THE HIGH COURT

JUDICIAL REVIEW

[2024 IEHC 720]

[2023 No. 606 JR]

BETWEEN:

K.B.,

M.ARH.K. [a minor suing by his father and next friend, K.B.],

AND

M.AYA.K [a minor suing by his father and next friend, K.B.]

APPLICANTS

-AND-

THE MINISTER FOR JUSTICE

RESPONDENT

JUDGMENT of The Hon. Mr. Justice Alexander Owens delivered on 31 October 2024.

1 M.AYA.K and M.ARH.K. are nationals of the Islamic Republic of Pakistan. This application for judicial review is brought on their behalf by their father, K.B.

2 They challenge decisions made by the Minister for Justice (the Minister) on 28 February 2023 to decline to give them citizenship. The Minister refused to exercise discretion conferred by s.16(1) of the Irish Nationality and Citizenship Act 1956 (the 1956 Act) to grant them certificates of naturalisation, notwithstanding that they did not meet a legal requirement to show that they had the prescribed reckonable residence in the State.

3 When I considered this this initially, I proceeded on the basis S.15B of the of the 1956 Act was relevant and that these applicants had a path to naturalisation by that route in the light of their application for regularisation of their status under the 2022 Scheme. I had assumed that the decision-makers took this into consideration as they referenced it in their decision.

4 This was incorrect. As was pointed out by counsel for the applicants at the hearing, this provision was not in place when the Minister decided these applications for naturalisation. I noticed this point when reviewing this judgment for issue as an approved judgment.

5 In fact, the provision of the 1956 Act which was relevant to these applications was s.15(1)(a)(ii) of the 1956 Act, as inserted by s.8 of the Irish Nationality and Citizenship Act 2004. The effect of this provision was that a minor born in the State could apply for naturalisation. The residence conditions for naturalisation set out in s.15(1)(c) of the 1956 Act applied to both adults and minors.

6 This error resulted in errors in analysis of some of the legal issues.

7 Having reviewed the matter, I remain of the view that M.AYA.K. and M.ARH.K. have not established that I should set aside these decisions. These decisions explained the reasons why the Minister refused their applications clearly and sufficiently. These reasons were valid.

8 The policies which the Minister applied when making these decisions are valid. These policies state that the Minister will only exercise discretion in favour of an applicant for citizenship who qualifies for waiver of statutory conditions for naturalisation in exceptional circumstances. These policies were applied correctly.

9 What is the Minister mandated to decide when asked to exercise discretion under s.16(1) of the 1965 Act based on Irish descent or Irish Association and how should the Minister go about making that decision?

10 Where s.16(1) of the 1956 Act is relied on by an applicant, the Minister is asked to exercise two discretions simultaneously. The first is discretion on whether to grant naturalisation. The second is discretion to decide whether, as part of the first process, the Minister should dispense with any non-compliance by an applicant with one or more of the statutory conditions for naturalisation.

11 The condition for naturalisation which these applicants did not comply with required that an applicant have a minimum period of qualifying residence in the State, as specified in s.15(1) (c) of the 1956 Act.

12 Two provisions of the Constitution of Ireland are relevant to statutory policy embodied in the naturalisation provisions set out in Part III of the 1956 Act, as amended.

13 The first relevant provision is contained in Article 9 of the Constitution. By Article 9.1.2°: "[t]he future acquisition and loss of Irish nationality and citizenship shall be determined in accordance with law." By Article 9.2.1°: "Notwithstanding any other provision of this Constitution, a person born in the island of Ireland, which includes its islands and seas, who does not have, at the time of the birth of that person, at least one parent who is an Irish citizen or entitled to be an Irish citizen is not entitled to Irish citizenship or nationality, unless provided for by law."

14 The second relevant provision is Article 2 of the Constitution. By this Article: "[i]t is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish Nation. That is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland. Furthermore, the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage."

15 Section 16 the 1956 Act, as amended, most recently in 2004, following amendment of the Constitution of Ireland on 24 June 2004, provides as follows:

> "(1) 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: (a) where the applicant is of Irish descent or Irish associations; (b) where the applicant is a parent or guardian acting on behalf of a minor of Irish descent or Irish associations; (c) where the applicant is a naturalised Irish citizen acting on behalf of a minor child of the applicant;… (f) where the applicant is or has been resident abroad in the public service; (g) where the applicant is a person who is a refugee within the meaning of the United Nations Convention relating to the Status of Refugees of the 28th day of July, 1951, and the Protocol Relating to the Status of Refugees of the 31st day of January, 1967, or is a Stateless person within the meaning of the United Nations Convention relating to the Status of Stateless Persons of the 28th day of September, 1954.
>
> (2) 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, or is the civil partner of, a person who is an Irish citizen or entitled to be an Irish Citizen, or (b) he or she was related by blood, affinity or adoption to, or was the civil partner of, a person who is deceased and who, at the time of his or her death, was an Irish citizen or entitled to be an Irish citizen."

The statutory "conditions for naturalisation" are defined by s.15(2) of the 1956 Act. This provides that: "[t]he conditions specified in paragraphs (a) to (e) of subsection (1) and paragraphs (a) to (d) of section 15B(1) are referred to in this Act as

conditions for naturalisation." The conditions for naturalisation applicable to the applications by M.ARH.K. and A.AYA.K. required that they have "a period of one year's continuous residence in the State immediately before the date of the application and, during the eight years immediately preceding that period, has a total residence in the State amounting to four years" : see s.15(1)(c) of the 1956 Act.

16 For minor applicants for naturalisation who were born in the State, this residence requirement of four years of residence during the eight years immediately preceding the period of one year of continuous residence in the State immediately before the date of the application was reduced to two years in 2023: see s.15B(1)(a) and (c) of the 1956 Act, as inserted by s.8 of the Courts and Civil law (Miscellaneous Provisions) Act 2023.

