S47

Supreme Court of Ireland Decisions

Judgment

Title:	P v Minister for Justice and Equality
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Supreme Court Record Number:	74/18
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Date of Delivery:	31/05/2019
Court:	Supreme Court
Judgment by:	O'Donnell Donal J.
Status:	Approved
Result:	Appeal allowed

Judgments by	Link to Judgment	Concurring
Clarke C.J.	Link	O'Donnell Donal J., Dunne J., O'Malley Iseult J.
O'Donnell Donal J.	Link	Clarke C.J., Dunne J., O'Malley Iseult J., Finlay Geoghegan J.

AN CHÚIRT UACHTARACH

THE SUPREME COURT

[S:AP:IE:2018:000074]

Clarke C.J.
O'Donnell J.

Dunne J.
O'Malley J.
Finlay Geoghegan J.

Between/

A.P.

Applicant/Appellant

AND

The Minister for Justice and Equality

Respondent

Judgment of Mr Justice Clarke, Chief Justice, delivered the 31st May, 2019.

1. Introduction

1.1 On 1 September 2014, the respondent ("the Minister") made a decision to refuse an application by the appellant/applicant ("Mr. P.") seeking naturalisation as an Irish citizen. Thereafter, Mr. P. brought these proceedings in the High Court in which he sought, in substance, to quash that decision of the Minister and to obtain an order of mandamus requiring the Minister to disclose the information on which the decision to refuse was based.

1.2 While it will be necessary to go into the background facts in a little more detail in due course, in essence the underlying basis for Mr. P.'s proceedings stemmed from the fact that the only reason given for the Minister's refusal was stated to be on the basis of national security considerations. However, the basis for the Minister reaching a conclusion that national security interests justified both the refusal of Mr. P.'s application for naturalisation and the refusal to provide any further details was not specified to any greater extent than the assertion that national security justified those decisions.

1.3 There had been a previous successful application by Mr. P. to the High Court following an earlier refusal by the Minister to grant Mr. P. a certificate of naturalisation in April 2013. The Minister provided no reason for the refusal on this earlier occasion, relying on certain provisions of the Freedom of Information Act 1997, as amended, for so doing. The High Court (McDermott J.) held that there was nothing to inhibit the Minister from providing both a reason for the refusal of the application and a justification for the withholding of any information pertaining to the underlying basis for that reason. On that basis, the High Court granted an order of *certiorari* quashing the decision of *the Minister (A.P. v. Minister for Justice and Equality (No. 2)* [2014] IEHC 241). Thus, it was made clear that the Minister was required to give some reasons. In addition, in the course of those previous proceedings, certain documents were disclosed to Mr. P., although privilege was claimed and sustained in respect of other documentation.

1.4 Thus, the position had evolved, by the time of these proceedings, to one in which Mr. P. had access to certain limited information and had been given the broad reason of national security for the Minister's decision. In essence, the issue which was before the High Court in this case was as to whether that was sufficient to meet Mr. P.'s entitlements and the Minister's obligations.

1.5 The High Court (Stewart J.) found in favour of *the Minister (A.P. v. Minister for Justice and Equality* [2016] IEHC 408). Mr. P. appealed to the Court of Appeal which,

again, through two separate judgments delivered respectively by Gilligan and Hogan JJ., found for the Minister (*X.P. v. Minister for Justice and Equality* [2018] IECA 112). It was against that decision of the Court of Appeal that Mr. P. sought leave to appeal to this Court. It is first appropriate to turn to the basis on which leave to appeal was granted.

2. Leave to Appeal

2.1 By determination dated 25 September 2018 (*A.P. v. The Minister for Justice and Equality* [2018] IESCDET 131), this Court granted leave to Mr. P. to appeal the decision of the Court of Appeal on the following grounds, as set out in para. 11 thereof:-

> (i) Whether the grant of citizenship is within the unfettered discretion of the Minister for Justice and Equality and, if so, whether any procedures inure to the benefit of an applicant?
>
> (ii) Whether national security issues need to be disclosed to an applicant for citizenship in such a way as to enable that applicant to meet, or at least make any relevant representations that may be thought appropriate, those concerns prior to any decision against a grant of citizenship is made?
>
> (iii) Whether fairness of procedures demands that a decision internal to the Department of Justice and Equality to refuse citizenship be reviewed externally and by what mechanism?
>
> (iv) Whether the European Union Charter of Fundamental Rights and Freedoms governs the application for and refusal of citizenship by the Minister for Justice and Equality?

2.2 In order to more fully understand the precise issues which arise on this appeal, it is appropriate to set out the facts and the proceedings to date in a little more detail.

3. The Facts and the Proceedings to Date

3.1 By way of background, Mr. P. is an Iranian national who was granted refugee status in Ireland in December 1991. Since that time, he has made a number of applications for a certificate of naturalisation under the provisions of the Irish Nationality and Citizenship Act 1956, as amended ("the 1956 Act"), all of which have been denied. The most recent application for naturalisation was made by Mr. P. in August 2011. As mentioned above, on 30 April 2013, the Minister issued a first decision in respect of that application, refusing to grant Mr. P. a certificate of naturalisation. The Minister provided no reason for the refusal of this application, relying on certain specified provisions of the Freedom of Information Act 1997, as amended, for so doing.

3.2 Mr. P. challenged this decision in the High Court by way of judicial review, seeking an order of *certiorari* quashing the Minister's decision, an order of mandamus requiring the Minister to provide the reason for his decision and a declaration that the Minister's failure to provide reasons was unlawful, on grounds, amongst other things, that the Minister's actions breached his right to fair procedures, constitutional justice and an effective judicial remedy.

3.3 In the course of these earlier proceedings, an affidavit was filed on behalf of the Minister by Mr. John Kelly, Assistant Principal Officer in the citizenship section of the Department of Justice and Equality, alluding to the existence of certain confidential documents concerning the application and Mr. P.'s background (Documents A, B and C), which underlay the basis for the Minister's refusal to grant a certificate of naturalisation and over which the Minister asserted public interest privilege. The basis for the claimed privilege was that the disclosure of the documents in question would be adverse to the

interests of the State. Mr. P. sought to contest the privilege claimed and to be permitted to inspect the documents referred to in Mr. Kelly's affidavit.

3.4 In a judgment delivered by McDermott J. on 17 January 2014 (*A.P. v. The Minister for Justice and Equality* [2014] IEHC 17), the relevant documentation on which the Minister relied was reviewed and the claim of public interest privilege was examined. It was held that Document A should be disclosed in full, that Document B should be disclosed in a redacted form and that it was in the public interest that the Minister's claim of privilege over Document C should be upheld in its entirety. This decision was not appealed. The disclosed documents indicated that a recommendation had been made to the Minister that Mr. P. should not be granted a certificate of naturalisation because the author of the report could not be satisfied that he met the "good character" requirement of s. 15(1)(b) of the 1956 Act, as amended.

3.5 Following a hearing of the substantive judicial review proceedings, in a judgment of the High Court (McDermott J.) delivered on 2 May 2014 (*A.P. v. Minister for Justice and Equality (No. 2)* , as previously referred to), it was held that the decision of the Minister should be quashed on the basis that the cited provisions of the Freedom of Information Act 1997 did not assist in providing an understanding of the decision-making process or the reasons for the refusal of the application. Further, having regard to the existence of the reason for the refusal as disclosed in the relevant documentation, McDermott J. held that the Minister was in a position to give notice of Mr. P.'s failure to fulfil the statutory requirement of "good character" and if it was considered appropriate to refuse to disclose any further information as to the underlying basis of that conclusion, a justification should have been furnished in that regard based on the fact that the recommendation was made on the basis of information which was properly the subject of privilege.

3.6 Mr. P.'s application of August 2011 was then submitted for reconsideration together with further submissions on the part of Mr. P. On 1 September 2014, the Minister issued the decision refusing to grant a certificate of naturalisation which is the subject matter of the current proceedings. The refusal was made on the basis of a report prepared by the office of the Minister dated 9 July 2014 which was signed by the Minister and furnished to Mr. P. on behalf of the Minister along with her decision to refuse his application. This recommended against the grant of a certificate of naturalisation was on the grounds that:-

> *"…[T]he Minister cannot have confidence in [the applicant's declaration of fidelity to the Irish State and his undertaking to faithfully observe the laws of the State and to protect its democratic values] in this case nor be satisfied that the applicant meets the condition of good character as specified in s. 15(1)(b) of the Irish Nationality and Citizenship Act 1956 as amended…"*

3.7 The report makes clear that this recommendation was based on an "attached report" which contains information regarding Mr. P. received on a strictly confidential basis and which appears to relate to "national security/international relations considerations". It is further stated that the information contained within the confidential report cannot be disclosed on the basis of the "State's interest in protecting its security and international relations" which were said to outweigh Mr. P.'s interests in knowing the Minister's specific basis for refusing to grant a certificate of naturalisation. It appears from the affidavit evidence of Mr. John Kelly, filed on behalf of the Minister, that the confidential report which was attached to the report of 9 July 2014 is the same as that described as Document C in the judgment of McDermott J. delivered on 17 January 2014, over which a claim of privilege had been sustained.

3.8 Mr. P. subsequently initiated these judicial review proceedings, seeking, amongst other things, an order of *certiorari* in respect of the decision of the Minister dated 1

September 2014 and an order of *mandamus* requiring the Minister to disclose the gist of the information which forms the basis for the refusal. In the decision of the High Court, Stewart J. held that Mr. P. failed to discharge the burden of proof on him to establish that there was an error in the decision making process engaged in by the Minister and refused to grant the reliefs sought. This conclusion was reached on the basis, amongst other things, that the interests of national security comprised a legitimate justification for the decision of the Minister not to issue reasons for her decision. Further, she considered that the finding of McDermott J. that Document C should remain confidential was *res judicata* and that to disclose the gist of Document C, as requested by Mr. P., would effectively lead to the disclosure of some measure of the document's content.

3.9 This decision was upheld by the Court of Appeal (Gilligan, Hogan and Peart JJ.). In his judgment, Gilligan J. agreed with the conclusion of the trial judge, noting that, in compliance with the duty of an administrator to give reasons as set out in *Mallak v. Minister for Justice* [2012] IESC 59, [2012] 3 I.R. 297, Mr. P. was given a reason for the refusal of his application, namely that it was in the interests of national security. Further, reliance was placed on the judgment of McDermott J. of 17 January 2014 to the effect that it was in the public interest that aspects of Document B and the entirety of Document C remain confidential. Considering that the grant of citizenship was a privilege, and that the decision of the Minister did not deprive the appellant of his liberty, Gilligan J. concluded that the interests of national security outweighed the interests of Mr. P. to know the content of the materials relied on and that it was within the Minister's discretion to refuse to release the same.

3.10 Hogan J., concurring, emphasised that the judicial finding of McDermott J., to the effect that the material which was not disclosed to Mr. P. in the course of the application presents real and pressing national security concerns, meant that the fair procedure rights of Mr. P. must be necessarily constrained. Further, he held that the creation of a system of special counsel, as exists in other jurisdictions, lies outside the scope of the judicial function.

3.11 Finally, Hogan J. rejected the submission made on behalf of Mr. P. that the Minister's refusal involves the implementation of European Union law for the purposes of invoking the guarantees to good administration and the right to an effective remedy contained in the EU Charter of Fundamental Rights and Freedoms. He found that the decision to grant citizenship by naturalisation represents an exercise of sovereign power by the State, in accordance with the Article 9.1.2 of the Constitution. In his view, such a decision remains a matter exclusively for the Member State and therefore does not involve the implementation of Union law. On that basis, he held that the EU Charter of Fundamental Rights had no application to the issues presented on the appeal.

