THE COURT OF APPEAL

[2019] IECA 285

Appeal No: 2019/344

Birmingham P.
Whelan J.
McGovern J.

BETWEEN/

RODERICK JONES

APPLICANT

- AND –

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Ms. Justice Máire Whelan delivered on the 14th day of November 2019

Introduction

1. The Irish Nationality and Citizenship Acts, 1956-2004 comprise the Irish Nationality and Citizenship Act, 1956, the Irish Nationality and Citizenship Act, 1986, the Irish Nationality and Citizenship Act, 1994, the Irish Nationality and Citizenship Act, 2001 and the Irish Nationality and Citizenship Act, 2004. They have been amended in turn by the Adoption Act, 2010 and the Civil Law (Miscellaneous Provisions) Act, 2011. They are referred to throughout as the Citizenship Acts.

2. This appeal is primarily concerned with the construction of one of the statutory prerequisites to be established before an applicant is eligible to be considered for naturalisation pursuant to the Citizenship Acts, namely the first part of the condition specified in section 15(1)(c) of the Irish Nationality and Citizenship Act, 1956 (as amended)("the 1956 Act") which requires an applicant to satisfy the Minister that he has "had a period of one years' continuous residence in the State immediately before the date of the application…"

Background

3. The appellant is an Australian citizen. He has resided in the State since October 2011. He has no children and is not married. He has been in full time employment in the State since October 2011.

4. On the 31st August, 2017 he applied to the Minister for a Certificate of Naturalisation pursuant to the Citizenship Acts. Question 5.6 in the naturalisation application form enquires whether an applicant has been absent from the State for more than six weeks per annum in any of the past five years. The applicant is required to provide details of all such absences separately.

5. On the 25th of November, 2017 the Minister wrote to the appellant requesting details of his departure dates from the State in the months of December 2014 and December 2015. Thereafter, the appellant was refused naturalisation by a decision notified to him in

February 2018. Judicial review proceedings were issued in respect of that decision and same were compromised. Rather than submitting a fresh application, by letter dated the 28th September, 2018 the appellant elected to submit further documentation and to pursue the original application.

6. Since the appellant's application was dated the 31st August, 2017, the relevant dates to meet the condition of "one years' continuous residence" specified in s.15(1)(c) of the Act ran from the 1st September, 2016 to the 31st August, 2017. Absences from the State during the relevant year were stated by the appellant to be as follows: -

   (i) 30th August, 2016 to the 5th September, 2016 in Albuferia, Portugal (with ex-girlfriend).

   (ii) 4th September, 2016 to 6th November, 2016 in Glasgow, Scotland (to see ex-girlfriend).

   (iii) 16th February, 2017 to 18th February, 2017 in Aberdeen, Scotland (to see ex-girlfriend).

   (iv) 26th May, 2017 to 29th May, 2017 in London on holiday.

   (v) 29th May, 2017 to 20th June, 2017 in Hobart, Australia (three days to visit university, balance to visit family).

   (vi) 18th August, 2017 to the 20th August, 2017 – Bruges, Belgium (holidays with friends).

   (vii) 23rd August, 2017 to 23rd August, 2017 – Loughborough, United Kingdom (university visit).

   (viii) 30th August, 2017 to 30th August, 2017 – Loughborough, United Kingdom (university visit).

7. There was some dispute between the parties as to how certain dates ought to be calculated including the days of travel abroad and return into the State. On the appellant's assessment, his absences abroad during the relevant year for the purposes of s.15(1)(c) were about ninety days. The respondent contends that for approximately one hundred days the appellant was absent from the State with only approximately three of those days related to work. Whichever approach to calculation is adopted, it appears that over ninety percent of the appellant's absences from the State in the relevant year were unconnected with his work.

Decision of 11th October 2018

8. By decision dated the 11th October, 2018 the Minister gave notice deeming ineligible the appellant's application on the basis that he did not have one years' continuous residence in the State immediately preceding the date of his application as required by the first part of s15(1) (c) of the Act.

9. The decision under challenge provides reasoning as follows: -

> "While the Act clearly stipulates the statutory periods of residence required in the State and that the final year be continuous residence, it has long been recognised that many people may travel abroad for a holiday or may have some unexpected or unavoidable reason to travel abroad. In this regard it is considered that a reasonable and generous period of up to 6 weeks be allowed to provide for absences from the State for normal holidays and other short term and temporary nature absences, such as for business meetings or a family wedding or bereavement or medical emergency while abroad, and that such short-term nature absence from the State would not impact on the statutory residence requirement. The Minister may allow some further discretion where there are wholly exceptional or unavoidable circumstances.
>
> In the notes attached to the application form it is made clear to applicants that arrangements for assessment of residence are on the basis that the person is physically resident in the State for the required period of time and that where there are significant absences from the State the application may be refused.
>
> When this policy has been applied to your [application] it has been determined that you did not meet the above criteria at the date of application. The documentation submitted with the application, coupled with our own internal enquiries have disclosed that while you have five [years'] residence in the State, you did not have one years' continuous reckonable residence immediately preceding the date of your application when the absences from the State have been deducted. It has been calculated that you have in excess of 6 weeks' absence from the State in the last year continuous. These absences, you have stated, were for holidays, therefore your application for naturalisation has been deemed ineligible. A document showing our calculations in this regard is attached for your information."

