Neutral Citation [2013] IEHC 296

THE HIGH COURT

JUDICIAL REVIEW

Record No. 2012 / 786 J.R.

Between:

A. J., K.J., Z.J. (A MINOR, SUING BY HIS FATHER AND NEXT FRIEND A.J.) AND R.J. (A MINOR, SUING BY HER FATHER AND NEXT FRIEND A.J.) [AFGHANISTAN] (No. 2)

APPLICANTS

- AND-

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT OF MS JUSTICE CLARK, delivered on the 18th day of June 2013

1. These are among the most unusual proceedings which this Court has encountered. The applicants seek declarations within judicial review proceedings of the respondent Minister's decision dated the 22nd December, 2008, which granted permission to the first applicant A.J. to remain in Ireland.

2. A.J. and his wife and children are nationals of Afghanistan. His children Z.J. and R.J. are minors and they live with their mother K.J. in Iran and have never been in this State. The proceedings are intrinsically involved with the Minister's refusal to grant them long stay visas to join their father / husband in Ireland. They seek a series of declaratory reliefs but do not challenge the refusal to grant the visas as might be expected. Instead, they challenge the adequacy of the reasons given for the Minister's positive decision granting A.J. leave to remain.

3. A.J. claims that his wife and children are currently living illegally in Iran in very deprived conditions. The Minister's refusal to grant visas permitting them to enter and reside in Ireland was stated to be due to his general policy not to permit any person, whether related or not, to join or visit any persons who have been granted temporary permission to remain in the State. Thus, persons facing deportation who are granted leave to remain are informed that they cannot have any legitimate expectation that family members will be permitted to join them. While the decision to refuse the visas might have been the obvious object of challenge, the applicants have elected to pursue a particularly tortuous route and mounted this very unusual and inventive set of proceedings.

4. While legal inventiveness is a powerful and admirable tool to challenge rigidly held legal concepts which in turn may lead to the recognition of previously unspecified or enumerated rights, the Court is not convinced that legal creativity has any place when dealing with facts.

5. The facts are that the case comes before the Court by order of Ryan J. dated the 17th September, 2012, when the applicants sought leave on an ex parte basis to apply for judicial review of the Minister's decision in order to obtain the following reliefs:-

> *(i) A declaration that the first applicant is entitled to be given reasons for the decision made on 22nd December 2008 granting him permission to be in the State pursuant to s. 4 of the Immigration Act 2004;*
>
> *(ii) A declaration that the decision, and the reasons therefore, on their true construction, being based on the specific facts of the applicant's case amounts to an acknowledgement of the respondent that the first applicant is entitled to protection on the basis of non-refoulement;*
>
> *(iii) In the alternative, a declaration that the purported reasons furnished to the first applicant on 18th June 2012 are so opaque as to render the applicants' constitutional right of access to the courts pursuant to Article 40 of the Constitution ineffective;*
>
> *(iv) An order directing the respondent to furnish full and clear reasons for his decision of 22nd December 2008, as further clarified on 18th June 2012.*

6. Ryan J. granted leave to the applicants to seek reliefs *(i)* and *(iii)* but he directed that the application for leave to seek relief *(ii)* should be moved on notice to the respondent Minister. The applicants issued and served their motion and also applied for an urgent prioritised hearing. In support of that application documents relating to A.J. and to his wife and son were furnished *ex parte* to the Court and ultimately, by direction of this Court, to the Minister. The situation urged on the Court in support of the application for priority related to the son's ill health, the poor conditions under which the family were living in Iran and the length of time the husband / father was waiting to be reunited with his family. The respondent then served a counter-motion seeking to have the order of Ryan J. set aside on the basis that the application for leave to seek all reliefs should have been moved on notice to the respondent. That motion was considered by this Court and refused by decision dated the 24th January, 2013 (*A.J. v. The Minister* [2013] IEHC 27).

7. The substantive case proceeded on the 14th and 15th March, 2013. Ms Sunniva McDonagh S.C. with Mr James Buckley B.L. appeared for the applicants and Mr Frank Callanan S.C. with Mr David Conlan Smyth B.L. appeared for the respondent. The Court was informed at the end of the proceedings that an appeal to the Supreme Court had been lodged by the respondent in relation to the determination of the preliminary issue of whether the entire leave application should have been on notice to the Minister.

Time

8. The respondent argues that the applicants are significantly out of time in bringing these proceedings which were commenced in mid-September 2012. The Court has ruled that the decision of the 22nd December, 2008 is not governed by Section 5 of the Illegal Immigrants (Trafficking) Act 2000 and so the applicants are subject to the *three month* time limit prescribed by Order 84, rule 21(1)

of the Rules of the Superior Courts. As *certiorari* is not sought, the time limit is unaffected by the 2011 amendments to that Order but the applicant father remains very much out of time. The applicants argue that the time limit did not begin to run until the 18th June, 2012, when pursuant to a Freedom of Information request the Minister released a Memorandum to the applicants which contained a reference to Section 5 of the Refugee Act 1996. In their contention it was not until then that the applicants became aware that the Minister had considered Section 5 in arriving at his decision to grant leave to remain and that this previously unknown factor cast new light over the 2008 decision. The applicants assert that only then did they become aware of the possibility that leave to remain was granted because the Minister believed that to return A.J. to Afghanistan would effect a prohibited *refoulement*, and was not based on humanitarian grounds. The respondent refutes this contention, arguing that the applicants are using this untenable argument to overcome their unconscionable delay. The Court agreed to hear the application in full before determining the delay issue.

BACKGROUND

9. It is common case that the immigration history of A.J. is material when considering the Minister's reason(s) for granting him leave to remain. He came to Ireland from Afghanistan in December 2004 in search of asylum, leaving his wife and three small children behind. He claimed that he was a member of the Hazara ethnic group and a Shia Muslim from a village in the Ghazni region of central-east Afghanistan. His father was a supporter of the socialist Khalq regime and later joined the insurgent Hizb-i-Islami to fight the Soviet invasion. A.J. followed suit in 1994. He claimed that he was part of a security team led by his father, which operated from a base under the command of a local chief. In early 1995 the chief surrendered to the Taliban and thereafter A.J. and his father fought with the Taliban. He says that he remained mainly involved in security, transporting weapons and conducting searches and interrogations although he was also involved in frontline fighting for a period in 1998. In 2001, after the Northern Alliance came to power, his brother was arrested by the local security commander and killed. After the Taliban was defeated, A.J. and his father went into hiding for some months but in March 2002 his father returned[1] and A.J. later learned that his father had been tortured and killed and his body left to rot in the street. A. J. then went to northern Iran where he remained for two years until he was arrested and returned by the Iranian authorities to the Afghan border in 2004. He feared being arrested by government forces so he travelled to Pakistan and then to Ireland with the assistance of a people-smuggler who had previously been in business with his father.

10. A.J. told the asylum authorities that he feared a return to any part of Afghanistan as he is Hazara, an ethnic minority. His asserted fear of persecution was also associated with his history in the Taliban and the Hizb-i-Islami and was complex, confused and inconsistent. On his questionnaire he said he feared the current government and the Alliance Front (seemingly a reference to the military wing of the Northern Alliance, also known as the United Front). He said he had been involved in the arrest of commanders from the Alliance Front and in forcibly recruiting members of the Alliance Front to fight against that group and against American forces. He also claimed to have "*eliminated and killed*" those responsible for his father and brother's deaths and he submitted three documents which referred to his alleged involvement in the murder of two men, including a military commander.[2]

11. At interview he claimed that that his legal representative had promised to cross out the reference to his involvement in killings but had left it too late. He also blamed his bad handwriting and his lack of literacy for the mistake. Both at interview and later on appeal he sought to resile from any suggestion that he had ever been involved in killings or in any human rights abuses although he was aware that they had occurred. In his notice of appeal he denied killing the two men whose names appear on the newspaper articles he himself had earlier submitted and said that the purpose of the arrest warrant had been to force him to come out of hiding so that he would be killed. He also said he feared the local Hazara – his own tribe – who had suffered under the Taliban, as he had arrested a number of Hazara while fighting for the Taliban. At his oral hearing he said local people mistakenly believe him to be responsible for the death of two commanders because his group had captured the commanders on a previous occasion. The commanders' deaths apparently coincided with the death of A.J.'s father and mother. He later denied any involvement in beating or executing people as his role was to arrest people and not to mete out punishment and he always followed orders. The reference in his questionnaire to having "eliminated and killed" people must have been a mistake in translation but when the translator confirmed the translation was correct he attempted to state that he was illiterate and could have made a mistake and what he meant was that he was accused of having done so.

12. Whatever the truth of these conflicting positions, the Refugee Applications Commissioner found no evidence that he was a high profile figure under the Taliban and found that as the interim government were no longer pursuing low level former Taliban members and as the situation was gradually improving for Hazaras, he was not in need of international protection. It was found that the evidence submitted failed to substantiate his claim.