17 Section 16A(1) of the 1956 Act specifies as follows:

> "A period of residence in the State shall not be reckoned when calculating a period of residence for the purposes of granting a certificate of naturalisation if-
>
> (a) it is in contravention of section 5(1) of the [Immigration Act 2004],
>
> (b) it is in accordance with a permission given to a person under section 4 of the Act of 2004 for the purpose of enabling him or her to engage in a course of education or study in the State, or
>
> (c) it consists of a period during which a person (other than a person who was, during that period, a national of a Member State, an EEA state or the Swiss Confederation) referred to in subsection (1) of section 16 of the International Protection Act 2015 is entitled to remain in the State in accordance only with the said subsection."

18 Unauthorised residence in the State or permitted student residence in the State are not treated as qualifying residence for the purposes of the conditions for naturalisation.

19 Other conditions for naturalisation include good character and, in the case of an applicant other than child born in the State, intention to reside in the State after naturalisation.

20 A child who was not born in the State is not automatically eligible to apply for naturalisation while a minor: see ss.15(1)(a) and 15B(1)(a) of the 1956 Act.

21 Where a child becomes an adult and then applies for naturalisation, qualifying residence in the State during childhood may be used to satisfy the conditions for naturalisation set out in s.15(1)(c) of the 1956 Act.

22 An applicant of full age, whether born in the State or not, has a route to naturalisation by complying with the residency requirements set out in s.15(1)(c) of the 1956 Act.

23 A person can obtain naturalisation without being born in the State or without having sufficient qualifying residence in the State by establishing descent from an Irish citizen or association with an Irish citizen or by coming within one of the other categories set out in s.16(1) of the 1956 Act. Section 16(1) allows the Minister to dispense with any unfulfilled residence conditions for naturalisation and give applicants who come within these categories accelerated citizenship.

24 A person who is eligible to be considered by the Minister for exemption from compliance with conditions for naturalisation under s.16(1) of the 1956 Act may be in the process of fulfilling residence conditions for naturalisation, or may be in a position to regularise residence status and eventually apply for naturalisation by showing sufficient qualifying residence.

25 That person may not have sufficient qualifying residence in the State for a variety of reasons. That person may be a recent refugee or stateless person, a person in the public service abroad, an undocumented alien or a child born in the State to parents who are aliens with irregular residency status.

26 M.AYA.K and M.ARH.K. were born in Ireland in February 2006 and February 2012, respectively. They have grown up and been educated here. However, they are not Irish citizens or entitled to Irish citizenship as of right. Their parents are Pakistani nationals who are not Irish citizens.

27 Their father, K.B., entered the State as a student in 2003 and has remained here since. He had a student residency permission between 2003 and 2011.

28 Their Mother, N.A., lived in Ireland for many years without permission. She was married to K.B. They divorced in 2011.

29 The Minister gave K.B. permission to remain in the State between 2012 and 2017 on the basis of his marriage to an EU citizen in October 2011. He divorced this wife in 2017. In March 2017 K.B. applied to retain his residence card on an individual basis, following this divorce. His application was refused on 24 July 2018 on grounds that his 2011 marriage was a marriage of convenience.

30 In 2017 K.B. applied for certificates of naturalisation for M.ARH.K. and M.AYA.K, based on his permission to remain in Ireland from 2012. These applications were rejected in October 2018. The reason given was their lack of reckonable residence in the State. These decisions were not challenged.

31 In July 2018 K.B. was advised that the Minister was treating K.B.'s authorisation to reside in the State on the basis of his 2011 marriage as invalid *ab initio* on the ground that this marriage was not genuine. M.AYA.K and M.ARH.K. dispute the validity of this step. They contend that their presence in the State for the duration of K.B.'s permission to remain based on his marriage to an EU citizen was authorised by law.

32 M.AYD.K. was born in late December 2018. His parents are N.A. and K.B. He was issued with an Irish passport in January 2019.

33 In March 2019 M.AYA.K and M.ARH.K., through their mother, N.A., applied to be naturalised as Irish citizens. They relied on M.AYD.K.'s Irish passport as evidence that M.AYD.K. is an Irish citizen. This was necessary in order to establish that they fulfilled the criterion of "Irish descent or Irish associations" set out in s.16(1)(a) and (b) of the 1956 Act.

34 Their applications were advanced on the premise that they had insufficient authorised residence in the State.

35 A letter from their solicitors accompanied these applications. It forwarded their Irish birth certificates, their brother's Irish passport and letters from their schools and general practitioners verifying attendance.

36 Their solicitors noted that M.AYA.K. and M.ARH.K. had not "registered with GNIB" as they were under 16 years of age and that "their previous applications were rejected for reason that their father did no had (sic) the qualifying residency in the State. However, their father's application is still awaiting decision." They submitted that "the applicants being siblings have the sufficiently strong Irish association through their brother, are eligible for registration as an Irish citizen. We submit that the applicants'

Irish association must be assessed through their brother who is an Irish Citizen by birth and settled in the State."

37 Their solicitors "submitted that there is no guidance or any strict rule to meet the residency test requirement by applicants as the applications are submitted on the basis of their Irish association."

38 Each applicant stated that he was the full brother of M.AYD.K. and that "therefore applicant has sufficient strong Irish association through his brother [M.AYD.K.], Irish citizen, hence Irish association is claimed. It is pertinent to mention that applicant never had Pakistani passport because parents were divorced and separated, hence applicant was unable to apply for Pakistani passport. Applicant born in February 2006/February 2012 since then he has never left the State, therefore he has spent all his life in the State. It is believed that there are sufficiently strong compelling and compassionate circumstance. This it is requested to the Minister to exercise his discretion in applicant's favour to waive off any condition in application which may have affected application in negative manner and oblige."

39 At that time M.AYD.K. was the only member of the family who could show lawful residence in the State. On any view of the facts, M.AYA.K. and M.ARH.K. did not continuously lawfully reside in the State during the period of one year immediately prior to the date of their applications for naturalisation, as required by s.15B(1)(c) of the 1956 Act.