3.12 As noted earlier, the issue, in essence, is as to whether Mr. P. was entitled, as a matter of law, to any further reasoning in relation to the decision to refuse, so as to thereby render the Minister's decision unlawful on the basis of insufficient reasons. Before going on to address the specific legal issues which arise in that context, it is appropriate to make a number of observations which provide some of the backdrop to the issues which require to be determined.

4. Some Observations

4.1 The first area of observation derives from the specific case made by Mr. P. in these proceedings. The case made on behalf of Mr. P. before this Court concerned a contention that the reasons given by the Minister for refusing naturalisation did not meet the criteria identified by this Court in a series of cases following on from *Mallak* . The obligation of a public law decision maker to give reasons is, of course, well established. It is also clear that there are two separate, although frequently overlapping, bases for the obligation in question. The first can be found in the obligation of transparency, whereby persons with a legitimate interest in public law decisions are

entitled to know why those decisions were taken. The second stems from the fact that persons who may be affected by public law decisions are entitled to sufficient information to enable them to consider whether it might be appropriate to exercise a right of appeal (if one exists) or to seek to challenge the decision through judicial review proceedings

4.2 While the right to reasons is well established, there can, of course, often be a legitimate debate about the precise extent to which such decisions require to be reasoned and the level of detail as to the reasoning which requires to be provided. The underlying rationale for the obligation to provide reasons will inevitably inform the assessment of the extent of the detail which requires to be provided.

4.3 But it is also clear that a person who may potentially be directly and adversely affected by a public law decision is entitled to be heard in the decision making process and, in that context, will ordinarily be entitled to be informed of any material, evidence or issues which it might be said could adversely impact on their interests in the decision making process. See, inter alia, the judgments of this Court in *State (Gleeson) v. Minister for Defence* [1976] I.R. 280, *Kiely v. Minister for Social Welfare* [1977] IR 267 and *State (Williams) v. Army Pensions Board* [1983] I.R. 308.

4.4 The entitlement to know the case against you is itself a fundamental part of the right to be heard, for the right to be heard would be of little value if the person concerned did not know the issues which might adversely affect their interests in the relevant decision making process.

4.5 However, the precise nature of the information to which a person involved in a public decision making process may be entitled can itself be dependent on the nature of the decision concerned. At one end of the spectrum can be found cases where it is sought to make an adverse decision potentially interfering with the rights of or imposing obligations on an individual. In a similar vein may be cases where a person has a legal right under law to a particular entitlement, provided that certain facts can be established but where there may be evidence or materials available to the decision maker to suggest that the necessary facts are not present. In such cases, it may well be realistic to speak of the right to know the case against oneself.

4.6 On the other hand, there may be cases where a broad discretion is given to the decision maker as to whether a particular benefit should be conferred in circumstances where no legal right as such to the benefit exists. In such a case, the applicant for the benefit has the right to be heard, in the sense of the right to make whatever representations are considered appropriate. There may also be an entitlement, in some circumstances, to be told of any information, evidence or materials which might adversely affect the exercise by the decision maker of the discretion in question, so as to afford the person concerned an opportunity to comment on those matters. The precise extent to that entitlement will be dependent on all the circumstances of the case, including the nature of the decision to be taken. However, there are undoubtedly significant differences between cases where rights may be interfered with or obligations imposed, on the one hand, and cases where a benefit or privilege is sought, on the other.

4.7 Against the backdrop of that analysis, it may be that, in some circumstances, there will not be any significant material difference between the right to know and make representations on the case which might be made against a person in the context of a public law decision, on the one hand, and the right to be given reasons for an adverse decision, on the other.

4.8 However, as noted above, the precise nature of the process to which a person potentially affected may be entitled can be dependent on the nature of the decision to

be taken. But be that as it may, the entitlement of a party to know of the materials, evidence and issues which might adversely affect their interests in the decision making process is itself a function of the right to be heard and the entitlement to involve themselves in the process in a way which affords the interested party an appropriate opportunity to engage with the issues which might adversely affect their interests. That rationale is, at the least, very similar to the rationale for giving reasons for a decision once made. The extent of the obligation is informed, at least in significant part, by the obligation to provide a transparent process and to afford a party with legitimate interests a proper opportunity to either effectively participate in the decision making process (where the right to know the case against oneself is engaged) or to consider an appeal or judicial review (where the right to reasons for a decision already made is engaged).

4.9 The reason for that analysis is as the background for an observation that while the case made on behalf of Mr. P. in these proceedings and on this appeal concerns reasons given for a decision already made, the same logic would seem to inevitably apply to any issue concerning the obligation to provide similar information in advance of the decision so as to enable a party, such as Mr. P., to engage in the decision making process. Put simply, it would require particular circumstances for it to be possible to envisage that there would be a difference between the nature of the information which required to be given pre-decision so as to enable the right to be heard to be effective and the nature of the reasons which would require to be given post-decision to enable a party to consider whether they should appeal or review. While, therefore, this case is directly concerned with reasons given for a decision already made, it would seem clear that much of the analysis would necessarily have equal application to a consideration of the information which would require to be furnished during the decision making process itself.

4.10 It should, of course, be emphasised that the precise application of the right to be heard and the right to be given reasons can, as previously noted, be dependent on the nature of the decision concerned. In particular, the precise extent of either entitlement may be influenced by whether the decision involves rights and obligations, on the one hand, or a benefit or privilege, on the other. However, the point is that, however extensive or otherwise the entitlement may be in the circumstances of a particular type of case, there is unlikely to be any great difference between the extent of the right to know of possible reasons for a future adverse decision, compared with the right to know the reasons for such a decision once made.

4.11 In the context of a decision concerning naturalisation such as is at issue in these proceedings, it is also necessary to take into account the fact that a person can renew or repeat an application despite a previous refusal. The decision is not of the sort where, once taken, it is binding in practice for the future and not capable of being re-opened, or only is subject to being re-opened in limited and defined circumstances. Thus, there may, in reality, be little difference in practice between establishing a right to greater reasons for an adverse decision once taken as opposed to obtaining information which may be relevant to making representations in respect of a decision under consideration. If adequate reasons are given in a decision, having regard to all relevant circumstances, then a party who feels that there is anything that they may be able to add to their application can always make a renewed application and deal with those issues in whatever way they consider appropriate.

4.12 The second area of observation concerns the question of whether, and if so, to what extent, it could ever be permissible in the Irish legal system for a court to have regard to evidence, which is material to the determination of a substantive issue in a case, in circumstances where all of the parties did not have access to all of that evidence. It is certainly clear that there is no general procedure known to Irish law which would allow a case to be decided on the basis of evidence which all affected parties did not have the opportunity not only to know, but also to challenge. In that

context, some limited examples where, perhaps, an absolutely pure application of that rule have been held not to apply need to be considered.

4.13 First, there is the area of discovery of documents. It is, of course, the case that any party to civil proceedings in Ireland (including public law proceedings) is entitled to invite a court to require another party to the same proceedings (and in some limited circumstances, third parties who are not directly involved) to disclose on oath the existence of any documents which might be relevant to the issues in the case. In addition, a party will be entitled to inspect and make copies of any documents, subject only to a valid claim for privilege being maintained. It is in the context of such a claim for privilege being made on behalf of a State authority that issues can arise which require the balancing of legitimate State interests and the interests which are secured by the proper administration of justice, in the context of a court having access to all relevant evidence which might impact on the just resolution of proceedings. It is worth briefly tracing the history of the development of the case law in that regard. Irish law in this context is based on the common law and the historical position in the United Kingdom was that the production of documents by State authorities could legitimately be resisted on the basis of a certificate from a relevant minister of government to the effect that State interests were affected, as held by the House of Lords in *Duncan v. Cammell Laird & Co. Ltd* [1942] AC 624.

4.14 However, the Irish courts ultimately took a different view, first, in *Murphy v. Corporation of Dublin* [1972] I.R. 215 where Walsh J., on behalf of this Court, held at p. 234 that it was "impossible for the judicial power in the proper exercise of its functions to permit any other body or power to decide for it whether or not a document will be disclosed or produced". When an attempt was subsequently made to revisit the issue in *Ambiorix v. Minister for Environment (No. 1)* [1992] 1 I.R. 277, this Court approved the principle laid down in *Murphy* to the effect that any conflict between the public interest involved in the production of evidence in judicial proceedings and the public interest involved in the confidentiality of documents pertaining to the exercise of the executive power falls to be decided by the courts.

4.15 The position is, therefore, well settled. The ultimate decision in Ireland on whether legitimate State interests outweigh the requirement to produce documents in the context of court proceedings is one which must be made by a court rather than by the State authority itself. Furthermore, it is clear from the case law, as per Walsh J. in Murphy at pp. 234-235 which was approved by Finlay C.J. in *Ambiorix* at pp. 283-284 and more recently restated by McKechnie J. in *Keating v. Radio Telefís Éireann and Ors* . [2013] IESC 22 at para. 36, that, if it is considered necessary, the Court may itself look at the documents concerned to enable the Court to make an appropriate assessment. In that context, the party seeking to inspect the contested document will obviously not have sight of it and counsel representing that party will only be able to make submissions of a general nature. It follows that this is one, admittedly very limited, case where a judge, in ruling on what is essentially a procedural and evidential matter, may have regard to materials (in the shape of the documents concerned) which are not available to one of the parties. It is also true that judges sometimes exercise a similar role where a document is disclosed in a redacted form as part of the discovery process but where it is asserted that the redacted portions contain material which is irrelevant to the case in question and not, therefore, properly the subject of disclosure. Judges have sometimes looked at the documents concerned in an unredacted form to satisfy themselves that the asserted irrelevance is correct.

4.16 But all such cases do not involve the substantive determination of the case but rather, are only concerned with the disclosure of potential evidence. It is, of course, the case that the ultimate resolution of proceedings can sometimes depend on whether certain evidence is made available but that does not take away from the fact that the Court which ultimately decides the merits of the case will only have access to the same

evidence that is available to all of the parties. In at least many cases, a judge who has to read confidential information for the purposes of determining a disclosure obligation will not be the judge who will ultimately decides the merits of the case. It should be emphasised that the question of whether a judge who has seen material which is not ultimately permitted to be regarded as evidence in the case is to decide the merits of the case will depend on whether it can be said that a sufficient conflict arises from those circumstances such as to make it inappropriate for the judge concerned to remain the final arbiter of the merits of the case.

4.17 That there is an exception to the rule which prohibits materials being considered by a judge which are not available to all of the parties, which can be found in the discovery process where State immunity is asserted, cannot be doubted. However, for the reasons which I have sought to analyse, it is a very limited exception. It will be necessary to return in due course to an analysis of the implications of the law in that area for the resolution of this case.

4.18 One other area might be mentioned, being that of intellectual property litigation. Issues relating to confidentiality often arise in patent proceedings, where relevant documents in the disclosure process can contain commercially sensitive information, the disclosure of which may give rise to a risk of significant prejudice to the producing party. The issue of disclosure is commonly addressed by the establishment of what is known as a "confidentiality ring" of persons, usually the opposing party's lawyers or experts, who are selected by the court and who may alone view the confidential material which material will be withheld from the relevant party to the litigation. Such practice is well established as a matter of English law: see, inter alia, the principal authority of the Court of Appeal in *Warner-Lambert Company v. Glaxo Laboratories Ltd* [1975] R.P.C. 354.

