Judgments

Judgment Title: Abuissa -v- MJELR

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Judgment by: Clark J.

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Neutral Citation Number: [2010] IEHC 366

THE HIGH COURT

JUDICIAL REVIEW

2009 487 JR

BETWEEN

MOHAMMED ABUISSA

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT OF MS. JUSTICE M. H. CLARK, delivered on the 1st day of July, 2010.

1. This is an application for judicial review of the decision of the Minister for Justice,

Equality and Law Reform ("the Minister"), dated the 6th February, 2009 refusing the applicant a certificate of naturalisation. The basis for the challenge is the failure of the Minister to provide any reasons for the refusal.

2. Leave was granted to seek judicial review on an *ex parte* basis by Peart J. on the 11th May, 2009. Mr. Colm O'Dwyer, B.L. appeared for the applicant and Mr. Anthony Moore, B.L. for the respondent at the substantive hearing.

Background to the claim

3. By way of factual background, Mr. Abuissa claims to be a Palestinian born in Libya. He says that he and his parents moved to Jordan when he was three and that in Jordan they had refugee status. His birth certificate is lost but he believes that he was born in October, 1973. He attended university in Syria where he obtained a degree in geography in November, 1998. The translation of his degree describes the graduate as Mr. Mohammad Abu Issa and states that his parents are of Jordanian nationality. The applicant arrived in Ireland in 2004 and sought asylum. No information on his asylum claim was before the Court nor was it in any way explained how a person with refugee status in Jordan could claim asylum in another country. No details of the persecution that he feared were introduced. In his affidavit grounding this application he states that he "*experienced persecution at the hands of the authorities in Jordan*". Documents before the Court indicate that his appeal from the negative recommendation of the Refugee Applications Commissioner was successful before the Refugee Appeals Tribunal and the Minister was therefore obliged to grant him refugee status in accordance with s. 17(1) (a) of the Refugee Act 1996.

4. According to the applicant's affidavit, some two years after his status as a refugee was clarified he opened a Lebanese restaurant in Dublin with substantial financial help from his parents who continue to reside in Jordan, together with a loan from the Bank of Ireland. Since obtaining refugee status in 2005 he has travelled regularly to and from the Middle East using his refugee travel permit, which describes him as a teacher.

5. On the 19th February, 2008 the applicant applied for a certificate of naturalisation pursuant to s. 15 of the Irish Naturalisation and Citizenship Act 1956, as amended. The Minister raised no issue as to the adequacy of the applicant's age, character, period of continuous residency in the State or intention to reside in Ireland for the purposes of s. 15(1) (a), (b), (c) or (d) of the Act. In any event, the applicant claims that he would benefit from the terms of s. 16(g) of the Act. The relevant provisions of the Act, as amended, are ss. 14, 15 and 16:-

> *"14. Irish citizenship may be conferred on a non-national by means of a certificate of naturalisation granted by the Minister.*
>
> *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) is of full age or*
> >
> > *(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 made, either before a justice of the district court in open court or in such manner as the Minister, for special reasons, allows, a declaration in the prescribed manner, of fidelity to the nation and loyalty to the State.

(2) The conditions specified in paragraphs (a) to (e) of subsection (1) are referred to in this Act as conditions for naturalisation. […]

16. 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: […]

(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 28th day of July, 1951 […].”

6. The applicant stated that he was of good character and had never been charged or convicted with any offence. He wished to be granted naturalisation to obtain an Irish passport to facilitate his travel to and from all countries of the Middle East where he wishes to source the ingredients for sweetmeats such as baklava, which are extremely popular with Muslims when breaking their fast during Ramadan and which he says are unavailable elsewhere. He states that his refugee travel document does not allow him to enter the same number of Middle Eastern countries as would be available to him with an Irish passport. In addition, he has to obtain a visa in advance of entry to many countries and this will not be necessary with an Irish passport. In his affidavit he states that “*my nationality and citizenship are extremely problematic”.*

7. On the 6th February, 2009 the Minister informed the applicant that his application for a certificate of naturalisation had been refused in the Minister’s absolute discretion. No reasons were given for the Minister’s decision. The letter addressed to the applicant’s solicitor was in the following terms:-

“The Minister has considered your client’s application under the provisions of Irish Nationality and Citizenship Acts 1956 and 1986 and has decided not to grant a certificate of naturalisation.

In reaching this decision, the Minister has exercised his absolute discretion, as provided for by the Irish Nationality and Citizenship Acts 1956 and 1986. There is no appeals process provided under this legislation. However your client should be aware that you may reapply for the grant of a certificate of naturalisation at any time. Having said this, any further application will be considered taking into account all statutory and administrative conditions applicable at the time of application.”

8. The applicant's solicitor wrote to the Minister on the 17th February, 2009 asking "*in accordance with the principles of natural justice to be informed of the reasons for the Minister's refusal."* The applicant's solicitor also applied for and received a copy of the applicant's file under the Freedom of Information Acts but no reasons for the refusal were apparent from the file. The applicant now seeks an order of *certiorari* quashing the decision and an order of mandamus directing the Minister to reconsider his application. For sake of completeness, it should be said that the file obtained on FOI shows that the applicant has been issued with a refugee travel document stamped "Valid for all countries except Palestine".

Primary Argument: The Obligation to Give Reasons

9. Mr O'Dwyer B.L., counsel for the applicant, argued that the failure to give reasons for the refusal to grant a certificate of naturalisation was a breach of fair procedures and natural and constitutional justice. Without furnishing reasons for his refusal, it was not possible to determine whether the Minister had accorded with his obligation to act fairly and in accordance with natural or constitutional justice. Without knowing the reasons for the Minister's decision, the Court cannot exercise its jurisdiction to review the reasonableness of the Minister's decision.

10. It was fully accepted that there is no right to a certificate of naturalisation and that the Act of 1956, as amended, merely gives a right to apply. There was no dispute that the privilege of naturalisation and the grant or refusal of an Irish passport are within the discretion of the Minister but the challenge was on the basis of the obligation to provide reasons irrespective of that "absolute discretion".

