible, has not fettered her discretion and (to quote from p. 205 of *Mishra*) *"does not disable the Minister from exercising her discretion in individual cases."* The evidence supports a finding that the Minister's policy of exceptionality guided the implementation of her absolute discretion, in a lawful manner. It will be recalled that the decision makes explicit that the respondent considered *all* relevant factors before reaching a conclusion. To quote once more from the decision itself:

> *"All things considered, although the applicant has Irish associations through blood, I do not believe that there are exceptional or compelling circumstances in relation to this application to persuade the Minister to waive the s. 15 conditions in the exercise of his absolute discretion under s. 16."* (emphasis added).

75. In oral submissions, it was contended on behalf of the applicant that *"a policy of exceptionality must be confined to s. 16 and cannot apply to why s. 15 conditions were not satisfied"*. Despite the sophistication with which this submission is made, I take a different view, bearing in mind (i) the *absolute discretion* which s. 16 confers on the respondent; (ii) s. 16's reference to the conditions for naturalisation which *"may"*, in exercise of absolute discretion, be dispensed with; (iii) the fact that these conditions for naturalisation are found, and defined, in s. 15; and (iv) even if all s. 15 conditions for naturalisation are satisfied, an applicant enjoys no *right* to the issue of a certificate of naturalisation, under s.16.

Mishra

76. Returning to the decision in *Mishra*, having made clear (at p. 203 of the reported judgment) that *"the absolute discretion which is conferred upon the first respondent is, in my view, subject of course to its being exercised in accordance with constitutional justice",* the learned judge examined the absolute discretion conferred on the Minister, pursuant to s. 15 of the 1956 Act. Given the fact that s. 16 also confers absolute discretion on the respondent, the analysis in *Mishra* would appear to be equally applicable to s.16. Mr. Justice Kelly referred to the decision of Costello J. (as he then was) in *Pok Sun Shum v Ireland* [1986] ILRM 593, where it was:-

> *"…pointed out that the Minister might be satisfied that all the conditions set out in s. 15 were met but, nonetheless, might refuse a certificate of naturalisation on grounds of public policy, which had nothing to do with the individual applicant. I agree with these views. In so concluding, it must be borne in mind that the award of a certificate of naturalisation is a privilege and not a right. The fact that an applicant may comply with all of the statutory provisions set out in s. 15 of the Act does not mean that it automatically follows that he is entitled to citizenship. If such were the case, there would be no discretion at all vested in*

> *the Minister. She would become a near cipher who when satisfied that the statutory requirements of s. 15 were met would be obliged to grant citizenship. Such an approach would effectively rewrite the section and abolish the discretion."*

77. The foregoing seems to me to emphasise that, in the exercise of her absolute discretion, the Minister is 'at large', subject to acting in accordance with natural or constitutional justice. It also seems to me that the analysis in *Mishra* fatally undermines the applicant's submission that it was impermissible for the respondent, when exercising absolute discretion in a s. 16 application, to consider whether the applicant had proffered exceptional or compelling reasons for her failure to comply with the residence requirement set out in s. 15.

Publish

78. Among the applicant's submissions is to assert that the Minister applied a secret or unpublished policy. Regarding the applicant's reliance on *D.E. v Minister for Justice* [2018] 3 I.R. 326 ("*D.E.*"), the facts can be summarised as follows. The applicant was a child who suffered from sickle cell disease. An application for asylum was unsuccessful and a deportation order was made. Having evaded deportation for a number of years, the applicant applied to the Minister to revoke the deportation order, relying on an alleged policy of the Minister of granting residency to applicants who had been in the State for more than five years. As Clarke C.J. stated, at para. 12, p. 333 of the reported decision:

> "… it was submitted on behalf of D.E. that, as he was unaware of the operation of this policy, he was unable to make submissions which might have affected the outcome of the decision. Therefore, D.E. submitted that, insofar as there are guidelines in existence, they should be published to allow applicants to make submissions in relation to them. In this regard, reference was made to the decision of the Supreme Court of the United Kingdom in *R. (W.L.) (Congo) v. Home Secretary* [2011] UKSC 12, [2012] 1 A.C. 245, a case arising in the context of detention in immigration matters."

79. I pause to say, that unlike the position in *D.E.*, the applicant in the present case made detailed submissions, through her solicitors, who argued on her behalf that she had a *"very strong"* case for naturalisation.