13. At the appeal stage A.J. submitted a letter from the Examining Physician at SPIRASI to A.J.'s then General Practitioner dated the 30th June, 2005, which stated that he was suffering from major depressive disorder and panic attacks and needed bereavement counselling and psychiatric help. It stated that his mother had died shortly after his father was killed.[3] Later he learned that the oldest of his three children, his son, had died in hospital in Afghanistan. He told the Tribunal Member at the appeal hearing that he had died of grief. To add to his troubles he claimed that his wife received no protection from Hazara members of government after his departure.

14. In a very thorough appeal decision, the Tribunal Member accepted that A.J. was highly disturbed and had suffered as a result of bereavements in his family. While she noted inconsistencies in his account and found that the three documents submitted in support of his claim that he was wanted by the government authorities were not genuine; for the most part she believed his evidence and accepted that he had been a low level member of the Taliban and Hizb-i-Islami. However, she found that he had never been in a position of command and that country of origin information (COI) indicated that a person in such position would not be at risk within Afghanistan. She accepted COI which advised that while the Hazara ethnic group may face social discrimination in some areas, there was no risk of persecution by reason of ethnicity. Having so determined she made the following remarks which are relevant to subsequent events:

> *"Finally, it was submitted to me that the simple act of returning the Appellant to his country, **given his mental state**, would amount to persecution. As noted above, my enquiry is limited to considering whether the Appellant falls within the definition set out in Section 2 [of the Refugee Act 1996], I have concluded that he does not. I have no jurisdiction to recommend that the Appellant be given leave to remain **on humanitarian grounds**, however I can certainly suggest that the Appellant would be clearly an appropriate candidate given the suffering he has experienced, the loss of family members, and the fragile state of Afghanistan at present. The general feeling of insecurity in Afghanistan could certainly exacerbate any symptoms the Appellant currently suffers." (The Court's emphasis)*

15. She made a negative recommendation to the Minister and on the 29th December, 2005, A.J. was informed that he would not be declared a refugee. He was invited to make representations to remain temporarily in the State.[4] No challenge was brought to the decision to refuse his appeal.

First Leave to Remain Application
16. In January 2006 his legal representatives, the Refugee Legal Service, applied on his behalf for humanitarian leave to remain. The submissions indicated that details of the persecution he had suffered would be apparent from his file. It was stated that his son had died at the age of seven due to the stress of witnessing his grandfather's death and that his wife and other two children remained in Afghanistan. The Minister was asked to exercise compassion and to grant him permission to remain in the State because of his depression and post-traumatic stress disorder outlined by a SPIRASI psychiatrist. It was further submitted that to return him to Afghanistan would breach Section 5 of the Refugee Act 1996 and / or Articles 3 and 8 ECHR. It was stated that he would face a serious risk to his life or liberty if deported and the Minister was referred to the documentation previously submitted on foot of the asylum application and to six COI reports on Afghanistan. No specific fears other than those expressed during the asylum application were identified.

17. The same medical reports used for the Tribunal hearing were submitted together with a new letter from a SPIRASI counsellor indicating complaints of discomfort / pain in his chest and right side. Testimonials with regard to his good character were sent together with a personal letter from A.J. dated the 24th January, 2006, which reiterated his fears and his grief because of the loss of his elder son in 2005 as a result of a serious psychological illness. His fear was that as he had been a political activist in Afghanistan he would be arrested, targeted as a criminal and sentenced to death. He said human rights are not observed in Afghanistan and many Hizb-i-Islami and Taliban members had been arrested, persecuted, abused and killed by the authorities in unknown prisons throughout the country. He said he had been arrested and tortured by the Northern United Forces during the time of the Taliban and was left with serious injuries to his chest, hand and legs.[5] He said he was using several kinds of medication and suffered from anxiety about the future.

18. These personal submissions were followed in February 2006 by a report from a counsellor stating that he was suffering from acute symptoms of post-traumatic stress disorder having experienced the death of both of his parents, his brother and his son. She recommended as follows:

> *"I strongly recommend Minister, that Mr [J] should be considered as eligible for Leave to Remain on humanitarian grounds as well as health grounds, so that he may access services for his ongoing recovery which would certainly not be available to him, given the fragile state of Afghanistan at present. I strongly believe that given Mr [J]'s present psychological state of mind, the mention of possible return to his own country would seriously exacerbate his present symptoms." (The Court's emphasis)*

19. However, before any decision was taken, A.J. was involved in May 2006 in a highly publicised protest by Afghan asylum seekers seeking to bring attention to their living and accommodation conditions. The publicity surrounding this demonstration / protest led to an attempt to bring a fresh application for asylum.

Section 17(7) Application
20. In late June 2006 Burns Kelly Corrigan Solicitors applied for permission for A.J. to be re-admitted to the asylum system pursuant to Section 17(7) of the Refugee Act 1996, arguing that his situation had changed significantly arising from the "*serious and widespread*" publication of his identity in national and international media following his involvement in the protest. It was submitted that this may have placed him in a position of grave danger, especially if returned to Afghanistan, and that this danger was compounded by publication of the details of (other) protesters who had allegedly committed heinous crimes in Afghanistan including politically motivated murder and rape. It was asserted that every person who had participated in the protest was now under suspicion of having perpetrated such acts. Two newspaper articles relating to the protest were submitted together with more detailed submissions relating to a web-search showing about 137,000 hits for the terms "Afghan hunger strikers Dublin" and reports detailing the worsening situation in Afghanistan.

21. The application to be readmitted into the asylum system was refused. The memorandum of May 2007 setting out the recommendation to the Minister found the application to be without foundation. In the course of the assessment of the Section 17(7) claim, it was noted that A.J. was entitled to apply for subsidiary protection and for temporary leave to remain when the Minister would consider any refoulement issues raised. There was no challenge to the Minister's decision not to re-admit him to the asylum system.

Updated Leave to Remain / Subsidiary Protection Claims
22. In early July 2007 A.J. applied for subsidiary protection and re-submitted the leave to remain application made in January 2006. The subsidiary protection application focused on the same issues as the asylum claim and Section 17(7) applications. Recent newspaper articles and a COI report were furnished to the Minister in relation to the growing strength of the Taliban.[6]

23. In September 2007, the Minister was informed that matters had come to light which added "*extreme urgency*" to the pending applications as his family was now in Iran where his son was about to undergo a very serious heart operation. The increased stress this news had placed upon A.J. was described and the Minister was asked to expedite matters in light of these traumatic events as A.J. wished to be with his son in Iran for the operation. In January 2008 the Minister was informed again that his wife and children had escaped from Afghanistan to Iran, that his son needed an operation and that A.J.'s health had deteriorated.

24. No decisions were forthcoming on either the leave to remain application or on his application for subsidiary protection, made two and a half years and twelve months earlier. On the 17th June, 2008, A.J.'s current solicitors, Jeanne Boyle & Co, made updated submissions in support of the leave to remain and subsidiary protection applications. There was no fresh information on the family's then living conditions and the same asserted facts previously put before the Minister were repeated. Some further details on the experiences suffered by A.J.'s wife and children while seeking to enter Iran were furnished and it was stated that they fled Afghanistan to escape the deteriorating situation there but when they arrived in Iran they were detained and Mrs K.J. was repeatedly raped. His son was seriously ill and the situation of his wife and children was a source of great stress and anxiety to him. It was stated that the situation in Afghanistan remained dangerous and that there was indiscriminate violence with civilians at risk of torture and death. The Minister was asked to consider the comments made by the Tribunal Member in 2005 as to his suitability for leave to remain. [It will be recalled that the Tribunal Member suggested that he might be a suitable candidate for leave to remain on humanitarian grounds.] The updated subsidiary protection representations detailed that his wife and children were detained after crossing the border into Iran at Zaidan but they eventually escaped and were now living in Tehran where the situation for them was bleak.[7] It was further submitted that the UNHCR had assessed that the Ghazni area of Afghanistan, where the applicants are from, as insecure and that there was a risk of indiscriminate violence if they returned to Afghanistan where COI indicated that State protection and internal relocation were unavailable. Nine COI reports were furnished to the Minister with those submissions.

25. Two weeks later, further medical reports on A.J.'s emotional and psychological difficulties were furnished. UNHCR eligibility

guidelines for assessing the international protection needs of Afghan asylum seekers were furnished in October 2008 and in early December 2008, in response to "recent correspondence" which is not exhibited, A.J.'s passport photos were furnished and the Minister was informed that it was not possible for A.J. to obtain a passport from the Afghani authorities.

26. Finally, in December 2008, A.J. was refused subsidiary protection but granted permission to remain in Ireland for a period of two years.

