

## THE HIGH COURT

## JUDICIAL REVIEW

[2017 No. 511 JR]

BETWEEN

ADRIANA BORTA

(A MINOR SUING THROUGH HER MOTHER AND NEXT FRIEND NADEJDA BORTA)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

**Ex tempore JUDGMENT of Mr Justice David Keane delivered on 23 March 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 ('Ms Borta') seeks an order of *certiorari* quashing the decision of the respondent ('the Minister'), dated 16 May 2017, refusing to grant her a certificate of naturalisation under s. 16 of the Irish Nationality and Citizenship Act 1956, as amended ('the Act of 1956'), because, while the Minister acknowledges that Ms Borta is a person with 'Irish associations', as that term is defined under s. 16(2) of the Act of 1956, the Minister does not consider those associations sufficiently strong to warrant the exercise in Ms Borta's favour of the Minister's absolute discretion to grant a certificate of naturalisation.

3. Ms Borta was given leave to seek *certiorari* of the said decision by Order of O'Regan J made on 26 June 2017.

**Background**

4. These are the relevant facts. Ms Borta's mother avers that she is a citizen of both Romania and Moldova who came to Ireland in 2007. Ms Borta was born in Moldova on 20 May 2003. Her father is not a citizen of Ireland. She was cared for by her grandmother from the age of two years until she was eight years old. Ms Borta's mother did not obtain permission to reside in Ireland until she obtained a Romanian passport on 23 December 2011. On 27 June 2012, Ms Borta obtained a Romanian passport of her own and her mother brought her to Ireland immediately afterwards. Ms Borta was then nine years old.

5. Ms Borta has a sister who was born in the State on 6 October 2014 and who is a citizen of Ireland, presumably on the basis of her mother's residence on the island of Ireland for a period of not less than three years in the four years immediately preceding her birth, thus bringing her within the scope of s. 6A of the Act of 1956, whereby citizenship by birth in the island of Ireland remains available to persons born to non-nationals in such circumstances.

6. Through her mother, Ms Borta applied for a certificate of naturalisation on 24 January 2017. She did so based on her Irish associations under s. 16 of the Act of 1956. In the box on the application form marked 'particulars of Irish descent or Irish associations', Ms Borta's mother entered:

**'Camelia Borta – 06/10/2014 Ireland, sister of [Ms Borta]'**

7. The Irish Naturalisation and Immigration Service ('the INIS') wrote to Ms Borta's mother on 16 May 2017, stating that the Minister had decided not to grant Ms Borta a certificate of naturalisation. The letter encloses a submission that was prepared for the Minister on the application and recites that the Minister's decision is 'annotated thereon.' It isn't. There is no annotation on the copy of the submission exhibited on behalf of the applicant and the copy of that correspondence exhibited on behalf of the Minister includes only the INIS letter. However, the applicant did not take any point in that regard and the application before me proceeded on the basis that the Minister adopted the recommendation in the submission as her decision on the application.

8. The submission is almost as terse as the relevant portion of the application form, already quoted, although in view of the terseness of the former it is difficult to see how it could be more expansive. It states in material part:

**'Details of Irish Descent or associations:** Adriana Borta is a minor of Irish associations through blood as her sister, Camelia Borta, is an Irish citizen.

**Other relevant Information:** Adriana Borta was born in Moldova in May 2003, and arrived in the State in August 2012. She has been in full time education in the State since her arrival here and is due to sit the Junior Certificate in June 2018. Her sister, Camelia Borta, is an Irish citizen.

**Recommendation:** I do not consider such associations to the State as sufficiently strong to be considered for naturalisation in this case. I recommend that the Minister should exercise her discretion and refuse the application for naturalisation on behalf of Adrian Borta.'

**Law**

9. Section 16 of the Act of 1956 provides in material part as follows:

'The Minister may, in his absolute discretion, grant an application for a certificate of naturalisation in the following cases, although the conditions for naturalisation (or any of them) are not complied with:

...

(b) where the applicant is a parent or guardian acting on behalf of a minor of...Irish associations....'

