THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 600 JR]

BETWEEN

JOHN SHERIDAN SENIOR, JOHN SHERIDAN JUNIOR, THOMAS SHERIDAN, DANIEL SHERIDAN AND PATRICK SHERIDAN

APPLICANTS

AND

TAX APPEALS COMMISSION

RESPONDENT

AND

CRIMINAL ASSETS BUREAU

NOTICE PARTY

JUDGMENT of Mr. Justice Twomey delivered on the 5th day of April, 2019

SUMMARY

1. This is a judicial review of a series of decisions of an Appeal Commissioner of the Tax Appeals Commission. The applicants, ("the Sheridans"), with an address given as simply Rathkeale, County Limerick seek an order of *certiorari* quashing those decisions which were all made on 26th April, 2018 in a tax appeal. The Sheridans say that the critical issue in their case is the failure of the Appeal Commissioner to give any reasons for his decision.

2. The primary claim made, in their appeal before the Appeal Commissioner by the Sheridans, who as members of the travelling community are nomadic workers, was that as such they are non-resident for tax purposes in Ireland *'given that they stayed in their caravans at different locations abroad'* (para. 20 of the affidavit of Sheridan's tax consultant, Mr. Eugene Dolan ("Mr. Dolan"), dated 16th July, 2018). As nomadic workers, who spend a number of months each year in different European countries carrying out their tarmacadam business, the Sheridans claimed that they are not subject to the relevant provisions of the Taxes Consolidation Act, 1997 (the "1997 Act"). In rejecting their appeal, the Sheridans say that the Commissioner did not give any reasons for his decision.

BACKGROUND FACTS

3. Tax assessments for a number of years were raised by the notice party, the Criminal Assets Bureau ("CAB"), in respect of members of the Sheridan family. These assessments were appealed on behalf of the Sheridans. Appeals in relation to certain years of assessment were considered by CAB and were held to be in order. However, appeals in relation to other years of assessment were disallowed by CAB because of the Sheridans' failure to file returns and pay the sums due on foot of the returns pursuant to the 1997 Act. CAB determined that the Sheridans were not entitled to make appeals in respect of certain years of assessment because of their failure to fulfil the statutory conditions for making an appeal, which are set out in ss. 933(1) and 959AH (which is similar in effect to s. 957(2), which applied to some of the years in question).

4. Section 933(1)(a)(b) of the 1997 Act states:

> "(a) A person aggrieved by any assessment to income tax or corporation tax made on that person by the inspector or such other officer as the Revenue Commissioners shall appoint in that behalf (in this section referred to as "other officer") shall be entitled to appeal to the Appeal Commissioners on giving, within 30 days after the date of the notice of assessment, notice in writing to the inspector or other officer.
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> (b) Where on an application under *paragraph* (a) the inspector or other officer is of the opinion that the person who has given the notice of appeal is not entitled to make such an appeal, the inspector or other officer shall refuse the application and notify the person in writing accordingly, specifying the grounds for such refusal."

5. Section 959AH states:

> "(1) Where a Revenue officer makes a Revenue assessment, no appeal lies against the assessment until such time as—
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> (a) where the assessment was made in default of the delivery of a return, the chargeable person delivers the return, and
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> (b) in all cases, the chargeable person pays or has paid an amount of tax on foot of the assessment which is not less than the tax which—
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> (i) is payable by reference to any self assessment included in the chargeable person's return, or
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> (ii) where no self assessment is included, would be payable on foot of a self assessment if the assessment were made in all respects by reference to the statements and particulars contained in the return delivered by the chargeable person.
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> (3) References in subsection (1) to an amount of tax shall be construed as including any amount of interest which would be due and payable under section 1080 on that tax at the date of payment of the tax, together with any costs incurred or other amounts which may be charged or levied in pursuing the collection of the tax contained in the assessment or the assessment as amended, as the case may be.
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> (4) The requirements of this section apply in relation to an assessment as amended by a Revenue officer as they apply to a Revenue assessment made by a Revenue officer."