11. The applicant argued that in *Li Gu He v. The Minister for Justice, Equality and Law Reform* [2009] I.E.H.C. 78 and *Bepo v. The Minister for Justice, Equality and Law Reform* (Unreported, High Court, Cooke J., 18th June, 2009), reasons were given for the refusal of a certificate of naturalisation and the reasonableness of those reasons were reviewed by the Court. The applicant contended that in *Bepo*, Cooke J. stated that if the Minister wished to refuse the applicant because of his bad character, he must give him an opportunity to deal with that issue. It was further submitted *that Pok Sun Shum v. Ireland* [1986] I.L.R.M. 593 no longer represents current law, which is now found in *Mishra v. The Minister for Justice, Equality and Law Reform & Others* [1996] 1 I.R. 189 where Kelly J. found that the Minister should have put the reason for his refusal to the applicant so as to afford him an opportunity to respond to it. No such opportunity was afforded the applicant in this case.

12. The applicant placed very great reliance on the decision of the Court of Appeal in *R v. Secretary of State for the Home Department, ex parte Mohammed Fayed* [1998] 1 W.L.R. 763. That decision concerned s. 44 of the British Nationality Act 1981, which established that in coming to a naturalisation decision in his discretion, the Home Secretary was not required to assign reasons for such decision and such decisions were not subject to appeal or review in any court. It was submitted that the Court of Appeal had stated that natural justice required that the Home Secretary provide reasons for his refusal to grant naturalisation, in order to allow the Fayed brothers to challenge the reasons for that refusal. Following that decision, ss. 44(2) and (3) of the British Nationality Act 1981 were repealed by s. 7(1) of the Nationality, Immigration and Asylum Act 2002.

Secondary Arguments

13. The applicant's second argument was that Article 34 of the 1951 Convention Relating to the Status of Refugees ("the Geneva Convention") places an obligation on the Minister to complete the refugee process by integrating the applicant into Irish society by the grant of naturalisation. The applicant argued that this puts him

in a higher position than most applicants who seek naturalisation. Article 34 provides:

> *"The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings."*

14. Finally the applicant argued that s. 18(1) of the Freedom of Information Act 1997, as amended, requires the Minister to give reasons for his decision. It provides:-

> *"(1) The head of a public body shall, on application to him or her in that behalf, in writing or in such other form as may be determined, by a person who is affected by an act of the body and has a material interest in a matter affected by the act or to which it relates, not later than 4 weeks after the receipt of the application, cause a statement, in writing or in such other form as may be determined, to be given to the person—*
>
> *(a) of the reasons for the act; and*
>
> *(b) of any findings on any material issues of fact made for the purposes of the act."*

15. The applicant furnished the Court with a "letter decision" of the Information Commissioner (*Case No. 020353, Mr X v. The Minister for Justice, Equality and Law Reform*, decision of the 22nd May, 2005) which found that there is no inconsistency in the furnishing by the Minister of a statement of reasons pursuant to s. 18 of the FOI Act, and the discretion vested in the Minister by ss. 15 and 16 of the Act of 1956, as amended.

The Respondents' Submissions

16. Mr Anthony Moore, B.L., counsel for the respondent Minister, objected to the introduction of any argument on the FOI Act 1997, as amended, as this was not pleaded in the statement of grounds. That notwithstanding, he submitted that the provisions relied on by the applicant must be read in the light of s. 24 of the Act of 1997, which provides:-

> *"(1) A head may refuse to grant a request under section 7 in relation to a record (and, in particular, but without prejudice to the generality otherwise of this subsection, to a record to which subsection (2) applies) if, in the opinion of the head, access to it could reasonably be expected to affect adversely—*
>
> *(a) the security of the State,*
>
> *(b) the defence of the State,*
>
> *(c) the international relations of the State, or*
>
> *(d) matters relating to Northern Ireland.*

17. The respondent argued that if the applicant in this case suspects that he has been refused naturalisation on grounds of national security because of his previous connection with a Palestinian organisation in Jordan, that could well be the reason for refusal as the Minister may not necessarily wish him to know of any suspicions

held. There might be people who have been granted refugee status to whom the Minister may not be satisfied to grant such certificate of naturalisation on grounds of national security, defence or international relations.

18. The main thrust of the Minister's arguments was that s. 15(1) of the Irish Nationality and Citizenship Act 1956, as amended, determines that the Minister may grant a certificate of naturalisation "*in his absolute discretion*". In *Pok Sun Shum v. Ireland* [1986] I.L.R.M. 593, it was accepted that the Minister's discretion must be exercised in accordance with the principles of constitutional and natural justice. Costello J. found however that no breach of natural justice arose out of the Minister's failure to give reasons for refusing a certificate of naturalisation. Costello J. found that natural justice does not require reasons to be provided in every case and that the Minister had a very wide discretion to grant or refuse a certificate of naturalisation, which is not a right but a privilege.

19. The Minister argued that *Pok Sun Shum* has never been overturned and the differences between that decision and *Mishra v. The Minister* [1996] 1 I.R. 189 are more apparent than real. It was submitted that *Li Gu He v. The Minister* [2009] I.E.H.C. 78 and *Bepo v. The Minister* (Unreported, High Court, Cooke J., 18th June, 2009) can be distinguished. The respondent contends that a number of decisions recognise that the Minister does not have to give reasons for the exercise of his absolute discretion. The Supreme Court decisions in *Breathnach v. The Minister for Justice, Equality and Law Reform* [2004] 3 I.R. 336 and *Kinahan v. The Minister for Justice, Equality and Law Reform* [2001] 4 I.R. 454 are examples of this authority. In both cases, the Supreme Court upheld the High Court's finding that the Minister was not required to furnish reasons in the circumstances of the case. In addition, the respondent relied on *Afzaal Nawaz v. The Minister for Justice, Equality and Law Reform* [2009] I.E.H.C. 354, where this Court held that the grant or refusal of naturalisation is a matter for the Minister.