The Decision Refusing Subsidiary Protection but Granting Leave to Remain
27. The decision refusing subsidiary protection was notified to A.J. by letter dated the 22nd December, 2008, when the Repatriation Unit wrote to him in the following terms:

> *"Dear Mr. [J].*
>
> *1. I am directed by the Minister for Justice, Equality and Law Reform to refer to your application for subsidiary protection under the European Communities (Eligibility for Protection) Regulations, 2006 S.I. No. 518 of 2006 ('the Regulations') dated 09/09/2008. Your application was considered in accordance with the above Regulations and the Minister has determined that you are not a person eligible for subsidiary protection. A copy of the report setting out the Minister's determination is enclosed for your information.*[8]
>
> *2. The Minister has also considered whether a deportation order should be made in respect of you,* ***having regard to the matters referred to in section 3(6) of the Immigration Act, 1999****. In that regard, I am directed to inform you that as an exceptional measure, the Minister has decided to grant you temporary permission to remain in the State for two (2) years until 22 December 2012. You will be required to apply one month before the end of the expiry period if you wish to renew this permission. […]*
>
> ***The following conditions will apply to your permission to remain in the State:***
>
> *- That you will obey the laws of the State;*
>
> *- That you will not become involved in criminal activity;*
>
> *- That you will make every effort to become economically viable in the State by engaging in employment, business or a profession;*
>
> *- That you will take all steps … to enable you to engage in employment …;*
>
> *- That you will reside continuously in the State;*
>
> *- That you will accept that the granting of your 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." (Emphasis in original)*

28. The refusal to grant subsidiary protection was not challenged. A.J. applied to have his permission to remain renewed in November 2010 and in January 2011 it was renewed until the 22nd December, 2013, again "*[a]s an exceptional measure*".

Visa Applications
29. Meanwhile in February 2010 the applicants' solicitor lodged 'D class' visa applications with the Irish Embassy in Iran for his wife and children to join him in Ireland. A version of the said applications was sent to the Visa Section of the Department of Justice. Once again information relating to the death of his brother, father, mother,[9] eldest son, the difficult circumstances of the wife and children in Iran, their past experiences in Afghanistan and later in Iran and his son's kidney and cardiac problems was furnished.

30. In January 2011 the Visa Section refused the applications reciting that the grant of family visas to those who had leave to remain was contrary to public policy and that they had not shown any compelling grounds as to why an exception should be made. Significantly, the accompanying memorandum noted that the mother had been issued with an Afghan passport in October 2009 which included both children and that A.J. also had an Afghan passport issued in April 2009, which suggested that they did not have difficulties with the Afghan authorities. It was noted that there was evidence that A.J.'s son had been receiving treatment for his condition in Iran for quite some time and that A.J. had spent time in Iran in 2009 on foot of a visa from the Iranian authorities which was stamped on his Afghan passport. It was accepted that the situation in Afghanistan remains fragile, that A.J. was suffering from a severe depressive disorder and that reports indicated it would not be good for his psychological well-being if he were returned to Afghanistan.

31. The applicant's solicitors lodged an appeal against the refusal of the visas and at the same time informed the Minister that Mrs K.J.'s Afghani passport had been renewed and was valid until 2016. By further letters in May 2011, it was submitted that the family was in "serious danger" in Iran and a medical report prepared by SPIRASI dated the 24th February, 2011, was re-submitted which described A.J.'s extreme distress over the conditions relevant to his family in Iran but suggested that he had the potential for a full recovery and meaningful life now that his safety and security were guaranteed in Ireland.

32. The appeal failed and the decision dated the 22nd July, 2011, gave the same reason for refusing visas to A.J.'s family:-

> *"It is not general policy to permit any person, whether related or not, to join or visit persons who have been granted temporary permission to remain in the State. Your case has been fully examined and you have not shown any compelling grounds as to why an exception to this policy should be made in your case.*

33. Again, no challenge was brought to the reasonableness of this decision in the light of the family's asserted difficulties. The applicants would now be significantly out of time to bring proceedings challenging the visa refusal decisions.

Provide reasons for the leave to remain
34. While awaiting a decision on the visa appeal, the applicants' solicitor wrote in February and again in May 2011 to the Minister seeking the reasons for the decision to grant leave to remain. This request must have elicited some surprise in the Minister's department but notwithstanding the unique nature of the request, two letters of reply were sent. The general tenor of the letters was that all matters relevant to Section 3(6) of the Immigration Act 1999 were considered in coming to the positive decision, that "*the Minister used his discretion by deciding not to sign a Deportation Order"* and that "*having weighed up all the factors in favour of*

deportation as against those favouring the granting of leave to remain in the State, the Minister concluded that the factors against deportation held the greater weight."

35. No information was put before the Court to explain why the reasons for a positive humanitarian leave to remain were sought.

36. Although not strictly relevant to this review, the Court was informed that on the 13th August, 2012, the wife and children applied online for 'D class' visas. Those applications have been returned with a note suggesting that the applications should be made to the Embassy in Tehran. It was submitted that this puts the family in a *Kafkaesque* position as the said embassy has recently closed.

37. The respondent pointed out that the Minister's successive refusals to grant visas are not challenged in these proceedings. The applicants replied that this is because they are not in a position to dislodge the negative visa decisions without first knowing the true nature of the leave to remain decision. However, at a later stage in the hearing which was conducted over several days, it became apparent that the applicants' motive was the hope that if it was established that a *refoulement* based decision was the reason for the leave to remain, that would strengthen their visa applications and would render irrational the conclusion that there were no exceptional circumstances bringing this family outside of the general policy of excluding the family members of those granted leave to remain.

Records Released under FOI

38. In July 2011 the applicants' solicitors made a request to the Minister under the Freedom of Information Acts seeking the release of certain documents in connection with the leave to remain decision. The records sought by the applicants were released following an appeal to the Freedom of Information Commissioner and were ultimately furnished on the 18th June, 2012. The records include a Memorandum which states as follows:

> *"1. Laurena Gradwell, A.P.O. [handwriting:] Agreed LTR for two years*
>
> ***Consideration of file under Section 3 of Immigration Act 1999, as amended, and Section 5 of the Refugee Act 1996, as amended:***
>
> ***File Reference(s): [...]***
>
> ***Applicant's Name(s): [A.J.]***
>
> ***Date(s) of Birth: 21/03/1975***
>
> ***Nationality: Afghan***
>
> *I have examined Mr [J]'s case under Section 3 of the Immigration Act 1999, as amended, and Section 5 of the Refugee Act 1996, as amended (Prohibition of Refoulement).*
>
> *In light of my consideration of the specific and exceptional circumstances of Mr. [J]'s case, I conclude that his situation does warrant the granting of temporary permission to remain in the State as an exceptional measure. Therefore, I recommend that the Minister grant Mr. [J] permission to remain in the State.*
>
> ***Gareth Hargadon***
>
> ***Subsidiary Protection Team 1***
>
> ***22/12/2008" (Emphasis in original)***

39. The Minister also released an undated, unsigned two-page case summary relating to the subsidiary protection application which reviewed A.J.'s asylum claim and the findings of the Tribunal, the claims made by his solicitors in relation to his involvement in the protest and the deteriorating situation in Afghanistan. This document appears to be an internal draft as it contained no analysis, reached no conclusions and made no recommendations. It appears from the affidavit of Mr David Byrne, on behalf of the respondent, that this document was drawn up prior to the 20th November, 2008, in an attempt to set out some of the history of the file.

40. The Minister also released the 14 page document which forms the examination of A.J.'s subsidiary protection application by Mr Gareth Hargadon which was signed on the 20th November, 2008, and approved by Mr James Boyle, Assistant Principal Officer on the 21st November, 2008. This document or memorandum was said to have been attached to the letter of the 22nd December, 2008, which informed A.J. that he had not been granted subsidiary protection but had been granted leave to remain under Section 3(6), referred to at paragraph 27 above.

41. The memorandum shows that the claim for subsidiary protection was addressed by first summarising the Tribunal decision and was then considered under three headings – (i) his former Taliban / Hizb-i-Islami membership and the worsening situation in Afghanistan; (ii) his involvement in the 2006 protest and (iii) his medical condition.

42. *The Taliban history*: COI reports were cited in support of the conclusion that low profile or ordinary former members of the Taliban such as A.J. do not have trouble re-integrating into their communities. It was suggested that if he feared indiscriminate violence he could avail of the protection of the Afghan police force.[10] Although that force faced major problems, it was clear that efforts were being made by the authorities to institute real police reform. Extensive quotes were drawn from a UK Home Office COI report of August 2008 and passages relating to other avenues of complaint were also quoted.

43. *The protest*: it was found that he had not submitted any definitive evidence to substantiate his belief that he would be subjected to serious harm as a result of his involvement in the incident. Although there had been widespread news coverage of the protest and many participants were named, there was no evidence to suggest that the Afghan authorities researched the worldwide media in respect of failed asylum seekers upon their return to Afghanistan, or that groups or individuals who were the victims of Taliban atrocities carried out such research. It was noted that although internet access was available in Afghanistan it is not widely used or accessible by western standards.

44. *The medical condition*: the medical reports submitted were considered but it was found that subsidiary protection is directed against human action, not against illness or natural disaster and that he was not entitled to such protection by virtue of his medical condition. His personal circumstances and characteristics were outlined noting his family's situation but the examining officials found

nothing to suggest these circumstances would amount to "serious harm" within the meaning of the Qualification Directive and Protection Regulations.