Judicial Review application

10. On the 12th November, 2018 the appellant was granted leave to apply for judicial review in respect of the Minister's decision. He sought an order of *certiorari* quashing the decision of the Minister which had deemed ineligible the appellant's application for a Certificate of Naturalisation pursuant to the 1956 Act as notified by letter of the 11th October, 2018 addressed to the appellant's solicitors.

The grounds upon which the said relief were sought were as follows: -

(1) The Minister erred in law by applying the requirements in s.15(1)(c) of the 1956 Act that an applicant for a Certificate of Naturalisation have "one year's continuous residence in the State immediately before the date of his application" in an overly literal manner and by failing to make any reasonable allowance for temporary absences from the State for valid reasons such as reasonable holidays.

(2) The Minister erred in law by having a policy that the s.15(1)(c) requirement of "one year's continuous residence in the State immediately before the date of his application" cannot be satisfied where the applicant is absent from the State for over six weeks during the relevant year, absent wholly exceptional circumstances and by failing to approach the consideration of this requirement as a question of fact rather than discretion.

(3) The Minister's finding that, due to absences from the State, the appellant has not had a period of one year's continuous residence in the State immediately before the date of his application is materially wrong in fact and irrational in the legal sense.

11. The Minister opposed the application, contending that the appellant was absent from the State for approximately fourteen weeks during the relevant period and argued that on no interpretation of s.15(1)(c) could he be said to have had "a period of one year's continuous residence in the State immediately before the date of his application".

Judgment of the High Court

12. The High Court judgment was delivered on the 11th July, 2019. Based on an interpretation not argued for at trial, the issue was characterised by the judge at para. 2 as follows: -

> "In the impugned decision-letter of the 11.10.2018, the Minister concludes by reference to the aforementioned 'continuous residence' requirement that Mr Jones is ineligible to be considered for naturalisation by virtue of s.15(1). This is because Mr Jones was absent for a period of in excess of what might be described as the 'discretionary absence period of 6 weeks + possibly more in exceptional or unavoidable circumstances' that the Minister has hitherto been prepared to tolerate when deciding whether a person 'has had a period of one year's continuous residence' for the purposes of s.15(1)(c) (and which he brought to bear in the case of Mr Jones)."

13. The judge considered at para. 3 that:

> "…the Minister, when assessing whether the applicant 'has had a period of one year's continuous residence', is not acting in the realm of discretion. Either an applicant 'has had a period of one year's continuous residence' or he has not. Although the Minister has manifested very real humanity in (i) trying to nuance the clear wording and effect of s.15(1)(c), by (ii) applying a 'discretionary absence period…' so as (iii) to allow for the realities of modern life in which multiple work/holiday absences may be possible in any one year unfortunately (iv) the Minister has gone beyond what is legally permissible in this regard because (v) the Act of 1956 does not confer any discretionary power on the Minister in this regard; an applicant either 'has had a period of one year's continuous residence' or he has not; there is no basis in the just-quoted wording for introducing a 'discretionary absence period of 6 weeks + possibly more in exceptional or unavoidable circumstances.'"

14. The High Court judge considered a dictionary definition of the word "continuous" in s.15(1)(c) finding that it suggested "unbroken, uninterrupted, connected throughout in space or time". He concluded: -

> "Whatever the intention of the Oireachtas may have been, the court does not see that a literal reading of the word 'continuous' yields an absurdity that requires the court to move on to an alternative reading of the section."

15. Considering the approach adopted by the Minister the High Court judge observed: -

> "…the Court says – (i) there is no basis in s.15(1)(c) for the application of such discretion, (ii) the word 'continuous' in s.15(1)(c) bears its ordinary English meaning, (iii) no matter how one comes at Mr Jones' residence history for the period 01.09.2016 to the 31.08.2017, one cannot say that a one-year period of residence that is punctuated by 97 days of holiday absences and three days of work absences is 'unbroken, uninterrupted, connected throughout in space or time', (iv) the court does not see that a literal reading of s.15(1)(c) yields an absurdity that requires a court to move on to an alternative reading of same, with (v) the result of (i)-(iv) being that Mr Jones is ineligible to be granted a certificate of naturalisation by virtue of s.15(1)."