20. The respondent disputed the applicant's interpretation of the effect of Article 34 of the Geneva Convention. Hathaway's text on the *Law of Refugee Status* notes that Article 34 was not framed as a strong obligation on states and does not require the grant of naturalisation. The respondent referred the Court to *Sofineti v. Judge Anderson and D.P.P.* [2004] I.E.H.C. 440 and *Siritanu v. D.P.P.* [2006] I.E.H.C. 26.

THE COURT'S ASSESSMENT

21. The framework of this Court's assessment of the arguments advanced in this case is limited because there has been no constitutional challenge to the legality of s. 15 or s.16 of the Irish Nationality and Citizenship Act of 1956, as amended. It was only at the stage of additional written submissions that an argument was raised that the Minister's absolute discretion to grant or refuse a certificate of naturalisation contravenes the European Convention of Human Rights. The main argument has been that when relying on his absolute discretion to refuse an application for naturalisation, the Minister should as a matter of fairness indicate why the applicant has been refused. The existing law on that point is found in the decision of Costello J. in *Pok Sun Shum v. Ireland* [1986] I.L.R.M. 593. Among the many issues requiring determination in that case was the question of whether the Minister ought to have provided reasons for refusing to grant the applicant, a Chinese national, a certificate of naturalisation. The applicant had permission to work and operate a business in the State. Following his suspected involvement with a serious altercation between rival Chinese gangs, his permission to remain in the State was revoked and he was asked to leave. However, he continued to reside and work in the State and married an Irish citizen with whom he had four children before the deportation order was reinstated. After five years had elapsed since his first permit to enter and work, he applied for a certificate of naturalisation. His

application was refused in the Minister's absolute discretion. In examining whether the decision should be quashed because the Minister provided no reason for his refusal, Costello J. went back to basic principles on the right of the Minister to control immigration and the actions and movements of foreign nationals within the State and stated:-

> *"In relation to the permission to remain in the State, it seems to me that the State, through its Ministry for Justice, must have very wide powers in the interest of the common good to control aliens, their entry into the State, their departure and their activities within the State."*

22. Costello J. accepted without argument that the Minister's position started from the essential premise that the power to grant or refuse a certificate of naturalisation was not unfettered and stated:-

> *"it is a discretion that must be exercised by the Minister in accordance with the powers granted to him by the Oireachtas, and, in addition, it must be exercised fairly and in accordance with the principles of natural justice. If it can be shown that the Minister in exercising his discretion in some way failed to carry out the legal requirements laid down by this section, or failed to act fairly then, of course, the court has power to review his decision."*

23. This statement of the law was not in dispute nor was Costello J. asked to adjudicate on the issue as the case proceeded on this given premise. He continued:-

> *"Undoubtedly, there are cases in which a person, whose position is going to be adversely affected, should be given an opportunity to know the consideration that may be used against him, but it is well known that the extent and scope of natural justice depends on the facts of each case. There is no general rule of natural justice that in each case where a decision might be made adverse to an applicant, there must be disclosure. And I think that in this case, because of the nature of the discretion which the Statute gives to the Minister, he is not required to inform an applicant of the reasons which may appear to him adequate. The Minister may be satisfied that all the conditions that are set out in s. 15 are met but nonetheless he may refuse on grounds of public policy, which have nothing to do with the individual applicant and the certificate of naturalisation. Because of the special control of aliens which every State must exercise, because of the very particular nature of the discretion that is given under the 1935 Act to the Minister in relation to aliens, it seems to me that, in considering the 1956 Act and the duties in relation to both certification under the 1956 Act and permission to reside in the State under the 1935 Act, the Minister is not required to inform an applicant of the information on the files and give him an opportunity to comment on them. The comments may be of no particular relevance to what the Minister may be required to do. In my view, there was no breach of natural justice in this regard."*

24. The decision in *Pok Sun Shum* has been the bedrock of immigration law in Ireland for the last two decades. The decision has been referred to and upheld in the Supreme Court several times in recent years when issues relating to deportation have arisen and especially when the deportation of the parent of an Irish citizen child has been in issue (see e.g. *In re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360; *P, B and L v. The Minister for Justice, Equality and Law Reform* [2001] I.E.S.C. 107; *A.O. and D.L. v. The Minister for Justice, Equality and Law Reform* [2003] 1 I.R. 1). The decision has survived the incorporation of the European Convention on Human Rights into domestic law and as far as the Court is aware represents the state of domestic law on the limitations of the Minister's absolute discretion to refuse a certificate of naturalisation without

providing reasons.

25. The applicant argued that notwithstanding the findings in *Pok Sun Shum*, the absence of a reason for the refusal nullifies the validity of the decision because if he does not know the reasons for his refusal then he cannot know whether the Minister treated him fairly. In the Court's view the issue has two distinct facets – the Minister's discretion and the general obligation to comply with fairness in the exercise of that discretion. The Irish Naturalisation and Citizenship Act 1956, as amended, unequivocally states that the Minister has an *absolute discretion* to grant or refuse a certificate of naturalisation. The Court must accept the plain meaning of the words *absolute discretion*. There is no ambiguity in the expression. If the legislature had intended that the Minister should provide reasons, it is highly unlikely that he would have been given *absolute discretion* by the Act of 1956 or that the words *absolute discretion* would have been retained in the amendment in 1986. The Courts must respect the wording of the statute. However it is equally the case that *Pok Sun Shum* recognises that the Minister's absolute discretion is fettered by the obligation to act fairly and in accordance with the principles of natural justice.

26. In determining the issues raised it is first necessary to restate that there is no *right* to a certificate naturalisation. The grant of such a certificate is a *privilege*. In such circumstances, different principles apply compared with a situation where the applicant has a right to a benefit subject to compliance with statutory pre-determined requirements. The grant of a certificate of naturalisation which leads on to the entitlement to travel on an Irish passport as an Irish national is a privilege which for good reasons is jealously guarded.

