Neutral Citation Number: [2010] IEHC 187

THE HIGH COURT

JUDICIAL REVIEW

2010 626 JR

BETWEEN/

HASAN ABEDALI JIAD

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Cooke delivered on the 19th day of May, 2010.

1. The applicant applies to the Court *ex parte* for leave to seek judicial review of a decision of the respondent made on 23rd November, 2009 refusing his application for a certificate of naturalisation under s. 14 of the Irish Nationality and Citizenship Act 1956 (as amended). In particular, leave is sought to apply for an order of *certiorari* to quash that decision together with an order of *mandamus* to compel the Minister to reconsider the application.

2. The applicant is a native of Iraq who came to Ireland as an asylum seeker in 1996. His application was unsuccessful but he was granted temporary leave to remain in the State in May 1997 which has since been renewed from time to time and currently stands extended until May 2011. He says that he has settled successfully in Ennis, Co. Clare and since 2003 has operated a small business in which he now employs five people.

3. The application the subject matter of this judicial review proceeding is the third application which he has made for a certificate of naturalisation. He first applied in September, 1999 but was refused in 2003, no reason for the refusal being given. He applied again in 2004 but was once more refused without stated reason in 2006. The application which is the subject of the contested refusal of 23rd November, 2009 was made in September, 2006.

4. In the letter of 23rd November, 2009 refusing the present application, the only explanation given by the Minister was in these terms:

> "In reaching this decision, the Minster has exercised his absolute discretion, as provided by the Irish Nationality and Citizenship Acts 1956 – 1986, as amended. There is no appeals process provided under this legislation. However, you should be aware that you may reapply for the grant of a certificate of naturalisation at any time. Having said this, any further application will be considered taking into account all statutory and administrative conditions applicable at the time of the application."

5. In the statement of grounds proposed to be relied upon if leave is granted, the main grievance expressed, perhaps understandably, is directed at the fact that this is the third application which has been refused and that no reasons have been given. Thus, the following objections are raised:-

> o Re-applying is pointless when the applicant has already applied three times and does not know the basis on which he has been refused;
>
> o There appears to be no rational basis for refusal when the applicant has been living in this State for fourteen years;
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> o There is a failure to consider all material and relevant matters including the applicant's connections to the State, his financial position and so must be based upon some unknown or irrelevant factors;
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> o The applicant has not been afforded a fair procedure because the reason for the refusal has never been put to the applicant so as to allow him to respond;
>
> o If no reasons are provided the Court cannot assess whether the decision has been taken in a manner compatible with the Constitution or the European Convention on Human Rights.

6. This application for leave is not one of those subjected to the limitations of s. 5 of the Illegal Immigrants (Trafficking) Act 2000 so that the ordinary standard for the grant of leave applies namely, that an arguable case must be demonstrated.

7. Section 14 of the 1956 Act (as amended) provides that Irish citizenship may be conferred upon a non-national by means of a certificate of naturalisation granted by the respondent. Section 15 of the Act upon which the present application turns reads as follows:-

> "(1) Upon receipt of an application for a certificate of naturalisation, the Minister may, in his absolute discretion, grant the application, if satisfied that the applicant –
>
> (a) (i) is of full age or
>
> (ii) is a minor born in the State;

(b) is of good character

(c) has had a period of one years continuous residence in the State immediately before the date of the application and, during the eight years immediately preceding that period has had a total residence in the State amounting to four years;

(d) intends in good faith to continue to reside in the State after naturalisation; and

(e) has made either before a justice of the District Court in open court or in such manner as the Minster, for special reasons, allows, a declaration in the prescribed manner, of fidelity to the nation and loyalty to the State.

(2) The conditions specified in para. (a) – (e) of subsection (1) are referred to in this Act as conditions for naturalisation.

8. Section 16 of that Act also provides that the Minister may "in his absolute discretion" grant a certificate of naturalisation in a number of specific cases notwithstanding the fact that the conditions for naturalisation in s. 15 (or any of them) are not complied with. It is not contested that the absolute discretion relied upon by the Minster in the contested refusal in the present case is that of s. 15 (1). No question arises of the Minister having exercised the distinct discretion under s. 16 to refuse to grant the certificate notwithstanding the non-compliance with conditions.

