Neutral Citation Number: [2010] IEHC 488

THE HIGH COURT

JUDICIAL REVIEW

2009 796 JR

BETWEEN

ELIAS MATTA

APPLICANT

AND

THE MINISTER FOR JUSTICE AND LAW REFORM, IRELAND AND ATTORNEY GENERAL

RESPONDENT

JUDGMENT OF MS. JUSTICE M. CLARK, delivered on the 21st day of July, 2010.

1. By order of Peart J. dated the 27th July 2009 the applicant obtained leave to seek *inter alia* an order of *mandamus* directing the Minister for Justice and Law Reform ("the Minister") to make a decision on his long-term residency application and his application for a certificate of naturalisation within a reasonable time or a period of time directed by the Court. On the 14th August 2009 the Minister granted the applicant long-term residency and these proceedings for relief on that aspect of his claim became moot. The claim relating to his claim for a certificate of naturalisation was subsequently withdrawn and the only issue that remains unresolved is costs.

2. The costs application was heard on the 14th April 2010. Mr Brian Leahy, B.L. and Mr Michael McGrath, B.L. appeared for the applicant and Mr Anthony Moore, B.L. for the respondent. As the primary issue to be determined by the Court is whether it was reasonable for the applicant to commence proceedings when he did, the background to the proceedings is of relevance.

Background

3. The applicant is a national of Lebanon who has been legally resident in Ireland since 2003 working on a series of work permits. The first work permit was valid for a period of one year but was renewed thereafter on an annual basis for the next four years. On the 22nd June 2005 the applicant married a national of Lebanon in Cork. On the 30th July 2007 she gave birth to their daughter who is a citizen of Ireland by reason of her parents' continuous legal residence in the State. In early 2008 the applicant's wife suffered an acute life threatening and rare neurological disease which necessitated a lengthy period of in-patient care in hospital. The applicant had to take on the full time care of his young baby and the care of his wife. Clearly, he had to take leave from work. Perhaps fortuitously for him during that difficult time, the applicant's employer offered him a redundancy package and thus he was able to be the full time carer for his wife and child. Both the husband and wife received social welfare payments during this time and the applicant was paid a carer's allowance for caring for his sick wife.

4. His solicitors (Thomas Coughlan & Co.) had in the meanwhile on the 9th May 2008 applied for long-term residency rights on his behalf on the basis of his five years of legal work permits and his parentage of an Irish citizen child. Long term residency status dispenses with the requirement that a person's employer should obtain and pay for a work permit from the Department of Trade, Enterprise and Energy with necessary annual renewals and relieves the person from being tied to employment with that single employer. Although at the time of the application the applicant was in employment under his existing work permit, the Minister was requested to afford priority to the application in the light of the wife's neurological illness. The Minister's agents declined to afford him priority and he was informed that his application would be considered in chronological order. He was further informed that there would be a substantial wait owing to the large number of applications being processed.

5. His solicitors then made frequent and repeated requests to the Minister to process his application on a priority basis due to his wife's illness and after July 2009 because he had been made redundant and was unable to work. His solicitors also wrote to the *Irish-Born Child Section* again seeking priority on the basis of his wife's continuing illness.

6. The Minister's agents expressed sympathy with the family's position and although they sought police clearance they informed the applicant that long-term residency applications were processed in strict chronological order. The letter noted that the applicant's permission to remain in the State extended to the 28th February 2010. The applicant had also made an application for naturalisation and again sought priority on the basis of his parentage of an Irish citizen child and his wife's illness. He was informed that all applications were scheduled for consideration in chronological order. The IBC Unit refused to consider a further application for stamp 4 status until the *Long-Term Residency Unit* had made its determination.

7. The applicant's wife who had been on maternity and then sick leave returned to work on the 20th July 2009. In the run up to her return to employment, the generally polite correspondence from the applicant's solicitors to the Minister's office took on a different tone. While the applicant's wife was debilitated, the husband's employment situation created no prejudice but as his wife's recovery began and continued and there was hope for a full return to health, the applicant found that his legal status and ability to work was frail as he now had no employer and his permit to work had lapsed.

