Unapproved

THE COURT OF APPEAL

Neutral Citation number: [2020] IECA 185

Appeal Record Number: 2019/41

Costello J.
Power J.
Binchy J.

BETWEEN/

M.N.N.

APPELLANT

- AND -

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Ms. Justice Power delivered on the 13th day of July 2020

1. This appeal arises from the refusal of the High Court (Barrett J.) to grant an order of *certiorari* quashing a decision of the respondent ('the Minister') to refuse an application for a certificate of naturalisation on the basis that the applicant ('the appellant') was not of 'good character'.

2. Leave to seek judicial review was granted by Humphreys J. on 14 May 2018. The grounds upon which judicial review was sought included an alleged breach of the rules of natural and constitutional justice in that the Minister's decision to refuse the certificate was based on 'an alleged incident' wherein s. 12 of the Child Care Act 1991 had been invoked. A further alleged breach of the rules of natural and constitutional justice was said to consist

of a failure on the part of the Minister to consider substantive submissions that had been made in respect of the appellant's application.

Background

3. The appellant was born in Angola and arrived in Ireland on 2 January 2003.[1] His application for asylum was refused but he was granted leave to remain on humanitarian grounds. There was a reference in the file to his traumatic past involving torture and imprisonment. The grant of humanitarian leave to remain has been renewed, periodically, since 2008. The appellant is separated from his former wife. He is the father of five children, three of whom were born in the State and all of whom are Irish citizens.

4. An initial application for naturalisation was made in 2012 but was refused on the grounds that the appellant had insufficient reckonable residence in the State. On 16 October 2013 the appellant submitted a fresh application for a certificate of naturalisation and it is that application which is the subject of this appeal. On 28 November 2013 he received a letter from the Irish Naturalisation and Immigration Service ('INIS') acknowledging receipt of his application and advising that it is a statutory requirement that applicants for naturalisation be of 'good character'.

5. Upon making his application for naturalisation the appellant disclosed that he had two convictions for road traffic offences. The offences, which were strict liability offences, were committed in December 2012 and related to a failure to display a motor tax disc and a failure to display an insurance disc.[2] A fine of €350 was imposed in respect of each offence. At the time of his application for naturalisation the appellant had no criminal or other charges pending against him.

---

[1] Though there are other references to 1 January 2003 in the file.

[2] As can be seen from para. 16 below the appellant's insurance cover had, in fact, been cancelled due to his failure to pay the monthly premium.

6. As is usual in such applications, the Minister, pursuant to s. 8 of the Immigration Act 2003, requested An Garda Síochána to provide a report about the appellant's background. A Garda Report dated 29 July 2014 was furnished and it disclosed the aforesaid traffic offences.

7. On 9 September 2014 the appellant was asked by the Minister to provide explanations or furnish submissions in relation to the offences listed in the Garda Report. The appellant replied, promptly, by letter dated 12 September 2014. He explained that although the convictions were dated 21 June 2013 the offences in question had occurred on 9 December 2012. Two 'Fixed Charge' notices in the sum of €60 each had been sent to him at a previous address in County Louth. In late December 2012, the appellant and his wife had moved to a new address. In or about this time their marriage relationship was breaking down. The appellant moved out of the family home and eventually found employment in Galway, from where he travelled to Dundalk at weekends to see his children as *per* a court access order.

8. In preparing his application for citizenship the appellant had contacted the District Court in Galway to ascertain whether there were any charges pending against him. At this point he learned of the imposition of the fines in respect of the two traffic offences. He explained that the Fixed Charge letters had been forwarded to the family home address by the letting agent of the previous premises in which he had lived. As the marriage relationship had ended acrimoniously, his ex-wife had hidden the letters. Similarly, when summonses for his attendance at court had been issued and delivered, his ex-wife had also hidden those. Consequently, as he was no longer living in the marital home, he had no knowledge that Fixed Charges were overdue or that he had been summoned to appear in Court. Upon discovery of these matters, he had paid the fines, immediately. The file before the Court discloses that the appellant furnished to the Minister a copy of his policy of motor insurance

confirming cover from 24 February 2012 to 23 February 2013 and a copy of his motor taxation disc valid for the period in question.

9. For reasons unknown on 9 September 2015, the Minister appears to have made a second request for information on the appellant to An Garda Síochána. A second Garda Report dated 4 January 2016 issued. In addition to the two road traffic offences referred to above, the second Garda Report contained a reference to an incident that occurred on 31 May 2013 at an address in County Louth which was the home that the appellant had shared with his former wife. The incident was described in terms of s. 12 of the Child Care Act 1991 having been invoked.[3] The appellant is described in the Report as a 'witness' and the details of the incident are set out in the following terms:-

> *"Section 12 of Child Care Act Invoked in relation to five children following domestic altercation between parents, father assaulted mother causing her injuries. Mother disclosed to Gardai that children were not safe with father."*

10. The Minister wrote to the appellant on 12 February 2016 seeking details of the circumstances surrounding the incident noted on the Garda Report and requesting that the appellant furnish any documentation he had from the Health Service Executive ('the HSE'). The appellant replied on 11 March 2016 and provided an explanation in relation to the alleged incident.

---

[3] Section 12 of the Child Care Act 1991, as amended, confers upon a member of An Garda Síochána the power to take a child to a place of safety. Where a member of An Garda Síochána has reasonable grounds for believing that there is an immediate and serious risk to the health or welfare of a child and that it would not be sufficient for the protection of the child to await the making of an application for an emergency care order by the Child and Family Agency ('the CFA') then, that member may, without warrant, enter a house and remove the child to safety. Once removed, the child shall be delivered up to the custody of the CFA for the time being. If the child is not returned to his or her parent, the CFA may apply for an emergency care order.

The Appellant's Submissions on the Alleged Incident

11. The appellant's explanation of the alleged incident was set out in the context of an acrimonious breakdown of his marriage. His submissions may be summarised as follows. His ex-wife had sought to incriminate him by making serious allegations which would lead to his being separated from his children. She had contacted the HSE and had made allegations against the appellant, the subject matter of which he was not aware. At a time when he was out of the country, the HSE had brought an application to court on behalf of his ex-wife seeking a Barring Order based on the allegations she had made. When the appellant had returned to Ireland he brought an application to the District Court seeking access to his children and that court on 8 July 2014 made an order granting him access as requested. As he was based and working in Galway it was difficult for the appellant to see his children but he described how he made his utmost effort to send them money and to be involved in their daily lives. He had contacted their schools and had obtained up-to-date information in relation to their progress. There was no issue of concern in relation to him being with his children and if there had been any such concern the District Court judge would not have granted him access to them. He was worried, not knowing the outcome of allegations made by his ex-wife. In an effort to ascertain the nature of those allegations he had contacted Dundalk District Court, but the only information available was that there was no case against him, save for a reference to the aforesaid Barring Order. He also contacted the HSE in Dundalk to find out further information, but nothing came of his efforts in this regard.

12. Over the years since lodging his application for naturalisation, the appellant was unrepresented. In or about September 2017, he obtained the assistance of his current solicitors. On 6 November 2017 they wrote to the Minister on his behalf seeking a decision on his application for naturalisation. Noting that over three years had lapsed since his

application had been lodged, they submitted that the appellant was entitled to a decision as a matter of fair procedures. In that letter the appellant's solicitors set out a comprehensive account of the appellant's circumstances and made detailed submissions in relation to *'(i) the incident of 31 May 2013 and (ii) the road traffic offences referred to above'*. Enclosed with that letter was a letter of the same date penned by the appellant and addressed to the Minister.

13. The appellant's solicitors explained that the incident of 31 May 2013 had precipitated the separation of the appellant from his wife. A frank and forthright explanation was provided, which may be summarised thus. The appellant had been having an extra-marital affair and his wife had found out about it. They were arguing in the car on their way home. The appellant's wife bit his left hand, violently. In an effort to release his arm from her teeth the appellant had bitten her in return. He stopped the car suddenly causing his wife to hit her forehead against a phone holder. He asked her to leave the car and the appellant drove home. Forty minutes later, eight members of An Garda Síochána arrived at his home. His account of what happened is set out in his letter to the Minister of the same date. The appellant describes how, upon opening the door, two female and six male Gardaí had entered his home. He was asked, immediately, about the whereabouts of his baby daughter and he informed the Gardaí that she was sleeping. The Gardaí wanted to see the baby and he accompanied them upstairs. The appellant then describes his shock and abhorrence upon hearing that his wife had made the most serious allegations of a criminal nature against him concerning not just herself but also his baby daughter. He was distressed at having to observe an intimate examination of the baby by one of the female Gardaí. He describes how he was cautioned, arrested and taken to Dundalk Garda station and detained overnight. He was brought before the Dublin District Court the following morning and he appeared before a Judge. He tried to defend himself and was assisted by a lawyer whom he met in

the court. He was then released, and the matter was referred to Dundalk District Court. On 22 August 2013[4] the case against him was withdrawn and the matter was struck out due to the absence of evidence.

14. The appellant's solicitors confirmed their instructions that, following the incident in the car, the appellant had understood that his wife had gone to hospital for treatment and that she had been admitted overnight. The Gardaí had invoked s. 12 of the Child Care Act 1991 and had taken the children into the care of the Child and Family Agency (then the HSE). They explained that the appellant did not know how long the children had been kept in care nor when they had been returned to their mother. He had not been contacted by the HSE or any social worker in relation to any child care proceedings. He had visited his father, who was ill, in Angola in June 2013 and had returned to the State in August 2013. He attended the Dundalk District Court on 22 August 2013 and on that day his ex-wife withdrew her complaints and the case against him was struck out.

15. In September of the same year, the appellant was granted a Protection Order. He had also applied for a Safety Order in respect of his then ex-wife because on three occasions she had gone to Galway to harass him, verbally assault him and insult him. On 12 November 2013, the District Judge issued a warning to his ex-wife. The appellant's solicitors confirmed that he had been in constant employment since November 2014. Prior to that date he had been on Disability Allowance because of a hip operation in 2004. He had undergone several surgical procedures, including, operations on his arm, his chest and his toe.

16. On behalf of the appellant, his solicitors furnished an explanation in relation to the context in which the fines for driving without insurance and without motor tax had been

---

[4] There is a discrepancy on the file in relation to this date. Whereas the appellant refers to 23 August 2013, a letter on file from the solicitors who attended court on his behalf refers to the case against the appellant having been *'withdrawn and struck out at Dundalk District Court on the 22nd of August 2013'*.

imposed. The appellant had been paying an annual premium on his car insurance by way of monthly instalments. In November 2012, he did not have sufficient funds and was unable to pay that month's instalment. The insurance was cancelled. On 9 December 2012 he had been stopped by Gardaí in Termonfeckin, County Louth. The fines were sent to his then address but he had moved out of that address very shortly, thereafter. He did not receive the notifications, nor did he receive the Summons to attend Drogheda District Court on 21 June 2013. On finding out that he owed €700, he paid the fines in full. In relation to his failure to display a current motor tax disc, the appellant instructed his solicitors that he had failed to renew his motor tax because, at the time, he had been going through financial difficulties, in that he was obliged to pay a deposit for house rent. His solicitors advised the Minister that the appellant was not aware that the insurance on his car had expired due to the non-payment of the November instalment. He took out a new insurance policy from 10 December 2012 to 9 December 2013 and a copy of that policy was enclosed with the letter from his solicitors. Since that incident in December 2012, he has always paid his motor insurance and taxation on time.

