

**THE HIGH COURT**

[2021] IEHC 395

[Record No. 2019/271 MCA]

**BETWEEN**

**THE STATE OF KUWAIT**

**APPELLANT**

**AND**

**NADA KANJ**

**CLAIMANT**

**JUDGMENT of Mr. Justice Barr delivered electronically on the 11th day of June, 2021**

**Introduction**

1. This is an appeal on a point of law pursuant to s.10A of the Unfair Dismissals Acts 1977 – 2015, against a determination made by the Labour Court in favour of the claimant. That determination held that the appellant was not entitled to rely on the doctrine of sovereign immunity to block the claimant’s claim pursuant to the Unfair Dismissals Acts.
2. The facts of the case can be briefly stated in the following way: The claimant is a citizen of both the Lebanon and Ireland. At all material times she was employed in the Kuwaiti Cultural Office in Dublin as an academic adviser. Her employment in that position commenced in 2007 and ended in 2017.
3. The claimant brought a claim under the Unfair Dismissals Acts 1977-2015 against the appellant, in which she claimed that she had been unfairly dismissed from her position as an academic adviser in the Kuwaiti Cultural Office in Dublin. The appellant raised an objection before the WRC that it did not have jurisdiction to enter onto the dispute, because the appellant was claiming sovereign immunity. The WRC held in favour of the appellant on this issue.
4. The claimant appealed that decision to the Labour Court, which, in its determination dated 22nd July, 2019, allowed the appeal and held that having regard to the provisions of customary international law, and in particular the provisions of Art. 11.2(a) of the United Nations Convention on Jurisdictional Immunities of States and their Property, 2004, the claimant was entitled to maintain her claim and the appellant was not entitled to invoke sovereign immunity.
5. In essence, Art. 11.1 provides that a state cannot invoke immunity from jurisdiction before a court of another state in proceedings which relate to a contract of employment between the state and an individual for work performed, or to be performed, in whole or in part, in the territory of that other state. Thus, it can be seen that Art. 11.1 constitutes an exception to the doctrine of sovereign immunity. However, Art. 11.2 provides a number of exceptions to that exception and in particular it provides that para. 1 of Art. 11 shall not apply if “(a) The employee has been recruited to perform particular functions in the exercise of governmental authority”.
6. The essential conflict between the parties before both the WRC and the Labour Court, was whether the claimant in her role as academic adviser in the Kuwaiti Cultural Office in Dublin could be held to have been engaging in the exercise of governmental authority on

behalf of the State of Kuwait. In its determination, the Labour Court held that the claimant did not come within the provisions of Art. 11.2(a) and as a result, her case therefore fell within the provisions of Art.11.1, meaning that the appellant was not entitled to raise the doctrine of sovereign immunity against her claim.

7. The appellant appeals against the determination of the Labour Court on a number of grounds, including: That the Labour Court failed to engage with the evidence that had been led before it and had failed to give reasons for the conclusion that it had reached at the end of its determination; that the Labour Court had applied the wrong test and in particular, they had looked for extra factors, other than those specified in Art. 11.2(a). The arguments raised on behalf of the appellant will be set out in more detail later in the judgment.
8. In response, it was submitted on behalf of the claimant that the court's role was limited on an appeal on a point of law; the court was not entitled to assess the correctness of the decision reached by the Labour Court, but was confined to assessing its lawfulness.
9. It was submitted that when one looked at the decision as a whole, it was a comprehensive decision wherein all the relevant evidence and the law had been summarised in depth and in these circumstances, it could not be said that the reasons for the decision were unknown, notwithstanding that the decision portion of the determination itself was somewhat brief.
10. It was further submitted that the Labour Court had had regard to relevant Irish case law and in particular, to a relevant decision of the Supreme Court in 1998 and had also had regard to subsequent developments in the area, by reviewing the 2004 Convention and case law from the European Court of Human Rights and the Court of Justice of the European Union. It was submitted that, taken as a whole, the Labour Court decision was unimpeachable.
11. Having regard to the primary ground put forward on behalf of the appellant; that the Labour Court had failed to properly engage with the evidence put before it and had failed to resolve the conflicts in that evidence and had failed to give any or any adequate reasons for the conclusion that it had reached, it is necessary to give a brief summary of the evidence that was before the Labour Court.

