THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 980 JR]

BETWEEN

MOHAMED SAMIR SALEM OMARA

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

Ex tempore JUDGMENT of Mr Justice David Keane delivered on 19 January 2018

Preliminary
1. This judgment is given *ex tempore* in accordance with the principles summarised by Humphreys J in *Walsh v Walsh* (No. 1) (Unreported, High Court, 2 February, 2017), [2017] IEHC 181 and, in particular, subject to the safeguard described by Munby LJ in *In re A. and L. (Children*) [2011] EWCA Civ. 1611 (at para. 47) and noted by Humphreys J (at paras. 15-16) whereby the parties will have the ability and, indeed, the duty to seek further elaboration or explanation from the court if they feel that something is missing.

Introduction
2. The applicant ('Mr Omara') seeks an order of *certiorar*i quashing the decision of the respondent ('the Minister'), dated 20 September 2016, expressing an inability to further process Mr Omara's application for naturalisation as the spouse of an Irish citizen, under s. 15A of the Irish Nationality and Citizenship Act 1956, as amended ('the Act of 1956') because Mr Omara could not provide an affidavit that the Minister had requested on 8 September 2016 averring to the continuing subsistence of the couple's marriage at that time.

3. By Order of the Court made by O'Regan J on 30 January 2017, Mr Omara had also been given leave to seek a declaration that the said application for naturalisation 'has been granted subject to his attendance at and participation in a citizenship ceremony.' Very wisely, Counsel for Mr Omara expressly withdrew that application in the course of his Reply at the hearing of the application.

Background
4. The relevant facts are these. Mr O'Mara is an Egyptian national who submitted an application for naturalisation under s. 15A of the Act of 1956 on 20 January 2016. Mr Omara married an Irish citizen on 23 May 2012 and has been resident in County Down since in or about January 2013. There is one child of the marriage, a daughter born in Belfast on 20 November 2014.

5. As part of the prescribed application form under s. 15A of the Act of 1956, Mr Omara's Irish citizen spouse made the following declaration on 20 January 2016:

> 'I Tina Rose Omara do solemnly and sincerely declare that I married Mohamed Samir Salem Omara on the 23/05/2012 at Cairo in Egypt and that we are living together as husband and wife, that our marriage is subsisting and that no proceedings for divorce or annulment of this marriage have been commenced, or are about to be commenced in any court of law. I declare that my spouse was born on 10/11/1983 at Monofiya in Egypt a national of Egypt and I make these solemn declarations conscientiously believing the same to be true and by virtue of the Statutory Declarations Act 1938, as amended by the Civil Law (Miscellaneous Provisions) Act 2008.'

6. The Irish Naturalisation and Immigration Service ('the INIS') wrote to Mr Omara on 23 August 2016, stating - in material part - that the Minister proposed to grant his application, 'subject to the successful completion of the application process.' On 2 September 2016, the INIS again wrote to Mr Omara, informing him that the Minister intended to grant his application for a certificate of naturalisation at a citizenship ceremony at the National Convention Centre in Dublin on 19 September 2016, at which Mr Omara would be required to make the prescribed declaration of fidelity to the nation and loyalty to the State.

7. Evidently without Mr Omara's knowledge, the Minister subsequently received an e-mail dated 4 September 2016, which purported to be from Mr Omara's Irish citizen spouse. It states in relevant part:

> 'I am sending you a email to let u know that me and my husband are no longer together. We are planning to get a divorce and we had applied for the Irish nationality and citizenship through marriage.'

It was followed by an undated letter to the same effect, that was received at the Department of Justice and Equality on 7 September 2016.

8. On 8 September 2016, the INIS wrote to Mr Omara stating:

'You were recently issued with an invitation to attend the Citizenship Ceremony taking place on 19/09/2016 in Dublin. However, I am to inform you that this invitation has now been withdrawn and you should not attend the Citizenship Ceremony on this date.'

The invitation has been withdrawn as your application for naturalisation now requires further consideration and case assessment.

I would be obliged if you could forward a Sworn affidavit signed by you and your spouse that you are in a subsisting marriage on that date.'

