Neutral Citation: [2016] IEHC 173

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 651 J.R.]

BETWEEN

O. T. A.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Ms. Justice Faherty delivered on the 15th day of April, 2016

1. The applicant seeks an order of certiorari quashing the decision of the respondent pursuant to s. 15 of the Irish Nationality and Citizenship Act 1956 (as amended) refusing the grant of a certificate of naturalisation to the applicant, as notified to him on 26th August, 2014.

Background

2. The applicant is a Nigerian national and has been lawfully resident in the state since 9th May, 2007. He was granted permanent residence in the state on 24th April, 2012 based on his derivative EU Treaty Rights by virtue of his marriage to an Irish national. The applicant submitted an application for naturalisation on 5th October, 2012. In the Form 8 which the applicant completed on 4th September, 2012 for the purposes of his application for naturalisation he answered in the affirmative the query as to whether he had ever committed "any offences against the laws of Ireland or any overseas country". He also answered in the affirmative the query as to whether he had "any convictions in the state or any other country (including traffic offences)…". The submissions made on behalf of the applicant and which accompanied the Form 8 gave details of the applicant's conviction in the following terms:

> "[The applicant] received a conviction in Dublin District Court in or around 12/11/2010 for driving a taxi without a taxi license. He was fined €2,900. This fine has been paid and documentation in this regard is enclosed herein. Our client is most regretful and ashamed regarding this matter. We would respectfully submit that almost two years have elapsed since he received this conviction and he has paid in full the fine imposed by the Court. This incident was the only occasion in which he came to the adverse attention of the authorities."

The submissions continued, inter alia, as follows:

> "It is respectfully submitted that considering the totality of the circumstances in this case, and in particular the duration of [the applicant's] residence in the State, his integration into Irish society and his work record, it would be disproportionate to conclude that [the applicant] is not of good character on the basis of the offence he committed in 2010 under the Taxi regulation Act. We would therefore respectfully ask the Minister to exercise his discretion in a favorable light."

3. The applicant's correspondence was acknowledged on 18th October, 2012 and he was informed that his application had been initially assessed and had proceeded to the second stage of processing.

4. On 20th November, 2013 the respondent wrote to the applicant asking for an explanation as to why an address which appeared on the court documents in connection with the applicant's €2,900 fine was not listed by the applicant as a place of residence and he was requested to submit a full list of addresses and dates on which he had resided at such addresses since first entering the State. On 19th December, 2013, the applicant explained that the address listed on the court documents was not one at which he resided but rather that of his brother, and he explained that the address was that to which his brother's taxi was registered and he confirmed that the list of addresses previously provided by him was otherwise accurate.

5. On 15th January, 2014 the respondent wrote to the applicant in respect of a list of offences which were contained in a Garda report attached to the said letter and the applicant was requested to give an account of the circumstances surrounding the offences and an explanation for not disclosing the offences in his application form.

6. The schedule which attached to the letter detailed that the applicant had incurred a fine of €390 in the District Court on 29th May, 2009 for the non display of a tax disc. It also detailed that the Probation Act was applied on 6th November, 2008 for giving a false name/address/date of birth under the Road Traffic Act and that on 22nd October, 2007 the Probation Act was applied for the failure to provide a valid passport.

7. On 13th March, 2014 the applicant provided the following explanations:

> "Court date 29/05/2009 – No road tax
>
> Our client instructs that this was an honest mistake. He had just returned from holidays abroad and did not realise that his tax disc had expired while he was away.
>
> We are instructed that the reason for not disclosing this matter in the naturalisation application form is because he was not aware of it. The summons had been sent to his old address… and he was fined in absentia in the District Court. He only became aware of this matter around August/September 2013 and he was in fact advised by Gardaí to appeal the matter, which he did. The fine was reduced to €150 on appeal. We enclose a copy of the order of the Circuit Court dated

07/10/2013. It would therefore appear that the information provided to you by the Gardaí is not accurate i.e. the fine was reduced on appeal.

Court date 06/11/2008 – Giving false name/address/d.o.b.

This charge relates to the previous case already dealt with (see previous correspondence). He was driving his brother's taxi without a taxi license and a number of charges issued in relation to this matter. We understood that he received a fine of €2,900 in relation to the main offence. Note that he was not convicted in relation to this charge sheet and he was given the benefit of the Probation Act. A copy of the District Court order, dated 06/11/2008 is enclosed herein.

Court date 22/10/2007 – Failure to produce a passport

Our client was still in the asylum process at that time and he was not in possession of a passport when same was requested by the Gardaí. Note that no conviction was imposed. You will also note that this was an offence under the old wording of s. 12 of the Immigration Act, 2004, which was declared unconstitutional by the High Court on 25/03/2011."

8. In concluding submissions, his legal advisors stated:

"It is respectfully submitted that, considering the totality of the circumstances in this case, and in particular the duration of [the applicant's] residence in the State, his integration into Irish society and his work record, it would be disproportionate to conclude that our client is not of good character."

Further documentation in relation to the applicant's employment was enclosed with the letter and the respondent was advised that the applicant was the father of an Irish citizen child and that while he did not reside with the child's mother, he had joint guardianship and regular contact with the child in respect of whom he was making regular maintenance payments.

The decision

9. By letter dated 26th August, 2014 the applicant was advised that the respondent had decided not to grant him a certificate of naturalisation. It is this decision that is the subject matter of the within proceedings.

10. The letter of 26th August, 2014 advised as follows:

"I am directed by the Minister for Justice and Equality to refer to your client's application for a certificate of naturalisation.

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

Section 15 of the Irish Nationality and Citizenship Act, 1956 provides that the Minister may, in her absolute discretion, grant the application if satisfied that the applicant is of good character. The Minister, having considered your client's application and the offences referred to in the attached report, has decided not to grant your client a certificate of naturalisation.

A copy of the submission that was prepared for the Minister, with her decision annotated thereon, is enclosed for your information.