80. Furthermore, as made clear, at para. 27 p. 336, it was for the purposes of the argument that Clarke C.J. was prepared to assume that Irish law recognises a principle similar to that identified in *R. (W.L.) (Congo) v. Secretary for the Home Department* [2011] UKSC 12, [2012] 1 AC 245, whilst noting that the said case involved a situation where the relevant authorities published criteria, but had not followed them (a situation very different to that in the present case).

81. From para. 28 onwards, the learned judge set out an analysis of the 'pros' and 'cons' of *"the publication of criteria by reference to which general statutory discretions or adjudications are*

likely to be exercised or made". It seems to me that the analysis at para. 29 is particularly relevant in the present case, where Clarke C.J. stated:-

> "*… it must be acknowledged that it will almost invariably be the case that, where the Oireachtas has decided to confer a broad discretion or adjudicatory power on a relevant person or body, it will have done so precisely because it was not considered either possible or perhaps appropriate to attempt to define the circumstances in which the power in question should be exercised with any greater level of precision. It must be assumed that the Oireachtas confers a broad general power rather than requiring the decision-maker to apply specific criteria precisely because the Oireachtas considers that conferring the power in that way is appropriate."* (emphasis added).

82. Thus, the Supreme Court's decision in *D.E.* does not seem to me to be authority for the proposition that the Minister was under a legal obligation to publish her policy of exceptionality. Moreover, it entirely undermines the applicant's argument (at para. 19 of her written legal submission) that *"the respondent has purportedly applied a test when refusing to exercise her discretion in this case which is not contained in the 1956 Act".*

83. Nor is the present case an appropriate one to determine whether the Minister had, or has, a legal obligation to publish such policy or criteria as may guide the exercise of her discretion. I take this view for several reasons, which, at the risk of repetition, can be summarised as follows: (i) the applicant's submissions state that on 20 May 2022, the respondent *published* on her website a statement regarding her discretion in cases of Irish decent or Irish associations which statement referred, *inter alia* to a requirement for *"exceptional and compelling reasons"*; (ii) neither the applicant nor her solicitor have averred that they were *unaware* of the Minister's policy; (iii) the applicant does not aver that she was *prejudiced* in any way; or (iv) that she would or could have provided *additional* information had she been more aware of the said policy.

Association going back one generation

84. As well as referring to the Minister's policy of requiring *"exceptional and compelling reasons"*, as published on the respondent's website on 20 May 2022, para. 42 of the applicant's written legal submissions quotes the policy as also stating: *"an association going back two generations without any other link to the State is generally considered as not sufficient to warrant consideration or the waiving of the statutory residence conditions… Applicants are expected to have a reasonable period of lawful residence in the State, generally around 3 year… An Irish association through a great-grandparent (or a grandparent where that grandparent obtained citizenship through naturalisation) and where there is no, or negligible, reckonable residency would generally be deemed insufficient to warrant recommending the Minister exercise absolute discretion to waive the statutory conditions under s. 15 of the Irish Nationality and Citizenship Act 1956, as amended and would result in a refusal."* (emphasis added).

85. As noted earlier, approximately 10 months before the Minister issued her decision in the present case, her website made public the policy that exceptional and compelling reasons would be required for a recommendation that the Minister exercise absolute discretion to waive the conditions for naturalisation and set out in s. 15. Whereas the applicant submits that the respondent failed to give her the benefit of the foregoing policy in circumstances where her Irish association goes back just one generation to her father, it seems to me that this submission is undermined by the facts in this case. The Minister was perfectly aware, and noted in her decision, that the applicant is the daughter of a naturalised Irish citizen. The Minister was also aware of the applicant's residency history. It is plainly not the case that an Irish association going back one generation *shall* be considered sufficient to waive the statutory residence condition. Thus, it seems to me that this aspect of the applicant's case 'boils down' to an assertion, unsupported by evidence, that the Minister applied one aspect of her policy but did not apply another, or that the application by the Minister of her policy should have produced a different result. Either way, the applicant has not established unlawfulness.