#### **The Appellant's Evidence before the Labour Court**

12. The Labour Court heard evidence in the appeal over three days on 28th November, 2018 and on 12th and 13th February, 2019. The court heard from five witnesses, three on behalf of the appellant. On the other side, it heard from the claimant and from a former colleague of hers. The essential conflict which the Labour Court had to resolve was whether the claimant in her role as academic adviser, was acting at a level of sufficient seniority and responsibility that she could be said to be exercising governmental authority on behalf of the State of Kuwait; or whether, as put forward by the claimant, she was merely carrying out largely administrative and clerical functions in relation to the disbursement of scholarship funds to Kuwaiti students studying in Ireland.

13. On behalf of the appellant, evidence was given by Mr. Mostafa Farghali, an academic adviser in the appellant's cultural office in Dublin since August 2013. He stated that as an academic adviser, the person would be a member of the Academic Committee, which was formally invested with powers by the Kuwaiti Ministry of Higher Education to make certain decisions in relation to Kuwaiti students in Ireland, such as whether to freeze or extend a student's scholarship. In relation to other matters, such as the qualifying criteria for scholarships, the committee merely made recommendations to the relevant ministry, which would then decide whether or not it would accept the recommendation.
14. In cross-examination, counsel for the claimant put it to the witness that neither of her employment contracts made any reference to her being a member of the Academic Committee. Counsel put it to the witness that an advertisement of July 2018, for the post of academic adviser in the Kuwaiti Cultural Office in the UK, which listed the duties of the position, made no reference to the successful candidate being a member of an Academic Committee. Counsel further put it to the witness that no meeting of the Academic Committee had taken place in the period 2014 – 2016, when Dr. Messi had been the Head of Office. The witness stated that the committee had only met occasionally during that period to discuss certain specific issues. When asked in cross-examination whether the witness believed the power to make decisions lay with the Cultural Office, or with the Head of Office or with the Academic Committee, the witness confirmed that all written communications from the Cultural Office to the Ministry were signed by the Head of Office. Likewise, communications from the Ministry to the Cultural Office were addressed to the Head of Office.
15. When asked to give a breakdown of an academic adviser's workload, Mr. Farghali stated that typically 50% was paperwork in the office; 40% was preparation for and attendance at the Academic Committee and 10% was liaising with students.
16. Evidence was given by Mr. Abdullah Al Naimi, who was also an academic adviser in the Cultural Office. He had held that position since May 2010. He stated that there were five principal aspects to the role of an academic adviser: participation in the work of the Academic Committee; organising the payment of students' fees to academic institutions and the payment of allowances to students; maintaining data in relation to students' academic progression on the principal database; the production of documentation required by students, such as letters confirming the fact that they are being sponsored by the State of Kuwait; and direct engagement with academic institutions.
17. In relation to the Academic Committee, Mr. Al Naimi referred to Decree No. 52 promulgated by the Kuwaiti Deputy Minister of Higher Education on 12th April, 2012, which delegated power to local academic committees to make decisions and grant approval in relation to a number of matters affecting students, such as change of major subject; change of institution; sufficient progression to merit payment of scholarship; approval for workplace training; approval for participation in online courses, etc. A translation of the decree was submitted in evidence. According to the witness, the

decision of the Academic Committee with regard to any of the foregoing matters in relation to any student had "*legal, political and financial implications*".

18. The witness stated that the key responsibility for ensuring that all payments made to and on behalf of students by the Cultural Office were in order and correct, rested with the academic adviser. He stated that the State of Kuwait was constantly looking for new ways to collaborate with Irish education and research institutions, that could deliver educational programmes that met Kuwait's requirements.
19. In cross-examination, the witness stated that in his opinion, participation in the work of the Academic Committee was a key part of the academic adviser's role. He estimated that that aspect of the work would account for 40% of the academic advisor's time. He stated that the Academic Committee meetings typically lasted approximately 3 – 4 hours. In reply to a question from the court, he stated that approximately 15 – 20% of an academic adviser's work could be classified as administrative in nature. The balance of the work, required a high degree of sophistication and professionalism on the part of the individual performing the role.
20. Mr. Al Naimi stated that an academic adviser was required to take the lead on many matters and to bring forward suggestions and demonstrate initiative. The holder of the post was required to have the ability to interact with a range of ministries when navigating complex rules, regulations and procedures. They were also required to be familiar with the rules applied by Irish universities, the Garda National Immigration Bureau and the visa arrangements operated by the Irish State.
21. The final witness on behalf of the appellant was Ms. Yollalel Massri, who had been employed as an accountant in the Cultural Office in Dublin since December 2015. She gave evidence in relation to the process whereby an academic adviser would raise an invoice in respect of the fees payable on behalf of a student. That element in the process was the responsibility of the academic adviser, because it was the adviser who was familiar with the student and was aware of the student's academic progression. As the accountant, Ms. Massri was responsible for checking the payment details and bank details of the payee and releasing the funds. She stated that approximately 90% of payments made by the Cultural Office required the signature of an academic adviser, an accountant and the Head of Office. She confirmed to the court that her role could only be performed in her absence, by another accountant. Likewise, she could not substitute for an academic adviser. In cross-examination, the witness stated that the accountant was responsible at all times for transferring funds; the academic adviser's role was confined to requesting the payment of student fees and allowances.