4.19 In this jurisdiction, protective limitations on disclosure in the context of patent proceedings were first considered in *Koger Inc. & Ors. v. O'Donnell & Ors* . [2009] IEHC 385. Kelly J. considered a number of decisions of other jurisdictions and determined that a restriction on disclosure, by means of the establishment of a "confidentiality ring", will only be permitted where it can be justified by exceptional circumstances. In those proceedings, it was concluded that the interests of justice required limited disclosure of the material in question to the plaintiffs' legal advisors and to a nominated officer of the plaintiffs, under strict conditions so as to delimit the use or further disclosure of the information in ways which would prejudice the defendant. More recently, the principle set out in *Koger Inc. v. O'Donnell* was followed by the High Court (McDonald J.) in *De Lacy v. Coyle* [2018] IEHC 428.

4.20 However, it must be emphasised that the sort of evidence with which Courts are concerned in this area is essentially expert material. Thus, both parties' experts will have access to all of the relevant materials. The receiving party's lawyers will not only have access to the material but will also be able to consult with that party's experts so as to assist in the cross-examination of their opponents' witnesses. The extent to which the individual client or party could make any meaningful contribution to that process would be quite limited. If an opponent's expert view is to be contested, then this can only really be done by either, or both, competing experts' testimony or by the cross-examination by a skilled lawyer of the expert concerned, almost always with the assistance of that lawyer's own expert to give guidance on the appropriate lines of questioning. The client's input is likely to be minimal, if not non-existent.

4.21 A very different situation arises where the only way in which evidence or materials concerned could be challenged would inevitably require direct input from the client him or herself. In such a case, the ability to challenge an opponent's evidence is dependent on the client knowing that evidence so that, if considered appropriate, the client can give conflicting evidence or explanations which might impact on the inferences to be

drawn. Likewise, there will be no possibility of effective cross-examination if the basis for the adverse view is not known in the first place.

4.22 Against the background of that analysis, it seems to me that it can be said that it does not appear that there is any provision in Irish law which would allow a court, making a substantive decision on the merits, to have regard to information which is not available to both sides of the case, even if there may be limited circumstances where certain confidential information may only be available to the lawyers and experts on one side and where there may also be what might be called an exception where the Court is simply considering whether documents should be disclosed, rather than the substantive merits of the case itself.

4.23 I should emphasise that this analysis is concerned with the availability of evidence or materials to parties in judicial proceedings. Part of the underlying rationale for the decisions of this court in *Murphy* , and also in *Ambiorix* , derived from the fact that the evidence concerned was potentially relevant to judicial proceedings and that the administration of justice itself was therefore engaged. The purpose of the analysis which I have just conducted is to identify the fact that, in judicial proceedings, a court cannot have regard, in coming to its ultimate conclusion on the merits, to materials or evidence which were not available generally to the parties. It does not necessarily follow that, in all circumstances, a balancing of competing interests would necessarily lead to the same conclusion in the context of a purely administrative decision making process which did not involve the administration of justice itself. Likewise, it is not for a court to rule on whether materials need to be disclosed except in proceedings in which the lawfulness of an administrative decision is challenged. Such questions are at least initially matters for the administrative decision maker, subject only to review by the courts on the grounds of lawfulness.

4.24 That being said, however, if there should be a judicial review challenge to an administrative decision and if particular documents can be shown to be relevant to the issues which arise on that challenge, the question of whether the party challenging the administrative decision concerned can have access to those documents becomes a matter arising in the administration of justice and, thus, the issue of whether the content of the documents concerned requires to be disclosed becomes a matter solely for the Court.

4.25 Difficult questions arise where it is said that there are overriding State interests which preclude certain documentation being given to an individual who challenges an administrative decision in judicial review proceedings. The Court is aware that there are a number of jurisdictions where judges can have access, in certain circumstances, to State security information which is not made available to a party which might be affected by a public law decision under challenge in the courts. On one view, it might be said that a judge being required to review for legality an administrative decision, without having access to some of the information which informed that decision, is placed in a difficult position in being able properly to assess the legality of the challenged decision. But there is in Irish law what appears to me to be an equally potent principle to the effect that it is wrong for a judge to make a decision when influenced by evidence which was not available to a party and which, therefore, the party concerned was not able to challenge in any meaningful or effective way.

4.26 However, short of breaching the State's legitimate and proportionate security interests, it is difficult to see how a process can be constructed which might not, in at least some cases, potentially infringe one or other of what might otherwise be considered matters of principle. Either the Court will have to assess legality without having access to information which formed part of the administrative decision making process but which is covered by State security privilege or the Court will have to make a decision on the substantive merits of the case on the basis of evidence or materials

which a party was not permitted to access and could not, therefore, challenge. Neither proposition is particularly attractive but one or other solution must be found if State security privilege is to be upheld. Irish law clearly favours the solution which does not permit the Court to have regard to materials not available to the parties.

4.27 Whether, and if so, to what extent, it might be possible to put in place, by legislation, a legal basis for a departure from that position which would meet a test of proportionality, having regard to the legal rights and obligations at stake, is a matter which does not arise in this case and on which I would not, therefore, express any opinion at this stage. In that context, I would agree with the observation of Hogan J. in the Court of Appeal in this case to the effect that the creation of a system such as the special counsel process adopted in the United Kingdom could not be achieved solely by judicial decision. It is sufficient to record that, in the absence of any such legal basis, there is no process known to Irish law which would enable a court determining the merits of a case such as this to have regard to materials which are withheld from a party.

4.28 Having made those observations, I now turn to an analysis of the central issue which arises.

5. The Central Issue

5.1 The real issue which lies at the heart of these proceedings is as to the extent to which the undoubted difficulties which the State would face in obtaining potentially vital intelligence, either from its own agencies or, perhaps even more importantly in the Irish context, from agencies of friendly foreign powers, can provide a legitimate legal and constitutional justification for the approach taken by the Minister in this case.

5.2 It seems clear that much relevant intelligence information will, in the Irish context, come from agencies of friendly foreign states. It seems almost inevitable that such information will be shared only on the basis that it remains confidential. There can be little doubt but that an obligation in law to disclose such information to parties who may be mentioned in the relevant intelligence material could lead to such information not being available to the State at all. The potential adverse security consequences which would follow from the drying up of international intelligence are all too obvious. That is not to say that a mere assertion of the possibility of such difficulties being encountered by the State can necessarily, and in each and every case, trump all other considerations. That analysis does, however, emphasise the weight which needs to be attached to any circumstance which might realistically lead to a significant diminution in the availability of relevant security information to the Irish authorities stemming from the reluctance of friendly foreign agencies to supply such information because of the risk of it being disclosed.

5.3 It must, of course, be recognised that, in many cases, the position of the State and its agencies may be impaired if they are unable, for reasons such as those which lie at the heart of the refusal in this case, to make information available. If the State is, as it were, the moving party, whether in criminal or civil proceedings, then the onus rests on the State to present before the Court sufficient evidence to allow the Court to reach whatever conclusions are required in order that the claim advanced by the State can be made out. In a criminal prosecution, evidence to establish the guilt of an accused beyond reasonable doubt needs to be put forward. In civil proceedings, evidence sufficient to establish the facts on the balance of probabilities needs to be led. If the State is not in a position to present evidence in its possession, then that may well lead to the State being unable to establish its case. Indeed, in certain circumstances the case may never be brought because the State would be unable to bring the proceedings with any chance of success due to lack of evidence which it is prepared to disclose.

5.4 One illustration of this impairment can be seen in the context of the criminal offence of membership of an illegal organisation. Section 3(2) of the Offences against the State (Amendment) Act 1972 ("the 1972 Act") renders admissible in evidence the belief of a Chief Superintendent of the Gardaí that a person accused of the criminal offence of membership of an illegal organisation is in fact a member of that organisation. As referred to in oral submissions, in *Redmond v. Ireland* [2015] 4 I.R. 84, this Court held that s. 3(2) of the 1972 Act would not be consistent with the Constitution if it permitted the conviction of a person solely on the basis of opinion evidence, in circumstances where privilege is asserted over all of the material which led to the formation of that opinion. The opinion evidence in such cases can, of course, like any other evidence, be challenged as a matter of principle. However, a practical problem will necessarily arise if the entire basis for the opinion is stated by the witness concerned to derive from intelligence which cannot be disclosed. A constitutional construction of this provision, therefore, requires that the belief evidence of a Chief Superintendent be supported by some other evidence implicating the accused in the offence charged, which evidence has to be independent of the witness giving the belief evidence. Therefore, in such criminal proceedings, where opinion evidence is admitted in circumstances where no justification for the opinion is put forward other than material which is not disclosed on the grounds of confidentiality, an acquittal will almost certainly follow.

5.5 Thus, it may well be seen that, in many circumstances, the consequence for the State or its agencies in being unable, for reasons of security or international relations and confidentiality, to place certain evidence before a court or an administrative body in a manner where that evidence will be disclosed to a relevant party, may simply be that the State will be unable to achieve the legal ends which it wishes.

5.6 But this case is different. Here, the person who potentially suffers by the unavailability of the evidence is Mr. P., who is unable to know in any detail the national security reasons which apparently justify both the refusal of naturalisation and the refusal of detailed reasons. Mr. P. is, therefore, unable in any practical way to contest the issue. The real question is as to the proper approach, as a matter of principle, in a case such as this.

5.7 I propose to turn shortly to the principle of proportionality. I accept that this principle does not directly apply in the circumstances of this case, for it is not sought to interfere, as such, with any right which Mr. P. might enjoy. The conferring of a certificate of naturalisation is a benefit or privilege to which Mr. P. is not entitled as of right. Rather, the extent of his rights is confined to the entitlement to make representations as to why such a certificate should be granted to him.

5.8 However, it seems to me that, by analogy, the principles which underlie proportionality can have some relevance in the circumstances of this case. Here, the Court is concerned with a situation where, ordinarily, it might be said that Mr. P. would be entitled to more detailed reasons for the Minister's refusal which he seeks to challenge. In that context, it is, perhaps, appropriate to identify two different ways in which it might be said that detailed reasons cannot be given.

5.9 First, it is clear from the *Mallak* case law that there may well be situations where it is not, in practice, possible to give any detailed reasons for the administrative decision concerned may involve the exercise of a very broad discretion by the decision maker which may not, by nature of the decision itself, be susceptible to detailed reasoning. Where the decision itself is based on a broad general discretion, then it may be that the reasons which can be given are themselves broad and general.

5.10 However, there may be a second category of case where there may be a different basis on which the failure to give more detailed reasons may be sought to be justified, being that there are legitimate considerations which may preclude going into greater

detail. In such a case, it might well be possible to determine that, as a matter of practicality, more detailed reasons could be given but that it would be wrong to require such detail, having regard to legitimate considerations. It seems to me that, in the latter case, there is at least an analogy with the principle of proportionality for, in such circumstances, the issue is as to the extent to which those legitimate considerations can justify declining to provide reasons which would otherwise be required. In that way, the overall consideration is at least not dissimilar to that which underlies the doctrine of proportionality, which is itself concerned with the justification for impairing rights in order to protect other legitimate considerations. I should emphasise that, like in all other cases, such an analogy should not be taken too far but I find the comparison to be at least of some assistance in the task which this Court has to confront in resolving this case.

5.11 One of the core elements of the principle of proportionality is identified in the Irish jurisprudence in *Heaney v. Ireland* [1994] 3 I.R. 593, where, at p. 607, Costello J. first invoked the formulation of the doctrine of proportionality which was set out by the Canadian Supreme Court *in R v. Chaulk* (1990) 3 S.C.R. 1303:-

> *"The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:—*
>
> > *(a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;*
> >
> > *(b) impair the right as little as possible, and*
> >
> > *(c) be such that their effects on rights are proportional to the objective..."*

5.12 One key element of the test is that the measure adopted should only impair rights to the minimum extent necessary to achieve the legitimate public end. It seems to me that there is a legitimate basis for applying a similar consideration to a situation where, as here, more detailed reasons could, as a matter of practicality, be given but where it is said that there are legitimate interests involved which justify not going further. In such circumstances, it seems to me to follow that a failure to give more detailed reasons can only be regarded as justified if that failure impairs the entitlement to reasons to the minimum extent necessary to protect the legitimate countervailing interests engaged.

