THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 373 J.R.]

BETWEEN

K. N., I. R., A.R.,

and

M. K., M. R., M. R.N. (MINORS SUING BY THEIR FATHER AND NEXT FRIEND, K. N.)

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Ms. Justice Faherty delivered on the 20th day of June, 2017

1. The applicants are Pakistani nationals legally resident in the United Kingdom. The first named applicant has been living in the UK since 2007. He is the owner and director of High Protection Security Services Limited, a company registered in the UK.

2. On or about 27th June, 2014, the applicants applied for a visa to visit the first named applicant's brother who resides in the State. The first named applicant subsequently submitted the requisite documentation, including a letter from AnR Accountants, dated 30th June, 2014, in support of the application. The said letter referred to the first named applicant's company, High Protection Security Services Limited, and read as follows:-

> "Please accept this letter as confirmation that we act as accountants for the above named and will be preparing the accounts for the year ended 31st March 2014.
>
> We can confirm that Mr. Khalique ur Rahman Nayyar is the Director and Shareholder of the above mentioned Limited Company since 22nd March 2013 and is responsible for running the affairs and fulfilling compliances of the above mentioned Limited Company.
>
> We have provided this information strictly for your purposes, without taking any responsibility on the part of the above. if u (sic) have any concerns do not hesitate to contact us."

3. The letterhead had on it a stated address, telephone number and fax number, as well as website and email addresses.

4. On 8th July, 2014, the applicants were informed by the respondent's Visa Office in the Irish Embassy in London that the application was refused for the following reason:-

> "ID: Authenticity of documents.
>
> The letter you declared to be from your accountant is a fraudulent document. You have signed a legal declaration as part of your application which states that the information given to you is complete and true. This declaration also states that any false or misleading information or false supporting documentation may result in the refusal of your application without the right of appeal, and that this may result in being prevented from making further Visa applications. You have knowingly provided false information and documentation to the Visa Office therefore your visa application has been refused, and you cannot apply for an Irish visa for a period of two years. Furthermore, you have no right of appeal."

As made clear subsequently, the allegation of fraud in that decision centred on the web address for AnR Accountants as appeared on the letterhead used by the accountants on 30th June, 2014.

5. On 23rd July, 2014, Edward Marshall, Solicitors in the UK for the first named applicant, wrote to the respondent requesting a reconsideration of the decision dated 8th July, 2014. It was submitted, *inter alia*, that AnR Accountants' letter should not be treated as a false document. The letter advised that the first named applicant had approached his accountant (Mr. Rehan Iqbal) in AnR Accountants and that it had been explained to him that on the occasion of the visa application Mr. Iqbal had used an old letterhead from the practice on which to print the letter of support dated 30th June, 2014. It was explained to the respondent by Edward Marshall Solicitors that Mr. Iqbal accepted that this was an error on his part and that the first named applicant was unaware that an old letterhead had been used in error. The solicitors exhibited a statutory declaration from Mr. Iqbal to this effect.

6. The solicitors further advised that it was unfair and unjust for the respondent to make the decision it did in circumstances where the first named applicant was not interviewed and was not given an opportunity to rebut the allegations levelled against him. It was also asserted that it was unfair and unjust that he had no right of appeal in circumstances where the allegation levied against him was serious. The respondent was requested to accept the statutory declaration and to remove the allegation of deception from the applicants' file.

7. According to the first named applicant, there was no reply from the respondent to this correspondence. The first named applicant then instructed Imran Panaawala Solicitors who wrote to the respondent on 21st August, 2015, requesting a reply to the previous letter of 23rd July, 2014.

8. On 26th August, 2014, the respondent sought evidence that Mr. Iqbal was the registrant of the web domain "anraccountants.com" (which had appeared on the letterhead of 30th June, 2014), as well as a copy of the accountant's "new in date letterhead".

9. The first named applicant's solicitors replied on 17th September, 2014, wherein they attached two documents in response to the

respondent's request, namely a letter from Mr. Iqbal and the new letterhead of the accountant firm.

10. In his letter, Mr. Iqubal confirmed that the old domain name, "anraccountants.com", had been jointly accessed by him and his erstwhile partner (Mr. Asfand Malik) and that the domain had originally been purchased from a named "Hoster Company" and registered in the name of Mr. Malik on 24th May, 2009. It was said that the domain expired sometime in May, 2012, and that during this period, the "Hoster Company" was later sold internally to another "Hoster Company" and for this reason it was very difficult to obtain the ownership records for the old domain "anraccountants.com". It was submitted that Mr. Iqubal had fought "tooth and nail" to obtain the information he was providing to the respondent but that other than what was enclosed he would not be able to locate or obtain any further information with regard to the ownership of the old domain.

11. On 3rd October, 2014, the respondent advised the solicitors that "without evidence of your client's registration of the domain anraccountants.com, it is not possible to reconsider the decision".