**The Claimant's Evidence before the Labour Court**

22. In her evidence to the Labour Court, the claimant gave a breakdown of her daily work in the office in the following terms: approximately 95% of her time was taken up with paperwork and inputting data; 4 – 5% was spent making contact with individual students by email or telephone; and about 1% of her time was taking up with attendance at graduation and conferring ceremonies.

23. The claimant gave the following examples of duties that she regularly undertook in her role as academic adviser: assisting students who are studying in Irish universities; setting up student sponsorship records; presenting academic information to potential students; managing the practical affairs of approximately 300 Kuwaiti students sponsored by the Kuwaiti Ministry of Higher Education to study in Ireland each year; liaising between Irish academic institutions and the parents of Kuwaiti students in relation to such matters as student placements, student progression and appeals processes; creating files and maintaining a student database; organising travel tickets, books and allowances for students; confirming whether the student had complied with sponsorship rules before requesting the disbursement of sponsorship funds; documenting all student activities; monitoring students' studies and their attendance at various institutions; issuing students with reminders of their obligations under Kuwaiti student rules, regulations and policies; preparing student progress reports; and attending weekly meetings with other academic advisers and the Head of Office to discuss student related issues.
24. The claimant stated that she was not required to have prior security clearance to access the computer database, as it did not contain sensitive or personal data. She stated that much of her work would involve the generation of proforma letters for various people, e.g. letters requested by students seeking new accommodation, or renewal of their GNIB authorisations. Such letters were pre-signed by the Head of Office.
25. The claimant stated that her first involvement with the Academic Committee was in September 2016. She stated that there had been no similar meetings of the Academic Committee during the period that Dr. Messi held office. She stated that she had attended about fifteen meetings of the Committee in total. In the course of those meetings certain issues were discussed that had arisen in relation to students assigned to her, or to her colleagues. On average, she stated that the meetings of the Academic Committee lasted between 30 – 45 minutes. They took place at weekly or fortnightly intervals.
26. The claimant stated that she never handled funds, nor did she have the power to authorise disbursement of funds. She stated that she exercised merely an administrative function in that process, whereby she carried out checks on a student's details and eligibility, before sending a memorandum to the accountant and to the Head of Office, along with the particular student's request for payment.
27. The claimant denied that she ever had any role in negotiating with any third level institution in relation to fee levels, or the allocation of places to Kuwaiti students. However, she had attended one meeting in UCC in February 2008. Her recollection was that the Head of Office had requested her to prepare a memorandum in advance of a meeting that he was to have with the university authorities in order to secure an increase in the number of places in the medical school that would be available to Kuwaiti students. She also made the advance arrangements for the meeting by telephone. She stated that at the last minute, the Head of Office directed her to attend the meeting in his place. She stated that that was most unusual and was outside the normal brief of an academic adviser. Her recollection was that the meeting in UCC was awkward and tense, as she

had not been expected at that meeting. Finally, she told the court that neither she, nor any other academic adviser, provided consular assistance as part of their role. That was dealt with directly by the Kuwaiti Embassy in London.