10. Section 16(2) of the Act of 1956 provides in material part:

'For the purposes of this section a person is of Irish associations if –

(a) He or she is related by blood, affinity or adoption to...a person who is an Irish citizen....'

### Analysis

11. The applicant's first argument is that the Minister's decision is unlawful because, in adopting the recommendation that Ms Borta's associations with the State are not 'sufficiently strong to be considered for naturalisation', the Minister was implicitly holding that Ms Borta did not meet the condition precedent to the exercise of the Minister's absolute discretion that she be 'a minor of Irish associations' when, plainly, she did meet that condition, being the blood relative of her Irish citizen infant sibling Camelia Borta.

12. I reject that argument because I reject that construction of the submission and, hence, of the Minister's decision. The preceding part of the submission makes clear that it is acknowledged that Ms Borta is an applicant of Irish associations through her blood relationship with her Irish citizen sister. It thus requires a strained construction of an, at worst, infelicitously drafted sentence to hold that the submission later resiled from, or contradicted, that acknowledgment in recommending that those associations were not sufficiently strong to be 'considered for naturalisation.' In the context of the submission as a whole, the words I have just quoted read far more obviously and logically as a recommendation that the Minister exercise the absolute discretion conferred by s. 16 to refuse a certificate of naturalisation to Ms Borta on the basis that her Irish associations, while expressly acknowledged to exist, were not strong enough to warrant the exercise of that discretion in her favour.

13. For the same reason, I reject Ms Borta's second argument that the Minister's decision was thus made in breach of s 16(2) of the Act of 1956.

14. Ms Borta's third argument is that the Minister acted in breach of the obligation to give reasons. The Minister accepts that there is an obligation to decide upon an application under s. 16 of the Act of 1956 in accordance with law, which encompasses an obligation to provide reasons for that decision; *Mallak v Minister for Justice* [2012] 3 IR 297 (per Fennelly J at 322).

15. The obligation on the Minister is to disclose, at least, the essential rationale on foot of which the decision is taken; *Meadows v Minister for Justice* [2010] 2 IR 701. As Hardiman J observed in *FP v Minister for Justice* [2002] 1 IR 164 (at 175), where an administrative decision must address only a single issue, its formulation will often be succinct.

16. The grounds on which Ms Borta made her application were not extensive. In January 2017, when the application was made, she had been residing in the State with her non-citizen mother for approximately four and a half years as a minor in full time education and had an Irish citizen sibling who was then 2 years of age. The reason given by the Minister for declining to grant Ms Borta a certificate of naturalisation on that basis is that her Irish associations were not strong enough to warrant the exercise of the Minister's absolute discretion in her favour.

17. I am satisfied that the reason given, while succinct, plainly discloses the essential rationale on foot of which the decision was taken. I therefore reject that argument.

18. Ms Borta's fourth argument is that the Minister's decision is irrational or unreasonable on the basis of the reason given.

19. In considering the argument, the starting point must be the identification of the general principles applicable to the determination of whether an administrative decision is unreasonable or irrational. As Denham J observed in *Meadows v Minister for Justice* [2010] 2 IR 701 (at 743-744):

'[144] The relevant factors in the general test are as follows:-

- (i) in judicial review the decision-making process is reviewed;
- (ii) it is not an appeal on the merits;
- (iii) the onus of proof rests upon the applicant at all times;
- (iv) in considering the test for reasonableness, the basic issue to determine is whether the decision is fundamentally at variance with reason and common sense;
- (v) the nature of the decision and the decision maker being reviewed is relevant to the application of the test;
- (vi) where the legislature has placed decisions requiring special knowledge, skill, or competence, for example as under the Planning Acts, with a skilled decision maker, the court should be slow to intervene in the technical area;
- (vii) the court should have regard to what Henchy J. in *The State (Keegan) v Stardust Compensation Tribunal* [1986] I.R. 642 referred to as "the implied constitutional limitation of jurisdiction" in decision making which affects rights. Any effect on rights should be within constitutional limitations, should be proportionate to the objective to be achieved. If the effect is disproportionate it would justify the court setting aside the decision.'