45. Certain issues surrounding his credibility were also highlighted and ultimately it was found that he was not eligible for subsidiary protection. The conclusion advanced by Mr Hargadon was that, "*I have concluded that [A.J.] has not shown substantial grounds for believing that he is at risk of suffering serious harm if returned to Afghanistan*." The same conclusion was set out by a more senior official Mr Boyle, who added that "*Consideration should now be given as to whether a deportation order should be made in respect of [A.J.] having regard to the matters referred to in Section 3(6) of the Immigration Act, 1999, as amended*."

46. The combination of documents indicates that shortly after this recommendation, a decision was taken by Mr. Hargadon to recommend the grant of leave to remain which was approved by Ms Laurena Gradwell APO.

47. As noted above, three months after these documents were released, the current proceedings were issued and leave was sought ex parte before Ryan J. on the 17th September, 2012, to apply for the declaratory reliefs set out at paragraph 5 above.

Prioritised hearing

48. In December 2012 the applicants applied to the Court for an urgent prioritised hearing on the basis of a supplemental affidavit sworn by the applicants' solicitor Ms Jeanne Boyle in which she exhibits medical reports[11] concerning the conditions of A.J., his wife and his son, which were forwarded to the Minister to elicit his consent for a priority application. Those reports indicate that A.J.'s son Z., now 10 years of age, suffers from a form of heart disease and that one of his kidneys had been removed in May 2011 following a car accident in Iran and that he was in hospital awaiting a heart transplant. His wife lost a four-month old baby[12] in Iran in September 2011 as she could not go to hospital owing to her status as an illegal immigrant. In 2012 A.J. was awaiting hip surgery and was continuing to take anti-depressants, anxiolytic medications and analgesics. It was asserted that A.J. has a number of injuries which he attributes to torture in Afghanistan between 1994 and 2001, including fractures to his lower legs resulting from direct blunt trauma, a deformity of his arm arising from traumatic injury, deformity of his rib cage attributed to blunt trauma, scars on his buttocks due to knife trauma and chronic low back pain due to disc protrusion. [This was new information which was not put before any protection decision maker.]

49. Ms Boyle's affidavit also addresses A.J's travel to Iran which is based on what her client told her. She asserts that he has made four trips to Iran in recent years; in 2009 for a period of three months; in 2010 for three weeks; in 2011 for 2 ½ months and in 2012 for three months. He travelled using an Afghan passport which he obtained by post having paid a substantial amount of money and he has not returned to Afghanistan.[13] The Court granted priority and encouraged the applicants to apply again for visas to visit the husband / father in the State. At that time, the Court was unaware of the history and did not raise any of the inconsistencies now apparent in the affidavit filed. Having been granted priority in December 2012, the case did not proceed until March 2013.

BASIC CONTENTIONS

50. The grounds on which the applicants seek declaratory relief are essentially twofold. First, the applicants state that they are now aware since obtaining FOI that the decision to grant leave to remain to A.J. was based on the prohibition of *refoulement* and not on humanitarian grounds and they seek a declaration to that effect. In the alternative, the reasons for the decision cannot be identified owing to their opacity and vagueness and they seek a declaration to that effect.

51. The respondent contends that on the contrary, it is clear from the face of the decision and as a matter of logic that leave to remain was granted on an exceptional *ad misericordiam* basis arising from the humanitarian considerations which A.J. brought to the Minister's attention and was not based on the principle of *non-refoulement*.

52. Multiple, lengthy written submissions were submitted by both parties who also made lengthy oral submissions at the hearing. The following is a summary of their key arguments.

Applicants' Submissions

53. The applicants contend that the reasons for the Minister's decision of the 22nd December, 2008, are so vague, opaque and unclear that the underlying rationale cannot be properly adduced and that the decision is open to multiple interpretations and inconsistent explanations have been given as to its meaning. They rely on the judgments of the Supreme Court in *Cosgrave v. The Director of Public Prosecutions* [2012] IESC 25 (Hardiman J. dissenting), *Sulaimon v. The Minister for Justice* [2012] IESC 63 (Hardiman J.), *Rawson v. The Minister for Defence [*2012] IESC 26 (Clarke J.), *Mallak v. The Minister for Justice* [2012] IESC 59 (Fennelly J.) and the judgment of Cooke J. in the High Court in *J.D.S. [Nigeria] v. The Minister* [2012] IEHC 291 where *Rawson* was considered. They argue that the decision is defective as they cannot know if grounds exist for challenging the decision.

54. In the alternative, the applicants contend that the positive decision was granted on the basis of the prohibition of *refoulement* and confirmation for this contention is found in the Memorandum of Mr Gareth Hargadon dated the 22nd December, 2008, released to the applicants in 2012 in response to their FOI request and which is headed "*Consideration of file under Section 3 of Immigration Act 1999, as amended, and Section 5 of the Refugee Act 1996, as amended*". The memo states "*I have examined Mr [J]'s case under Section 3 of the Immigration Act 1999, as amended, and Section 5 of the Refugee Act 1996, as amended (Prohibition of Refoulement)"* (the applicants' emphasis). If the decision to grant leave to remain was under Section 3 of the Immigration Act 1999 then there would have been no requirement to consider the application of Section 5 of the Refugee Act 1996 but the Memorandum makes it clear that Section 5 was in fact examined and thus it follows that the Minister refused permission to remain under Section 3. They argue that the use of the word "discretion" as would be expected in a positive Section 3 leave to remain decision is absent from the letter of the 22nd December, 2008. Instead the phrase "exceptional measure" was utilised which means that it must have been a refoulement decision.

The applicants argue that the fact that the Refugee Appeals Tribunal decided in 2005 that A.J. is not a refugee does not discharge the duty of the Minister to consider the issue of refoulement afresh as was identified by the Supreme Court in *Meadows v. The Minister & Others* [2010] 2 I.R. 701; [2011] 2 I.L.R.M. 157. The leave to remain stage was the first time Section 5 was considered as the Tribunal Member expressly left over the question of whether, in light of A.J.'s mental condition, his return to Afghanistan might itself amount to persecution. Section 5 is wider than Section 2 of the Refugee Act 1996 insofar as refoulement protects against all threats to the "*life or liberty*" of the applicant while refugee status provides protection only to those suffering "*persecution*".

55. The applicants' net point is that leave to remain granted under Section 5 is equivalent to a form of international protection and is therefore a more prized right than humanitarian leave to remain under Section 3. Leave to remain based on the principle of non-*refoulement* could permit family reunification and warrant deviation from the general policy operated by the Minister in relation to humanitarian leave to remain where there was no expectation that such a person could be joined by family members. The applicants

argue in effect that if the Court finds that A,J.'s permission to remain in Ireland rather than face deportation to Afghanistan was based on a risk of refoulement, they may then be able to seek family reunification.

Respondent's Submissions
56. The respondent disputes the contention that the decision of the 22nd December, 2008, is unclear. He argues that the decision is self-evidently based on humanitarian considerations and not on the prohibition of *refoulement* as is obvious from the nature of the submissions made to the Minister which raised humanitarian issues and furthermore that the applicant was never given the impression that his permission to remain was based on anything other than humanitarian reasons. The sequencing of the decisions demonstrates the validity of this premise. The application for international protection had been considered four times before the 22nd December, 2008: – by the Refugee Applications Commissioner in July 2005; by the Refugee Appeals Tribunal in October 2005; by the Minister on the Section 17(7) application in June 2007 and again by the Minister in November 2008 in the context of the subsidiary protection decision. In the absence of radically changed circumstances it would be inconceivable to find that there was no risk of serious harm if the applicant were to be returned to Afghanistan in November 2008, but then four weeks later to find that there was a risk of refoulement contrary to Section 5 of the Refugee Act 1996. It would be a "*grotesque implausibility*" for the Minister to engage in a *volte face* between November and December 2008 on the same facts.

57. The respondent points out that the letter of the 22nd December, 2008, by which the Minister's decision to grant leave to remain was notified to A.J., makes no reference whatsoever to Section 5 of the Refugee Act 1996. The only reference to Section 5 is in the short internal memorandum by Mr Hargadon of the same date which was released under FOI. In the respondent's contention, the applicant requests the Court to rely on the unofficial document while affording no weight to the official letter notifying the Minister's decision to A.J. and which states on its face that it is a decision under Section 3(6). The respondent also points to the letters sent to the applicants' solicitors in February and May 2011 which also state that the leave to remain was a Section 3(6) decision and must, he argues, carry some weight as they show that reasons for the decision were furnished when sought and were based on Ministerial discretion.