9. In these circumstances the Court is satisfied that leave cannot be granted for the purpose of the application proposed to be made because no stateable case is established to the effect that the Minister's refusal in the decision of 23rd November, 2009 is in any way unlawful. The position in law, as the Court sees it, is essentially this. The conferral of citizenship is a function of the sovereignty of the State. No non-national has a right to citizenship. The State grants citizenship as a privilege. The State has an absolute discretion as to whether or not it will accord that privilege to a non-national in any case and in the 1956 Act the Oireachtas has delegated that executive function to be exercised by the respondent Minister. Because there is no right on the part of any non-national to be granted citizenship and because the Oireachtas has empowered the Minister to grant certificates of naturalisation in his absolute discretion, the Minister cannot be under any obligation to give a reason for the refusal of the certificate in any given case where the absolute discretion is relied upon. To require the Minister always to state a reason peculiar to the circumstances of an applicant other than the exercise of the absolute discretion would be to deprive the basis upon which the statutory delegation had been enacted by the Oireachtas of its meaning and effect.

10. This Court is satisfied that the law as so stated is well settled and binding upon it. In particular, in his judgment in *Pok Sun Shum and Others v. Ireland and Others* [1986] I.L.R.M. 593, Costello J. (as he then was) said:

> "There is no general rule of natural justice that in each case where a decision might be made adverse to an applicant, there must be disclosure. And I think that in this, because the nature of the discretion which the Statute gives to the Minister, he is not required to inform the applicant of the reasons which may appear to him adequate. The Minister may be satisfied that all of the conditions that are set out in s. 15 are met but nonetheless he may refuse on grounds of public policy, which have nothing to do with the individual applicant and the certificate of naturalisation. Because of the special control of aliens which every state must exercise, because of the very particular nature of the discretion that is given under the 1935 Act to the Minister in relation to aliens, it seems to me that, in considering the 1956 Act and the duties in relation to both certification under the 1956 Act and permission to reside in the State under the 1935 Act, the Minister is not required to inform an applicant of the information on the files and give him an opportunity to comment upon them … there is no general rule of natural justice that reasons for the decisions of an administrative authority must be given. Again, the extent and scope of the rule of natural justice must depend on the particular statutory function which the Minister or the State department is carrying out. I think it is relevant, in this connection, to bear in mind that under the 1956 Act the Minister was conferring a benefit or a privilege on the applicant and that he was not issuing a licence to which someone having complied with certain conditions, was entitled. This is a case where, even if an applicant complied with certain conditions, the Minister could refuse the certificate."

11. In *Mishra v. Minister for Justice* [1996] 1 I.R. 189 Kelly J. agreed with those views and added: "…it must be borne in mind that the award of a certificate of naturalisation is a privilege and not a right. The fact that an applicant may comply with all of the statutory provisions set out in s.15 of the Act does not mean that it automatically follows that he is entitled to citizenship. If such were the case, there would be no discretion at all vested in the Minister. She would become a mere cipher who when satisfied that the statutory requirements of s.15 were met would be obliged to grant citizenship. Such an approach would effectively rewrite the section and abolish the discretion." This Court respectfully agrees.

12. In other words, "absolute discretion" means exactly what it says. Even where all of the conditions stipulated in s. 15 are manifestly complied with, the Minister is entitled to refuse the certificate and to do so over and over again. Implicit in the applicant's main objection (see paragraph 6 above,) is the proposition that after two, three or more unsuccessful applications for a certificate, a refusal in the exercise of the absolute discretion becomes irrational if no reason based upon the character, conduct, circumstances or future intentions of an applicant is forthcoming from the Minister. Any such implication ignores the fundamental reality of the legislative purpose of the Oireachtas namely that the State is never obliged to grant citizenship to any non-national however worthy in character or exemplary in behaviour he or she may be. Neither refugee status nor temporary leave to remain in the State on humanitarian grounds is granted as a stepping stone to citizenship. They are granted as a means of temporary protection to the individual concerned in discharge of the State's obligations to the international community.