40 The Minister was obliged under s.16(1) of the 1956 Act to consider whether, in exercise of discretion, certificates of naturalisation should be granted to M.AYA.K. and M.ARH.K., although they did not comply with residence conditions for naturalisation.

41 Should they be fully exempted from statutory requirements that person who applies for naturalisation be an adult and have a full year of continuous lawful residence in the State immediately prior to the date of application and a total period of lawful residence in the State of four years in the previous eight years?

42 In August 2019 the Minister requested further documentation, including passports of M.AYA.K. and M.ARH.K.

43 M.AYA.K. and M.ARH.K. provided these documents under cover of letters from their solicitors dated 13 September 2019 and 3 October 2019. These included Pakistani passports issued to M.AYA.K. and M.ARH.K. in early September 2019. On 17 September 2019 the Minister advised due receipt and stated that "if further

documentation and/or clarification of any related matter to the application is required from you, we will write to you requesting it. Otherwise, you will receive a letter in due course informing you of the Minister's decision on the application."

44 In July 2021 the Minister received a written representation from a Child and Family Agency social care worker in support of M.AYA.K's application for naturalisation. This advised that of his "diagnoses of AHD (sic) among other medical conditions." The writer stated that he was going into transition year that September and that: "[he] and his family are concerned that his unresolved immigration status may impact the normal transition year programme including work experience and travel, that his fellow students will be participating in. N.A., supported by M.AYA.K's GP, has also expressed concern of the unresolved immigration status on his mental health."

45 So far as I can ascertain from the exhibits, no other information relating the personal or family circumstances of M.AYA.K. and M.ARH.K. or their relationship with their brother was provided to the Minister in support of their applications. However, I note that in 2023 the decision-makers were aware that M.AYA.K. was due to sit his Leaving Certificate exams.

46 In September 2021, the Minister refused both of these applications.

47 Part of the reasoning for the refusal of the Minister to exercise discretion under s.16 of the 1956 Act in 2001 was that: "[t]he grant of a naturalisation certificate under section 16….is a rare occurrence and only made under the most exceptional circumstances. This is because the Minister enjoys absolute discretion under Section (sic) and this discretion is rarely used, particularly in the context of other viable pathways to citizenship which exist under the 1956 Act …. I do not consider…the circumstances display exceptional and compelling reasons which would warrant the Minister exercise her absolute discretion under section 16… to grant citizenship in this case."

48 In November 2021 M.AYA.K and M.ARH.K. challenged the validity of this refusal in judicial review proceedings.

49 They asserted that the Minister had "fettered her discretion and/or imposed an inappropriate requirement and/or taken into account irrelevant considerations in imposing a requirement or test or rule of thumb of 'exceptional or compelling' reasons or circumstances when there is no such requirement or test in the statute."

50 They also asserted that the Minister erred in law by, reasoning believing that "other viable pathways to citizenship exist under the 1956 Act."

51 Other challenges to the validity of these decisions related to parts of the reasoning which they claimed took into account revocation of the Irish passport issued to M.AYD.K. on the ground that it was issued, "based on EU Treaty rights granted to his father [K.B.] which was subsequently revoked."

52 Those proceedings were compromised in late 2022 on the basis that the Minister would reconsider these applications for naturalisation. The issues raised by the applicants relating to the validity of application of the Minister's policy and whether a reference in her decision to "other viable pathways to naturalisation" could invalidate a decision to refuse naturalisation remained unresolved.

53 State authorities also attempted invalidate M.AYD.K.'s Irish passport on the ground that this document was issued in reliance on his father's permission to remain which had been improperly obtained and that M.AYD.K was not an Irish citizen. M.AYD.K. challenged the withdrawal of this passport in judicial review proceedings. These proceedings were also settled on terms that M.AYD.K. would apply for new passport which was granted to him and it is now accepted that he is an Irish citizen by birth.

54 M.AYD.K. was issued with a new Irish passport on 29 November 2022. This passport was submitted to the Minister on behalf of M.AYA.K. and M.ARH.K. as proof of M.AYD.K's Irish citizenship in support of their applications for naturalisation. The Minister then considered these applications afresh.

55 At some point prior to May 2022 the Minister published guidance relating to applications for certificates of naturalisation under s.16 (1) of the 1956 Act in circumstances where an applicant was in a position to show connection with an Irish citizen through descent or family association. This advice was most recently updated on the Minister's website in May 2022.

56 The Minister is unable to state when this guidance was first issued or whether this information was available to applicants in March 2019 when M.AYA.K. and M.ARH.K.'s applications for naturalisation were lodged. It follows that I must decide these applications for judicial review on the assumption that this information was not in the public domain in the period between 2019 and May 2022.

57 This guidance refers to the Minister's "absolute discretion" to waive conditions for naturalisation in certain circumstances, including where the applicant is of Irish descent or Irish associations (defined as related through blood, affinity or adoption to a person who is or is entitled to be an Irish citizen).

58 This guidance then quotes s.16(2) of the 1956 Act and states as follows:

"The fact that the Act provides for use of discretion should not be taken that it is policy to do so on the sole basis of Irish descent or Irish associations. There is no right or entitlement to have any of the statutory conditions waived even where the applicant comes within the certain circumstances defined. It is entirely at the Minister's discretion and this discretion is used very rarely and only under the most compelling and exceptional circumstances.

An application under s.16 of the Act that relies on Irish associations and affinity should be supported by substantive documentation supporting the claim, documentation that in the view of the Minister renders the application exceptional and one where the normal pathways to citizenship provided for by the legislation are not appropriate.

Applications for naturalisation are often received where the Applicant seeks the Minister to exercise absolute discretion under Section 16 of the Irish Nationality and Citizenship Act 1956, as amended to waive the statutory conditions on the basis of Irish descent or Irish associations going back two, three and indeed more generations. An association going back two generations without any other link to the State is generally considered as not sufficient to warrant consideration or the waiving of statutory residence conditions.