6. *Prima facie* therefore, before a person's appeal will be heard by the Appeal Commissioner, the *'chargeable person'* must have filed a return in respect of that period and paid the sum due on foot of that return. CAB determined that since this was not done in respect of several of the years, the Sheridans were not entitled to appeal in respect of those years.

7. In relation to the *'chargeable person'* provisions, section 58(1) of the 1997 Act provides that:

> "Profits or gains shall be chargeable to tax notwithstanding that at the time an assessment to tax in respect of those profits or gains was made—
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> (a) the source from which those profits or gains arose was not known to the inspector,
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> (b) the profits or gains were not known to the inspector to have arisen wholly or partly from a lawful source or activity, or
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> (c) the profits or gains arose and were known to the inspector to have arisen from an unlawful source or activity,
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> and any question whether those profits or gains arose wholly or partly from an unknown or unlawful source or activity shall be disregarded in determining the chargeability to tax of those profits or gains."

8. Section 18(1)(a) of the 1997 Act provides that:

> "Tax under this Schedule shall be charged in respect of—
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> (a)the annual profits or gains arising or accruing to—
> (i) any person residing in the State from any kind of property whatever, whether situate in the State or elsewhere,
>
> (ii) any person residing in the State from any trade, profession, or employment, whether carried on in the State or elsewhere,
>
> (iii) any person, whether a citizen of Ireland or not, although not resident in the State, from any property whatever in the State, or from any trade, profession or employment exercised in the State, and
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> (iv) any person, whether a citizen of Ireland or not, although not resident in the State, from the sale of any goods, wares or merchandise manufactured or partly manufactured by such person in the State"

It is to be noted that a person can be a *'chargeable person'* under s. 18(1)(a)(iii) and s. 18(1)(a)(iv) even where that person is not resident in the State. Similarly, s. 58 of the 1997 Act, in providing that profits or gains are chargeable from lawful or unlawful activities, does not refer to residency as a condition for such a charge arising. Nonetheless, as noted hereunder, the Sheridans appealed the rejection by CAB of their appeal. That appeal was grounded on the basis that the statutory pre-conditions for appealing a tax assessment i.e. of filing a tax return and paying tax, did not apply to them since they were not tax resident in Ireland and thus they were not chargeable persons. This appeal to the Appeal Commissioner was rejected by him and the primary issue before this Court therefore is whether the decision of the Appeal Commissioner should be invalidated because of the failure of the Appeal Commissioner to give reasons for that decision.

9. To take Mr. John Sheridan Senior's appeals (although similar issues arise in relation to the other Sheridans), it is relevant to note that it was accepted by CAB (and indeed by the Appeal Commissioner) that he was entitled to appeal the years of assessment 2004-2007 and 2009-2011. However, he was not allowed by CAB to appeal the years of assessment 2008 and 2012-2014. The Sheridans then unsuccessfully appealed this refusal to the Appeal Commissioner. Thus, it is the decision of the Appeal Commissioner, to uphold the decision of CAB that the Sheridans were not entitled to appeal those particular years, that is the subject of this judicial review.

10. In essence, the Sheridans case before the Appeal Commissioner was that they were not tax resident in Ireland and accordingly, they did not have to file a tax return or pay tax, and should not have to do so to appeal an assessment against them, since they were non-resident for tax purposes.

Hearing of the 21st June, 2017

11. The Sheridans attended the hearing of their appeal before the Appeal Commissioner on 21st June, 2017 and were represented by counsel and their tax adviser. The primary argument canvassed by the Sheridans at the hearing was that, as they claimed that they were non-resident in Ireland for tax purposes, they were not chargeable persons and so there was no obligation upon them to file tax returns.

12. The argument advanced by CAB and considered by the Appeal Commissioner was very straightforward, namely that it is a pre-condition of an appeal that a person have filed a tax return and paid the relevant tax. The argument of the Sheridans seems to be equally straightforward, namely that they claimed not to be resident in Ireland for tax purposes and, as such, they were not liable to pay tax and file a return and so should not be precluded from making an appeal by virtue of that fact. In order to properly analyse the decision given in respect of this relatively straight forward conflict of views, it is necessary to analyse the evidence that was before the Appeal Commissioner.

