THE HIGH COURT

[2020 No. 255 JR]

BETWEEN

A.B. (A MINOR SUING THROUGH HER FATHER AND NEXT FRIEND C.D.)

APPLICANT

– AND –

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 30th June 2021.

SUMMARY

This application concerns a decision of the Minister on appeal to refuse a short-stay 'C' visa to a third-country teenager who is hoping to come to Ireland. The impugned decision presents with various deficiencies that have resulted in its being quashed by this Court and the matter returned to the Minister for fresh consideration. This summary is part of the court's judgment.

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1. This application concerns a 16 year old third-country girl who wants to come to Ireland to see her mum, dad, brother and sister. She first made the application for a short-stay 'C' visa when she was 14 years old. She is now 16 years old. There is a handwritten letter on file, written by the girl when she had just turned 14, and which pretty much condenses what is at stake. It

reads as follows (there are errors in the English but I wish my knowledge of the girl's native language was as good as the English of the young girl who wrote the below letter):

"Hello to Irish Government

I am [Name]. I live in [Stated Place]. My parents...and my sister and brother live in Ireland too. They have repeatedly tried reunification the family but all attempts were unsuccessful. The reason are clear at this stage, me and my family don't have the right to do so. We obey the laws of Ireland. As a member of their family, please give me the opportunity to visit the country several times a year and spend some time with my family. Believe me this is very important for me.

I have the right to go from my school a year to a few times in the holiday and I can return to normal. I have a holiday in summer and Christmas and some time a year.

I am so sorry to the government of Ireland that once again please support me and I hope that you will understand and take into consideration this issue and will be positive.

If I have [made] some mistakes...[in my] letter, sorry about that, I'm learning English now.

Respectfully:

[Signature]"

2. On 9th December 2019, following an appeal against an initial refusal, the Department again refused the travel visa sought. That refusal is the subject of these proceedings. The key facts are best detailed by way of brief summary chronology:

4.4.19. Applicant's parents apply for a visit C visa on behalf of the Applicant.

20.5.19. Application refused.

17.7.19 Appeal submitted on behalf of Applicant.

7.10.19. Solicitor sends letter enclosing further documents in support of appeal.

9.12.19. Appeal refused. This refusal is the subject of the within application.

3. The appeal decision is short. However, there is nothing wrong in that. Brevity is the sometimes unappreciated soul of wit. Of course, whether pithy or prolix in her decisions, when the Minister is brought to court in judicial review proceedings she is 'stuck' with whatever decision she has made. She cannot seek, as she has sought in these proceedings, to expand an impugned decision. An impugned decision, to use a colloquialism, must stand or fall 'on its own two feet' in any ensuing judicial review proceedings.

4. The impugned decision is sufficiently short that the pertinent parts can be quoted in full:

> "*The reasons for the refusal of your appeal are as follows:*
>
> *You have previously applied to Join Parent Visa Application 24/06/2016. This application was refused…..It was subsequently appealed….This appeal was refused….*
>
> *In the refusal letter, it is stated in relation to your parents…*[that they] *arrived in the State in 2008 and 2011 respectively. Their asylum requests were subsequently turned down. They were subsequently granted temporary permission to remain in the State as an exceptional measure.*
>
> *One of the conditions of their temporary permission is:*
>
> > *'That you accept that the granting of your temporary permission to remain does not confer any entitlement or legitimate* [expectation] *on any other person, whether related to you or not, to enter or remain in the State.'*

This has led to my concerns on your visit family visa application, where obligations to return [to] *your home country have not been deemed sufficient, Information supplied by you, including letters from your parents (this letter has not been signed), grandmother and…*[Stated Place] *Public School #*[Stated Number] *concerning your personal, economic and family circumstances has been insufficient that you would observe the conditions of any visa granted, with particular regard to the use of public funds and public resources and the possible risk of overstaying in the State.*

The visa sought is for a specific purpose and duration. I am not satisfied that such condition would be observed. Information supplied by you concerning your personal, economic and family circumstances are insufficient in order that the conditions of the visa would be fully observed if granted.

I am not satisfied that you have demonstrated sufficient evidence of strong obligation to return to your home country, where the granting of the visit may result in a cost to public funds and public resources. I must consider the potential risk of costs arising to the State if the conditions of the visa were not to be observed".