There is no appeals process provided under this legislation. However, your client should be aware that they may reapply for the grant of a certificate of naturalisation at any time. When considering making such a re-application your client should give due regard to the reasons for the refusal given in the attached submission. Having said this, any further application will be considered taking into account all statutory and administrative conditions applicable at the time of application."

11. The submission to which the letter referred reads:

"The Minister may in her absolute discretion grant a certificate of naturalisation, if satisfied that the applicant fulfils the statutory conditions specified in the Irish Nationality and Citizenship Act 1956, as amended.

Comments:

[The applicant] has come to the adverse attention of the Gardaí, see attached Garda report, copy of court orders and letter of explanation from the solicitor regarding the offences and why they were not disclosed on his application form. The resulting fine imposed on him by the court has been paid. The applicant did disclose a fine for €2,900 on his application form for driving a taxi without a license on 12/11/2010. This offence did not appear on the Garda report as the address the taxi was registered at was the applicant's brothers (sic) address. The fine has been paid. He is employed by [a named employer] since 16th October 2008. He has one Irish citizen child who does not reside with him but he has regular access and supports financially.

Recommendation:

Given the nature and recency of the offences, I would recommend that the Minister defer making a decision on granting a certificate of naturalisation for a period of 18 months."

12. The submission was signed by three civil servants. The words "Refuse NW 13/08" was annotated thereon in manuscript.

Leave

13. On 10th November, 2014 leave was granted by MacEochaidh J. to seek judicial review by way of certiorari to quash the decision.

14. The grounds upon which relief is sought are:

i. The rationale of the decision is opaque and not patent from the terms of the decision itself such that the Applicant's constitutional right of access to the Courts has been breached. The Applicant relies on the following:

a. It is not clear whether the solicitor's explanation as to why the offences were not disclosed on the application form is accepted. Two of the matters did not proceed to conviction and accordingly they were not "convictions" as set out in the application.

b. There is no finding in relation to whether the Applicant is of good character notwithstanding the reference in the refusal letter to the consideration of the "offences in the attached report". It is not clear whether these were regarded as convictions going towards "good character", or whether they were factors taken account of in the Respondent's discretion. The Respondent appears to rely on her absolute discretion to refuse the application but such discretion only arises if there has first been a finding that the Applicant is of good character.

c. The recommendation from three officials is to defer making a decision on the application for a period of 18 months. There is no reason as to why this recommendation was not followed and accordingly no reasons within the meaning of the jurisprudence for the refusal.

d. As a matter of fair procedures and in order to uphold the rule of law, the Applicant is entitled to know whether he has met the "good character" condition such that this case is one of "absolute discretion" and is entitled to have the reasons for the refusal set out patently in the decision itself.

e. If the application were successful the Applicant would become not merely an Irish citizen but also an EU citizen. In that regard, the Respondent is implementing EU law in making the decision and the Charter of Fundamental Rights of the European Union may be relied upon. In this regard, the decision breaches Article 41 (2) of the Charter in relation to the right to good administration and in particular the right to give reasons.

f. The decision making process was not fair, open and transparent and the Applicant has not been able to respond to any concerns of the decision maker.

g. While the Applicant has been told he can reapply at any time it is precisely because he can do this that he is entitled to reasons for the refusal in order to maximise his chances of success by inter alia the timing of any subsequent application."

15. The respondent filed her Statement of Opposition on 26th February, 2015 and a grounding affidavit was sworn by John Kelly of the respondent's department on 26th February 2015. Mr. Kelly was one of the three officials who signed the submission which was made to the respondent in advance of the decision to refuse the application for naturalisation. In essence, the present application is opposed by the respondent on the grounds inter alia that there was "ample evidence" before the decision maker to ground the conclusion that the applicant was not of "good character" and that the decision is clear in this regard.

The law

16. The Irish Nationality and Citizenship Act 1956, as amended, provides:

"14.—Irish citizenship may be conferred on a non-national by means of a certificate of naturalisation granted by the Minister.

Conditions for issue of certificate.

15.—(1) Upon receipt of an application for a certificate of naturalisation, the Minister may, in his absolute discretion, grant the application, if satisfied that the applicant—

(a) (i) is of full age, or

(ii) is a minor born in the State;

(b) is of good character;

(c) has had a period of one year's continuous residence in the State immediately before the date of the application and, during the eight years immediately preceding that period, has had a total residence in the State amounting to four years;

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

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

(i) made a declaration, in the prescribed manner, of fidelity to the nation and loyalty to the State, and

(ii) undertaken to faithfully observe the laws of the State and to respect its democratic values.

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

The submissions made on behalf of the applicant

17. At the outset, counsel for the applicant acknowledged that the relevant legislation provides the respondent with absolute discretion as to whether to grant a certificate of naturalisation. It is contended however that the exercise of absolute discretion only comes into play when the statutory conditions are fulfilled. The present challenge is on the basis that the applicant is entitled to know the reason for the decision which was made in respect of his application. The challenge concerns the failure to provide reasons. Recent jurisprudence has confirmed the applicant's entitlement to be apprised of the reason for the refusal. While the respondent's statement of opposition alleges that the basis of the decision is that the applicant was not of good character and that it should have been clear to the applicant the reason for the refusal was the recency and nature of the offences he committed, those reasons were not mentioned in the decision. It is submitted that the rationale for the decision is opaque and not patent from the terms of the decision such that the applicant has been caused real prejudice. This is a case where the reasons for the refusal are not discernible. The wording of the recommendation to the Minister suggests that this was a decision where the Minister was applying her "absolute

discretion" as is expressly referred to in the submission made to the Minister by her officials. A consideration of absolute discretion would not have been necessary if the application had foundered at the earlier stage i.e. by reason of the applicant not being of good character. The respondent is now attempting to violate express terms of the decision by seeking to shoe-horn the reasons for the decision into the "good character" precondition and suggests that the applicant was told that he did not meet the good character requirement on the basis of having committed "offences". However, the decision comprises one word, "Refuse". The recommendation (whose relevance is not conceded) which was made to the respondent was that the respondent should defer making a decision on the granting of a certificate of naturalisation for a period of 18 months. Insofar as reference was made in the submission to the recency and nature of the offences, that was the reason for the recommendation to defer making the decision, not the reason for the refusal. Furthermore, nowhere in the submission made to the Minister by her officials is it stated that the applicant failed to fulfil any of the statutory conditions (in particular being of good character).

