P. v. Minister for Justice, Equality and Law Reform [2001] IEHC 134; [2002] 1 ILRM 16 (2nd January, 2001)

THE HIGH COURT

JUDICIAL REVIEW

P-v-THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM
2000/596 JR
AND
L-v-THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM
2000/758 JR
AND
B-v-THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND THE ATTORNEY GENERAL
2000/597 JR

JUDGMENT of Mr. T.C. Smyth delivered the 2nd day of January, 2001.

1. These cases are a random sample of a large number of cases of which I believe and consider to be of a representative character. The hearings took place separately but consecutively, Judgment being reserved in all cases as there many common characteristics and arguments adduced, through a number of different Counsel. The applications came before the Court under the procedure provided for by Section 5 (2) of the Illegal Immigrants (Trafficing) Act, 2000. The Section was considered upon reference to it by the Supreme Court, under the title 'In the Matter of Article 26 of the Constitution and Section 5 and Section 10 of the Illegal Immigrants (Trafficing Bill) 1999: the Judgment of the Court was delivered on the 28th August, 2000.

2. The facts of the individual cases may be very briefly summarised as follows:-

The case of P.

3. He is a Romanian National and was an asylum seeker in the State in November, 1999. His application for asylum was refused by the Minister under the Refugee Act, 1996, on the basis that it was manifestly unfounded and he was so informed by letter dated 31st March, 2000 which informed the Applicant that he had failed to adduce evidence of persecution. This decision was unsuccessfully appealed and the Applicant notified by letter dated 5th July, 2000 a letter enclosed the Appeals Authority's recommendation the deciding officer being Mr. Mick Quinn and the letter states *(inter alia)* as follows:-

"As a result of this refusal the Minister for Justice, Equality and Law Reform proposes to make a deportation Order in respect of you under the power given to him by Section 3 of the Immigration Act 1999."

4. Following upon this letter Mr. Watters the Applicant's Solicitor by letter 24th July, 2000 wrote to the Minister making representations that he be permitted to remain in the State on humanitarian grounds. This letter was followed up by another from Mr. Watter's enclosing references favourable to the Applicant. The Minister made a Deportation Order dated 4th September, 2000, the concluding paragraph of which reads:-

"Now, I, John O'Donoghue, Minister for Justice, Equality and Law Reform, in exercise of the powers conferred on me by the said subsection (1) of Section 3, hereby require you the said F. P. to leave the State within the period ending on the date specified in the notice served on or given to you under subsection (3)(b)(ii) of the said Section 3, pursuant to subsection 9(a) of the said Section 3, and to remain thereafter out of the State."
(The form of Deportation Order used in this and the other cases is identical, and is expressly provided for in S.I. No 319 of 1999 being the Immigration Act, 1999 (Deportation) Regulations 1999.

5. A letter of notice of the making of the Order is dated 19th October, 2000. In the cases upon which the Minister decided to make a Deportation Order refusing leave to remain on humanitarian grounds, the letters of notice are in a uniform format, and although they are individually addressed and bear distinguishing file reference numbers they are similar in content and read:-

"I am directed by the Minister for Justice, Equality and Law Reform to refer to your current position in the State and to inform you that the Minister has decided to make a Deportation Order in respect of you under Section 3 of the Immigration Act, 1999. A copy of the Order is enclosed with this letterIn reaching this decision the Minister has satisfied himself that the provisions of Section 5 (prohibition of refoulement) of the Refugee Act, 1996 are complied with in your case.
The reasons for the Minister's decision are that you are a person whose refugee status has been refused and, having had regard to the factors set out in Section 3(6) of the Immigration Act, 1999, including the representations received on your behalf, the Minister is satisfied that the interest of public policy and the common good in maintaining the integrity of the asylum and immigration systems outweigh such features of your case as might tend to support your being granted leave to remain in this State."

6. The letter proceeds to indicate a number of consequential requirements.

7. While there is no averment in the Applicant's Affidavit as to the date of receipt of the Order and Notice, no point has been taken by the Minister and it is conceded that the application was made within the time limited by Section 5 of the Act of 2000 as appears from exhibit FP1. The Applicant, perhaps through his Solicitors had secured copies of letters of notice and copies of Deportation Orders sent to Mr. G.N., Ms. M. P. and Mr. C. B. (the latter being one and the same person as is named in the title of the third case referred to herein).

The case of L.

8. He is a Romanian National, by trade a locksmith, and was an Applicant for asylum in the State. He applied on or about 10th August, 1999, having completed an application form he was called for interview which took place on 30th May, 2000. His application was refused and he was so notified by letter dated 22nd June, 2000 which informed the Applicant that:-

(i) the application did not show on its face any grounds that he was a refugee
(ii) that the leaving or not returning to his country of nationality did not relate to fear of persecution
(iii) that without reasonable cause, he made false or misleading representations of a material or substantial nature in relation to the application
(iv) that he failed to adduce evidence of persecution.

