[2018] IEHC 538

THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 1012 J.R.]

BETWEEN

LUKASZ PIOTR KRUPECKI AND J.A.M. (A MINOR SUING BY HIS FATHER AND NEXT FRIEND LUKASZ PIOTR KRUPECKI)

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

(No. 2)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 1st day of October, 2018

1. In *Krupecki v. Minister for Justice and Equality (No. 1)* [2018] IEHC 505 (Unreported, High Court, 20th July, 2018) I dismissed a judicial review application directed to removal and exclusion orders against the first-named applicant save as to a point regarding a lack of reasons in the exclusion order, and held that, on that point, the Minister had failed to provide such reasons. The issue now is the appropriate remedy for that finding. I delivered an *ex tempore* judgment on 23rd July, 2018 on that issue and now take the opportunity to give lengthier written reasons.

2. I have received helpful submissions from Mr. Michael Lynn S.C. (with Mr. Paul George Gunning B.L.), for the applicants and from Mr. Anthony Moore B.L. for the respondent.

3. The essential question is whether to quash the decision or alternatively to adjourn the challenge to the decision and in the meantime to direct the Minister to state reasons for that decision. I will consider the arguments for and against in sequence.

Considerations in favour of quashing the decision
4. The arguments in favour of a simple order quashing the decision are as follows.

Constitutional importance of reasons
5. The applicants rely on the fact that reasons derive not merely from the Minister's common law duty, but also from the right to fair procedures under Article 40.3 of the Constitution. That is reinforced by the EU Charter of Fundamental Rights and the ECHR (as applied by the European Convention on Human Rights Act 2003). However, that does not mean that the right to reasons, or indeed any right, is to be interpreted in an inflexible manner. Rights are, in general, subject to and qualified by duties, by the rights of others, by social order and by public interest considerations. It is not necessarily conducive to the smooth operation of a statutory scheme by the executive branch of government if decisions are quashed outright where more proportionate options are available to the court, such as directing reasons.

The decision in *Balc*
6. Mr. Lynn relies on the similar finding in regard to the absence of reasons made by the Court of Appeal in *Balc v. Minister for Justice and Equality* [2018] IECA 76 (Unreported, Court of Appeal, 7th March, 2018), which resulted in that court quashing the decision in question. It seems to me that that approach is not decisive in the present case for the simple reason that the Court of Appeal was not asked to make the alternative order of directing reasons as opposed to quashing the decision. The doctrine that a point not argued is a point not decided (*The State (Quinn) v. Ryan* [1965] I.R. 70 at 120) applies here.

Submissions that the statute requires reasons
7. Mr. Lynn submits that there is a heightened obligation to set out reasons where that is a specific obligation under the statutory scheme in question. He submits that this is such a scheme and in those circumstances the court should be very slow to give the Minister an opportunity to state reasons save in exceptional circumstances. Regulation 23(1) of the European Communities (Free Movement of Persons) Regulations 2015 (S.I. No. 548 of 2015) gives the Minister jurisdiction to make an exclusion order in respect of a person who, in the Minister's opinion, poses a danger to public policy or public security for reasons specified in that provision. Regulation 23(2) provides that the duration of the exclusion period shall be specified in the order. Of crucial importance here is para. (4) of reg. 23, which provides that a notification of a proposal to make an exclusion order: "*shall contain (a) unless the Minister certifies that it would endanger the security of the State to make them known, the reasons giving rise to the proposal referred to in paragraph. (3), (b) a statement that the person concerned may make representations in writing to the Minister to which shall include the particulars specified in Schedule 4 within 15 working days of the date of issue of the notification, and (c) the proposed duration of the exclusion period.*"

8. This provision draws an express distinction between providing (i) the reasons for making the proposal and (ii) the proposed duration of the exclusion period, which is not subject to a requirement to furnish reasons. It is in the light of that distinction that reg. 23(6) must be read, which provides that where the order is made and unless the security of the State otherwise requires, the "*reasons for the making of the order*" must be notified to the person concerned. In the light of para. (4) *Nash* that can only mean the reasons for the order itself rather than for the duration of the order.