12. On 9th October, 2014, the first named applicant's solicitors forwarded to the respondent a file said to have details of the domain name of their client's accountant which they said was "self explanatory"

13. On 16th October, 2014, the respondent's Visa Office replied that it failed to see how the contents of the file which had been forwarded was self explanatory and sought an explanation of how it was evidence of the first named applicant's accountant's previous registration of the domain.

14. Panaawala Solicitors replied on 11th November, 2014, stating, *inter alia*, that the domain name had expired and the first named applicant's accountant (Mr Iqbal) had mentioned to the first named applicant that he was unable to log on to the previous domain account to obtain information to prove that it was previously owned by him. It was also stated that as the domain name had been purchased by the accountant's erstwhile partner Mr. Malik, the first named applicant's accountant had not been a registrant of the domain name for this reason. The respondent was also advised that the domain name had since been purchased by another customer, which prevented the first named applicant's accountant from obtaining information about its previous ownership. It was submitted that the first named applicant had submitted his accountant's letter "in good faith" and that it was not the duty of the first named applicant to check that his accountant had used the correct letterhead. In this context, the respondent was asked again to reconsider its decision not to grant the visas. Part of the information furnished to the respondent comprised a document which referredto Mr. Malik and a named address as the "Administrative Contact" for the domain name "anraccountants.com".

15. The Visa Office's response on 3rd December, 2014, was that it found the evidence insufficient and inconclusive.

16. On 12th February, 2015, another firm of solicitors, Bajwa Solicitors, wrote to the respondent on behalf of the first named applicant taking issue with the contents of the decision of 8th July, 2014 and reiterating that the first named applicant had provided documentation from his accountants "in good faith". It was pointed out that the first named applicant's accountant had admitted his mistake in a statutory declaration dated 18th July, 2014, to the effect that he and he alone, as the author of the letter of 30th June, 2014, was solely responsible for the document which the respondent considered "fraudulent" and that the content of the letter of 30th June, 2014 was "absolutely genuine". The respondent was again requested to review the decision.

17. On 18th March, 2015, the Visa Office replied, apologising for the delay in responding and stating as follows:-

> "Unfortunately, I have already made an exception and carried out an extensive reconsideration of your client's applications and upheld the original decisions. In the process of trying to explain a suggested mistake that was made with the original application with regards to the document we found misleading a further misleading document was submitted."

18. On the same date, Bajwa Solicitors sought clarification as to what other misleading document was being referred to and how it was of a misleading nature. The response from the Visa Office on the same date was that it was "the new accountant's letter that had misleading contact information".

19. On 20th March, 2015, Bajwa Solicitors forwarded to the respondent the letterheads that had previously been forwarded and enquired whether these were the documents referred to in the respondent's email of 18th March, 2015, which was replied to by the respondent in the affirmative.

20. On 9th April, 2015, the Bajwa solicitors wrote to the respondent advising that they had the applicant's instruction to initiate judicial review proceedings on the basis that the applicants had not received clarity regarding the respondent's decision that AnR Accountant's first letterhead was "fraudulent" or how it had been concluded that the new letterhead was "misleading".

21. The respondent's response on 16th April, 2015, to that communication was, to the effect that it had been decided to allow the applicants to make fresh visa applications. The applicants' solicitors were also asked to confirm what they found unclear from the Visa Office's communications so that the Visa Office could inform the applicants exactly what the issues were with the documentation which had been submitted.

22. On 21st April, 2015, the applicant's solicitors confirmed that the applicants were happy to make a fresh application as long as the previous applications were not taken into account and that there would be no record of the previous decisions maintained against the first named applicant and his family. The respondent was asked to confirm this. On this basis, the applicants would not proceed with a judicial review.

23. The response from the Visa Office on 22nd April 2015, was that "any fresh applications will be given full consideration on their own merits", without adverting to the other issues raised on behalf of the applicants.

24. On 28th April, 2015, Bajwa Solicitors wrote to the Visa Office in the following terms:-

> "I have taken instructions from my client since your last email regarding the issue of clarity with the client's visa applications. The main issue our client understands was the allegation of their accountant's documents being alleged as fraudulent documents and also misleading documents? They are still unclear as to what parts of these documents you allege were fraudulent and misleading? This is especially difficult for them as they only engaged the services of this accountant and had repeatedly asked the accountant to verify the different parts of his letterhead and found them to be true.
>
> Our client's main and primary concern even more than the fact that they can make a fresh application is the fact that the

previous assertion of deception that was alleged is not still imputed on them and also the fact that the visa was rejected on this basis is not maintained as a record. As you may be aware my client and his family being Pakistani passport holders rely on the visa process to travel practically to any country within the EU and when they make any application a previous refusal to any EU country is taken into account and will have a very prejudicial impact going forward. That is why they need certainty as to the visa office's position regarding their offer of 'fresh applications' in that their previous applications are considered null and void from the start?"