28. Evidence was given on behalf of the claimant by Mr. Ian Dunne, who had been engaged as an IT Consultant in the Cultural Office in Dublin between July 2008 and April 2011. He stated that he had knowledge of the role performed by an academic adviser within the Cultural Office. He stated that he had effectively performed a large part of that role for a number of months in 2009, when there was a vacancy prior to the arrival of Mr. Al Naimi. He had also carried out his responsibilities as the IT Consultant during that period. Furthermore, he stated that he had substituted for the claimant on more than one occasion. However, at no stage had he directly engaged with students.
29. Mr. Dunne stated that neither the Academic Committee, nor the DEIRA computer database, was in place at the time that he acted in the role of academic adviser. As part of the academic adviser role carried out by him, Mr. Dunne stated that he prepared memoranda for the Head of Office and the accountant, requesting the disbursement of funds to individual students, which was based on the student's results, as provided to him by the relevant educational institution. He stated that he had not signed the memoranda, as they were signed by an academic supervisor. Mr. Dunne stated that he had also played a role in processing payments to students, once they had been approved by the Head of Office and the accountant. Payment was initiated through "*batch processing*", which required him firstly to upload a file containing the names and bank details of payees to the Cultural Office's bank's website. The Head of Office then authorised the payments, by entering a code into a device that had been supplied by the bank. That device was kept by the Head of Office in a safe in his office.
30. Mr. Dunne stated that when covering the role of academic adviser, he had also notarised students' degree results in the company of an academic supervisor. The Head of Office had provided him with the official seal for that purpose. Mr. Dunne stated that in his opinion and based on his experience of fulfilling many of the duties associated with the role of academic adviser, the role was comprised essentially of secretarial and administrative tasks.
31. The summary of the evidence given above, has been taken from the determination handed down by the Labour Court.
32. In that determination, the court also set out a summary of the legal submissions that had been made by counsel on behalf of each of the parties. It also set out an extensive summary of the law in relation to the doctrine of sovereign immunity generally in customary international law, and also set out the development of that doctrine in relation to contracts of employment. In its determination, the Labour Court referred to a large number of decisions from both the Irish Courts and the EAT; as well as referring to decisions from the ECHR and the CJEU. They also referred to academic writings on the subject. The Labour Court also set out the provisions of Art. 11 of the 2004 Convention and referred to cases where that had been discussed.

### **The Decision of the Labour Court**

33. Having summarised the evidence and the law as outlined above, the Labour Court gave its decision in the following terms: -

*"Discussion and decision*

*Having considered in some detail the evidence of the claimant and other witnesses proffered by the respondent, the court finds that the claimant's role as Academic Adviser in the Cultural Office did not involve the exercise of any public powers or governmental authority and did not touch on the business of the State of Kuwait such as to entitle the respondent to rely on the doctrine of sovereign immunity in the within proceedings. It follows that the court cannot accept Ms. Ennis BL's submission that para. 2(a) of Article 11 of the United Nations Convention on Jurisdictional Immunities of States and their Property 2004, is determinative of the issue before this Court, as it has not been established that the claimant was 'recruited to perform particular functions in the exercise of governmental authority'.*

*That being the case, the court finds that the respondent is not entitled to rely on the doctrine of limited sovereign immunity to preclude the determination of the claimant's substantive complaint under the Act.*

*The court so determines."*

### **Submissions on behalf of the Appellant**

34. As already noted, the primary submission on behalf of the appellant was that the Labour Court had failed to provide any, or any adequate reasons as to why it had reached the conclusion that it had. It was submitted by Mr. Molloy SC on behalf of the appellant that it was clear from the oral evidence that had been presented to the Labour Court and from the considerable volume of documentation that had been placed before it, that there was a conflict between the parties as to the nature of the role that was performed by the claimant as academic adviser.
35. On the one hand she and her witness, had purported to paint her role as being merely administrative and clerical. As against that, the appellant's witnesses had given evidence that both in her role as academic adviser and by her membership of the Academic Committee, which body had been specifically authorised by the Deputy Minister for Higher Education to carry out a significant role in the disbursement of scholarship funding to Kuwaiti students, that she was engaged at a reasonably high level within the Cultural Office in Dublin and as such, could be seen as exercising governmental authority on behalf of the State of Kuwait.
36. Counsel pointed out that in addition to the oral evidence, the documentary evidence established that the claimant was the holder of a Master's Degree and was in receipt of a salary, inclusive of allowances, of approximately €44,000. In relation to the overall funds that were disbursed by the Cultural Office, the evidence before the Labour Court had been that there was an annual fund of approximately €50m disbursed among approximately 500 Kuwaiti students in Ireland. It was submitted that in these circumstances there was

significant evidence before the Labour Court that the claimant was operating at a fairly high level in terms of both responsibility and financial importance.