9. Therefore, this is not a case where the statute requires reasons for each and every element of the decision such as the duration of it, although I say that without taking from the general administrative law need for reasons independently of the statute. But even if it was such a case, the fact that the statute requires reasons to be notified does not mean that notification of a decision with reasons lacking, or provision of the reasons at a later date, has the effect that an otherwise valid decision is necessarily invalid. The terms of the statute would be one matter among others to be considered in the exercise of the court's discretion as to the appropriate order in the interests of justice.

Caselaw on reasons relied on by the applicant
10. The applicant's argument majors on the judgment of Kelly J. (as he then was) in *Deerland Construction v. Aquaculture Licences Appeals Board* [2008] IEHC 289 [2009] 1 I.R. 673. That judgment relies heavily on the judgment in *Nash v. Chelsea College of Art and Design* [2001] EWHC Admin 538. In the latter judgment, Stanley Burnton J. held that where there was a statutory duty to give

reasons as part of the notification of the decision then "*only in exceptional circumstances if it all will the Court accept subsequent evidence of the reasons*", para. 34. However, it is clear that U.K. caselaw was somewhat more involved than what was opened to the court in *Deerland*. Indeed, Stanley Burnton J. had already qualified his views in another case after *Nash* but before *Deerland* was decided, and that later case was not opened to the court in *Deerland*. That case was *R. B v. Merton London Borough Council* [2003] EWHC 1689 Admin [2003] 4 All E.R. 280, where he held that the proposition just referred to was too widely expressed and stated that "*reasons that merely elucidate reasons given contemporaneously with a decision would normally be considered by the Court*", para. 42.

11. That, however, is only a first step in qualifying the caselaw and it is clear now that there is a mountain of caselaw going the other way, which I will refer to later in this judgment.

12. The applicants' written submissions plaintively state that *"the judgment in* Deerland *does not appear to have been departed from by the courts. It remains good law*", (para. 14) That is a highly questionable argument. The applicant's logic, if that is the word, here is that if a court makes a decision based on a snapshot or even a fragment of U.K. law where not all authorities were opened in the first place and where the U.K. law has evolved massively in the meantime, and indeed where the Irish courts have also made relevant decisions either not opened to the court originally or handed down subsequent to that decision, then the fact that no judge has specifically stated that the caselaw has so evolved means that the original decision stands for all purposes. Such an inhumanly mechanical view of *stare decisis* would be a recipe for illogicality and would bring the intellectual coherence of the law into disrepute.

13. In any event *Deerland* has been relied on as not precluding the subsequent provision of reasons. In *L.S. v. Refugee Appeals Tribunal* [2010] IEHC 246 (Unreported, High Court, 4th June, 2010), Birmingham J. held that the furnishing of late reasons for a decision by the chairperson of the Refugee Appeals Tribunal was lawful. In doing so he gave consideration to *Deerland*, held that in the *L.S.* case there was "*no statutory obligation to furnish reasons"*, and that *Deerland* did not provide even an arguable basis for invalidating the tribunal chairperson's decision in circumstances were the tribunal had subsequently clarified what the reasons for the decision were.

Risk of retrospective reasoning
14. It is certainly the case that allowing reasons to be provided after a decision creates risks in any given case that reasons may be manufactured or retrospectively created for the purposes of the litigation: see *R. v. Westminster City Council* ex parte *Ermakov* [1996] 2 All E.R. 302 [1995] EWCA Civ 42. In *T.A.R. v. Minister for Justice and Equality* [2014] IEHC 385 (Unreported, High Court, 30th July, 2014) McDermott J. held that the court should be "*circumspect*" in relation to permitting late reasons, having regard to such considerations. That is not, of course, an absolute prohibition on later reasons; simply a note of caution.