58. Finally, the respondent argued that A.J. is trying to establish a new form of international protection under Section 5 of the Refugee Act 1996 with a parallel right to family reunification based on a series of assumptions which, if accepted, would change the system of international protection and family reunification as it operates in Ireland. In the Minister's contention, the right to family reunification only arises where refugee status is granted under Section 2 of the Refugee Act 1996 or where subsidiary protection is granted, whereas the grant of leave to remain under Section 5 of the Refugee Act 1996 does not entail a right to family reunification. The applicants are seeking a launching pad for a series of further challenges to the general policy of the respondent in relation to family reunification in the case of persons granted humanitarian leave to remain. The application is wholly contrived, objectively opportunistic and is in the teeth of every tenet of judicial review.

Relevant provisions
59. In the view of the Court it is vitally important to view the relevant statutory provisions to understand first the distinction between international protection under the rubric of refugee law or subsidiary protection and the prohibition against refoulement and then the quite separate and different discretionary leave to remain on humanitarian grounds.

60. Section 2 of the Refugee Act 1996 sets out the definition of a "refugee". It provides:

> *"[...]"a refugee" means a person who, owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country; or who, not having a nationality and being outside the country of his or her former habitual residence, is unable or, owing to such fear, is unwilling to return to it [...]".*

61. Section 5 of the Refugee Act 1996 which prohibits refoulement – provides:

> *"(1) A person shall not be expelled from the State or returned in any manner whatsoever to the frontiers of territories where, in the opinion of the Minister, the life or freedom of that person would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion.*
>
> *(2) Without prejudice to the generality of subsection (1), a person's freedom shall be regarded as being threatened if, inter alia, in the opinion of the Minister, the person is likely to be subject to a serious assault (including a serious assault of a sexual nature).*

62. Section 5(1) reflects the principle set down in Article 33 of the *Convention Relating to the Status of Refugees 1951*, which provides:

> *"Prohibition of Expulsion or Return ("refoulement")*
>
> *(1) No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*
>
> *(2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."*

63. It is relevant also to consider Article 21 of Council Directive 2004/83/EC (commonly known as the Qualification Directive) which provides:

> ***"Protection from refoulement***
>
> *1. Member States shall respect the principle of non-refoulement in accordance with their international obligations.*
>
> *2. Where not prohibited by the international obligations mentioned in paragraph 1, Member States may refoule a refugee, whether formally recognised or not, when:*

(a) there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present; or

(b) he or she, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that Member State.

3. Member States may revoke, end or refuse to renew or to grant the residence permit of (or to) a refugee to whom paragraph 2 applies."

Thus it can be seen that the early Refugee Convention forbade the return of fleeing refugees to face the persecution from which they had fled. State Parties had to receive such persons and assess their claims rather than closing their borders and refusing to accept them. Although the return of persons convicted of particularly serious crimes was permitted, in the ordinary way a person who has been declared a refugee is highly unlikely to face deportation and thus the issue of refoulement does not normally arise. The persons in the contemplation of the drafters of Article 33 of the Geneva Convention were unlikely to be *failed* asylum seekers but rather the refugees who had not yet been declared as such.

64. Section 3(6) of the Immigration Act 1999 provides for the deportation of persons who have no lawful permission to be in the State and includes failed asylum seekers. It states that:-

"In determining whether to make a deportation order in relation to a person, the Minister shall have regard to

(a) the age of the person;

(b) the duration of residence in the State of the person;

(c) the family and domestic circumstances of the person;

(d) the nature of the person's connection with the State, if any;

(e) the employment (including self-employment) record of the person;

(f) the employment (including self-employment) prospects of the person;

(g) the character and conduct of the person both within and (where relevant and ascertainable) outside the State (including any criminal convictions);

(h) humanitarian considerations;

(i) any representations duly made by or on behalf of the person;

(j) the common good; and

(k) considerations of national security and public policy

so far as they appear or are known to the Minister."

65. Applications appealing to the Minister's discretion to permit a failed asylum seeker to remain in the State rather than face deportation were described by Hardiman J. in *F.P. & Others v. The Minister* [2002] 1 I.R. 164, at p. 172, as *ad misericordiam* applications.

66. Subsidiary protection, which is the relatively new international protection recognised to cover those in fear for non-Convention reasons, was brought into domestic law by the *ECs (Eligibility for Protection) Regulations 2006* (S.I. No. 518 of 2006). A person eligible for subsidiary protection is inter alia a person "*in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, would face a real risk of suffering serious harm as defined in these regulations*" and who "*is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country*". "*Serious harm*" is further defined as consisting of the death penalty or execution, torture or inhuman or degrading treatment or punishment of an applicant in the country of origin, or serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

67. Finally, Regulation 4(6) of the 2006 Regulations states that nothing in those Regulations shall affect the discretionary power of the Minister under Section 3 of the 1999 Act.

THE COURT'S ANALYSIS

68. Having regard to the submissions made by the parties and to the law distinguishing the two types of leave to remain, it seems to the Court that this case is not actually concerned with a lack of clarity in the decision which halted the proposed deportation and rather the challenge by way of declaratory orders is an attempt to circumvent the applicants' failure to challenge the lawfulness of the respondent's refusal to grant visas to the J. family in Iran within the defined time limits. By this process it is hoped that an obvious Section 3(6) decision can be transformed into a decision based on refoulement where the Minister had found he could not order the deportation of A.J. because in his opinion; *the life or freedom of that person would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion*, thereby creating a right for A. J. to be joined by his family in Ireland.

69. The questions addressed by the Court in arriving at that determination were

Are the reasons for the Minister's decision of the 22nd December, 2008, clear?

a. If yes, is this a decision under Section 3 of the Immigration Act 1999 or Section 5 of the Refugee Act 1996 or otherwise?;

b. If no, are the applicants entitled to be given a full statement of the reasons for the decision?

70. The law on the duty to give reasons, which is the foundation of judicial review and has been considered on innumerable occasions, was extensively argued before the Court. However, every reported judgment brought to this Court's attention concerned decisions refusing the licence, permission, status or right sought and not to a positive decision granting a right or permission or exercising discretion, as occurred in this case. There was no dispute between the parties on the law opened but the respondent argued against their relevance to the particular facts of this case.

71. The applicants relied on the unanimous judgment of the Supreme Court in *David Rawson v. The Minister for Defence* [2012] IESC 26 in aid of their application for a declaration that A.J. was entitled to be given reasons for the decision made on the 22nd December, 2008, granting him permission to be in the State. *Rawson* concerned a member of the Defence Forces who failed in his appeal against a decision to discharge him from the airforce. Notwithstanding specific appeal submissions, he received a curt one line determination upholding the earlier decision without any reasons being provided. He challenged the lawfulness of the decision. Clarke J. prefaced his examination of the theory underlying the common law duty to give reasons as follows:-

> *"5.2 It is clear… that this case is not a "reasons" case as such. Rather it is a case where it is said that the record does not suggest that those involved in the decision making process applied their mind to the right question at all rather than failed to give adequate reasons for their answer to that question.*
>
> *…*
>
> *6.3 […] a party faced with a decision which affects their rights and obligations must be entitled to assess whether they have a basis for challenging the lawfulness of the decision in question. The courts have consistently held that it is an inherent part of the judicial review role of the courts that parties need to know enough about the process and the decision which affects them to be able to mount a challenge to that decision on the grounds of unlawfulness in an appropriate case".*

72. The Court then went on to consider how cases such as *O'Donoghue v. An Bord Pleanála* [1991] I.L.R.M. 750 and *The State (Sweeney) v. Minister for the Environment* [1979] I.L.R.M. 35 support this principle and how recently in *Meadows* it was found that a failure to supply sufficient reasons would affect the applicant's "*constitutional right of access to the Courts to have the legality of an administrative decision judicially reviewed rendered either pointless or so circumscribed as to be unacceptably ineffective*". The Court stated that:

> *"6.9 …While, as already pointed out, this is not a "reasons" case per se nonetheless the underlying rationale for the case law on the need to give a reasoned but not discursive ruling, while not strictly speaking applicable, seems to me to have a bearing on a case such as this where the issue is as to whether the decision maker addressed the correct question.*
>
> *6.10 … [I]f a person affected does not have any sufficient information as to the question which the decision maker actually addressed then it surely follows that that person's constitutional right of access to the courts to have the legality of the relevant administrative decision judicially reviewed is likely to be, in the words of Murray C.J. in Meadows, "rendered either pointless or so circumscribed as to be unacceptably ineffective"."*

73. Applying those principles to the facts of the *Rawson* case, Clarke J. continued:

> *"7.2 While a judgment made in relation to a "reasons" case it seems to me that the logic of Clare v. Kenny [2009] 1 I.R. 22 is equally applicable to a challenge based on a contention that the correct question was not asked or inappropriate considerations were given. In that case MacMenamin J., at p.36, stated that:-*
>
> *"… a court in judicial review proceedings cannot act on what must be at best a hypothesis as to the possible rationale for the decision, particularly so in the context of the array of possible reasons, some of which would go beyond jurisdiction … The situation required a decision so that all the parties would be aware precisely of their positions. The reason or rationale for the decision as to jurisdiction unfortunately cannot be inferred from what was said by the respondent".*
>
> *7.3 There may, of course, be cases where it is possible to say with a great deal of comfort that the decision maker has approached the issue in a particular way. The materials before the court may make it clear as to what the approach of the decision maker was so that, even if not set out in express terms, there is only one real basis on which it might be considered that the decision maker approached the issues under consideration."*

74. Clarke J. found that Rawson was not such a case as it was not known why Airman Rawson's appeal was rejected. He acknowledged that "*[t]here may be cases where an analysis of the situation with which the decision maker was presented bears only one reasonable interpretation*", but he held that Rawson was not such a case and ultimately that while there may be circumstances in which a decision-maker could conclude that Airman Rawson's defence was insufficient, in this case there was insufficient evidence to meet the requirement that the courts be able to be satisfied, in the event of a challenge, that the decision maker asked the right question.