16. The trial judge considered the grounds on which *certiorari* had been sought by the appellant concluding at para. 5 that: -

> "Rather than being 'overly literal' the Minister has, with respect, been excessively generous in his approach to s.15(1)(c), bringing an approach to bear that is inconsistent with a (proper) literal reading of that provision; the Minister, in his application of the 'discretionary absence period of 6 weeks + possibly more in exceptional or unavoidable circumstances', has sought to exercise a discretion that he does not possess under s.15(1)(c). The absence of such discretion combined with the dictionary definition of 'continuous' has a result that it is not open to the Minister to make allowance for the referenced 'temporary absences'."

He considered that the Minister has sought to exercise a discretion he did not possess under s.15(1)(c).

17. Regarding the appellant's contention in ground (iii) that the Minister's finding that due to absences from the State the appellant had not had a period of one year's continuous residence before the date of his application was materially wrong and irrational the trial judge observed at para. 5: -

> "The Minister's 'finding' is neither materially wrong nor irrational. However, his means of getting to that 'finding' rests on legal error. The Minister, it will be recalled, arrives at his conclusion because Mr Jones has gone beyond the 'discretionary absence period of 6 weeks + possibly more in exceptional or

unavoidable circumstances' that the Minister has hitherto applied in the context of s.15(1)(c)."

The judge reiterated his view observing that: -

> "… No matter how one comes at Mr Jones' residence history for the period 01.09.2017-31.08.2017, one cannot say that a one-year period of residence that it punctuated by 97 days of holiday absences and three days of work absences is 'unbroken, uninterrupted, connected throughout in space or time.'"

He further observed that: -

> "The court does not see that a literal reading of s.15(1)(c) yields an absurdity that requires the court to move on to an alternative reading of same."

18. The Court observed at para. 7 that the Minister: -

> "…in the impugned decision-letter has come to the right conclusion by the wrong route there is no point in the court exercising its discretion to grant any of the reliefs sought."

Grounds of appeal

19. The appellant appealed the decision on three grounds: -

(1) That the High Court judge erred in law in his interpretation of the term "continuous residence" in s.15(1)(c), mistakenly considering that continuity of residence in the State is affected by any type, or duration of absence from the State – finding in effect that "continuous residence" requires presence in the State uninterrupted by even a single night's absence in circumstances where such an interpretation had not been advocated for by the Minister.

(2) The High Court judge erred in law in failing to hold that the Minister's policy that the s.15(1)(c) requirement of one year's continuous residence in the State immediately before the date of an application could not be satisfied where the applicant is absent from the State for over six weeks during the relevant year, absent wholly exceptional circumstances, was unlawful.

(3) The High Court judge erred in law in failing to hold that the Minister had erred in treating the issue of continuous residence as a matter of discretion rather than as a matter of fact.

The appellant seeks an order setting aside the judgment and order and seeks an order of *certiorari* quashing the decision of the Minister which deemed ineligible the appellant's application for a Certificate of Naturalisation notified by the letter of the 11th October, 2018. An order is sought remitting the matter back to the Minister to be determined in accordance with law. The Minister opposes the appeal in part only. Ground one is not opposed insofar as the Minister contends that the High Court judge erred in law in his interpretation of the term "continuous residence" in s.15(1)(c) of the 1956 Act.

20. The Minister agrees that the High Court judge's interpretation of s.15(1)(c) was not one advanced or advocated for by either party at the hearing. However, the Minister contends that the High Court judge was correct to find that the Minister's policy and his interpretation of s.15(1)(c) was not unlawful on the grounds advanced by the appellant or on any grounds. Whilst the High Court judge did not find that the Minister's policy and interpretation of s.15(1)(c) was unlawful on the basis contended for by the appellant, the High Court had found that the Minister's policy and interpretation was unlawful by virtue of what the respondent contended was an erroneous interpretation applied to the term "continuous residence" by the High Court judge. Finally, the Minister contends that the High Court judge was correct to determine that the consideration of the term "continuous residence" was not a matter of discretion.

Submissions of the appellant

21. The appellant contended that the High Court erred in law in its interpretation of the term "continuous residence" in s.15(1)(c) of the 1956 Act. It was argued that the finding of the High Court judge that to achieve statutory "continuous residence" required presence in the State uninterrupted by even a single night's absence for three hundred and sixty-five days of the year immediately prior to the application was a construction not advocated for by either party at the hearing before the High Court. It was posited that rather than mechanically calculating days of absence the Minister ought to have evaluated whether the appellant was continuously resident in the State for the previous year in the sense of continuously having his home in Ireland and not residing elsewhere. It was posited that the correct approach would have been for the Minister to ask whether the appellant was resident in the State (as opposed to elsewhere) throughout the relevant twelve-month period.