37. Counsel accepted that an appeal on a point of law was not an appeal on the merits, but he was referring to these factors as showing that there was evidence which the Labour Court had to assess and reach a conclusion on, prior to giving its decision. Counsel submitted that the Labour Court had not engaged with the evidence; it had merely summarised all the evidence, then gone on to summarise the legal submissions and give a wide ranging summary of the law, and had then just reached a conclusion, much in the same way as a jury would do at the end of a criminal trial. It was submitted that that was not acceptable having regard to the duty on decision makers in Irish law to furnish reasons for their decisions. In particular, counsel referred to *Heron v. Bank of Ireland* [2015] IECA 66; *Doyle v. Banville* [2018] 1 I.R. 505 and *Nano Nagle School v. Daly* [2019] 3 I.R. 369.
38. Counsel stated that not only had the Labour Court failed to engage with the evidence and state why it was preferring the evidence of the claimant over that which had been led on behalf of the appellant, but it had also failed to explain why it was departing from the decision of the Supreme Court in *Government of Canada v. Employment Appeals Tribunal and Burke* [1992] 2 IR 484, where the court had looked at the issue of sovereign immunity and had held that a chauffeur employed in the Canadian Embassy was not entitled to pursue a claim against his employer due to that doctrine. It was submitted that the Labour Court had failed to explain why it was departing from a decision given by the highest court in Ireland.
39. Counsel pointed out that in *Sabeh El Leil v. France* [2011] IRLR 781, decisions reached by the French Courts to the effect that the head accountant in the French Embassy was not entitled to sue his employer in relation to his dismissal due to the doctrine of sovereign immunity and due to the fact that in his capacity as head accountant he participated in acts of governmental authority; the ECHR had declared that the French decisions had been in breach of the applicant's rights under Art. 6 of the ECHR, due to the fact that the French Court of Appeal and the Cours de Cassation had declined to engage with the evidence. The ECHR had reached a similar conclusion in *Cudak v. Lithuania* [2010] 51 EHRR 15, because the Lithuanian Courts had accepted a certificate from the Polish Government which had enabled them to rely on sovereign immunity, which the ECHR held was in breach of the applicant's Art. 6 rights.
40. By way of subsidiary argument, it was submitted on behalf of the appellant that the Labour Court in its determination had applied the wrong test. In particular, from the wording of the determination, it was clear that they had adopted a three-tier test in holding that the claimant's role as academic adviser in the Cultural Office did not involve (i) the exercise of any public powers, or (ii) governmental authority and (iii) did not touch on the business of the State of Kuwait. It was submitted that that placed the threshold too high, because the exception provided for in Art. 11.2(a) of the 2004 Convention, only provided that the employee had to be engaged to perform functions "in the exercise of



governmental authority". It was submitted that having regard to these two matters, the Labour Court had made errors of law and the decision should be set aside.

#### **Submissions on behalf of the Claimant**

41. Mr. Lynn SC on behalf of the claimant submitted that on an appeal on a point of law, the court was not entitled to overturn the decision merely if it would have come to a different conclusion on the facts that had been before the original decision maker. It was only entitled to set aside the decision if it was satisfied that there was no evidence to support the conclusion that had been reached by the decision maker, or if he/she had proceeded on foot of an erroneous view of the law: see *Transdev Ireland Limited v. Caplis* [2020] IEHC 403.
42. In relation to the adequacy of reasons argument that had been put forward on behalf of the appellant, it was submitted that on an appeal such as this, the court must look to the entirety of the decision, and not just at the concluding paragraphs thereof. It was submitted that when one had regard to the entirety of the determination of the Labour Court in this case, it was clear that they had had regard to all the evidence before it, both oral and documentary and had also had regard to the decision in the *Canada* case, as it was referred to extensively in the determination. It was submitted that the duty to give reasons, did not mean that the decision maker had to give an elaborate judgment, such as might be produced in the Superior Courts. As had been established in the *Transdev* case, it was sufficient if the gist of the reasons was given in the decision: see para. 16 of the judgment.
43. It was submitted that in this case it was abundantly clear that having received a sizeable volume of documentation and having held a hearing over three days, and having heard extensive legal submissions, the Labour Court had preferred the evidence and submissions led on behalf of the claimant, to the effect that her role as academic adviser was largely administrative and clerical in nature. It was submitted that that was a finding that was open to the Labour Court on the evidence that had been before it.
44. It was submitted that the parties were agreed that, while Ireland was not a party to the 2004 Convention, it represented the state of customary international law at the present time. It was submitted that the Labour Court had had regard to the relevant provisions in that convention and had reached its decision, based on the extensive European and English case law that had been opened before it, that the claimant did not come within the provisions of Art. 11.2(a). It was submitted that that finding was unimpeachable at law.
45. In relation to the *El Leil* case, it was submitted that the ECHR in that case had effectively held that in order for an employee to come within the provisions of Art. 11.2(a), he or she would have to have some degree of autonomy in relation to decision making and other matters. It was clear that the claimant did not have any such autonomy in the circumstances of her role within the Cultural Office in Dublin.