5. A number of points might be made about the decision letter before proceeding further.

6. First, while the Minister is perfectly entitled to refer to the previous history of the 'join parent' application, that history will always be there. As counsel for the child submitted at the hearing, it cannot be that because one makes a previous 'join parent' application (and complies fully with the law in so doing) that that will forever be held against one thereafter (in truth it is not clear why it would be held against one that one had done something lawful and complied with the law). Otherwise the situation (doubtless frightening for 'join parent' applicants) would arise that a failed 'join parent' application could greatly impede ever seeing one's child in Ireland. Moreover, as just touched upon, to rely upon a person's past history of complying with the law to support the proposition that she might not in the future comply with the law is

logically unsustainable; insofar as history can be relied upon as a predictive tool a history of past compliance surely points towards the likelihood of future compliance.

7. Second, as to the letter of invitation which the parents wrote, and of which the decisionmaker observes "*this letter has not been signed*", it *was* signed, and the court accepts the contention of the applicant that the decision letter does convey that the fact of the parents' letter not having been signed was being held against the daughter. The purported absence of signature/s was clearly mentioned for some reason and the only reason it could have been mentioned was a negative one: the decisionmaker clearly was not praising the fact that the letter was not signed (though again, for the avoidance of doubt, it was signed). As the requirement that the letter be signed features in the 'Invitation letter' section of the INIS Guidelines, the logical conclusion to be drawn is that the (mistaken) perception that there was no signature was being highlighted as a breach of the guidelines. At the hearing, the Minister tried to turn this into a 'material failure of fact' point. The court has treated at length with the law applicable to 'material error' and 'tolerable error' in a separate judgment being handed down today in *E, F and Z v. Minister for Justice and Equality* and the parties, if interested, are referred to that judgment; there is no point in duplicating that analysis here. But in any event what is objectionable in this regard is not just that (i) the Minister erred in identifying a signed letter as an unsigned letter, but that (ii) the Minister went on to hold it against the applicant that the letter was unsigned (when in fact it was signed).

8. There was suggestion at the hearing that the Minister meant nothing by the observation that the letter was unsigned, but she clearly did and it is unimpressive that the Minister would seek (a) on the one hand to contend that when, in a decision, she identifies a non-existent breach of the Guidelines she means nothing by it, whilst (b) on the other hand she is perfectly satisfied to stand over any breaches that are correctly identified as being meaningful (a particular problem here, of course, being that none of the guidelines-related deficiencies which have been identified in a verifying affidavit sworn by a civil servant for the purpose of the within proceedings are identified in the impugned decision).

9. Third, as to the letter of 31st October 2018 from the school, the court must admit that there were times during the hearing when it wondered if the Minister had read a different letter. The letter states that "*We inform you that* [Stated Name] *has not missed school before and her absence for two weeks will not cause her delay. The school is not against her travel.*" It is

patently clear from this letter that the school has been asked if the child can be absent for two weeks and that, having regard to the child's unblemished attendance record, the school is satisfied for her to absent herself for that period. No reason is given in the impugned decision as to why a letter from a school which patently anticipates that a child with an unblemished attendance record will be absent for two weeks only is somehow deficient in terms of indicating that the child should be back in her home country in two weeks' time. And this Court is tasked with reviewing the impugned decision as it is, not with considering whatever reasons the Minister might have thought to include in the impugned decision but did not: the Minister had her chance, she got her say, she wrote the decision, she must live with the consequences.

10. Fourth, as to the letter from the grandmother (with whom the child lives in her home country), the court must admit that again there were times during the hearing when it wondered if the Minister had read a different letter. It is a little longer than the school-letter and reads as follows:

> "*I,* [Stated Name] *am applying* [to] *the Government of Ireland with great respect, I have a great request to give opportunity to my granddaughter* [Stated Name]*, to visit Ireland as a tourist, to visit her parents for 2 or three weeks, as they live in Ireland.*
> *Please, give opportunity for her to see the country and get used to it before you award the status of unification of the family. I have been* [Stated Name's] *guardian for already 7 years. I will continue my duties as she comes back and until she receives the official right to live with her parents*". [Emphasis added]

11. The court freely admits to being mystified by the reading that the Minister has sought to place on this letter, *viz*. that it somehow suggests that the child is set to remain in Ireland. The grandmother indicates that the child is coming "*as a tourist*", that she is coming for "*2 or three weeks*" and that the grandmother will continue to look after the child "*as she comes back and until she receives the official right to live with her parents*". It is obvious that the family has some long-term hope that the child may yet get permission to live in Ireland but it is just as obvious from the above-quoted letter that (commendably) the grandmother intends to act lawfully and look after the child "*until she* [the child] *receives the official right to live with her parents*" whenever that happens, if ever. (The court understands from the submissions at the

hearing that the parents are now on the long path to Irish citizenship and that if and when they become citizens they hope to make a new application, as citizens, to have their daughter join them here).