17. The appellant's solicitors then set out the reasons why, in their view, a refusal of his application for naturalisation would be disproportionate and unreasonable in the light of all the circumstances of his case. He had been living in the State since January 2003, that is, for almost fourteen years at that stage. He had permission to remain on a Stamp 4 Visa since June 2008. He had very strong connections with Ireland through family, work and friendships. He had numerous friends from work and from his membership of the Presbyterian Church in Dundalk which he attends whenever he is not working. He does not intend to return to Angola in the future but intends to spend the rest of his life in Ireland. He feels part of Irish society and considers himself to be partly Irish. His strongest connection with Ireland is the fact that his five children are Irish citizens. He would like to be fully

integrated into the Irish nation by becoming an Irish citizen. In such circumstances, the appellant's solicitor requested of the Minister that a decision would issue as soon as possible, thereafter.

18. In the appellant's solicitors' letter of 6 November 2017 (see para. 12 above), was a letter of the same date addressed to the Minister by the appellant. He set out his account of what had occurred in relation to the incident of 31 May 2013. He provided a fuller picture of his relationship with his wife at that time. They had lived together from 1999 until 2013 and had five children. He denied ever physically assaulting his ex-wife. His marriage was in difficulty by the end of 2012. He explained how his ex-wife had lost respect for him and despised and insulted him because of his inability to work due to his health problems. Following his hip replacement, he was on Disability Allowance whereas his wife had an income from her work as a part-time cleaner. Their relationship had deteriorated over a number of years and they had become increasingly estranged. They ended up living in separate rooms and, eventually, in December 2012 he began an affair with a Congolese woman who had, since that time, remained his girlfriend.

19. The appellant further submitted that he had never ill-treated, abused or neglected in any manner, whatsoever, any of his children – all of whom he loved and had supported to the best of his ability. His ex-wife had made false allegations against him claiming that he wanted to rape her and his youngest daughter. She did this to denigrate him and to destroy his character and reputation and to get him into trouble with the Gardaí and the authorities of the State. She had acted in a viciously vindictive and irrational manner because she had felt scorned by the fact that he had an extra-marital affair.

20. The appellant very much regretted the hurt he had caused to his ex-wife. His marriage was over by the time his relationship with his girlfriend had begun. That relationship is ongoing. He believed that he should not have been punished and harassed by

his ex-wife because their marriage had broken down. He also confirmed that he was currently working part-time as a hotel kitchen assistant and that he was in receipt of Job Seekers allowance. He had not come to the adverse attention of the Gardaí in relation to any matter apart from the incident already addressed. In his view, he is of good character and is a law-abiding person. He confirmed that he was integrated, fully, into Irish society and has more connections with Ireland than with Angola. He visited Angola when his father was ill, as he is the oldest son of the family. Both his parents had since died and there was now no longer any reason for him to travel to Angola. He reiterated that all of his children are Irish citizens. He also has relations living in Ireland – all of whom are Irish citizens. He set out his plan to advance in the hospitality or catering industry by returning to college to train as a chef and the appellant confirmed that he hopes to formalise his relationship with his girlfriend in the near future.

The Minister's Reply

21. On 7 November 2017, the Minister wrote to the solicitors for the appellant seeking a Letter of Authorisation confirming that they were acting on his behalf. Signed authorisation was sent to the Minister by return letter of 9 November 2017. On 13 November 2017, the Minister replied to the appellant's solicitors in the following terms:-

> *"I am directed by the Minister for Justice and Equality to refer to your correspondence received in this Office. Your client's application for naturalisation* ***is currently being prepared for submission to the Minister.***[5] *If further documentation and/or clarification of any matter related to your client's application is required from you, we will write to you requested it (sic). Otherwise you will receive a letter in due course informing you of the Minister's decision on your client's application."*

[5] Emphasis in bold has been added both here and throughout the judgment unless otherwise indicated.

The Impugned Decision

22. On 12 February 2018, the appellant's application for a certificate of naturalisation was refused. A letter was sent on behalf of the Minister on that day and it stated:-"

> *"I am directed by the Minister for Justice and Equality to refer to your application for a certificate of naturalisation.*
>
> *Section 15 of the Irish Nationality and Citizenship Act, 1956 as amended, provides that the Minister may, in his absolute discretion, grant the application if satisfied that the applicant is of good character. The Minister, having considered your application, is not satisfied that you are of good character and has decided not to grant a certificate of naturalisation in this case.*
>
> *A copy of the submission that was prepared for the Minister, with decision annotated thereon, is enclosed for your information.*
>
> *There is no appeals process provided under this legislation. However, you should be aware that you may reapply for the grant of a certificate of naturalisation at any time. When considering making such a re-application you should give due regard to the reasons for refusal given in the attached submission. Having said this, any future application will be considered taking into account all statutory and administrative conditions applicable at the time of application."*

23. Enclosed with that letter was a single page document entitled 'Adult application for a certificate of naturalisation' and which was described in the letter to the appellant as 'the submission prepared for the Minister with decision annotated thereon'. Throughout this judgment I shall refer to that document as 'the Submission'. It sets out the appellant's name, address, file reference number, gender, date of entry into the State, date of birth and marital status. In the column next to the word 'Representations' is entered 'No'. Thereafter, the following is stated:-

> *"The Minister has absolute discretion to grant or refuse a certificate of naturalisation, if satisfied or not that the applicant fulfils the statutory conditions specified in the Irish Nationality and Citizenship Act 1956, as amended. Naturalisation is a privilege and not a right and the Minister is under no obligation to grant a certificate of naturalisation.*

The onus is on each applicant to disclose in their application all appropriate information and evidence to help demonstrate that he or she satisfies the conditions for a certificate of naturalisation including, character.

Comments: *This application was previously submitted to the Minister and an up-dated Garda report was requested on 9/9/2015, see attached copy of previous submission.*

Information has come to light in the course of the processing of this application which the applicant could reasonably have foreseen would be taken into consideration in the decision making process. The Minister is not obliged to give advanced notice of information of which the applicant is already aware. The attached Garda report details motoring offences on 21/06/2013 and an alleged incident where Section 12 Child Care Act was invoked on the 31/05/2013.

Recommendation: *The relevant information related to the non-compliance by the applicant with the laws of the State is attached to this submission. Given the nature of the offences and the alleged incident I am not satisfied that the applicant is of good character and I would not recommend this applicant for a certificate of naturalisation.*

Not Recommended. For Minister's decision please."[6]

24. The above Submission contains the signatures of five personnel within the Minister's department and a handwritten date appears after the name of each signatory: Breda M. Henebry, Further Processing LS Team, 20/4/2017; Alice A. Treacy, Further Processing LS Team, 21/4/2017; and Ray G. Murray, Assistant Principal, 8/15/17. Below the signatures of the above three members of the Processing Team are two hand-written notes and two further signatures. The first states '*Recommended for refusal* - Kevin Clark, 2/2/2015' (*sic*) and to the left of that is stated '*Application refused at* (illegible) - Michael Kirrane, 2/2/2018'. During the hearing, counsel for the Minister informed the Court that

[6] The Submission contains the emphasis in bold.

the second Garda Report was attached to the Submission. The court was also informed that Michael Kirrane is the Director of the Division that deals with applications for naturalisation.

25. I pause, at this stage, to note that the second Garda Report which was attached to the Submission does not make any reference to the fact that no charges were pending against the appellant arising from the invocation of s. 12 of the Child Care Act 1991 nor is there any reference to the fact that the appellant's ex-wife had withdrawn her complaint against the appellant. Furthermore, the Submission prepared for the Minister does not go beyond referring to the motoring offences of 21/06/2013 and the alleged incident in respect of which s.12 of the Child Care Act was invoked. It is, therefore, not evident either on the face of the notification letter or on the Submission that was prepared for the Minister, whether the signatories thereto, and, in particular, Mr. Michael Kirrane, who had made the decision on the Minister's behalf, had considered the appellant's submissions containing contextual and exculpatory information and which had been set out by his solicitors in their letter of 6 November 2017 and by the appellant in his letter to the Minister of the same date.

The High Court

26. In his Statement of Grounds, the appellant set out the six grounds upon which judicial review was sought. The first refers, generally, to an alleged breach of the rules of natural and constitutional justice. The second asserts, more specifically, a breach of the rules of natural and constitutional justice in that the decision to refuse a certificate was based on an alleged incident wherein s. 12 of the Child Care Act 1991 was invoked. A further breach of the rules of natural and constitutional justice is alleged by reason of the failure on the part of the Minister to consider the substantive submissions made by the appellant on 6 November 2017. The Statement of Grounds also contains claims that the Charter of Fundamental Rights was engaged and that the Minister had been in breach of Article 6 and/or

Article 8 of the European Convention on Human Rights. In reality, this appeal proceeded on the basis that the Minister's refusal was in breach of the rules of natural and constitutional justice on a number of fronts.

27. In the Statement of Opposition, the Minister pleaded that his decision was made in accordance with the provisions of the Irish Nationality and Citizenship Acts 1956 to 2004 (hereinafter 'the Act') and that in the 'exercise of his absolute discretion', he was not satisfied that the appellant was of good character. The appellant failed to satisfy the conditions of naturalisation pursuant to s. 15 of the Act. His claim in respect of the alleged breach of the rules of natural and constitutional justice was denied. It was also pleaded that the Minister had arrived at his decision having regard to all aspects of the appellant's conduct and character, which included not only the alleged offence, but also the convicted offences. It was further pleaded that the appellant's submissions of 6 November 2017 were appropriately considered by the three signatories notwithstanding the date that appears on the Submission. It was also pleaded that the case was considered by another servant or agent of the Minister whose handwritten note on the face of the decision is dated 2 February 2018. All alleged breaches of European Union law and European Convention on Human Rights law were also denied.

28. The Statement of Grounds was grounded upon an affidavit sworn by the appellant on 10 May 2018. On behalf of the Minister, Mr. Ray Murray, Assistant Principal, within the Citizenship Division of the Department of Justice and Equality, swore an affidavit on 28 September 2018. I shall return to those affidavits, presently.

29. In a judgment that ran to just four paragraphs the trial judge refused the application for an order of *certiorari* together with all other reliefs claimed. He noted that the Minister considered the Garda Report which referred to the motoring offences and an alleged incident where s. 12 of the Child Care Act 1991 was invoked. Citing *AA Algeria v. Minister for*

Justice and Equality [2016] IEHC 416, *AMA v. Minister for Justice and Equality* [2016] IEHC 466 and *AA v. Minister for Justice and Equality* [2017] IEHC 491, the trial judge noted the Minister's wide discretion regarding naturalisations. In his view, these cases show that the Court is limited to reviewing whether the Minister acted capriciously, autocratically and/or arbitrarily in reaching his conclusions. He was satisfied the Minister had not so acted.