9. The Applicant appealed that decision but the appeal was unsuccessful and the Applicant was duly notified by letter dated 15th August, 2000 that the refusal was on the basis that his refugee status within the State was manifestly unfounded. This letter was signed by the deciding officer Linda Grealy which enclosed the Appeal's Authority's recommendation. As in the case of P the recommendation was only sent to the Applicant and his legal representatives. In the events the Refugee Legal Service applied by letter dated 5th September, 2000 to the Minister on the Applicant's behalf to remain in the State on humanitarian grounds. The representations were not successful and the Minister signed a Deportation Order dated 16th November, 2000 of which, the Applicant was given notice of by letter 23rd November, 2000 signed by one Wendy Murray of the Repatriation Unit, Immigration Division of the Minister's Department. The Order and letter of the notice of the making of the Order are in the same terms as in the case of P.

10. The Applicant's application for leave to apply for Judicial Review as provided for under Section 5(2) of the Act of 2000 was outside the period of 14 days, but I was satisfied that there was good and sufficient reason for extending the period which I did on the hearing. [Mr. Bradley for the Minister correctly did not press the issue unfairly and no point arises for determination in this regard].

The case of B.

11. He is a Romanian, by trade a metal worker. He was an Applicant for asylum in the State. It appears that he arrived in Ireland on or about 21st April, 1997 and wished to claim asylum. An application for same was apparently made, although not exhibited. However a report was made of an interview with the Applicant dated 2nd June, 1998. A decision of the Minister to refuse the Applicant refugee status was made and conveyed to him on 27th July, 1998. On 18th August, 1998 the Applicant married another Romanian person who was and still is in Ireland, one spinster N. A. who status and entitlement to remain in the State is not before the Court. A letter dated 25th September, 1998 was written to the Respondent on behalf of the Applicant, by his Solicitor Mr. James Watters indicating the Applicant's intention to appeal the Minister's decision. By letter dated 15th January, 1999 addressed to the Applicant's Solicitors and signed by Annmarie Quarray of the Asylum Appeals Unit of the

Respondent's Department refused to recognise the Applicant as a refugee on a consideration of all of the evidence provided by the Applicant. The letter enclosed all the material (other than material which had been supplied to the Department on the basis that it would not be disclosed further) on which the decision was made. By letter 23rd March, 1999 one Richard Fennessy the officer authorised by the Minister of the Asylum Division of the Respondent's Department having considered the recommendations of the Appeals Authority decided to uphold the original decision and refused the appeal on the ground that the refugee status within the State was not such as to qualify for recognition in accordance with the definition of refugee contained in the 1951 UN Convention as amended and defined.

12. The Applicant's Solicitor by letter dated 9th April, 1999 made representations as to why the Respondent should not make a Deportation Order. In short the Applicant made an application for leave to remain in the State on humanitarian grounds and this was supported by some testimonals as to his upright character, religious observance and education. The foregoing representations were made prior to the coming in to effect of Section 3 of the Immigration Act 1999.

13. By letter dated 20th January, 2000 signed by Eileen Doyle, Repatriation Unit, Immigration Division of the Respondent's Department and addressed to the Applicant's Solicitor it is stated as follows:-

"Dear Sirs,
I am directed by the Minister for Justice Equality and Law Reform to advise you that the Minister proposes to consider your client's deportation under the power given to him by Section 3 of the Immigration Act 1999. You have already forwarded representations on behalf of your client prior to the implementation of the aforementioned legislation and the purpose of this letter is to give your client the opportunity to update the representations and to bring any new information, which may assist your client's case, to the Minister's attention."

(emphasis added)

14. This letter was accepted in a letter from the Applicant's Solicitor dated 4th February, 2000 which *(inter alia)* states:-

"Re: Our Client C. B. - Romanian National
Re: Humanitarian leave to remain in Ireland - further submissions .
Dear Ms. Doyle,
I referred your letter dated the 20th January, 2000. In accordance with Section 3 of the Immigration Act 1999 we wish to make further written submissions to the Minister for Justice, Equality and Law Reform stating reasons why our client should be allowed to remain in Ireland"

(emphasis added)

15. The letter concludes thus:-

"The Department of Justice have failed to act adequately with this man's application for humanitarian leave to remain in Ireland. Indeed the medical report from Mr. B.'s G.P. would suggest that this man is in state of ill health. This has been exacerbated by the uncertainty of his situation in this country. I refer specifically to your letter dated 12th April, 1999.
I would ask the Minister for Justice, Equality and Law Reform to exercise his discretion and allow my client to remain in Ireland on humanitarian grounds."