22. The appellant in submissions placed reliance on the decision *The State (Goertz) v. The Minister for Justice* [1948] I.R. 45 which had considered the words "ordinarily resident" in s.5(5) of the Aliens Act, 1935.

23. The appellant argued that the High Court judge correctly had regard to the dictionary definition of "continuous" at para. 3 of his judgment: "However, he erred in not focusing on the word 'residence'". It was contended that "…the effect of the judgment is to interpret the word "residence" as meaning 'presence'". It was contended that the High Court judge erred in law in failing to examine the 1956 Act in order to construe the word "residence" appropriately. It was argued that when such an examination is undertaken it becomes apparent that the word "residence" must be taken to mean lawfully living in a particular place with the intention of having one's settled home there: "Interpreted as such, being absent from the State for holidays or work reasons does not break continuity of residence which will be broken only by the applicant taking up another residence elsewhere – something not done by having a holiday… or travelling abroad for work reasons".

24. It was posited that absence from the State *per se* could not preclude an applicant from having "continuous residence" on the literal meaning of those words. Absence from the State would break continuity of residence only if the appellant were to move his settled

home from the State to another country it was postulated. Further, an exclusively literal approach to the term "continuous residence" is not permitted by the statute. The High Court's determination that the literal meaning of "continuous residence" in the sub-section meant that a single night spent outside the State broke continuity of residence was absurd and failed to reflect the plain intention of the Oireachtas. It was argued that reading the words "continuous residence" in s.15(1)(c) as meaning a period of uninterrupted presence in the State gave rise to an absurdity. Rather, the sub-section should be interpreted to require that the appellant had been genuinely living in the State for at least the past year and had his home here and not have taken up residence elsewhere. It was further contended that if an applicant cannot be said to be resident in any other country the requirement of "continuous residence" would very likely be satisfied.

25. The appellant argued that the Minister had fettered his discretion in applying an extra-statutory test outside the confines of the 1956 Act to his construction of the "one year's continuous residency" criteria and specified in s.15(1)(c).

Submissions advanced on behalf of the Minister

26. The Minister argued that the High Court had erred in its interpretation of the term "one year's continuous residence" in s.15(1)(c) of the 1956 Act. The State's submissions traced the history of the sub-section noting that the Irish Nationality and Citizenship Act, 2001 which commenced on the 30th November, 2002 had inserted a new section 16A into the 1956 Act. The latter provision was in turn amended by s.11 of the Irish Nationality and Citizenship Act, 2004. Whilst the appellant and the Minister differed as to the correct interpretation of "continuous residence", both agreed that the interpretation as found by the High Court was not the product of submissions by either of them.

27. The Minister disagreed with the construction of the High Court judge insofar as he determined that a person seeking naturalisation cannot be absent from the State for even one day in the year immediately prior to application or that to do so would breach the statutory requirement in s.15(1)(c). It was contended that such a construction gave rise to a clear absurdity. This was exemplified in a scenario where an applicant who made a round trip to Belfast returning the same day would forfeited any continuity of residence in the State for the purposes of s.15(1)(c) on the basis of such an interpretation.

28. It was accepted that the High Court appeared to have considered the general proposition that the words "continuous" and "residence" combine to create a statutory term. The High Court judge nonetheless continued to assert a narrow and strict dominant emphasis on the word "continuous". It was argued that in so doing, the High Court noted that a person could retain one's residence in Ireland despite travelling abroad before proceeding to find that such a person's residence would not be continuous.

29. It was contended on behalf of the Minister that the term "continuous residence" can and ought to be interpreted literally – but reading both words harmoniously. The High Court judge had erred in placing too great an emphasis on the word "continuous" without

affording sufficient regard to the word "residence" in interpreting the totality of the term "continuous residence" it was argued.

30. With regard to the correct approach to the term's interpretation it was contended that a literal interpretation was supported by the fact that the Act does not prescribe any definition of the types of "residence" which are calculable.

31. The Minister strenuously contested the proposition that a finding by the Minister that the appellant was not continuously resident in this jurisdiction was tantamount to a determination that the appellant was resident in another jurisdiction.