18. The recommendation to the Minister to defer making a decision was not accepted. Instead, the decision-maker went off on a different tangent, namely an outright refusal without reasons being stated.

19. It may well be that there was evidence upon which to reach a conclusion to refuse but that is not the test in the present case. The respondent's contention that there was "ample evidence" upon which to ground the conclusion is to confuse the concepts of irrationality/reasonableness with the duty to give reasons. The fact that there was evidence before a decision-maker which might have entitled him or her to reach a particular conclusion is not an appropriate defence to the obligation to reach a reasoned decision and to furnish reasons for such a decision. Had it been said that the decision to refuse was because the applicant had not met the good character requirement that would have been well and good as there would have been a reason for the decision. However, as the respondent did not accept the recommendation to defer and refused the applicant outright without stating why, it cannot comfort the applicant that NW might adhere to the recommendation as that is not set out in the decision.

20. It is submitted that the decision falls short of what is required by Meadows v. Minister for Justice [2010] 2 I.R. 701, Rawson Minister for Defence [2012] IESC 26, Mallak v. Minister for Justice [2012] 3 I.R. 297, Christian v. Dublin City council [2012]2 I.R. 506 and the test set out in EMI. v. the Data Protection Commissioner [2013] 2 I.R. 669.

21. The respondent's incorrect approach to the duty to give reasons is compounded by the fact that an affidavit has been sworn by a person other than the decision-maker which purports to explain the original decision and to expand on the reasons for it. Insofar as the respondent purports to set out the reasons for the refusal on affidavit that is hearsay as the decision-maker has not sworn an affidavit. In this regard, counsel relies on the dictum of Humphreys J. in Leng v Minister for Justice [2015] IEHC 681.

22. Apart from objecting to the hearsay nature of this affidavit, it is submitted that it is not appropriate for a deponent in the context of a subsequent challenge to the decision to offer explanations or a rationale for a decision ex post facto not contained in the decision itself.

In the present case, nowhere is it to be found in the decision that the applicant failed to meet the good character requirement. Yet, the respondent urges on the court to infer that that was the reason for the decision. That, counsel submits, is not a permissible approach.

23. On this particular issue, counsel submits that the decision of "NW" as annotated on the submission made to the respondent is simply a refusal. As the refusal does not follow the recommendation to defer there are in effect no discernible reasons. It is submitted that whatever limited value the recommendation to defer contains must surely point to the recommendation being based on the absolute discretion of the Minister. If the decision were truly one based on good character, the issue of "absolute discretion" would not arise. It is submitted that an applicant should be told that he has not met one of the statutory preconditions, in this case the good character condition. That is the correct approach as is clear when one looks at the other statutory preconditions in s. 15. If these preconditions are not fulfilled, it is surely an unassailable proposition that the decision would indicate that a particular precondition as to age/residency was not fulfilled. If no reference was made to any of those statutory conditions, but merely the "absolute discretion" of the Minister was referred to in the decision, could it seriously be contended that the decision was clearly one based on the age/residency of the applicant? The answer must be in the negative. The same logic applies to the "good character" condition.

24. It is not permissible for the respondent to argue that the reasons can be explained or ascertained or enlarged by reference to Mr. Kelly's affidavit. It is not appropriate for a decision maker in a public law matter to seek to advance further reasons or to expand on the previous reasons and call to justify the decision in later judicial review proceedings. While it is permissible to correct clerical errors or other minor errors in a decision, it is not appropriate for the decision maker to ex post facto justify the decision by expanding on the reasons. In this regard counsel relies on a decision of the English Court of Appeal in R.(S) v. London Borough of Brent [2002] EWCA Civ 693 [2002] ELR 556 where it is stated:

> *"It should not be supposed that errors of reasoning or due process can be explained away or marginalised by evidence if judicial review is sought. For reasons set out by this court in R v Westminster City Council, ex parte Ermakov [1996] 2 All ER 302…, it is not ordinarily open to a decision-maker who is required to give reasons to respond to a challenge by giving different or better reasons"*

25. Moreover, the court should not be merely circumspect about allowing gaps in the decision to be filled by affidavits filed subsequently by the respondent but also should be wary of accepting any submissions of counsel for the respondent made at the judicial review hearing explaining the material gaps which arise. In this regard counsel referred to T.A.R. v. the Minister for Justice Equality and Defence [2014] IEHC 385. Insofar as the respondent asserts that the reasons for the decision are in the pro forma letter which issued on 26th August, 2014 where there is a reference to the applicant's offences, the same letter advises the applicant to look at the reasons in the submission document which was attached to the letter. However, as already submitted, no reasons appear on the face of that document and the decision constitutes only the word "Refuse".

26. While the respondent relies on the decision of Stewart J. in M.A.D. v. Minister for Justice [2015] IEHC 446, the applicant's circumstances are distinguishable. In M.A.D., the applicant was told that he had not met the good character precondition. That was not the case here. If the applicant's failure to meet the good character requirement was the reason for the refusal, he should have been told that. Finally, insofar as Mr. Kelly in his affidavit avers that the applicant's submissions to the respondent on the issue of his offences were taken into account in arriving at the decision there is no evidence that that was the case.