20. In the written and oral submissions that were made on her behalf, Ms Borta's argument on this point appeared to rest on the proposition that, lineal blood relationships apart, the closest possible blood relationship is that of siblinghood. Ms Borta's argument continued that, as the immediate lineal descendants (*i.e.* the children) of Irish citizens would more logically be expected to rely on either a direct claim to citizenship or on the exemption under s. 16(c) of the Act of 1956, whereby the conditions under s. 15 may be waived where the applicant is a naturalised Irish citizen acting on behalf of a minor child of the applicant, in reality an application

under s. 16(b) based on siblinghood is one based on the closest or, as Ms Borta would contend, the strongest Irish association through blood relationship ever likely to arise. Thus, Ms Borta submits it was necessarily irrational or unreasonable of the Minister to conclude that her Irish associations were not strong enough to merit the grant of a certificate of naturalisation, since – as Ms Borta and her legal representatives choose to interpret the term ‘strong’ – they could not be stronger.

21. In my view this argument is based on a false premise, namely that the strength of Irish associations based on a blood relationship to a person who is an Irish citizen can – and must – be calibrated by reference to a single measure or dimension; that of degree of relationship. There are several other dimensions to blood relationship including, but not limited to, the duration of any such relationship and the number of such relationships. Furthermore, Irish associations, whether through blood relationship, affinity, adoption or civil partnership, are merely the gateway to the exercise of the Minister’s absolute discretion under s. 16. They do not represent the destination point at which the absolute discretion to grant a certificate of naturalisation converts into an obligation to do so. I can see no basis upon which, having established that an applicant has passed through that gateway, the Minister cannot then go on to consider a wide range of other matters such as the duration of an applicant’s residence in the State; that of each blood relation through whom Irish associations are claimed; the degree of an applicant’s cultural, social or economic ties to the State, and so on. It seems to me that, where relevant, those matters too will inform a judgment on the strength of an applicant’s Irish associations, quite apart from the determination of the antecedent question of whether an applicant has the necessary Irish associations to be eligible for consideration in the first place

22. For those reasons, I can find no basis to conclude that the Minister’s decision was fundamentally at variance with reason and common sense and I reject Ms Borta’s fourth argument on that basis.

23. When the last point arose in argument in the course of the hearing, Counsel on behalf of Ms Borta suggested that the Minister’s failure to list all of the criteria that might be taken into consideration in the exercise of the absolute discretion under s. 16 amounted to a failure by the Minister to give reasons for the decision to refuse a certificate of naturalisation in this case.

24. As far as I can see, Ms Borta’s application was based on her four and a half years residence in the State, her participation in full time education here, and her siblingship with an Irish citizen infant. For my part, I cannot accept that, in order to comply with the requirement to give reasons, there was a positive obligation on the Minister, not merely to consider those matters on which Ms Borta sought to rely, but also, having done so, to expressly state that it is possible for an applicant to have resided in the State for a longer period; to have demonstrated a blood relationship with an Irish citizen who has resided in the State for a longer period; to have demonstrated a blood relationship with more than one Irish citizen; to have demonstrated more extensive social, cultural or economic ties with the State, and so on, until every imaginable factor material to the exercise of the Minister’s absolute discretion under s. 16 had been exhaustively listed. Hence, I reject that argument.

25. Finally, Ms Borta argues that, because her mother has expressed on affidavit the belief that other s. 16 applicants claiming Irish associations through siblingship with a person who is an Irish citizen have been successful, there is necessarily some form of inconsistency in decision-making or, worse, invidious discrimination at work that renders the Minister’s decision on Ms Borta’s application unlawful. For the reasons I have given in relation to the preceding argument, I am satisfied that this argument is based on the same false premise; that all s. 16 applications based on Irish associations through siblingship with an Irish citizen are of equal strength and that any distinction between them must therefore amount to either irrationality or unlawful discrimination, or both. As I have rejected the proposition on which it rests, I must therefore reject that argument also.

## **Conclusion**

26. The application is refused.