25. On 30th April, 2015, the Visa Office advised as follows:-

> "What was misleading about the original accountant's letter was that it contained a website address that was registered to a company in America since 2012 and an invalid postcode. The claim that the letterhead was old and that the address had been registered to the accountants previously was not substantiated with evidence and so not accepted. The new letterhead submitted also contained misleading information in that the address and contact number did not match and so again the claims were not accepted.
>
> I can't ascertain whether your clients did or didn't know that these documents were misleading, but in submitting the application they take responsibility for the accompanying supporting documentation.
>
> The previous decisions are not considered null and void.
>
> The ban on accepting further applications has been lifted and fresh applications will be considered on their own merit."

26. On 13th July, 2015, Mac Eochaidh J. granted the applicants leave to seek an order of *certiorari* of the decision of 30th April, 2015, together with a declaration that the decision was in breach of the applicant's right to fair procedures and natural and constitutional justice and a breach of their rights under the European Convention on Human Rights.

27. In summary, the grounds upon which relief is sought are:-

> • The allegation that the first named applicant's accountant's letterhead was fraudulent and/or misleading should not have been imputed to the applicants. The applicants did not knowingly supply false or misleading information to the respondent. The decision was unreasonable and/or irrational and breached the principle of fair procedures and natural and constitutional justice when considered in the context of the evidence which was before the respondent. There was no reasonable, rational, lawful or evidential basis upon which the respondent could have reached the decision of 30th April, 2015, and the decision is invalid;
>
> • The decision of 30th April, 2015, is based on an error of fact. The reasons provided for the refusal are not substantiated or based on verified facts;
>
> • The decision was unreasonable and/or irrational and in breach of fair procedures and natural and constitutional justice in that the applicants were not afforded:
>
> (a) the opportunity to appeal an allegation of a serious nature;
>
> (b) the opportunity to make submissions in respect of the allegation levied;
>
> (c) the opportunity of an oral hearing; and
>
> (d) the benefit of the doubt in circumstances where the allegation levied against them was of a serious nature and should have attracted a higher standard of proof on the part of the respondent.

28. It is further alleged that the decision was unreasonable and/or irrational and breached the principles of fair procedures and lacked proportionality in that it failed to consider the prejudice that the decision would cause to the applicants.

29. In the statement of opposition, the respondent denies the applicants' claims and asserts, *inter alia*, that the applicants were at all times on notice that they were solely and fully responsible for any and all documentation submitted in support of their visa applications and that the applicants consented to bearing such responsibility.

The applicants' submissions

30. It is submitted that the decision of 8th July, 2014, failed to state or substantiate the aspect of the accountant's letter that was found to be fraudulent and that the respondent in so concluding, and imposing a two year ban on the applicants from applying for a visa, breached fair procedures in circumstances where the applicants were given no opportunity to address the allegations levied against them.

31. Fundamentally, the applicants take issue with the manner in which the respondent, in the decision of 30th April, 2015, imputes fraud on their part in circumstances where the applicants had addressed the respondent's concerns as outlined in the earlier decision of 8th July, 2014. Furthermore, the applicants take issue with the respondent's conclusions in the decision of 30th April, 2015, that the further documentation which they had submitted was incorrect in circumstances where no reasons were given for this conclusion. Counsel contends that it is not sufficient for the respondent to allege that the information which has been submitted is fraudulent or misleading without giving reasons for such a conclusion.

32. It is submitted that in the decision of 30th April, 2015, the respondent made allegations which she has failed to substantiate either with regard to AnR Accountants' first letterhead or with regard to the findings made in respect of the later letterhead. In particular, the decision not to accept the explanations tendered by the applicant's accountant with regard to the first letterhead was unreasonable, irrational and unfair. If the respondent was minded to so conclude, this should have been raised in advance with the applicants. In all of those circumstances, it is submitted the respondent's decision not to consider her prior decision of 8th July, 2014, null and void was unfair and prejudicial to the applicants. The applicants further submit that in exercising her power not to grant them visa applications, the respondent was obliged to have regard to fair procedures and constitutional justice.

33. Counsel emphasises that the respondent's right to grant or refuse a visa is not being challenged in the within proceedings: what is being challenged is the respondent's failure to afford fair procedures before arriving at her decision of 30th April, 2015 and the absence of any reasons in that decision.