16. In or about this time the Illegal Immigrants (Trafficing) Bill 2000 was being considered by the legislature and on the passing of the Bill it was forwarded to the President for her signature. By Order given under her hand and seal on the 30th June, 2000 the President referred Section 5 and Section 10 of the Bill of the Supreme Court for a decision on the question as to whether the said sections or any provisions thereof were repugment to the Constitution or any provision thereof. The decision of the Supreme Court is contained in the Judgment of the Court delivered on the 28th day of August, 2000.

17. The Respondent made and signed a Deportation Order on the 28th September, 2000 requiring the Applicant within the period ending on the date specified in the notice served on the Applicant under subsection (3)(b)(ii) of Section 3, pursuant to subsection (9)(a) of Section 3 and to remain thereafter out of the State. The notice of the making of the Order is dated 16th October, 2000 and signed by one Wendy Murray, Repatriation Unit Immigration Division of the Respondent's Department.

18. The text of the letter of 16th October, 2000 is identical to that in the case of P in particular as to the reasons of the Minister's decision.

General Issues

1) It must be emphasised that these cases come before the Court by way of Judicial Review . The cases before the Court all seek, for a variety of reasons, the primary relief of *certiorari* to quash the Orders of the Minister. In the State **(Abenglen Properties Ltd)-v-The Right Honourable The Lord Mayor Aldermen and Burgesses of Dublin** [1982] ILRM 590 at 597, O'Higgins, C.J. expresed this view of certiorari:-

"Today it is the great remedy available to citizens, on application to the High Court, when anybody or Tribunal, (be it a Court or otherwise) having legal authority to effect their rights and having a duty to act judicially in accordance with the law and the Constitution, acts in excess of legal authority or contrary to its duty. Despite this development and the extention, however, certiorari still retains its essential features. Its purpose is to supervise the exercise of jurisdiction by such bodies or tribunals and to control any usurpation or action in excess of jurisdiction. It is not available to correct errors or to review decisions or to make the High Court a court of appeal from the decisions complained of . In addition it remains a discretionary remedy."

(emphasis added)
2) The Constitutional status of non-nationals.

19. Why this arose at all as an issue in these proceedings I found difficult to understand as it was considered in detail by the Supreme Court on the Reference (p.27-32 (inclusive) of the unreported Judgment.

3) It has no function of the Court to enquire in to the detailed personal circumstances and to seek to make its own evaluation thereof - that is the concern of the Minister under the statutory provisions. The courts cannot and must usurp the Ministerial jurisdiction.
4) These cases take as their point of departure, the conclusion of a process under the Refugee Act 1966 (I note the positions expressed by the Supreme Court in **Anisimova-v-Minister for Justice** [1998] 1 ILRM 523 prior to the enactment of the Act of 1999). No proceedings have been taken against the various decisions made under the Refugee Act 1996. All Applicants proceeded on the basis of an election to proceed to claim relief by way of application to remain within the State on humanitarian grounds.

The Statutory Scheme

The relevant statutory provisions applicable to the cases are those set out in Section 3 of The Immigration Act 1999 and in particular the following subsections.
A *"S.s.(1) Subject to the provisions of Section 5 (prohibition of refoulement) of the Refugee Act, 1996 and the subsequent provisions of this section, the Minister may by order (in this Act referred to as "a Deportation Order") require any non national specified in the order to leave the State within such period as may be specified in the Order and to remain thereafter out of the State*
S.s.(2) An Order under subsection (1) may be made in respect of -
(f) a person whose application has been refused by the Minister."

20. There are other categories of persons in respect of whom deportation orders may be made but as all the Applicants come within category (f) it is unnecessary to consider such other categories. Much of the debate before the Court expressed by Counsel in their submissions related to the mandatory provisions binding on the Minister in the provisions of Section 3(a) and which reads as follows:-

"S.s.(3)(a) Subject to subsection 5, where the Minister proposes to make a deportation order, he or she shall notify the person concerned in writing of his or her proposal and of the reasons for it and of the reasons for it and, where necessary and possible, the person shall be given a copy of the notification in a language he understands."

(emphasis added)

21. In my Judgment it is not imperative that the Minister uses the expression "proposes to make" what is mandated by the subsection is that it is clear to the recipient what is that the Minister is about.