15. Indeed, in *T.M. v. Refugee Appeals Tribunal* [2016] IEHC 469 [2016] 7 JIC 2925 (Unreported, High Court, 29th July, 2016) (under appeal), at para. 31, I noted that "*of course there is force in the view expressed by McDermott J. in* T.A.R." but indicated that such subsequent reasons are not impermissible in principle. In *R.P.S. Consulting Engineers v. Kildare County Council* [2016] IEHC 113 [2016] 2 JIC 1518 [2017] 3 I.R. 61 I noted that one way of preventing the retrospective creation of reasons was to require the decision-maker to positively state whether the reasons were in their mind at the relevant time, and I incorporated such a requirement into the order made in that case.

16. Certainly, however, the risk of retrospective reasons is a factor and is one of a number of factors that the court can consider in the interests of justice in any given case. However, as I say, that can be dealt with by directing the decision-maker to inform an applicant as to whether the reasons were in their mind at the relevant time.

Submission that the default order should be one of *certiorari*
17. Reliance was placed on para. 62.5 of Michael Fordham, *Judicial Review Handbook*, 6th Ed. (Oxford, 2012) to the effect that "*the remedy for a breach of a reasons duty should normally be quashing the decision to be taken afresh, rather than ordering the giving of reasons. That reflects the self-disciplining rationale of reasons and avoids after-the-effect* 'reconstruction'". The submission that the default order should be quashing the decision necessarily involves an acceptance that the court has a discretion to order otherwise.

18. I certainly take into account whatever can be said in favour of quashing a decision in an individual case, but I do not accept the idea that an order of *certiorari* should be a rigidly default order or should be required except in exceptional circumstances. The court should make whatever order is required in the interests of justice in any given case.

Artificiality of late reasons
19. Mr. Lynn submits that it would be artificial to ask the Minister to elaborate on the reasons as to why in September, 2017 the Department decided on a particular exclusion period. That is covered by the approach in *R.P.S.* at para. 115(iv) that, where there is a risk of such a problem, there can be a requirement for a positive statement on behalf of the decision-maker as to whether those were the reasons in their mind at the time.

Considerations in favour of requiring reasons
20. Turning now to the considerations in favour of making an order directing that reasons be provided, rather than quashing the decision outright, these considerations are as follows.

The court has a jurisdiction to direct reasons
21. I discussed this jurisdiction in *R.P.S* at para. 107, relying on *Hurley v. MIBI* [1993] I.L.R.M. 886, to the effect that the court can require the furnishing of further and adequate reasons where the original reasons are held to be inadequate. Also supportive of that proposition is the judgment in *English v. Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, where Lord Philips M.R. was of the view that in a civil leave to appeal application on a reasons ground the court could adjourn the application and allow additional reasons to be sought in the meantime, before then considering those additional reasons: see para. 25. I said in *R.P.S.* at para. 110 that that was not an exact analogy, but certainly helpful in the present context.

Separation of powers
22. A nuanced approach to the remedies available to the court best respects the separation of powers. It means an executive decision is only overturned to the extent to which it is proportional to do so and is not overturned if it can be dealt with in some other way such as by ordering and then reviewing the reasons for that decision.

The English caselaw relied on in *Deerland* has evolved considerably since
23. The respondents submit, in my view correctly, in their written submissions that "*the approach taken by Stanley Burnton J. in* Nash *has not been applied rigidly and the courts have tended to examine on a case-by-case basis whether a decision-maker should be*

allowed to submit late reasons for a decision which lacked adequate or, indeed, any reasons, with late reasons being permitted in some cases and not others" with reliance being placed on caselaw referred to at pp. 672 to 675 of Fordham.

24. Thus, for example, in *Adami v. Ethical Standards Officer of the Standards Board for England* [2005] EWCA Civ 1754, the Court of Appeal held, relying on *R. v. Higher Education Funding County Council* ex parte *The Institute of Dental Surgery* [1994] 1 W.L.R. 242, that it was "*clearly of the view that in the context of judicial review and in an appeal process from a statutory tribunal it would, or should be open to the court to refer an inadequately reasoned decision back to the tribunal below without first quashing it*" (para. 22). It also held at para. 23 that in the context of there being no challenge of the material facts found by the tribunal that "*In such circumstances, where inadequacy of reasons is the only candidate for attacking a decision, remission with or without quashing for identification or clarification is likely to be the most efficient, as well as just, way of dealing with it.". The court also held that in such a context "to quash a decision without more is likely to be a disproportionate and inappropriate response to a failure to give adequate reasons".*