Applicants who seek to avail of the discretion provided under section 16 of the Act are expected to have a reasonable period of lawful residence in the State, generally around 3 years, to show that they have some substantial and tangible connection with Irish society and the State. An Irish association through a great-grandparent (or a grandparent where that grandparent obtained citizenship through naturalisation) and where there is no, or negligible, reckonable residency would generally be deemed insufficient to warrant recommending the minister exercise absolute discretion to waive the statutory conditions under Section 15 of the Irish Nationality and Citizenship Act 1956, as amended would result in such a refusal.

As citizenship is generally by descent, an application claiming an Irish association by "ascent" (i.e. based on being the parent of an Irish citizen children) or through Irish citizen siblings is not sufficient to warrant or justify recommending the Minister to exercise absolute discretion to waive the statutory conditions, in the absence of exceptional and compelling reasons."

59 The legal advisers for M.AYA.K. and M.ARH.K were not made aware of the existence of this guidance during the earlier judicial review proceedings. They first found out about it when it was relied on in the Minister's statement of grounds of opposition in these proceedings dated 26 January 2024.

60 Following this disclosure, M.AYA.K and M.ARH.K. were permitted to amend their grounds for seeking judicial review.

61 On 28 February 2023 the Minister, acting on recommendations of officials who examined the applications, declined to exercise discretion to grant certificates of naturalisation to M.AYA.K and M.ARH.K.

62 The terms of that decision show that the Minister was not prepared to disregard the statutory requirement that the applicants have authorised residence in the State which was sufficient to satisfy the relevant conditions for naturalisation.

63 These recommendations noted that: "[s]ection 16 of the Act confers broad discretionary powers on the Minister in the context of granting a certificate of naturalisation. It is Ministerial policy that these powers should be used sparingly and only in exceptional and compelling circumstances, particularly where other viable pathways to naturalisation are available to an applicant under the Act."

64 The Minister's advisers set out the family's immigration and residence history. They noted that the applications by M.AYA.K and M.ARH.K for naturalisation relied on Irish association through blood relationship with their brother M.AYD.K. who was born in the State in December 2018 and they accepted that he is an Irish citizen. They also noted as relevant information M.AYA.K.'s education history and that he was due to sit the Leaving Certificate in June 2024 and that his unresolved immigration status impacted the normal transition year programme including work experience and travel that his fellow students participated in. They noted M.ARH.K.'s school history. They noted that both children had never been outside the State.

65 They also noted that on 1 February 2022 N.A. lodged an application on behalf of her family for permission to remain under the 2022 Regularisation of Long-Term Undocumented Migrants Scheme (the 2022 Scheme) and that decisions were awaited on these applications.

66 The following reasons for the refusal were set out in each of their recommendations to the Minister:

> "Recommendation.
>
> It is acknowledged that [M.AYA.K] [M.ARH.K.] meets the statutory test under section 16 of having an Irish association through being related by blood to his brother, M.AYD.K. However, as stated previously, it is Ministerial policy that the Section 16 power of waiver should only be used sparingly and in

exceptional circumstances and that most applications are subject to meeting the conditions for naturalisation in Section 15.

In this regard, the Court of Appeal in *Borta v. Minister for Justice* [2019] IECA has recently made clear that the predominant pathway to naturalisation is Section 15:

'[t]he wording of s.15(2) in combination with s.16 establishes in the first place that s.15 is the predominant pathway towards a certificate of naturalisation… It is when those conditions are met that the Minister is entitled in his or her absolute discretion to consider whether to grant a certificate of naturalisation." [at paragraph 20]

The Court of Appeal in *Borta* also confirmed that the Minister has the power to take into account the relative strength of the Irish associations claimed:

"On the simple question of whether the Minister is entitled to consider relative strength of Irish associations, it can be seen that there is no restriction on that power." [at paragraph 31]

There does not appear to be circumstances attendant to this application which can be described as exceptional. In addition, it is noted that the minor in this case has one Irish association by blood relation to his Irish citizen brother, lasting approximately 3 months at the time of the application on 19/03/2019. The relative strength of this association does not appear to be particularly strong in terms of the fact that there is only one Irish association and the very short duration of that Irish association. For these reasons, I do not recommend that the Minister use his absolute discretion to grant this application."

67 On 13 April 2023 K.B., M.AYA.K. and M.ARH.K. were given permission to remain in the State for a period of two years from that date under the 2022 Scheme. If they retain this status, they will eventually fulfil the qualifying residence conditions for naturalisation set out in ss.15(1)(c) and 15B(1)(c) of the 1956 Act.

68 They will then be entitled to apply for naturalisation on that basis. M.AYA.K. is no longer a minor, which will give rise to computation complications in his case if such a course is pursued as he will have to show a longer period of reckonable residence and both might lose the benefit of some periods of authorised residence which were otherwise reckonable.

69 M.AYA.K and M.ARH.K. are also still eligible to apply for citizenship and for waiver of full compliance with any outstanding residence conditions for naturalisation. They can bring to the attention of the Minister any facts which show that their circumstances are exceptional and merit immediate grant of certificates of naturalisation. These may include of passage of time due to administrative decisions and litigation.

70 M.AYA.K and M.ARH.K complain in these proceedings that they were deprived of an opportunity to make their case because the Minister's 2022 policy was not drawn to their attention. They also claim that the Minister failed to apply policy correctly and that the decision-makers irrationally referred to viable pathways to naturalisation being open to them.

71 They assert that ministerial policy is illegal and confusing and that the Minister incorrectly introduced an issue that the applicants should regularise their residency status and qualify for citizenship into her reasoning.

72 They complain about a reference to the fact that the duration of their relationship with their brother being of less than three months at the time of their applications for naturalisation and a finding that this relationship is of very short duration. They say that the decision-makers only had regard to a period of three months and this was inconsistent and illogical; given that the duration of their association with their brother was four years when the Minister came to make her decision.

73 They claim that the Minister failed to act in their best interests or to take into account that they are children and the circumstance that they were born in Ireland and have lived their lives here and been educated here and other circumstances set out in the narrative of facts in the documents which contained the recommendations.