46. It was submitted that the Labour Court had not applied the wrong test as alleged on behalf of the appellant. It was clear that the wording that had been used was referable to the dicta in the *Canada* case in 1998, but they did not represent an incorrect test having regard to the provisions of Art. 11.2(a), as they were effectively just alternative ways of saying the same thing. The essential point was that the employee must exercise some degree of governmental authority, or policy, on behalf of the state by which she was employed and there was no evidence that the claimant did that. It was submitted that insofar as there had been reference in some of the oral evidence to certain “decrees”, these were in effect no more than internal memoranda governing the operation of the Cultural Office in Dublin.
47. Counsel referred to the decision of the UK Supreme Court in *Benkharbouche v. Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62, which was a joint appeal involving two women who had been employed as domestic worker or housekeeper/cook by Embassies in the UK. The court had effectively disapplied its own immunity statute as being contrary to Art. 6 of the ECHR. Thus, even workers at a fairly low level within the Embassy, were entitled to access to the courts as protected under Art. 6.
48. In summary, it was submitted that the determination of the Labour Court had contained a comprehensive summary of the evidence and the law; that had been followed by a clear and succinct finding, which was open to the court on the evidence before it and was not irrational. Accordingly, it was submitted that the decision was unimpeachable.

### **Conclusions**

49. The general duty to give reasons is well established in Irish law: *Connelly v An Bord Pleanála & Ors.* [2018] IESC 31, *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3, *Balz v. An Bord Pleanála* [2019] IESC 90, and *Mallak v. Minister for Justice, Equality and Law Reform* [2012] IESC 59.
50. The nature of the reasoning that is required on an adversarial dispute was examined by the Court of Appeal in *Bank of Ireland Mortgage Bank v. Heron* [2015] IECA 66. That decision makes it clear that where there is a conflict of evidence between the parties, it is essential that the decision maker engages with the evidence and resolves the conflict one way or the other. In the course of his judgment on behalf of the court, Kelly J. (as he then was) referred to the judgment of Henry L.J. in *Flannery v. Halifax Estate Agencies Limited* [2001] WLR 377 where the judge set out a number of principles in relation to the duty to give reasons, two of which are particularly apposite in this case:-

“(3) *The extent of the duty, or rather the reach of what is required to fulfil it, depends on the subject-matter. Where there is a straightforward factual dispute whose resolution depends simply on which witness is telling the truth about events which he claims to recall, it is likely to be enough for the judge (having, no doubt, summarised the evidence) to indicate simply that he believes X rather than Y; indeed there may be nothing else to say. But where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain*

*why he prefers one case over the other. This is likely to apply particularly in litigation where, as here, there is disputed expert evidence; but it is not necessarily limited to such cases.*

- (4) *This is not to suggest that there is one rule for cases concerning the witnesses' truthfulness or recall of events, and another for cases where the issue depends on reasoning or analysis (with experts or otherwise). The rule is the same: the judge must explain why he has reached his decision. The question is always, what is required of the judge to do so; and that will differ from case to case. Transparency should be the watchword."*

51. Kelly J stated as follows in relation to the need to give reasons at para. 16 et seq:-

*"[16.] For many years the Superior Courts have held that administrative bodies making judicial or quasi judicial decisions must give reasons for so doing. Such bodies must satisfy the criteria identified by Murphy J. in O'Donoghue v. An Bord Pleanála [1991] ILRM 750 where he said in the context of a decision given by the Planning Board that it:*

*"... must be sufficient first to enable the courts to review it and secondly, to satisfy the person having recourse to the Tribunal that it has directed its mind adequately to the issues before it."*

*[17.] That line has been followed in many subsequent decisions including Grealish v. An Bord Pleanála [2006] IEHC 310, Mulholland v. An Bord Pleanála [2006] ILRM 287, and Deerland Construction Limited v. Aquaculture Licences Appeals Board [2008] IEHC 289. Given that administrative bodies are required to give reasons for their decisions, no lesser standard can be required of courts exercising judicial functions.*