30. Barrett J. found that the Minister had considered the submissions made and the Garda Report and that he had not considered the 'alleged incident' as more than alleged. Barrett J. was satisfied that since *Tabi v. Minister for Justice, Equality and Law Reform* [2010] IEHC 109, the Minister may consider motoring offences when assessing character. He found no want of proportionality in the Minister's decision. He rejected the claim that EU law was engaged in the naturalisation application, citing a non-reversed finding of Cooke J. in *Mallak v. Minister for Justice, Equality and Law Reform* [2011] IEHC 306, at para. 24, as authority in this regard. As to the appellant's claim that his submissions of 6 November 2017 were not considered, the trial judge referred to the fact that a senior departmental official had averred that they *'were'* and that, following such consideration, the official's view was that the recommendation to refuse should stay as it was. These averments had not been controverted. Noting that arguments in relation to the breach of Article 6 and Article 8 of the European Convention on Human Rights had not been 'greatly developed', the trial judge found no such breach to be present in the instant case.

Grounds of Appeal

31. Three grounds of appeal were advanced by the appellant. The first relates to an alleged error in law on the part of the trial judge in finding the Court was limited to reviewing whether the Minister acted arbitrarily, capriciously or autocratically in reaching his decisions. Citing *Mallak v. Minister for Justice,* the appellant submitted that the Minister

was required to observe the requirements of the rules of natural and constitutional justice and that the trial judge failed to encompass this aspect of review in the instant case.

32. The second ground of appeal was that the trial judge erred in fact in finding that the Minister *'did not consider the 'alleged incident' as more than alleged'* in circumstances where the recommendation to the Minister stated, on its face, that *'Given the nature of the [minor road traffic] offences and the alleged incident I am not satisfied that the applicant is of good character and I would not recommend this applicant for a Certificate of Naturalisation'*. The appellant also asserts that the trial judge further erred in this finding in circumstances where it had not been brought to the decision maker's attention that the allegations against the appellant had been withdrawn and the proceedings struck out.

33. The third ground of appeal was that the trial judge applied the wrong test in determining that the Minister had not breached the appellant's rights to fair procedures in failing to consider the substantive submissions made by the appellant on 6 November 2017. Noting that the trial judge observed that a senior department official had averred that they were considered and that following those considerations his view of the recommendation did not change, the appellant asserts that the correct test was whether the submissions were considered before the Ministerial decision had been made. The appellant relies upon the fact that by letter dated 13 November 2017 the Minister stated that the application *'is currently being prepared for submission to the Minister'* and that if further documentation or clarification of any matter were required from the appellant it would be requested in writing. Notwithstanding that statement in November 2017, the recommendation to the Minister had been signed some months previously, namely, in April and May 2017. The appellant states that the Submission refers to a 'previous submission' to the Minister but that no mention was made of the existence of this previous submission in the Schedule of

Documents which his solicitors had received pursuant to a Freedom of Information request made on 19 October 2017.

34. The appellant further asserts that whereas the Minister's Statement of Opposition pleads that the appellant's submissions of 6 November 2017 were considered by the three signatories to the Submission notwithstanding the date appearing thereon, Mr. Murray, the Minister's deponent, does not confirm this on affidavit. He alternates between averments in respect of generic practices within the relevant Division and those that relate, specifically, to the treatment of the appellant's file.

35. In the Notice of Opposition, the Minister claims that there is no merit to the appellant's first ground of appeal and that in referring to the limited role enjoyed by the Court in reviewing applications for naturalisation, the trial judge was correctly applying the law to the facts of the appellant's case. The second ground of appeal is said to be *'factually groundless'* insofar as it asserts that the decision maker's attention had not been drawn to the fact that *'the alleged incident'* had been withdrawn and the proceedings in question struck out. The appellant had received a reply to his submissions of 6 November 2017 and Mr. Murray had averred to the fact that the 'entire file', including his submissions, of 6 November 2017, had been fully considered. The Notice of Opposition pleads that the third ground of appeal, namely, that the Ministerial decision was made prior to Mr. Murray forming the view that the recommendation to refuse should stay as it was, is factually unsustainable. In this regard, reference is made, once again, to the Affidavit of Mr. Murray.

Legal Principles

36. Applications for naturalisations are determined pursuant to the relevant provisions of the Act. Section 15(1) provides as follows:-

"15.—(1) Upon receipt of an application for a certificate of naturalisation, the Minister may, in his absolute discretion, grant the application, if satisfied that the applicant—

(a) (i) is of full age, or
(ii) is a minor born in the State;

(b) is of good character;

(c) has had 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 had a total residence in the State amounting to four years;

(d) intends in good faith to continue to reside in the State after naturalisation; and

(e) has, before a judge of the District Court in open court, in a citizenship ceremony or in such manner as the Minister, for special reasons, allows—
(i) made a declaration, in the prescribed manner, of fidelity to the nation and loyalty to the State, and
(ii) undertaken to faithfully observe the laws of the State and to respect its democratic values."

Exercising an 'Absolute Discretion'

37. As is evident from the above statutory provision, the Minister's 'absolute discretion' to grant an application for naturalisation only arises if he is satisfied that an applicant is of 'good character'. The precise standards to be applied by the Minister when making such an assessment as to 'good character' shall be considered, presently, but, in the first instance, it is necessary to consider what is involved in the exercise of an 'absolute' discretion.

38. Extensive as the competence may appear, it is clear from the jurisprudence of the superior courts that acting pursuant to an 'absolute discretion' does not relieve the Minister of the obligation to operate within the rule of law. In discharging statutory functions, including the obligation to be satisfied in respect of an applicant's character, the Supreme

Court has confirmed that the Minister is required to observe and comply with the requirements of the rules of natural and constitutional justice. Thus, in *Mallak v Minister for Justice* [2012] 3 I.R. 297, Fennelly J. agreed with the observations of Hogan J. in *Hussain v. Minister for Justice* [2013] 3 I.R. 257, [2011] IEHC 171, at para. 17 where he said:-

> *"This description* ['absolute discretion'] *nevertheless cannot mean, for example, that the Minister is freed from the obligations of adherence to the rule of law, which is the very cornerstone of the Irish legal system: Maguire v. Ardagh [2002] 1 I.R. 385 at p. 567, per Hardiman J. Nor can these words mean that the Minister is free to act in an autocratic and arbitrary fashion, since this would not only be inconsistent with the rule of law, but it would be at odds with the guarantee of democratic government contained in Article 5 of the Constitution."*

39. The *Hussain* judgment to which Fennelly J. referred might, rightly, be regarded as providing the 'gold standard' of what the law requires of the Minister when determining how the question of an applicant's 'good character' is to be assessed. In *Hussain*, Hogan J. acknowledged that there is no settled of fixed interpretation of the words 'good character'. Applying the standard principle of *noscitur a sociis,* he considered that these words should take their meaning according to their relevant statutory context and the general objects of the legislation. For Hogan J., it was implicit from the general tenure of s. 15 of the Act that the section was designed to empower the Minister to grant naturalisations to persons who have resided in the State for an appreciable period of time and who intend to continue to do so into the future. Moreover, the requirement that an applicant make a declaration, generally, and in open court, of fidelity to the nation and loyalty to the State, suggested to Hogan J. that such a person must be prepared to make a public commitment that he or she will discharge ordinary or civic duties and responsibilities. He stated:-

> *"15. It is against this background that the words "good character" must be understood and measured. Viewed in this statutory context, it means that the applicant's character and conduct must measure up to reasonable standards of civic responsibility as gauged by reference to contemporary values. The Minister cannot, for example, demand that applicants meet some*

exalted standard of behaviour which would not realistically be expected of their Irish counterparts. Nor can the Minister impose his or her own private standard of morality which is isolated from contemporary values."

40. By describing the discretion as *'absolute'*, the Oireachtas, according to Hogan J., intended to emphasise that the grant by the Minister of a certificate of naturalisation *'is the purely gratuitous conferring of a privilege in exercise of the sovereign authority of the State'* (*Jiad v. Minister for Justice, Equality and Law Reform* [2010] IEHC 187, *per* Cooke J.). He confirmed that the description cannot mean, for example, that the Minister is freed from the obligation to adhere to the rule of law, the *'very cornerstone of the Irish legal system'* (*Maguire v. Ardagh*). Nor can it mean that the Minister is free to act in an autocratic or arbitrary fashion because:

"...if the Minister could act ***entirely*** *upon his own personal conceptions of what was entailed by good character on the basis that the Oireachtas had thereby vested him with an "absolute" discretion, the way would be opened for the imposition of private morality and arbitrary choice in the sphere of public law."*[7]

41. In *Mallak*, Fennelly J. considered the *'absolute discretion'* of the decision maker noting that the fact that a power is to be exercised as an '*absolute discretion*' may well be relevant to the extent of the Court's power to review it and, to that extent, would appear potentially relevant to the question of reasonableness. In his view, however, it could scarcely ever justify a decision maker exceeding the limits of his powers under the legislation by '*taking account of a legally irrelevant consideration'* (para. 47). He stated: -

"It does not follow from the fact that a decision is made at the absolute discretion of the decision maker, here the Minister, that he has no reason for making it, since that would be to permit him to exercise it arbitrarily or capriciously. Once it is accepted that there must be a reason for a decision, the characterisation of a Minister's discretion as absolute provides no justification for the suggestion that he is dispensed from observance of such requirements of the rules of natural and constitutional justice as would otherwise apply."

---

[7] The judgment contains the emphasis in bold.

Such Discretion is Amenable to Judicial Review

42. Consequently, notwithstanding the subjectively expressed statutory formulation set out in s. 15 of the Act, the Minister is not immunised from judicial review in his assessment of whether an applicant is of 'good character'. The exercise of his discretion in determining and applying the applicable criteria in the process of such an assessment is, clearly, amenable to review by the courts. Both Cooke J. in *AB v. MJELR* [2009] IEHC 449 and Hogan J. in *Hussain* stated as much, and those authorities were, in turn, approved by the Supreme Court in *Mallak.* Indeed, as far back as *The State (Lynch) v. Cooney* [1982] I.R. 337, the Supreme Court (O'Higgins C.J.) had confirmed that the Minister's conclusion upon exercising a discretion must be one *'which is bona fide held and factually sustainable and not unreasonable'*. Underscoring this point was the opinion of Henchy J. which was quoted by Hogan J. in *Hussain*: -

> *"It is to be presumed that, when it conferred the power, Parliament intended the power to be exercised only in a manner that would be in conformity with the Constitution and within the limitations of the power as they are to be gathered from the statutory scheme or design. This means, amongst other things, not only that the power must be exercised in good faith but that* ***the opinion or other subjective conclusion set as a pre-condition for the valid exercise of the power must be reached by a route that does not make the exercise unlawful - such as by*** *misinterpreting the law or by misapplying it through taking into consideration irrelevant matters of fact or through* ***ignoring relevant matters.*** *"*

43. Seen in this light, Hogan J. was satisfied that the Minister is obliged to direct himself, properly, in law by reference to the question of what 'good character' actually means. His decision could not stand, for example, if he took irrelevant considerations into account, an observation confirmed by Edwards J. in *LGH v. Minister for Justice, Equality and Law Reform* [2009] IEHC 78).[8] In *Hussain,* Hogan J. acknowledged that the Minister would