25. In *Aerospace Publishing Ltd v. Thames Water Utilities Ltd*. [2006] EWCA Civ 717 the court noted that the power to require further reasons "*is something which emerges from the inherent powers of the court"* rather than from specific English rules of court. In *R. K.M. v. Cambridgeshire County Council* [2012] UKSC 23 at 38 Lord Wilson for the UK Supreme Court referred to the "*fully formed inquiry*" that was enabled by "*the amplification of …reasoning…in response to the application for judicial review"*. Likewise, in *R. (Hewitson) v. Guildford Borough Council* [2011] EWHC 3440 Admin at para. 27 a witness statement was admitted as evidence of what was in the decision-maker's mind at the time without the necessity for quashing the decision. Also relevant is *Baxendale-Walker v. Law Society* [2006] EWHC 643 Admin [2006] 3 All E.R. 675 at 28 where a tribunal was held to be entitled to give reasons either at the time of the decision or later. In *Re L* [1994] ELR 16 at para. 24 A - B it was held that since reasons had subsequently been given "*no useful purpose would be served by quashing the decision now*". Likewise, in *R. v. Brent London Borough Council* ex parte *Baruwa* [1997] 29 HLR 915 at p. 929 it was held that looking at an affidavit which amplified the reasons "*saves the bother and expense of going back to the decision-maker to make a new decision which will incorporate the material which appears in the affidavit".*

Subsequent clarification of reasons may operate to an applicant's advantage
26. It is not necessarily the case that allowing subsequent reasons always operates to the benefit of respondents. A number of English cases have illustrated situations where reasons provided at a later stage were held to be defective. Thus an approach that excluded such late reasons could, in those cases, operate to the disadvantage of applicants: see the caselaw cited in *Fordham* at s. 62.4.5 pp. 672-673, in particular *R. v. D.P.P.* ex parte *Manning* [2000] EWHC Admin 342 [2001] 1 QB 330.

Broader view of caselaw not referred to in, or decided since, *Deerland* supports a discretionary approach
27. It is clear from a broader view of the administrative law jurisprudence that reasons can be given subsequently. For example, in *The State (Daly) v. Minister for Agriculture* [1987] I.R. 165 [1988] I.L.R.M. 173 at 172, Barron J. referred to a situation where a failure to give reasons meant that the court could not review the exercise of administrative powers in the light of fair procedures criteria. He held that: "*Since the Minister has failed to disclose the material upon which he acted or the reasons for his action there is no matter from which the court can determine whether or not such material was capable of supporting his decision.*" That was in a context where an opportunity had been afforded during the proceedings to clarify the reasons and where such a belated opportunity was not taken up.

28. Such a flexible approach also emerges from the Supreme Court decision in *Y.Y. v. Minister for Justice and Equality* [2017] IESC 61 [2018] 1 I.L.R.M. 109. There the Supreme Court considered that an original decision to make a deportation order was lacking in reasons but did not quash that decision. Rather it allowed the matter to be remitted to the Minister to have the matter reconsidered in the context of an application to revoke that decision (see para. 83).

Need to prioritise substance over form
29. The courts should be concerned with the substance of a decision rather than the form in which it emerges. There is no necessary doctrine that reasons have to be given in a decision itself. They could be given in an accompanying document or even a subsequent document. That is consistent with the recent Supreme Court decision in *M.A.K. v. Minister for Justice and Equality* [2018] IESC 18 (Unreported, Supreme Court, 13th March, 2018) in a somewhat different context that a decision does not necessarily have to be a self-contained document and can refer either expressly or impliedly to another, related document.

Need to avoid drawing on scarce judicial resources
30. There is a fundamental related issue here in terms of the limited resources available to the court. It is acute in the immigration context, but not limited to that. Some decision-making processes may conceivably, in principle, be completely watertight such that a decision-maker is basically *functus officio* after the decision. Others are not so in principle. For example, ministerial decision-making generally is in the latter category. The door of the Minister or a Department of central government is in general always open to receiving further correspondence subject to anything to the contrary in a given statute.