9. Mr Omara e-mailed the INIS in response on 17 September 2016, stating (in terms that have been slightly corrected for clarity):

> 'Hello my name is Mohamed and I have been [married to] an Irish citizen for over 3 years and we have [a two-year old daughter] and [I have applied] for Irish naturalization through marriage and I got the invitation [letter] after [paying] the fee but 10 days before my ceremony me and my wife [argued] together and one week before my ceremony I [received a

letter withdrawing] my invitation to my ceremony [pending receipt of an] affidavit [that would] have to be [sworn] by me and her [before a suitably qualified person] and she didn't want to do it so can you help me plz for any solution??? Thanks.'

10. The Minister received another e-mail and, subsequently, another letter from the person purporting to be Mr Omara's spouse, each dated the 18 September 2016 and both in broadly similar terms. The relevant part of the e-mail states:

> 'I WILL NOT be sending an affidavit as we are no longer together and I have started divorce proceedings. As he only stayed with me to get this citizenship. He has sent the money for the certificate of naturalisation €950 by banker (sic) draft. He would like his money back as he can't proceed as I'm refusing to lie on affidavit for him.'

11. This train of correspondence culminated in the decision under challenge, which was communicated in a letter dated 20 September 2016 from the INIS to Mr Omara. In relevant part, it states:

> 'On the basis that you cannot provide a Sworn Affidavit to support your section 15A application, we are no longer able to process your citizenship application.
>
> It is open to you to lodge a new application if and when you are in a position to meet the statutory requirements applicable at that time.'

12. It is common case that Mr Omara never afterwards furnished the affidavit or affidavits requested. Counsel for Mr Omara conceded that he and his Irish citizen spouse are no longer living together while asserting, on the basis of his instructions (although it was not in evidence), that their marriage continues to subsist in that it has neither been dissolved nor annulled.

Procedural Background

13. By Order of the Court made by O'Regan J on 30 January 2017, Mr Omara was given leave to seek the reliefs already described on the following grounds:

> (i) The Minister breached Mr Omara's legitimate expectation that his application for naturalisation had been, or would be granted, subject to his attendance at and participation in a citizenship ceremony.
>
> (ii) The Minister has erred in law with respect to the concept of a 'subsisting marriage' and thereby acted in error, unreasonably or irrationally, in basing her decision on the ground that Mr Omara was not in a subsisting marriage or that he had not provided sufficient evidence in that regard.
>
> (iii) The Minister was acting *ultra vires* her powers in purporting to re-open Mr Omara's application for naturalisation for 'further consideration and case assessment' in her letter of 8 September 2016, and/or in refusing Mr Omara's application for naturalisation in her letter of 20 September 2016.
>
> (iv) The Minister breached fair procedures, either per se by reason of re-opening Mr Omara's application for naturalisation after he had been invited to attend a citizenship ceremony; and/or in failing to put to Mr Omara for comment the information upon which such decision was based.

Law

14. Section 15A of the Act of 1956 provides in material part as follows:

> '(1) …[T]he Minister may, in his or her absolute discretion, grant an application for a certificate of naturalisation to the non-national spouse or civil partner of an Irish citizen if satisfied that the applicant-
>
> …
>
> (c) and that citizen-
>
> (i) are married to each other, have been married to each other for a period of no less than 3 years, and are living together, as attested to by affidavit submitted by the citizen to the Minister in the prescribed form,
>
> *(d) is, in the case of a spouse, in a marriage recognised under the law of the State as subsisting,*
>
> *… and*
>
> (h) 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.'

15. Section 17 of the Act of 1956 provides:

'An application for a certificate of naturalisation shall be-

> (a) in the prescribed form, and
>
> (b) accompanied by-

(i) such fee (if any) as may be prescribed, and

(ii) such evidence (including statutory declarations) to vouch the application as the Minister may require.'

16. The form of application for a certificate of naturalisation prescribed under s. 17 of the Act of 1956 for a person of full age such as the applicant is that set out in *Form 8* in the schedule to the Irish Nationality and Citizenship Regulations 2011 (S.I. no. 569 of 2011). The form requires an applicant to provide a range of relevant particulars, which include a statement of his or her marital status, accompanied by a declaration under the Statutory Declarations Act 1938, as amended by the Civil Law (Miscellaneous Provisions) Act 2008, that those particulars are true. As the declaration in this case of the applicant's spouse demonstrates, where an applicant is applying for naturalisation based on his or her marriage to an Irish citizen, the form also requires the applicant's spouse to make a statutory declaration in the following terms:

> 'I [*Full name of spouse of applicant*] do solemnly and sincerely declare that I married [*Name of applicant*] who was born on the [*Date of Birth*] at [*Place of birth*] in [*Country of birth*] a national of [*Country*] on the [*Date of marriage*] at [*Country of marriage*], that we are living together as husband and wife, that our marriage is subsisting and that no proceedings for divorce or annulment or dissolution of this marriage have been commenced, or are about to be commenced, in any court of law and I make this solemn declaration conscientiously believing the same to be true and by virtue of the Statutory Declarations Act, 1938, as amended by the Civil Law (Miscellaneous Provisions) Act 2008.'

Analysis

17. This is an application that, I regret to say, is attended by a pervasive air of unreality and a troubling disregard of controlling authority.

18. The manner in which Mr Omara frames the grounds upon which he seeks relief, entail the following explicit – or, at the very least, strongly implicit - propositions:

> (i) The Minister had already made a decision (and, thus, had exercised her absolute discretion) under s. 15A(1) of the Act of 1956 to grant Mr Omara a certificate of naturalisation, as evidenced by the INIS letters to him of 23 August 2016 and 2 September 2016, such that the Minister was acting *ultra vires* in purporting to engage in further consideration or case assessment of his application, as indicated in the INIS letter to Mr Omara of 8 September 2016, and in purporting to be unable to process that application further, as stated in the INIS letter to Mr Omara of 20 September 2016.
>
> (ii) The INIS letters to Mr Omara of 23 August 2016 and 2 September 2016 gave rise to a legitimate expectation on the part of Mr Omara that he would receive a certificate of naturalisation, which the Minister then unlawfully breached.
>
> (iii) The implicit reason for the ultimate refusal by the Minister of Mr Omara's application for a certificate of naturalisation was that he was not in a 'subsisting marriage' or had not provided sufficient evidence of that fact, and either conclusion was erroneous, unreasonable and irrational.

(i) unlawful exercise of discretion?

19. *Hodzic v MJELR* [2010] IEHC 549 (Unreported, High Court (Birmingham J), 13th July, 2010), is a case involving a challenge to a refusal to grant a certificate of naturalisation. Mr Hodzic had applied for a certificate – under s. 15 rather than s. 15A of the Act of 1956 – in January 2004. By letter dated 17 February 2009, he was informed that the Minister had approved his application. On 7 May 2009, he made the necessary declaration before a judge of the District Court (equivalent to that under s. 15A(1)(h) of the 1956 Act, as set out above). However, on 11 May 2009, the INIS wrote to Mr Hodzic informing him that the Minister had decided not to grant him a certificate of naturalisation. That occurred because, on 9 April 2009, the Minister had received information that, on 27 March 2007, Mr Hodzic had been convicted on a charge of drunk driving. Section 15(1)(b) of the Act of 1956 requires the Minister to be satisfied, as a precondition to the exercise of the absolute discretion to issue a certificate of naturalisation, that the applicant is of good character (as does s. 15A(1)(b), the applicable provision in Mr Omara's case). Mr Hodzic challenged that decision on a number of grounds. One was that the Minister had purported to exercise the discretion conferred by s. 15 of the 1956 Act twice when it could only lawfully (or *intra vires*) be exercised once. That proposition is closely equivalent, if not identical, to the first of the three propositions on which Mr Omara relies. Another was that the Minister's earlier decision to approve Mr Hodzic's application for a certificate of naturalisation created a legitimate expectation on his part that, if he made the appropriate declaration, he would in fact receive a certificate, which the Minister then breached. That ground is essentially identical to the second of the three propositions on which Mr Omara relies.