13. Counsel for the applicant has relied upon a number of cases in which the Minister has apparently exercised his "absolute discretion" and yet leave has been granted. One such case was a judgment of this Court in *A.B. v. M.J.E.L.R.* (Unreported 18th June, 2009.) However, as the Court pointed out in that judgment, although the Minister had used the term "absolute discretion" in the letter of refusal, the fact that the letter was accompanied by a memorandum recording that the applicant "has come to the adverse attention of An Garda Síochána" clearly indicated that the Minister was not truly exercising such a discretion but had concluded that the "good character" condition of s. 15 had not been met. That being so, the Minister had not actually exercised an absolute discretion under s. 15 but was obliged to refuse the application for non-compliance with one of those conditions. (See para. 15 of the judgment).

14. Counsel for the applicant relied also upon the judgment of Edwards J. of 30th January, 2009 in *L.G.H. v. M.J.E.L.R. & Anor.* [2009] IEHC 78. There too, however, the position was quite distinct from that of the present case. Although the Minister had again stated in the refusal that he was exercising his absolute discretion, the letter of refusal was accompanied by a document similar to that in the

A.B. case above being an internal submission in the department with a recommendation to the Minister on the application. This contained the information that the applicant (*L.G.H.*) had not come to the adverse attention of the Garda Síochána but convictions had been recorded against two of the applicant's sons. The convictions in question were for various road traffic offences. In effect, Edwards J. came to the conclusion that the Minister had treated the convictions recorded against the two sons as bearing upon the condition of the "good character" of the applicant for the purpose of s. 15 and the decision to refuse was quashed upon the ground that the Minster had thereby taken account of an irrelevant consideration. Once again, this was not a case of the true exercise of absolute discretion without statement of reasons. It was a further case of a decision to refuse based upon the necessary implication that one of the conditions in s. 15 had been found not to be fulfilled.

15. Counsel for the applicant relied on two further points the first of which derived from the judgment of the English Court of Appeal in *R. v. Secretary of State for the Home Department, ex parte Fayed & Another* [1997] 1 All E.R. 228. This was relied upon because of the analogous provisions of the British Nationality Act 1981 under which the Home Secretary was not required to assign any reason for the grant or refusal of any application under that Act for naturalisation as a British citizen. The Court of Appeal, while acknowledging that the Home Secretary was not required to give reasons for refusing an application for citizenship under that Act, held that he was nevertheless required to exercise his discretion reasonably and fairly before arriving at his decision. This involved affording the applicant for citizenship an opportunity to make representations on matters of concern to the Home Secretary prior to making a decision adverse to the applicant. The Court is satisfied that the circumstances of that litigation were so particular that the judgment affords no useful guidance to the issue raised on the present application quite apart from the fact that the legislative and constitutional contexts are distinct. The relevant provisions of the United Kingdom statute governing the function of the Secretary of State in deciding applications for naturalisation did not employ the term "absolute discretion" but provided that he might " if he thinks fit " and "was satisfied an applicant fulfils the requirements" grant the certificate. Furthermore, the judgments in question seem to this Court to turn, at least in part, upon the fact that the "concerns" alleged to be at the basis of the Home Secretary's refusal decision had apparently been openly canvassed in a press release and in answers to parliamentary questions in advance of the decision. In other words, where a decision-maker proposes to adopt a decision taking into account matters potentially adverse to the interest of the addressee, the fair exercise of the discretion involved may require that the matters be put to the addressee for comment or rebuttal before the decision is taken even if there is no subsequent obligation to state reasons for that decision when it has been made.

16. In those circumstances the position is more akin to that considered in many judgments of the Irish courts concerning the exercise of administrative discretion by reference to the fulfilment of conditions and the law on the issue is no different. Where the Oireachtas provides for the grant of a right, licence or other benefit and confers upon an administrative decision-maker the discretionary function of determining whether the applicant for it satisfies prescribed conditions, it is well settled law that the power in question must be exercised consistently with the requirements of constitutional justice and fair procedures. It is enough to recall the statement of Walsh J. in *East Donegal Co-Operative v. AG* [1970] I.R.317:-

> "All the powers granted to the Minister by s. 3 which are prefaced or followed by the words 'at his discretion' or 'as he shall think proper' or 'if he thinks fit' are powers which may be exercised only within the boundaries of the stated objects of the Act: they are powers which cast upon the Minister the duty of acting fairly and judicially in accordance with the principles of constitutional justice, and they do not give him an absolute or unqualified or an arbitrary power to grant or refuse at his will."