---

[8] In *LGH*, Edwards J. considered that the Minister's regard to the fact that the applicant's two adult sons had convictions for motoring offences was an absurd *non sequitur* since she could not, in any way, be held responsible for the conduct of her adult children.

obviously be entitled to conclude that a person who was knowingly in possession of either forged notes or counterfeited items was not a person of 'good character' since this shows '*a level of calculated dishonesty which is plainly at odds with ordinary standards of civic morality*'. The real question, however, was whether the Minister was entitled, **without more**, to reach this conclusion on the facts of the case before him. He was satisfied that, assuming always that fair procedures had been complied with, the Minister would be entitled to refuse an application if it could reasonably be concluded that the applicant was involved in serious criminal wrongdoing even though he had never been convicted or even charged with such an offence. Importantly, however, he noted (at para. 23):-

> *"But it is equally the case that an applicant cannot be disqualified for the purposes of s. 15 of the Act of 1956, merely because he or she has come to adverse garda attention. The gardaí may, for example, be quite mistaken in their belief that the applicant had engaged in wrongdoing. In the present case, it means, for example, that the applicant may have a perfectly good explanation for both the forged notes and the counterfeiting incidents which shows that no moral blame attaches to him."*

Assessing 'Good Character'

44. In *Tabi v. The Minister for Justice, Equality and Law Reform,* Cooke J. considered it *'well settled law that it lies with the Minister to decide what factors or criteria are to be taken into account in assessing whether an individual applicant is of "good character".* Since *Tabi,* the law on this point has evolved somewhat and Cooke J.'s articulation cannot be read without further qualification. In deciding the factors which fall to be considered when assessing an applicant's character, the Minister is not 'at large' or unconstrained and does not exercise hegemonic control over the process. His determination of those factors must be gauged against what Hogan J. described as *'reasonable standards of civic responsibility as gauged by reference to contemporary values'.* Whilst the grant, where given, is the grant of a privilege and not a right, the process through which that decision is

reached is one that enjoys legal protection in terms of procedural fairness. In *Mallak*, Fennelly J. noted (at para. 49) that where the Minister finds that an applicant has failed to comply with one of the statutory provisions in s. 15(1), that exercise is to be distinguished from what might be called the Minister's more general *'absolute discretion'*. Referring to the judgments of the High Court in *AB* and *Hussain*, he stated:-

> *"It does not appear from these cases that the courts generally regard the mere fact that a person is applying for an important privilege, Irish citizenship, which he has no legal right to compel the State to grant him, as meaning that he enjoys inferior legal protection when pursuing his application."* (at para. 52)

45. This Court has recently considered what is required of the Minister when assessing 'good character' for the purposes of s. 15(1) of the Act. In *Talla v. The Minister for Justice and Equality* [2020] IECA 35, Haughton J. reviewed the relevant jurisprudence on the test to be applied by the Minister when conducting an assessment of character and he cited, with approval, the judgment of Mac Eochaidh J. in *GKN v. The Minister for Justice and Equality* [2014] IEHC 478. The applicant in *GKN* had been involved in what was described in the Garda Report (on which the Minister relied) as *'a hit and run'* and had been fined €300 at Galway Circuit Court. The offence arose under s. 106 of the Road Traffic Act 1961. Noting that this section can involve extremely minor occurrences or events involving the loss of life, Mac Eochaidh J. stated that:-

> *"...the mere fact that an offence under s. 106 is recorded against an applicant could not, of itself, rationally ground a negative naturalisation recommendation. [...] The connection between character and criminality can only be established when the Minister has all relevant information in connection with the crime."*

46. As it transpired, the *'hit and run'* had involved the applicant grazing a parked jeep with his own motor vehicle. The incident occurred at night time and the applicant had tried to locate the jeep's owner. Being unable so to do, he had driven away. He reported the incident to the Gardaí. Subsequently, he was arrested and convicted in respect of the 'hit and

run' incident and of leaving the scene of an accident. Mac Eochaidh J. held that the s. 106 offence had to be seen in context. In this regard, he took guidance from a decision of Lang J. in the case of *Hiri v. Secretary of State for the Home Department* [2014] EWHC 254. Lang J. articulated what he considered to be the statutory test applicable when determining, in the context of an application for naturalisation, whether the requirement of 'good character' had been fulfilled. At para. 35 of his judgment he stated as follows:-

> *"In my judgment, in deciding whether an applicant for naturalisation meets the requirement that "he is of good character", for the purposes of the British Nationality Act 1981, the Defendant* ***must consider all aspects of the applicant's character****. The statutory test is not whether applicants have previous criminal convictions - it is much wider in scope than that. In principle, an applicant may be assessed as a person "of good character", for the purposes of the 1981 Act, even if he has a criminal conviction. Equally, he may not be assessed as a person "of good character" even if he does not have a criminal conviction. Plainly, criminal convictions are relevant to the assessment of character, but they are likely to vary greatly in significance, depending upon the nature of the offence and the length of time which has elapsed since its commission, as well as any pattern of repeat offending. So, in order to conduct a proper assessment, the Defendant ought to* ***have regard to the outline facts of any offence and any mitigating factors.*** *She ought also to have regard to the severity of the sentence, within the sentencing range, as this may be a valuable indicator of the gravity of the offending behaviour in the eyes of the sentencing court. Although I asked for details of the number of applications she has to process, none was provided. Her letter of 26th September 2012 stated that the majority of applicants do not have any unspent convictions. I was not provided with any evidence to support a view that it was too onerous for her to consider individual convictions.*
>
> *The Defendant is entitled to adopt a policy on the way in which criminal convictions will normally be considered by her caseworkers, but it should not be applied mechanistically and inflexibly. There has to be a comprehensive assessment of each applicant's character, as an individual, which involves an exercise of judgment, not just ticking boxes on a form."*

47. Applying the test set out in *Hiri*, Mac Eochaidh J. was not satisfied that the Minister had all the relevant information that he should have had in the submission that led to the decision. He observed: -

"I note that the author of the short submission to the Minister selects certain information only from the overall application for the attention of the Minister. The author informs the Minister that the fine has been paid, that the applicant has two Irish-born children and he is a self-employed taxi driver. In my view, it was incumbent upon the author of the report to draw the attention of the Minister to the circumstances surrounding the incident on the night in question, in particular, because the respondent's agent had specifically sought information about the conviction of the applicant of an offence under s. 106 of the Road Traffic Act. Having sought that information, which, in my view, transpired to be exculpatory in nature, it ought to have been brought to the Minister's attention. In its absence, the Minister merely had documents saying that an offence of a serious nature had been committed and that this was a 'hit and run'. It was a denial of the applicant's constitutional rights not to place all of the relevant information before the Minister. I am satisfied that the decision should be quashed on this ground."

48. Haughton J. in *Talla* adopted the same approach, stating at para. 37 of the judgment:-

"I, too, would adopt the principles enunciated by Lang J. The Minister in determining whether a person is of 'good character' ***must undertake a comprehensive assessment of each applicant's character as an individual.*** *While criminal convictions, or the commission of offences, are relevant to this enquiry and assessment, it is wider in scope than that, and the outline facts and any mitigating circumstances, the period of time that has elapsed since the last conviction, and other facts that may be relevant to character, must all be taken into consideration."*

49. The importance of the Minister considering all relevant information, recorded accurately and in context, had already been underscored by this Court (Baker J.) in *A.A. v. MJE* [2019] IECA 272. Prior to applying for naturalisation, the applicant in *A.A.* had sought asylum but had, subsequently, withdrawn her application. Thereafter, she visited Sudan—her country of origin. In refusing naturalisation, reliance was placed on that visit. However, the Minister did not have the asylum file before her and the recommendation that was furnished to her had not shown the basis upon which asylum had been refused. Baker J.'s difficulty with the process was stated in the following terms: -

"I have difficulty with the description in the recommendation to the Minister that the application for asylum of the appellant was "refused". That description is, in my view, unduly prejudicial to her and does not carry the nuance of the circumstances in which this appellant

found herself. She successfully sought judicial review of the decision of the RAT on appeal from the refusal to grant her asylum, and the appeal was never determined because she withdrew it, on her own explanation, because she had, by then, obtained residence in the State, and a grant of refugee status would not have afforded her any further privileges."

Considering Traffic Offences in the Assessment of Character

50. In *Talla,* Haughton J. noted that there is ample authority for the proposition that it is open to the Minister to determine whether a person is not of 'good character' by reference to the commission of road traffic offences, particularly, where the offences are at the more serious end of the spectrum (see, for example, *Kareem v. Minister for Justice* [2018] IEHC 200, where the applicant was convicted for driving without insurance and *Zaigham v. Minister for Justice* [2017] IEHC 630, where the applicant was convicted of driving without tax or a driving licence). In several cases that have come before the courts, the refusal to grant naturalisation was not based on the commission of the offences themselves but rather on the failure of the person seeking naturalisation to disclose them. It can be inferred, safely, from this Court's judgment in *Talla,* that something more than a mere reference to the existence of traffic offences is required if the Minister is to rely upon their commission as evidence that goes to character. In that case, the rationale for determining that the 'nature' of the traffic offences meant that the applicant was not of 'good character' was not apparent from the Submission that had been placed before the Minister.

51. The number of offences and the dismissal of past offences may also have a role to play in the Minister's determination. In *Ashique v. Minister for Justice* [2019] IEHC 254, the relevant information attached to the recommendation before the Minister related to '*non-compliance by the applicant with the laws of the State*'. The recommendation stated that '*Given the nature of the offences resulting in court convictions'*, the Minister was not satisfied that the applicant was of good character. Barrett J. found that the reference to the word *'offences'* and *'convictions'* in the plural was erroneous because the applicant had only

one conviction. There was also a reference in the Garda Report in that case to a dismissal of an offence relating to insurance. Of some importance was the trial judge's view that dismissal *per se* could not normally be *'relevant information related to non-compliance... with the laws'*, stating that *'in truth, it points to the contrary, especially when coupled with the presumption of innocence'*.

Summary of Principles

52. The following emerges from the caselaw:

(i) in describing the Minister's discretion as 'absolute', the Oireachtas intended to emphasise that the grant of a certificate of naturalisation involves the conferring of a privilege;

(ii) the fact that naturalisation is the grant of a privilege does not mean that an applicant enjoys inferior legal protection when pursuing such an application;

(iii) the Minister's absolute discretion to grant naturalisation only arises if satisfied that an applicant is of 'good character' and, extensive as that competence may appear, it does not release the Minister of the obligation to operate within the rule of law and his determination is amenable to judicial review;

(iv) in determining the criteria to be considered when assessing 'good character' an applicant's character and conduct must be assessed against reasonable standards of civic responsibility gauged by reference to contemporary values;

(v) the connection between character and criminality can only be established when the Minister has all relevant information, including, context and mitigating factors, in connection with a crime;

(vi) information that is presented to the Minister in a Submission or recommendation must be accurately recorded, complete and seen in context and considered in full by the decision maker before reaching a determination; and

(vii) in deciding whether an applicant fulfils the 'good character' requirement of the Act, the Minister must undertake a comprehensive assessment of an applicant as an individual and must consider all aspects of character.

Discussion

Is this a 'Discretion' case?