12. As to the point concerning the means to support the child while she is here (encompassed by the reference to "*economic circumstances*"), the child's family are undoubtedly poor. But as there is no sign of them becoming rich, the logical effect of this proposition would seem to be that the daughter is unlikely ever to be allowed to visit for so long as her family remain as poor as they are. That is a proposition which raises quite profound moral issues. But those issues aside (and this is not a court of morals), the economic resources point when brought to bear in this case is, with respect, irrational. As was noted by the solicitor for the applicant in a letter of 17th July 2019 to the Minister, the parents in this case have managed to put together the money in the past to fund return family visits for four to the third country, and if they can fund a family holiday for four (plus one) in that country, they can presumably fund a home-stay holiday in Ireland when but one person has to be flown in from the third country and then back again. It is illogical to posit that a family which has shown itself able to pay for the more expensive of two options would not be able to afford the much less expensive of two options.

13. The decisionmaker moves on to observe, *inter alia*, as follows:

> "*The visa sought is for a specific purpose and duration. I am not satisfied that such condition would be observed. Information supplied by you concerning your personal, economic and family circumstances are insufficient in order that the conditions of the visa would be fully observed if granted.*"

14. It has been suggested by counsel for the applicant that she and her family feel that they are being condemned as liars by the Minister when they are (and they seem to be) solid, law-abiding people. The court respectfully does not read the impugned decision so. The Minister is stating that, having considered matters, the Minister is not satisfied that the terms of the visa would be complied with. That is not the same as saying 'I think you may be telling lies', it is simply bringing a standard to bear and stating, rightly or wrongly, that that standard has not been met to the Minister's satisfaction. There is no easy way for the Minister to 'sugar-coat' that conclusion; however, it is not a suggestion that anyone is lying.

15. The court asked at the hearing how a child of 14 (now 16) years old who has barely started out in life is expected to show that she will return to her home country, beyond proving that she will return to school, school being the only 'formal' thing that most children do (maybe also in some instances holding down a part-time job once they turn 16 or 17 years of age). Counsel for the Minister mentioned that perhaps a lease showing a continuing tenancy or title deeds showing that the grandmother lives in a two-bedroomed house would be the kind of things expected. But as counsel for the child noted, there is no normal 14 (now 16) year old who has a tenancy agreement. And the court would respectfully note that the grandmother could be living in a palace in the child's home country but that fact would likely make no difference if a child's natural affections for her parents prompted a desire within her to overstay in Ireland with her parents (though again, *inter alia*, the letter from the school and the grandmother point to the clearest intention that the child will go home).

16. The questions in Bold text below arise to be answered in these proceedings. The court answers each question after posing the question in Bold text. Again, the court notes that what falls to be reviewed in these proceedings is the impugned decision and the reasoning therein, ***not*** the decision, the reasoning therein, and such other reasons that have been volunteered since the making, and outside the text, of the impugned decision.

17. Q1. Is the Minister's decision of 9th December 2019 unreasonable in circumstances where (i) the decision is effectively based on a finding that the 16 year old applicant and her parents are being untruthful when they say that their intention is that she will return to the third country and (ii) no reasons have been given for rejecting the credibility of the statements made?

18. A1. As to (i), the court refers to its observations in para.14: it does not see that anyone is being called a liar. As to (ii), there seem to be three reasons for rejection the application (the court does not see what has occurred as a rejection of credibility for the reasons stated in para.14). First, that the child made previous application to join her parents here the unstated implication, it seems, being that there is a desire to overstay on any travel visa. As mentioned above, the court does not see how logically a past history of complying with the law can be relied upon to support the proposition that one may not do so in the future: surely that past history points in precisely the opposite direction? Second, the allegedly deficient letters, the

reasoning in respect of which is inadequate for the reasons stated at paras.7-11. Third, the Minister seems to look adversely on the fact that the family are poor (reference is made to their "*economic circumstances*"), but as there is no sign of the family becoming rich, the effect of this proposition is that the daughter will never be allowed to visit for so long as they are poor.

19. Q2. If the court were to find that reasons were in fact given for the adverse credibility finding made against the applicant and her parents, are such reasons invalid on the basis that they are not intelligible, specific, cogent and substantial?

20. A2. Again, the court does not see what has occurred as a rejection of credibility for the reasons stated in para.14. As to the reasonableness of the reasons given for the refusal of the application, the court has essentially answered this question in its response to limb (ii) of Q1.

21. Q3. Is the respondent's decision of 9th December 2019 unreasonable, irrational, contrary to the Minister's own policy and in breach of the principle of *audi alterem partem*, in circumstances where the Minister has found that the documentation and information provided for the purposes of evidencing the applicant's obligations to return to her home country is insufficient, notwithstanding the fact that the applicant has provided all the documentary evidence required for this purpose by the respondent's published policy?