31. Accepting the possibility, if not desirability, of subsequent provision of reasons where original reasons are lacking opens the possibility that in reasons cases such disputes can be resolved out of court and possibly without the necessity for proceedings at all. Thus a pre-action letter in reasons cases is highly desirable and may indeed in some instances be considered necessary where it can serve a useful purpose. As emphasised in *Rooney v. Minister for Agriculture and Food* [2016] IESC 1 (Unreported, Supreme Court, 28th January, 2016) by O'Donnell J., "*litigation is not in itself an intrinsically desirable activity"* (para. 2). To some extent, litigation needs to be discouraged where alternative options are available. Hence the courts in the judicial review context have developed the doctrine of alternative remedies. In addition, consideration needs to be given to the desirability of pre-action correspondence where that is capable of resolving the matter in question: see for example my decision in *Li v. Minister for Justice and Equality* [2015] IEHC 638 (Unreported, High Court, 21st October, 2015). Mr. Lynn submits that in a given case an applicant could be prejudiced in the meantime, for example by being removed from the State. But there are solutions even for such a situation (noting at the same time that the pre-action protocol in the U.K. for immigration cases does not apply to deportation injunctions). In principle, in such a case there is nothing wrong with an applicant writing saying that his complaint is lack of reasons and the reasons are required within a given time but that confirmation is required immediately that the applicant will not be removed pending a response. If no such immediate confirmation is given, then it might well be reasonable to apply to the court without further notice. If the case alternatively was such that there was no huge prejudice by allowing a time for response, then an immediate response might not be necessary. The court probably should also in such a situation regard the affording of an opportunity to give reasons in response to a pre-action letter as being reasonable cause for extension of time if such was required, as otherwise there would be a disincentive to an attempt to resolve the case informally.

A flexible approach with regard to orders directing reasons rather than quashing decisions sits well with the evolving jurisprudence on flexibility of remedies
32. An approach whereby the court can direct reasons rather than crudely quashing the decision on a reasons ground can be viewed

as part of a broader set of developments whereby public law remedies are becoming more flexible. At one time, if any unconstitutionality or even illegality was shown in a decision or a statutory provision it was handed a judicial death certificate - total, comprehensive, fully retrospective and immediately effective. Such a crude approach could often work significant injustice. It failed to balance the interests concerned at all, still less in a nuanced, considered and proportionate manner. A number of evolving remedies in the law demonstrate that the jurisprudence is developing to respond in a much more proportionate way to the competing policy interests involved. The ultimate order in this and in other related contexts, of which I will mention a number, should be guided by the interests of justice rather than inflexible theory. Those other contexts where flexible approaches are developing include the following:

(a) **The admissibility of unconstitutionally obtained evidence**. Here the law has, not a moment before time, significantly evolved to a more proportionate position as set out in *DPP v. J.C.* [2015] IESC 31 [2017] 1 I.R. 417.