22. In the case of P the letter signed by Mick Quinn dated 5th July, 2000 *(inter alia)* states:-

"As the officer authorised by the Minister, I have considered the recommendations of the Appeals Authority and have decided to uphold the original decision and refuse your appeal." [i.e that the application for refugee status within the State was manifestly unfounded]
As a result of this refusal, the Minister for Justice Equality and Law Reform proposes to make a deportation order in respect of you under the power given to him by Section 3 of the Immigration Act, 1999."

(emphasis added)

23. I am unable to accept counsel's submission that the letter failed to give a reason for the Minister's proposal or that the letter fails to identify a reason for doing so. The word reasons (plural) embraces the singular reason. However where one of a number of reasons is given by the Minister he cannot afterwards rely on any other uncommunicated reasons to defend his compliance with the subsection.

24. In the case of L (argued very ably by Mr. Shipsey) excepting the fact that the relevant letter is dated 15th August, 2000 and bearing the signature of Linda Grealy the circumstances are identical. There is no statutory form to which the proposal of the Minister must comply, neither is there inhibition or impropriety of advancing as a reason that given in these cases.

25. In the case of B it is to be noted that when the process under the Refugee Act 1996 came to a conclusion with the letter from the Aslyum Division signed by Richard Fennessey who was the officer authorised by the Minister (see paragraph (3) of the letter) it is dated 29th March, 1999 . The Immigration Act 1999 became law on 7th July, 1999. Nevertheless the letter of 29th March, 1999 did clearly indicate to Mr. B that if he wished to make written representations as to why the Minister should not make a Deportation Order, he should do so within 14 days of the date of the letter. This invitation was taken up on Mr. B's behalf by his Solicitor in a letter dated 9th April, 1999 and I note in particular that there is a medical certificate furnished to vouch that Mr. B "is suffering from diabetes". The Act having become law a period of time of 6 months elapsed, and on 20th January, 2000 Eileen Doyle of the Respondent's Department wrote as follows:-

"I am directed by the Minister for Justice, Equality and Law Reform to advise you that the Minister proposes to consider your client's deportation under the power given to him by Section 3 of the Immigration Act 1999 . You have already forwarded representations on behalf of your client to the implementation of the aforementioned legislation and the purpose of this letter to give your client the opportunity to update the representations and to bring any new information, which assists your client's case to the Minister's attention."

(emphasis added)

26. This is the linkage to the previous correspondence prior to the Act becoming law. The response to that letter is dated 4th February, 2000, which copper fastens the link. It is there in these terms:-

"I refer to your letter of 20th January, 2000. In accordance with Section 3 of the Immigration Act 1999 we wish to make further written submissions to the Minister for Justice, Equality and Law Reform stating reasons why our client should be allowed to remain in Ireland."

(emphasis added)

27. This letter concludes with a reference to a letter dated 12th April, 1999 which is not with the papers.

28. The Immigration Act 1999 does not contain any transitional provisions (analogous to those contained in Section 28 of the Refugee Act 1996) nor is such contained in the several amendments to the Act of 1999 by the Illegal Immigrants (Trafficing) Act, 2000 nor are the categories of cases to which Section 3(3) applies extended by way of any amendment of Section 3(5) in particular. Accordingly notwithstanding the unity of the correspondence as a whole by internal reference I am satisfied a this stage that the mandatory provisions of Section 3(3)(a) was not complied with after the Act becoming law. According all steps that flow or follow upon same under Section 3(3)(b) no matter how carefully or fully complied with by the Minister are of any effect.

29. However in each of the cases listed argument was advanced by Counsel concerning the observance or non observance of the provisions of Section 3(3)(b) and in particular sub clause (ii) thereof.

B *"S.s.(3)(b) A person who has been notified of a proposal under paragraph (a) may, within 15 working days of the sending of the notification, make representations in writing to the Minister and the Minister shall*
(i) before deciding the matter, take into consideration any representations duly made to him or her under this paragraph, in relation to the proposal, and
(ii) notify the person in writing of his or her decision and of the reasons for it, and, where necessary and possible, the person shall be given a copy of the notification in a language that the persons understands."

30. The Section also enjoins the Minister specifically in this way.

"S.3(6) In determining whether to make a deportation order in relation to a person, the Minister shall have regard to "a number of specific matters listed from (a) to (k) inclusive "so far as they appear or are known to the Minister"

31. All three cases were decisions by the Minister refusing the Applicants leave to remain in the State upon humanitarian grounds and what is of importance is the first three paragraphs which are identical in each Letter of Notice, which notwithstanding its earlier citation in full in this Judgment, I insert herein for convenience of narrative which reads:-

"I am directed by the Minister for Justice, Equality and Law Reform to refer to your letter to your current position in the State and to inform you that the Minister has decided to make deportations orders in respect of you under Section 3 of the Immigration Act, 1999. A copy of the order is enclosed with this letter. In reaching this decision the Minister has satisfied himself that the provisions of Section 5 (prohibition of refoulement) of the Refugee Act, 1996 are complied with in your case. The reasons for the Minister's decision are that you are a person whose refugee status has been refused and, having had regard to the factors set out in Section 3(6) of the Immigration Act, 1999, including the representations received on your behalf, the Minister is satisfied that the interests of public policy and the common good in maintaining of the asylum and immigration system outweigh such features of your case as might tend to support your being granted leave to remain in this State."