27. The applicant was entitled to know the basis for the decision to enable him to challenge same. In the present case, the applicant is left in a situation where the recommendation by the officials to the decision-maker was not followed and where a decision which issued leaves the applicant in a position whereby he does not know upon what basis the refusal was made.

The respondent's submissions
28. It is submitted that a key issue which colours the consideration of the within application is that, as acknowledged by the applicant's counsel, the Minister has absolute discretion and unless the decision is capricious or manifestly unfair it should stand. It is submitted that that is the test and this is accepted in M.A.D. v. Minister for Justice and Tabi v. Minister for Justice [2010] IEHC 109. While there is a duty to give reasons there is not a duty to give a very specific recent decision unlike the situation which pertained in Rawson which concerned the dismissal of an individual from his post. It is submitted that the fact that the applicant had previous convictions is something the Minister was absolutely entitled in her discretion to have regard to in deciding whether a certificate for naturalisation should be granted. Essentially, the core of the applicant's case is that while it is accepted that the respondent can make a decision it is contended because the respondent did not say "and because of these offences" and "because I am not satisfied that you are of good character" that the decision is defective. However, it is patently clear from the decision what the basis of the refusal is. It is formulated squarely on the fact that there are offences and the fact that the applicant has come to the attention of the authorities on a number of occasions. The decision is clear in that it specifically refers to the "nature and recency" of specific offences committed by the applicant as being the key reason for the refusal. The applicant cannot be in any doubt as to why his application has been refused. The decision as communicated to the applicant on 26th August, 2014 refers specifically to the respondent's absolute discretion and to "good character". It makes specific reference to a number of offences which were detailed in the Garda report which attached to the letter. Furthermore, it referred to the submission which the officials prepared for the respondent. The decision of the respondent based on that submission constitutes her refusal.

29. It is acknowledged that the jurisdiction on the duty to give reasons has been expanded and in this regard counsel for the respondent does not disagree with the applicant's contention as to the state of the law on the duty to give reasons in light of Meadows, Mallak and EMI.

30. It is submitted however that in all of those cases what is very clear is that the issue is not whether it was a reasoned decision but rather whether it is clear to the applicant what the issue is. In EMI, Clarke J. stated that you can infer the reason for the decision from the context and surrounding materials and from what has gone on in the course of the decision-making process. Instead of an obligation to set out a reasoned decision in every case, the requirement is to make it clear to the applicant what the relevant issue is so that he or she can address it in a subsequent application and/or in any judicial review application.

31. The applicant is trying to side-step the jurisprudence in Tabi and M.A.D. by suggesting that there is some lack of clarity in the decision in this case because of a mild deficiency in the wording. It is submitted however that there is no way that anyone reading the decision could not know that the basis of the decision was that the applicant did not satisfy the test of good character. The applicant drove his brother's taxi without a license and the ramification of that was of relevance. Furthermore, giving a false name to the Gardaí has imputations of dishonesty.

32. What was recommended to the decision-maker by the officials was the deferral of the decision for 18 months. That recommendation essentially said that the applicant could not at that time be recommended on good character grounds because of the conviction and offences. While the decision-maker decided that he was going to refuse the application he did so in the context whereby the applicant was advised in the letter of the 26th August that he could re-apply. Essentially, the applicant was being advised that he would have to have regard to the nature of the offences and their recency in the context of a future application. Thus the applicant knew what he had to address in the next application.

33. There is no merit in the applicant's contention that the considerations of the officials prepared the submissions for the decision-maker were different to the considerations of the decision maker. In the body of the decision it is made clear that the decision was based on the offences and the decision itself is based on the submission from the officials in this regard. The fact that the individual delegated by the Minister decided to refuse the application and allow the applicant to re-apply rather than deferring a decision for 18 months was not tantamount to the decision- maker going off on a different tangent to what was alluded to in the submission prepared by the officials. There has never been anything else in issue in this case other than the applicant's offences. While counsel for the applicant does not accept that the decision is a good-character decision, one has to ask the question what else can the reference to the applicant's offences mean other than a reference to good character. It is patently clear to anybody reading the decision that a reference to the applicant's offences is a reference to character.

34. Essentially, counsel for the applicant makes a highly technical argument but a perusal of the decision shows that at issue are the applicant's offences in the context of a good character assessment. Consistent with what is set out by Clarke J. in EMI, when the decision is looked at in its entirety it is very clear what is in issue. Furthermore, this can also be gleaned from the context in which the decision was made.

35. The respondent relies on the principle set out Mallak and EMI, namely that one can look at the decision in the round in order to see whether the basis for the decision is obvious which, the respondent's counsel submits, it is. On the face of the letter sent to the applicant on 26th August, 2014 it is very clear what the basis of the decision is. In the submission prepared for the decision-maker, as referred to in the covering letter, it is specifically stated that the applicant had come to the adverse attention of the Gardaí and the applicant was specifically referred to the Garda report which accompanied the letter of 26th August, 2014. Furthermore, reference was made in the letter to the taxi offence and indeed to the submissions the applicant himself had made in respect of the offences.

36. The thrust of the decision is that the officials who prepared the submission for the decision-maker were not prepared to give a recommendation of good character at the particular time i.e. they were not prepared to state that the applicant satisfied the good character requirement. The decision-maker made his decision to refuse based on that recommendation but concurrently with that decision the applicant was advised in the covering letter of 26th August, 2014 that he could re-apply at any time. The decision to refuse was to the same effect as the recommendation to defer. The applicant knows from the decision that what he has to address is the nature and recency of the offences and that he has to convince the decision-maker that he has turned over a new leaf. If the decision had been to defer it would have had the same effect. Therefore, the recommendation to defer was essentially a refusal at the particular time for the reasons set out in the submission and the covering letter.