8. On the 4th June, 2009 the applicant's solicitors wrote letters to the *Long-Term Residency Section* and the *Citizenship Section* noting that 12 months had elapsed since they first made application. They asserted that the Minister was in breach of the rules of constitutional justice relying on *Mobin and Gafoor v. The Minister for Justice, Equality and Law Reform* (Unreported, High Court, Edwards J., 17th July, 2007). They reserved the right to issue proceedings seeking an order of *mandamus* compelling the Minister to fulfil his constitutional duty.

9. On the 8th July, 2009 they wrote again to the *Long-Term Residency Section* referring on this occasion to the judgment of this Court in *Afzal Nawaz v. The Minister for Justice, Equality and Law Reform* (ex tempore, Unreported, High Court, Clark J., 26th June, 2009). It was stated that the delay was causing the applicant actual prejudice and they again reserved the right to take judicial

review proceedings. The Long-Term Residency Section replied on the 14th July, 2009 reiterating that the office processed applications in a strict chronological order and was now processing applications made in October, 2007.

10. By reply dated the 14th July, 2009 the applicant's solicitors stated:-

> *"[O]ur client has attended a sequence of interviews regarding a new position open to him in the Information Technology Sector. He … is due to be offered a job within the next week or so. Given that he doesn't have his Stamp 4 status he cannot take up his position. You have all the information that you require in order to finalise your decision and our client is suffering an actual prejudice. He has already been advised by the Irish Born Child Section that they will not consider an application based on his Irish Citizen Child. He anxiously wishes to take up this employment. In these circumstances we believe there is now no option, given the actual prejudice involved, for our client but to take an application by way of judicial review …"*

11. It was submitted that a delay of in excess of 12 months in processing the application had been described by Edwards J. in *Mobin* as being *"so unreasonable and unconscionable as to violate the rules of constitutional justice"*.

12. By reply dated the 24th July 2009 the *Long Term Residency Unit* repeated that applications were dealt with chronologically and that applications from October 2007 were being dealt with. It was added that "*Every effort will be made to process your client's application to avoid any financial burden on the State*". That letter was stamped "received" by the applicant's solicitors on the 27th July 2009.

13. The within proceedings for *mandamus* were lodged in the Central Office on Thursday the 23rd July 2009 and issued on Monday the 27th July 2009 on which date leave to apply for judicial review was granted. The long term residency permit issued on the 14th August 2009 some fifteen months after the application was made. The *mandamus* proceeding in relation to the long-term residency application then became moot.

THE COURT'S ASSESSMENT

14. The principles underlying the question of costs in a case such as the present were clearly set out in *Garibov v. The Minister for Justice, Equality and Law Reform* [2006] I.E.H.C. 371 where Herbert J. held:-

> *"What is before the court is an application to seek judicial review. Without dealing with the application fully on its merits it would be impossible and, indeed improper for the court to endeavour to predict the outcome of the application. It appears to me that the question which the court must ask in considering this application for costs is,* ***whether in the circumstances it was reasonable for the applicants to have commenced their application for leave to seek judicial review****.*
>
> *[…] In my judgment so far as the present application for costs is concerned, the court has to consider whether:-*
>
> > *"the decision to commence these judicial review proceedings was a proportionate reaction in the applicants to the situation arising from the decisions and actions of the respondents, their servants and agents; the decision to commence these judicial review proceedings was clearly based upon identified, existing and relevant constitutional, statutory and additionally or alternatively legal rules and principles; the decision to commence these judicial review proceedings was on its face manifestly, (as distinct from arguably) frivolous or obviously unstateable and for the purpose of delay; any alternative course of action was reasonably available to the applicants which would not have exposed the respondents to the risk of incurring legal costs; the applicants had afforded the respondents a reasonable opportunity, insofar as the particular circumstances of the case would permit of addressing and responding to their claims before commencing these proceedings." (*emphasis added*)*

15. Applying those principles to the present case, the Court has to determine whether it was reasonable or proportionate for the applicant on the 27th July 2009 to seek to compel the Minister to accord priority to the applicant's long-term residency application which was being dealt with in chronological order. The reasonableness of instituting proceedings must be assessed by reference to the situation pertaining on the 27th July 2009 although the Court is not precluded from having regard to subsequent events.