74 They assert that the Minister unlawfully fettered discretion by imposing a policy that the lawful residence requirement only be exempted in exceptional circumstances. They claim that they have not received an adequate explanation of why their associations with an Irish citizen "are not sufficiently strong" and that they are entitled to be given the "standard measure" relied on in making this finding.

75 Their legal submissions complain about absence of any indication by the decision-makers in 2023 as to whether they treated the period during which the applicants' father held a permission to be in the State on the basis of his marriage to an EU resident as part-fulfilment of the residency conditions for naturalisation. These submissions suggest that the applicants' solicitors canvassed this point in their letter to the Minister dated 11 January 2023.

76 The argument here appears to be that the Minister ought to have identified the extent of non-compliance of each of these applicants with residence conditions for naturalisation at the dates of their applications and then determined whether there were excusing circumstances which would justify the making of exceptions in respect periods during which they were not authorised to reside in the state.

77 This issue did not feature in the grounds on which the applicants were permitted to seek judicial review. I am not prepared to entertain it.

78 On 11 January 2023 solicitors for M.AYA.K and M.ARH.K corresponded with the Minister with reference to her pending decisions on their applications for naturalisation. The solicitors asserted that the policy requiring exceptionality which underpinned the Ministers 2021 decisions and other reasoning for those decisions was invalid. They relied on legal contentions in the applicants' previous judicial review application. This letter did not provide any further information to support their applications for naturalisation which might address the requirement to demonstrate exceptionality.

79 This letter expressed concern with reasoning leading to the Minister's 2021 decision which mentioned that the authorities were considering revoking of M.AYA.K.'s passport on grounds that it was issued in reliance on a residence permission granted to K.B. in exercise of EU Treaty rights which had been revoked.

80 The applicants' solicitors did not request that the period during which K.B. was permitted to reside in Ireland, based on his marriage to an E.U. citizen, be taken into account as part-compliance with the requirements of s.15B(1)(c) of the 1956 Act.

81 Applicants for public permissions, privileges or entitlements should seek to engage positively with decision-makers and put their best foot forward. All relevant circumstances which might persuade a decision-maker to recommend in favour of an applicant should be put before that decision-maker.

82 They cannot legitimately complain about aspects of decisions which omit to address matters which they have not brought to the attention of decision-makers or which they wish to advance with the benefit of hindsight after an adverse decision.

83 There is no basis for the applicants' criticism that the decision-makers "failed to make clear or to reason in relation to the fact that any faults attributed to the applicants' parents were being attributed to the Applicants." No such impermissible reasoning can be inferred from absence of any mention of such blame in their recommendations to the Minister.

84 While the applicants' inability to meet lawful residence conditions for naturalisation at the time of their applications flowed from their parents' undocumented status, there is no evidential support for any suggestion that they were not recommended for naturalisation because their parents were regarded as at fault in not regularising their personal immigration status.

85 I do not accept the argument that s.16 of the 1956 Act precludes the Minister from imposing a general policy that the discretion conferred by this provision will only be exercised in exceptional and compelling circumstances. This policy does not involve unlawful fettering of ministerial discretion. There is nothing unreasonable in requiring that applicants who qualify for discretionary exemption from generally applicable eligibility conditions must demonstrate exceptional circumstances which justify a grant of exemption.

86 Section 16 of the 1956 Act is not intended by the Oireachtas to provide a primary path to naturalisation. Applicants for naturalisation who may benefit from exercise of discretion under s.16(1) are not in the same position as those who fulfil the conditions for naturalisation.

87 The "absolute discretion" conferred on the Minister by s.16 of the 1956 Act is a discretion to disregard statutory conditions for naturalisation intended by the Oireachtas to apply to all applicants. This discretion is somewhat different to the "absolute discretion" conferred by s.15 of the 1956 Act, which is to grant a certificate of naturalisation where an applicant meets the conditions for naturalisation. An applicant for naturalisation who seeks exercise of the discretion conferred by s.16(1) of the 1956 Act, also seeks exercise of the discretion conferred by s.15 of that Act.

88 These provisions do not prevent formulation of a policy of Ministerial restraint in exercise of the discretion granted by s.16(1) of the 1956 Act. The fact that this discretion is declared by the Oireachtas to be "absolute" is not intended to prevent this.

89 The Oireachtas did not intend that an applicant for naturalisation who meets one of the criteria set out in s.16(1) of the 1956 Act has an automatic right to waiver of the conditions for naturalisation. While the Oireachtas has given the Minister "absolute discretion" to waive these requirements to the fullest extent that the law allows, this provision only has the effect of making exercise of discretion in favour of granting such exemptions immune from most legal challenges.

90 Decisions to refuse to exercise discretions conferred on the Minister by the 1956 Act are subject to the normal rules relating to judicial review. Decision-makers must

conform to the rules of natural justice and act rationally and fairly. They must give reasons which sufficiently explain why the decision has gone against the applicant: see *A.P. v. Minister for Justice and Equality* [2019] 3 I.R. 317; ([2019] IESC 47).

91 The most usual reason for a request to the Minister to exercise discretion under s.16(1) of the 1956 Act is likely to be inability of an applicant for naturalisation to satisfy residence conditions for naturalisation set out in ss.15(1)(c) and 15B(1)(c) of that Act.

92 The Minister's policies relating to exercise of discretion under s.16(1) of the 1956 Act were within her area of competence. These policies are fully consonant with the residual nature of the discretion to grant citizenship conferred by that provision, which must be viewed within the overall scheme of Part III of the 1956 Act.

93 The courts do not make policy in this area. Courts can only interfere with policies which take into account matters not permitted by the 1956 Act or policies which exclude proper exercise of discretion. Within these bounds the Minister has wide discretion to formulate policy, consistent with the intention of the Oireachtas.

94 The Minister may make policies which seek to achieve a proper balance between exercise of this discretion and the general policy of the 1956 Act which requires that applicants for citizenship by naturalisation satisfy the conditions for naturalisation.