Discussion

32. John Stanley in his text "*Immigration and Citizenship Law*" (Thomson Reuters, 2017) observes at 28.01: -

> "Naturalisation as an Irish citizen is a privilege, not a right. The Irish Nationality and Citizenship Acts, 1956 to 2004, as amended (the "Citizenship Acts") give the Minister for Justice and Equality an 'absolute discretion' to naturalise a person as an Irish Citizen by granting the person a certificate of naturalisation. To be eligible for naturalisation, a person usually must satisfy certain 'conditions of naturalisation', with more lenient conditions applying where the applicant applies as the spouse or civil partner of an Irish citizen."

33. As was stated by O'Donnell J. in the Supreme Court in *A.P. v. The Minister for Justice Equality and Law Reform* [2019] I.E.S.C. 47 at para. 1: -

> "Under s.15 of the Irish Nationality and Citizenship Act, 1956 (as amended) ('the 1956 Act'), the Minister for Justice and Equality ('the Minister') may, in his or her absolute discretion, grant a certificate of naturalisation to a person if satisfied that the applicant complies with certain statutory conditions, any of which may be waived by the Minister in circumstances themselves set out in the Statute. The satisfaction of the statutory condition (or satisfaction subject to waiver of some or all of the conditions) does not give rise to an obligation on the Minister to grant any application. Rather, satisfaction of the conditions or permitted waiver allows the Minister to exercise the absolute discretion conferred by statute as to whether or not to grant the certificate of naturalisation."

34. In his judgment at para. 2 O'Donnell J. continues: -

> "The origin of the procedure, and the extremely broad discretion conferred upon the Minister, lies in some fundamental conceptions of sovereignty. It is a basic attribute of an independent nation that it determines the persons entitled to its citizenship. A decision in relation to the conferral of citizenship not only confers the entire range of constitutional rights upon such a person, but it also imposes obligations on the State, both internally in relation to the citizen, and externally in its relations with other States."

35. At para. 42 of the judgment O'Donnell J. observes: -

> "There are obvious differences between citizens and non-citizens in relation to the question of acquisition of the status of citizenship, so there is no necessary inequality in treating citizens and non-citizens differently in relation to the acquisition of citizenship. The procedures under the 1956 Act are a clear example of this, since, by definition, they apply only to non-citizens seeking naturalisation. That decision relates to status and does not, at least directly, engage other rights."

I respectfully agree with this analysis of the ambit and operation of s.15.

36. In a paper entitled "Super Citizens: Defining the 'Good Character' requirement for Citizenship Acquisition by Naturalisation", Hibernian Law Journal 2018, 17(1), 73-90, Bashir Otukoya considers the criteria to be satisfied by an applicant for naturalisation identified in s.15(1). Citing data from Eurostat, the statistical office of the European Union, and the Migrant Integration Policy Index (MIPEX), he observes that: -

> "Criticisms of these conditions are rare, considering that Ireland is renowned for its easy and open naturalisation system; naturalising more immigrants than any other European country in 2015, and currently one of the top naturalising countries in the EU. Ireland's naturalisation system could be seen as easy or open because, unlike most of its European Union counterparts, the applicant is not required to have any knowledge about the State's history or customs, nor is the applicant required to understand or speak either of the official languages of the State, and the applicant's understanding of the civic structures of the State has no bearing on the granting of naturalisation."

37. Whilst mindful of course that the granting of naturalisation is a function vested exclusively by the legislature in the Minster as an exercise by the State of its sovereignty and that the Oireachtas has delegated the powers governing acquisition of citizenship by naturalisation to the Minister, nevertheless, the relevant statutory provision is to be interpreted in light of the overall statutory framework having due regard to the ordinary principles governing interpretation. Whereas the granting of the certificate is an exercise by the State of its sovereignty, the ascertainment of the actual legislative intent is to be found in the text of the sub-section itself which must be resorted to in the first instance.

38. It is noteworthy that s.15(1) specifies five distinct conditions, all of which must be satisfied by the applicant before an application will be found to be valid and eligible, to be considered by the Minister at which point an exercise ministerial discretion as described in the sub-section comes into play as to whether or not to exercise the statutory discretion to grant the application.

39. The third condition, s.15(1)(c), encompasses two distinct elements and provides as follows: "(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 date, has had a total residence in the State amounting to four years;" Hence, compliance

with the residency condition encompasses two separate and distinct elements, the latter portion is temporally concerned with the second to ninth year preceding the date of the application but the first part of sub-section (c) is concerned solely with the year immediately before the date of the application. It is the first part of s.15(1)(c) alone that is of concern in this application.

40. The term "continuous residence" must be accorded its ordinary and natural meaning. If the said meaning is plain, then effect should be given to it. The principles of statutory construction were reiterated in *Howard v. Commissioners of Public Works* [1994] 1 I.R. 101 wherein at p. 151 Mr. Justice Blayney stated: -

> "The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the lawgiver."