Irrationality

86. Both parties agree that the concept of irrationality at play in these proceedings is that outlined in the well know decisions in *State (Keegan) v Stardust Compensation Tribunal* [1986] IR 642 (the "*State (Keegan)"*) and *O'Keeffe v An Bord Pleanála* [1993] 1 I.R. 39 ("*O'Keeffe*"). The classic analysis of irrationality, for the purposes of judicial review, is found in the decision of Henchy J. in the *State (Keegan),* as follows:

> "*I would myself consider that the test of unreasonableness or irrationality in judicial review lies in considering whether the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense**.*** *If it does, then the decision-maker should be held to have acted ultra vires, for the necessarily implied constitutional limitation of jurisdiction in all decision-making which affects rights or duties which requires, inter alia, that the decision-maker must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision*." (emphasis added).

Paras 48 and 49 of the applicant's written legal submission assert:

> *"48. The respondent's confident assertion that the applicant will be 'able to apply for naturalisation using the predominant section 15 pathway' does not have a rational basis. It is also somewhat belied by the plea, at paragraph 1 of her Statement to the effect that the applicant was in the State unlawfully after her 2019 visitor permission expired until she returned to Brazil on 14 August 2019.*
>
> *49. It is irrational/unreasonable for the respondent to have concluded, based only on the applicant's stated desire to return to Ireland to live permanently, that she would be in a position to fulfil the section 15 'reckonable residence' criteria in the future."*

87. The principal articulated in the *State (Keegan)* does not seem to me to be an invitation for the court to conduct a 'granular' critique of every aspect of a decision-maker's *reasoning*. Rather, the question is whether the *conclusion* to which the decision-maker came to is vitiated by irrationality, in the sense explained in the *State (Keegan).* In my view, the applicant has not established that the conclusion arrived at by the Minister "*plainly and unambiguously flies in the face of fundamental reason and common sense".*

88. In *O'Keeffe*, Finlay CJ. made clear that: "*The circumstances under which the Court can intervene on the basis of irrationality with the decision-maker involved in an administrative function are limited and rare*", further stating:-

> *"[I]n order for an applicant for judicial review to satisfy a court that the decision-making authority has acted irrationally … so that the court can intervene and quash its decision, it is necessary that the applicant should establish to the satisfaction of the court that the decision-making authority had before it no relevant material which would support its decision."* (emphasis added).

89. Focusing on the decision actually made by the Minister (as opposed to scrutinising the wording used at different points in the Minister's analysis) the decision was not to grant a certificate of naturalisation because, in the Minister's view, the facts relied upon were not exceptional or compelling. Although put in a number of ways, this was expressed as follows on the final page of the 5-page analysis enclosed with the 15 March 2023 decision:-

> *"All things considered, although the applicant has Irish associations through blood, I do not believe that there are exceptional or compelling circumstances in relation to this application to persuade the Minister to waive the s. 15 conditions in the exercise of his absolute discretion under s. 16."*

90. Given how high the 'bar' is set by the *State (Keegan)* and *O'Keeffe,* it seems to me that for the applicant's irrationality claim to succeed, she must establish, in effect, that the *only* lawful result opened to the respondent was to find that that the circumstances in her case *were* exceptional and compelling reasons to waive the conditions for naturalisation (i.e. that any *other* decision by the Minister plainly and unambiguously flew in the face of fundamental reason and common sense). In my view, despite the great skill deployed by the applicant's counsel, this high 'bar' has not been 'cleared'. Similarly, the facts wholly undermine the proposition that the respondent had "*no relevant material"* before her which would support the decision she reached.

Failure to take account of facts

91. During the course of oral submissions it was also contended that *"the Minister did not take account of the factual situation"* when she came to the decision that there were no exceptional or compelling reasons for the applicant not meeting the s. 15 residence requirement. It seems to me, that this submission is undermined by the facts which emerge from an analysis of the evidence.

Not only does the decision confirm that *all* factors were taken into account, the decision itself refers *to* the facts relied on by the applicant, including: her continuous residence in Ireland from August 2006 to June 2012; her travel to Brazil following completion of her leaving certificate; the applicants marriage to her husband, a Brazilian national, in December 2017; and the birth of their two children, in Brazil, in December 2017 and November 2019 (see internal pg. 2 of the 5-page analysis enclosed with the decision). The Ministers decision also noted, explicitly, that an application for naturalisation could have been made by the applicant's father who became a naturalised citizen in October 2012, prior to the applicant attaining the age of 18 (see internal pg. 3 of the 5-page analysis). Indeed the same paragraph effectively repeats the facts which, according to the applicant's written legal submissions, *"were eminently capable of being viewed as 'rare' or 'exceptional' or 'outside the norm'",* in that the decision states: *"The applicant's solicitors advise, Ms.* [DD] *having returned to Brazil after her leaving certificate, fell in love, married and had a child there, while continuing to hold deeply rooted ties to her family who reside in* [location]*, where she spent her formative years".* Thus, the assertion that the respondent failed to take account of the factual situation is, with respect, no more than an assertion.