95 This includes policies which give primacy to the intention of the Oireachtas as set out in ss.15, 15A, 15B, 15C, and 16A of the 1956 Act. This aspect of the Minister's policy is neither unreasonable nor illogical. In the context of conditions for naturalisation which require minimum periods of lawful residence in the State, this implements the statutory intent that applicants must comply with those conditions.

96 The conditions for naturalisation which require applicants to show minimum periods of authorised residence in the State dovetail with provisions of the Immigration Act 2004. These laws have been enacted in exercise of the State's entitlement to regulate the terms on which aliens may enter and remain in the State.

97 The statutory intent is that authorised residence in the State is a route to naturalisation; not the reverse of that scenario. Aliens who reside in the State without authorisation are not rewarded with the privilege of citizenship. Those who are in present the State otherwise than as permitted by law can have no general expectation that their irregular status will be cured by naturalisation.

98 It follows that the Minister may require that an applicant for citizenship who qualifies for discretionary exemption from the residence conditions for naturalisation must demonstrate exceptional circumstances which justify the making of an exception.

99 The terms "exceptional" and "compelling" connote a requirement that any applicant for naturalisation who relies on s.16 of the 1956 Act must make a persuasive case which demonstrates clearly that the Minister should exempt that applicant from the legal obligation to meet conditions for naturalisation such as those set out in ss. 15(1)(c) or 15B(1)(c) that Act.

100 It can be seen from the nature of the categories listed in s.16(1)(a), (b), (c), (f) and (g) of the 1956 Act that the claims of stateless persons, refugees, persons resident abroad in the public service and naturalised Irish citizens acting on behalf of their minor children for discretionary exemption under s.16(1) from conditions for naturalisation may be much more compelling than those of persons of Irish descent or Irish associations who either do not reside in the State or are here without authorisation.

101 For instance, strength of a claim for exemption by child with Irish associations who was not born in the State but who fulfils the residency conditions for naturalisation may be stronger than that of an undocumented minor who was born in the State.

102 The degree of exceptionality required to persuade the Minister to exercise discretion in favour of an applicant will depend on all the circumstances of that applicant's case. These include the nature of the condition of naturalisation which that applicant does not comply with, the extent of non-compliance, and whether good reasons exist which make it appropriate not to insist on such compliance and appropriate to grant naturalisation immediately.

103 The use of the word "most" in association with the words "exceptional" and "compelling" in the Minister's general policy and the guidance document relating to applications for citizenship based on Irish descent or Irish associations might potentially be more problematic; but only for those who choose to interpret this requirement in an illogical manner.

104 The Oireachtas does not intend that a decision by the Minister not to exercise discretion conferred by s.16 of the 1956 Act should be upset by dint of reasoning which undermines the Minister's policies or depends on strained or unreasonable interpretation of either ministerial policy or administrative decisions which implement that policy.

105 The purpose of the Minister in using the word "most" in guidance and explanations of these policies is to emphasise to intending applicants who can show Irish descent or Irish associations and the world at large that the exempting discretion given by s.16(1) will rarely be exercised, and then only for very good reasons. Connection with Ireland through descent from an Irish citizen or association with an Irish citizen might be very recent or tenuous.

106 For instance, a person who happens to have a distant forebear or brother who happens to be an Irish citizen can have little expectation that conditions for naturalisation which require a minimum period of authorised residence in the State will be waived. The same point may apply to a case to where a person not authorised to reside in the State is a blood relation of a person who is or becomes an Irish citizen. The ministerial guidance shows that the Minister's policy is that, absent special circumstances, persons of Irish descent or Irish associations should take the route of fulfilling the statutory conditions for naturalisation.

107 However, in each of these examples, an applicant may be able to point to extenuating circumstances and persuasive reasons as to why the Minister should disregard non-compliance with residence conditions for naturalisation.

108 I do not accept the applicants' submissions that the decision-makers misinterpreted reasoning in the judgment of the Court of Appeal in *Borta v. The Minister for Justice and Equality* [2019] IECA 255 or that they misinterpreted a statutory test or misunderstood s.16(1) of the 1956 Act or elevated policy guidelines to the status of inflexible legal rules.

109 Neither do I accept the submission that the Minister's decisions adverse to M.AYA.K. and M.ARH.K. were invalidated by the reference in the reasoning of the decision-makers to the policy of the Minister that discretion under s.16(1) of the 1956 Act be used "Sparingly, ...particularly where other viable pathways to naturalisation are available to an applicant under the Act."

110 Applicants for naturalisation who do are currently unable to comply with residence conditions for naturalisation may or may not have a viable pathway to citizenship by regularising their residency status.

111 The decision-makers did not proceed on the basis that the Minister could or should only exercise discretion under s.16(1) of the 1956 Act in favour of an applicant for naturalisation who is unable to take steps which may result in compliance with the lawful residence conditions for naturalisation. Their recommendations do not say that.

112 They referred to the judgment of the Court of Appeal in *Borta* and stated that the predominant path to naturalisation is that set out in s.15 of the 1956 Act. This referred to the normal path by which aliens qualify for citizenship. In the context of residence conditions for nationalisation, eligible status is achieved by having a qualifying authorisation to remain in the State and residing here on foot of that authorisation for the periods necessary to comply with the residence conditions for naturalisation.

113 It is clear from the text of their recommendations that the decision-makers were aware that N.A. had made these applications to regularise her residency status and that her two elder sons under the 2022 Scheme and that decisions on these applications were awaited.

114 The statement that: "[i]t is Ministerial policy that these powers should be used sparingly and only in exceptional and compelling circumstances, particularly where other viable pathways to naturalisation are available to an applicant under the Act" was neither illogical nor confusing. The decision-makers were stating Ministerial policy that, in general, applicants for naturalisation should seek to qualify by fulfilling the residency conditions for naturalisation, if this is viable.

115 The norm is that applicants for naturalisation must satisfy the conditions for naturalisation. This remains the position, even where an applicant qualifies for a discretionary exemption under s.16(1) of the 1956 Act.