27. Secondly, Mr. Abuissa was granted refugee status pursuant to the recommendation of the Refugee Appeals Tribunal. Under s. 17 of the Refugee Act 1996 the Minister was obliged to accept the recommendation made, no matter what the circumstances. The Minister has no right of review or appeal from the recommendation of the Tribunal. It is therefore entirely possible that a Minister who has granted refugee status may for good reasons be unhappy to grant a certificate of naturalisation leading to the right of that person to be declared an Irish citizen and to travel on an Irish passport.

28. Thirdly, the Minister is the sole person in this State who can grant a certificate of naturalisation to an applicant who has fulfilled the statutory conditions for naturalisation set out in ss. 15(1) (a) to (e) of the Act of 1956. He is also the sole office holder who can, in his absolute discretion, waive the statutory conditions for the grant of a certificate of naturalisation, provided that s. 16 of that Act applies. It is for the Oireachtas to introduce any amending legislation to modify or amend this situation and it is not for the courts to modify the Minister's functions and powers or usurp the functions of parliament.

29. Against that background, the fundamental question is whether the Court can determine that the Minister's decision to refuse to grant a certificate of naturalisation to a foreign national should be accompanied with some statement of reasons. In effect such a determination would qualify the Minister's absolute discretion and may give rise to the inference that those reasons can then be reviewed by the Court.

30. The applicant was not refused a certificate of naturalisation because he failed to fulfil the statutory conditions set out in s. 15(1) but because the Minister relied on his absolute discretion to refuse him. There are few instances in Irish law where a Minister is granted the sole power of deciding the outcome of an application in his absolute discretion, but this is one of them. The closest analogy to the Minister's

absolute discretion is the right of the Director of Public Prosecutions to determine without providing reasons not to initiate a prosecution of any particular offence. In *Savage v. DPP* (Unreported, High Court, Finlay P., 31st July, 1980), the slightly different question was whether the opinion of the DPP, which formed the basis of the issue of a certificate for the return for trial to the Special Criminal Court, was reviewable. Finlay P. held that it was not and said:-

> *"If the contention made on behalf of the plaintiffs in this case were correct and if the opinion of the Director of Public Prosecutions…were reviewable by a court then…, it would be necessary for the Director in order to uphold the certificate he issued…to reveal in open court in litigation at the instance of the accused person himself all the information, knowledge and facts upon which he formed his opinion. This would obviously, as a practical matter, entirely make impossible the operation of Part V of the Act of 1939…The revealing of such information in open court under conditions under which persons are seeking to overthrow the established organs of the State would be a security impossibility and to interpret Section 46 sub-section 2 of the Act of 1939 so as to make that necessary would be to vitiate the entire of that sub-section.'*

31. In *State (McCormack) v. Curran* [1987] I.L.R.M. 225, it was held that the discretion of the DPP was reviewable only in narrow circumstances identified by Finlay C.J. at page 237 as being where *"...it can be demonstrated that he reaches a decision mala fide or influenced by an improper motive or improper policy then his decision would be reviewable by a court."* Again in *H. v. DPP* [2004] 2 I.R. 589 the Supreme Court held that, in the absence of a *prima facie* case of *mala fides* being made out, and where the facts did not exclude the reasonable possibility of a proper and valid decision of the DPP not to prosecute, he could not be called upon to explain his decision or to give the reasons for it, nor to disclose the sources of the information upon which it was based.

32. The facts and circumstances are always relevant to the appropriateness of the provision of reasons for the exercise of a ministerial discretion. The principle that the Minister does not invariably have to provide reasons for the exercise of his discretionary powers has also been applied in relation to the conditions attached to temporary release from prison. *Breathnach v. The Minister for Justice, Equality and Law Reform* [2004] 3 I.R. 336 is an example of an unsuccessful challenge to a decision where the Minister did not provide reasons for his decision that the applicant should be handcuffed when on temporary release from prison. No reasons were subsequently provided on affidavit. Ó Caoimh J. held:-

> *"It is clear that the respondent enjoys a particularly wide discretion in the granting of temporary release and that the notice party had a discretion to release the applicant subject to any conditions which he chose to impose or any directions of the respondent. The present case may be contrasted with the circumstances in* The State (Daly) v. Minister for Agriculture *[1987] I.R. 165 and other cases cited by counsel for the applicant where the fulfilment of a condition precedent entitled the applicant to continued employment in circumstances where he had fulfilled the terms of his probation. It is clear that the standard form of conditions for those released"on escort" included the requirement that the prisoner remain handcuffed at all times and in the company of prison staff. Neither s. 2 of the Act of 1960 nor the provisions of the Rules of 1989 have been impugned in these proceedings. Insofar as the rules give a particularly wide discretion to the respondent and to the notice party, I am satisfied that the*

requirements of justice do not require the giving of reasons for the impugned decision. In the circumstances, I must conclude that the applicant has failed to establish that the decision made in his case to impose the particular condition was irrational."

33. The decision of the High Court in *Breathnach* was affirmed on appeal by the Supreme Court on the 6th October, 2004. Similarly, the Supreme Court in *Kinahan v. The Minister for Justice, Equality and Law Reform* [2001] 4 I.R. 454 held that no reasons were required for the refusal to grant temporary release.

34. Ministerial discretion in prisoners' applications and the situation in relation to the DPP's decisions has many similarities with the Minister's power to grant or refuse a certificate of naturalisation in his absolute discretion. That power forms part of the executive functions of government where courts are usually reluctant to interfere and which are not usually considered justiciable issues on the basis of the doctrine of the separation of powers. The law has been and remains that generally, where defence, security or international relations issues arise, the Minister is not obliged to give reasons for his decisions. If he chooses to rely on his *absolute discretion*, then in the absence of a demonstrated breach of constitutional justice or manifest unfairness, or a *prima facie* case of *mala fides*, his decision cannot be challenged. If the Minister elects not to give reasons, that is within his prerogative and his decision must be accepted unless it can be shown that the actions of the Minister are *mala fides*. No such allegation was made in this case.