(emphasis added)

32. The submissions made on behalf of the Applicants centred on this letter (but were not exclusively so confined) the contentions may be summarised as follows:-

1 The deportations orders were signed in blank. For this assertion there is no evidence.
2 The letter of notice which accompanied each deportation order should have been prepared and dispatched to the Applicants prior to the making of any such order. The logic of this arrangement seems flawed, one cannot give notice of a non existing order and Section 3(a) expressly deals with the Minister's proposal to make a deportation order.
3 That even if the deportation order was made prior to the signing of the letter of notice, and if such sequence was correct, it is the deportation order itself that should contain:-
(i) the reasons for the Minister's decision, and
(ii) the date of effect of the deportation

33. The response made by the Respondent is that Statutory Instrument (S.I. No 319 of 1999, the Immigration Act, 1999 Deportation) Regulations, 1999 made by the Minister under seal on 18th October, 1999 exercising the powers conferred on him by Section 7 of the Act of 1999 is the prescribed form for the purposes of Section 3(7) of the Act. The form of deportation order used in all three cases is as in accordance with the Statutory Instrument. The Respondent also submits that the documents are clearly to be read together and that they are expressly related by internal reference one to the other. In the course of the argument it was contended that the provisions that S.I No 319 of 1999 were repugnment to the Constitution. The legal process by which a specified range of decisions made under the Act of 1999 and other enactments and orders is to be challenged set out in Section 5 of the Illegal Immigrants (Trafficing) Act, 2000. The constitutionality of that section has been determined in the decision on

the Article 26 reference (see p.51 et seq. of the unreported Judgment of the Supreme Court). What is of importance in the context of the case of B in particular (and many other cases) is that the provision of Section 5(3)(b) of the Illegal Immigrants (Trafficing) Act, 2000 which reads:-

"This subsection shall not apply to a determination of the High Court insofar as it involves a question as to the validity of any law having regard to the provisions of the Constitution."

34. While the restricted right of appeal contained in Section 5(3)(a) is part of an overall scheme of the Acts it clear that there is an unrestricted right of appeal in any case in which there is a constitutional issue raised as envisaged by the Section. B's case specifically (see Notice of Motion paragraphs 4 and 5) contain specific constitutional challenges. While no such specific challenge appears in the papers in the case of P and L Counsel intimated to the Court that in the event of leave being granted to apply for Judicial Review application would be made to extend the grounds upon which the Court would be moved to include the constitutional challenge to the existing legal provisions: the right to which Mr. Bradley, with customary conciseness, challenged. I acknowledge that the 14 day limitation as set out in Section 5(2)(a) imposes a degree of pressure upon applicants and their advisors who in their anxiety to try and avoid having to seek an extension of the period within which application shall be made, present papers to the Court that may be less than complete to found the case they wish to present to the Court. Accordingly it may be from time to time be necessary to take this factor in to account. While not wishing to be in any way critical of any Applicant in this regard, the cases, not only those in this adjudication, but in the numerous other cases which have come to my attention, particularly on applications to extend time for the bringing of proceedings, reveal almost invariably a constitutional challenge having regard to the validity of a legal provision. By the insertion of such a ground for seeking leave the whole statutory scheme for the restricted appeal provisions is being sought to be circumvented. In my opinion an Applicant is entitled to challenge if so advised in an appropriate case the validity of any law having regard to the provisions of the Constitution but not as an integral part of an application for leave to apply for Judicial Review under the statutes.

4 It was a common theme of all Applicants that the letter of Notice was:-
(i) Inadequate in giving reason(s)
(ii) Not readily understandable
(iii) Devoid of reasons
(iv) Deficient in failing to explain public policy and the common good
(v) That to base a deportation order giving as a reason a consideration of the common good was a reflection on the good name and reputation of the Applicant. (I reject this point which I finds lacks substance and appears to arise from a confusion between the expression common good as appearing in Section 3 subsection (2)(i) and Section 3(6)(j)
5 The use of the expression "maintaining the integrity of the asylum and immigration system" renders the Letter of Notice defective in the following respects:-
(a) it takes in to account an extraneous matter and
(b) the expression was unintelligible.