34. In aid of his submission as to what was required on the part the respondent to substantiate her claim that the applicants had furnished fraudulent and/or misleading *information, counsel for the applicant cites a decision of the Northern Irish High Court In the matter of an application by Astrit Zekaj for Judicial Review* [2007] NIQB 13 where Gillen J. states:-

> *"[i]t is necessary for the decision-maker to be satisfied that a fraudulent claim, and not merely a false representation, has been made. A false representation is merely a representation that is inaccurate and does not necessarily connote fraud."* (at para. 19)

35. In the same vein, counsel cites a decision of McCloskey J. in *An Application for Judicial Review by Olanyinka Olayiwola Ajiboye* [2008] NIQB 110 to the effect that in the context of "entry by deception… the essential test is one of materiality. The alleged deception must be material in the sense that it is a factor which precipitated the decision granting leave to enter". (at para. 19)

36. Counsel also relies on the decision in Hussein & Anor v. Minister for Justice [2014] IEHC 130, where Mac Eochaidh J. states:-

> *"In my view, I am required on this appeal to seek to identify false and misleading information and if found to enquire as to the effect of that on the application for refugee status. I must be satisfied that the false or misleading information would have produced a negative asylum recommendation had such been known to ORAC. In my view, it is not sufficient that the false or misleading information would have caused a different analysis of the asylum application but the same result. In other words, it seems to me that the effect of the false or misleading information must persuade the court that the declaration as to refugee status would not have been obtained. I fully accept what Cooke J. said at para. 23 in Gashi that the expression "decisive for the granting of refugee status' is used so as to require refugee status to be revoked where it is clear that the decision to grant it would not have been made had the true full facts been known'. The function of the court on an appeal from a decision of the Minister taken under regulation 11 of the 2006 Regulations is to ask whether the Minister was correct (that false/misleading information was decisive) and I can only do this by asking the same question which the Minister was obliged to ask. I must seek to identify the false or misleading facts, ask would these have been decisive in the sense that they would have produced a negative asylum decision if known and then decide if the Minister was correct to revoke refugee status, even if the court has additional material unavailable to the Minister."* (at para. 44)

37. It is submitted that in the instant case, the allegation of misleading or fraudulent documents as levelled against the applicants was not material to the visa application itself. The respondent's contentions refer only to a website address and matters such as a discrepancy between a contact address and a telephone number in circumstances where no issue was taken with the substantive contents of the AnR Accountants' letter of 30th June, 2014 concerning the first named applicant's business affairs.

38. Reliance is also placed by the applicants on an immigration decision of the UK Upper Tribunal in *SM and Ihsan Qadar v. Secretary of State for the Home Department* [2016] UKUT 229 (IAC) where it was held that the key question for the Tribunal was whether the Secretary of State, before instigating removal proceedings against migrants, had proved that deception had been used in the procurement of certificates of competence in the English language necessary for the admission to the UK of international students and migrants. It is submitted that in the present case, the respondent has failed to meet any standard in respect of the allegations levied against the applicants.

39. The applicants' primary argument is that the decision of 30th April, 2015 was not substantiated in any shape or form notwithstanding that they had furnished an explanation for the difficulties concerning the domain name of AnR Accountants. It is not clear why the applicants' visa applications were refused. This is contrary to the requisite standard required of administrative decision makers, as enunciated in *Mallak v. Minister for Justice* [2012] IESC 59 and T.A.R. v. Minister for Justice [2014] IEHC 385. It is submitted that similarly to the position as found by McDermott J. in *T.A.R.*, the respondent's decision is devoid of any basis for the refusal of the visas. It is further contended the respondent was not proportionate in her decision.

40. It is submitted that the issues to be tried in the within proceedings are:-

> (i) whether the respondent has proved to the requisite standard that the applicants' application for a visa was fraudulent and/or misleading;
>
> (ii) whether the respondent has substantiated its allegation against the applicants to any appreciable degree;
>
> (iii) if the above questions are answered in the affirmative, whether the applicants' visa application was fraudulent and/or misleading such that it justified the respondent's decision not to render her earlier decision null and void;
>
> (iv) whether the error on the accountant's letterhead can be imputed on the applicants' application and record; and
>
> (v) whether the respondent's decision to refuse the visa applications was rational, proportionate and reasonable in all the circumstances.

The respondent's submissions

41. While the applicants take issue with the respondent's decision dated 8th July, 2014, counsel submits that the only decision in respect of which leave has been granted to bring the within proceedings is the decision made on 30th April, 2015. There is no leave granted to challenge any other decision, or the record of any other decision. It is therefore submitted that a collateral attack on any other decision of the respondent, including that of 8th July, 2014, is not a matter which is permissible in the course of the within proceedings.

42. As nationals of Pakistan, which is not a visa-exempt country, the applicants were required to apply for visas. Part of the process contained a declaration, which the applicants were directed to read and then sign, that all information given by them was complete, true and accurate. Furthermore, they were aware that any false or misleading information or false supporting documentation could result in the refusal of the application without right of appeal and that this may result in their being prevented from making future visas applications up to a period of five years. These declarations were freely made and acknowledged by the applicants when completing the visa applications. Furthermore, the declarations made it clear that any persons submitting any documentation in respect of an application was entirely responsible for such documentation and accordingly the applicants were on notice of this. It is submitted that it is for the applicants to verify any documents submitted by them in support of their application. It is for the applicants to ensure that the documents submitted were not false or misleading.

43. While the applicants' submission assert as a fact that the contents of AnR Accountants' documentation were accepted, that is entirely without basis or foundation as at no point in the respondent's decision was there any concession that the said contents were accepted.