(b) **Orders curtailing the application of a provision rather than striking it down**. Rather than invalidating *in toto* a problematic statutory provision, where a constitutional issue has been identified, there is an emergent jurisprudence on taking the alternative approach of "*reading down*" the provision rather than declaring it to be unconstitutional (see Fordham at para. 46.2). Thus in B.*G. v. Murphy* [2011] IEHC 445 (Unreported, High Court, 8th December, 2011) at para. 48, Hogan J. made an order declaring that if the act impugned in that case were to be applied in a particular specified way that that "*would be to breach the plaintiff's constitutional right to equality under Article 40.1*" rather than making a declaration of unconstitutionality either in whole or in part. I discuss the "*reading down*" jurisprudence in some detail in my judgment in *McNamee v. D.P.P*. [2016] IEHC 286 (Unreported, High Court, 12th May, 2016) and I do not interpret this element of the discussion as having been upset by the Court of Appeal judgment affirming the order I made in that case. At para. 29 I referred to the judgment of the Supreme Court of Canada in *McDonald v. Attorney General of Prince Edward Island* [1997] 3 S.C.R. 3 where an over-broad statute was read down by implying a qualification that it would not apply in certain circumstances. I also referred to the similar approach taken by Hogan J. in *McCabe v. Ireland* [2014] IEHC 435 (Unreported, High Court, 30th December, 2014) (reversed on appeal on an issue not related to this point) and the judgment of Laffoy J. in *S.M. v. Ireland (No. 2)* [2004] I.R. 369 at 401 where, having found that a particular sentencing statute gave rise to unconstitutional discrimination, the court did not strike down the statute but rather declared that if the plaintiff were to be convicted and sentenced to a sentence that exceeded that applying to the comparable discriminatory situation, which was in that particular case an assault on a female, his rights would be infringed. I also noted at para. 30 of *McNamee* that proportionality had taken a centre stage in recent years in the public law context: see *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701, *Mallak v. Minister for Justice, Equality and Law Reform* [2012] 3 I.R. 297, and that a proportional approach was also required in relation to remedies. As noted by Kevin C. Walsh in "Partial Unconstitutionality", 85 N. Y. U. L. Rev. 738, (2010)) at 742, "*it is necessary to change the foundational metaphor that structures thinking about judicial review-a change from excision to displacement. The familiar excision-based approach to judicial review implies that a court has the power to eliminate unconstitutional provisions by a process of subtraction. In contrast, under a displacement based approach, a court does not excise anything from a statute but instead determines the extent to which superior law displaces inferior law in resolving the particular case before it"* – in this sort of context the superior law being a constitutional provision that requires a reading-down of a statutory provision that would otherwise be in conflict with it.

(c) **Partial quashing of a decision**. In *R. v. Inner South London Coroner* ex parte *Kendall* [1988] 1 W.L.R. 1186 at 1194, Simon Brown J. describes such a jurisprudence as "*consistent also with this court's increasing flexibility of response and remedy in the ever developing field of judicial review*." I would regard that sentiment as very much in keeping with the approach I am taking in relation to the issue of whether to direct reasons as an alternative to quashing a decision, in the present case. Further jurisprudence to this effect is referred to in Fordham at para. 43.1.6 pp. 477 – 478, referring *inter alia* to *R. v. Secretary of State for the Environment* ex parte *Lancashire County Council* [1994] 4 All E.R. 165 (quashing a particular passage in a policy guidance document); *R. v. London Borough of Southwark* ex parte *Dagou* (1996) 28 H.L.R. 72; *R. v. Belmarsh Magistrates Court* ex parte *Gilligan* [1998] 1 Cr. App. R. 14 (quashing of committal as to certain offences but not others); *R. v. Snaresbrook Crown Court* ex parte *Patel* [2000] C.O.D. 255 (quashing of part of court order regarding costs); R. *v. Southwark Coroner's Court* ex parte *Epson Health Care NHS Trust* [1995] C.O.D. 92 (quashing part of coroner's verdict leaving the central finding in place). In *H.A.A. (Nigeria) v. Minister for Justice and Equality* [2018] IEHC 34 [2018] 1 JIC 2303 (Unreported, High Court, 23rd January, 2018) at para. 6, I noted and applied the English jurisprudence on the jurisdiction of the court to partially quash a decision rather than set it aside in its entirety where the ground for *certiorari* affected only a severable part of that decision.