13. There was evidence before the Appeal Commissioner that returns had been filed on behalf of several members of the Sheridan family during some, but not all, of the years from 2004 to 2014. Indeed, this is the reason why appeals were permitted in relation to those years where tax returns had been filed. For example, in relation to Mr. John Sheridan Senior, the decision of the Appeal Commissioner dated 26th April, 2018 reflects and adopts the decision of CAB by stating:

> "The appeals for 2004, 2005, 2006, 2007, 2009, 2010, and 2011 have been accepted."

It appears to be common case that these appeals were accepted because tax returns were filed and tax paid in respect of those years.

14. In the next sentence, it makes clear that tax returns and taxes were not paid in respect of the other years, since the Appeal

Commissioner states:

> "The Tax Appeals Commission has refused to accept the appeals for 2008 (because no return has been delivered) and 2012, 2013 and 2014 (because the self-assessed tax abilities have not been paid)."

15. It is relevant to note therefore that there was evidence before the Appeal Commissioner that returns had been filed for certain years by the Sheridans, who were nonetheless claiming that they were not resident in Ireland for tax purposes. This filing of tax returns by the Sheridans was sought to be discounted by them as not meaning that they were tax resident in Ireland. They sought to do so through their tax adviser, Mr. Noel Loughran, who swore an affidavit, which was before the Appeal Commissioner. In that affidavit, he sought to explain the inconsistency between their claim that they were not tax resident in Ireland and the fact that in relation to certain years they had filed returns and/or paid taxes, as follows:

> "Unfortunately, I note that in a number of Income Tax Returns for each of these family members it was stated that the particular family member was "resident but not ordinarily resident in the State". This was an unfortunate use of words as the word "normally" should have been included rather than the word "ordinarily". What was intended to be conveyed was that they did not in the ordinary course of events live in this country for most of the particular income tax year.
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> However, I acknowledge that in hindsight the wording of these tax returns was an unfortunate misrepresentation of the true position, residency wise, for the particular income tax year."

16. It is crucial to note that that was the extent of the documentary evidence before the Appeal Commissioner regarding the tax residency of the Sheridans, i.e. that they had filed tax returns and paid taxes for certain years, but their tax adviser claimed that they were nonetheless not tax resident in the State.

17. It is important to note that no documentary evidence was provided on behalf of the Sheridans to support the contention that they were not tax resident in Ireland. In particular, there was no documentary evidence to suggest that they were tax resident in any other jurisdiction. The case before the Appeal Commissioner therefore was based solely on the submissions of counsel, rather than evidence, that it was possible for the Sheridans not to be tax resident in Ireland if they did not spend sufficient time within the State. Similarly, it was submitted to the Appeal Commissioner by counsel for the Sheridans that it was possible for the Sheridans to be tax resident in no jurisdiction if they spent certain limited time periods in different countries. This is clear, since at para. 20 of Mr. Dolan's affidavit dated 16th July, 2018, he avers regarding the conduct of the hearing before the Appeal Commissioner that the:

> "position was drawn to the [Appeal Commissioner's] attention at the hearing […of] the factual and technical position that it does not follow that an individual not tax resident in this country must be tax resident in another jurisdiction."

18. It is also important to note that although the Sheridans were at the hearing before the Appeal Commissioner, they provided no oral evidence in support of their counsel's submission that they were not tax resident in Ireland. Thus, although extensive submissions were made by their counsel on their behalf regarding their claim that they were not tax resident in Ireland, absolutely no documentary evidence created by them or as a result of their activities was produced to the Appeal Commissioner, to support their contention that they were not tax resident in Ireland. It follows that the only document created by them in support of a finding one way or the other was the tax returns which they had filed which indicated that they were, in fact, tax resident in Ireland for certain years.