5.13 In those circumstances, it seems to me that it is incumbent on the Minister to put in place measures which only impair the entitlement of Mr. P. to be informed of the reasons for any adverse decision to the minimum extent necessary to protect legitimate State interests.

5.14 It is true that an assessment had been made by the High Court in the earlier proceedings previously referred to, applying the balancing test identified in *Murphy* and *Ambiorix* , to the effect that the relevant documentation did not have to be disclosed. However, it does not follow that it might not be possible to provide a synopsis of that material, or some of it, which gave some indication of the issues of concern, but in a manner which would not impair any of the security interests at play. Whether that is so in the circumstances of this case is not, of course, a matter which this Court can determine, although it is asserted by the Minister, and averred to by in the affidavit evidence filed on behalf of the Minister, that this would not be possible in the circumstances of this case. But it remains a possibility.

5.15 Furthermore, there is no reason, in principle, why an independent person, with appropriate security clearance, could not be given the task of assessing the documentation for the purposes of advising on whether, in that person's opinion, there was any further information which could properly be given.

5.16 In that context, it is important to emphasise that there is at least the possibility of there being a difference between the justification for the disclosure of a document, even in redacted form, and the disclosure of at least some aspects of what counsel for Mr. P. described as the gist of the document. It may, of course, be the case that it would be impossible to disclose even part of the gist of the reasons set out in a document without impairing the very same legitimate State interests which would prevent the disclosure of the document in question. But that need not always be so.

5.17 It must be recalled that the discovery procedure is not one whereby information, as such, is required to be disclosed, but rather one where existing documentation must be made available. Thus, if inspection is permitted (possibly after a successfully contested application challenging privilege claimed), it is the document itself, in whatever form it may be and with or without appropriate redaction, which must be disclosed. I agree with the views expressed in the courts below to the effect that the decision made by McDermott J. in the previous proceedings already referred to is *res judicata* , so that it follows that the disclosure of the entirety of Document C and the redacted parts of Document B must be held to be impermissible because of State privilege. But the decision of McDermott J. related to those documents in the form in which they were held by the Minister. While it is also true that the basis for the views expressed by McDermott J. was that the information contained in the documents could not properly be disclosed, it does not necessarily follow that it would be impossible to put some of the information contained in those documents into a different form, such that its disclosure would not impair State interests or, at least, would not do so to a sufficient extent so as to outweigh what might otherwise be the entitlement of Mr. P. to be given more detailed reasons for the Minister's refusal.

5.18 On that basis, I have come to the view that it has not been established that the Minister has impaired the entitlement which Mr. P. would otherwise enjoy to more detailed reasons only to the minimum extent necessary to secure legitimate State interests. It is at least possible to put in place an enhanced process whereby, for example, an independent assessment could be made as to whether any version of the information, or part of it, could be provided in a way which would not affect State interests to the extent that disclosure should not be required.

5.19 It is not, of course, for the Court to be prescriptive as to the precise form of any process which should be put in place. It is, however, for the Court to assess whether it would be possible to put in place measures which would interfere to a lesser extent with the entitlement of a person such as Mr. P. to more detailed reasons. The analysis just conducted is by way of example to illustrate the reasons why I would suggest that it is possible to put such an enhanced process in place. On that basis, I would conclude that it has not been demonstrated that the process which was engaged in in the circumstances of this case can be said to have impaired Mr. P.'s entitlement to reasons only to the minimum extent necessary so as to protect legitimate State interests. I would add that I should not, in this judgment, be taken as expressing a view, one way or the other, as to the type of measure which would be necessitated to provide a legally sound process.

5.20 I should emphasise that it is not, in my view, necessary that the final decision making role is taken away from the Minister. Both as an exercise of the executive power of the State and under statute, it is the Minister who must make the final decision on naturalisation and, having regard to the State interests at stake, the Minister must make the final decision as to what information must be disclosed, subject only to the

overriding power of the Court, in the course of the discovery process in judicial review proceedings, to exercise a judgment on whether State immunity privilege has been correctly claimed.

5.21 Apart from determining such privilege issues, it is clear that a court would not play any role in any enhanced process other than, if called on, to consider the lawfulness of the process and the decision taken at the end of it. It might be possible to put in place a legislative scheme which gave to a judge a specific role in the decision making process itself. However, no such legislative scheme currently exists. It would be a breach of the separation of powers for a court to devise such a scheme and impose it on the Minister.

5.22 It therefore follows that the courts cannot currently exercise any role in second guessing the underlying decision, save by means of ordinary judicial review proceedings. In the context of such proceedings it may, of course, be open to a court to review documentation whose disclosure is sought, in the same way as was adopted by McDermott J. in the course of the earlier proceedings to which reference has been made. But for the reasons analysed earlier in this judgment, it is clear that the only information a court can consider in making a substantive judicial review decision on the lawfulness of a ministerial refusal, such as is at issue in these proceedings, must be materials which are available to all of the parties.

5.23 However, I would hold that it has not been demonstrated that the process followed in this case minimised Mr. P.'s entitlement to reasons to the minimum extent necessary and I would, therefore, quash the decision of the Minister on such grounds.

5.24 Before concluding this judgment, it is necessary to say something about the argument raised which suggested that this Court should have regard to the Charter of Fundamental Rights of the European Union in its assessment of the case. The underlying dispute between the parties on this question was as to whether the Charter had any application. Having regard to the fact that I propose that the Minister's decision be quashed on purely national law grounds, it follows that it is not, strictly speaking, necessary to address this Union law issue. However, I propose to make some observations on that topic.

6. The Charter

6.1 The starting point has to be to note that the decision under challenge in this case is one to refuse naturalisation. It is clear that, ordinarily, the conditions for the acquisition and loss of nationality are, both as a matter of international law and as a matter of Union law, a matter for each Member State. Counsel for Mr. P. accepts that proposition at a general level. However, it is argued that Article 20 of the Treaty on the Functioning of the European Union confers citizenship of the European Union on the citizens of each of the Member States, with Article 20(1) providing that:-

> *"Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship."*

On that basis, it is argued that any issue concerning citizenship of a Member State engages Union law and thus allows reliance on the Charter.

6.2 Similar issues were considered by the CJEU in *Rottmann v. Freistaat Bayern* (Case C-135/08), EU:C:2010:104, [2010] ECR I-1449. In that case, Mr. Rottmann, who had formerly been an Austrian national and had become a naturalised German national, had had his German citizenship revoked. The CJEU undoubtedly considered that, in the circumstances of the case in question, Union law was engaged.

6.3 However, it is important to analyse the reasoning of the CJEU which led to that conclusion. First, the Court identified certain general propositions at para. 39 of its judgment:-

> *"39. It is to be borne in mind here that, according to established case-law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality (Micheletti and Others, paragraph 10; Case C 179/98 Mesbah [1999] ECR I 7955, paragraph 29; and Case C 200/02 Zhu and Chen [2004] ECR I 9925, paragraph 37)."*

6.4 In so doing, the Court distinguished cases such as *The Queen v. Secretary of State for the Home Department ex p. Manjit Kaur* (Case C 192/99), EU:C:2001:106, [2001] ECR I 1237, stating at para. 49 of its judgment:-

> *"49. Unlike the applicant in the case giving rise to the judgment in Kaur who, not meeting the definition of a national of the United Kingdom of Great Britain and Northern Ireland, could not be deprived of the rights deriving from the status of citizen of the Union, Dr Rottmann has unquestionably held Austrian and then German nationality and has, in consequence, enjoyed that status and the rights attaching thereto."*

6.5 Importantly, the Court went on to comment on the principle of international law that Member States have the power to lay down the conditions for the acquisition and loss of nationality. In that context, the Court drew attention in its judgment to Declaration No. 2 on Nationality of a Member State, which is annexed to the Final Act of the Treaty on the European Union and which involves a declaration that "...wherever in this Treaty establishing the European Community reference is made to nationals of the Member States, the question whether an individual possesses the nationality of a Member State should be settled solely by reference to the national law of the Member State concerned".

6.6 However, the Court in *Rottmann* indicated that, in the circumstances of the case in question, what was engaged was not the sole entitlement of Member States to determine the conditions for the acquisition and loss of nationality but rather, what was described as a principle, deriving from the respect of citizens of the Union, that the exercise of any power which affects rights conferred and protected by the legal order of the Union engages Union law in an assessment of the legality of any measures adopted.

6.7 The position was, of course, that Mr. Rottmann was, at all material times, a citizen of the Union and the measure proposed by Germany involved, by depriving him of German citizenship, the removal of his Union citizenship, because he had already lost his Austrian citizenship by becoming naturalised in Germany. It follows that Mr. Rottmann was a citizen of the European Union and the CJEU considered that he therefore had rights in that capacity, such that a measure which would deprive him of those rights necessarily involved the engagement of Union law.

6.8 The situation in this case is completely different. Mr. P. undoubtedly has rights as a declared refugee and those rights enjoy protection under Union law which would, should the removal of his refugee status be considered, require compliance with the Charter. However, there is no such proposal. The refusal of naturalisation does not affect in any way the rights which Mr. P. enjoys in Ireland as a refugee. The refusal of naturalisation does not take away any rights conferred by Union law, for its only effect is that Mr. P. will not become a Union citizen. But Union law confers no entitlement to citizenship on any particular category of person, other than to recognise that everyone who is, in accordance with the national law of any Member State, a citizen of that State is also a Union citizen. It is thus strongly arguable that the sole competence in the grant of citizenship remains with the Member State. However, as determined by the CJEU in *Rottmann* , the removal of citizenship of a Member State, given that it may affect the

rights which the Union Treaties confer on Union citizens, does engage the Charter. However, in my view, there is nothing in *Rottmann* which suggests that Union law has any role in the decision to grant citizenship as opposed to its removal

6.9 Given that it is unnecessary to reach any final conclusion on these matters, I confine myself to offering the above observations and also note the view expressed by Lord Mance, speaking for a majority of the *United Kingdom Supreme Court in Pham v. Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 WLR 1591 (at para. 85), which doubted whether even the Union competence identified by the CJEU in *Rottmann* was consistent with the Treaties. If such an issue became necessary for the determination of a case it might, of course, be required that there be a reference to the CJEU. However, for the reasons already identified, it does not appear to me that it is necessary to reach any final determination on the boundaries of Union law in this area.

7. Conclusions

7.1 For the reasons set out in this judgment, I have come to the view that it has not been demonstrated that the process followed by the Minister in determining the extent to which it was permissible, consistent with legitimate State security interest grounds, to disclose information to Mr. P. interfered with the entitlement of Mr. P. to know the reasons for the Minister's decision to the minimum extent necessary to protect those legitimate State interests.

7.2 On that basis, I would consider that the decision of the Minister must be quashed. Having come to that view, I also set out the reasons why I do not, therefore, consider it necessary to reach a final determination on the issue of EU law raised in argument. I do, however, offer some observations on that question.

7.3 In all the circumstances, I propose that the decision of the Minister to refuse naturalisation to Mr. P. should be quashed and that the matter should be remitted back to the Minister to make a further decision, following on from an enhanced process which conforms with the principles identified in this judgment.

7.4 I have had the opportunity of reading in advance the judgment of O'Donnell J. on this appeal. I note that O'Donnell J. has come to the same conclusion as I have but by a slightly different legal route. I acknowledge that the route adopted by O'Donnell J. also provides a legally sustainable basis for coming to the conclusion which we share. In that context I should state that I agree with the judgment of O'Donnell J.