16. By coincidence on the 29th July 2009 this Court delivered its formal decision in *Afzaal Nawaz v. The Minister for Justice, Equality and Law Reform* [2009] I.E.H.C. 354 having already delivered an *ex tempore* judgment the previous month. The applicant in that case was represented by the same legal representatives as in this case. Mr Nawaz had commenced proceedings seeking to compel the Minister to determine his naturalisation application within a specific period of time. The certificate of naturalisation issued some time after the proceedings issued and the relief sought became academic. Mr Nawaz claimed he was entitled to his costs but the Court found that it in circumstances where the Minister had provided resource-related explanations for anticipated delays and where there was no right to a certificate of naturalisation as opposed to a right to apply, it was unreasonable for Mr Nawaz or indeed any applicant to issue mandatory proceedings. The Court made no order for costs because Nawaz was the first time that the reasonableness of the issue of proceedings in such cases was tested. However, the Court warned the parties that it might be appropriate in subsequent cases arising from the same or similar facts for an order for costs to be made against an applicant.

17. In *Nawaz* the Court found that in the absence of cogent evidence of arbitrary or capricious behaviour in the consideration of naturalisation applications, it was not appropriate for a court to direct a Minister to carry out his discretionary functions within any particular time limit. These principles were applied to long-term residency applications in *Russell Nearing v. The Minister for Justice, Equality and Law Reform* (Unreported, High Court, Cooke J., 30th October, 2009). Cooke J. noted that there is no legal entitlement to long-term residency and that its grant is entirely in the discretion of the Minister. He held:-

> *"Mandamus does not issue against an administrative decision maker simply because there is a duty to make a decision. Mandamus lies to make good an illegal default in the discharge of a public duty. There must have been, either expressly or by implication, a wrongful refusal to make a decision or such an egregious and unjustified delay in dealing with the application as to be tantamount to a refusal in its effect."*

18. Cooke J. noted that there was *"no element of urgency in the applicant's personal situation which would have required the Minister to depart from the normal administrative order for dealing with applications for long term residency so as to accord this application some priority"* and that there was nothing to suggest his application was being dealt with arbitrarily. Cooke J. concluded:

> *"Once it is clear that the department has in place a particular system for the administration of such a scheme, it is not*

the role of the Court in exercise of its judicial review function to dictate how a scheme should be managed or to prescribe staffing levels or rates of productivity in the relevant section of the department. Once it is clear from the evidence that there is in place an orderly, rational and fair system for dealing with applications, the Court has no reason to infer any illegality in the conduct of the Minister unless some specific wrong doing or default is demonstrated in a given case."

19. The applicant here contends that his case is distinguishable on the basis of the following passage from the written decision of this Court in *Nawaz*:-

> *"The applicant was informed from the first opportunity that there would be a delay in dealing with his application. This was subsequently explained further. No valid reason was advanced for this applicant to demand / require / insist on the consideration of his application before the identified period. The Minister was never informed of any special or pressing circumstances requiring an earlier consideration. It is highly unlikely that the applicant would have been able to identify any such circumstances."*

20. He contends that his case can be distinguished from that of Mr Nawaz or Mr Nearing because he did inform the Minister of *"special and pressing circumstances requiring an earlier consideration"* of his long-term residency application. He accepts that - in spite of his solicitors' repeated assertions during 2008 and 2009 - the fact of his wife's illness and his redundancy did not make this case exceptional although they undoubtedly made the family's life difficult. He argues that the delay in processing his long-term residency application did in fact prejudice his position in July 2009 when he received an offer of employment which was conditional on his legal entitlement to work in Ireland. The information he received at that time was that his long-term residency application would not be processed until early 2010. Those circumstances made it entirely reasonable to commence *mandamus* proceedings as he would be unable to accept the position offered without a stamp 4 permit.

21. This argument is not in fact supported by the facts of the case nor are those circumstances reflected in the statement of grounds relied on when the proceedings issued. Those grounds show a remarkable similarity to those which failed in Mr Nawaz's case where the basic tenor was *I have applied for status and the Minister has failed to provide that status within what I the applicant consider to be a reasonable time. I have suffered loss and damage as a result of the excessive delay.*

22. In reviewing the facts there can be no doubt that Mr Matta's wife had been seriously ill and that his life was difficult during the period when he applied for both long-term residency and a certificate of naturalisation. However this unfortunate state of affairs played no real role in his application for long-term residency or in any claim that his wife's illness created any urgency in the application. In July 2009 his wife had recovered to the extent that the applicant was seeking to return to work. Although much emphasis has been placed on his wife's illness in the early correspondence where priority was being forcefully sought, it is difficult to see the connection between those demands and the family's circumstances as it does not appear that Mr Matta could have worked or sought employment while providing care for his wife and infant child during most of 2008 and up to June 2009.