22. A3. The court does not see this as the problem presenting. One could provide all the information mentioned in the guidelines and, at the end of the day, the Minister still retains a discretion as to whether or not to grant the visa sought. (On the extent of the Minister's discretion, see *RMR v. Minister for Justice, Equality and Law Reform* [2009] IEHC 279, at para.25). The problem presenting is the fact of the manifold deficiencies in the impugned decision, as identified throughout this judgment.

23. Q4. Is the respondent's decision of the 9th December 2019 invalid by reason of being based on a material error of fact, in circumstances where the Minister has incorrectly stated in the decision that the invitation letter from the applicant's parents is unsigned?

24. A4. The treatment of the parents' letter is undoubtedly problematic for the reasons identified in para.7 above. Along with the other problems presenting and considered herein,

the difficulties identified in para.7 have led the court to its decision to quash the impugned decision.

25. Q5. Is the Minister's decision of 9th December 2019 unreasonable and disproportionate in light of the personal circumstances of the applicant and her family members, as detailed in the application?

26. A5. In light of the various deficiencies that the court has indicated (in its answers to the just-considered questions and elsewhere in this judgment) to present in the impugned decision, the court considers that the impugned decision is unreasonable and disproportionate.

27. Separate from the particular questions perceived to arise in the within application, another three points fall to be treated with.

28. First, the pre-litigation letter point. The court notes that the statement of opposition mentions, and the point was also raised at the hearing, "*that the applicant failed to send any pre-action letter prior to the institution of proceedings*". As this Court made clear in *Mukovska v. Minister for Justice and Equality* [2018] IEHC 641, at para.5, now almost three years ago:

> "[I]*t remains the case that there is no obligation to issue such a letter (absent contrary legislative provision, and here there is no such provision applicable, and…the court does not see how, absent some other factor presenting, it could affect its application of discretion in judicial review proceedings that an applicant did not do what she was obliged to do.*"

29. The decision in *Mukovska* was appealed by Ms Mukovska and judgment in that appeal is awaited but, tellingly, the Minister did not make any cross-appeal in that case against the just-quoted observation.

30. Earlier this month this Court was obliged to address a similar point in *McDaid v. Monaghan County Council* [2021] IEHC 402, admittedly a planning law case though nonetheless of interest. There, a person commenced planning proceedings by reference to the erroneous details on a Council file, the erroneous nature of those details was realised during

the discovery stage, the proceedings were then abandoned, and the Council sought its costs, contending, *inter alia*, that the proceedings could have been avoided if, instead of suing on the contents of the planning file, the plaintiff had first engaged with the Council by way of pre-action correspondence. The court, in the course of its judgment, observed as follows, at para.4:

> "*If the court might deal with the last point first, there is no legal requirement on a party to double-check with a planning authority that it has done its job right before commencing court proceedings arising out of an error on a planning file. A party is entitled to commence judicial review proceedings by reference to such documentation as exists on the relevant planning file. Where a planning authority has erred (be that a clerical error – and a clerical error, though clerical, is nonetheless an error – or a more substantial error) then the consequences of that error will play out in whatever way they play out in the ensuing proceedings. Of course, planning authorities and staff within planning authorities will err – we are all human and we all err – and the courts do not require that people or processes be perfect. But neither do the courts require a double-checking process such as that contended for by the Council, whereby an affected person needs to engage in correspondence with a planning authority before commencing court proceedings in respect of an ostensible, documented error of timing that eventually turns out to have been a clerical error, rather than a more substantial error.*"

31. The law is the law. If the Minister wishes to change the position as outlined in *Mukovska* and/or there is a desire within Government to change the law as outlined in *McDaid*, then the gates of the Oireachtas are open and the Executive may try its luck with our democratically elected lawmakers. The court frankly does not understand why the Minister would leave the above-quoted portion of *Mukovska* unchallenged in the appeal in that case and then come to court three years later and say the legal position is somehow different from the position that she had left unchallenged.

32. The court cannot but note in passing the irony of the Minister pointing, on the one hand, to the perceived desirability of pre-litigation correspondence and, on the other hand, declining

to respond to parties' queries during the application process (albeit that, irony notwithstanding, the Minister's 'you provide the information, I decide the application' stance has previously been endorsed by the courts, for example, in *Khan & Ors v. Minister for Justice* [2017] IEHC 800, and the court does not seek to cast doubt upon the undoubted correctness of that case-law).