53. At the opening of the hearing in this case, counsel for the appellant submitted that the issue in this appeal does not concern the manner in which the Minister exercised an 'absolute discretion' case. It was not, he submitted, 'a discretion case'. Noting the provisions of s. 15(1) of the Act, he argued that the exercise of the discretion which, undoubtedly, vests in the Minister to grant a certificate of naturalisation, only arises **if** the Minister is satisfied that an applicant is of good character. According to the appellant, the Minister must first determine whether the statutory conditions of s. 15(1) of the Act have been fulfilled by an applicant prior to proceeding to exercising his absolute discretion to grant naturalisation. Citing *Mallak* as representing the 'sea change' position in respect of reviewability, he submitted that in making such a determination, the requirements of natural and constitutional justice must be observed. The essence of this case, it was argued, turns on *how* the Minister arrived at his determination that the appellant had failed to meet the statutory requirement that he be of 'good character'.

54. Noting that the appeal was, squarely, 'a good character issue', counsel for the Minister did not disagree with the appellant's opening position save as to say that a margin

of discretion remains in relation to what the Minister was entitled to examine in conducting an assessment of 'good character'.

55. In approaching this appeal, the central issue which the Court must decide is whether the requirements of natural and constitutional justice were met in the process that led to the Minister's determination that the appellant had failed to fulfil the statutory prerequisite as to 'good character'. There is, indeed, a distinction to be drawn between cases '*where the Minister finds that an applicant has failed to comply with one of the statutory conditions in s. 15(1) and what might be called his more general "absolute discretion"*' (see Fennelly J. in *Mallak*). Whereas the Minister is not entitled to choose, '*carte blanche*', the factors that are relevant to good and bad character nor impose his personal conceptions of private morality upon the decision making process, he, nevertheless, retains an element of discretion in terms of the weight he attributes to certain aspects of an applicant's conduct or character. The bottom line is that the Minister's assessment is to be gauged against the '*reasonable standards of civic responsibility*' (see *Hussain*) and not some super human standard of model citizenship. In *Talla,* Haughton J. cited the principle set out in *Hussain* wherein Hogan J. stated that the Minister may not demand of applicants for naturalisation *'an exalted standard of behaviour that would not realistically be expected of their Irish counterparts*'.

The Scope of Review

56. The appellant's first ground of appeal is that the trial judge erred in finding that the court is limited to reviewing whether the Minister acted arbitrarily or capriciously or autocratically in reaching the conclusions he reached. Articulated in rather general terms, this ground is based on the contention that, post-*Mallak,* the scope of review is broader than that posited by the trial judge and that the Minister is required to observe the requirements of natural and constitutional justice in the decision making process. During the hearing, this

first ground was not developed in great detail in its own right save for reference to a want of proportionality in how the Minister reached his conclusion concerning the appellant's character. However, it is fair to say that the general proposition concerning the Minister's obligations in a post-*Mallak* landscape, infused all the arguments and submissions made by the appellant in relation to the two other grounds of appeal. Consequently, I propose to focus the discussion around the second and third grounds of appeal which relate to the Minister's consideration of an 'alleged' incident and to his alleged failure to consider any of the appellant's submissions.

The Minister's Consideration of an 'Alleged' Incident

57. The appellant submits that the trial judge erred in finding that the Minister did not consider the 'alleged incident' as more than alleged in circumstances where express reference was made, on the face of the impugned decision, to 'the nature' of 'the alleged incident' as being the basis for the Minister not being satisfied that the appellant was of good character. Emphasising that he was not arguing for a 'convictions only' policy, Mr. Power SC, on behalf of the appellant, accepted that where disturbing allegations are made about an applicant, the Minister *is* entitled to have regard to them. However, if he had ongoing concerns about such allegations he was obliged to find out more and then to come to a view, one way or the other, on whether those allegations should carry any weight and, if so, why. In coming to such a view, the Minister is not obliged to be satisfied beyond reasonable doubt, but he is not entitled to leave allegations 'hanging'.

58. The Minister argues that the trial judge's finding to the effect that the Minister did not consider the alleged incident as more than alleged was made on the evidence and that it was a finding which was open to the trial judge to make. He was also correct to find, on the basis of Mr. Murray's evidence, that the representations made by the appellant concerning

the alleged incident had been considered. It was disputed that the Minister had not been made aware of the 'strike out' of court proceedings against the appellant because the appellant had himself made the Minister aware of these matters in his submissions of 6 November. The Minister also highlighted that the appellant had been convicted of road traffic offences and that, *per Tabi*, the Minister was entitled to consider these offences when considering character.

59. That the Minister is entitled to have regard to serious allegations of wrongdoing even where these do not lead to any criminal prosecution is a matter that is worth reiterating. In reaching a decision on an applicant's character, the Minister is entitled to have regard to a range of matters and is not limited to considering only those wrongs which have resulted in court proceeding and criminal convictions. This point was underscored by Hogan J. in *Hussain* where he held that assuming always that fair procedures had been observed, the Minister would be entitled to refuse an application if it could reasonably be concluded that the applicant was involved in serious criminal wrongdoing even though he had never been convicted or even charged with such an offence. What matters is that the conclusion must be one that was reached, reasonably. It cannot be the case that the mere fact that an applicant for naturalisation has come to the attention of the Gardaí is sufficient, in and of itself, to be a ground for deciding that he or she is not of good character. As Hogan J. noted (at para. 23), an applicant cannot be disqualified for purposes of s. 15 of the Act merely because he or she has come to adverse Garda attention. There may be an error on the part of the Gardaí in believing that an applicant had been engaged in wrongdoing.

60. The question in this case is whether the Minister had regard to the alleged incident 'as more than alleged' in coming to his determination in respect of the appellant's character and, if he did, whether his conclusion in respect of the appellant was a reasonable one in all the prevailing circumstances. It will be recalled (see para. 9) that the incident in question

to which the Minister's attention was specifically drawn, was set out the second Garda Report attached to the Submission. It referred to s. 12 of the Child Care Act 1991 having been invoked in relation to the five children following a '*domestic altercation*' between the parents and an assault upon their mother, by the appellant, causing her injuries. It also referred to a disclosure made by the mother to the Gardaí to the effect that the children '*were not safe with [their] father*'.

61. On any objective reading, the information contained in Garda Report would give cause for concern to a decision maker. It is self-evident that the Minister would be entitled to conclude that a person who poses a serious risk to a child or who assaults another is not a person of 'good character' for the purposes of s. 15 since that would be indicative of the type of behaviour described by Hogan J. in *Hussain 'which is plainly at odds with ordinary standards of civic morality'*. But as in *Hussain*, the real question here is whether the Minister was entitled, without more, to reach this conclusion on the facts of the case before him.

62. In this regard, it is somewhat intriguing that the Minister had, in fact, sought the appellant's views on the alleged incident and had requested any HSE documentation arising therefrom (see para. 10). Having made this request, however, no reference whatsoever was made by the Minister to the appellant's detailed account of what had, in fact, transpired—an account furnished both in his letter of 11 March 2016 and the submissions of 6 November 2017. Whereas Mr. Murray avers that the 'entire file' was 'considered', he does not say *by whom*, and there is no reference on the face of the Submission that the Minister had any regard to any exculpatory factors attaching to the alleged incident. Had the appellant's own letters or his solicitors' submissions been placed, even summarily, before the Minister the following exculpatory considerations would have emerged:

- that the events of the night in question had occurred in the context of a domestic dispute;
- that the assault had occurred by way of self-defence following an assault upon him by his wife;
- that in response to allegations made by his wife the Gardaí had intervened;
- that by taking the appellant into police custody, an 'emergency' had been created whereby young children would have been left alone and unsupervised in their home, their mother having gone to the hospital, and that it was this emergency which gave rise to the invocation of s. 12 of the Child Care Act 1991;
- that no childcare proceedings were pursued whether before the courts or otherwise;
- that no findings had ever been made that the appellant posed a risk to children but, on the contrary, the District Court had granted him weekly access to his children in the context of his marriage break down;
- that the allegations made against him by his wife had been withdrawn and that criminal charges levied against him had been struck out; and
- that the appellant required and had secured a Protection Order against his wife.

63. Seen in this light, the allegations contained in the Garda Report relating to the alleged incident take on a somewhat different hue. In *G.S. v. The Commissioner of An Garda Síochána and Others* [2017] IEHC 190, the applicant was refused a placement in nursing school based, *inter alia*, on the content of a Garda vetting report that had been requested by Trinity College. At issue in the case was whether two offences which had been struck out in the District Court ought to have been disclosed through the Garda vetting system. In his judgment, McDermott J. reasoned that the core issue in the case was one of '*fairness of procedures*' and he found the Garda vetting report lacking in this regard. He isolated the failure of the report in its '*blanket disclosure*' to '*place the strike out orders as well as minor*

previous convictions and other information in their proper context'. He found that the omission of such context in the Garda report amounted to a failure of an essential requirement of the test of fairness and proportionality.

64. Applying the principles of fairness and proportionality, articulated by McDermott J. in *G.S.*, it seems to me that the updated Garda Report in this case suffers from a similar infirmity in that it, too, contains a 'blanket disclosure' of allegations arising from a domestic incident without putting that incident and placing the strike-out order subsequently made in the appellant's favour, within their proper context. The Court was not told why the Minister, having already obtained a Garda Report, requested an 'updated Garda report' following the first submission of the appellant's application for naturalisation.[9] Nor was it explained why the updated report contained damaging allegations which arose from a domestic dispute incident which had already been known to the Gardaí but not included when furnishing the first report. Moreover, the infirmity in the updated Garda Report is replicated on the face of the Submission that went to the Minister insofar as there is a remarkable absence in that Submission of any context into which the allegations ought to have been placed. I consider that, as a matter of fair procedures, the Minister was obliged not only '*to put matters not involving a criminal record or pending civil or criminal proceedings to the applicant for his comments'* (as *per Hussain*) but, having put them to the appellant, was thereafter obliged to show that such comment as was received had been considered and weighed in the balance before reaching a decision adverse to the appellant.

65. The problem facing this Court is that it does not know what view the Minister took in relation to the alleged incident. It is evident that he took some view as otherwise there would have been no need to refer to the nature of the alleged incident when coming to his decision on the appellant's character. Whereas the Minister was not obliged to apply the

---

[9] See Submission to the Minister at para. 3

criminal standard of proof in reaching a view, I am satisfied that he was not entitled to rely upon an allegation made against the appellant, without more. Allegations are easily made and even where they are without substance they can have a wholly detrimental effect upon an individual. In his letter of 13 November 2017, the Minister had stated, expressly, that he would revert to the appellant if clarification of any matter was required but no further correspondence was had with the appellant until the decision to refuse the application issued—a decision that was stated to be based, *inter alia,* on the nature of the alleged incident. Although this is not a 'reasons' case, the reference in the letter of 12 February 2018 informing the appellant that he could re-apply but that if he did so, he should have regard to 'the reasons for the refusal' makes it imperative that the appellant be given some indication of the view the Minister formed in relation to the alleged incident. As matters stand, the appellant does not know what view was taken in respect of those events or what view, if any, the Minister took of the submissions made by the appellant in respect of thereof.