35. In pursuance of the concept of fairness, it has long been recognised that the Constitution applies to all legislative and administrative acts and that such acts may be challenged if shown to be inconsistent with the Constitution and constitutional justice. However, the prerogative powers – as opposed to legislative or administrative acts of the State – which include the power to formulate foreign policy and manage state security, are constitutionally outside the scope of judicial review (see e.g. *Boland v. An Taoiseach* [1974] I.R. 338; *Crotty v. An Taoiseach* [1987] I.R. 713; *McGimpsey v. Ireland* [1988] 1 I.R. 567). Even in circumstances where an executive power derives from statute, judicial restraint applies as the Courts have no power to review political issues and the policy of government. Such decisions are not justiciable as they do not lend themselves to examination by the judicial process.

36. In the United Kingdom, prerogative powers were until relatively recently considered to be beyond the scope of judicial review. The position has changed somewhat subsequent to the decision of the House of Lords in *Council of Civil Service Unions v. Minister for Civil Service* [1985] 3 W.L.R. 1174. That case examined whether any power lies in the Courts to review an executive decision. The House of Lords held that it is the subject-matter of a power rather than its source which determines whether it is susceptible to judicial review. The decisive factor is not whether a minister is exercising a prerogative power rather than a statutory power, but the particular subject-matter of the power. At p. 1203 of his judgment, Lord Roskill found that among the powers which are not susceptible to judicial review by reason of their nature and subject-matter were *"[p]rerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others".* The power to grant or refuse naturalisation was not included in that admittedly non-exhaustive list but is perceived to be the exercise of a prerogative power in this jurisdiction as involving the grant of a privilege.

The provision of reasons in other jurisdictions

37. The situation in the UK is perhaps the closest to that in this jurisdiction and is

governed by the British Nationality Act 1981. Similar issues to those which arise here were examined in *R v. Secretary of State for the Home Department, ex parte Mohammed Fayed* [1998] 1 W.L.R. 763 although the Court of Appeal did not address question of whether the grant of naturalisation was a prerogative power. Section 6 of the British Nationality Act 1981 provides that the Home Secretary "*may if he thinks fit*" grant naturalisation if satisfied that the applicant fulfils the requirements of Schedule 1 to the Act, which sets out conditions similar to s. 15(1) (a) to (e) of the Act of 1956. Section 44(2) of the Act of 1981, as enacted, provided that the Home Secretary was not "*required to assign any reason for the grant or refusal of any application for naturalisation*" and that such decisions "*shall not be subject to appeal to, or review in, any court*". Very briefly the facts in *Fayed* were that the Secretary of State had refused to grant naturalisation to two brothers who were businessmen with extensive commercial interests in the UK and who were long term legal residents there, without providing any reasons for his refusal. During the lengthy period during which the applicants were waiting for a determination and following a degree of public comment and speculation on the matter, the solicitor for one of the applicants enquired whether a meeting with the Secretary of State might have been useful as he was concerned about the delay. An assurance was given with regard to his concerns but the offer of a meeting was rejected. Discussions were described as "unnecessary".

38. The applicants were then refused without any reason being furnished. While the Court of Appeal criticised ss. 44 (2) and (3) of the British Nationality Act 1981, all three Judges held that the obligation to give reasons was not obligatory in all cases. The majority found (Kennedy L.J. dissenting) that ss. 42(2) and (3) could not be interpreted as relieving the Minister from the normal obligation to act fairly before he came to his decision. The majority found that it was unfair for the Home Secretary's to refuse to discuss the matters which led to the refusal with the applicants before the decision was made. Lord Woolf M.R. stated:-

> *"As the minister has a discretion to give the applicant notice of an area of concern, that discretion must itself be exercised reasonably. If not to give notice would result in unfairness then the discretion can only reasonably be exercised by giving notice. It is already the practice of the Minister to inform the applicant if one of the preconditions which are discretionary bars to success are not fulfilled. If this is the practice it is by no means obvious that there is any logical reason for not taking the same course in the areas where the Secretary of State has an even wider discretion when the identity of the issues will be less ascertainable by the applicant."*

39. The majority of the Court of Appeal (Lord Woolf M.R. and Phillips L.J.) relied on the decision of the Privy Council in *A.G. v. Ryan* [1980] A.C. 718 where Lord Diplock held that an ouster clause of the court's jurisdiction in legislation "*does not prevent the court from enquiring into the validity of the Minister's decision on the ground that it was made without jurisdiction and is ultra vires."* The Court of Appeal quashed the Home Secretary's decision and concluded that as *Ryan* was decided and reported before the British Nationality Act 1981 was passed, the inference could be drawn that:-

> *"Parliament was not in enacting section 44(2) intending by the ouster provision contained in that section to exclude the ability of the court to review a decision of the Secretary of State on the grounds, for example, that he had not complied with any requirement of fairness which the Act imposed upon him or the express prohibition against discrimination in section 44(1) when considering applications for naturalisation."*

40. Following from that decision the British Nationality Act 1981 was amended to

remove s. 44(2) and (3) so that while the Secretary of State still has the sole power to grant or refuse naturalisation, his decisions are subject to a limited review by the courts.

41. Thus it is clear that while the issues that were addressed by the Court of Appeal were similar to those arising here the context and the wording of the statute in which those issues arose was wholly different.