75. The applicants also rely on the judgment of Cooke J. in the joined cases of *J.D.S. and P.T.D.S. (an infant) [Nigeria] v. The Minister* [2012] IESC 291 where he referred to the Rawson decision. The joined cases concerned a woman who was refused asylum and subsidiary protection. The Minister then made deportation orders against her and her child. Relying on *Meadows*, they argued that inadequate reasons were given for the decision that *refoulement* was not an issue in the case. The respondent sought to distinguish the case from *Meadows* on the basis that the reasons for the decision under Section 5 were clear from a reading of the files as a whole. Cooke J. noted that the examination of file drew no explicit conclusions from extracts quoted from country of origin information. He described the examination of file as "an assemblage" of COI covering different topics and observed that since it was not possible to link the conclusion drawn at the end to any particular passage, he was not satisfied that he could understand why the Minister had formed his opinion on Section 5 of the Refugee Act 1996. Although there was a clear implication as to why the Minister had formed that opinion, he concluded thus:-

> *"20. In these circumstances the Court accepts that the fundamental proposition advanced in support of the leave ground is correct. While it is possible and even highly probable that the hypothesis advanced on behalf of the Minister as to the rationale and reasons for the s. 5 conclusion is that suggested, the addressee of a deportation order cannot be expected to wait for the forensic analysis of the memorandum in the course of judicial review in order to understand why the crucial opinion has been reached…It is necessary in the view of the Court that the decision should explain why the deportation order is being made and why, in particular, it is concluded that the deportee faces no risk to life or to*

person on repatriation contrary to the prohibition in s. 5."

76. The applicants also rely on the unanimous judgment of the Supreme Court in *Ghandi Nawak Mallak v. The Minister for Justice* [2013] 1 ILRM 73; [2012] IESC 59 which concerned a declared refugee who had been refused a certificate of naturalisation in the Minister's absolute discretion without any reason being given. There was no appeal process and an application to the Office of the Information Commissioner proved fruitless as a decision was taken not to disclose whether records existed in relation to the Minister's decision. A request under the Data Protection Acts caused the release of a Garda report and a Garda request form but no reasons for the refusal were identifiable.

77. In the High Court Cooke J. who heard the substantive application found that, in light of the Minister's absolute discretion and following the judgment of Costello J. in *Pok Sun Shum & Ors v. Ireland & Ors* [1986] ILRM 593, there was no requirement for the Minister's decision to be accompanied by a statement of reasons. He pointed out that as there was no right of appeal, no reasons were required. Cooke J. also rejected arguments relating to Article 13 ECHR and Article 41 of the Charter of Fundamental Rights of the EU. In the Supreme Court, Fennelly J. prefaced his decision by noting that the duty to give reasons is closely related to the rules of natural justice. He held:

> *"3. While our courts have extensively considered the adequacy of reasons when they have actually been given, there has been no principled consideration of the question whether a general obligation to furnish reasons exists at all or, if it does not, in what cases reasons should be given and why. There is a persistent view, as evidenced by the High Court judgment in the present case, that there is no general obligation at common law to give reasons for administrative decisions. There must be a close relationship between the process of giving prior notice and giving reasons after the event."*

78. Thereafter, Fennelly J. departed from that "*persistent view*" and found that just because the Minister had absolute discretion it did not follow that he was not obliged to have reasons for his decisions, as in order to act fairly and rationally, decision-makers must not make decisions without reasons [§ 43]. Fennelly J. held that the fact that a power is exercised in the Minister's absolute discretion may be relevant to the extent of the courts' power to review the decision but that does not mean he is dispensed from observance of the rules of natural and constitutional justice [§ 45]. Fennelly J. reiterated the importance of the constitutionally protected right of access to the courts to enforce one's legal rights [§ 46]. It was not contested that in exercising his absolute discretion, the Minister must act in accordance with law and in principle his decisions are open to review [§ 47].

79. Fennelly J. went on to assess the extent of the Minister's obligation to give reasons for his decision to refuse a certificate of naturalisation by reference to (i) the developing general principles of judicial review and (ii) the particular statutory provision. With respect to (i), he held:

> *"52. The general principles of natural and constitutional justice comprise a number of individual aspects of the protection of due process. The obligation to give fair notice and, possibly, to provide access to information or, in some cases, to have a hearing are intimately interrelated and the obligation to give reasons is sometimes merely one part of the process. The overarching principle is that persons affected by administrative decisions should have access to justice, that they should have the right to seek the protection of the courts in order to see that the rule of law has been observed, that fair procedures have been applied and that their rights are not unfairly infringed."*

80. Fennelly J. examined the judgments of O'Higgins C.J. and O'Hanlon J. in *State (Lynch) v. Cooney* [1982] I.R. 337, Barron J. in *State (Daly) v. Minister for Agriculture* [1987] I.R. 165, Blayney J. in *International Fishing Vessels Ltd. v. Minister for the Marine* [1989] I.R. 149, Costello P. in *Pok Sun Shum v. Ireland* (cited above) and *McCormack v. Garda Síochána Complaints Board* [1997] 2 I.R. 489, and Finlay C.J. in *The State (Creedon) v. Criminal Injuries Compensation Tribunal* [1988] I.R. 51, and he held:

> *"63. This body of cases demonstrates that, over a period approaching thirty years, our courts have recognised a significant range of circumstances in which a failure or refusal by a decision-maker to explain or give reasons for a decision may amount to a ground for quashing it. Costello J. attached importance, quite correctly, to the presence or absence from the statutory scheme of a right of appeal. The absence of a statement of reasons may render such a right nugatory.*
>
> *In the present state of evolution of our law, it is not easy to conceive of a decision-maker being dispensed from giving an explanation either of the decision or of the decision-making process at some stage. The most obvious means of achieving fairness is for reasons to accompany the decision. However, it is not a matter of complying with a formal rule: the underlying objective is the attainment of fairness in the process. If the process is fair, open and transparent and the affected person has been enabled to respond to the concerns of the decision-maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded.*
>
> *Several converging legal sources strongly suggest an emerging commonly held view that persons affected by administrative decisions have a right to know the reasons on which they are based, in short to understand them."*

81. In *Mallak*, the Supreme Court ultimately held that the application for naturalisation should be considered afresh and that it would be for the Minister to determine what procedures to adopt in order to comply with the requirements of fairness.

82. Other judgments in *Liam Cosgrave v. Director of Public Prosecutions & Others* [2012] IESC 24 and *Faisol Oluwanifemi Sulaimon (an infant) v. The Minister for Justice* [2012] IESC 63 cited by the applicants are not on point and will not therefore be considered.

83. It seems to this Court that the applicable principles on the duty to give reasons are now well established and were succinctly summarised by Murray C.J., as he then was, in *Meadows* (cited above), as follows:

> *"An administrative decision affecting the rights and obligations of persons should at least disclose the essential rationale on foot of which the decision is taken. That rationale should be patent from the terms of the decision or capable of being inferred from its terms and its content".*

84. As noted above, *Meadows* and all other 'reasons' cases of which this Court is aware involved the *refusal* of the particular permission sought, whether it be a certificate of naturalisation, planning permission, a fishery licence, a radio transmitting licence, entitlements to benefits or leave to remain for humanitarian reasons. The cases reported have never involved a challenge by a successful applicant to the absence of the reasons for a decision to *grant* the permission sought. While there can be little doubt that administrative law and society at large are well served by transparent, clear and reasoned decisions on all occasions, that is not to

say that every decision requires an exposition of reasons. There are many administrative decisions which simply do not require a written statement of reasons. Included in those are decisions which follow automatically once pre-conditions are met and which are refused if those conditions are not fulfilled, where no discretion is exercised. The applicant either complies with conditions or he does not. However, where the exercise of discretion is involved, whether statutory discretion or otherwise and that discretion is exercised to *refuse* the permission sought, the reasons for refusal are required so that a disappointed or dissatisfied applicant understands clearly why he / she failed and can consider whether the legality of the reasons can be challenged by way of appeal or judicial review, as appropriate, or whether he / she can make a fresh application having addressed the deficits in that first, unsuccessful attempt. As the Supreme Court held in *Mallak*, the "*overarching principle is that persons affected by administrative decisions should have access to justice, that they should have the right to seek the protection of the courts in order to see that the rule of law has been observed, that fair procedures have been applied and that their rights are not unfairly infringed*." It is difficult to see how, if a person makes extensive submissions directed towards the exercise of discretion and that discretion is exercised in his favour, he could then be in need of the protection of the courts.