It is submitted that notwithstanding the decision of the Supreme Court in Mallak, Tabi v. Minister for Justice [2010] IEHC 109 remains good law and that the dictum of Cooke J. in Tabi expressly acknowledges the very wide discretion which the respondent has. Cooke J. stated

> *"12. In circumstances where the Minister has explicitly based his decision upon the existence of four convictions, even for "minor offences", the existence of which is undisputed, it could not in any sense be said that the Minister has acted in a way which is arbitrary, capricious, partial or manifestly unfair."*

37. In M.A.D., the wording of the respondent's decision was almost exactly the same as in the applicant's case. In that case, the grant of a naturalisation certificate was "not recommended" and the decision maker went on to refuse the application on that basis. Stewart J. specifically rejected the argument that because the offences concerned were minor offences that the Minister could not engage on a good character assessment. Furthermore, it is also clear from M.A.D. that convictions are not necessary to put good character in issue. It is sufficient that a person has come to the attention of the Gardaí.

38. Stewart J. noted the absolute discretion which is vested in the respondent and she went on to state:

> *"37. In this instance, that which is under review is the exercise of an executive power. It is clear that the minister has been bestowed by statute with an absolute discretion in relation to this matter. While such a decision does certainly fall within the scope of judicial review, courts should be reluctant to intervene where the applicant might seek to achieve precision in the form of guidelines, especially where this would result in a fettering of the discretion conferred upon the minister by the statute.*

39. The importance of giving reasons in a decision is to attain fairness. In the present case this has been achieved. The applicant's case is not one where the respondent has had regard to extraneous matters other than the offences. The applicant is making a highly artificial argument that he does not know whether the basis of the refusal is because the good character requirement was not satisfied. That argument is not sustainable having regard to the contents of the decision and to the course of dealing between the parties. Even in the applicant's own affidavit he acknowledges that "the offences were considered and that a decision was reached not to grant the application". There is no argument made on behalf of the applicant that the decision-maker relied on anything other than the offences.

What led to the decision of the Supreme Court in Mallak to conclude that an order of certiorari was appropriate was the absence of reasons. The same cannot be said of the present case. Furthermore, the reason for the decision to refuse the application was clearly obvious to the applicant.

40. Gormley v. Minister for Agriculture [2014] IEHC 313 is authority for the proposition that there can be various circumstances where very brief reasons are adequate. Similarly, in Doody v. Governor of Wheatfield Prison [2015] IEHC 137, Noonan J. stated:

> *"25. Where reasons must be given, as in most cases, the nature and extent of the reasons will necessarily vary by reference to the circumstances of the case. As noted by this court in Nowak v. Irish Auditing and Accounting Supervisory Authority [2015] IEHC 94, there have been many cases where brief and succinct reasons have been held sufficient - see for example Laurentiu v. Minister for Justice [1999] 4 I.R. 26 and FP v. Minister for Justice [2002] 1 I.R. 164. Other cases may arise where the nature of the issue concerned imposes a duty on the decision maker to furnish detailed and elaborate reasons."*

41. What is important is that the essential rationale of the decision be communicated to the applicant in the Meadows sense and which should be patent or capable of being inferred.

42. If the court is not satisfied that the basis for the decision is not crystal clear, the court can be satisfied from the procedures followed and from the submissions which the applicant himself made that the offences were the reason for the refusal. There can be no other plausible or reasonable interpretation taken from the decision.

In this regard counsel relies on the dictum of Clarke J. in EMI v. the Data Protection Commissioner [2013] 2 I.R. 669.

It is clear from the submission document prepared for the respondent upon which the decision is annotated that the decision-maker considered the Garda report, the court orders and the explanations from the applicant's solicitor regarding the offences as to why they were not on his application form.

43. It is submitted that Mr. Kelly's affidavit does not purport to expand or enlarge the reasons provided to the applicant. The affidavit does not shore up the decision, nor is it an ex post facto explanation for the decision. At para. 4 of his affidavit Mr. Kelly avers as follows:

> "I say and have been advised that the certificate of naturalisation was refused because the Respondent was not satisfied that the Applicant was of "good character" because of the nature and recency of the offences that are described in the submission prepared for the Respondent. I say and believe that the Applicant does not dispute that he committed the offences. I say it is accepted that some of the offences were dealt with by way of the Probation Act. However, it could be noted that the application of the Probation Act involves a finding by the Court of trial that the acts alleged were proved."

44. As Mr. Kelly was one of the officials who made the submission to the decision maker, his evidence is not hearsay, contrary to what is alleged on behalf of the applicant.

45. In any event, this issue is not relevant as it is patently obvious from the decision on what basis the decision was made.

46. There is no suggestion that the decision- maker departed from the rationale of the submissions made to him by the officials; the applicant's complaint in this regard is without merit. The same considerations are set out in the letter communicating the decision to the applicant as are contained in the officials' submission to the decision-maker.

The applicant's response to the respondent's submissions

47. It is submitted that the ratio of Tabi v. Minister for Justice supports the argument the applicant makes because in that case Cooke J. refused to quash the decision because he was satisfied that the Minister had refused the application on the basis that good character was not established and the applicant in that case had been advised as much. That did not happen in the present case. Moreover, the respondent's reliance on M.A.D. v. Minister for Justice is misplaced because as is evident from the leave grounds, leave was not given in that case on the basis of a failure to give reasons or the opaqueness of the decision, unlike the present case. Moreover, the pro forma letter sent by the respondent to the applicant is almost on all fours with the letter which was sent in M.A.D. This only serves to undermine the pro forma nature of such letters upon which the respondent seeks to rely as forming part of the decision.

48. Furthermore unlike M.A.D., the issue in the present case is not the unreasonableness of the decision. The issue is whether reasons for the decision can be found and whether they are sufficient. It is submitted that in Mallak, Clarke J. states that the test is

to look at the decision itself. The court has to satisfy itself that the decision-maker asked himself the right question, namely whether good character was established. It is submitted that the refusal decision gives no indication that that consideration was embarked on.