*[18.] That such is the case cannot be doubted having regard to the decision of McCarthy J. in Foley v. Murphy [2008] 1 I.R. 619.*

*[19.] In that case McCarthy J. considered a number of Irish and English authorities in favour of the proposition that reasons must be given for judicial decisions. In Foley's case, Her Honour Judge Murphy, a Circuit Court judge, had failed to give reasons for refusing an award of the applicant's costs. On judicial review McCarthy J. granted certiorari to quash her decision because of the failure to give reasons for it. He remitted the matter back so that the question could be determined in accordance with law."*

52. While the *Heron* case dealt with the duty of a court to give reasons, I am satisfied that a similar duty applies to all decision makers. Where there is conflicting evidence before a decision maker, it is essential that he/she engages with the evidence. He may decide that he prefers the evidence of one set of witnesses, rather than the evidence of witnesses called on behalf of the opposing party. He may feel that the evidence of certain witnesses is supported by documentary evidence; whereas the evidence of other

witnesses may be contradicted by contemporaneous records or other documents; the decision maker is entitled to reach whatever decision he or she regards as appropriate on the evidence, but it is incumbent upon them to state clearly why they are accepting certain evidence and rejecting other evidence called on behalf of the opposing party.

53. In *Doyle v. Banville* [2012] IESC 25, the Supreme Court was dealing with an appeal in relation to an RTA. The plaintiff's case was that he was a motorcyclist driving behind the defendant's car, when she suddenly braked sharply to take a left turn, which she had almost passed; as a result, he claimed that he had had to swerve onto the other side of the road, where he collided into an oncoming vehicle.
54. The defendant's evidence was that she had always intended turning left; she had slowed her speed from an appropriate distance in advance of the left turn and had indicated her intention to make the left turn. She denied that she had braked suddenly. Clarke J. (as he then was) delivering the judgment of the court, stated as follows in relation to the duty of the trial judge to engage with the conflicts that arose on the evidence:-

*"...to that end it is important that the judgment engages with the key elements of the case made by both sides and explains why one or other side is preferred. Where, as here, a case turns on very minute questions of fact as to the precise way in which the accident in question occurred, then clearly the judgment must analyse the case made for the competing versions of those facts and come to a reasoned conclusion as to why one version of those facts is to be preferred. The obligation of the trial judge, as identified by McCarthy J. in Hay v. O'Grady, to set out conclusions of fact in clear terms needs to be seen against that background.*

- 2.4 *In saying that, however, it does need to be emphasised that the obligation of the trial judge is to analyse the broad case made on both sides. To borrow a phrase from a different area of jurisprudence, it is no function of this Court (nor is it appropriate for parties appealing to this Court) to engage in a rummaging through the undergrowth of the evidence tendered or arguments made in the trial court to find some tangential piece of evidence or argument which, it might be argued, was not adequately addressed in the court's ruling. The obligation of the court is simply to address, in whatever terms may be appropriate on the facts and issues of the case in question, the competing arguments of both sides.*
- 2.5 *In addition there may be cases where the court has nothing more to go on but the demeanour of the witnesses and where there will be little more to be said than that the court found one set of witnesses as being more credible than another. However where, as in a case such as this, there are factors surrounding the accident in question on which the parties lay emphasis for their argument as to which of two competing accounts should be accepted, then the court must, of course, address at least the broad drift of the argument on both sides so that the parties may know why the court came to its conclusions."*

55. Finally, in the *Nano Nagle* case, MacMenamin J pointed out that the statutory duty under which the Labour Court operates provides that, on request, it should set out a statement of “why” it reached its determination (see s.88(1) of the 1998 Act). In that case, the decision of the Labour Court was struck down due to the fact that it had omitted to deal with the evidence of one witness, who was seen by the court as having given crucial evidence on a central issue in the case. In the course of his judgment, MacMenamin stated as follows:-

*“Justice must be seen to be done. Part of that process must be that a deciding tribunal is seen to engage with the relevant evidence, and, in its decision, address it one way or another within the prism of the applicable law. When an award is made, there should be some explanation of the basis for the award, as compared to any other sum.”*