42. The Court is grateful to counsel for providing further material on the situation on naturalisation in the United States of America, Canada and Australia. The Supreme Court of the United States has traditionally held that political questions are non-justiciable as they are claims under which no judicial relief can be granted. The question of what is a political question was addressed in *Baker v. Carr*, 369 U. S. 186 (1962), where the U.S. Supreme Court said:-

> *"It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."*

43. A unanimous Supreme Court in the later case of *Mathews v. Diaz*, 426 U.S. 67 (1976) at pp. 81-82 stated that "*The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization*." The underlying rational is evident from the decision of the Supreme Court in *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) at pp. 588-589:-

> *"It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to <u>be largely immune from judicial inquiry or interference</u>.*
>
> *[…] It is not necessary, and probably not possible, to delineate a fixed and precise line of separation in these matters between political and judicial power under the Constitution. Certainly, however, nothing in the structure of our Government or the text of our Constitution would warrant judicial review by standards which would <u>require us to equate our political judgment with that of Congress</u>." (emphasis added)*

44. Thus policy decisions on immigration and naturalisation are considered political questions and as such are generally immune from review. The grant of naturalisation in the United States is determined by the Attorney General in accordance with the Immigration and Nationality Act 1952 and is preceded by a personal investigation of the applicant. At an interview conducted with the Citizenship and Immigration Services (USCIS) pursuant to s. 335 of the Act of 1954,

questions are asked of the applicant to assess whether he fulfils the statutory pre-conditions for naturalisation, i.e. in relation to his background, his place and length of residence, his character, his attachment to the U.S. Constitution and his willingness to take an oath of allegiance to the United States. Unless the applicant is exempt, the USCIS officer will also examine him on his ability to read, write and speak English and will give him a civics test, testing his knowledge of U.S. history and government. The applicant is entitled to a reasoned determination on his application. If refused, he is entitled to request an appeal hearing with a USCIS officer, pursuant to s. 336(a) of the Act of 1952. If he remains dissatisfied after the appeal hearing, he can seek review of the denial of his application before the U.S. District Court. Section 310 (5) (c) of the Act of 1952 provides that such review shall be *de novo* and the court may make its own findings of fact and conclusions of law and, if the petitioner so requests, the court shall conduct a hearing *de novo* on the application.

45. Thus, the procedure by which naturalisation applications are determined in Ireland is very different to the procedure that applies at present in the U.S.

Canada

46. Canada operates on the basis of the separation of powers between the Crown acting through the Governor General and provincial counterparts, the legislature, the executive and the courts. Immigration and naturalisation decisions are subject to the requirement that reasons for refusal of an application must be given. The powers and prerogatives of the Governor General concerning among other things the conduct of measures concerning national defence and security are generally immune from judicial review except on the issue of constitutionality and jurisdiction. Applications for citizenship are governed by the Citizenship Act (R.S., 1985, c. C-29), which was last amended in 2009. Pursuant to s. 14 of the Act, applications are investigated by a citizenship judge who determines whether the applicant meets the requirements of the Act. Once the applicant has been investigated, the judge notifies the designated Minister and provides him with the reasons for his determination {s. 14(2)}. Where the citizenship judge does not approve the application, he or she must notify the applicant of that decision, of the reasons for it, and of the right to appeal {s. 14(3)}. If the applicant does not fulfil the statutory requirements, the citizenship judge may recommend that the Minister exercises his discretion under s. 5(3) to waive certain requirements on compassionate grounds {s. 15(1)}. Both the Minister and the applicant have an entitlement to appeal to the Federal Court from the decision of the citizenship judge {s. 14(5)}. The Court's decision pursuant to such an appeal is final and no appeal lies therefrom {s. 14(6)}. Where such an appeal is open to an applicant, the Federal Court of Appeal does not have jurisdiction to hear and determine an application for judicial review of the decision {s. 16}.

47. It seems that if the applicant meets the statutory requirements (which are similar to those applicable in Ireland under the Act of 1956 and in the U.S. under the Act of 1952), the minister "*shall*" grant citizenship to that person {s. 5). Moreover, the Act grants to the Minister in his discretion the right to waive certain statutory requirements on compassionate grounds {s. 5(3)}. In addition, the Governor may direct the Minister to grant citizenship to a person in order to alleviate special cases of undue hardship or to reward services of exceptional value to Canada {s. 5(4)}.

48. An exception arises where there are reasonable grounds to believe the applicant will engage in activity that constitutes a threat to national security or is part of a pattern of criminal activity that may be punishable on indictment {s. 19(2)}. In such cases, the Minister may make a report to the Review Committee and the

applicant is entitled to be told in writing of the making of such a report. The Review Committee must investigate the grounds set out in the Minister's report and must send to the applicant a statement summarising "*such information available to it as will enable the person to be as fully informed as possible of the circumstances giving rise to the report*" {s. 19(5)}. Upon completion of its investigation, the Review Committee must report to the Governor General and must provide the complainant with the conclusions of the report {s. 19(6)}. Section 20 provides:

> *"(1) Notwithstanding anything in this Act, a person shall not be granted citizenship […] where, after considering the report made under subsection 19(6) by the Review Committee […] declares that there are reasonable grounds to believe that the person with respect to whom the report was made will engage in an activity described in paragraph 19(2)(a) or (b)."*

49. In sum, it is generally the case in Canada that it is only where issues of national security and criminality arise that the Minister is not obliged to grant citizenship to a person who fulfils the statutory pre-conditions set down in s. 5(1) (a) to (f) of the Citizenship Act, as amended.

Australia

50. The separation of powers is also a feature of the Australian Constitution. As in the UK, executive action is not immune from review simply because it is carried out pursuant to a prerogative power. As was found in *Council of Civil Service Unions v. Minister for Civil Service* [1985] 3 W.L.R. 1174 in the UK, the crucial factor is not the source of the power but its subject matter. The grant of citizenship is determined by the Australian Citizenship Act 2007. A person is eligible to become an Australian citizen "*if the Minister is satisfied*" that the person has met the specified eligibility requirements. As in the UK and Ireland, the Minister for Justice may refuse to approve the application despite the person being eligible {s. 24(2)}. There are certain grounds on which the Minister must not approve the person becoming an Australian citizen, including where he is not satisfied of the identity of the person {s. 24(3)}, where the person is a risk to national security, and where the person has committed offences {ss. 24(4) and (4A)}. In all decisions to refuse citizenship "*the notice must include the reasons for the decision*" {s. 47(3)} and a decision of the Minister to refuse to approve an applicant can be reviewed by the Administrative Appeals Tribunal {s. 52}. The applicant can appeal from decision of the AAT to the Federal Court of Australia on a question of law, pursuant to s. 44(1) of the Administrative Appeals Tribunal Act 1975, as amended.

51. None of the countries whose naturalisation procedures were briefly examined give to their appropriate Minister the *absolute discretion* to determine whether to grant or refuse naturalisation.