Decision of 26th April, 2018

19. It is against this background that the decision of the Appeal Commissioner was handed down on the 26th April, 2018. The Sheridans claim that this decision does not contain any reasons and should be invalidated as a result. The relevant parts of the decision are as follows:

> "I am directed by [the Appeal Commissioner] to confirm that, having carefully considered the arguments advanced on behalf of the [Sheridans] and on behalf of [CAB], he has decided that the provisions of section 957 (2) [in respect of the years of assessment up and including 2012] and section 959AH(1) [in respect of the year of the 2013 year of assessment and subsequent years] of the Taxes Consolidation Act 1997, as amended, are applicable to the [Sheridans], and the obligation to submit returns and pay tax as a precondition to the bringing of an appeal must be satisfied by the [Sheridans] before their appeals can be accepted by the Tax Appeals Commission.
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> Accordingly, where your clients have failed to deliver a return or failed to pay their self-assessed tax liabilities in respect of a particular year, the Tax Appeals Commission has decided not to accept the appeal for that year."

20. The question for this Court to consider is whether, in the circumstances of this case, the wording of the decision of the Appeal Commissioner is fatally undermined because of the failure to set out the reasons for this decision, such that it should be struck down by this Court.

THE LAW

21. The recent decision of the Supreme Court in *Connelly v. An Bord Pleanála* [2018] IESC 31 considers the need for decision makers, such as an Appeal Commissioner in the Revenue, to give reasons. At para. 6.15, Clarke C.J., states:

> "Therefore, it seems to me that it is possible to identify two separate but closely related requirements regarding the adequacy of any reasons given by a decision maker. First, any person affected by a decision is at least entitled to know in general terms why the decision was made. This requirement derives from the *obligation to be fair to individuals* affected by binding decisions and also contributes to transparency. Second, a person is entitled to have *enough information to consider whether they can or should seek to avail of any appeal* or to bring judicial review of a decision. Closely related to this latter requirement, it also appears from the case law that the reasons provided must be such as to allow a court hearing an appeal from or reviewing a decision to actually engage properly in such an appeal or review.
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> However, in identifying this general approach, it must be emphasised that its application will *vary greatly from case to case* as a result of the various criteria identified earlier which might distinguish one decision, or decision making process, from another." (Emphasis added)

22. Later on in his judgment at para. 10, Clarke C.J states:

> "Just as, at one extreme, the modern law on reasons does not permit a decision maker to engage in a simple box ticking exercise so also, at the other extreme, the law *does not require a level of reasoning which goes beyond that required to*

afford an interested party reasonable information as to why the Decision was made and whether it can be challenged. In those circumstances I would hold that the reasoning of the Board in this case was adequate. Insofar as the High Court judgment held otherwise I would reverse the judgment." (Emphasis added)

23. In the earlier Supreme Court decision in *Oates v. Browne* [2016] 1 I.R. 481, Hardiman J. quoted with approval a judgment of Murphy J.:

> "In *O'Donoghue v. An Bord Pleanála* [1991] ILRM 750 the Court addressed the question of a duty to give reasons as follows (per Murphy J. at p. 757):
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> > "It is clear that the reason furnished by the Board (or any other tribunal) must be sufficient, first to enable the Courts to review it and secondly to satisfy the persons having recourse to the Tribunal that it has directed its mind adequately to the issue before it.
> >
> > I wish to say, though it is surely unnecessary to do so at this stage of the evolution of the jurisprudence, that I agree with that formulation of why, in point of law, it is necessary for a deciding body to give reasons. It is a practical necessity that reasons be stated with sufficient clarity that if the losing party exercises his or her right to have the decision reviewed by the Superior Courts, those Courts have the material before them on which to conduct such a review. Secondly, and perhaps more fundamentally, it is an aspect of the requirement that *justice must not only be done but be seen to be done* that the reasons stated must "satisfy the persons having recourse to the tribunal, that it has directed its mind adequately to the issue before it". (emphasis added)

24. Another helpful decision to understand the rationale for the requirement to give reasons is the Court of Appeal decision in *Bank of Ireland v. Heron* [2015] IECA 66, *albeit* that the case itself concerned the need for judges, as distinct from statutory bodies, to give reasons. At para. 16, the Court stated:

> "For many years the Superior Courts have held that administrative bodies making judicial or quasi judicial decisions must give reasons for so doing. Such bodies must satisfy the criteria identified by Murphy J. in O'Donoghue v. An Bord Pleanála [1991] ILRM 750 where he said in the context of a decision given by the Planning Board that it:
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> > . . . must be *sufficient first to enable the courts to review it and secondly, to satisfy the person having recourse to the Tribunal that it has directed its mind adequately to the issues* before it.'" (emphasis added)

25. The Court of Appeal went on to quote from the judgment of Henry L.J. in *Flannery v. Halifax Estate Agencies Limited* [2000] 1 WLR 377. There Henry L. J commented on the duty to give reasons in the following terms:-

> "(1) The duty is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties - especially the *losing party should be left in no doubt why they have won or lost.* This is especially so since without reasons the losing party will not know . . . whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not.
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> (2) The first of these aspects implies that want of reasons may be a good self-standing ground of appeal. Where because no reasons are given it is impossible to tell whether the judge has gone wrong on the law or the facts, the losing party would be altogether deprived of his chance of an appeal unless the court entertains an appeal based on the lack of reasons itself.
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> (3) The extent of the duty, or rather the reach of what is required to fulfil it, depends on the subject-matter. Where *there is a straightforward factual dispute whose resolution depends simply on which witness is telling the truth about events which he claims to recall, it is likely to be enough for the judge (having, no doubt, summarised the evidence) to indicate simply that he believes X rather than Y;* indeed there may be nothing else to say. But where the dispute involves something in *the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other*. This is likely to apply particularly in litigation where as here there is disputed expert evidence; but it is not necessarily limited to such cases. (emphasis added)
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> (4) This is not to suggest that there is one rule for cases concerning the witnesses' truthfulness or recall of events, and another for cases where the issue depends on reasoning or analysis (with experts or otherwise). The rule is the same: the judge must explain why he has reached his decision. The question is always, what is required of the judge to do so; and that will differ from case to case. Transparency should be the watchword."

26. There is one other recent decision of the Court of Appeal which is relevant to the present case and that is the case of *Criminal Assets Bureau v. McCarthy* (unreported, Peart J., Court of Appeal, 28th February, 2019) in which at para. 70, Peart J. states:

> "Taking an overall view of the evidence given by the appellants on affidavit, and in their cross-examination, and considering also what is stated by the trial judge as to the inability of the appellants in their evidence to produce any documents or records evidencing their income, and the evidence given on affidavit by the CAB deponents, in my view it was entirely open on the evidence of the trial judge to conclude as he did. There were many unsatisfactory elements of the appellants' evidence given under cross examination. Taking the judgement 'in the round', there is sufficient clarity and justification given by the trial judge for concluding that these appellants had not discharged the onus of proof that had fallen upon them. There was no obligation to make an express finding as to credibility. It is in many cases possible to parse and analyse a written judgement and *discover some paragraph that might have been better phrased, or where some particular piece of evidence has not been analysed in detail and a conclusion reached upon it. But that is not a ground upon which to set aside the judgement* unless the perceived defect represents a fundamental flaw in the judgement such that it is fatally undermined. (emphasis added)
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> In my view, even if it may be considered that the trial judge's treatment of the evidence relating to the explanation of the source of funds could have been somewhat more expansive, the manner in which it has been treated does not fatally undermine the reasoning of the trial judge and his overall conclusion as to failure by the appellants to discharge their onus of proof.

I would therefore reject this ground of appeal."

The rationale for the need to give reasons

27. Based on these cases, one can easily understand why a decision maker must give reasons, namely to ensure:

- that the individuals, the subject of the decisions, are in no doubt why they have won/lost and that they have enough information to appeal/judicially review the decision, and
- that any court reviewing the decision is satisfied that the decision maker directed his/her mind to the issue at hand.

However, it is important to note that:

- the extent of the requirement to give reasons will depend very much on the nature and extent of the conflicting evidence before the decision maker, and
- it is almost always possible to parse and analyse a decision and argue that it could have been more expansive or better phrased, but that is not a ground to set aside a decision.