20. In his judgment, Birmingham J addressed the first ground just described in the following terms:

> 'This is an area in which there is a divergence between the procedure mandated by statute and the general understanding of what happens in practice. It is widely believed that the Minister considers an application on its merits, reaches a decision, informs the applicant and, if the decision is a favourable one, invites the applicant to make a declaration. A general belief would be that declarations are made only by individuals who have been approved for citizenship. I think it reasonable to conclude that anyone in receipt of the letter of the 17th February, 2009, would believe that and I also believe that it is reasonable to infer that the author of the letter was working on just that basis.
>
> However, the statutory procedure is materially different. The Minister has a discretion, indeed an absolute discretion, to grant a certificate to persons who have complied with the five conditions specified in the Act of 1956, one of which requires that an individual has made the statutory declaration. So, notwithstanding the misleading impression created by the letter of 17th February, 2009, the Minister could not actually grant the application in February, 2009 because he could not have been satisfied that at that stage the applicant had complied with all the conditions. On the contrary, the Minister was fully aware that, as of that time, the applicant had yet to comply with one of the essential conditions.
>
> In truth, the furthest the Minister could have gone was to consider the matter and to form a view that he would grant a certificate once all preconditions were complied with.
>
> That being so, arguments based on a suggestion that a discretion, which could only be exercised once, had been exercised or purportedly exercised twice are misplaced. The discretion was exercised only once when the certificate was refused. I have referred to the discretion being exercised only once but it is probably more accurate to say that the

> Minister was concluding, in the light of up to date information, that the applicant as a person with a conviction for drunk driving was not a person of good character and so did not comply with the provisions of s. 15(1)(b) of the Act of 1956.'

21. In *J.O. v MJE* [2016] IEHC 759 (Unreported, High Court, 11th November, 2016), Stewart J expressly followed *Hodzic* in holding that the absolute discretion under s. 15 (and, by obvious implication, s. 15A) cannot be exercised until all of necessary criteria have been complied with.

22. It follows that no question can arise in this case of the Minister's having acted *ultra vires* whether by purporting to twice exercise a discretion that can only be exercised once or by purporting to re-open (or to further consider or assess) an application that had already been determined. Indeed, the position is that the Minister has not yet had an opportunity to exercise the absolute discretion conferred by s. 15A(1) of the Act of 1956 even once, since Mr Omara has not yet made the necessary declaration under s. 15A(1)(h) that is a condition precedent to that step.

(ii) breach of legitimate expectation?
23. In *Hodzic*, Birmingham J went on to address the legitimate expectation argument in the following way:

> 'The real issue is whether, given that the Minister was making a decision in relation to an individual who had been told that his application for a certificate had been approved, it was unreasonable to proceed in the manner that the Minister eventually did. If the question is framed in those terms, the argument is closely related to the issue of legitimate expectation and I will consider both arguments together. So far as legitimate expectation is concerned, while the doctrine has been around for over forty years, its scope and extent remains controversial. Counsel for both sides have engaged in careful analysis of many of the leading authorities from this jurisdiction and further afield referring to classic cases such as *Webb v. Ireland* [1988] I.R. 353 and *Abrahamson v. The Law Society of Ireland* [1966] 1 I.R. 403, as well as more recent statements of the law such as *Lett & Company Limited v. Wexford Borough Corporation and Others* [2007] IEHC 195, (Unreported, High Court, Clarke J., 23rd May, 2007) and *Atlantic Marine Supplies Limited and Sean Rogers v. Minister for Transport, Ireland and the Attorney General* [2010] IEHC 104, (Unreported, High Court, Clarke J., 26th March, 2010).
>
> This is a case where the applicant is seeking to hold the Minister to a position adopted on the basis of incomplete information and seeking to compel the Minister to make a decision other than the one that would appear appropriate to him in the light of the most complete information by reference to an earlier indication that was given.
>
> It is useful to consider what the position would be of a Minister, on whose behalf a letter in terms similar to that of the 17th February, 2009, had been issued, but who then became aware of information before the process had been completed that the applicant was a serial rapist or had been complicit in war crimes. Would the Minister in such a situation be compelled to implement what had been his original intention or would he be entitled to give further consideration to the issue and reverse his original intentions? Would the Minister in that situation be forced to grant a formal certificate, notwithstanding that such an outcome was demonstrably undesirable, and then proceed to initiate the procedure for revocation that is provided for in s. 19 of the Act of 1956? Assistance in answering these hypothetical questions is to be found in the origin of the doctrine of legitimate expectation. It is an equitable doctrine, a development of the doctrine of promissory estoppel. Further assistance is also to be found in the fact that a certificate of naturalisation cannot be seen as a statutory benefit or entitlement. As we have seen, no non-national has an entitlement to a certificate – if a certificate is issued, a privilege is being conferred. For my part, I see nothing particularly equitable in trying to hold a decision-maker to a decision made in the absence of complete information, even if the absence of information might be seen to derive from a systems failure for which the subject of the decision bears no responsibility whatsoever.'