66. This Court has no way of knowing whether the Minister (as distinct from Mr. Murray) considered the damaging allegations made by the appellant's former wife in their proper context. On the face of the Submission that went to the Minister, there is nothing to suggest that he did. While stating that the 'entire file' was considered, Mr. Murray does not aver to the fact that it was the decision maker (as distinct from himself) who considered it and thus who considered the alleged incident in its proper context. Consequently, in circumstances where the Submission itself is silent as to the context in which the alleged incident occurred and in the light of the limited averment made by Mr. Murray in his Affidavit, there was no basis for the trial judge's finding that the Minister did not consider the alleged incident as more than alleged.

67. Insofar as the Minister had regard to the nature of the 'alleged incident' in conducting the assessment under s. 15 of the Act, the inference to be drawn or the implication that arises

is that the mere fact that the appellant had come to the attention of the Gardaí in the context of a domestic dispute, implied or suggested that he was not of 'good character' *or, at all events, that the respondent might so regard him*' (*Hussain*, at para. 7). To the extent that the decision maker, in considering '*the nature of the alleged incident*' relied upon that updated Garda Report with its damaging allegations, without more, when reaching his conclusion that the appellant was not of good character, there was, to my mind, a want of fairness and proportionality in the decision making process. In principle, it is not sufficient that important contextual and exculpatory information in relation to an applicant's character is to be found somewhere in the file to which a Submission is attached. Such is the force of the inference drawn when a serious question concerning the welfare of a child is brought into play, there remains a risk that a decision maker may deem it unnecessary to look any further. That being so, where serious and damaging allegations appear on the face of a Submission or recommendation, basic fairness and natural justice require that any information that may assist in ruling out such justifiable concerns should be highlighted, specifically, for the decision maker's attention. Otherwise, the mere mention of such an allegation could result in the destruction of an applicant's chances of having his application considered, fairly. In this case, I am not satisfied that the Minister could, reasonably, have reached his conclusion on the appellant's character based on the alleged incident as it was presented in the updated Garda Report that was appended to the Submission. Consequently, I accept the appellant's submission that it breached the rules of natural and constitutional justice to have presented the information on the alleged incident without, at the same time, placing that information in context and disclosing that the allegation made against the appellant had been withdrawn and the proceedings arising from the incident struck out at Dundalk District Court on 22 August 2013.

The Alleged Failure to Have Regard to All Relevant Material

68. The appellant's third and overlapping ground in bringing this appeal, is that the trial judge applied the wrong test in determining that the Minister had not breached the appellant's right to fair procedures in failing to consider the substantive submissions sent by the appellant on 6 November 2017. It was not, in the appellant's view, open to a senior department official to aver that submissions were considered *after* a recommendation had already been made and that the decision was taken to leave the recommendation as it was. The correct test, it was argued, was whether the submissions had been considered by the Minister *before* the decision was made. It was obvious from the dates appearing on the face of the Submission that went to the Minister that the recommendation to refuse naturalisation had already been made several months prior to the appellant's detailed submissions of November 2017. The Affidavit of Mr. Murray is of limited assistance. Consequently, it was argued that there was a clear breach of the rules of the natural and constitutional justice in that the Minister had failed to weigh all relevant factors in coming to his view of the appellant's character. He had reached a determination in respect of s. 15 of the Act in circumstances where it was clear that he had done so without regard to all relevant information on the file and, in particular, to the detailed submissions of the appellant.

69. On behalf of the Minister, this point was contested. It argued that the correspondence sent to the appellant upon receipt of his submissions of 6 November 2017 supports the fact that consideration was given thereto. Two letters were sent and in the one dated 13 November the appellant was expressly advised that his application for naturalisation was '*currently being prepared for submission to the Minister*'. Furthermore, in the Affidavit of Mr. Murray he expressly averred at para. 10 that the '*entire file*', including the submissions of 6 November 2017 had been '*fully considered*'. The trial judge was entitled to make a

finding in respect of this matter and this Court, it was argued, should not interfere with that finding.

70. As noted above, the fundamental question to be addressed when considering a refusal of an application for naturalisation based on a determination that an applicant is not of 'good character' is whether the Minister's conclusion was one that he could, reasonably, have reached. In considering what constitutes 'reasonableness' for this purpose, Baker J. in *A.A.* confirmed that '*the correct approach is to consider whether the decision was factually sustainable, not unreasonable, or not made in reliance on irrelevant considerations*' (para. 52). She found that Hogan J.'s judgment in *Hussain* contained a useful analysis of the appropriate test. The test he articulated, according to Baker J., was whether the conclusion of the Minister '*flowed from the evidence*' and was a correct application of the principle to those facts. I agree with that test and propose to adopt it in this case by asking whether the Minister's determination that the appellant was not of good character flowed from the evidence that was before him. In this regard, reference to the 'evidence' refers not just to the brief Submission that was presented to the Minister but rather to the contents of the entire file as it stood on the date of the decision to refuse, that is, on 12 February 2018.

71. In considering whether all of the evidence on the file, including, the appellant's submissions of November 2017, had been presented to the Minister for his decision, the first observation that creates doubt in this regard is the fact that the dates of the processing by two members of the processing team and the recommendation signed by Mr. Murray were several months prior to the submissions made by the appellant and his solicitors on 6 November 2017. This fact, as it appears on the face of the Submission, lends support to the view that a recommendation to refuse had already been made at a time *before* the appellant's submissions could have been considered. In this context, the averments contained in Mr. Murray's Affidavit come sharply into focus.

72. Mr. Murray explained the various steps that are taken within his Division when an application for naturalisation is being processed. He stated:-

> *"The Respondent's submissions are first prepared by the processing team and then following a full consideration of the file, I make a decision on the recommendation. The entire file is then sent to the Principal Officer and the Assistant Secretary for a final decision on behalf of the Minister."*

There is nothing to indicate that this four-step process was not followed in this case.

(1) The Minister's submissions were prepared by two members of the processing team and dated 20 and 21 April 2018, respectively.

(2) Mr. Murray then conducted a full consideration of the file.

(3) Mr. Murray made a decision recommending that the application be refused and signed off on this decision on 8 May 2017.

(4) Thereafter, Mr. Murray sent 'the entire file' forward to the Principal Officer and Assistant Secretary for a final decision.

73. In the Affidavit relied upon by the Minister and, indeed, by the trial judge, Mr. Murray averred to the fact that the appellant's '*entire file, including his submissions dated 6th November 2017, have been fully considered*'. Importantly, and somewhat strikingly, he does not state by whom. One must infer from his explanation of the various stages set out above that, as *per* Step 2, he was the person who undertook a full consideration of the file. His recommendation was made on 8 May 2017 and, assuming that the usual practice he describes was followed in this case, he then forwarded the '*entire file*' onwards for a final decision by a higher authority.

74. Mr. Murray then sets out, in non-specific terms, what happens, generally, when additional submissions are received after the point when he 'signs off' on a recommendation in a case. He states:-

*"I say that any additional information received on **a** file after I have signed off on the recommendation is brought to my attention and **I** then further **consider** whether the recommendation should change in light of the further information received."*

Mr. Murray's Affidavit is ominously silent as to what happens, both in physical terms and procedurally, to such additional information after ***he*** has considered it. Is the entire file retrieved from the higher authority to which it had been sent after he had 'signed off'? Are the additional submissions then appended thereto? Is the updated file then forwarded, once again, to the higher authority? Is the higher authority apprised of the additional information? Is it informed of the fact that the initial recommendation has been reconsidered in the light of the additional information? Is it apprised of the outcome of such reconsideration? Is the attention of the higher authority drawn, specifically, to the additional information and to the reasons for the outcome of the reconsideration? One cannot but be struck by the absence of any evidence in respect of these matters in the Affidavit of Mr. Murray.

75. Having set out the usual practice that is followed when additional information is brought to his attention subsequent to his having signed off on a recommendation, Mr. Murray avers that, in the appellant's case, having considered the additional submissions of 6 November, it was his view that the recommendation to refuse the application should remain as it was. Since none of the questions posed above are answered in the Affidavit of Mr. Murray, the Court is faced with an obvious lacuna in the evidence in this case as to what occurred thereafter. It does not know whether the appellant's file was retrieved from Mr. Clark or from Mr. Killrane and the appellant's exculpatory submissions of 6 November appended thereto. It does not know whether the updated file was then forwarded, once again, to Messrs Clark and Killrane. Were they apprised of the additional information? Were they informed of the fact that the initial recommendation of 8 May 2017 had been reconsidered in the light of the additional information? Were they apprised of the outcome of such

reconsideration? Was their attention drawn, specifically, to the appellant's additional submissions and to the reasons for the outcome of Mr. Murray's reconsideration?

76. The absence of evidence in respect of such important matters in the decision making process creates a difficulty. It raises many questions, perhaps the most important of which is whether the person actually charged with making the final decision in this matter was apprised of and had regard to all relevant information on the appellant before coming to a view as to his character. The appellant submits that none of the exculpatory evidence submitted by him in his application for naturalisation was considered by the Minister. Very serious allegations appear on the Garda report to which the Minister's attention was directed. The reference to s. 12 of the Child Care Act 1991 having been invoked would, without more, raise a concern in the mind of any person charged with determining whether a person was of good character. Similarly, the allegation that the appellant had assaulted his wife and that his children '*were not safe*' with him, would, without more, rightly amplify and reinforce such concern. If the allegations in the Garda Report were not accompanied by the contextual and exculpatory information surrounding the events that gave rise to them, then the decision that was made '*given the nature*' of such allegations, was based on a one-sided and incomplete version of the events surrounding the alleged incident. For fairness to be attained, those allegations ought to have been viewed in the context of the additional information which the appellant had submitted. The damaging allegations, clearly, did not represent 'the whole story'. Just as the reference to the appellant's conviction for a 'hit and run' incident in *GKN* had to be seen by the Minister in its true context, so too, did the allegations in this case require to be seen against the factual background which was omitted from the Garda Report and the Submission to the Minister. Without more, the impugned decision, on its face, is problematic.

77. During the hearing, Ms. Brennan SC, counsel for the Minister argued that the appellant's submissions could not be viewed as 'exculpatory'. He had, after all, admitted to driving without motor insurance and to biting his wife. In her view, the information that he had he provided, disclosed that he was not a 'model citizen'. The difficulty with Ms. Brennan's submission is that whether the appellant is a 'model citizen' is wholly irrelevant to this Court's consideration of the decision making process that was undertaken in respect of his application for naturalisation and it plays no part in what the Minister has to determine. The correct test is, of course, the one articulated by Hogan J. in *Hussain* and Haughton J. in *Talla.* The Minister cannot demand that the appellant meets some exalted standard of behaviour that would not realistically be expected of his Irish counterparts. What was required was an examination of whether the appellant's character and conduct measure up to reasonable standards of civic responsibility as gauged by reference to contemporary values. It is difficult to see how counsel for the Minister could form a view on the nature of the appellant's character based on his submissions in circumstances where there is no evidence before the Court that the Minister actually did so.

78. The Minister's attention was drawn to the Garda Report attached to the recommendation. The Report contained details of two convictions for motoring offences and various references to the domestic dispute incident. I propose to consider each in turn, as the decision to refuse naturalisation was based on the Minister's not being satisfied that the appellant was of good character given the nature of the traffic offences and the nature of the alleged incident.