41. In *Harrisrange Limited v. Michael Duncan* [2003] 4 I.R. 1 McKechnie J. observed at para. 22: -

> "Where however an application of this literal approach leads to an "absurdity" then recourse may be had to an alternative approach, such as the one previously articulated as the golden or mischief rule but more modernly being referred to as the schematic or teleological approach. This permits the Court to attribute to the words a secondary or modified meaning which they are capable of bearing."

42. As observed by Dodd in "*Statutory Interpretation in Ireland*" (Tottel Publishing, 2008) at 7.16: "It is presumed that the legislature does not intend enactments to create absurd results."

This gave rise to the rule against absurdity of which the author states: -

> "The rule can be expressed in the following terms: 'A construction leading to so patently absurd and unintended a result should not be adopted unless the language used leaves no alternative."

43. Section 5 of the Interpretation Act, 2005 effects a statutory codification of the rule against absurdity or so-called "golden rule". It provides: -

"5.–(1) In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction)—

(a) that is obscure or ambiguous, or

(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of—

(i) in the case of an Act to which paragraph (a) of the definition of "Act" in section 2 (1) relates, the Oireachtas, or

(ii) in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,

the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole."

44. In the Supreme Court decision *Irish Life and Permanent Plc. v. Dunne and Anor.* [2016] 1 I.R. 92 Clarke J. (as he then was) observed at p. 107 of his judgment, referring to s.5(1) aforesaid: -

> "So far as it is material to this case, it would seem that the section applies where, on a literal interpretation, a construction would be absurd or would fail to reflect the plain intention of the Oireachtas. In such cases, the provision should be given a construction which reflects that plain intention of the legislation where same can be ascertained from the legislation as a whole. In considering that provision in *Kadri v. Gov. Wheatfield Prison* [2012] IESC 27, [2012] 2 I.L.R.M. 392, I said the following at pp. 402 and 403: -
>
> > 'It seems to me that there is at least a broad similarity between that area of jurisprudence and the intent behind at least aspects of s.5(1) of the Interpretation Act 2005. It is important to note that the construction which that section requires is one that "reflects the plain intention of (the legislature) where that intention can be ascertained from the Act as a whole'.
>
> It is clear, therefore, that it not only is necessary that it be obvious that there was a mistake in the sense that a literal reading of the legislation would give rise to an absurdity or would be contrary to the obvious intention of the legislation in question, but also that the true legislative intention can be ascertained. There may well be cases where it may be obvious enough that the legislature has made a mistake but it may not be at all so easy to ascertain what the legislature might have done in the event that the mistake had not occurred."

He continued at p. 108: -

> "... it is not for this Court to assess the policy behind any legislation. Where there are possible reasons for adopting a particular measure, even if there might be grounds for believing that the legislation may be ill-suited to achieving its ends, the courts are given no mandate by s.5 of the 2005 Act to intervene. The question which must be asked is as to whether there could be any possible or conceivable basis on which the Oireachtas might have chosen to legislate in the manner which a literal construction of the relevant provisions would require."

In considering the statutory provision at issue in that case he expressed the view: -

> "…I cannot see any conceivable basis on which the Oireachtas might have chosen to allow for a case stated in one type of circuit appeal but not in another where the distinction between the two types of cases could have no possible bearing on whether a legal issue, which might warrant clarification by this Court, might arise. The result is, clearly, absurd."

He continued: -

> "But that is not sufficient for the purposes of s.5. As pointed out in *Kadri*, it must also be possible to tell, from the Act as a whole, what the true legislative intention actually is. In my view, such is possible in this case."

At p. 109 he observed: -

"There was some debate at the hearing before this Court as to whether s.5 truly extended the principles of construction beyond those which had previously been identified in the case law of the courts and are referred to, for example, in works such as *Bennion on Statutory Interpretation* (5th Ed., Butterworths, 2008). It is not necessary for the purposes of these appeals to consider whether s.5 extends beyond the parameters of the common law rules thus identified. It may well be that, at a minimum, s.5 is designed to encourage courts to engage, in appropriate cases, in the sort of purposive interpretation which that section mandates. However, it is also clear that s.5 only applies in limited circumstances. There are limits to the extent to which a court can be expected to correct errors in legislation even allowing for the scope of section 5. The court cannot be asked to rewrite legislation. The court cannot be asked to include provisions which the Oireachtas may have omitted, but where there might be legitimate debate as to whether the Oireachtas would have included same (or in what form same might have been included)."