24. While the comparable hypothetical questions in the present case are obviously less dramatic, the answers they invite are no less compelling. What would be the position of a Minister, on whose behalf a letter in terms similar to those of 23 August and 2 September, 2016 had been issued, who then becomes aware of information that suggests that the applicant under s. 15A of the Act of 1956 is no longer living with his or her Irish citizen spouse or is no longer in a subsisting marriage with that person, or both? Is the Minister in such a situation compelled to implement a previously formed intention to naturalise that person based on the prior understanding that the person was living together in a subsisting marriage with his or her Irish citizen spouse or is the Minister not then entitled to give further consideration to the issue and perhaps even reverse his or her original intentions? I am satisfied that, on any sensible reading of s. 15A of the Act of 1956, the latter proposition is the correct one.

(iii) did the Minister wrongly rely on the absence a subsisting marriage?
25. The third contention upon which Mr Omara's arguments in this case rely is that the Minister effectively exercised her absolute discretion to refuse his application for a certificate of naturalisation and that her implied reason for doing so was that he was not in a 'subsisting marriage' or had not provided sufficient evidence of that fact. Mr Omara submits that either reason was erroneous, unreasonable and irrational.

26. I cannot accept the factual premise upon which that argument is based. It is clear from the train of correspondence already described and, in particular, the INIS letter of 20 September 2016 that the Minister did not purport to refuse Mr Omara's application for a certificate of naturalisation on the basis that he was not in a subsisting marriage with his Irish citizen spouse. Rather, the Minister's position was that she was unable to consider that application further unless or until Mr Omara could provide the sworn affidavit from his Irish citizen spouse setting out the up-to-date position concerning their marriage that the Minister had expressly requested. Mr Omara's application thus ran aground under s. 17 of the Act of 1956 in that he could not provide the evidence to vouch it that the Minister required.

27. Although Mr Omara never sought to raise the issue in his correspondence with the INIS, in both the written and oral submissions made on his behalf great emphasis is placed on the specific terms of the INIS letter to him of 8 September 2016, in which the writer stated:

> 'I would be obliged if you could forward a Sworn affidavit signed by you and your spouse that you are in a subsisting marriage on that date. Please forward by post.'

28. There is no doubt that the terms in which that request is framed leave something to be desired. It is also necessary to acknowledge that, prior to the commencement of these proceedings, Mr Omara was never furnished with the e-mail and postal correspondence that gave rise to the Minister's concerns.

29. But as against that, the Minister's request was made in the context of the applicable statutory framework. As part of that

framework, it is a condition precedent to the exercise of the Minister's absolute discretion under s. 15A of the Act of 1956 that he or she must be satisfied that, amongst other things: (a) the applicant and his or her Irish citizen spouse are living together (s. 15A(1)(c)); and (b) the marriage between the applicant and his or her Irish citizen spouse is one recognised by the laws of the State as subsisting (s. 15A(1)(d)). The prescribed statutory declaration that Mr Omara's Irish citizen spouse was required to make, and had made almost eight months earlier, is a composite one that included, amongst other matters, both such recitals. There is no suggestion that Mr Omara ever sought clarification of the nature or scope of the request contained in the INIS letter of 8 September 2016.

30. Assuming, for the purpose of argument, that the relevant request in the INIS letter of 8 September 2016 falls to be construed in a strict technical sense as a narrow requirement for evidence solely of the continuing subsistence of Mr Omara's marriage, rather than as a (perhaps, clumsily phrased) shorthand request for confirmation on oath by Mr Omara's Irish citizen spouse that there had been no material change in the matters covered by the statutory declaration that she had made the previous January, it is difficult to see how that could assist Mr Omara. His problem was not that he was in a position only to provide the former and not the latter, but rather that he was unable to provide either. As he now concedes, his Irish citizen spouse would not provide him with any further affidavit or declaration.

31. It may well be correct to suggest, as Counsel for Mr Omara does based solely upon his instructions, that despite the concession that Mr Omara is no longer living with his Irish citizen spouse, their marriage continues to subsist as one recognised by the laws of the State, in that it has not been dissolved or annulled, but it is unnecessary for me to express a view on that issue. Indeed, it would be inappropriate to do so. There was no evidence regarding the continuing subsistence of Mr Omara's marriage in September 2016 before the Minister . Nor is there any such evidence before this Court now. In the affidavit that he swore on 16 December 2016 to ground the present application, Mr Omara includes no such averment.