Have the Irish courts previously reviewed the Minister's absolute discretion?

52. The applicant has argued that the decisions of *Mishra, Bepo* and *Li Gu He* establish that if the Minister does provide reasons for his refusal to grant a certificate of naturalisation, then those reasons are subject to review by the courts. The argument is that if the Court can review the reasons given, then by analogy the Court can review the failure to give reasons. The Court is not convinced that this argument is correct.

53. There is an important distinction between reviewing the refusal by the Minister because the applicant is not in compliance with the statutory conditions for naturalisation, where a refusal by the Minister does not depend on his discretion, and the quite different proposition of reviewing a decision taken by the Minister in

his absolute discretion, which operates only when the statutory pre-conditions are met. In the view of the Court, the first is subject to judicial review while a decision where no reasons are provided is only reviewable when it can be demonstrated that the Minister acted unfairly, capriciously or *mala fides*.

54. In *Mishra* the application for a certificate of naturalisation was stated to have been refused in the Minister's absolute discretion and no reasons were provided. However, the reasons became apparent during the course of the proceedings and the Court thereafter considered only whether the Minister had fettered his discretion in an arbitrary and unjust manner. *Mishra* is not therefore authority for the proposition that the Minister must give reasons in every case. It is important to note however that, although the issue did not strictly arise for consideration, Kelly J. expressly dealt with the necessity to provide reasons. He upheld the applicable principles formulated by Costello J. thirteen years earlier in *Pok Sun Shum* and quoted from that decision at p. 593, where Costello J. accepted that the Minister's decision is not unfettered and is a discretion which:-

> *"must be exercised by the Minister in accordance with the powers granted him by the Oireachtas and, in addition, it must be exercised fairly and in accordance with the principles of natural justice. If it can be shown that the Minister in exercising this discretion in some way failed to carry out the legal requirements laid down by the section, or failed to act fairly then, of course, the court has power to review his decision."*

55. Similarly, *Bepo* is not a case about review by the Court of the Minister's reasons for the refusal of the grant of a certificate. The issue in *Bepo* was the Minister's rejection of the application because the applicant had not met the statutory conditions for naturalisation set out in s. 15(1) (a) to (e) of the Act of 1956, as amended. As noted above, one such condition is that the applicant must be of good character {s. 15(1) (b)}. The applicant in *Bepo* had come to the adverse attention of An Garda Síochána and as such was not considered of sufficient character to be granted naturalisation and the Minister refused the application. While the letter stated that the Minister has exercised his "absolute discretion," Cooke J. was not convinced that this was an accurate portrayal of his determination because the decision involved the conditions for naturalisation set down in s. 15(1). Cooke J. held that:-

> *"for the reasons given by Costello J. in the Pok Sun Shun case, the Minister cannot be compelled by court order to consider the exercise of a discretion to waive compliance with such a condition nor to provide a statement of reasons for a refusal to waive the condition."*

56. Thus, *Bepo* is not authority for the proposition that the Minister is obliged to give reasons for a decision taken in his absolute discretion.

57. This leaves the case of *Li Gu He*. While at first glance the Minister's decision in that case would appear to have been taken in his absolute discretion, it becomes clear on closer analysis that the decision was in fact based on the Minister's determination that the applicant was not of "good character" within the meaning of s. 15(1) (b) of the Act of 1956. That determination appears to have been taken because the applicant's two sons had criminal records and her third son had been charged with a criminal offence. It is a mischaracterisation of the decision, therefore, to suggest that it was taken in the Minister's absolute discretion. In those circumstances, the findings of Edwards J. do not assist in the present case. It should be added that much of the confusion which has arisen in the interpretation of the courts' role in these cases can be laid at the door of the Minister who frequently states that a decision is made in his "absolute discretion" whereas those decisions are invariably made because the pre-conditions outlined in s. 15(1) have not been

met.

58. Having determined that there is in fact no authority for the contention that the courts do, and in the past have on the basis of full judicial review principles, reviewed the Minister's decisions made in his *absolute discretion*, the Court rejects the applicant's primary contention that the Minister must provide reasons for his decision to refuse an otherwise qualified applicant. As a general proposition, courts do not review policy decisions in relation to the issue of Irish passports to applicants of any particular nationality or political adherence because such decisions are a feature of government policy over which the Court has a limited review function. The Minister must be assumed to receive competent advice and to be aware of information and events which affect the internal and external security of the State. It is the Minister and not the Court who formulates policies in the interests of the common good as the Minister is the person tasked with national security and is in command of information concerning any threats to the well being and security of the State, which is not available to ordinary citizens or to the Court.

59. The Minister was unusually assiduous in holding his counsel in the decision to refuse the applicant in this case and he maintained his silence during the entire proceedings. No affidavit was filed on behalf of the Minister and a freedom of information request disclosed nothing whatever apart from routine checking by the Minister's civil servants of information received. While it is possible that a perusal of the applicant's asylum application file may have been enlightening, the file was not before the Court. The asylum file was of course, available to the Minister who made no attempt to introduce it into evidence by means of an affidavit or otherwise. No discourse, discussion or exchange of information in any form took place between the applicant and the Minister prior to the decision being taken which could permit either the applicant or the Court to establish any want of fairness as occurred in *ex parte Fayed*. It was the failure of the Home Secretary to apply fair procedures *before* the decisions in *Fayed* were taken that was criticised by the Court of Appeal in that case and it is that important distinction which limits the assistance provided by the *Fayed* decision to the Court in these proceedings.

60. In sum, while it may have been preferable for the Minister to have given reasons for his refusal to grant the applicant a certificate of naturalisation or for the Court to have been given the option to consider the Minister's reasons on a confidential viewing of any information relied on by the Minister, if any, the law supports the Minister's position and the principles restated in *Pok Sun Shum* remain applicable.