45. In *Crilly v. T and J Farrington Limited* [2001] 3 I.R. 251 Murray J. (as he then was) noted that regard should be had to the statute as a whole at p. 295: -

> "Manifestly, … what the courts in this country have always sought to ascertain is the objective intent or will of the legislature. This is evident for example from the rule of construction according to which when the meaning of the statute is clear and definite and open to one interpretation only in the context of the statute as a whole, that is the meaning to be attributed to it…" (p. 295)

Decision

46. The High Court judge construed the condition of "continuous residence" specified in the first part of s.15(1)(c) as follows: -

> "… for the last year prior to a naturalisation application an applicant must show a one-year period of residence in Ireland that is 'unbroken, uninterrupted, connected throughout in space or time'".

47. The High Court judge erred in law in his interpretation of the term "continuous residence" provided in s.15(1)(c) of the 1956 Act. The construction is unworkable, overly literal, unduly rigid and gives rise to an absurdity. "Continuous residence" within the meaning of the sub-section does not require uninterrupted presence in the State throughout the entirety of the relevant year nor does it impose a complete prohibition on extra-territorial travel as the High Court suggests.

48. At para. 6 of the judgment the judge instances a "business trip to London", the type of trip frequently undertaken as a day trip and states: -

> "But the problem for Mr Jones is that in none of those instances could a person who goes on any one of those trips in any one year be said to be in 'continuous residence' in Ireland during that year. Why? Because that person's period of residence in Ireland during that year has been punctuated by absences abroad and thus is not 'unbroken, uninterrupted, connected throughout in space or time', i.e. it is not continuous residence."

49. That an applicant for a Certificate of Naturalisation could be deemed ineligible by reason of, for example, taking a day trip to Newry in the immediate twelve months prior to submitting an application for naturalisation is accepted by both the appellant and the respondent as being plainly erroneous and reflects a construction of s.15(1)(c) not advanced by either party at the hearing in the High Court and amounts to an interpretative absurdity.

50. Such an approach creates an anomaly which defeats one of the fundamental purposes of the legislation by introducing a significant obstacle to compliance with one of the conditions for eligibility to apply for naturalisation which most applicants would find it impossible to meet.

51. The construction accorded to the relevant part of s.15(1)(c) by the High Court gave rise to a clear absurdity so as to engage s.5(1)(b) of the Interpretation Act, 2005 allowing an objective assessment of the "plain intention" of the provision.

Continuous residence

52. The term "continuous residence" is wholly distinct and separate from the concepts of "ordinary residence" or "residence" *per se*. The words ought to be construed harmoniously. The words "continuous residence" in the context in which they appear in s.15(1)(c) (first part) do not impose an obligation on an applicant that he be wholly precluded from leaving the jurisdiction at any time during the relevant year.

53. It is clear from the tenor of the words that significant importance is attached to physical presence within the State during the relevant year.

54. There are two distinct requirements to be satisfied within s.15(1)(c). It is clear that the Oireachtas has mandated that a more rigorous approach be applied to the physical presence of an applicant in the State in the year immediately prior to the date of the

application being submitted for a Naturalisation Certificate. Hence, the second limb of s.15(1)(c) is distinguishable and of limited assistance in construing the first.

55. The task of ascribing ordinary meaning to the words "continuous residence" requires that they be construed harmoniously. Contrary to the contentions advanced on behalf of the appellant to the effect that the Minister should merely have examined whether the appellant was continuously resident in the State for the previous year "in the sense of continuously having his home here and not being resident elsewhere" as meeting the test of "continuous residence" such an approach does not withstand scrutiny. The concepts of "residence" and "ordinary residence" are materially different from the concept of "continuous residence". Such an approach would disproportionately elide the weight to be attached to "continuous" and render that word nugatory – a word which does not appear in the second part of s.15(1) (c).

56. In ascertaining the plain intention of the Oireachtas for the purposes of section 5(1)(b) of the Interpretation Act 2005 with respect to the words "one year's continuous residence" it is to be inferred that the legislature attached significant importance to physical presence within the State during the relevant year.

57. As is clear from the notice of decision dated the 11th of October, 2018, referred to above at para. 9, the Minister's approach to the construction of "one year's continuous residence" in the first part of s.15(1)(c) is to operate a clearly communicated practice or policy of allowing applicants six weeks' absence from the State, for work and other reasons, and more time in exceptional circumstances. An applicant must otherwise generally be physically present in the State during the particular year and an application may be refused if there are significant absences.

58. The question arises whether the approach of the Minister improperly fetters the competence conferred on him by the relevant part of the sub-section. Is the approach disclosed in the letter of decision a rigid and inflexible policy operated by the Minister in connection with his construction of the first part of s.15(1)(c), or is it a reasonable policy primarily directed at ameliorating the potential harshness and rigidity of the first part of the sub-section, which places a significant but by no means absolute premium on the continuity of physical presence in the State during the relevant year as one of the preconditions to eligibility for consideration for a Certificate of Naturalisation.