32. I am not prepared to make either of the inferential leaps from the words used in the INIS letter of 8 September 2016 for which Mr Omara contends. The first is that the Minister, through the INIS, was confirming to Mr Omara that her sole reservation or concern in respect of his application was about the continuing subsistence of his marriage. The second is that the INIS letter of 20 September 2016 should be construed as the refusal of Mr Omara's application for a certificate of naturalisation on the narrow and specific ground that he was not then in a subsisting marriage, rather than as what it purports to be on its face, a letter informing Mr Omara that the Minister could no longer process his application for naturalisation because he could not provide the evidence to vouch it required by the Minister.

(iv) No useful or legitimate purpose served by the relief sought

33. A further difficulty that Mr Omara faces flows from his concession that, whether or not their marriage still subsists, he and his Irish citizen spouse are no longer living together, precluding him from meeting the relevant condition under s. 15A(1)(c) of the Act of 1956 for the exercise by the Minister of the discretion to grant or refuse him a certificate of naturalisation.

34. In the course of argument, the Court ventured to suggest that it must surely follow as a corollary to that concession that no useful or legitimate purpose would be served by granting an order of *certiorari* in respect of the Minister's letter of 20 September 2016, even if Mr Omara could otherwise establish an entitlement to one, since he now acknowledges that he could not then, and cannot now, meet the relevant condition precedent to the exercise of the Minister's discretion under s. 15A(1).

35. In response, Counsel for Mr Omara submitted that the Court's observation was based on a misconstruction of s. 15A(1)(c). Mr Omara contends that, properly construed, the requirement under that sub-section to satisfy the Minister that the applicant and his or her Irish citizen spouse 'are married to each other, have been married to each other for a period of not less than 3 years, and are living together, *as attested to by affidavit submitted by the citizen to the Minister in the prescribed form'* (emphasis added), means that the couple concerned must be living together at the time of the Irish citizen spouse's attestation to that fact, rather than at the time when all of the conditions precedent have been met and the Minister is required to exercise the relevant discretion.

36. I cannot accept that argument for several reasons. The first reason is that I do not accept that that is the plain or ordinary meaning of those words on a literal construction of them. The words in the sub-section that I have placed in italics do not say '*when attested to*', they say '*as attested to.*' The relevant requirement under s. 15A(1) is that, in order to exercise the discretion to grant a certificate of naturalisation, the Minister must be satisfied of a number of things, including – under s. 15A(1)(c) - that the applicant and his or her Irish citizen spouse 'are living together'. Thus, the requirement for the existence of that state of affairs is one that is plainly referable to the point in time when that discretion is, or becomes, exercisable. The attestation to that state of affairs by the Irish citizen spouse must logically precede the exercise of the Minister's discretion, but it seems to me tolerably clear that, while the requirement that the applicant and his or her Irish citizen spouse are living together is to be evidenced by the former, it must be capable of being complied with at the time of the latter.

37. I draw further support for that view by comparing the words of the sub-section at issue with those of s. 15A(1)(e) whereby the Minister must also be satisfied that the applicant 'had, *immediately before the date of the application*, a period of one year's continuous residence in the island or Ireland' (emphasis added). If it was the intention of the Oireachtas that the Minister should be satisfied only that the applicant and his or her Irish citizen spouse were living together at the time when the latter attested to that fact, rather than at the time when the Minister was required to exercise the relevant discretion to grant or refuse a certificate of naturalisation, then it would have used words such as those I have just placed in italics to put that intention into effect.

38. If I were wrong about that, s. 5 of the Interpretation Act 2005 would immediately come into play since, in my view, a literal interpretation making it a condition precedent that the Minister be satisfied that an applicant and his or her Irish citizen spouse were living together when the Irish citizen spouse attested to that fact, rather than when the Minister's discretion falls to be exercised, would be absurd. It would give rise to an obvious problem - analogous to the one considered by Birmingham J in *Hodzic* in relation to the assessment of good character - whereby a Minister who became aware that an applicant was no longer living with his or her Irish citizen spouse prior to being called upon to exercise the relevant discretion would be obliged to ignore that fact and compelled to act solely by reference to the position as it was in the past when the Irish citizen spouse attested that those persons were then living together. In those circumstances, it would be necessary to give the relevant words a construction that reflects the plain intention of the Oireachtas, which I have no doubt was that the Minister should be satisfied that the applicant and his or her non citizen spouse are living together when the Minister is required to decide whether to grant or refuse a certificate of naturalisation.