17. Finally, counsel drew the attention of the Court to a decision of the Office of the Information Commissioner in Case 020353, *Mr. X. v. Department of Justice, Equality & Law Reform*, dated 22nd May, 2005. It appears that in that case an applicant who had been refused a certificate of naturalisation under the 1956 Act on the basis of the exercise of absolute discretion and without a statement of reasons, had applied to the Department under s. 18 of the Freedom of Information Act 1997 in order to obtain a statement of the reasons for that refusal. The Department refused the statement of reasons on the basis that there was no obligation on the Minister under the 1997 Act to provide one. It relied on the fact that ss. 15 and 16 of the 1956 Act made the grant of the certificate subject to the absolute discretion of the Minister and that the 1997 Act could not therefore impose a duty on the Minister to give reasons for the refusal. In short, having carried out a review under s. 34 (2) of the 1997 Act, the Commissioner annulled the Department's decision upon the basis that, in effect, decisions under ss.15 and 16 were not excluded from the scope of s. 18 of the 1997 Act.

18. Counsel relied upon that decision of the Commissioner in order to submit that the legislative position had therefore changed since the judgment of Costello J. in 1986. The Court cannot agree. The position in relation to the construction and application of s. 15 of the 1956 Act remains unaltered. What has changed is that such an applicant has been given recourse to an alternative avenue of redress in the form of an application under the 1997 Act to obtain a statement of reasons. The present applicant has in fact availed of that redress and according to his affidavit he obtained access to the departmental file. He says: "The entire file was released but there is no reason for refusal anywhere in any of the documents. The file includes a Garda report which is 'clean'." It is clear therefore that this cannot be characterised as a case in which it can be suggested, even by implication, that the Minister had reason to consider that a condition of s.15 had not been fulfilled.

19. So far as s. 15 of the 1956 Act is concerned therefore, the Court considers that the law remains clear. Where the Minister genuinely exercises the absolute discretion to refuse the application he is under no obligation to give a reason for so doing and until such time as the law which this court must apply is changed, no arguable case can be made out that a refusal is tainted by illegality by reason only of the fact that it is one of a series of refusals for which no reason has ever been given. In the judgment of the Court this position is not altered in such a case by the invocation of constitutional rights to fair procedures "and/or the European Convention on Human Rights". As already indicated above, in the judgment of the Court the obligation to accord fair procedures arises where an administrative decision involves a determination which will impose some liability upon an addressee; withdraw some existing entitlement or deny a benefit which accrues provided certain conditions are met. As the above authorities make clear, the grant of a certificate of naturalisation for citizenship under the 1956 Act does not fall into any such category: it is the purely gratuitous conferring of a privilege in exercise of the sovereign authority of the State.

20. Counsel understandably emphasised that this was an application for leave only and that, by analogy with the *L.G.H.* case, leave ought to be granted so that the matter might be more fully argued on a substantive. The Court cannot agree. Leave to apply for judicial review cannot be granted on the basis that it may provoke or entice a respondent into advancing a defence which can be defeated or into providing reasons for a decision so that those can be attacked as unlawful. As the Court pointed out in its judgment in the case of *Singh & Anor v. MJELR* (Unreported, High Court, 17th February, 2010,) an ex parte application for leave must be approached on the basis that it represents the full case the applicant proposes to make and that all the proofs necessary to sustain the entitlement to the reliefs claimed are established. The Court must proceed on the assumption that if, for any reason, there is no appearance by a respondent to oppose the claim, the applicant would be entitled to insist that an order in the terms of the application as it now stands be made by the Court. In the present instance that entitlement has not been arguably established.

21. For all of these reasons the application for leave must be refused.