44. As regards the refusal dated 30th April, 2015, it is eminently clear why the new letterhead was not accepted: it was found to contain misleading information in that the address and contact number on the letterhead did not match. Moreover, in the said decision, the respondent afforded the applicants a remedy by lifting the ban which had been imposed on any future visa applications for a period of two years. Additionally, the applicants were informed that any future application would be considered on its own merits.

45. It is contended that in circumstances where the applicants had declared that all documentation submitted was true and accurate in all respects as of the date of submission of the visa application and if that was not the case the application would be rejected, on this basis alone, it was more than sufficient for the respondent to reject the visa application.

46. Counsel also submits that up to the decision of 30th April, 2015, the record demonstrates that the applicants were afforded numerous opportunities to address the issues raised by the respondent, both in the earlier decision of 8th July, 2014 and subsequently. Despite this, the applicants failed to do provide adequate explanations for the matters raised by the respondent in her letter of 8th July, 2014.

47. Contrary to the applicants' contention, it is not for the respondent to establish that her conclusion is correct.

48. It is further submitted that the applicants' counsel's reliance on Zekaj is misplaced as that decision relates not to an exercise of a matter "entirely within (the Minister's) discretion", as per Clarke J. in *R.M.R. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 279, but rather deals with the specific statutory offence of entry to the UK by deception. Similarly, counsel submits that no analogy may be drawn with the effect of false and misleading information in respect of revocation of refugee status, such as was under consideration in *Hussein* as that decision also concerned specific statutory provisions, namely s. 21 of the Refugee Act 1996, rather than ministerial discretion. Accordingly, the jurisprudence relied on by the applicants is irrelevant to the question of the strict liability for documents submitted with visa applications, which criterion the respondent was entirely at liberty to set in exercise of the executive policy of the State and to which conditions the applicants acquiesced.

49. Counsel also emphasises that the decision in issue in the within proceedings is not a finding of a Tribunal but rather an administrative exercise of executive discretion. Accordingly, the concept of the burden and standard of proof, as fall to be considered in the context of a hearing *inter partes*, is not applicable to the exercise of such a discretion.

50. Insofar as the applicants raise the issue of the proportionality of the respondent's decision, it is submitted that as non-nationals who are not permitted to enter the State without a visa, they have no right to enter the State such as might engage a proportionality analysis. In this regard, counsel cites *F.A. v. the Minister for Justice, Equality and Law Reform* [2016] IEHC 400.

51. While the applicants allege prejudice, same is both hypothetical and unsubstantiated. In effect, the applicants' arguments in this regard amount to a plea *ad misericordiam* in relation to a decision (namely that of 8th July, 2014) that is not part of the within proceedings. Effectively, the applicants are attempting to mount a collateral attack on a decision in respect of which no leave has been granted. Counsel submits that any prejudice suffered by the applicants is not a result of any failing or flaw on the part of the respondent, but rather results from the applicants' failure to properly to check the accuracy of the documentation which they submitted.

52. The remedy which the applicants seek in the within proceedings is to have their application re-considered. There was nothing preventing them re-applying for a visa as in the decision of 30th April, 2015, they were afforded the opportunity to do so. This step would have addressed their grievances entirely and would have had the benefit of permitting them to re-check any supporting documentation so as to ensure that same was accurate in all respects and capable of being stood over as accurate by them.

53. Counsel submits that the issues required to be determined in the within proceedings are:

- The extent to which a collateral challenge of a previous decision of the respondent is permissible where no leave to challenge such decision has been granted;

- Whether the respondent may regard the applicants as bound by their own freely given declaration as to the authenticity of documents submitted;

- Whether in the context of the exercise of a discretion in respect of the executive power control of the borders of the State, the respondent is entitled to require persons seeking access to the State responsibility for the accuracy and authenticity of documents submitted by them as authentic; and

- Whether the applicants herein have a more appropriate alternative and effective remedy.

Considerations

54. In the first instance, while there was debate between the parties' respective counsel as to whether in the within proceedings the applicants were attempting to mount a collateral attack on the decision of 8th July, 2014, I do not view the applicants' arguments in that vein. It is clear that the decision of 30th April, 2015, to some considerable extent, harkens back to the respondent's previous conclusion with regard to the letter from AnR Accountants of 30th June, 2014 and to the reason why the respondent concluded as she did on 8th July, 2014. However, that being said, I am satisfied that the decision under review in the present challenge is that of 30th April, 2015, albeit I take the view from the circumstances of this case that the decision must be viewed in the context of the communications which passed between the parties over a substantial number of months leading up to that decision.