39. That, of course, brings me back to the proposition that, even if Mr Omara could establish a defect in the decision contained in the INIS letter of 20 September 2016 that would otherwise entitle him to an Order of *certiorari* (and, for my part, I am satisfied that he cannot), he would still be in a situation where no useful or legitimate purpose could be served by the making of any such order. As judicial review is a discretionary remedy, if necessary I would have declined to grant the relief sought on that basis also.

(iv) Natural and constitutional justice and fair procedures

40. Mr Omara contends that the failure to put to him for comment the contents of the e-mail and postal correspondence received from his Irish citizen spouse amounts to a breach of his entitlement to fair procedures such as would warrant the grant of an order quashing the decision communicated to him in the INIS letter of 20 September 2016.

41. The applicant relies on the decision of the Supreme Court in *Mallak v. Minister for Justice* [2012] 3 IR 207 in support of that argument. The applicant in *Mallak*, having earlier been granted a declaration of refugee status, was refused a certificate of naturalisation without being given any reason whatsoever. Mr Omara was not refused a certificate of naturalisation, but rather was informed that his application for naturalisation could not be processed further. Mr Omara was informed, as the clear reason for that decision, that it was because he was unable to provide the sworn affidavit from his Irish citizen spouse that had been requested.

42. It is important to note that the Minister has never purported to express a view, much less reach a conclusion, concerning the subsistence or status of Mr Omara's marriage to his Irish citizen spouse either in September 2016 or at any time since then. It seems to me that the Minister has simply sought to do, what she has been enjoined to do by the Oireachtas under s. 15A(1) of the Act of 1956, namely to satisfy herself that each of the conditions precedent to the exercise of the discretion conferred on her under that sub-section has been complied with, and has, perfectly properly so far as I can see, invoked her power under s. 17 of that Act to require Mr Omara to provide evidence vouching his application to assist her in that regard. Mr Omara has, by his own admission failed to provide that evidence, even after being fully apprised of the contents of the correspondence that the Minister had received from a person purporting to be his Irish citizen spouse. Mr Omara concedes that he and his Irish citizen spouse are not living together as required under s. 15A(1) of the Act of 1956 to permit the exercise by the Minister of the discretion conferred on her under that section.

43. I am satisfied that the decision communicated in the INIS letter to Mr Omara of 20 September 2016 was not one reached in breach of Mr Omara's entitlement to natural and constitutional justice and fair procedures on the basis that he was not first provided with a copy of the correspondence that the Minister had received from his Irish citizen spouse for the purpose of being invited to comment upon it.

Conclusion

44. Mr Omara's submissions that the Minister acted *ultra vires* and in breach of a legitimate expectation on his part were made contrary to authority and without reference to that authority in the written submissions filed on his behalf on 23 October 2017. I regret to say that, for the reasons I have given, I am satisfied that Mr Omara's remaining arguments were meretricious at best.

45. The failure to cite relevant authority is of particular concern in circumstances where there is a requirement to do so under the Code of Conduct of the Bar of Ireland and where that requirement has been specifically drawn to the attention of practitioners in the Asylum List under paragraph 9.2 of the then applicable Practice Direction HC 69, which is substantially reproduced at paragraph 14 of the current Practice Direction HC 73. The issue is one of acute concern in the present case in which leave to seek judicial review was sought, and granted, *ex parte* on 30 January 2017.

46. Two consequences must follow. First, for the reasons already given, Mr Omara's application must be refused. Second, I require the parties and, in particular, the legal representatives for the applicant to address the court on the extent to which these proceedings are captured by the principles identified by Cooke J. in *O.J. v Refugee Applications Commissioner* [2010] 3 IR 637 and, more particularly, on whether this is an appropriate case in which to make a wasted costs order under O. 99, r. 7 of the Rules of the Superior Courts.