56. The key issue in this case was whether the claimant in her role as academic adviser was merely engaged in fairly rudimentary administrative tasks, which did not involve any decision making on her part, or the exercise of governmental authority on behalf of the State of Kuwait; or whether, her role envisaged her carrying out tasks that could truly be said to involve the implementation of policy or governmental authority of the State of Kuwait.
57. In this regard, the Labour Court had conflicting evidence before it, as outlined earlier in the judgment. There was a significant body of evidence led on behalf of the appellant, which tended to support the proposition that the claimant was more than a mere administrative or clerical officer operating at a low level. That evidence included the following: that she held a Master’s Degree; she was paid a significant salary; she was on the Academic Committee, which had been authorised by decrees issued by the Deputy Minister for Higher Education to take decisions on the policy of the Kuwaiti State in relation to the education of its students abroad and how that would be facilitated; she had represented the State of Kuwait in negotiations with UCC concerning access for Kuwaiti students to places on medical degree courses in that university and she played a significant role in the disbursement of circa. €50m annually in funding to Kuwaiti students studying in Ireland.
58. Against that evidence, was the evidence that had been given by the claimant and by her witness, Mr. Dunne, to the effect that there had been no meetings of the Academic Committee between 2014 and 2016 and that thereafter, the meetings were held on a weekly or fortnightly basis and were relatively short in duration, lasting some 30 – 45 minutes. She had given evidence that her role in the organisation was at a fairly low level, which mainly involved checking that students were properly enrolled in institutions; had all requisite GNIB clearance and had passed their exams. She stated that she did not have any autonomy, nor any decision making function within the organisation. Her evidence in this regard was supported by the fact that Mr. Dunne, who was employed as an independent IT Consultant, had carried out some of the functions of an academic

adviser prior to the appointment of Mr. Al Naimi and also on occasions when the claimant was absent.

59. The Labour Court was entitled to come to a conclusion that it preferred one set of evidence to the other; but it was obliged to set out its reasons why it was rejecting some, or all, of the evidence led on behalf of the appellant, or why it may have accepted that evidence, yet still come to the conclusion that the claimant's role did not involve the exercise of governmental authority. In reaching either of those conclusions, it had to set out clearly the reasons why it had reached whichever conclusion it chose.
60. The court accepts that in looking at the Labour Court determination, it must look at the decision in the round and not just focus on the final portion of the determination where the decision is set out. While the determination set out an admirable summary of the background facts; the evidence that had been led by each of the parties and the legal submissions and had set out a clear summary of the case law that had been opened to it; but it then just gave a bald conclusion, without saying why it had reached that conclusion. The decision was much like the verdict of a jury in a criminal trial. It merely gave the result, having given a summary of the evidence, but did not tie the two together by saying why the court resolved the conflict in evidence in favour of the claimant.
61. Unfortunately, the judgment of the Labour Court did not engage with the conflicting evidence that had been led in relation to the status of her role as academic adviser within the Cultural Office; nor did it say why it had resolved the conflict in evidence in favour of the claimant. In essence, the Labour Court had to state clearly why it came to the conclusion that the claimant did not come within Art. 11.2(a) of the Convention. It did not do that.
62. In order to give a lawful decision, the Labour Court, having set out meticulously the evidence that was tendered before it and the legal submissions that had been made to it, it had to (a) make findings of fact and give reasons why it was making those findings; (b) it had to apply the relevant legal authorities to the facts and having done that, it would then have given a reasoned explanation as to why it reached its conclusion. Unfortunately, that did not happen in this case. The court must allow the appellant's appeal on the ground that the Labour Court failed to give adequate reasons for its decision.
63. The court also allows the appeal on the ground that the Labour Court appears to have applied the wrong test, insofar as it appears to have applied three factors in determining whether or not the claimant came within the provisions of Art. 11.2(a) of the Convention. In holding that the claimant's role as academic adviser in the Cultural Office did not involve the exercise of any public powers, or governmental authority and did not touch on the business of the State of Kuwait, it would appear that the Labour Court was applying a three-fold threshold test in order for sovereign immunity to apply. Whereas in Art. 11.2(a) it is only necessary for the employee to be recruited to perform particular functions in the exercise of governmental authority.

64. On this basis, the court is satisfied that the Labour Court committed an error of law in applying the wrong test in determining whether sovereign immunity was available in the circumstances of this case. On this ground also the appeal is allowed.
65. In light of its findings herein, the court proposes to make an order allowing the appellant's appeal; setting aside the determination of the Labour Court made on 22nd July, 2019 and remitting the matter back to the Labour Court for a further determination in accordance with law.
66. As this judgment is being delivered electronically, the parties will have two weeks within which to furnish brief written submissions in relation to the form of the final order and on costs and on any other matters that may arise.