Prejudice

92. The present case involves the making of an application for naturalisation by an applicant who, with the benefit of expert legal advice, set out all facts and circumstances upon which she relied and made submissions to the respondent. The applicant does aver that she was prejudiced by not having further advance notice of the Minister's policy. Nowhere does the applicant contends that, had she been more aware of the Minister's policy, she would or could have provided additional factual information or submissions. At this juncture, it is appropriate to note that internal pages 7 and 8 of the applicant's 'Form 8' include the following instructions:

> *"6. If your application is based on Irish associations you must provide:*
> *…*
> *The Minister may, in his absolute discretion, waive some of the conditions for naturalisation where the provisions of section 16 apply. As a general rule, where this section applies you will normally be expected to have a minimum of 3 years reckon of residence in the State. There is no right or entitlement to have any conditions for naturalisation waved, it is entirely at the ministers absolute discretion.*
>
> *7. IMPORTANT - please note the following points:*
>
> *Naturalisation is a privilege and not a right. The onus is on each applicant to disclose all information and evidence to help demonstrate that he or she satisfies the conditions for a certificate of naturalisation, including being of good character…"* (underlining added).

93. In the foregoing manner, the applicant was 'squarely' on notice of the obligation to "*disclose all information and evidence*" relevant to her application. There is no suggestion that the applicant failed to do so. My point is that the applicant does not aver that there is *any* fact,

document, or submission which she could or would have included, had she been more aware of the respondent's policy.

94. Thus, the evidence before me allows for a finding that all facts and circumstances relevant to the application *were* before the Minister. Furthermore, the Minister considered *all* facts and circumstances before coming to her decision. As to submissions, I find it impossible to see what might have been added had the applicant or her solicitors asserted that her case was *"exceptional"* (as opposed to asserting, as they in fact did, that her application was *"very strong"*.) There, is of course, an equivalence between *"very strong"* and *"compelling",* but the fundamental point is that all facts were put to the Minister who weighed and evaluated all relevant factors in coming to the decision in exercise of her absolute discretion.

Reasons

95. Another aspect of the applicant's challenge is to claim that inadequate reasons were given for the Minister's decision. During the hearing, counsel for the applicant opened the Supreme Court's decision in *Mallak v The Minister for Justice, Equality and Law Reform* [2012] IESC 59; [2012] 3 I.R. 297, in particular, paras. 45 to 48, inclusive, from the reported judgment. It should be noted that the facts in *Mallak* are materially different to those in the present case. In *Mallak*, the respondent Minister informed the applicant that his application for a certification of naturalisation was refused, but the respondent did not provide *any* reasons for the refusal, insisting he was not obliged to explain his decision. As the headnote makes clear, the Supreme Court, in allowing the appeal and quashing the Minister's decision, held:-

> *"1, that it could not be correct to state that the 'absolute discretion' conferred on the respondent implied that he was not obliged to have a reason. The rule of law required all decision makers to act fairly and rationally, meaning that they must not make decisions without reasons."*

96. Mr. Justice Fennelly's decision in *Mallak* states:-

> " …it can be accepted that the grant or refusal of a certificate of naturalisation is, at least in one sense, a matter of privilege rather than of right. The appellant is not a person who, by reason of birth in Ireland or by reference to his parentage is entitled, as a matter of right, to Irish citizenship. In the words of s. 14 of the Act of 1956, he is a non-national and the grant of the status of citizen upon him is within the discretion of the State. Costello J. said in *Pok Sun Shum v. Ireland,* [1986] I.L.R.M. 593 at p. 599, regarding the applicant in that case, that it was relevant to bear in mind that *"the Minister was conferring a benefit or privilege on the applicant*...". That was undoubtedly a major reason for his conclusion that there was no obligation to give reasons. On the other hand, that learned judge was quite clear in stating that the applicant had a right to apply to the court for judicial review." (para. 48).