49. Contrary to the respondent's submissions, there is nothing in the "comments" section of the submission which was made to the decision-maker which states that the decision-maker expressly considered the explanations and submissions which were made on the applicant's behalf vis-à-vis the offences in question.

50. The crucial issue in this case is that the applicant does not know what the reasons are for the refusal. How can it be inferred that the decision-maker decided that the applicant was not of good character when the submissions furnished to the decision maker by the officials are prefaced by a reference to the respondent's "absolute discretion".

51. With regard to the respondent's argument that the decision be looked at in the round, it is submitted that it is not appropriate to cherry-pick the reference to "offences" when the decision constitutes only the word "Refuse". Counsel relies on Rawson as support for the argument that it is not appropriate for the court to draw inferences as to what may or may not in the mind of a decision-maker.

Considerations
The requirement to give reasons

52. It is by now trite law that an administrative decision affecting rights and liabilities should disclose the reasons upon which it is based.

53. As to the requirement for an administrative decision to contain reasons, in Meadows v. Minister for Justice [2010] 2 I.R. 701 Murray CJ. stated:

> *"[93] An administrative decision affecting the rights and obligations of persons should at least disclose the essential rationale on foot of which the decision is taken. That rationale should be patent from the terms of the decision or capable of being inferred from its terms and its context.*
>
> *…*
>
> *…..*
>
> *[98] The fact remains that it is not possible to properly discern from the first respondent's decision the actual rationale on foot of which he decided that s. 5 of the Act had been "complied with". Accordingly in my view there was a fundamental defect in the conclusion of the first respondent on this issue."*

54. In Rawson v. Minister for Defence [2012] IESC 26, the Supreme Court reiterated the importance of being able to discern the reason for a decision from the terms of a decision. Clarke J. referred to Meadows in the following terms:

> *"6.7 More recently in Meadows v. Minister for Justice, Equality and Law Reform [2010] 2 I.R. 701 Murray C.J. said that a failure to supply sufficient reasons would affect the applicant's "constitutional right of access to the Courts to have the legality of an administrative decision judicially reviewed could be rendered either pointless or so circumscribed as to be unacceptably ineffective.*
>
> *6.8 While the primary focus of a number of the judgments cited, and indeed aspects of the decision in Meadows itself, were on the need to give reasons as such, there is, perhaps, an even more general principle involved. As pointed out by Murray C.J. in Meadows a right of judicial review is pointless unless the party has access to sufficient information to enable that party to assess whether the decision sought to be questioned is lawful and unless the courts, in the event of a challenge, have sufficient information to determine that lawfulness.*
>
> *….*
>
> *7.6 As pointed out by MacMenamin J. in Clare v. Kenny it is not for the court to engage in a hypothetical exercise in seeking to determine the possible rationale for a decision particularly where there may be many possible bases on which a decision might be reached. By a parity of reasoning it seems to me that it is not possible to infer that the decision maker asked the correct question when there are a number of different bases on which the question could be approached and where the record and the evidence is silent as to the basis on which the decision maker actually approached the issue in question."*

55. Mallak v. Minister for Justice [2012] 3 I.R. 297 is authority for the proposition that naturalisation decisions must contain reasons.

Fennelly J. stated:

> *"[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."*

At para. 78, he stated:

> *" The result is that the Minister has not suggested that there are any reasons relating to the applicant's character which could justify refusing him naturalisation and that his rights under the Refugee Act 1996 are not restricted in the interest of national security or public policy. Furthermore, the Minister granted a certificate of naturalisation to the applicant's wife with whom he has the right to live (in company with their children). One can understand the applicant being mystified. In my view, the Minister was under a duty to provide the applicant with the reasons for his decision to refuse his application for naturalisation. His failure to do so deprived the applicant of any meaningful opportunity either to make a new application for naturalisation or to challenge the decision on substantive grounds. If reasons had been provided, it might well have been possible for the applicant to make relevant representations when making a new application. That*

might have rendered the decision fair and made it inappropriate to quash it. In the absence of any reasons, it seems to me that the appropriate order is one of certiorari quashing the decision."

56. In his judgment in EMI Records (Ireland) Ltd. & Ors. v. Data Protection Commissioner [2013] 2 I.R. 669, Clarke J. opined:

> *"70….There should not be doubt as to where the reasons can be found. Clearly, an express reference in the decision itself to some other source outside of the decision document meets that test. Where, however, it is suggested that the reasons can be found in materials outside both of the decision itself together with materials expressly referred to in the decision, then care needs to be taken to ensure that any person affected by the decision in question can readily determine what the reasons are notwithstanding the fact that those reasons do not appear in the decision itself or in materials expressly referred to in the decision.*
>
> *[71] Where, for example, an adjudicator makes a decision after a process in which both sides have made detailed submissions it may well, as Fennelly J. pointed out in Mallak v. Minister for Justice [2012] IESC 59 , [2012] 3 I.R. 297 , be that the reasons will be obvious by reference to the process which has led to the decision such that neither of the parties could be in any reasonable doubt as to what the reasons were. But it seems to me that, in a case where any party affected by a decision could be in any reasonable doubt as to what the reasons actually were, it must follow that adequate reasons have not been given.*
>
> *[72] There may, of course, be cases where it is easy to see what reasons have been given and where the real issue is as to whether those reasons are adequate. However, the first point has to be to determine what reasons, if any, have been given, and where those reasons may be found."*

57. Clarke J. formulated a three questions test for "reasons" cases:

> *"[73] It follows that in reasons cases there may well be three questions raised:- (1) Do reasons have to be given and if so what type of reasons?; (2) Where can the reasons be found, and by reference to what evidence or materials can the court objectively ascertain the reasons?; and (3) When the reasons given, if any, have been ascertained, are those reasons sufficient to meet the requirements established in the case law?"*

58. The question as to whether reasons have been given may be on occasions be a question to be addressed by asking whether the reason for the decision is inherently obvious or can be inferred from the context or process within which it is framed. In EMI, Clarke J. put it thus:

> *"[75] It seems to me that the trial judge was entirely correct in holding that the enforcement notice itself does not provide any reasons. The real question is as to whether, as argued by counsel for the Commissioner, it might be said that the reasons are obvious either inherently, having regard to the circumstances of the case, or by reference to the process which led up to the decision to issue the enforcement notice. At the level of principle, in many types of cases, it is, of course, possible that a requirement for reasons may be met where the reasons are inherently obvious or where they can be readily inferred from the decision sought to be challenged, taken in conjunction with the process which led to the making of that decision…."*

59. In Kenny v. Coughlan [2014] IESC 15, it is clearly recognised that the extent to which the duty to give reasons applies may vary according to the nature of the decision and must be determined in light of the circumstances of the case :

> *"24. As the case-law of the European Court of Human Rights indicates, and as also stated earlier in this judgment, the degree and extent to which a decision of the District Court must be explained by giving reasons will depend in turn on the nature and circumstances of the case. In some cases it may be necessary to succinctly but fully explain the reasons for the decision so that the parties have a proper understanding of the reasons upon which it was based. In this case the offence was simply that of speeding and the mode of trial was summary. This was one of hundreds of such cases that come before the District Court routinely every day of the week. There had been a clear presentation of the issues by the parties, in adversarial proceedings. The District Court Judge indicated that he preferred the evidence given on behalf of the prosecution. The District Court Judge said that he was accepting the evidence of the prosecution. In the circumstances that was sufficient reason. There was no requirement for the trial judge in such a situation to elaborate on the obvious."*

60. Turning now to the present case in light of the jurisprudence on the duty to give reasons. There is no dispute between the parties but that reasons were required to be given by the respondent for the decision to refuse the naturalisation application. The question which has to be addressed in these proceedings is whether reasons were as a matter of fact given for the refusal and by reference to what evidence or materials can the court objectively ascertain whether reasons for the refusal were given. It then falls to determine whether the reasons advanced are sufficient, although the court notes the applicant's counsel's acknowledgement that had it been the case that the applicant was apprised that his application was refused because good character was not established, it would be difficult to impugn the decision on that basis given the "absolute discretion" with which the respondent is vested under the Act. If the applicant's contention that the refusal decision is devoid of rationale or so opaque as to amount to the same thing is upheld by this court then it would follow that an order of certiorari should be granted, on the principle set out in Mallak.

Were reasons given and where are they to be found?

61. Fundamentally, it is asserted by the applicant that the respondent exercised her statutory discretion in refusing the application without stating the basis for the refusal. The applicant's other argument is that the rationale for the decision is opaque. It is argued that the instant case is an "absolute discretion" case in terms similar to the decision which fell foul of the Supreme Court in Mallak. It is contended that there is no finding in relation to whether the applicant is of good character notwithstanding the reference in the refusal letter to the consideration of the "offences in the attached report". Moreover, counsel submits that it is not clear whether the offences were considered as going towards "good character" or whether they were factors taken account of in the respondent's discretion.

62. The other argument which is advanced by the applicant is that the recommendation made by the officials who prepared the submission in this case for the respondent was not followed by the individual (NW) who made the ultimate decision. Thus, it is contended that while the submission document refers to the applicant's offences, it cannot be simply inferred that the basis of the refusal related to the applicant's failure to meet the good character requirement, in the absence of any reference to the issue of good character in the submission document or in the decision-maker's manuscript notation. It is submitted that the letter of 26th August,

2014, which refers to good character, cannot be relied upon by the respondent as the basis for the refusal given that the applicant was specifically referred to the submission document for the purpose of discerning the reasons for the decision.

63. The respondent urges upon the court that the decision is one where the applicant was clearly advised that the reason for the refusal was that he had not met the precondition of being of good character. Particular reliance is placed by the respondent on the submission document prepared by the officials as constituting the basis for the refusal, in particular "the nature and recency" of the offences therein referred to which, the respondent argues, left the applicant in no doubt but that the good character requirement was not met.

64. Furthermore, the respondent contends that in conjunction with the basis for the refusal decision as contained in that submissions document, the letter of 26th August, 2014 clearly referred to the good character requirement, in addition to the applicant's offences, such that it had to have been clear to the applicant that he did not meet the good character requirement.

65. It is certainly the case that words to the effect "I am not satisfied that you are of good character" do not appear in the submission document. However, in that same document, the applicant's attention is drawn to the fact that he "has come to the adverse attention of the Gardaí". A schedule detailing certain offences was attached to the document. There is also reference in the submission document itself to the fine of €2,900 imposed on the applicant for driving a taxi without a license. Moreover, the recommendation to the decision-maker to defer making a decision on the granting of a naturalisation certificate, as set out in the document, refers to "the nature and recency of the offences".

66. It seems to me that the issue boils down to whether the applicant could reasonably deduce from the submissions document upon which the refusal is annotated that the respondent was not satisfied that he had met the good character requirement. In other words, is the failure to refer to "good character" in the submission document sufficient to vitiate the decision on the basis that it is devoid of rationale? I am not satisfied that it is. While it is not patent from the word "Refuse" as annotated on the document that the respondent was not satisfied as to the applicant's good character, the question to be determined is whether it can reasonably be said that the applicant would have been "mystified", in the Mallak sense, as to why his naturalisation application was refused. Given the reference to the offences in the submission document and the reference therein to the respondent's discretion to grant naturalisation if she is "satisfied that the applicant fulfils the statutory conditions specified in the Irish Naturalisation and Citizenship Act 1956, as amended" (emphasis added), I find that it cannot reasonably be considered that the applicant would have been "mystified" at the refusal of the application, particularly when the offences are referred to in the same document. Furthermore, regard must be had to the letter of 26th August, 2014 which advised the applicant of the respondent's decision not to grant his application. It states, in part:

> "Section 15 of the Irish Naturalisation and Citizenship Act, 1956 provides that the Minister may, in her absolute discretion, grant the application if satisfied that the applicant is of good character. The Minister, having considered your client's application and the offences referred to in the attached report, has decided not to grant your client a certificate of naturalisation."