Judgment of O'Donnell J. delivered the 31st day of May, 2019.

Introduction

1 Under s. 15 of the Irish Nationality and Citizenship Act 1956 (as amended) ("the 1956 Act"), the Minister for Justice and Equality ("the Minister") may, in his or her absolute discretion, grant a certificate of naturalisation to a person if satisfied that the applicant complies with certain statutory conditions, any of which may be waived by the Minister in circumstances themselves set out in the statute. The satisfaction of the statutory conditions (or satisfaction subject to waiver of some or all of the conditions) does not give rise to an obligation on the Minister to grant any application. Rather, satisfaction of the conditions or permitted waiver allows the Minister to exercise the absolute discretion conferred by statute as to whether or not to grant the certificate of naturalisation.

2 The origin of the procedure, and the extremely broad discretion conferred upon the Minister, lies in some fundamental conceptions of sovereignty. It is a basic attribute of an independent nation that it determines the persons entitled to its citizenship. A decision in relation to the conferral of citizenship not only confers the entire range of constitutional rights upon such a person, but also imposes obligations on the State, both internally in relation to the citizen, and externally in its relations with other states.

3 This case raises a very difficult issue, which is by no means unique to this jurisdiction, in that it is sought to challenge a decision to refuse naturalisation where the information relied upon is subject to a valid claim of privilege, and, moreover, where the reason given for the decision is that it was based upon information which it is not possible to disclose. It is apparent that the issue raised is one of real difficulty, and may also arise outside the field of citizenship. It has been encountered in other jurisdictions in criminal prosecutions, in challenges to arrests or the issuance of warrants, in deportation decisions, and in cases in which orders are made restricting a person's movement within a state, where such restriction is permitted by law. It can also arise in employment decisions and in other civil claims. A wide range of arguments drawing on materials from variants of all legal systems in the Western world, along with the case law of the European Court of Human Rights and the Court of Justice of the European Union, were addressed by both parties. No consensus can be identified, and no rule of universal application has emerged. In those circumstances, it is, in my view, a counsel of prudence to proceed cautiously and incrementally, and to consider the matter solely within the already difficult and somewhat unique legal context in which it properly arises for decision in this case: that is, the nature of the obligation to give reasons in cases where a certificate of naturalisation is refused under the provisions of the 1956 Act. It is obvious that a consideration of these issues may raise further questions about other closely related issues, such as the obligation to disclose information in advance of a decision being made, or claims that documents can be withheld for disclosure or production in legal proceedings on grounds that their disclosure would damage the legitimate interests of the State. However, these are strong currents running in a direction which is not easy to chart, and in such circumstances, there is much wisdom in the Chinese advice to ford the river by feeling the stones.

The facts and proceedings to date

4 Mr. P. (referred to hereinafter, where convenient, as the applicant), is an Iranian national who arrived in the State in October 1989 and was granted refugee status in December 2001. He has resided in the State since then, and has two children born in Ireland, who are Irish citizens. Prior to the application the subject of these proceedings, he had made four previous applications for a certificate of naturalisation, all of which had been refused.

5 The most recent application was made by Mr. P. on 23 August 2011. Eventually, on 30 April 2013, the Minister issued a decision refusing to grant him a certificate of naturalisation. The Minister provided no reason for the refusal of the application, relying in this regard on certain provisions of the Freedom of Information Act 1997 (as amended) ("the 1997 Act") for so doing.

6 The decision of the Minister was made shortly after the delivery of the unanimous decision of this court in *Mallak v. Minister for Justice* [2012] IESC 59, [2012] 3 I.R. 297, where the Minister had refused an application for naturalisation, and had equally refused to provide reasons for that decision, contending he was not obliged to do so in law. That contention was upheld in the High Court, and but reversed by this court. The Supreme Court held that, notwithstanding the fact that the Minister was entitled to make a decision in his or her absolute discretion, that did not mean that he or she was not

obliged to give a reason. It was said that the rule of law required all decision-makers to act fairly and rationally, meaning that they must not make decisions without providing reasons.

7 As already noted, in the decision of 30 April 2013, the Minister sought to rely on the provisions of the 1997 Act to refuse to provide more detailed reasons. This decision was challenged in the High Court by way of judicial review seeking an order of *certiorari* quashing the Minister's decision, and an order of *mandamus* requiring the Minister to provide reasons for his decision. In the course of those proceedings, an affidavit was filed on behalf of the Minister by Mr. John Kelly, an assistant principal officer in the citizenship section of the Department of Justice and Equality ("the Department"), referring to the existence of certain confidential documents concerning the application and Mr. P's background, which were described, respectively, as documents A, B and C. It was acknowledged that those documents, over which the Minister asserted public interest privilege, formed the basis for the Minister's refusal to grant a certificate of naturalisation. That privilege was challenged on behalf of Mr. P.

8 In a judgment delivered by McDermott J. on 17 January 2014 (see [2014] IEHC 17), the documentation on which the Minister relied was reviewed and inspected by the judge and the claim of public interest privilege examined. It was held that document A should be disclosed in full, document B should be disclosed in redacted form, and it was in the public interest that the Minister's claim of privilege over document C should be upheld in its entirety. This decision was not appealed in those proceedings. The disclosed documents indicated that a recommendation had been made to the Minister that Mr. P. should not be granted a certificate of naturalisation on grounds that the Minister could not be satisfied that he met the good character requirements in s. 15(1)(b) of the 1956 Act.

9 Thereafter, there was a hearing of the substantive judicial review proceedings by the same judge. In a careful judgment delivered on 2 May 2014 (see [2014] IEHC 241) it was held that the decision of the Minister should be quashed on the basis that the citation of the provisions of the 1997 Act did not sufficiently assist in providing an understanding of the decision-making process for the refusal of the application. The judgment made extensive reference to the recent decision of this court in *Mallak v. Minister for Justice* [2012] IESC 59, [2012] 3 I.R. 297, and in particular para. 79 of the judgment, which referred to the possibility that the Minister could either give notice of his or her concerns to an applicant or "continue to refuse to disclose his reasons but provide justification for doing so". McDermott J. considered, in the first place, that there was no reason why the Minister could not in this case furnish a reason for the refusal of the certificate "namely the failure on the part of the applicant to fulfil the 'good character' condition". The difficulty for the Minister, the judge observed, was that he did not wish to disclose the information upon which that recommendation or conclusion was based. At para. 28 of the judgement, McDermott J. observed "in those circumstances, he was obliged, having regard to para. 79 of the *Mallak* decision, to provide a justification for not doing so. Any challenge to the conclusion reached in respect of "good character" or any justification proffered for refusing to give reasons for that justification may then be the subject of challenge, if that is considered appropriate".

10 Paragraphs 29 and 31 of the judgment set out how the learned High Court judge considered the matter should proceed thereafter. Having observed that the decision of the Minister could be challenged, he continued, at para. 29:-

> "This is without prejudice to the entitlement of the respondent when justifying the withholding of reasons as to why the conclusion as to good character was reached, to rely upon any appropriate privilege of the type asserted in this case. However, the court is satisfied that the utmost transparency is required in such cases, and that the respondent should

> have firstly, informed the applicant that the reason for the refusal of the certificate was that he had failed to fulfil the condition of "good character" under s. 15(1)(b) of the Act. Secondly, if it was considered appropriate to refuse to give any further reasons, a justification should have been furnished in that regard based on the fact that the recommendation was made on the basis of information which was properly the subject of privilege: a cryptic general reference to provisions of the Freedom of Information Act 1997 was, in this case, insufficient. In that way, the applicant would be furnished with some understanding at the earliest possible opportunity and to the extent practicable, of the reason for the refusal and/or the justification, if any, for the withholding of the basis for that reason. It is important in this respect that each case is considered on its own merits and that all relevant matters are considered by the [Minister] at the time the decision is made. The court does not consider it to be appropriate that the reason for refusal of the certificate and/or the reasons for refusing to disclose the underlying basis for that decision were revealed for the first time after the initiation of judicial review proceedings. The limited but important information ultimately disclosed in Mr. Kelly's affidavit ought properly to have been furnished in the letter of 30th April together with the material which was the subject of the disclosure order."

11 Accordingly, McDermott J. considered that it was appropriate to make an order of *certiorari* quashing the decision of the Minister. At para. 31, he considered how the matter should then proceed:-

> "It is important that this matter be reconsidered in accordance with these legal principles. The refusal of a certificate of naturalisation on the basis of "good character" is a matter of considerable importance to the applicant in any future application. It is essential that he be given to understand as fully as possible the precise basis and context of that refusal. It is common case between the parties that the applicant has no prior convictions. He is the father of two Irish citizen children born in 1994 and 1997. He has resided for 23 years in the State and has made five applications for naturalisation, all of which have been refused in 1997, 2004, 2008, 2010 and 2013. He is now 48 years old. It is important in any future application that he be given the opportunity to address as far as possible the reasons for the refusal if he is to make a meaningful application. I do not consider that the respondent adequately complied with the obligation to furnish the reason for the refusal in this case notwithstanding the exigencies under which the respondent must operate. The respondent is, of course, entitled to withhold material on the basis of public policy as recognised in *Mallak* and this court's decision on the disclosure application, but should make the earliest possible disclosure of reasons underlying the decision consistent with that duty. It may well be that a letter setting out the factors of which the court is now aware following the initiation of these proceedings would be sufficient to meet the case but it is essential to the fairness of the process that the withholding or furnishing of reasons is determined carefully with due regard to the facts and requirements of each case."

12 There was no appeal against this decision, or indeed the judge's prior decision on the disclosure of the underlying documentation. It was not suggested in this case that the judgment was in any way in error, or that its terms should be qualified. I should say, I consider it was a careful and indeed rigorous application of the existing law with a view

to ensuring that the utmost transparency that was possible should be afforded to the applicant. The following principles emerge from the judgment:-

> (i) That, in this case, the applicant should have been informed that the reason for the refusal of the certificate was that it was considered he failed to fulfil the condition of good character under s. 15 of the 1956 Act;
>
> (ii) That, if it was considered appropriate to refuse to give further reasons, a justification should have been provided, namely that the recommendation was made on the basis of information properly the subject of privilege, and a cryptic general reference to the provisions of the 1997 Act was insufficient;
>
> (iii) That this information should be provided at the time the decision is made known to the applicant; that it should not have required the initiation of judicial review proceedings in order to be revealed; and that the material which it was now accepted was not covered by privilege ought to have been furnished with the letter of 30 April 2013;
>
> (iv) In any reconsideration, the Minister would be entitled to withhold material on the basis of public policy but should make the earliest possible disclosure of reasons underlying the decision consistent with such duty to withhold the material;
>
> (v) A letter setting out the factors which had emerged in the course of the proceedings (that the decision was based on the good character ground, and that the underlying reasons were the subject of a valid claim to public interest privilege) may well be sufficient to meet the case.

13 Subsequent to the decision of McDermott J. in the High Court, the application of August 2011 was submitted for reconsideration, together with further submissions on the part of Mr. P. On 1 September 2014, the Minister issued a decision refusing to grant a certificate of naturalisation. The letter which issued to Mr. P.'s solicitors notified them that the Minister had considered their client's application, and had decided not to grant a certificate of naturalisation. The letter enclosed a copy of the submission which had been prepared for the Minister with the decision annotated thereon. The letter also informed the solicitors that there was no appeals process, but that there could be a further application for a certificate of naturalisation at any time, and any such application would be considered taking into account all statutory and administrative conditions applicable at the time of the application.