The Road Traffic Offences

79. In terms of the traffic offences, Ms. Brennan sought to distinguish the facts in this case from those in *Talla* by arguing that no 'moral culpability' arose in *Talla* in respect of

driving without insurance whereas the appellant, in this case, 'had made a decision' to drive without insurance by not paying his premium. In addressing 'moral culpability', she fails to observe that the appellant in *Talla* did not disclose his convictions when asked, specifically, about them in his application for naturalisation, whereas the appellant in this case was entirely 'up front' in terms of his motoring history. Furthermore, it cannot be said that the facts in this case lead, inevitably, to the conclusion that the appellant 'knew' that his policy of insurance would lapse, without any grace period, if a month's premium went unpaid (due to impecuniosity). Of course, the appellant ought to have checked with his insurer but so, too, could it be said that Mr. Talla ought to have checked with his brother choosing to drive a car which, it transpired, was uninsured.

80. In any event, as noted above, it is open to the Minister in determining whether a person is of 'good character' to have regard to the commission of offences under the Road Traffic Acts. That said, something more than a mere reference to the existence of such offences is required if reliance is to be placed upon them as a reason for concluding that a person is not of good character. It can be inferred that the reference in the impugned decision to the 'non-compliance' by the appellant with 'the laws of the state' relates to the two motoring offences mentioned in the updated Garda Report. As noted in *Talla*, within the category of 'no insurance' offences there is 'a wide spectrum of possibilities' ranging from the serious and repeated to the once off and-inadvertent. Notwithstanding Ms. Brennan's submission on point, it cannot be said, unequivocally, that the appellant deliberately and knowingly drove without insurance. If anything, the once-off nature of the offence which covered days rather than months, may be said to fall towards the less serious end of the spectrum. (In fact, his conviction was for a failure to display insurance but his solicitors, quite correctly, were entirely up front with the Minister and set out the full facts of the wrongdoing that had occurred.) Unlike the applicant in *Hussein v Minister for Justice*

[2015] 3 I.R. 423 who, unable to take out insurance (holding only a Bangladeshi driving licence), had deliberately driven without cover, the appellant in this case had taken out a valid policy of insurance for the entire year (24 February 2012 to 23 February 2013) but had failed to meet just one month's payment of the premium. Once made aware that this had caused a cancellation of that policy, the appellant set about reinstating cover the following day (10 December 2012).

81. The reference in the impugned decision to the '*nature*' of the offences in this case, does not, as Haughton J. put it, '*identify the Minister's essential rationale for regarding the appellant's 'no insurance' offence [...] as reflecting on his character, such as to regard him as not being of 'good character'.* It is, at least, arguable that, in the light of the appellant's explanation, the offence of driving without insurance might be regarded as lacking any deliberate criminal intent or *mens rea.* What is lacking from the Minister's decision is an analysis as to why the nature of the appellant's two offences, which were committed so long ago, should lead to the conclusion that he was not of 'good character'. As stated in *Talla*, the state of mind of the offender is surely relevant to assessing the bearing that the offence may have on an individual's character as, indeed, is '*the manner in which the offence is met e.g. is it faced up to early, is there a plea?*'

82. The Minister, in this appeal, relies upon the judgment of Cooke J. in *Tabi* where he rejected an argument that convictions for *'minor offences'* could not constitute a basis, in themselves, for considering that an applicant was of good character. Cooke J. held that it was a matter for the Minister to decide what criteria are relevant to his assessment and criminal convictions of any kind *'are clearly matters which are directly relevant to the issue which the Minister has to consider*'. He stated:-

> *"Once the Minister is satisfied that the existence of criminal convictions is of itself a sufficient reason for considering that an applicant does not satisfy the "good character" condition, that is a sufficient basis for his decision."*

83. In view of this Court's approval in *Talla* of the '*Hiri*' test (adopted by Mac Eochaidh J. in *GKN*), I do not consider that *Tabi* can be regarded as the categorical statement of the law on the Minister's entitlement to rely upon criminal convictions for the purposes of assessing 'good character'. The law has developed since *Tabi* and the test for assessing 'good character' in the face of criminality is more nuanced than as stated by Cooke J. therein. Criminal convictions are relevant to the assessment of character, but they are not, in themselves, determinative thereof. Thus, it is not sufficient for the Minister to have regard only to the *fact* that an applicant for naturalisation has criminal convictions. What is required is a consideration of '*all aspects of an applicant's character*' in deciding whether he or she meets the relevant requirement for the purposes of s. 15 of the Act. The correct test is worth repeating. It is not whether an applicant has previous criminal convictions—it is wider in scope than that. An applicant may be assessed as a person of good character even if he has criminal convictions, perhaps, all the more, so if the convictions in question relate to strict liability offences. Such offences do not depend on personal moral culpability. As noted by Lang J. in *Hiri*, a person may still be of good character notwithstanding a criminal conviction and a person may not be of good character despite having a clean criminal record.

84. It is clear from the Submission made to the Minister that reliance was placed upon the *'nature'* of the appellant's road traffic offences to determine that the appellant was not of good character. Where the Minister relies upon traffic offences it is axiomatic that he has an understanding of the nature of the offences. The understanding that led the Minister to conclude that the appellant was not of good character needs to be stated in reasons that can be understood by the appellant (see *Talla,* para. 39 citing *AP v. MJE* [2019] IESC 47, a naturalisation case.) The quashing by this Court of the Minister's decision in *Talla* was based upon the manner in which the Minister's decision had been reached. This Court was not satisfied that the Minister had before him all relevant material to enable him to form a

reasonable view as to whether the appellant was of 'good character'. The obligation upon administrative or public law decision makers to have regard to '*all relevant circumstances*' was confirmed by Clarke C.J. in *A.P.* The test of whether the Minister considered '*all relevant material*' (*Talla*) or '*all relevant information*' (*GKN*) before reaching a decision has, undoubtedly, a solid jurisprudential basis but it is, in my view, a test that looks to substance rather than form. As the objective is always the attainment of fairness in the process, administrative decisions that affect individuals must be reached in a manner that respects the rules of natural and constitutional justice.

85. A similar concern arises in this case as arose in *Talla.* In my view, it was incumbent upon the author of the Submission to draw the Minister's attention to the circumstances surrounding the imposition of the fines in respect of each strict liability offence and to inform him, however succinctly, of the applicant's explanation in respect thereof. The author of the Submission was obliged to ensure that all relevant information pertaining to the driving convictions was considered, particularly, where such information had been requested of the appellant. There is nothing on the face of the recommendation to indicate that the decision maker was aware of and/or had any regard to the context in which the appellant had been the subject of two fines imposed by the Drogheda District Court. He had explained how those fines of €350 had 'started life' as two €60 Fixed Charge Notices. Having moved out of his house following an acrimonious breakdown of his marriage, he was unaware of the Notices or the Summonses to court because his ex-wife had failed to forward his post. Upon learning of the existence of the fines imposed by the court in his absence, he paid them, immediately. It is difficult to see how his consequent failure to pay the fines or attend court could be said to have involved any moral culpability on his part or to have reflected badly on his character. That contextual history of the road traffic offences was relevant to the overall assessment of the appellant's character and the absence of any reference thereto

raises a question as to the fairness of the decision making process. In reaching a decision under s. 15(1) of the Act, the Minister is involved in ascertaining whether there exists a connection between character and criminality. However, offences, where committed, must be seen in context and, as Mac Eochaidh J. stated '*the connection between an applicant's character and criminality can only be established where the Minister has all relevant information in connection with the crime*' (*GKN* at para. 15).

86. Furthermore, nowhere in the impugned decision is it explained why two fines imposed in those circumstances should mean that the appellant is not of good character. In these circumstances, it cannot be said that the Minister's determination that the appellant was not of good character 'flowed from the evidence' concerning the road traffic offences.

The Domestic Dispute

87. In terms of the other references in the Garda Report to the alleged incident of 31 May 2013, I have already observed the views of McDermott J. in *G.S.* where he underscored the importance of placing convictions *and other allegations* within their proper context. The infirmities within that Report which set out damaging information as to character without any reference to context or the exculpatory 'strike out' of proceedings against the appellant have already been noted. Since there is nothing in Mr. Murray's Affidavit to indicate that the 'entire file', including the submissions of 6 November 2017, had been considered by any person other than Mr. Murray, this Court cannot say that the decision maker was made aware of anything other than the information contained in the Garda Report. This raises a further question concerning a deficiency in the decision making process. Fair procedures require that all relevant facts and exculpatory matters relevant to the allegations that arose from the domestic dispute ought to have been considered in the Minister's assessment of the appellant's character.

88. There is nothing to indicate that the context in which s. 12 of the Child Care Act 1991 was invoked was known to the Minister. In my view, it was incumbent upon the author of the Report to draw the Minister's attention to the fact that this provision had been invoked in circumstances where, following an allegation made by his wife, the appellant was taken to the Garda station. Unless s. 12 was invoked, the five children would have been left alone and unsupervised. It was equally incumbent upon the author of the Report to draw the Minister's attention to the fact that no child care proceedings were instituted on foot of the s. 12 invocation or that whatever charge had been levied against the appellant arising out of the 'alleged incident' had been struck out by the District Court in August 2013. The author of the Report points to the fact that the children's mother had disclosed to Gardaí that they '*were not safe with [their] father*' without drawing the Minister's attention to the fact that the appellant was never questioned, let alone convicted, in respect of any offence relating to his children. On the contrary, the District Court had granted the appellant an order for access to his children and there was evidence on file to confirm that he made his best endeavours, travelling regularly from Galway to Dundalk, to see his children and to support them on a regular basis.

89. The author of the Report informs the Minister that the appellant had assaulted his wife without drawing his attention to the fact that what had transpired had occurred in the context of self-defence whereby the appellant had attempted to release his arm from his wife's teeth. Nor is it suggested to the Minister that the appellant's version of this event should be considered in conjunction with the fact that he had been granted, by the Galway District Court, a Protection Order against his wife.

90. Considerable exculpatory information had been given to the Minister in response to specific requests made, on his behalf, to the appellant. Having sought that information which, on any view, places the incident of 31 May 2013 in context, it ought, specifically, to

have been brought to the decision maker's attention. The failure to draw the Minister's attention to the dismissal of whatever charges had been made against the appellant following that incident is noteworthy, particularly where, as Barrett J. noted in *Ashique*, a dismissal points not to '*non-compliance by the applicant with the laws of the State*' but, in truth, to the contrary.

91. None of the contextual or exculpatory information which the appellant provided is noted on the face of the recommendation to refuse. It appears that what was presented to the Minister about the domestic dispute was a one-sided version of events as alleged to the Gardaí by the appellant's wife in the context of a bitter breakdown of the marriage. In this regard, I find the observations of Mac Eochaidh J. in *GKN* to be particularly apposite to the facts of this case. As in *GKN*, the author of the Submission that went to the Minister had selected certain information only from the overall application and had brought that to the attention of the Minister. In the absence of the abundant exculpatory and contextual information that had been furnished by the appellant, the Minister merely had a recommendation stating that the relevant information related to the non-compliance by the appellant with the laws of the State and the involvement of the appellant in an alleged incident of a serious nature. Adopting the '*Hiri*' principles enunciated by Lang J., Haughton J. in *Talla* held that in determining whether a person is of 'good character' the Minister '*must undertake* ***a comprehensive assessment of each applicant's character as an individual'***. Criminal convictions are relevant to this assessment but the outline facts, mitigating circumstances, the time that has elapsed since the last conviction[10] and any other factors that may be relevant to character, '*must all be taken into consideration*'. This is no evidence that all those factors were considered by the Minister in this case.