Article 34, Geneva Convention

61. The applicant's secondary argument was that Article 34 of the Convention relating to the Status of Refugees 1951 ("the Geneva Convention"), to which the State is a signatory, obliges the Minister to grant naturalisation to all those who have been granted refugee status. The first point to note in this regard is that there is nothing in the Refugee Act 1996, as amended, or its appendices that in any way qualify the Minister's absolute discretion pursuant to s. 15 of the Irish Nationalisation and Citizenship Act 1956, as amended. The Court accepts the arguments presented by the respondent on this issue. While the terms of the Geneva Convention guide and advise the State on the assessment and determination of refugee status, the Convention does not displace domestic law. The executive arm of the State through the Minister retains the ultimate power to grant naturalisation and citizenship to all foreign nationals including recognised refugees. Article 34 of the Convention was not incorporated into domestic law by reason of its inclusion in a schedule to the Refugee Act 1996 and is not the law of the State. The Refugee Act 1996 contains no words stating that Article 34 is to be part of Irish law.

An analogous argument in relation to Article 31 of the Geneva Convention (which is scheduled to the Refugee Act 1996 in precisely the same way as Article 34) was fully considered and determined in *Sofineti* and *Siritanu* (cited at paragraph 20 above).

62. In *Sofineti*, O'Higgins J. held that there is nothing in the Refugee Act 1996 to suggest an intention to incorporate the Convention in its entirety into domestic law and that the clear purpose of including the provisions of the Convention in a schedule to the Act was for convenience of reference and not to incorporate all the provisions into law. O'Higgins J. also rejected the argument that the applicant had a legitimate expectation that because Ireland is a signatory to the Convention, the protection of Article 31 thereof would be afforded to her.

63. In *Siritanu*, relying heavily on findings made in *Sofineti*, the applicant argued that he had a legitimate expectation that agencies of the Irish State (in particular, the Director of Public Prosecutions) would respect the terms of Article 31 of the Geneva Convention. Dunne J. followed the S*ofineti* judgment and held that *"there is no legitimate expectation that Article 31 of the Convention can be successfully invoked so as to prevent the Director of Public Prosecutions from prosecuting and maintaining a prosecution*".

64. These conclusions apply with equal force in the present case. There is nothing in the Refugee Act 1996 to suggest an intention on the part of the Oireachtas to incorporate Article 34 of the Geneva Convention into domestic law. In those circumstances, the applicant cannot rely on Article 34 in these proceedings, nor can he argue that he had a legitimate expectation that the terms of Article 34 would operate in his favour.

65. In any event, Article 34 does not – as the applicant has argued – mandate Contracting States to naturalise refugees. It merely requires States to facilitate assimilation and naturalisation of refugees "*as far as possible*" with no further guidance as to the meaning or extent of that broad caveat. In the view of the Court, even if Article 34 was part of domestic law, it could not displace the Minister's absolute discretion to grant or refuse a certificate of naturalisation.

Freedom of Information

66. The final issue requiring consideration is the argument that s. 18 of the Freedom of Information Act 1997, as amended, requires the Minister to give reasons for a decision taken in his absolute discretion under ss. 15 and 16 of the Irish Nationality and Citizenship Act 1956, as amended. The Court is not satisfied that the provisions of the Freedom of Information Acts (FOI Acts) relied upon by the applicants could, following the general rules of interpretation, be taken as amending in a far reaching way the earlier Irish Nationality and Citizenship Acts 1956 and 1986 which are not referred to either specifically or by obvious implication in the body of the Act of 1997 or in the schedule of amendments thereto.

67. The Court notes that it was clear from the decision of the Information Commissioner (cited at paragraph 15 above) upon which the applicants rely, that the advice received by the Minister from the Attorney General disputed that s. 18 requires the Minister to furnish specific reasons for a refusal to grant naturalisation. The decision also makes clear that:-

> *"the exercise of the right is circumscribed by the fact that it cannot entail the giving of information or the disclosure of the existence or non-existence of particular records where the Oireachtas has already determined in relation to the Freedom of Information regime that*

such information might justifiably be withheld."

68. As was pointed out by the respondents, among the records which the Oireachtas has determined are exempt from disclosure under the Freedom of Information Acts are records which could reasonably be expected to adversely affect the security, defence or international relations of the State (see ss. 18(2) and 24(1) of the Act of 1997, as amended). Section 24(3) further provides that where s. 24(1) applies and where the head of the Department is satisfied that the disclosure of the existence or non-existence of the record would prejudice a matter referred to in that subsection, he or she "shall" refuse to grant the request and "shall not" disclose to the requester whether or not the record exists. This is clearly designed to allow decisions to be taken on the basis of national security, defence and international relations without revealing the materials leading to the decisions to those concerned.

69. As the grant of naturalisation is neither a right nor a benefit to which any applicant has a legal entitlement, the effect of a refusal without reasons of an application for naturalisation does not have the consequence or effect of withholding from the applicant a benefit which would be withheld or granted "*to a class of persons of significant size having regard to all the circumstances and of which the person is a member*". As previously stated, the application here was for the exercise of the Minister's absolute discretion to confer a privilege which the applicant accepts is not entitlement even if the conditions for naturalisation are met.

70. While it would have been preferable that the powers of the Minister provided by ss. 15 and 16 of the Act of 1956 had been specifically exempted in the Freedom of Information Acts, the Court is satisfied that the operation of s. 18 of the FOI Acts does not require the Minister to invariably give reasons for decisions taken in his absolute discretion. Properly construed, s. 18(2) (a) of the Act exempts the Minister from giving reasons in certain circumstances.

Conclusion

71. In the light of the foregoing, the Court is ***not*** satisfied that the applicant is entitled to the reliefs sought and the application ***fails***. The assistance provided to this Court by counsel for both the applicant and the respondent indicates that in the USA, Canada and Australia the grant of naturalisation is a privilege in the discretion of a nominated government minister but that an applicant for naturalisation is entitled by statute to be informed of the reasons for any negative decision. The furnishing of reasons is undoubtedly the trend in modern times where transparency is the accepted norm. If the situation in this State is to reflect the trend in other common law jurisdictions, then that is a matter for the legislature and not for the courts.