14 It is particularly important in the light of the decision of McDermott J. and the challenge now raised to the decision notified in the letter of 1 September 2014, to set out in some detail the terms of the submission which it is apparent the Minister accepted.

15 The recommendation recites the name of the applicant, the file references, his date of birth, marital status, and nationality, and his date of entry into the State. It records the relevant legal provisions, namely, that under the 1956 Act, the Minister may in her absolute discretion grant an application for a certificate of naturalisation, if satisfied that the applicant fulfils the statutory provisions, and, pursuant to s. 16, may do so even when the conditions for naturalisation (or any of them) are not complied with where, among other things, the applicant is of Irish decent or has Irish associations, or is a refugee. The submission then states:-

" Comments :

A.P. arrived into the State in October 1989 on a visitor's visa. He applied for refugee status, which was granted in December 2001. He has resided in the State since then and fulfils the statutory conditions regarding residency. He has 2 children born in the State in 1994 and 1997 who are Irish citizens. The Garda Vetting Unit has confirmed that there are no convictions recorded against Mr. P. and have cleared him to work with children and vulnerable persons.

Mr. P. has made 4 previous applications for a certificate of naturalisation, all of which resulted in a refusal of the applications.

There are national security/international relations considerations in this case. Please see attached report, which contains information received on a strictly confidential basis regarding this applicant. This information is of concern to the State. The Ministerial Decisions Unit has also been issued with a copy of the confidential report. However, at present no restrictions, in the interests of national security or public policy, have been placed upon Mr. P.'s rights as a refugee, as provided for under section 17(2) of [the 1996 Act]. The fact that restrictions have not been placed upon Mr. P.'s rights as a refugee does not mean the Minister is therefore precluded from taking into consideration any matters that relate to national security or come within the sphere of public policy considerations in a naturalisation context in making her decision.

Quite clearly it is one thing for a person granted refugee status in the State to travel abroad on a travel document issued by the State and quite another for a person to travel abroad using an Irish passport, with holders of the latter being extended welcome without any visa requirements in many countries. The applicant has stated in submissions he has made in support of his application that he wants his application granted in order to be recognised as being from Ireland, as a person who has become Irish and to be able to travel freely to other countries with his daughters, including not being segregated from them and subjected to separate treatment at border controls.

Please see attached file, which contains submissions on behalf of the applicant. The fact that the applicant has resided for so long in the State as a refugee without obtaining Irish citizenship has caused some to question why that would be. Mr. P. has stated that employers seem surprised that he is not an Irish citizen and when he explains that he has been refused Irish citizenship this inevitably raises suspicions. He states that he has missed valuable postgraduate studying opportunities in Amsterdam, Barcelona, and Sweden as the difference in fees for EU students and non-EU students is significant and the fees are consequentially prohibitive for him.

The applicant asserts that he is of good character and that if the reason for peoples' refusal is based on an adverse finding in respect of his character, then that finding is based on incorrect information.

Mr. P. has been resident in the State for what is now a significant proportion of his life and has Irish associations of 2 Irish citizen children. Mr. P. appears to be well regarded in his community as attested by the 9 references in support that he recently submitted. Some have provided their opinion of his character as being very good or excellent.

Recommendation :

It is essential that the Minister on behalf of the State, has confidence in the declaration of fidelity to the Irish nation and loyalty to the State and the undertaking to faithfully observe the laws of the State and protect its democratic values made by new Irish citizens. Having carefully considered the case and taken into account the applicant's

submissions and references, I am of the view that the Minister cannot have such confidence in this case, nor be satisfied that the applicant meets the condition of good character as specified in section 15(1)(b) of [the 1956 Act], and I would not recommend that the Minister, in her absolute discretion, waive the good character condition for naturalisation under section 16 of that Act. I therefore recommend that the Minister refuse Mr. P.'s 5th application for a certificate of naturalisation.

It is established law that applicants for a certificate of naturalisation are entitled to know the reasons for the decision on their application, or where the provision of reasons is being refused, be provided with a justification for not providing them. This is because if the reasons for a decision to refuse an application are not provided to an applicant then they will not know if the decision is unlawful or if there are matters that they might be able to address or mitigate in any future application.

The context and basis for the recommendation have been outlined as far as possible in this submission without disclosing the privileged information and the submission should be provided to Mr. P. to inform to the fullest extent possible the reasons for the decision in this case. The State's interests in protecting its security in international relations must in this case outweigh the applicant's interest in knowing the Minister's specific basis for refusing him this privilege.

Not recommended. For the Minister's decision please."

16 The submission is signed by an identified individual in the Further Processing LSR team of the Department, and by an assistant principal officer. Subsequently it is directed on its face to the then Director General of the Department, who set out his conclusion in handwriting on the submission as follows:-

> "Minister, having considered the submission and attached papers, I support the negative recommendation in this case."

17 Finally, the letter also contains the handwritten signature of the then Minister dated 25 August 2014, signifying her approval. It is, I think, clear that the Minister and the Department have sought to comply with the judgment of McDermott J. in this case. All the matters that ought to be considered in favour of Mr. P. are fairly set out in the submission. The reason for the submission is set out: that is, that the departmental office and the Minister are of the view that the Minister cannot have confidence in the applicant's declaration of fidelity and loyalty and the undertaking to faithfully observe the laws of the State, and cannot be satisfied the applicant meets the condition of good character. The submission also recommends that the Minister does not waive the good character condition under s. 16 of the 1956 Act. The submission also addresses the fact that applicants are entitled to know the reasons for the decision on their application, and where the provision of reasons is being refused, to be given a justification for not providing them. The reason for such a requirement is also set out. It is stated that the context and basis of the recommendation have been outlined "as far as possible in this submission without disclosing the privileged information" but that the submission should be provided to Mr. P. to inform him "to the fullest extent possible" of the reasons for the decision in the case. It is then specifically concluded that the State's interest in protecting its security and international relations must outweigh the applicant's interest in knowing the Minister's specific basis for refusing him. It has not been suggested that the information set out discloses any other basis for challenging the decision, or that there has been any failure to comply with what was contemplated by the decision of McDermott J. in the High Court.

18 The applicant challenged this decision in these proceedings. The High Court upheld the approach of the Minister by judgment of Stewart J. of 19 July 2016 (see [2016] IEHC 408), stating that the "applicant has failed to discharge the burden of proving that

there was an error in the decision-making process engaged in by the respondent in this case." On appeal to the Court of Appeal (Peart, Hogan and Gilligan JJ.) (see [2018] IECA 112) the judgment of the High Court was upheld in the judgment of Gilligan J. In a separate judgment, Hogan J. considered that the nature of the public interest in security was such that immunity could properly be claimed; and that consequently no claim could be made that the decision of the Minister was contrary to law despite the absence of an opportunity for the applicant to contest any material put forward for ministerial decision.

The appeal to this court

19 These proceedings were commenced by way of judicial review seeking to quash the Minister's decision. While the applicant challenged the lawfulness of the decision generally, the arguments made were somewhat diffuse, and it must also be acknowledged that the grounds upon which leave was granted for appeal to this court are both broad and more general than the case which was raised and considered in the High Court and the Court of Appeal.

20 It is important to keep clearly in mind the three possible ways in which the issue of confidential and privileged material may arise. First, it is possible in theory to challenge the procedure before the Minister on the ground that the Minister relied upon information which was not made available in advance to the person the subject matter of the decision for the purposes of submission and comment or rebuttal. Second, it is possible to challenge the adequacy of the reasons given for the refusal of a certificate of naturalisation. Finally, it is possible the court might have to consider the question of whether a document is privileged from inspection and production during the course of any litigation challenging either the decision-making process, or the reasons given. In each case, the information involved is exactly the same. It is the information contained in document C which was the basis of the submission to the Minister before she made her decision, and the information which it was considered could not be provided to substantiate the reasons for the refusal. It is also the self-same information in respect of which privilege was upheld in the proceedings before McDermott J.

21 It is, however, important to maintain the distinction set out above. This is because Irish law distinguishes sharply between the applicable law and procedures in each case. Since *Murphy v. Corporation of Dublin* [1972] I.R. 215, it is well established that a court may inspect the documentation in respect of which public interest is claimed with a view to satisfying itself, if necessary, that such privilege is properly claimed and is sufficient to override the interest in making available all relevant evidence in the particular case. This will require consideration of the interests involved in the particular circumstances of the case, and the significance of the document concerned. Although this is a difficult area that can give rise to acute problems in individual cases, the law is by now well established, and the procedures broadly familiar. Irish courts have not, however, had to address the difficult and controversial issue which has arisen in other jurisdictions where it is suggested that a court may proceed to determine the substance of a case on evidence that was not available to both parties or their chosen representatives because of the sensitivity of the information concerned. That issue does not arise in this case, nor does the court have to consider the validity of any administrative or quasi-judicial decision arrived at on information which has not been disclosed in advance to the person or party affected by the decision. This case, as I understand it, is a challenge made to the decision of the Minister on the grounds that the reasons given are inadequate. This conclusion can also be seen to follow from the fact that the decision notified to Mr. P. on 1 September 2014 which is sought to be challenged in this case was itself a reconsideration of the application made in 2011, in respect of which the decision

of the 30 April 2013 had been quashed by McDermott J. on the ground that the reasons given at that point were inadequate.

The applicant's position

22 The applicant, as I understand it, now contends that the reasons given are even now insufficient, that it ought to have been possible to offer to provide the gist of the information relied upon, and, if necessary, a special advocate procedure ought to have been adopted.

23 Reference to a special advocate procedure invokes by analogy the procedures adopted in other common law countries, most notably the United Kingdom, Canada, and New Zealand, which are now the subject of detailed procedures providing for the appointment of a special advocate, and what are described as closed material hearings. These procedures mean that decision-makers, and sometimes courts, will, in private hearing, consider material and hear evidence which is not provided to the individual or the advocate of his or her choice, but where the individual is represented by a special advocate with security clearance who cannot, however, communicate the substance of the information disclosed to the individual or seek instructions upon it. The procedures can be invoked at each stage of the decision-making process, including in relation to the question of disclosure of information to the party concerned and his or her chosen representatives; in testing evidence and making submissions on the decision; and, as I understand it, when the decision is being reviewed by a court, if appropriate.

24 No provision has been made by statute in this jurisdiction for any such procedure, whether by way of closed material hearings by decision-makers or courts, or for the appointment of special advocates. I do not wish to express any view on whether any such procedure would be possible or consistent with the Constitution, and if so, the limitations of any such process.

25 It appears that the origin of the procedure was in ad hoc steps taken in the course of proceedings such as *R. (Malik) v. Manchester Crown Court* [2008] 4 All ER 403 in the United Kingdom, and in New Zealand after the *Zaoui* case (see John Ip, 'The Adoption of the Special Advocate Procedure in New Zealand's Immigration Bill' (2009) N.Z.L. Rev. 207). However, in those jurisdictions and others, there is now a detailed statutory regime and provision for oversight and review. In *The People (Director of Public Prosecutions) v. Kelly* [2006] IESC 20, [2006] 3 IR 115, Fennelly J. stated at p. 145:-

> "The solution of special advocates appears to have been firmly rejected in this jurisdiction (see *Burke v. Central Independent Television plc* . [1994] 2 I.R. 61 and *Director of Public Prosecutions v. Special Criminal Court* [1999] 1 IR 60). Our courts have preferred to resolve conflicts between the conflicting imperatives of a fair trial and the protection of public confidential information by asking the responsible court itself to examine the material. This, as I have already mentioned was suggested by Keane C.J. in the case of *Director of Public Prosecutions v. Mulligan* (Unreported, Court of Criminal Appeal, 17th May, 2004) and was specifically ordained by this court in *Director of Public Prosecutions v. Special Criminal Court* [1999] 1 IR 60."