23. The applicant was not in a position to identify any evidence of arbitrary or capricious behaviour in the Minister's consideration of his long-term residency and naturalisation applications when he issued *mandamus* proceedings. He had been made aware by both the long-term residency and naturalisation sections that the system was that applications are placed in a queue and dealt with in strict chronological order. There is no evidence that any other application was arbitrarily prioritised over Mr Matta's or that his application was dealt with in any distinguishing way to that of other applicants.

24. The situation is that when the applicant's solicitors first threatened to institute judicial review proceedings in June and early July 2009, no mention was made of any interview, job offer or even conditional job offer or contract which would create an emergency situation or indicate that normal administrative delays would prejudice the applicant. The basis for the threat at that stage remained the illness of the applicant's wife and the applicant's redundancy which the applicant has correctly conceded could not have warranted an order of *mandamus*..

25. The Court is equally satisfied that the interview process and prospective job offer did not constitute a special, pressing or exceptional circumstance such that it was reasonable for the applicant to commence judicial review proceedings when he did. A certain amount of posturing by a solicitor on behalf of his client is acceptable at a stage when such threat is made in the hope of obtaining some priority.. However, when costs are sought against the Minister for issuing those proceedings, there is a duty to accurately present the facts to the Court when the reasonableness of the decision to commence those proceedings is being examined.

26. The Court is therefore grateful to the applicant's solicitor for providing a full set of letters and emails exchanged between the applicant's solicitors, the Minister and the recruitment officers at McAfee, the applicant's prospective employers. This correspondence establishes the following:

- On the 8th July 2009 the applicant's solicitors wrote insisting on priority and urgency based on the wife's illness and his redundancy;

- In June and July 2009 the applicant was applying for a highly skilled position with McAfee, a major internet security provider;

- On the 14th July 2009 the applicant's solicitor wrote:-

> *"[O]ur client has attended a sequence of interviews regarding a new position open to him in the Information Technology Sector. He … is due to be offered a job within the next week or so. Given that he doesn't have his Stamp 4 status he cannot take up his position. You have all the information that you require in order to finalise your decision and our client is suffering an actual prejudice. He has already been advised by the Irish Born Child Section that they will not consider an application based on his Irish Citizen Child. He anxiously wishes to take up this employment. In these circumstances we believe there is now no option, given the actual prejudice involved, for our client but to take an application by way of judicial review …"*

- On the 24th July 2009 the Minister wrote saying that the long-term residency section were now processing applications received in October 2007 (the applicant sought long-term residency in May 2008);

- On the 27th July 2009 the proceedings were issued;

• On the 28th July 2009 the applicant's solicitors wrote to McAfee saying that the Minister confirmed that they would prioritise their client's application for long term residency. [There is no evidence to support any such confirmation.] In particular it was stated *"It would assist me greatly if I could get written confirmation that he has been offered the job. I believe that this would conclude the application process immediately. The offer can be subject to getting his stamp 4 status. He is getting stamp 4, he is just in a queue and we need to get priority in the queue."*

• On the 29th July 2009 the recruitment officer replied stating that, *"Elias interviewed with us for a position […] and we are interested in his application. It is McAfee policy not to provide any contract to somebody who is still not allowed to work in the country, so unfortunately we will not be in a position to offer a job for the time being."* [This letter has the appearance of one provided to facilitate the request received the day previously.]

27. Clearly, when these proceedings issued on the 27th July the applicant had not received a job offer. It is also clear that his solicitors were aware that a firm job offer would serve to accelerate the consideration of his long-term residency application as the applicant could then very probably demonstrate prejudice. The further correspondence is illuminating.

• On the 31st July the solicitors wrote to the Minister in the following terms:

"Our client still hasn't received his decision nor do we have a firm commitment to finalise the application. Actual prejudice is being caused".