59. In my view, having regard to the overall scheme of the legislation and the tenor of the policy, the latter is the case. The Minister has not adopted a rigid or inflexible policy in construing compliance with the first part of s.15(1)(c). It is apparent that the objective of the Minister is to adopt a purposive, reasonable and pragmatic approach to the operation of that part of the sub-section. It is to be inferred from the criteria referenced in the decision sought to be impugned that a reasonable level of absences in connection with an applicant's employment or otherwise is not inconsistent with "continuous residence in the State" during the relevant one year.

60. The appellant was aware from the outset of and was legally advised in connection with the conditions to be met to satisfy the obligation imposed upon him to discharge the condition at s.15(1)(c) (first part). Whilst it was contended on his behalf before the High Court that "Much of his absences were for work reasons", in fact, it transpires that out of absences from the State aggregating to approximately one hundred days in the relevant year only three of the said days were referable to work.

The adoption of a policy

61. In the instant case, the established policy of the Minister was ameliorative in nature and mitigated the potential harshness of the first part of the sub-section. It operates for the benefit of applicants. It will be recalled that there is no limit to the number of applications for a Certificate of Naturalisation which the appellant can make.

62. Keane J. in *Carrigaline Community Television Broadcasting Company Limited v. Minister for Transport, Energy and Communications* [1997] 1 I.L.R.M. 241 stated: -

> "... The adoption by the licencing authority of a policy could have the advantage of ensuring some degree of consistency in the operation of the regime, thus making less likely decisions that might be categorised as capricious or arbitrary. But it is also clear that inflexible adherence to such a policy may result in a countervailing injustice. The case law in both this jurisdiction and the United Kingdom illustrates the difficulties in balancing these competing values."

63. In my view, it would be wrong to preclude the Minister as decision maker pursuant to the sub-section from formulating a policy identifying criteria calculated to mitigate the potential rigour of the sub-section. Such a policy is in the interests of good administration and consistency in decision making where each application is to be treated as a decision entirely on its own without reference to prior decisions or to any criteria. It is in the public interest that there is clarity so that an individual in the position of the appellant is clear as to how he can meet the condition of "one year's continuous residence in the State" for the purposes of being eligible to apply for a Certificate of Naturalisation.

64. The fact that over ninety percent of the appellant's absences from the State were non-work related is material. A policy which includes provision by the Minister of a period of six weeks to provide for absences in general for holidays and the like is reasonable and it accords with a purposive construction of the relevant part of s.15(1)(c) that such short-term absences from the State would not adversely impact on compliance by an applicant with the statutory residence requirement of "one year's continuous residence in the State immediately before the application".

65. The non-statutory rule or policy operated by the Minister whereby the requirement in the first part of s.15(1)(c) of "one year's continuous residence in the State immediately before the date of his application" could not generally be satisfied in circumstances where the applicant is absent from the State for in excess of six weeks during the relevant year immediately prior to the application in the absence of wholly exceptional circumstances

does not amount to a fettering of discretion. Neither does it amount to the imposition of an extra-statutory barrier to naturalisation nor is it unlawful.

66. The ministerial approach does not fetter discretion but rather facilitates flexibility, clarity and certainty in the operation of the first limb of the sub-section and assists applicants in establishing with certainty how the criterion of "one year's continuous residence in the State" is to be satisfied for the purposes of eligibility to apply for a Certificate of Naturalisation. The approach is sensible and is within the terms of the legislation and is consonant with the public good having regard to the nature of the decision in question and in particular in circumstances where it pertains to what has been described in the jurisprudence as "the purely gratuitous conferring of a privilege in exercise of the sovereign authority of the State" per *Hussain v Minister for Justice and Equality* [2013] 3 I.R. 257 at para. 16, relying on the dicta of Cooke J. in *Jiad v. Minister for Justice, Equality and Law* [2010] I.E.H.C. 187.

67. The criteria identified by the Minister in connection with establishing "continuous residence" are reasonable and balanced and have regard to societal norms regarding foreign travel as at the date of the submission of appellant's application on the 31st August, 2017.

68. The trial judge correctly concluded that the Minister's 'finding' was neither materially wrong nor irrational. However, the Minister's process of getting to that 'finding' did not rest on legal error contrary to the views of the trial judge.

69. The criteria embodied in the policy offer a reasonable and flexible set of criteria whereby compliance with the requirement of "continuous residence" can be established. The Minister was correct in concluding that the appellant did not have such a period of residence as constituted "continuous residence" and same was a finding of fact.

70. Save as aforesaid, the appeal ought to be dismissed.