35. I approach a consideration of these matters on the basis of the decision of Keane J. (as he then was) in **Golding & Ors-v-The Labour Court & Cahill May Roberts Ltd** [1994] ELR 153 at 159 -

"The determination of the Labour Court need not, as a matter of law, take, any particular form: what is essential is that the manner in which it is expressed leaves no room for doubt as to the reasons which led to the decision, thus ensuring that neither the appellate not the supervisory jurisdiction of this Court is frustrated by an inadequate indication of reasons."

Finlay C.J. in the **State (P & F Sharpe Ltd)-v-Dublin County Council** [1989] IR 701; [1989] ILRM 565 pointed out that :-

"In granting or refusing an application the Deciding Officer must act in a judicial manner - and this involves an obligation to ensure that an adequate note or record is made to permit a court upon review to be able to ascertain the material upon which the decision was reached ."
(emphasis added)

36. The topic was again dealt with by Finlay C.J. in **O'Keeffe -v-An Bord Pleanla** [1993] 1 IR 37 at 39 in this way:-

"What must be looked at is what an intelligent who person who had taken part in an appeal or had been appraised of the broad issues which had arisen in it would understand from this document, those conditions and those reasons."

37. The Judgment in the Supreme Court **Ní Éili-v-The Environment Protection Agency** [unreported 30th July, 1999] Murphy. J, referred to an earlier Judgment of his in **O'Donoghue-v-An Bord Pleanala** [1991] ILRM 750 (at 757) as to the nature and extent of the reasons which administrative tribunals must give for their decisions, in these terms:-

*"It has never been suggested that an administrative body is bound to provide a discursive Judgment as a result of its deliberations but on the other hand the need for providing the grounds of the decision as outlined by the Chief Justice (in the **State (Creedon)-v-Criminal Injuries (compensation) Tribunal** [1989] ILRM 104 could not be satisfied by recourse to an uninformative it technically correct formula."*

(emphasis added)

38. The Applicants in summary came to rely on the decision (quoted by Murphy. J in Ní Éili case of Evans, L.J. In **MJT Securities Ltd-v- Secretary of State for the Environment** [1989] JPL 138 (at p 144) *thus*

"The Inspector's statutory obligation was to give reasons for his decision, and the courts can do no more than say that the reasons must be 'proper, intelligible and adequate','as has been held. What degree of particularity is required must depend on the circumstances of each case."

39. I am satisfied and find as a fact that the letter read in context:-

a) does contain reasons
b) is a sufficient statement of reasons
c) gives adequate reasons for the purposes of any constitutional requirement that can be stated to require same
d) meets the obligation of fairness, natural justice and constitutional justice in giving reasons, on an *intra vires* exercise of powers.
e) is not a mere formalistic mantra (to adopt counsel's expression)

40. Having considered the Judgments in **Orange Communications-v-The Director of Telecommunications Regulations and Anor** (Supreme Court 18/5/200.; unreported and in particular the Judgment of Murphy J. (p 19-30) I am satisfied and find as a fact that the reasons given in the instant case are proper, intelligible and adequate. The case of **Flannery-v-Halifax Estate Agencies** [2000] 1 All E.R. 273 p 377/8 was relied upon as obligating of the giving of reasons in the context of litigation in cases of conflicting (expert) evidence in particular; in the instant case it is no function of the Court 'to enter in to the issues' that give rise to the decision. The case of **Baker-v-Canada** [1999] 2 R.C.S. 817 (p 844 section entitled "(4) The Provisions of Reasons" paragraphs 35 and 43 were of more interest than assistance on a topic that the *jurisprudence* of our courts deals with more than adequately.

While **R-v-Secretary of State for the Home Department and Anor** ex parte Canbolat [1998] 1 All E.R. 161 (at p.170) is of interest, it so primarily as indicating the degree of scrutiny that the Courts in the U.K. should adopt in relation to asylum issues under the specific statutory provisions in that jurisdiction.

41. The Judgment of Murphy. J in the **State (Haverty)-v-An Bord Pleanla and Anor** [1987] IR 485 (p.493) was advanced as assistance to me on the requirements of natural justice applicable to the cases before me. It is I hope clear from the narrative facts in this Judgment that, as the letter of Notice made clear the adjudicator considered the applicants submissions had regard to the requirements of Section 3(6) and carried out a balancing exercise and found that one " outweighed" the other.

42. The Applicants submitted that there was an onus on the Respondent to define or explain the expressions "common good " and "public policy" both referred to in the letter of Notice and in Section 3(b)(j) and (k) respectively. I do not consider the Respondent to be under any such obligation, he is obliged by statute to have regard to them with the other matters listed in Section 3(6) so far as appear or are known to him.