67. One cannot but conclude that the reference therein to good character followed as it is by reference to offenses had to have put the applicant on alert that the respondent had put "good character" in issue by reason of the offences. To my mind, notwithstanding that the message being communicated to the applicant might have been done in a more direct fashion, the clear inference of the letter of 26th August, 2014 and the accompanying submissions document, together with the schedule of offences, is that the respondent was not satisfied that the good character precondition, as set out in s.15 of the Act, was met by the applicant because of his offences.

68. Counsel for the applicant submits that insofar as the reference to good character can be read as a basis for the refusal, that reference only appears in a letter from an official who was not involved in the decision-making process, and that furthermore the said official was not one of the three individuals whose signatures appear on the submission document which was furnished to the respondent and upon which the refusal is annotated.

69. I am satisfied however that the contents of the letter of 26th August, 2014 do not constitute the views of its author but rather those of the respondent, as it is clearly stated that the letter is written on the direction of the respondent. I find nothing in the papers which are before the court to displace the author's assertion that what is being communicated to the applicant is the view of the respondent.

70. Furthermore, even if the reasons for the refusal were not reasonably capable of being inferred from the submissions document and the letter of 26th August, 2014 it remains the position that the course of dealing between the applicant and the respondent following the submission of the naturalisation application on 5th October, 2012 related in large part to the issue of offences which the applicant had committed. As acknowledged by the respondent in these proceedings, the applicant replied in a fulsome manner to the queries raised by the respondent and he provided explanations for the non disclosure of certain offences in his application form. More particularly, the applicant's legal representatives in relaying the applicant's explanation for the non-disclosure of the Probation Act matters and the Road Tax fine specifically urged the respondent that notwithstanding the said offences "it would be disproportionate to conclude that [the applicant] was not of good character". Indeed, in their original submissions, the applicant's legal representatives made the same plea with regard to the fine of €2,900 which the applicant had incurred for the offence under the Taxi Regulation Act.

71. When viewed against this backdrop, the letter of 26th August, 2014 and the submission document, both of which (in particular the submission document) refer to the said offences, cannot be viewed otherwise than as imparting to the applicant that the rationale for the refusal of his application for naturalisation was that he had not met the good character requirement.

72. One cannot lose sight of the overarching requirement as to why reasons must be given by an administrative decision-maker. It is to ensure "fairness" in the process (as set out in Mallak) so as to enable the recipient of a negative decision to, inter alia, respond the concerns of the decision-maker. From the papers which are before this court, the court can infer that at all relevant times the concerns of the decision- maker centred on the offences which were on the applicant's record. I am satisfied that the refusal decision made the applicant aware of this in sufficient terms for him to know what would have to be addressed by him to meet those concerns in any future application for naturalisation and to enable him to exercise his constitutional right of access to the courts.

73. An issue which the court had to decide in coming to its findings as set out above was whether the respondent's decision to deviate from the recommendation made in the submissions document to defer making a decision for 18 months and instead respond to the application by way of an outright refusal is of such import as to disentitle the decision-maker from relying on the underlying basis for the recommendation to defer, namely that the applicant had not met the good character requirement. In other words, can it be

said that the applicant was left "mystified" at the outright refusal by the respondent.

74. I am satisfied however that the thrust of the recommendation made by the officials was that they were not prepared to give a recommendation of good character at the particular time given the issue of the offences. While the decision-maker deviated on the issue of the deferral, I am not persuaded that it was not still clear to the applicant that the rationale for the refusal was the issue of the offences and his good character. Insofar as it is argued that the applicant was led to believe from the contents of the submission document that the "nature and recency of the offences" was a factor only in the recommendation to defer and not in the refusal of the application, to my mind the letter of 26th August, 2014, already referred to herein and quoted from, sufficiently connects the issue of the offences and the applicant's good character to the decision not to grant the applicant a certificate of naturalisation such that the applicant's contention in this regard is not sustainable.

75. Counsel for the applicant also submits that it was not clear whether the respondent had considered the representations which had been made on behalf of the applicant. Overall, I am satisfied that the representations were considered. There is reference to them in the submission document which was prepared for the respondent. The absence of a positive averment in either the submission document or in the letter of 26th August, 2014 that it was considered does not in my view negate the court's conclusion in this regard given the specific reference in the submission document to the applicant's solicitor's representation. I adopt the dictum of Humphreys J. in Leng v. Minister for Justice [2015] IEHC 681:

> *"21…..A statement that a file has been examined should in the absence of anything to the contrary be treated as equivalent to a statement that it has been read. There is nothing on the face of the decision to suggest that the letter from Ms. Miao was not, in fact, considered.*
>
> *22. More fundamentally, an obligation to have regard to a particular matter does not automatically create an obligation to refer to it in narrative form (see A.W.S. v. Refugee Appeals Tribunal (Unreported, High Court, Dunne J., 12th June, 2007, at p. 14 and my decision in R.A. v. Refugee Appeals Tribunal, Unreported, 4th November 2015). As long as the decision is not inconsistent with a document supplied, failure to refer to a document that does not automatically give rise to an inference that it has been disregarded. T he onus is on the person challenging a decision to show that relevant matter has been disregarded, if the decision by its terms suggests that it was examined (see G.K. v. Minister for Justice, Equality and Law Reform [2002] 2 I.R. 418)."*

76. Accordingly, for the reasons set out above, I am not satisfied that the challenges to the decision as set out in Grounds (f) (i) of the statement of grounds has been made out. The court did not consider it necessary to embark on an analysis of ground (f) i (e) of the Statement of Grounds.

77. The relief sought in the Notice of Motion is denied.