26 It is perhaps useful to observe that the Irish cases referred to by Fennelly J. relate to the question of disclosure, where there is already a well-established procedure for scrutiny by the court of documents over which public interest privilege is claimed, if a court considers it necessary to do so for the purposes of litigation before the court.

While the courts have shown a degree of flexibility as to the method by which competing interests may be reconciled in the context of litigation, it is fair to say that the decisions to date have shown a preference for seeking to resolve matters such as this through the existing procedures of the court, and, in particular, through the possibility of court determination (and if necessary inspection) which has been well established since *Murphy v. Corporation of Dublin* [1972] I.R. 215, where, if necessary, submissions may be made in open court by the parties at a hearing at which the individual would be represented by lawyers of his or choice, in the normal way. I express no view here on whether there are any circumstances in which a court would consider it appropriate to request the appointment of a special advocate to make submissions on the question of production of documents in respect of which privilege was claimed. It is sufficient for present purposes to observe that the issue has not yet arisen, and does not arise here.

27 Until now, it had not been sought in Irish law to provide for any procedure which would permit evidence to be given in proceedings which would not be available to one of the parties. Instead, the law, through the medium of the decided cases, sought a variety of *ad hoc* measures to try to achieve a difficult balance between the competing interests, while maintaining the principle that, in any court decision, the administration of justice cannot be based on evidence which is not disclosed to the parties. Until now, no court had to consider directly the validity of administrative or non-judicial decisions reached on the basis of information which is not disclosed in advance, or which is not the subject of a reasoned decision.

28 The applicant also argued that the Minister should at a minimum be obliged to provide the "gist" of the information which led to the Minister's decision. To some extent, the applicant's arguments shuttled between points relating to disclosure, the requirement to give reasons, the provision of the gist of the information, or some combination of all three, without identifying precisely what it is suggested was required by Irish law. As I understand it, the applicant maintains that the reasons given are inadequate, either because it was possible to provide the gist of the information or that a special advocate ought to have been provided with access to the documentation to argue on behalf of the applicant for the disclosure of the information, or the gist of it, in the Minister's decision.

The Minister's response

29 A very detailed replying affidavit was sworn by Mr. Kelly, an assistant principal officer in the Department. The affidavit sought to set out fully the sequence of events. It confirmed that the report referred to in the submission to the Minister was the same document as document C which McDermott J. had held was privileged from disclosure. It was also recorded that the Minister had accepted fully the judgment of McDermott J., so that even in a case where information could not be revealed, it was accepted the Minister was obliged to furnish the general nature of the reasons for the refusal of the certificate of naturalisation, and to provide a justification for the refusal to give any more detailed reasons.

30 Mr. Kelly also addressed the contention that a more limited version of the information contained in document C could be provided to the applicant and said that it was not possible for the applicant to disclose the "gist" or *précis* of the information contained in document C, as doing so would undermine the State's interest justifying the assertion of privilege, which was upheld by McDermott J. The affidavit also sought to explain that the Minister could not provide a *précis* of the information, or explain the

source of the information which she relied on in making the decision. At para. 16 of the affidavit he said:-

> "In the course of carrying out these investigations, the respondent sometimes receives information on a strictly confidential basis from external sources. This is information the State would not otherwise be able to obtain through its own resources and hence the respondent is dependent on the good will of the external agencies which currently provide this information. Consequently, in order to ensure that similar information will be available in the future, the respondent must respect that confidentiality and not disclose it to an applicant whose application may be refused as a result."

31 Later, Mr. Kelly also adverted to the difficulty that disclosure of a *précis* of the information could create beyond the context of the specific application. There is a risk of confirmation to a person who was a potential security threat that he or she is known to intelligent services either in this State or elsewhere. The disclosure of information may give rise to a danger to sources, and furthermore, where information comes from external sources, the provision of a *précis* would compromise the Minister's ability to obtain such information in future cases, as external sources would not be willing to share information which might ultimately be disclosed to the person who is the subject of the intelligence. These are weighty considerations, and they have not been challenged or sought to be contradicted.

32 The law relating to the provision of reasons for administrative decisions has been closely connected to the law relating to the review of decisions of naturalisation. In one of the earliest cases, *Pok Sun Shum v. Ireland* [1986] I.L.R.M. 593, Costello J. considered that the grant of citizenship was a privilege, there was an absolute discretion, and that there was no obligation to provide reasons for a refusal. However, subsequently the courts accepted that the decision to refuse on a stated ground such as good character could at least require the provisions of reasons. The question was subject to comprehensive review in the decision of *Mallak v. Minister for Justice* [2012] IESC 59, [2012] 3 I.R. 297. In that case, the Minister had relied solely on the absolute discretion provided for under the 1956 Act, and had refused an application for naturalisation without providing reasons. In the High Court, Cooke J. had dismissed the application for *certiorari* . The Supreme Court unanimously reversed that decision.

33 The sole judgment was delivered by Fennelly J., with whom the other members of the court agreed. The judgment reviewed carefully the development of administrative law in Ireland and other jurisdictions, and indeed the progress of legislative changes, all of which he considered could be seen as converging in a general principle that reasons were required for a decision. The conclusion is to be found at paras. 68 to 70 of the judgment, as follows:-

> "[68] In the present state of evolution of our law, it is not easy to conceive of a decision-maker being dispensed from giving an explanation either of the decision or of the decision-making process at some stage. The most obvious means of achieving fairness is for reasons to accompany the decision. However, it is not a matter of complying with a formal rule: the underlying objective is the attainment of fairness in the process. If the process is fair, open and transparent and the affected person has been enabled to respond to the concerns of the decision-maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded.
>
> [69] Several converging legal sources strongly suggest an emerging commonly held view that persons affected by administrative decisions

> have a right to know the reasons on which they are based, in short to understand them.
>
> [70] It has to be regarded as significant that s. 18(1) of the Freedom of Information Act, 1997, though principally concerned with the provision of information to the public, envisages that public bodies will give reasons for their decisions at the request of an affected person."

34 While *Mallak v. Minister for Justice* [2012] IESC 59, [2012] 3 I.R. 297 is undoubtedly a significant landmark decision of this court, it is noteworthy that it is carefully and cautiously expressed. In the first place, it is clear that the basis of the decision was fair procedures. It is not suggested that any constitutional right was involved, or any question of balance or proportionality. It was a matter of administrative law, and the fundamental question was to establish the general fairness of the procedures involved. In the event, the decision in that case was quashed simply on the grounds that no reasons for the Minister's decision had been provided, and thus the decision did not accord with fair procedures. There was no formal rule, and it was a question of fairness rather than form. It was a general but not absolute approach which leaves open the possibility of exceptions and qualifications.

35 It is important to note that the case dealt with the decision taken on the basis of the Minister's discretion and without any suggestion of State security interests. Indeed, the Minister in this case submitted, correctly in my view, that the judgment contemplates circumstances in which it may not be possible to give the reasons, or at least the detailed reasons which might normally expected in which case the decision-maker would be obliged to justify the refusal. This is apparent from a number of passages in the judgment. At para. 77 it is noted that "No reasons related to the public interest have been disclosed even in the most general terms". At para. 76 it is said:-

> "In the absence of any reasons, it is simply not possible for the applicant to make a judgment as to whether he has a ground for applying for a judicial review of the substance of the decision and, for the same reason, for the court to exercise its power. *At the very least, the decision-maker must be able to justify the refusal. No attempt has been made to do so in the present case and I believe it would be wrong to speculate about cases in which the courts might be persuaded to accept such justification"* (emphasis added).

36 Having concluded that it was appropriate to make an order for *certiorari* , Fennelly J. turned at para. 79 to what followed from the making of such an order:-

> "Following the making of the order, it will be a matter for the Minister to consider the application afresh. It will be a matter for him to decide what procedures to adopt in order to comply with the requirements of fairness. It is not a matter for the court to prescribe whether he will give notice of his concerns to the appellant or disclose information on which they may be based *or whether he will continue to refuse to disclose his reasons but to provide justification for doing so* . Any question of the adequacy of reasons he may actually decide to provide or any *justification provided* for declining to disclose them can be considered only when they have been given" (emphasis added).

37 The judgment plainly contemplates, therefore, the possibility that there may be reasons which would, as it were, justify the provision of only limited, or even no reasons for the decision. This is also apparent from some of the authorities and materials relied upon in the judgment. As already observed, Fennelly J. relied upon the provisions of s. 18 of the 1997 Act as an example of a legislative development illustrating a general

principle that public bodies will give reasons for their decisions at the request of an affected person. To that extent, the decision in *Mallak v. Minister for Justice* [2012] IESC 59, [2012] 3 I.R. 297 brings the law of judicial review into line with what is already provided for by statute. However, it is of some significance that the 1997 Act, (replaced in the interim by the Freedom of Information Act 2014), permitted under s. 23 an exemption from disclosure, even to the extent of the non-disclosure of the existence of records, where interests of national security are involved. Similarly, it is notable that s. 1(4)(a) of the Data Protection Act 1988 that that Act simply does not apply to personal data which in the opinion of either the Minister for Justice and Equality or the Minister for Defence is kept for the purposes of safeguarding the security of the State.

38 Fennelly J. also referred with approval to the majority decision of the Court of Appeal of England and Wales in *R. v. Secretary of State for the Home Department, ex p. Fayed* [1998] 1 WLR 763, which also dealt with a challenge to a decision to refuse a naturalisation application, brought in that case by the well-known Fayed brothers. Under the British Nationality Act 1981, it was expressly provided that the Secretary of State had an absolute discretion similar to that provided by the 1956 Act in this jurisdiction, and also provided under s. 44(2) that reasons were not required to be given for any refusal. However, the majority of the Court of Appeal (Lord Woolf M.R. and Phillips L.J.; Kennedy L.J. dissenting) held that in those circumstances, the Secretary of State was obliged, before reaching an adverse decision, to inform the applicants of the nature of the matters weighing against him or her, and to afford him or her an opportunity to address them. The majority of the Court of Appeal considered that this was a case where reasons would have been required at common law, if the provisions of s. 44(2) did not preclude the provision of reasons. In that sense, the *Fayed* case is the obverse of the case which arose in *Mallak v. Minister for Justice* [2012] IESC 59, [2012] 3 I.R. 297, and was of obvious relevance.

39 Again, however, it must be observed that no ground whatever had been identified as a basis for the decision in *R. v. Secretary of State for the Home Department, ex p. Fayed* [1998] 1 WLR 763, and there was no suggestion in the judgments that the information must nevertheless be provided, if international security was involved. Indeed, the majority appeared to have considered the possibility that in such circumstances such information could be withheld. At pp. 776 to 777 of the report, Lord Woolf M.R. addressed the consequences of the approach adopted as follows:-

> "It does not require the Secretary of State to do more than to identify the subject of his concern in such terms as to enable the applicant to make such submissions as he can. In some situations even to do this could involve disclosing matters which it is not in the public interest to disclose, for example for national security or diplomatic reasons. If this is the position then the Secretary of State would be relieved from disclosure and it would suffice if he merely indicated that this was the position to the applicant who if he wished to do so could challenge the justification for the refusal before the courts. The courts are well capable of determining public interest issues of this sort in a way which balances the interests of the individual against the public interests of the state."