55. To turn now to the grounds upon which the decision is challenged. First, it is, essentially, the applicants' contention that the decision-maker bears the burden of proving the conclusion that the applicants submitted fraudulent or misleading information. Contrary to the applicants' submission, I am satisfied that the established jurisprudence does not support the argument that the respondent bears the onus of substantiating the conclusions set out in her decision, or otherwise of establishing that her decision is correct. As stated by MacEochaidh J. in Hussein:

> *"The burden is on the appellant to demonstrate that the Minister's conclusion is incorrect. I reject the appellant's argument that the Minister bears a burden to establish that his decision is correct." (at para. 41)*

56. What is at issue here is an administrative decision concerning the exercise of the respondent's discretion to grant a visa to individuals who wish to enter the State. Fundamentally, it is for the respondent to determine the conditions under which visa-required foreign nationals enter, remain and leave the State.

57. In *R.M.R.,* Clarke J. put the matter as follows (at paras. 24 and 25):

> *"It is for the Minister to determine the conditions under which foreign nationals enter, remain and leave the State - this has been stated on many occasions by the courts (see e.g. Pok Sun Shum v. The Minister for Justice, Equality and Law Reform [1986] I.L.R.M. 593; Osheku v Ireland [1986] I.R. 377; In re the Illegal Immigrants(Trafficking) Bill 1999 [2000] 2 IR 360, F.P. v. The Minister for Justice, Equality and Law Reform [2002] 1 IR 164; A.O. and D.L. v. The Minister for Justice, Equality and Law Reform [2003] 1 I.R. 1; Bode (a minor) v. The Minister for Justice, Equality & Law Reform & Ors* [2007] IESC 62).
>
> *25. It is clear that the Minister is under no legal obligation to grant a visa – the grant or refusal of visas is entirely within his discretion and it is for the visa applicant to convince the Minister that he or she should be granted a visa. Government policy determines which foreign nationals require visas to visit or transit the State and whether they can work in the State. The inherent executive power and responsibility of the Government to formulate immigration policy is supplemented by statutory provisions including the Aliens Act 1935 and the Immigration Acts 1999, 2003 and 2004. There is at present no statutory framework for issuing visas. It is clear however from Regulation 3(a) and Schedule 1 to the Immigration Act 2004 (Visas) (No. 2) Order 2006 (S.I. No. 657 of 2006) that citizens of Sri Lanka are among those who require a valid Irish visa when landing in the State. A fortiori citizens of Sri Lanka cannot take up residence or work here without a visa and a work permit."*

58. Accordingly, if the respondent finds documents submitted in support of such an application are misleading or inaccurate or indeed fraudulent then visa applicants will have failed to meet the criteria necessary to persuade the respondent to grant them a visa.

59. In *F.A.*, Mac Eochaidh J. addressed the status of visa-required non-nationals who wish to enter the State, in the following terms:

> *"14. It is not indicated how the refusal of the visa fails to vindicate or to protect the rights asserted in circumstances where non-E.E.A. nationals do not enjoy rights to live in the State. They do not enjoy rights to enter the State. They do not enjoy the right to enjoy family life in the State unless they have permission to be in the state. They may be permitted to live in the State or to enter the State and then to enjoy family life in the State but this a matter for the relevant Minster and her officials to process.*
>
> *15. The mere denial of a visa does not establish a breach of rights. A bald assertion that rights have been violated notwithstanding the existence of a lengthy decision where rights are identified and analysed will not suffice to attract a grant of leave to seek judicial review because the court is not informed what argument supports the conclusion that rights have been violated and not vindicated. The point cannot be arguable in the absence of an argument. It is apparent from the tone of this ground, and indeed of the application in general, that the applicants disagree with the result and seek leave to pursue certiorari for that reason. More is required to grant leave. This court is not a visa appeal court."*

60. Of course, the exercise of ministerial discretion is subject to review by the courts. Accordingly, the legality or otherwise of the respondents' decision to refuse the applicants' visa application is to be considered in the context of relevant administrative law principles: whether the decision has been arrived at on the basis of correct facts; whether it is in accordance with fair procedures; and whether it has been reasonably and rationally arrived at. Furthermore, the basis for the refusal of the visas must be clear or patent from the decision.

61. As part of their challenge, the applicants allege a breach of fair procedures. I do not accept this argument. In the first instance, in making the visa application, the first named applicant was on notice, by virtue of the declaration made by him, that it was incumbent on him to ensure that the documentation furnished was complete and true to the best of his knowledge. Furthermore, in light of the copious correspondence which passed between the applicants' various legal representatives and the respondent between 26th August, 2014 and 17th September, 2014, there can be no question but that the first named applicant had an opportunity to address the basis upon which the decision of 8th July, 2014 had been refused. Moreover, he was on notice that the basis for the refusal centred on the webmail address which was listed on the first named applicant's accountant's letterhead. To my mind, this was sufficient to put the first named applicant on enquiry, when resubmitting the later "in date" letterhead of AnR Accountants, that contact numbers and addresses for the said firm, as contained on the letterhead, were matters of interest to the respondent.