(d) **Directions to the decision-maker if a matter is remitted**. An approach whereby the court provides specific directions on remittal is already routine where the matter is remitted to a differently-constituted decision-maker (as noted in de Blacam, *Judicial Review*, 2nd ed., p. 556 and Fordham, para. 3.1.3). Order 84 r. 27(4) of the Rules of the Superior Courts states that "*where the relief sought is an order of certiorari and the Court is satisfied that there are grounds for quashing the decision to which the application relates, the Court may, in addition to quashing it, remit the matter to the Court, tribunal or authority concerned with a direction to reconsider it and reach a decision in accordance with the findings of the Court*." A comparable provision exists under English law, s. 31(5) of the Senior Courts Act 1981, which provides that a matter may be remitted "*with a direction to reconsider the matter and reach a decision with the findings of the High Court*" (see Fordham, para. 3.1.5 and 3.1.6). While it has been held that the court must not "*direct procedures in advance"* (*Carroll v. Law Society (No. 2)* [2003] 1 I.R. 284 at 301), that approach is based on an assumption that one should not assume future difficulties. It has no relevance to a situation where one is dealing with the aftermath of difficulties that have actually happened. Giving directions to avoid repetition of identified legal problems is not directing procedures in advance – it is taking consequential steps (whether by declaratory relief or formal directions or orders) to ensure future compliance with law in a case of established breach. It is clear that the court can make mandatory orders requiring procedural steps, for example in requiring an *inter partes* hearing where there has been a wrongful failure to hold a proper hearing by the body below (see Fordham, para. 24.4.5). It was held in *R v. Lord Chancellor* ex parte *Law Society* (1994) 6 Admin LR 833 (DC) at 866 that "*procedural irregularities will make it appropriate for a court to quash an existing decision and to declare that a further decision should only be reached after proper consultation has taken place*". In *R. (A.) v. Lord Saville of Newdigate* [2001] EWCA Civ 2048 [2002] 1 W.L.R. 1249 at para. 57, Lord Philips MR remitted a matter to the inquiry, where the geographical location of the hearing had been challenged, "*with a direction that … evidence should not be taken in Londonderry*"). De Blacam comments that *"if the court quashes a decision, it may wish to clarify the consequences of that quashing and can do so by declaration in an appropriate case"* (2nd Ed., p. 462). There is no difference in principle between making a declaration and giving directions or orders in such a situation, as even a declaration can be enforced by proceedings for contempt (*O'Donnell v. Dun Laoghaire Corporation* [1991] I.L.R.M. 301 at 311). Fundamentally, the purpose of such directions is to save time and costs, particularly the court's time, which would be wasted if the same errors were to be repeated. I applied an approach along the foregoing lines in *Y.Y. v. Minister for Justice and Equality (No. 8)* (Unreported, High Court, 25th September,

2018).

(e) **Limiting full retrospection**. As opposed to previous assumptions that a declaration of invalidity amounts to a judicial death sentence for the legislation in question, more recent caselaw establishes that the retrospective effect of rulings are limited, so as, for example, not to disturb convictions under unconstitutional legislation: see *A v. Governor of Arbour Hill* [2006] IESC 45 [2006] 4 I.R. 88 [2006] 2 I.L.R.M. 481. It is possible for the court to mitigate other consequences of a declaration of invalidity (Fordham, para. 44.1). In *Percy v. Hall* [1997] Q.B. 924 at 950-952, Schiemann L.J. pointed out the need for flexibility in considering the possible impact of such a declaration.

(f) **The timing of a declaration of invalidity**. In N.*H.V. v. Minister for Justice and Equality* [2017] IESC 35 (Unreported, Supreme Court, 30th May, 2017) the Supreme Court provided for a suspended declaration of invalidity of the statutory provision in question. It was subsequently pointed out in *N.H.V. v. Minister for Justice and Equality* [2017] IESC 82 (Unreported, Supreme Court, 30th November, 2017) that such a technique was the exception rather than the rule. Nonetheless, the *N.H.V*. approach has been followed in other cases such as A.*B. v. Clinical Director of St. Loman's Hospital* [2018] IECA 123 (Unreported, Court of Appeal, 3rd May, 2018) per Hogan J. at para. 120 and *Agha (a minor) v. Minister for Social Protection* [2018] IECA 155 (Unreported, Court of Appeal, 5th June, 2018) *per* Hogan J.

33. The overall conclusion that can be drawn from the foregoing emerging caselaw is that the overriding consideration is the interest of justice. The court must be sensitive to fashion a proportionate and just remedy rather than automatically reaching for the crude, nuclear option of immediately quashing a decision in full simply because of the identification of any error.