40 It is plain, therefore, that the decision in *Mallak v. Minister for Justice* [2012] IESC 59, [2012] 3 I.R. 297 did not address, still less resolve, the difficult question which arises where it is said that reasons cannot be provided because of concerns of national security, and where the disclosure of information or even a *précis* thereof would involve disclosure of material which is otherwise privileged. It follows that the decision in this case is not governed by what was decided in *Mallak* . Indeed, in that case, insomuch as the issue was addressed, it appears to have been considered that there may be circumstances where a decision-maker may depart from the general obligation to give reasons for his or her decision, but in such a case must justify the refusal. However, by

the same token, *Mallak* clearly did not conclude that this would be sufficient. It was simply a possibility which was prudently considered in addressing the more general question which arose in that case. The precise issue which arises here, therefore, is that which was only touched on in both *Mallak* and *Fayed* , namely:-

> (i) what by way of fair procedures is required where it is said that the basis for the refusal of citizenship is contained in information which cannot be disclosed by way of reasons for the decision, and
>
> (ii) if it is possible to justify the refusal to give reasons, what is required by way of fair procedures to constitute such justification, so that a decision which did not provide reasons, would nevertheless be valid and not liable to be quashed?

41 These questions arise for decision, moreover, in the very particular context of an application for citizenship which is subject to review for legality by way of judicial review, but where, nevertheless, the nature of the review is necessarily limited by the very broad discretion which is afforded to the Minister by statute. In addition, while it is asserted on the applicant's behalf that his constitutional right to a good name is at issue, I do not think that the matter can or should be approached in this way. It was not suggested that the Minister had published her decision to anyone other than the applicant. Moreover, the basis upon which non-citizens may assert rights which the Constitution guarantees in terms in respect of citizens is, in my view, derived from the guarantee of equality before the law under Article 40.1: see *N.H.V. v. Minister for Justice* [2017] IESC 35, [2018] 1 I.R. 246, at p. 314, where I said that a determination of whether equality demanded that what would be prohibited (or permitted) in respect of citizens was also outlawed (or permitted) in respect of non-citizens involved "a consideration of whether the right is in essence social, and tied to the civil society in which citizens live, in the way that it might be said that voting is limited by belonging to the relevant society, or whether the right protects something that goes to the essence of human personality so that to deny it to persons would be to fail to recognise their essential equality as human persons, as mandated by Article 40.1."

42 There are obvious differences between citizens and non-citizens in relation to the question of acquisition of the status of citizenship, so there is no necessary inequality in treating citizens and non-citizens differently in relation to the acquisition of citizenship. The procedures under the 1956 Act are a clear example of this, since, by definition, they apply only to non-citizens seeking naturalisation. That decision relates to status, and does not, at least directly, engage other rights. There is no doubt, however, that fair procedures must be applied to any such decision. Accordingly, I would approach this question as it was approached in in *Mallak v. Minister for Justice* [2012] IESC 59, [2012] 3 I.R. 297: that is, as a question of fair procedures in administrative law. It is apparent, without in any way depreciating the significant concerns that arise in this case from the point of view of Mr. P., that nevertheless different considerations may be involved where a decision can be said to directly affect constitutionally protected rights. It may also be the case that different considerations will apply where it is sought to withhold information in the context of the procedures leading to a substantive decision, or where an application is made for disclosure of information in the course of court proceedings perhaps challenging the substantive decision. The focus of this case is solely on the question whether reasons should be provided for a decision refusing to grant citizenship.

43 The applicant is critical of the approach that the Minister takes in these proceedings, and accuses the Minister of adopting a position which has "launched an outright attack on the rule of law". In my view, that criticism is misplaced. It is very clear from the evidence in this case that the Minister went to some lengths to seek to comply with what she understood to be the decision of the High Court and the interpretation adopted in that case of the decision of this court in *Mallak v. Minister for Justice* [2012] IESC 59,

[2012] 3 I.R. 297. It remains to be determined whether what was done here accords with the requirements of fair procedures.

Discussion

44 I return, therefore, to the central question whether it can be said that the Minister has justified the limited reasons given, and the withholding of more detailed information. In that regard, a number important features of this case should be recognised. At the time of the notification of the negative decision, the applicant was furnished with the detailed submission that was submitted to the Minister, and accordingly shown the decision-making chain and the reasoning involved. The submission set out both that it was not considered possible to disclose the information, and, furthermore, that consideration had been given to whether it was possible to provide any more information by way of reasons. Furthermore, the basis of the decision was identified as document C (which had been inspected by a judge of the High Court), together with the claim that the national interest would be damaged by the disclosure of the contents of that document. The Minister's view that such interest outweighed the interests of the applicant in having access to the document for the purpose of proceedings had been upheld by a judge of the High Court who had inspected the document concerned. That decision was, moreover, open to appeal, if the applicant considered it struck the wrong balance.

45 The submission was prepared by an identified official and submitted to an assistant principal officer in the Department, who, in addition, swore a very comprehensive affidavit setting out the relevant background. This submission was reviewed and was the subject of advice by the then secretary general to the Department, and submitted to the Minister for personal approval. This process is a substantial guarantee that the concerns raised were genuine, and that the withholding of information did not involve arbitrariness or abuse of power. Furthermore, the assistant principal officer swore an affidavit stating specifically that it was not possible to provide any further information or the gist of the material relied upon. Since that affidavit was sworn in the course of these proceedings, the officer in question could have been the subject of cross-examination, and any claim to privilege made in respect of any answer to any question posed would of necessity have to be ruled upon by the trial judge in the presence of both parties, and after hearing submissions.

46 These are all substantial matters. Furthermore, Irish law more generally contemplates clearly a point at which the circle of decision and challenge must end. There are many situations in which cases must proceed to judgment where claims to privilege are upheld, and where by definition, therefore, one side may not have access to potentially helpful evidence. Similarly, criminal proceedings can and do proceed to a decision without the disclosure of material upon which privilege is properly claimed. There is also a limit to what can be expected by way of the provision of information in every case. The position was helpfully summarised in the judgment delivered by Lord Mance in the United Kingdome Supreme Court in the decision of *R. (Haralambous) v. St. Alban's Crown Court* [2018] UKSC 1, [2018] AC 236, at para. 62:-

> "On the other hand, it is established by decisions of both the European Court of Human Rights and the Supreme Court that there are circumstances where it may in the public interest be legitimate to withhold even the gist of the material relied on for a decision which a person affected wishes to challenge. The relevant case law is analysed in *Tariq v. Home Office* [2012] 1 AC 452, paras 27 to 37. This approach has been applied in the European Court of Human Rights to material allegedly making a person a security risk unsuitable for permanent employment

> which would entail him having access to a naval base (*Leander v. Sweden* (1987) 9 EHRR 433), to security material allegedly making a person unsuitable for employment with the central office of information (*Esbester v. United Kingdom* (1994) 18 EHRR CD72), and to material explaining the meaning of a statement by the Investigatory Powers Tribunal that "no determination had been made in his favour" in relation to a complainant in respect of complaints that his communications were being wrongly intercepted - a statement which could mean either that there had been no interceptions or that any interceptions taking place had been lawful (*Kennedy v. United Kingdom* (2010) 52 E.H.R.R. 4). The approach in these cases was applied domestically by the Supreme Court in *Tariq v. Home Office* [2012] 1 AC 452. The complainant's security clearance was withdrawn and he was suspended from his work as a Home Office immigration officer, after the arrest of close family members in the course of a suspected terrorism investigation. A closed material procedure was held, with a special advocate, under rule 54 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (S.I. 2004/1861). The majority concluded that there was no invariable rule that gisting must always occur. It depended on balancing the nature and weight of the circumstances on each side: see in particular para. 25."

47 Again, these are considerations to which due weight must be given. If national security concerns are properly raised, it cannot be the case that merely by seeking a decision, an interested party can demand access to information, the confidentiality of which is deemed essential to national security. It is worth noting, however, that in *R. (Haralambous) v. St. Alban's Crown Court* [2018] UKSC 1, [2018] AC 236, the restrictions on providing the gist of material occurred after there had been a limited closed materials procedure in which the information concerned was subject to some scrutiny independent of the state. Furthermore, it must be recognised that fundamental issues are involved if it is contended that a person can be the subject of an adverse decision on a matter of significance to them based upon materials not disclosed to them, and where the reasons for that decision are similarly withheld. The saga in the United Kingdom of decisions in relation to refusals of naturalisations on grounds of security, which commenced with *R. (A.H.K.) v. Secretary of State for the Home Department* [2012] EWHC 1117 (Admin), and came to a less than clear cut conclusion in *R. (K.) v. Secretary of State for the Home Department* [2014] EWCA Civ 151, vividly illustrates the difficulties in this area. The problem is compounded in this jurisdiction because there is no legislation dealing with the closed material procedure or any special advocate procedure, or any other method of addressing the difficult problem which arises not just in the area of naturalisation, but in many areas of the law.

48 I agree with Hogan J. in the Court of Appeal, and with the Chief Justice in this court, that it does not appear possible for the court to devise a complete procedure, cut from whole cloth, which is capable of being applicable in all of the many different and difficult situations where the issue of disclosure of information arises, and where it is resisted on the grounds of public interest. I do not rule out the possibility that in certain circumstances, *ad hoc* solutions might be sought. This, after all, is what has occurred in the field of discovery and disclosure, and the somewhat different techniques adopted to permit disclosure of some information while maintaining confidentiality, which are discussed in the judgment of the Chief Justice. Indeed, to some extent, that approach is what is urged in this case. I also agree that there are, to put it at its lowest, serious doubts that it would be permissible to provide that, certainly in respect of court proceedings, a court could proceed upon material which was not available to be considered or challenged by or on behalf of one party. While the special advocate and closed material procedures were introduced to address obvious problems of fairness, it is apparent that, as a solution, it has not been universally welcomed. The procedure is

necessarily limited, since the special advocate is restricted in the extent to which he or she can challenge material without receiving instructions on it. To that extent, the procedure has been memorably described by Lord Bingham in *R. (Roberts) v. Parole Board* [2005] 2 AC 738, at p. 754 (quoting Lord Hewart L.C.J. in *Coles v. Odhams Press Ltd.* [1936] 1 K.B. 416) as taking blind shots at a hidden target. On the other hand, concerns have been expressed that the very availability of the procedure has led to more use of the procedure, and more closed hearings, than might have been anticipated, or is in principle desirable. The primary objective should be to seek the maximum disclosure that is possible, and to ensure that, in so far as possible, any restriction on disclosure of reasons is demonstrably the least that is necessary.

49 For this reason, I agree with the approach set out at para. 5.18 of the judgment of the Chief Justice that, "in principle, it would at least be possible to put in place an enhanced process by which an independent assessment could be made as to whether any version of the information could be provided in a way which would not affect State interests to the extent that disclosure should not be required at all". Such a process of advice from an independent person with access to the information, which in this case has, after all, been seen already by a judge of the High Court, would itself also enhance confidence in any decision made. In these circumstances, I have come to the conclusion that it cannot be said that the decision not to disclose further reasons has been justified, with the result that the appeal should be allowed, and the decision of 1 September 2014 must be quashed. This, of course, does not mean that Mr. P. is entitled to citizenship, or that he would necessarily receive more by way of reasons. I recognise that this is frustrating for him, as it no doubt is for the Minister and the departmental officials who have sought to comply with the law as it then stood. However, this is a very difficult area, with competing considerations, an absence of legislative structure, and little by way of guidance from the decided cases. In such circumstances, it is perhaps unavoidable that any answers are limited, contingent, and not clear cut.

50 This decision, as observed at the outset, is limited to the narrow question of reasons. It does not directly address any question which might arise in a challenge to the procedures adopted before a decision is made, and applies still less to the questions which might arise if it were sought to rely on undisclosed material in circumstances in which constitutional rights were even more directly affected. It is clear that difficult issues may arise, and the courts may no doubt be required to consider the issues further. Finally, I should say that I agree with the Chief Justice that the issue in this case is a matter to be determined according to domestic law, and does not raise an issue of the law of the European Union.