Are the reasons for the impugned decision clear?
85. The Court is satisfied that the 2008 decision under challenge is unambiguous – A.J. was granted leave to remain for humanitarian reasons. The letter informing the applicant of the grant of leave to remain actually states that it is a decision under Section 3(6) of the Immigration Act 1999 that would be renewable after a period of three years. That decision must be viewed in the history of A.J.'s presence in the State and in the context of the permission sought which was principally for leave to remain in Ireland for personal reasons under Section 3(6) and alternatively and to a lesser extent, because of the risk that he would be persecuted if forcibly returned (refoulement) under Section 5. The full breadth of the humanitarian submissions has been set out in the earlier part of this decision, as have the rather general and not always relevant submissions under Section 5. There can be no room for doubt that this was a long awaited decision which followed countless letters and reports outlining the applicant's psychological health and concerning his depression brought on by grief at the loss of his father and brother in the conflict in Afghanistan, his extreme stress at the reported horrific circumstances of his father's death which was exacerbated by his mother and son's death and his separation from his family which in turn was compounded by their very unfortunate experiences when trying to flee Afghanistan. The state of his emotional health was raised in his appeal to the Tribunal and at his original leave to remain application. The Tribunal member actually recommended that he be given leave to remain on humanitarian grounds and his solicitors regularly updated the Minister on the state of his emotional health at regular intervals. Before final determination of the leave to remain of this former member of the Taliban he sought subsidiary protection based on a claim that he would face serious harm due to his history in the Taliban, his involvement in the hunger strikes in Dublin and from indiscriminate violence in the conflict raging in Afghanistan. That claim failed but Mr Boyle who approved the recommendation added that, "*Consideration should now be given as to whether a deportation order should be made in respect of [A.J.] having regard to the matters referred to in Section 3(6) of the Immigration Act, 1999, as amended*."

86. The decision which followed within one month was thus clearly made and granted under Section 3(6) even though the letter dated the 22nd December, 2008, notifying the applicant that he was not eligible for subsidiary protection but had been granted leave to remain is silent as to the exact fact or series of facts which tilted the Minister's discretion in A.J.'s favour. The situation suggested by the Applicants that this was a decision based on a risk of refoulement simply because an internal memo between Mr. Hargadon and Ms Gradwell referred to Section 3 of the Immigration Act 1999 and Section 5 of the Refugee Act 1996 makes no sense. It would be inconceivable that an official letter would inform an applicant that it had been determined that he did not require subsidiary protection but that at the same time it was recognised that to return him to Afghanistan would be to send him to face persecution. The letter by which the decision was conveyed raises no doubts as to the nature of the leave under Section 3(6) of the Immigration Act 1999. Quite apart from the absurdity of the argument that this was a refoulement decision, the decision letter makes no reference whatsoever to Section 5 of the Refugee Act 1996.

87. If the decision granting leave to remain were examined from the premise proposed by the applicants, that is that the Minister was unswayed by the eloquent pleas made on A.J.s behalf on humanitarian grounds but instead had formed the view that if he were to be returned to Afghanistan his life and freedom would be at risk for a Convention reason (notwithstanding that he had determined on the same facts that he faced no real risk of serious harm), for example because of his Hazara ethnicity (race) or because of his history in the Taliban (political opinion), the obvious question would be why would the Minister dissemble in this manner? Why would he say he was granting leave under Section 3(6) and why would the term "*as an exceptional measure*"- meaningless in the context of *refoulement*; an action prohibited in absolute terms under Section 5 and where discretion plays no role – be used? Why would the Minister not say he was satisfied that to return A.J. to Afghanistan would be prohibited because his life and freedom would be at risk if he had come to that decision? Why would he not say "*I am granting you leave to remain because I am concerned about the current conditions on the ground in Afghanistan where the Taliban are making a comeback/the government is imprisoning all former members of the Taliban*"? The submission makes very little sense and the applicants' suggestion that the Minister cynically concealed the true nature of his decision to avoid family reunification obligations is not supported by any evidence. The reality is that the Minister's designated civil servants had made the decision that A.J. was not eligible for subsidiary protection on the 21st November, 2008, and then went on in accordance with the assessment recommended by James G. Boyle Assistant Principal to consider whether a deportation order should be made in respect of A.J. having regard to the matters referred to in Section 3(6) of the Immigration Act.

88. It is the now the considerable experience of the Court that the examination of a failed asylum seeker's file follows a particular format. The object of the examination is to establish whether any reasons exist which would make it unduly harsh to deport, or failing that, whether even though the proposed deportee has failed to be recognised as being in need of international protection, conditions exist which would place him in danger of persecution if returned to his / her country of origin. The examination of an applicant's file invariably considers the various headings set out in Section 3(6) of the Immigration Act 1999 before moving on to refoulement considerations. The Minister is obliged by statute to have regard to any relevant submissions made by or on behalf of the applicant in that regard. Section 5 of the Refugee Act 1996 is only considered after those submissions have been assessed and a decision made. It is only if the Minister determined that nothing arises under Section 3(6) of the Act of 1999 which would render the deportation disproportionate or impermissible that he goes on to consider whether deportation would involve a threat to his/her life or freedom on account of his or her race, religion, nationality, membership of a particular social group or political opinion. The Minister must then have regard to any submissions made on the refoulement issue and consult relevant, objective, up-to-date COI to determine whether such threat exists. If having considered all the information, he holds that *refoulement* is not an issue, the examination goes on to consider any issues raised under the Constitution or under the ECHR and, where relevant, the Criminal Justice (UN Convention Against Torture) Act 2000.

89. If the usual course is adopted and the applicant succeeds on humanitarian grounds under Section 3(6), there is then no need to go further and consider any other submissions as the proposal to deport is withdrawn. What occurred in A.J.'s case was that the subsidiary protection application was considered on the basis of the submissions on serious harm and on the basis of relevant COI. His personal circumstances were scrutinised, including documentation and correspondence submitted on his behalf relating to his medical/psychological condition, his family circumstances, his asylum claim and the Tribunal Member's findings. When it was concluded that he was not eligible for subsidiary protection the senior civil servant reviewing the file directed a move straight to the leave to

remain submissions. It was then concluded on the 22 December, 2008, that his "specific and exceptional" circumstances warranted the grant of temporary permission to remain in the State as an exceptional measure. All that remained then was to notify the applicant of the decision and of the conditions attached to the leave to remain. That was done by letter to him on the same day notifying him that subsidiary protection had been refused but that *humanitarian* leave to remain "*as an exceptional measure*" under Section 3 of the Immigration Act 1999 had been granted. The applicant remained in the State with the benefit of that decision with a right to work and to renew that permission after three years. It is now known that A.J. obtained a visa from the Iranian government and visited his family in Iran on two occasions before he sought a renewal of his leave to remain. It is also known that he has been unable to work while in Ireland and has been receiving disability benefit from the State. The origin of his disability is not known as it played no part in the asserted previous harm in his asylum or subsidiary protection claim.

90. It is clear that A.J. realised the limitations of his humanitarian leave to remain when he was refused long stay visas for his family members and learned that the Minister cannot be obliged to grant family reunification with his wife and infant children as occurs with refugees. While the Minister maintains a residual discretion to identify exceptional circumstances which warrant deviation from the general policy, he did not find such exceptional circumstances in the J family's applications. There is no history of any challenge to the lawfulness of the decisions made in relation to refugee status, subsidiary protection or refoulement. Similarly, A.J. did not challenge the refusal to grant long stay visas to his wife and children and now, several years later, he and his family and their lawyers have sought to latch onto the wording of the internal memorandum of Mr Hargadon and Ms Gradwell to launch this unusual challenge. While the Court has no doubt that their motives are laudable and directed solely at reuniting this separated family, their challenge is without legal or factual basis. Their reliance on the memo prepared by Mr Hargadon is based on an unsustainable premise. The internal memo of the 22 December, 2008, is not a decision and is of no legal effect. It is not evidence or even an indication that humanitarian considerations were rejected and refoulement was considered and found to be the reason for a halt to the proposed deportation order and the grant of leave to remain.

91. Considering the short journey taken between the decision to refuse subsidiary protection and the decision to grant relief under Section 3(6), the arguments made concerning the wording of what is very probably a template heading of the memo are unsustainable.