97. It is in the context of a decision concerning a privilege, not a right, and the legislature's decision to confer absolute discretion on the Minister, that the asserted failures on the part of the Minister must be viewed. Whereas *Mallak* establishes that, in the context of what was a s. 15 naturalisation application, the Minister cannot make a decision without reasons, in the present case the Minister had reasons, and communicated them to the applicant.

Essential rationale

98. As Murray CJ. stated at para. 93 of the reported decision in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701; [2010] IESC 3 ("*Meadows*"):

> *"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…"*

Reasons given

99. It seem useful to quote, at this stage, the reasons which the Minister gave. Whilst it involves some repetition it will be recalled that the decision stated *inter alia*:-

> *"In order for the Minister to use his absolute discretion to waive the Section 15 conditions for naturalisation, under Section 16 of the Irish Nationality and Citizenship Act 1956, as amended, there must be exceptional and compelling reasons why this condition was not met…";*
>
> *"… no exceptional and compelling reasons were provided as to why the residency condition was not met…";*
>
> *" …while meeting the statutory criteria of having Irish associations through blood, affinity, adoption or civil partnership is necessary, it is not sufficient in and of itself to guarantee a waiver under section 16…";*
>
> *"As is Ministerial policy, the applicant's case must exhibit exceptional and compelling reasons as to why the section 15 (1) conditions were not met, and a Section 16 waiver can be granted under the Minister's absolute discretion… ";*
>
> *"The applicant's asserted Irish associations are beyond question in this case. However, the applicant has provided no exceptional and compelling reasons to explain why the section 15 (1) (c) residency criteria has not been fulfilled, and that a Section 16 (1) (a) waiver should be exercised in the Minister's view";*
>
> *"All things considered, although the applicant has Irish associations through blood, I do not believe that there are exceptional or compelling circumstances in relation to this*

application to persuade the Minister to waive the Section 15 conditions in the exercise of his absolute discretion under Section 16."

Explanation

100. Regarding the applicant's failure to meet the statutory reckonable residency criteria, para. 45 of the applicant's written legal submissions state: -

"The applicant, of course, entirely explained why she did not fulfil this requirement – she had moved to Brazil following her leaving certificate, fallen in love, and settled there. This explanation could not lawfully be ignored or rejected without cogent reasons which engaged with the explanation given."

101. A reading of the respondent's decision makes clear that the foregoing explanation was *not* ignored. There is no question of the respondent having ignored any facts, documents or submissions. The decision itself accurately summaries the applicant's case as well as making clear that all factors were considered by the Minister, who came to the view that they did not amount to exceptional or compelling reasons for why the relevant residency criteria was not fulfilled. Thus, the Minister provided reasons for her decision which were, in objective terms, clear and logical, i.e. cogent. In my view, the reasons given by the respondent "*at least disclose the essential rationale on foot of which the decision is taken",* in accordance the principle articulated in *Meadows.*

Connelly

102. The duty to give reasons was put in the following terms in the Supreme Court's decision in *NECI v The Labour Court* [2022] 3 I.R. 515 wherein, at p. 574 MacMenamin J. stated:-

"147. *In Connelly v An Bord Pleanála [2018] ILRM 453, this court held that it was possible to identify two separate, but closely related, requirements regarding the adequacy of any reasons given by a decision-maker. First, any person affected by a decision should at least be entitled to know, in general terms, why the decision was made. Second, a person was entitled to have enough information to consider whether they can or should seek to avail of any appeal, or to bring judicial review of a decision*…."

I am not satisfied that the applicant has established that the reasons contained in the impugned decision fail to meet the twin-requirements identified in *Connelly.*

Balz

103. The applicant submits, with reliance on *Balz v An Bord Pleanála* [2019] IESC 90, ("*Balz*") that the Minister failed to engage with and adequately address her submissions. Before proceeding further, it can fairly be said that, in *Balz*, the public nature of the decision at issue, the relevant facts, and the nature of the submissions, were all strikingly different to the present case. This can readily be seen from the Supreme Court's recent decision in *Rana v Minister for Justice* [2024] IESC 46 ("*Rana*"), wherein Ms. Justice O'Malley stated:-

"69. …. In *Balz*, the particular issue concerned certain guidelines relating to noise that had to be taken into account by planning authorities when considering applications for permission in respect of wind farms. The objectors, while acknowledging the obligation to consider the guidelines, submitted to the Board's Inspector that they had been shown by more recent science to be outdated and not fit for purpose. The Inspector said in his report that this was not "*a relevant planning consideration*". The guidelines, in his view, were what they were, and remained in force. Proposed revisions had not been brought into operation. The High Court considered that this meant that the Inspector had not evaluated the competing scientific material but held that he was not obliged to.