116 If potential applicants for naturalisation have a path to citizenship by the regular route based on qualifying authorised residence in the State, they will not be allowed to take a short cut merely because they qualify under s.16(1) of the 1956 Act to be exempted from complying with this requirement.

117 It is reasonable for the Minister to require that if a person eligible for a discretionary exemption from residency conditions for naturalisation under s.16(1) of the 1956 Act can regularise residency status and qualify for naturalisation that way, this course should be pursued, and that, absent exceptional and compelling reasons, residual discretion to grant naturalisation immediately will not be exercised in favour of such applicants.

118 Child applicants for naturalisation are not excepted from obligations to comply with authorised residence conditions for naturalisation. While these applicants, if they are born in the State, now enjoy reduced qualifying periods of lawful residence as conditions for naturalisation, they are not given any other special treatment.

119 I do not accept the applicants' suggestion that Article 42A of the Constitution of Ireland or Article 24 of the Charter of Fundamental Rights of the European Union require that the Minister give child applicants who are eligible for naturalisation any preferential consideration when exercising discretion under s.16 of the 1956 Act.

120 Age of an applicant is but one circumstance which may be relevant in determining whether an exception should be made where an applicant comes within s.16(1) of the 1956 Act.

121 The decision-makers were entitled to examine these applications for naturalisation by reference to the circumstances of M.AYA.K. and M.ARH.K. in early 2023.

122 Even if the option of regularising their residency status under the 2022 Scheme had not been available to M.AYA.K. and M.ARH.K. in 2023, they would still be obliged to demonstrate to the Minister that there were exceptional and compelling reasons as to why they should be exempted from the residence conditions for naturalisation.

123 I do not accept the submission that the decision-makers erred in law in their evaluation that M.AYA.K. and M.ARH.K. did not show compelling and exceptional circumstances which would justify a waiver of the requirement that they be lawfully resident in Ireland for the minimum periods set out in s.15B(1) of the 1956 Act.

124 The applicants submit that reasons given by the decision-makers for their conclusions on exceptionality were inadequate. They suggest that the decision-makers should have specifically referred in their reasoning to factors such as their ages and that they were born in Ireland and had never left the State and the difficulties encountered by M.AYA.K. in not being able to travel, in transition year through not having a passport and given them a weighting.

125 They rely on an *obiter dictum* in the judgment of the Court of Appeal at para. 40 of *Borta* which suggests that an applicant for naturalisation who seeks exercise of discretion under s.16(1) of the 1956 Act is entitled to enough information about the reasons to enable that applicant to know whether some later change of circumstance such as a longer period of association or passage of time would raise an expectation of naturalisation.

126 The judgment of the Court of Appeal in *Borta* related to validity of a decision by the Minister decline to exercise discretion under s.16(1) of the 1956 Act in the context of a different condition for naturalisation.

127 The background was that the applicant was born in Moldova in 2003 and came to Ireland to be with her mother in 2012 on a Romanian passport. Her mother was in Ireland since 2007 and regularised her residence in Ireland in 2011 by obtaining a Romanian passport. Her sister was born in the State in October 2014 and is an Irish citizen. She applied for naturalisation in January 2017. She relied on her sister's Irish citizenship under s.16 of the 1956 Act. She was part of a family unit which was for a long period lawfully settled in Ireland and which now included her Irish citizen sister.

128 She complied with the lawful residence conditions of naturalisation. Her problem was that she was not of full age as required by s.15(1)(a) of the 1956 Act. The first issue which the Minister was therefore obliged to consider was whether there were circumstances which would justify waiving the requirement that she be of full age at the date of her application as a condition for naturalisation.

129 The recommendation on which the Minister acted confined itself to a statement that "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…" That bare statement did not provide any insight into why the recommenders came to their conclusion.

130 This was the context of the dictum at para. 40 the judgment of the Court of Appeal in *Borta*. The comment of that Court on failure by the decision-makers to give a reason which would enlighten that applicant on whether she had a prospect of a successful application naturalisation in the future stemmed from lack of any explanation of the reason why the Minister considered that her existing associations to the State were not sufficiently strong.

131 The additional features in these applicants' cases related to their undocumented status at the time of their applications and the possibility that this could be regularised as a pathway to naturalisation.

132 *Borta* did not involve consideration of lack of compliance with lawful residence conditions or exercise of discretion based on criteria set out in guidance provided by established policy.

133 M.ARH.K and M.AYA.K were aware from the terms of the Minister's adverse decision back in in 2021 that this requirement of exceptionality applies to applications for naturalisation which rely on s.16 of the 1956 Act and that, in general, the appropriate route to citizenship is for an applicant to comply with the conditions for naturalisation.

134 There is no general rule that reasons for decisions must be explained in such detail that an applicant must be able to know what will persuade a decision maker to make a favourable decision in the event of a resubmitted application. The obligation to give sufficient reasons only relates to provision of information sufficient to enable the applicant to understand the reasons for the decision which has been given.

135 In these cases, the strength of the applicants' connection with their brother, M.ARH.K. was relevant; but it was not the only relevant consideration or even the main one. This consideration was "noted" by the decision-makers as being "in addition" to their finding "that there does not appear to be circumstances attendant to this application which can be described as exceptional."

136 The decision-makers concluded on this point that "The relative strength of that association does not appear to be particularly strong in terms of the fact that there is only one Irish association and the very short duration of that association."

137 In my view it was not necessary for the Minister to expressly state why she did not regard the circumstances of M.AYA.K and M.ARH.K. as exceptional or as providing a compelling reason why they should be exempted from the obligation of showing lawful residence in Ireland and qualifying for citizenship by regularising their status. All of the circumstances which could be regarded as in their favour were fairly summarised in the narrative prior to their recommendations. It was not necessary to recite those circumstances again in the operative part of their recommendation.

138 There was nothing irrational or incomprehensible about the determinations that these factors did not provide exceptional circumstances or compelling reasons. The conclusion that their circumstances were not exceptional did not require further explanation.