43. Much argument focused on the extent to which the Minister in stating that he he had regard to the factors set out in Section 3(6) in the letter of Notice failed to say what weight he attached to each particular heading for each particular Applicant and

that there ought to have been some form of points or other system applicable to each heading so that each Applicant could know under which heading he fell short and by mathematical calculation or by what number of points or what percentage he fell short of success he might then perhaps make a further application or applications to the Minister or the Courts and have the Minister's decision adjusted or altered. There is no such statutory requirement upon the Minister and the Court must not seek to legislate to obligate him so to do.

44. The concept of the common good, altogether for the necessity for the Minister to have regard to it, expressly under Section 3(6) is a proper basis for the Minister approaching the issue of the entitlement of non nationals to remain in the State. The Judgment of Gannon J. in **Osheku-v-Ireland** [1986] IR 733 was cited with approval in **Tang-v-The Minister for Justice** [1996] 2 ILRM 46, that decision was approved of in the Supreme Court decision of **Laurentiu-v-The Minister for Justice, Equality and Law Reform and the Attorney General** [1999] 4 IR 27 and in the decision of the Supreme Court in the Article 26 reference.

45. The Applicants' counsel asserted difficulty in deriving any meaning in the expression "the Minister is satisfied that in the interests of public policy and the common good in maintaining the integrity of the asylum and immigration system...." referred to in the letter of Notice. The asylum and immigration system is that set out in the Acts and Regulations. Keane J. (as he then was) in **Laurentiu** hereinbefore cited at page 93 of the report states:-

"The Oireachtas may properly decide as a matter of policy to impose specific restrictions on the manner in which the executive power in question is to exercised; what they cannot do, in my Judgment, is to assign their policy making role to a specified person or body, such as the Minister"

(emphasis added)

46. The letter of Notice in the expression in point merely but properly records that the Minister is satisfied that he is observing, as indeed he must, the material wholeness or completeness of the asylum and emigration systems which are contained in the Acts and Regulations.

47. In the case of B who married a fellow Romanian on 8th August, 1998 considerable stress was laid on the fact that both applications were not taken together, that one ought not to have been determined and the other left outstanding, that the married state albeit to a non national gave added status or weight to the application. It was a disclosed fact. The Minister's letter of Notice in the third paragraph stating that the provisions of Section 3(b) were considered would include the provision in Section 3 subsection 6

"(c) the family and domestic circumstances of the person"

48. I prefer the detailed submissions of Miss Barrington on the Respondents behalf on this issue and the extent to which marriage attracted rights and the distinguishing features of **Fajujonu-v-The Minister for Justice Ireland and the Attorney General** [1990] 2 IR 151 where the married non nationals had children born as Irish citizens who had rights as such.

C What is the meaning to be given to the expression in Section 5(2)(b) that leave shall not be granted unless "The High Court is satisfied that there are substantial grounds " for contending that the decision covers the determination recommendation refusal or orders invalid or ought to be quashed."

49. This matter was considered by the Supreme Court at p.44 et seq of the unreported Judgment on the Article 26 References whose decision made clear that the interpretation placed on the word substantial grounds by Carroll J. in the case of **McNamara-v-An Bord Pleanala** [1995] 2 ILRM 125 was appropriate. The case of **O'Dowd-v-North Western Health Board** [1983] ILRM 186 is referred to in the Judgment of Carroll, J but only in the context of a quotation from the Judgment of Egan. J in the Supreme Court decision of **Scott-v-An Bord Pleanala** , the High Court 1994 No 274 RJ (Costello J.) 27th July, 1994; [1995] 1 ILR 424. It is not possible to say whether the **O'Dowd** case was opened in full to Carroll. J. It is clear from the Judgment of Egan. J in the Scott case that he did not find the **O'Dowd** case to be of any assistance. While it is true that in the case of **O'Dowd**, **Scott** and the present cases each deal with different Acts of the Oireachtas both the case of **O'Dowd** and **Scott** are Supreme Court decisions.

50. There is no official report to show that the **O'Dowd** case was opened to the Supreme Court the case of the Article 26 reference. In the course of his Judgment in the **O'Dowd** case Griffin. J considered and adopted what was said by Denning L.J. and Parker L.J. in **Richardson-v-London County Council** [1957] 1 WLR 751 to the effect that:-

"(i) 'There must be more than reasonable grounds there must be substantial grounds;'
(ii) substantial grounds 'is something short of certainty , but considerably more than bears suspicion."