70. In the appeal in this Court, there was a dispute between the parties as to what the Inspector had meant, and therefore what the Board had meant in adopting his recommendations. The appellants argued that the Inspector had not considered the material they had furnished in support of their objection and that the Board had therefore refused to exercise its discretion to apply or disapply the guidelines.
The Board contended that it had simply refused to accept the appellants' claim, which it characterised as being that that the guidelines should be disregarded. It said that it had, in fact, considered the submissions in setting noise limits.

71. This position was set out in correspondence before the appeal hearing, rather than in evidence. The Board relied in part upon the statement in its decision that *"[i]n making its decision, the Board had regard to those matters to which, by virtue of the Planning and Development Acts and Regulations made thereunder, it was required to have regard. Such matters included any submissions and observations received by it in accordance with statutory provisions*".

72. O'Donnell J. considered the appellants' interpretation to be the more natural one. The Inspector had stated that the technical criticism of the guidelines was not a relevant planning consideration. It followed that he could not have had regard to the content of that criticism. That, the Court concluded, was a legal error."

Later in *Rana*, the learned judge went on to state:-

"92. The decision of this Court in *G.K.* makes it clear that a statement by a decision-maker that they have considered all the material put before them is sufficient, without further affidavit evidence, unless there is some evidence-based reason to think that they did not. I do not see *Balz* as affecting this principle. The Inspector in *Balz* did not claim to have considered the scientific material before him – on the contrary, he stated that it was not a relevant consideration."

104. In the present case, the decision makes explicit that everything put before the Minister was considered. Nor is there any evidence-based reason to doubt this. On the contrary, the decision

itself makes explicit reference to the matters relied upon by the applicant (which her solicitors describe, variously, as *"strong Irish associations"*; *"very strong"* connections to the State; and *"a strong case for naturalisation as an Irish citizen through Irish associations"*).

Further reasoning

105. At the heart of this aspect of the applicant's challenge is the claim that it was unlawful for the Minister to not elaborate *further* on the reasons given. However, *Rana* would seem to be authority for the proposition that a decision-maker does not have to address every aspect of a claim in the reasoning process; and that an applicant does not have a legal entitlement to a discursive narrative addressing all submissions (see also *Rawson v Minister for Defence* [2012] IESC 26).

106. Against this backdrop, and keeping in mind the principles articulated in *Meadows* and in *Connelly*, it is useful to quote once more from the decision under challenge, wherein the Minister's conclusion and the reasons for it were put, *inter alia*, as follows:

> *"All things considered, although the applicant has Irish associations through blood, I do not believe that there are exceptional or compelling circumstances in relation to this application to persuade the Minister to waive the Section 15 conditions in the exercise of his absolute discretion under Section 16".*

107. To be exceptional is to be rare, unusual, extraordinary, atypical or outside the norm. That being so, (i) was it necessary as a matter of law; and (ii) would it have added clarity which is otherwise missing, for the Minister to have gone further by stating, for example: "*I do not believe there are exceptional reasons because the facts and circumstances are not in my view unusual, extraordinary or atypical*"? In my view, the answer to both questions is no.

108. Furthermore, and without for a moment 'stepping into the shoes' of the decision-maker, can it be said that, in objective terms, the following facts, individually or cumulatively, are truly exceptional, rare, extraordinary or unusual: (i) to leave this State having completing secondary education? (ii) to travel to the home of one's birth? (iii) to stay with an aunt? (iv) to meet someone, fall in love and settle in the country of one's birth? (v) to marry and have a child there? (vi) to live and work there? (vii) for one's spouse to attend university there? Viewed objectively, I cannot see that any of these facts could be called exceptional, extraordinary, rare or unusual in any sense. It can also be said that, in objective terms, the reason why the applicant did not have a year's continuous residence in the State immediately prior to applying for naturalisation (in January 2019) together with 4 additional years during the preceding 8, is not explained by the failure to make a s. 16 (1) (c) application before the applicant turned 18 (in January 2013). Furthermore, and as noted earlier, no reason whatsoever has been given for what the applicant calls this "*missed opportunity*".