A copy of the email from McAfee dated the 29th july 2009 was enclosed and the letter continued,

"I confirm that I have spoken to them since and they do wish to offer Mr Matta a job but require international approval from their parent company. In order to get this he needs to have the legal entitlement to work in the State. He cannot work in the State until the Minister finalises his application for long term residency. […] We have made an open offer that in the event our client's application for long term residency can be dealt with immediately, we will not pursue the remainder of the proceedings thereby avoiding costs beyond the date of decision. This offer is without prejudice to the issues in the proceedings which remain valid. The matter can be resolved expeditiously so as to avoid further damage to our client and further costs being incurred."

• On the 10th August 2009 the applicant was in fact offered the position for which he had been interviewed. He sent an email to his solicitor stating that he was offered the job and that "the contract was stated to be valid for 14 days and is subject to me getting the work authorisation sorted out before the end of this period. Your urgent advice would be highly appreciated."

• On the 11th August 2009 the prospective employers wrote to the applicant sending a copy of the proposed contract of employment, stating:

"As discussed I would imagine that you will pursue your current course of action with the Department of Justice ***however if you do want us ie McAfee to make an application for a work permit please let me know and we will do the required from this side."*** *(emphasis added)*

• On the 13th August 2009 the solicitor wrote to the Minister stating that on the 10th August the applicant was offered a job conditional on the regularisation of his immigration status within 14 days. No mention was made of McAfee's willingness to themselves apply for a work permit. He said:-

"This means that if the Long Term residency section do not proceed to issue him with Long Term status the offer expires and he loses the job."

28. On the 17th August 2009 the solicitor wrote to McAfee stating

"I expect news on Stamp 4 this week. If it doesn't come through I completely support applying for a work permit / green card. The Department of Enterprise Trade and Employment are 100 times better to deal with than Justice. Let's wait until Friday and we can wait on a permit next week if stamp 4 doesn't come through. […] I remain hopeful on stamp 4 although the wait time on Long Term residency is close to two years, in these circumstances. I believe we will achieve priority. […]"

29. This correspondence indicates that within one day of the job offer, the employers had indicated that they were willing to obtain a work permit for the applicant through the Department of Enterprise, Trade and Employment. In those circumstances, it is difficult to see what prejudice the applicant had suffered by reason of the administrative delay in the processing of his long term residency application. The situation might have been different if McAfee had been requested and refused to apply for a work permit or if there was a real danger that the applicant would in fact lose the conditional contract.

30. The facts are that Mr. Matta only sought a new job after his wife returned to work in July 2009. His affidavit states that he was in receipt of a carer's allowance until that date. When he did interview for a job, his skills were such that his prospective employers were prepared to employ him either on foot of granted long-term residency or on foot of a work permit which they were prepared to obtain. Whatever the applicant or his solicitors may have anticipated or feared relating to his ability to legally re-enter the labour market was not realised. In the circumstances, it was not reasonable for the applicant to have sought an order of *mandamus*. He suffered no prejudice nor have any pressing facts been established to render it appropriate to have sought priority and been refused. The applicant is **not** entitled to his costs.

31. The respondent sought the costs incurred in refuting this claim and relied on *Nawaz* and *Nearing*. The decision in *Nearing* is in the Court's view particularly apt seeing that it involved an identical attempt to seek an order of *mandamus* to direct the Minister to process an application for an immigration status the grant of which lies firmly within his discretion. The Court totally endorses the reasoning in the *Nearing* decision. *Mandamus* was not appropriate there or in this case. The Minister had explained that there would be delay in dealing fairly with the application. If the Minister were to give priority to applicants who can afford to engage a solicitor to process their claims ahead of those who do not then the whole edifice of a fair*, first come, first served* edifice would crumble and all applicants would have cause to complain.

32. However, the decision in Nearing did not issue until October 2009 well after these proceedings were issued. The ex tempore *Nawaz* decision, which was delivered before these proceedings were issued, referred to an application for a certificate of

naturalisation which is made in the Minister's absolute discretion. In that decision, *Mobin* and *Gafoor* was distinguished. A series of decisions have now been delivered which has effected a change in the then developing practice of seeking *mandamus* in circumstances where the Minister had explained a delay in processing applications for long-term residency, visas to enter the State or certificates of naturalisation due to the volume of applications and resource restraints. That practice has now ended but the approach of the courts may not have been fully appreciated at the time when these proceedings issued. It would therefore be unduly harsh to require the applicant to pay the respondent's costs. It should be noted however that the concession made in this case might not be repeated in other such applications.

33. The Court will make no order as to costs.