92. Quite apart from that, the materials put before the Minister on refoulement consisted of an amount of COI reports relating to the murder of captured Taliban prisoners in 2001, to extraordinary renditions, to the abuse of Afghan prisoners by US troops, to the death of suspected militants in southern Kandahar and to the refusal of the U.S. to hand over control of its troops to the Afghan army. Nothing of relevance to his personal circumstances which would place him personally at risk in Afghanistan whether as a Hazara and a former Taliban soldier from Ghazni whose father and brother had been murdered by members of the Northern Alliance was addressed to the Minister. As it happened, the decision to grant leave to remain under Section 3(6) followed without the necessity to consider those submissions. Even if that were not the case and both the refoulement and the humanitarian considerations were considered, it would still be very difficult to countenance that a series of civil servants would be dissuaded by the volume of Section 3(6) submissions on A.J.'s mental health and distress and plump instead for mostly irrelevant submissions on *refoulement* and then conceal their decision by presenting opaque reasoning designed to mislead, as suggested by the applicants herein.

93. It remains to say that it is nigh impossible to imagine how when in late November 2008 it was considered that there was no risk of serious harm if A.J. were returned to Afghanistan, it could be decided less than a month later that his return would breach the prohibition of *refoulement*. Such an about turn would necessitate a finding that he would face a risk to his life or liberty for a Convention reason which is a more onerous threshold than that which applies to subsidiary protection which encompasses a risk of indiscriminate violence during armed conflict or serious harm for non-convention reasons. No attempt has been made to address the very obvious issue of why, although A.J. had been found not to be a refugee and was not in need of subsidiary protection, his deportation would or could breach the prohibition of *refoulement*. No fact or consideration was presented to justify the Minister's determination on this issue and instead the applicants rely on an internal memo following what is very probably an office template, to make a case out of nothing. The proposition is untenable.

94. It is not easy generally to imagine circumstances in which an individual would be refused international protection but yet his deportation would be considered a refoulement under Section 5. Such a finding would require a material change of circumstances in his country of origin between the subsidiary protection decision and the deportation consideration. For instance, a coup could have in the interval placed a regime hostile to the applicant's ethnicity, political opinion, religion or race in a position of power. While those circumstances could create a refoulement situation, it would be more appropriate to seek leave from the Minister to bring a fresh claim for asylum under Section 17(7) of the Refugee Act 1996 and to seek an injunction preventing any step toward deportation until that application had been considered.

95. The judgments of the Supreme Court in *Meadows* seem to suggest that a failed asylum seeker's deportation could possibly constitute refoulement. While strictly speaking *obiter*, Murray C.J., as he then was, held that at the deportation stage the decision maker is obliged to consider whether there are grounds under Section 5 which prevent him making a deportation order. It was found that where material has been put forward to support a claim that there would be a risk under Section 5: ,

> *"the Minister must specifically address that issue and form an opinion. Views or conclusions on such issues may have already been arrived at by officers who considered a proposed deportee's application for asylum, at the initial or appeal stages, and their conclusions or views may be before the Minister but it remains at this stage for the Minister and the Minister alone in the light of all the material before him to form an opinion in accordance with s. 5 as to the nature or extent of the risk, if any, to which a proposed deportee might be exposed".*

96. Prior to *Meadows*, the law was as established in *Kouaype v The Minister for Justice, Equality and Law Reform* [2005] IEHC 380 where Clarke J. held that in the absence of special circumstances the Minister had no obligation to engage in a significant reconsideration of matters in Section 5 of the Refugee Act, as the statutory provision was in substance a consideration of the same matters upon which a claim for refugee status had been determined by the statutory bodies. It is arguable that *Meadows* overturned this reasoning subject to the caveat that the Minister's practice up to that decision and which was criticised by the Supreme Court was to say that "refoulement has no application to this case", without actually saying that the fear claimed was the same fear which had been considered and rejected by the statutory bodies or that conditions on the ground were unchanged since the asylum claim was rejected.

97. More recently, in the case of *J.E. v. The Minister for Justice, Equality and Law Reform* [2010] IEHC 372, *Meadows* was distinguished and Cooke J relied instead upon the reasoning in Kouaype. Cooke J stated that in *J.E.*, no question of imminent threat to the life of the applicant was raised through the medical evidence and country of origin information, but in *Meadows* the applicant had alleged and to some extent substantiated a risk of serious assault and even torture.

98. While the Minister must consider any Section 5 submissions afresh at the deportation stage, that obligation did not arise in this case as a decision had already been made to grant humanitarian leave to remain on Section 3(6) grounds. As Section 5 grounds were never examined, the applicants' submissions with regard to the fairness and legality of any assessment of *refoulement* in this case are therefore misguided.

99. As the Court is satisfied that A.J. was granted leave to remain on humanitarian grounds referable to the submissions made on his mental health, it will be left to another day and another court to consider whether the blanket refusal of family reunification to those granted leave to remain can survive constitutional or Convention scrutiny. Similarly, another court may eventually consider the position of the family of a person whose deportation is prohibited because such action would expose the applicant to a risk to his life or liberty for a Convention reason. Further, given the Court's findings on the clarity of the decision, the Court will refrain from determining the interesting question of whether a person granted permission to remain is entitled to a full statement of the reasons for that decision, or indeed whether all positive decisions which rely on discretionary powers should be accompanied by an expression of the reasons for the decision as a demonstration of the just use of that power.

Conclusion

100. As indicated at the hearing, the Court formed the impression that these proceedings are contrived to circumvent the failure of the first applicant, now regretted, to challenge earlier negative decisions on subsidiary protection and on the refusal to issue visas to his wife and children. The applicants are out of time to bring such challenges and have conceived a collateral attack on the Minister's general policy against family reunification for those granted temporary leave to remain in Ireland where the grant of permission to remain is by the language used intended to be limited in duration in recognition of illness, vulnerability or other exceptional circumstances. In that regard, A.J. sought the exercise of compassion due to his compelling personal circumstances which were recognised as constituting *exceptional circumstances* and the exercise of Ministerial discretion. He has taken the benefit of that compassion and has sought and been granted an extension to his permission to be in the State. While his current circumstances are, if true, heart rending, they are not a reason to postulate the argument that his humanitarian leave was at all times a totally different leave based on refoulement which in turn may or may not give rise to family reunification rights. In the circumstances and for the reasons outlined above, the applicants are not entitled to the declaratory reliefs sought. The Court is satisfied that the reasons for the decision of the Minister dated the 22nd December, 2008, are patent from the terms of the decision and may be inferred from its terms and contents. While such limited reasoning may not generally be sufficient or appropriate when the decision is a refusal which negatively affects an applicant's rights and where he must be entitled to assess whether he has a basis for challenging the lawfulness of the decision in question, the same issues do not arise in the present case. As the applicants fail in obtaining the declarations they seek, the question of an extension of time does not arise.

1. At his s. 11 interview he said "we went to ask how my family was and they took my father and killed him. My father went in secret to see how my brothers and sisters were getting on" (Q. 14). However, at his oral appeal hearing he said his father had returned to surrender himself at the base to the Northern Alliance.

2. The documents submitted were purportedly issued by the Ghanzi Province Security Command of the Transitional government. Two of the documents were "Announcements" which requested members of the public to provide information about A.J. The first said he was charged with the murder of two men in March 2002 (Hamal 1381). The deceased men were stated to be the prosecutor of his local area and the deputy prosecutor who at the time was a military commander. The first document, which bore his photograph, stated that ammunition, weapons and receipts for additional weapons were found in his house which belonged to the Taliban and that evidence of his involvement with the Khalq regime was also uncovered. The second document confirmed that he had been charged with the murder of two men and was suspected of Taliban memebership. A.J. later explained that these two documents were newspaper articles published by the government and distributed in Kabul. A third document, dated the 13th April, 2002, called upon him to surrender to the local security authorities.

3. It is noted that Dr Durack says A.J. told him he had seen his father's dead body thrown in a town square, which is inconsistent with his account as told to the Commissioner and Tribunal.

4. Subsidiary protection was not available at that time.

5. This is the first time any reference was made to capture or torture.

6. The applicant had fought with the Taliban making his reference difficult to understand. He did not claim to fear the Taliban, he sad he feared local anti-Taliban commanders, local people and the government.

7. This reference to the son's ill health and their "bleak" situation has been repeated throughout the submission with little enhancement or detail.

8. The Applicants appeared to suggest that this report was not furnished until June 2012 when they made a FOI request. It would be unusual for the memorandum of facts and submission considered not to accompany the decision. It was certainly released to the applicants in June 2012 pursuant to their FOI request.

9. The assertions made do not accord with previous claims.

10. This unusual finding was not challenged at the time.

11. A report from a Tralee Medical Centre dated October 2005 states that he was incarcerated for two years by the Northern Alliance in Afghanistan and had been a freedom fighter since he was 15 years of age.

12. It appears this may have been a pregnancy of four months.

13. The Court's attention was directed by the Respondent to a number of odd issues: the son was stated to be having heart surgery in 2009. If his kidney was removed, the family must have has access to medical care. If the husband was able to travel to Iran so often and stay there for extended periods, he must have means although no working in this State. He clearly had permission to visit his family in Iran which casts doubt on their alleged illegal status there. The applicant is on disability benefit.