62. Accordingly, I am not persuaded by the applicant's argument that following the submission of the new letterhead, it was the respondent's obligation to put the applicants on notice of any further concerns the respondent may have, or afford the first named applicant an oral hearing prior to any decision on the visa application. This is so in circumstances where the requisite process was advised to the applicants from the outset by virtue of the declarations which the applicants had to sign in the course of completing the visa application, and, as I have said, in circumstances where the first named applicant was on heightened inquiry, as a result of the refusal of 8th July, 2014, of the likely focus which AnR Accountants' new letterhead would receive from those within the Visa Office charged with perusing the documentation submitted in aid of the visa application.

63. It is also contended on the applicants' part that there is a lack of clarity and an absence of reasons in the decision. Specifically, counsel for the applicants submits that the decision does not achieve the requisite standard for decision-making as set out in *Mallak*. In the course of his judgment in that case, which concerned the refusal of a certificate of naturalisation, Fennelly J. addressed the consequences of the failure to give reasons in the administrative decision-making process. He stated:

> *"64. In the present case, the applicant points to the effective invitation to the appellant to "reapply for the grant of a certificate of naturalisation at any time". That statement might reasonably be read as implying that whatever reason the Minister had for refusing the certificate of naturalisation was not of such importance or of such a permanent character as to deprive him of hope that a future application would be successful. While, therefore, the invitation is, to some extent, in ease of the appellant, it is impossible for the appellant to address the Minister's concern and thus to make an effective application when he is incomplete ignorance of the Minister's concerns.*

> *65. More fundamentally, and for the same reason, it is not possible for the appellant, without knowing the Minister's reason for refusal, to ascertain whether he has a ground for applying for judicial review and, by extension, not possible for the courts effectively to exercise their power of judicial review.*
>
> *66. 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 unable 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."*

64. Thus, the question to be addressed in the present case is whether reasons were given for the decision to refuse the visa application, and if so whether these reasons were obvious to the recipient of the decision (and to the Court).

65. Clearly, in the decision of 8th July, 2014, the applicants were advised that the visa application was refused because the respondent concluded that the letter the first named applicant "declared to be from [his] accountant] is a fraudulent document". While I note the letter of 8th July, 2014, is short on detail as to the manner of the alleged fraud, the said letter was nevertheless sufficient for the first named applicant's then legal representative, Edward Marshall Solicitors, to write to the respondent on 24th July, 2014, to advise that the first named applicant, on approaching his accountant following the visa refusal, had established that the accountant had used an old letterhead in error in relaying to the respondent the first named applicant's business details pertaining to his company High Protection Security Services Limited. Thereafter, and indeed over a period of months, the first named applicant's various legal representatives engaged with the respondent on the issue of the web domain "anraccountants.com" and its connection to the first named applicant's accountant, Mr. Iqbal. This issue was at the heart of the respondent's decision of 8th July, 2014, to refuse the visa application and formed part of her subsequent refusal to reverse the said decision after, according to the respondent, "an extensive reconsideration" of the applications for a visa had been carried out.

66. It is clear from the available record that as far as the respondent was concerned, further justification to uphold the decision of 8th July, 2014, was found in a document, namely AnR Accountants' new letterhead, which the first named applicant had submitted on or about 17th September, 2014, in a further attempt to substantiate his accountant's (Mr. Iqbal's) connection to "anraccountants.com". The respondent's justification was expressed as follows in email communication of 18th March, 2015, from the Visa Office:

> "In the process of [the first named applicant] trying to explain a suggested mistake that was made with the original application with regards to the document we found misleading a further misleading document was submitted".

67. By no stretch of the imagination could this communication be described as a model of clarity. While the respondent elaborated somewhat on this matter in her further communication on 18th March, 2015, it took until 30th April, 2015, for the respondent to identify precisely why she found the letterhead "misleading", namely that the "address and contact number" on the document "did not match".

68. All in all, while there is some scope to criticise the laborious process by which the reasons for the refusal of the visa application was communicated to the applicants, I am nevertheless satisfied, from a consideration of the communications which passed between the first named applicant's legal representatives and the respondent, that the basis upon which the visa application was refused is sufficiently clear from the decision dated 30th April, 2015, particularly when that decision is viewed against the backdrop of the communications which passed between the first named applicant's legal advisors and the respondent in the months leading up to the decision.

69. In all those circumstances, I am not satisfied that as regards the present decision, that the circumstances are on par with the situation which arose in *T.A.R* which led McDermott J. to conclude (at para.27) *"that it was not possible to determine accurately what the reasons meant in the context of the particular case."* Accordingly, I do not find the applicants' contention that there were no reasons given for the decision, or that there was a lack of clarity in the decision, to be made out.

70. That being said, I turn now to the question of whether the decision to refuse the visa application was reasonably and rationally arrived at.