ANALYSIS & DECISION

28. Therefore, in considering in this case whether the Appeal Commissioner gave adequate reasons for his decision, this Court is not concerned with whether the Appeal Commissioner might have expressed his decision better, since with hindsight, this could be said about almost every decision.

29. Instead this Court must analyse the Appeal Commissioner's decision to ensure that, in all the circumstances, the wording of the decision gave the Sheridans enough information to know why they were not granted their appeal and enough information to appeal/judicially review the decision. This Court must also be satisfied that in all the circumstances, the wording of the decision shows that the Appeal Commissioner directed his mind to the issue at hand. This Court must also consider whether, in light of the lack of evidence before the Appeal Commissioner, the alleged inadequacy of the reasons is such a fatal flaw that the validity of the decision is undermined.

30. In *CAB v. McCarthy*, Court of Appeal refused to overturn the judgment of the trial judge, on the grounds relied upon by the appellants that the judgment showed that the trial judge did not engage with the appellant's evidence and that he failed to explain why he rejected it. A critical factor in the Court of Appeal's decision was the inability of the appellants to produce any documents or records before the trial judge supporting their case during their cross examination.

31. In this case, the most important factor in considering the complaints of the Sheridans regarding the Appeal Commissioner's decision, is that unlike in *CAB v. McCarthy* (where the appellants went into evidence), the Sheridans, although represented by counsel at the hearing before the Appeal Commissioner, did not even provide any documentary or oral evidence to support their claim that they were not resident in Ireland for tax purposes.

32. The circumstances of this case therefore are closer to a situation in which the credibility of a witness is at issue, than to a situation in which two conflicting expert reports are before a decision maker and he has to give detailed reasons for choosing between them (as referenced by the Court of Appeal in the *Heron case*). Thus, the issue for resolution by the Appeal Commissioner was in the nature of a straightforward factual dispute, or credibility dispute, whose resolution, as envisaged in the *Heron case*, can be resolved by a statement of preference of X over Y with to quote the Court of Appeal, *'nothing else to say'*. In these circumstances, nothing else is required to establish that the decision maker had directed his mind to the issue at hand.

33. This is because the precondition which had to be satisfied for an appeal to be permitted was the filing of returns and the payment of tax. There is no dispute that no returns were filed and no tax was paid in respect of the relevant years. Therefore, all the Appeal Commissioner had to decide was whether the bare assertions made on behalf of the Sheridans should be accepted or not, i.e. that they were not tax resident in Ireland, which assertions were made without a scrap of supporting documentary evidence or oral evidence, either provided by them or by their tax adviser on affidavit, yet there was documentary evidence of tax residency in Ireland (being the tax returns which had been filed).

34. This was not a case of an intellectual exchange, with reasons and analysis advanced on either side, where the decision maker must enter into the issues canvassed before him and explain why he prefers one case over the other. On the contrary, this is a case where no evidence was provided on behalf of the Sheridans and so the task facing the Appeal Commissioner was very straight forward.

35. Perhaps the Appeal Commissioner might have made it even clearer that he had directed his mind to the issues at hand, by saying that he rejected the argument that the Sheridans were tax resident in Ireland because there was no evidence to support it, but his failure to do so, in the words of Peart J., is an improvement that could be made to any decision with the benefit of hindsight.

36. There is no question that the Sheridans could not have known why the Appeal Commissioner had found against them, since even if they had not been represented at the hearing, which they were (by counsel and a tax adviser), one cannot expect a decision maker to find in your favour if one provides no evidence to support the position you seek to maintain.

37. Similarly, there could be no question that justice has not been seen to be done, by the relative brevity of the Appeal Commissioner's decision, since any observer of the proceedings would have seen that no evidence was provided to support a finding of residence somewhere other than Ireland.

38. Equally, in all the circumstances, the decision does provide reasonable information as to why the decision was made to an interested party, namely the Sheridans, who were at the hearing and were fully aware of their decision not to give any evidence of their residency while their counsel argued that they were not resident in Ireland.

39. For all these reasons, this Court refuses to grant the order for *certiorari* of the Appeal Commissioner's decision.