33. Second, as to the verifying affidavit sworn by the civil servant on 13th November 2020, the Minister is gently reminded that it is not possible to cure deficiencies in an impugned decision by way of verifying affidavit in later judicial review proceedings, and that seems very much what is at play in para.25 of the verifying affidavit, 'picking up' on points that could have been made in the impugned decision and were not. Those points (referred to in the said verifying affidavit but not in the impugned decision) concern a perceived failing on the part of the applicant to comply with certain elements of the applicable INIS guidelines. However, any such perceived failings should have been pointed to in the impugned decision and would require briefly, but informatively, to be described therein, *i.e.* it would not suffice simply to point to an unspecified failure to comply with those guidelines and refer an applicant generally to the guidelines. One cannot but recall in this regard what seems to have been the following slightly (and, if so, understandably) exasperated observation of Murphy J., some three decades ago in *O'Donoghue v. An Bord Pleanála* [1991] 1 I.L.R.M 750, at p.757:

> "*I wish to say, though it is surely unnecessary to do so at this stage of the evolution of the jurisprudence, that I agree with that formulation of why, in point of law, it is necessary for a deciding body to give reasons. It is a practical necessity that reasons be stated with sufficient clarity that if the losing party exercises his or her right to have the decision reviewed by the superior courts, those courts have the material before them on which to conduct such a review*",

as well as the more recent, related observation of Fennelly J. in *Mallak v. Minister for Justice* [2012] 3 I.R. 297, para.69, that

> "*Several converging legal sources strongly suggest an emerging commonly held view that persons affected by an administrative decision*

have a right to know the reasons on which they are based, in short to understand them".

34. No reader could have any idea from the text of the impugned decision that the very specific types of deficiency referred to in para.25 of the verifying affidavit were of concern to the Minister. Indeed, if these deficiencies were of concern to the maker of the impugned decision, the within proceedings might well have been avoided if the said deficiencies had but been stated in the impugned decision of December 2019 instead of in the verifying affidavit of November 2020. That those deficiencies were not stated, however briefly, offends against the principles identified in the above quoted extracts from the judgments of Murphy and Fennelly JJ. in *O'Donoghue* and *Mallak* respectively, and that offence cannot now be cured by way of verifying affidavit.

35. Third, the "*continuing effect*" point. Counsel for the Minister suggested, by reference to *Leng v. Minister for Justice and Equality* [2015] IEHC 681, at para.48(iv), that in the exercise of its discretion in this case the court should have regard to whether the decision has continuing effects. The court has done so and sees no reason to present why a party who has sought to do everything right, who has met with a decisionmaker who has made multiple errors in her decision and lost on almost every point in the ensuing judicial review proceedings, should be told by the court that notwithstanding all the foregoing it was going to let a thoroughly deficient decision stand and she could go back and try her luck with the decisionmaker in a fresh application – with such a conclusion, the court anticipates, likely to be followed hard on by an application herein by the Minister that the applicant having been denied any relief ought not to get some or all of her costs. The court does not understand the discretion that it enjoys in judicial review proceedings to be a discretion to fly in the face of what justice demands. Nor are *Leng* (or *O'Keeffe v. Connellan* [2009] 3 I.R. 643 on which it draws in part) authority for any contrary proposition. The impugned decision, for the reasons identified in the within judgment, is seriously deficient and hence will be quashed.

Conclusion

36. The court will quash the impugned decision and remit the matter to the Minister for fresh consideration.

37. Because the applicant is a child the court has elected to anonymise the parties.

38. Given that the applicant has succeeded in this application and that this judgment is being delivered remotely, it may assist for the court to note that it proposes to make an order for costs in favour of the applicant. If either party objects to this proposed course of action, counsel might kindly advise the registrar or the court's judicial assistant within 14 days of the delivery of this judgment and the court will then schedule a brief costs hearing.

TO THE APPLICANT:
THIS JUDGMENT MEAN FOR YOU?

Dear Applicant

I am always concerned that because applicants in visa application cases are foreign nationals for whom English may not be their first language, they should, if possible, be placed by me in a position where they can understand the overall direction of a judgment that has a sometimes great impact on them. I therefore briefly summarise my judgment below. This summary, though a part of my judgment, is not a substitute for the detailed text above. It seeks merely to help you understand what I have decided. The Minister requires no such assistance. So this section of my judgment is addressed to you, the applicant, though copied to all. Your lawyers will explain my judgment more fully to you.

You asked me to look at the Minister's decision of 9th December 2019 to refuse you a short-stay 'C' visa for which you had made application. I have done so and consider that the Minister's decision is so flawed that (i) it should be quashed and (ii) your application should receive fresh consideration.

Yours sincerely

Max Barrett (Judge)