Conclusions and application of the foregoing to the present facts
34. In the light of the matters set out above, I conclude that the court has a discretion as to what order is appropriate in a context where reasons are lacking. Conceptually, if a decision in a given case is lacking in reasons the court can do one of a number of things:

(a). quash the decision;

(b). make a final order declining to quash it but directing further reasons; if those further reasons are inadequate, there is the possibility of further separate proceedings being brought by a given applicant;

(c). make an order directing further reasons and adjourning the application insofar as it seeks to quash the decision pending the outcome of that process;

(d). adjournment *simpliciter* with the opportunity being given to the respondent to supplement the decision by way of a statement of reasons in whatever form, including by filing a further affidavit or by furnishing such reasons directly to the applicant;

(e). deal with individual elements of the decision separately so that it could be quashed in part, with the balance of the proceedings dismissed in part or adjourned in part; and

(f). combine one or more of the above with a process whereby the applicant can be facilitated in seeking to review, revisit or reopen the impugned decision.

35. The court has a discretion to exercise whichever of these is just and appropriate in any given set of circumstances; but in general there may be many circumstances where it would be inappropriate to quash in its entirety a decision that might otherwise be valid if the problem can be dealt with simply by directing reasons. The fundamental precept of separation of powers would suggest that the court should seek only a proportionate interference in executive power rather than a disproportionate interference. The appropriate order is the one that best promotes the interests of justice in all of the circumstances. The court can have regard to all such relevant circumstances, including the risk of retrospective creation of reasons, whether it is practicable to require the decision-maker to state the original reasons, whether the lapse of time since the original decision is such that reasons cannot be identified, and so on. Applying the above analysis to the present facts it seems to me that the balance of justice is significantly in favour of requiring the Minister to furnish express reasons and adjourning the challenge until that is done rather than quashing the decision now. In so doing, I take into account all the circumstances including:

(i). The lack of a dispute as to the findings of fact in the sense that following the No. 1 judgment, all that remains of the case is a challenge to the reasons at this point in time.

(ii). The validity of the removal order which accompanies the exclusion order is not an issue in the sense that I have dismissed the challenge to that order at this point.

(iii). The only complaint that remains about the exclusion order is that no reasons were given for it. In those circumstances, providing an opportunity for reasons seems to be the most proportionate way of dealing with the matter.

(iv). The absence of a statutory obligation on the Minister to provide reasons for the duration of the order.

(v). Quashing the order would give a windfall benefit to the applicant, particularly where this was not a case where reasons were not furnished in defiance of the *Balc* doctrine but rather where the Minister failed to engage in what O'Donnell J. in another context called "*inspired legal clairvoyance*" (*D.P.P. v. J.C.*, para. 53) to predict that the *Balc* decision would be handed down at a later date.

Whether an applicant should be entitled to make further updated representations if the matter is remitted back to the Minister
36. Regulation 23(8) allows for revocation of exclusion orders. That is normally operable after three years from the enforcement of the order. The order must be complied with first except where the Minister takes his own initiative on the basis of new information: see para. (9)(b). Mr. Lynn requested that in the context of any reference back to the Minister for provision of further reasons, a timetable should be built in for him to request the Minister to operate that procedure. Mr. Moore has suggested that such a procedure may or may not be operable at the instance of the applicant and that matter remains to be decided. However, the order being made can facilitate such an application, or purported application depending on one's view; and in all the circumstances it seems reasonable to

allow the applicant to have an opportunity to request the Minister to undertake a review on his own initiative; that is without prejudice to any legal points that may be raised by either side as to the process.

Order

37. For all those reasons, the appropriate order is as follows:

(i). an order requiring the Minister to give reasons for the three-year exclusion period in the exclusion order;

(ii). an order directing the Minister to inform the applicant when giving those reasons as to whether they were the Minister's reasons at the time when the exclusion order was made;

(iii). an order adjourning the application for relief G point 2 on ground H point 3, that is *certiorari* of the exclusion order due to absence of reasons, to a time to be fixed; and

(iv). an order giving directions, which I will canvass with counsel, regarding the timescale for that process and regarding any application to the Minister to exercise his power under reg. 23(9)(b) of the 2015 regulations.