71. As is evident from the decision and the sequence of communication leading to the decision, as far as the letterhead of 30th June, 2014, was concerned, the respondent did not accept that the applicants had substantiated the claim that the letterhead was old and that the web domain had been previously registered to the first named applicant's accountant. Secondly, the respondent found that the address and contact number on new letterhead did not match. Having considered the extensive communication between the first named applicant's legal representatives and the respondent relating to the issue of the old letterhead and his accountant's (Mr. Iqbal's) connection to "anraccountants.com", I am satisfied that the respondent's conclusion on this issue falls within the range of rationality and reasonableness in administrative decision-making, thereby precluding this Court from interfering with the respondent's exercise of her executive discretion as to whether to grant the applicants entry into the State. That this Court might take a different view to that of the respondent is not the test on judicial review as the Court is not exercising an appellate function. Similarly, I find that no irrationality or unreasonableness attach to the respondent's conclusion that the address and contact number on AnR Accountants' new letterhead did not match. I note that while the applicants allege error of fact on the part of the respondent, this is not particularised in the statement of grounds in any shape or form. Nor is it alleged on affidavit that the respondent was in error in her conclusion that the address for AnR Accountants as given on their new letterhead did not match with the contact number given on the same document. I note that in his affidavit sworn 2nd June, 2015, the first named applicant avers as follows with regard to AnR Accountants more recent letterhead:

> "I have since corresponded with AnR Accountants by electronic mail so I know that their electronic mail address is correct and functioning. I have also confirmed online that AnR Accountants web address is working. Regarding AnR Accountant's post code, I have attended the premises [mentioned] on the accountant's letterhead and it does exist and the premises was indeed in the postcode area mentioned on the AnR Accountant's letterhead. When I attended it I was not able to speak to anyone as there was construction work being carried out however it is my understanding that an address given on a business letterhead does not have to correspond with where they carry out their ordinary business."

72. Even accepting that what the first named applicant avers is correct, it remains the case that this evidence does not address the respondent's conclusion that AnR Accountants address and contact numbers did not match, or suggest that the respondent erred in fact in finding a disjoint between the address given on the letterhead and the contact number which appears on the same document.

73. The case is also made by the applicants that the respondent's decision lacks proportionality. This is said to be in circumstances where the allegation of fraudulent/misleading information only pertained to the AnR Accountants' letterheads and not to any other aspect of the information furnished by the applicants. It is further submitted that the respondent failed to give any proportionate response to the fact that the first named applicant's accountant had submitted a statutory declaration explaining the inaccuracies in the letterhead dated 30th June, 2014. Counsel for the applicant contends that the decision flies in the face of these facts in accusing the applicants of knowingly submitting a fraudulent and/or misleading visa application. It is submitted that the respondent had several options open to her which could have been considered proportionate in the circumstances but failed in this regard. It is asserted that the respondent has chosen to penalise the applicants by condemning them to a situation where a fraudulent offence has been registered against them the implication of which will be an extremely onerous immigration experience into the future. Counsel also submits that as a business person who is required to travel across the EU, the first named applicant's ability to earn a living will be adversely affected. It is further submitted that the decision will adversely affect the minor applicants. In aid of their submission that the respondent's decision is disproportionate, counsel cites *Meadows v. the Minister for Justice, Equality and Law Reform* [2010] IESC 3.

74. I am not persuaded that the applicants' fundamental rights or freedoms have been limited or infringed by the respondent's decision such as might engage the respondent in embarking on a proportionality exercise. As stated by Mac Eochaidh J. in *F.A*, already quoted above, the decision of the respondent in refusing a visa application does not establish a breach of rights. As I have already indicated, on judicial review, the lawfulness of the substantive decision in this case falls to be considered in the context of whether it has been arrived at rationally and reasonably in the sense set out in *The State (Keegan) v Stardust Victims Compensation Tribunal* [1986] 1 I.R. 642 and *O'Keefe v. An Bord Pleanala* [1993] 1 I.R. 39. This is ascertained by asking whether the decision properly flows from the premises upon which it is based. In all the circumstances of this case, and for the reasons set out above, I am satisfied to find that the respondent's decision to refuse the visa application does not offend against the principles of rationality and reasonableness and on this ground also, the challenge has not been made out.

75. It is contended by the applicants that the decision attributes fraud on their part. It is certainly the case that the refusal decision of 8th July, 2014, was on the basis that a fraudulent document had been submitted. However, in the decision under challenge, there is no reference to fraudulent documents. The conclusion arrived at is that both letterheads of AnR Accountants, as variously put before the respondent, contained "misleading" information. I note that in the decision of 30th April, 2015, the respondent specifically states that it cannot be ascertained if the applicants were aware that the documents in question were misleading but that, effectively, in submitting them the applicants took responsibility for the said documents. For the reasons already outlined in this judgment, the Court finds that the respondent cannot be criticized for attributing responsibility for the documents to the applicants given the clear terms to which the first named applicant agreed when submitting the visa application on 27th June, 2014.

Summary
For the reasons set out in the Judgment, the relief sought in the Notice of Motion is denied.