139 The issue of strength of association between the applicants and their Irish citizen brother was part of their overall evaluation. The decision-makers regarded their blood relationship for a period of four years with their younger brother as "not particularly strong."

140 Any person reading these recommendations would understand why the decision-makers had come to these conclusions. They did not require any further explanation. The applicants were relying on familial association of four-years duration with a four-year-old child. This was part of their reasoning.

141 It was not necessary or appropriate for the decision-makers to provide what the applicants term "a measure" of the weight they placed on in concluding that the

association between the applicants and their brother was "not particularly strong." Contrary to what asserted in the applicants' statement setting out the grounds on which they seek judicial review, the decision-makers did not refer to these associations as not being "sufficiently strong."

142 The decision-makers were not obliged to state what the Minister might regard as exceptional and compelling reasons for waiving lawful residence conditions of naturalisation in favour of the applicants or to state what the Minister might regard as sufficient strength of association with an Irish citizen to justify immediate grant of citizenship. To require decision-makers to provide such a measure would make their task impossible. The strength of the association is but one of the matters which the Minister can consider in evaluating an application.

143 The approach advocated by the applicants requires impermissible judicial intrusion into exercise by the Minister of this statutory discretion.

144 I am not persuaded that M.AYA.K. and M.ARH.K. were disadvantaged in their applications as a result of omission by the Minister to draw attention to the May 2022 guidance on the Minister's website.

145 The reasoning which led to the 2023 recommendations did not turn on any aspect of that policy guidance which the applicants were not already aware of from earlier interactions with the Ministers' officials. They were aware of most of the policies contained in this guidance prior to reconsideration of their applications in January 2023.

146 They were aware from the terms of the recommendations in 2021 that the decision-makers did "not consider the Irish associations claimed sufficiently strong or in the circumstances of the case display exceptional or compelling reasons which would warrant to Minister exercise her absolute discretion under section 16 of the Irish Nationality and Citizenship Act 1956, as amended to grant citizenship in this case."

147 This information was supplemented by letter dated 12 April 2022 from the Minister to K.B. which contained the following text which is quoted in an affidavit sworn by their solicitor in an affidavit sworn on 31 May 2022 and in part of that letter exhibited by KB's solicitor to an affidavit sworn on 12 March 2024:

> "As the Act lays particular stress on descent under section 16, the Minister regards Irish association by descent as stronger than claiming Irish association laterally through Irish Citizen siblings as is the approach in immigration processes worldwide. The Minister may decide to use the absolute discretion

under Section 16 to approve an application where Irish Association is aimed to an Irish Citizen sibling but it is the minister's policy that this is only done where other exceptional or compelling circumstances exist. No such circumstances appear to exist in this case."

"Having considered the entirety of the matter it is the view of the Minister that the Irish Association claimed is not sufficiently strong enough -as the relationship was through a sibling rather than through descent- to waive the residency requirement. Accordingly in the absence of exceptional and compelling circumstances the Minister decided to refuse the application for a certificate of naturalisation in this case."

148 The applicants' legal advisers were also aware of the judgment of the Court of Appeal in *Borta*. They referred to that decision, albeit in another context, in their letter dated 11 January 2023 which provided a copy of M.AYD.K.'s new passport. This judgment confirmed that the Minister could take into account strength of Irish associations in assessing whether or not to exercise discretions given by s.16(1) of the 1956 Act. They knew the Minister could evaluate the nature and strength of connections through blood or affinity between an applicant for naturalisation and Irish citizens.

149 They knew that previous decision-makers took the view in 2021 that their claim to citizenship based on their family association between M.AYD.K and his brothers was not considered to be a strong one. This could not have come as any surprise, given that these applications were submitted when M.AYD.K was less than three months old.

150 The published guidance quoted became available on the Minister's website in May 2022 and was therefore in the public domain well in advance of reconsideration by the Minister of these applications in early 2023. The Minister had no obligation to draw the attention of the applicants' legal advisers to the details of this policy when the original judicial review proceedings were settled. The Minister was entitled to assume that the applicants and their legal advisers were aware of information which was readily available to the public at large.

151 In 2023 M.AYA.K. and M.ARH.K. had adequate opportunity to make further any representations deemed appropriate to persuade the Minister that there were exceptional or compelling reasons why they should be granted certificates of naturalisation. They have not demonstrated any failure by the Minister to bring relevant policy guidance to their attention. They have not demonstrated that they have been prejudiced by application of any element of the Minister's policy of which they were unaware.

152 The applicants submit that the decision-makers erred in law and failed to take relevant matters into consideration by reason of references in their recommendations to the fact that M.AYA.K. and M.ARH.K. had applied for naturalisation when the duration of their Irish association was approximately three months.

153 I do not agree. Their reference to the fact that the duration of association between the applicants and their infant brother at the time when these applications for naturalisation were lodged was approximately three months was a fair point. The decision-makers went on to point out that the applicants could show only one relationship by affinity with an Irish citizen and that the Irish association which they relied on was of "very short duration."

154 I do not interpret this as meaning that the decision-makers only took the period of three months up to the date of submission of the applications in March 2019 into consideration in their assessment of the strength of the applicants' connection with the State through their brother.

155 The full text of the statement of the relevant facts which preceded their recommendations shows that these decision-makers were aware of developments between March 2019 and January 2023 and took those matters into account. It is unreasonable interpret their reference to "very short duration of the Irish association" as a reference to the three-month period to March 2019 and not the four-year period to January 2023.

156 I also reject the submission that, if the decision-makers were deciding that this period of four years was insufficient, they should have given a reason for this conclusion and that this omission invalidated their decision.

157 The decision-makers were entitled to consider that a family relationship of four-years duration, starting at birth, between a young boy and two brothers who are six and twelve years older than him, did not provide strong support for their claims for naturalisation. This conclusion was not perverse or illogical. It did not require further explanation.

158 It follows that these applications for judicial review will be dismissed. As indicted by me to counsel today, costs must follow the event and will be awarded to the Minister against KB.