51. In my Judgment in seeking to properly apply the law as I understand it to be the test is substance and reality, rather than technicalities and ingenious argument. In **RGDATA Limited-v-An Bord Pleanala and Anor** (unreported 30th April, 1996) Barron. J observed :-

*"Having regard to the words of the statute, it is necessary to determine whether or not there is a submission of substance which it is reasonable to permit to go to a full hearing. In determining this question the Court should not be concerned with trying to determine what the eventual result is likely to be; see Judgment of Carroll. J in **McNamara-v-An Bord Pleanala** [1995] 2 ILRM 125 at page 130. In practice this is*

difficult since the submissions of the parties tend to deal with what the result should be."

52. In the cases with which this Judgment is concerned time was liberally given to counsel to elaborate on their cases in full (not because that in anyway betokened an acceptance by me as sought to be construed by Mr. McDonagh that it proved that there were substantial grounds) but, so that if I considered my decision warranted a certification of a point of law of exceptional public importance and that it would be desirable in the public interests that an appeal should be taken to the Supreme Court there would be a reasonably wide and proper basis for so doing.

D What is the correct standard proof under Section 5(b) of the Act of 2000?

53. Paragraph of the subsection refers to the High Court being "satisfied". In **O'Dowd's** case it ws held that the use of the word satisfied in the Mental Treatment Act 1945 indicated that the Oireachtas had in mind a higher standard of proof than that which a plaintiff would ordinarily would be required to discharge in a civil case. The Supreme Court in **G-v-DPP** [1994] 1 IR 374 set forth the burden of proof on an applicant to obtain liberty to apply for Judicial Review in ordinary course under The Rules of the Superior Courts O.84 r.20. Such applications are ex parte. All that is required of an applicant is that he establish a statable case. I am not satisfied that such a low standard is appropriate on an inter partes hearing and I consider it as appropriate and proper and propose to adopt the views of Glidewell L. J. In **Mass Energy Limited-v-Birmingham City Council** [1994] Env L.R. 298 (at p.307-8) wherein it is stated:-

"First, we have had the benefit of detailed inter partes argument of such depth and in such detail that, in my view, if leave were granted, it is unlikely that the points would be canvassed in much greater depth or detail at the substantive hearing. In particular, we have had all the relevant documents put in front of us....Thirdly, as I have already said, we have most, if not all, of the documents in front of us; we have gone through the relevant ones in detail - indeed in really quite minute detail in some instances - in a way that a court dealing with an application for leave to move rarely does, and we are thus in as good as position as would be the court at the substantive hearing to construe the various documents.

For those reasons taken together, in my view, the proper approach of this Court, in this particular case, ought to be - and the approach I intend to adopt will be - that we should grant leave only if we are satisfied that Mass Energy's case is not merely arguable but is strong; that is to say, is likely to succeed."

54. That view was approved by Keene J. in **R.-v-Cotswold District Council Ex Parte Barrington Parish Council** 75 P. and C.R. 515 at p.530 where he said:-

"Before dealing with those issues, it is necessary to consider the proper test to be applied to the substantive merits on an application for leave in case such as this.

Reference has been made by the respondents to the Court of Appeal decision in ***Mass Energy Limited-v-Birmingham City Council*** *. There Glidewell L.J. stated that, where there has been detailed evidence and substantial argument on an inter partes hearing, leave should not be granted merely because an arguable point has been shown, but only if the applicant shows a strong case which was likely to succeed: see page 308 as indicated in* ***ex p. Frost*** *that approach seems in principle to be as applicable at a first instance hearing of a leave application as in renewed leave proceedings before the Court of Appeal....For my part, I would prefer to put it on the basis that where the Court seems to have all the relevant material and have heard full argument at the leave stage on an inter partes hearing, the court is in a better position to judge the merits that is usual on a leave application. It may then require an applicant to show a reasonably good chance of success if he is to given leave."*

55. Kelly J. who considered these cases in the case of **Gorman and Others-v-The Minister for the Environment and Others** [unreported 7th December, 2000] stated as follows:-

"That approach appears to me to make a great deal of sense and to make for a far more economical use of court time than the application of the substantially lower standard arguable case" with which he was dealing .

56. I agree with the expression of view of Kelly J. and it seems to me appropriate in the cases under the Acts of 1999 and 2000.

Conclusion

57. I am satisfied in the evidence before me:-

1 The Plaintiffs have not discharged the burden of proof that any of the decisions impugned are unreasonable.
2 The Respondent did not act in *ultra vires* .
3 There is no error on the face of the records such as will entitle the Respondents to the relief of *certiorari.*
4 Solely on the ground that in the case of B there was a failure to expressly give reasons under Section 3(a) after the coming in to effect of the Act of 1999 which was a pre requisite to proceedings to the determination under Section 3(b), that B is entitled to an Order of *Certiorari* and no other and for no other than aforesaid.

58. Accordingly I refuse the leave sought by P. And L.