---

[10] In this regard, see Haughton J.'s analysis of the significance of the 'time' factor is *Talla* at paras. 42-45.

92. From the face of the impugned decision it is clear that the Minister relied on the *'nature'* of the road traffic offences and the *'nature'* of the alleged incident to determine that the appellant was not of good character. Fair procedures require that before reaching that determination, the Minister has before him a proper account of the context in which the offences and the alleged incident had occurred. They also require that when conducting his assessment, the Minister weighs in the balance the various positive features pertaining to the appellant's character. Such positive features in this case include the appellant's full transparency in respect of the traffic offences, the fact that six years had lapsed since the date of those offences, the fact that he had no criminal or other charges pending at the time of or since making his application for naturalisation, his obvious efforts to find and secure work and his attempts to discharge his obligations to his children, albeit in difficult circumstances.

93. Whereas counsel for the Minister referred to correspondence that passed between the Minister and the appellant as evidence that active consideration was given to the explanations and context provided by the appellant, the question of Haughton J. in *Talla* remains: *'By whom was there active consideration of the applicant's various explanations and documentation?'* I see no basis upon which this Court can find that the correspondence and/or his explanations were considered **by the decision maker.** There was ample opportunity for Mr. Murray to rebut the suggestion that Mr. Kirrane failed to consider the contextual explanations given by the appellant and to set out, precisely, the material that was considered by Mr. Kirrane before he signed the Submission. Whilst an affidavit could have been sworn by the decision maker deposing to these matters, I do not consider that this is necessary in every application for naturalisation. However, in circumstances where additional information has come to light after a recommendation to refuse has been made, what is required is **evidence** that such additional information was brought to the decision

maker's attention and that it was considered prior to the decision to refuse an application because an applicant has failed to meet the statutory requirement of 'good character'.

94. The sworn evidence on file supports the contention that Mr. Murray considered the entire file. However, in the light of his limited and generic averments, one is left with the impression that the file was then forwarded to Mr. Clark and Mr. Kirrane in May 2017. Thereafter, Mr. Murray certainly considered the additional information and decided not to change his recommendation, but the reality is that we do not know what happened with regard to the November submissions after that point. Whilst this is not a 'reasons' case, I find that the observations of McDermott J. in *TAR and IH v. Minister for Justice and Equality* [2014] IEHC 385 are relevant here, particularly, where he stated (at para. 23) that:-

> *"The attempts by the respondent to explain evidential shortcomings which led to the refusal underlines, in my view, the inadequacy of the reasons furnished to the applicants in the refusal."*

There is a basic inadequacy on the face of the impugned decision. I adopt the principle articulated by the Court of Appeal of England and Wales in *R v. Westminster City Council ex p. Ermakov* [1996] All E.R. 302[11], which confirms that when reviewing a decision, a Court must confine itself to the decision itself and the reasons contained on its face and not permit an *ex post facto* rationalisation. There is nothing on the face of the impugned decision to suggest that the entire file, including the submissions of 6 November 2017, were considered **by the decision maker** in advance of the decision to refuse.

95. I am not satisfied that, as a matter of probability, the decision maker considered all relevant or material information pertaining to the circumstances surrounding the domestic dispute. Moreover, I see no evidence of the Minister having considered and weighed all relevant considerations in conducting a comprehensive assessment of the appellant's

---

[11] Quoted with approval by Coffey J. in *Board of Management of St. Marnock's National School v. Secretary General of the Department of Education and Skills* [2017] IEHC 683 (at para. 52).

character as an individual before deciding to refuse him a certificate of naturalisation. Consequently, I find that there was no basis in the evidence before the trial judge for his finding that the Minister had considered the appellant's submissions and, accordingly, I accept that he erred in making such a finding.

Proportionality

96. In the course of the hearing and in the appellant's written submissions, reference was made to the issue of proportionality. In *AAA v. Minister for Justice* [2017] IESC 80, Charleton J. had observed that:-

> *"While the full extent of the interaction of proportionality in decision making with the duty to act reasonably, as cast on administrative and quasi-judicial bodies, should await scrutiny in an appropriate case, every case remains fact specific."*

The appellant contended that Keane J. had erred in *Kareem v. The Minister for Justice and Equality* [2018] IEHC 200 where he held that the principle of proportionality can have no part to play when a person is challenging an adverse decision on an application for naturalisation. It must be acknowledged that before this Court the appellant did not focus his argument along the lines that an assessment of proportionality is a requirement within the context of judicial review. Rather, he submitted that when this Court considers how the Minister arrived at his decision to refuse naturalisation, it should find that there was a want of proportionality in how the Minister made that assessment – in circumstances where there was no evidence that the appellant's submissions had been considered. In view of the appellant's limited submission in respect of the alleged want of proportionality in how the Minister reached his decision and having regard to the findings already made herein, I do not consider it necessary to conduct an examination of the broader question of whether proportionality can play any part when a person is challenging an adverse decision on an application for naturalisation. Consequently, whether the findings of Keane J. in *Kareem*

must be reconsidered in the light of the Supreme Court's decision in *V.J. v. The Minister for Justice and Equality* [2019] IESC 75 is a matter for another day.[12]

The 'Onus of Proof' in Judicial Review

97. In coming to the view that the Minister has failed to establish that he reviewed the submissions of 6 November 2017 and considered the exculpatory information provided in relation to the traffic offences and the domestic dispute incident, I do not lose sight of the fact that the onus remains always with the applicant in an application for judicial review to make his case, that is, to discharge the burden of proof. That said, however, there is, in principle, a duty on a public body to disclose all relevant information relating to the taking of a decision when challenged. As observed by Barrett J. in *Murtagh v. Kilrane* [2017] IEHC 384 (at para. 25):-

> *"The notion that it is not for a public body to make out an applicant's case for him is only partially correct. It is for the applicant to satisfy the court of his entitlement to judicial review and it is for the respondent to resist his application, if it considers it unjustified. But it is a process which falls to be conducted with all the cards face upwards on the table and the vast majority of the cards will start in the public body's hands."*

98. In this case, the Minister refused the appellant a certificate of naturalisation because, given of the nature of two traffic offences and allegations arising from a domestic dispute, he was not satisfied that the appellant of 'good character'. The appellant claims that this decision was reached in a manner that breached the rules of natural and constitutional justice because the Minister's determination was made without taking into account the contextual and exculpatory information that he had provided and, in particular, the submissions of 6 November 2017. The Minister opposes that contention and, in so doing, presents to the

---

[12] In *V.J.* the Supreme Court was applying the ruling of the Court of Justice of the European Union (CJEU) in the case of *HN v Minister for Justice, Equality and Law Reform* (Case C-604/12) and O'Donnell J. found that the requirement of *'a searching review'* is capable of being met by the remedy of judicial review.

Court, the Submission and recommendation that was before him. In examining that document, it is clear, on its face, that relevant information is missing. There is no mention of any consideration having been given to any of the contextual or exculpatory information provided by the appellant. That omission, therefore, begs the question as to whether, in fact, the decision maker had regard to all of the material that was relevant to an individualised assessment of the appellant's character before reaching a decision thereon. To that extent, the onus shifts to the Minister to establish to the satisfaction of this Court that he *did* have regard to all relevant information and that his decision was not reached in breach of the rules of natural and constitutional justice—one of the most basic of which is to 'hear the other side'.

99. The evidence the Minister presents to the Court is, on its face, problematic. It does not demonstrate that the appellant's account of grounding events had been 'heard' before the decision to refuse was reached. The dates on the Submission made to the Minister, as inserted by the processing team, clearly, pre-date receipt of the appellant's submissions of November 2017. Mr. Murray's recommendation to refuse the application is also dated several months prior to November 2017. Notwithstanding his averment, which I accept, that he considered the additional submissions and decided not to make any change to his recommendation, there is nothing on the face of the document to indicate such reconsideration. More importantly, there is no evidence that the additional contextual and exculpatory information was then drawn to the attention of the decision maker.

100. In *Murtagh,* Barrett J. was making reference to the dicta of Lord Donaldson M.R. in *R v. Lancashire County Council ex p. Huddleston* [1986] All E.R. 941 who said that public authorities should conduct public law litigation *'with all the cards face upwards on the table'*, an observation with which Clarke C.J. agreed in *RAS Medical Limited* [2019] 1 I.R. 63. In the instant case, the difficulty confronting the Court is that it is not evident on the face

of the impugned decision that any consideration was given to the appellant's submissions by the decision maker. As already noted, Mr. Murray's Affidavit does not bridge the gap and its silence on important evidential matters in relation to this specific appellant's application is remarkable. Consequently, with regard to the onus of proof having shifted to the Minister, one can only observe that in terms of the evidential lacuna in the Minister's case, not only are the cards not placed '*face up*' but they are difficult to find on the table.

Conclusion

101. The underlying objective in this Court's analysis of the decision making process in issue in this appeal is to ensure the attainment of fairness (see *A.A.* at para. 27). I have found that the conclusion reached by the Minister cannot be said to have 'flowed from the evidence' before him in circumstances where there is no reference in the impugned decision to any of the contextual or exculpatory evidence that was on the file. For the reasons set out in this judgment, I have found that the trial judge erred in his finding that the Minister did not consider the 'alleged incident' as more than alleged and that he had also erred in finding that the Minister had considered the appellant's submissions in reaching a decision on the appellant's application for naturalisation.

102. I have also found that the Minister's decision does not provide his rationale for determining that, based on the two road traffic offences and an alleged incident, the appellant had failed to meet the good character requirement of s. 15 of the Act. I am not satisfied that the evidence establishes that the Minister took into account all relevant information before reaching a decision not to grant the appellant a certificate of naturalisation. In view of my findings, I cannot but conclude that there was a breach of the requirements of the rules of natural and constitutional justice.

103. Accordingly, for the reasons set out in this judgment I would allow this appeal and order that the Minister's decision refusing naturalisation be quashed and that the appellant's application for a certificate of naturalisation be remitted to the Minister for reconsideration in accordance with the requirements of natural and constitutional justice.

104. As the appellant has been entirely successful and costs should thus follow the event, my provisional view is that the costs of the High Court proceedings and of this appeal should be awarded to the appellant. If the respondent wishes to submit that an alternative order should be made then, then he will have liberty to deliver written submissions, not exceeding 2,000 words, within 14 days of the date of this judgment. Thereafter, the appellant will have 14 days to deliver replying submissions on costs, not to exceed 2,000 words. In default of receipt of submissions from the respondent, an order in the proposed terms will be made.

As this judgment is being delivered remotely, Costello and Binchy JJ. have indicated their agreement with the reasoning and conclusions reached in respect of this appeal.