109. Not only does the foregoing highlight that, in light of the material before her, the decision which the Minister came to was one within her power to make, it illustrates that the Minister was under no obligation to provide more detailed reasons than she did. Having considered the authorities, I cannot accept that, in the present case, the Minister was obliged to set out additional narrative comprising, in effect, reasoning behind her reasons.

110. It also seems appropriate to note that, in the present case, the Minister's duty to give reasons is an aspect of natural justice, rather than any statutory duty imposed upon her by the Oireachtas. Furthermore, the decision concerns, not a right, but a privilege which is within the Minister's absolute discretion to grant, or not. Most importantly, the reasons given by the Minister seem to me to meet the twin-aims identified in *Connelly* in that this applicant (i) knows, at least in general terms, why the decision was made (and, in accordance with *Meadow* knows, at least, the essential rational on foot of which the decision was taken); and (ii) has been able to consider whether she could or should seek judicial review. In these circumstances, I take the view that to require *more* from the Minister by way of reasons would be for this court to impose, without jurisdiction, a legal obligation with respect to reasons which goes beyond the requirements of natural justice and which the Oireachtas did not impose upon her.

Outcome

111. It is difficult to avoid the conclusion that the applicant's fundamental objection is to the *outcome* of the respondent's analysis, particularly when para. 37 of the applicant's written legal submissions assert *inter alia* that: "… *the facts presented by the Applicant to the Minister in this case were eminently capable of being viewed as 'rare' or 'exceptional' or 'outside the norm'".* This submission, although deployed in an effort to suggest that the respondent gave insufficient reasons (a submission I feel bound to reject), discloses the applicant's dissatisfaction with the *outcome.* It is a submission which, in substance, impugns the qualitative assessment of the evidence as undertaken by the respondent. To submit that the same facts are eminently capable of supporting a different result (i.e. of exceptionality) is to suggests that the respondent should have accorded greater weight to same facts, thereby arriving at a different outcome on the merits. However, the weight to be given to the evidence is quintessentially a matter for the decision-maker (*per* Birmingham J. in *E (M) v Refugee Appeals Tribunal* [2008] IEHC 192; Unreported, High Court, 27 June 2008 at para. 27). Judicial review is not an appeal on the merits, regardless of how sophisticated the arguments are framed. This court is concerned with the lawfulness of the decision-making process, not the outcome and has no jurisdiction to substitute itself for the respondent, to whom the Oireachtas have entrusted the role of decision-maker.

In conclusion

112. I want to express sincere thanks to Ms Boyle SC for the applicant and Mr Leonard BL for the respondent. Both counsel provided detailed written submissions, in advance, which were

supplemented, during the hearing, by oral submissions of great clarity. These were of very considerable assistance in determining the issues which arose in these proceedings.

113. The concept of "anxious scrutiny" was analysed in detail by the Supreme Court in *Meadows* and some years later this court emphasised that: "*The law allows a wide margin of discretion to decision makers. It is not for the Court to impose its standards of excellence or otherwise upon what decision makers should decide or how they should decide it. Anxious scrutiny, or as it works in practice officious scrutiny, forms no part of our law and represents an attempted blurring of the separation of power by those who advocate it"* (see *Westwood Club v Information Commissioner and Another* [2014] IEHC 375, at para 86). Despite the sophistication of the arguments made on behalf of the applicant and the skill with which they were advanced, it seems to me that to quash the decision would necessarily involve this court engaging in this type of anxious scrutiny, namely, deconstructing the decision, critiquing individual parts divorced from the whole, and impermissibly finding fault (i) not with the decision itself, but with *how* the decision-maker expressed herself at various points; and (ii) not with the process, but with the outcome.

114. In the manner explained in this judgment, I have come to the view that the applicant has not discharged the burden of proving that the decision was other than lawfully-made, within jurisdiction, for adequate reason. Therefore, the applicant's challenge falls to be dismissed. My preliminary view is that, having been entirely successful, the respondent is entitled to her costs.

115. On 24 March 2020, the following statement issued in respect of the delivery of judgments electronically: "*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."*

116. The parties are invited to communicate, forthwith, and to submit an agreed draft order. In the event of disagreement on any issue, including costs, short written submission should be filed within 14 days.