Neutral Citation: [2010] IEHC 549

THE HIGH COURT

Record No. 2009 1079JR

BETWEEN

SENAD HODZIC

APPLICANT

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT of Mr. Justice Birmingham delivered the 13th day of July 2010

The applicant hails from the former Yugoslavia and has been resident in the State since 1998. At various times he has worked as an employee and, at times he has been self-employed. In January, 2004 he applied for a certificate of naturalisation.

Section 15 of the Irish Nationality and Citizenship Act 1956, as amended, (hereinafter "the Act of 1956") is the statutory provision which deals with the question of the grant of certificates of naturalisation. It provides as follows:-

> "15(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 -
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> (a) (i) is of full age, or
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> (ii) is a minor born in the State;
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> (b) is of good character;
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> (c) has had a period of one year's 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;
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> (d) intends in good faith to continue to reside in the State after naturalisation; and
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> (e) has made, either before a Justice of the District Court in open court or in such manner as the Minister, 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 paragraphs (a) to (e) of subsection (1) are referred to in this Act as conditions for naturalisation"

By letter dated the 17th February, 2009, the applicant's solicitor was informed that the application for a certificate of naturalisation had been approved. The letter is a standard form letter and would not appear to have been prepared with the particular circumstances of the applicant in mind. Of relevance to the present application is that it begins:-

> "I am directed by the Minister for Justice, Equality and Law Reform to inform you that your client's application for a Certificate of Naturalisation has been approved".

The letter also contains the sentence:-

> "A formal certificate confirming Irish citizenship should issue in due course". It may be noted that the letter in question issued following the submission of a recommendation to the Minister for Justice, Equality and Law Reform (hereinafter "the Minister") by Mr. Mark Dugdale of the Department of Justice, Equality and Law Reform, which recommendation the Minister accepted. That recommendation included the following comment section:-
>
> "Mr. Hodzic has come to the adverse attention of the Gardaf. On the 12th July, 2001, he was charged with assault causing harm, but the case was withdrawn as the injured party was not willing to give evidence. On the 16th November, 2001, he was convicted of assault causing harm and given the Probation Act. On the 17th July, 2004, he was charged with failing to wear a safety belt and exceeding a 40mph speed limit. This resulted in a non-conviction when the case was not called in court.
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> Although Mr. Hodzic has come to the adverse attention of the Gardai, his only conviction was over a minor issue, as it was dealt with under the Probation Act, and was seven years ago. In the circumstances, I would recommend that the Minister not allow these matters to impinge upon his view of Mr. Hodzic's character."

On the 7th May, 2009, the applicant made the necessary declaration before a judge of the District Court. However, by letter dated the 11th May, 2009, from the citizenship section of the Irish Naturalisation and Immigration Service, ,the applicant .was informed that the Minister had decided not to grant a certificate of naturalisation. This letter issued following the submission of a recommendation to the Minister. While this submission appears on its face to be dated the 6th January, 2009, that is clearly an error and the actual date of the submission would seem to be the 20th April, 2009. That submission contained the following comment section:-

> "Mr. Hodzic's application for naturalisation was forwarded to the Minister for his decision earlier this year. The submission recommended naturalisation, a copy is attached for ease of information. Subsequently, this section has been notified by the Garda that he has come to their adverse attention on four separate occasions following the original report submitted.

> This involves two charges of drunk driving, the first on the 27th March, 2007, for which he was fined €250.00 and disqualified for one year. The other on the 18th February, 2009, has not yet been brought to court On the 13th April, 2007, charges for Employ Unlicensed Driver (sic). No Insurance (Owner), Owner exceed maximum load (sic), Permit driver to use record sheet for longer than intended and failing to deliver a copy of merchandise license resulted in a nonl conviction when the case was not called in court. On 2nd March, 2008, charges of No Insurance and Driving without a license and failing to produce both documents also resulted in a non-conviction. However, on the basis of the conviction for drunken driving, I would recommend that the Minister reconsider his decision to grant naturalisation and, in fact, refuse Mr. Hodzic's application for naturalisation."

This recommendation was acted upon by the Minister who refused the application on the 28th April, 2009, and then by letter of the 11th May, 2009, the applicant was informed that the Minister had decided not to grant a certificate of naturalisation. The second drunk driving charge which had not been disposed of when the submission was prepared, or at least the outcome of which was unknown at the time the submission was prepared, was actually dealt with on the 19th April, 2009, and resulted in a conviction. The applicant was fined €1,000.00 and disqualified from driving for four years. In relation to the first conviction for drunk driving, that conviction was recorded on the 27th March, 2007, which as it happens, was the date of the initial report from An Garda Siochana as to the circumstances in which the applicant had come to garda notice.

Against this somewhat unusual factual background, the applicant argues that the purported exercise of discretion was *ultra vires* in that it was based on an error of law. It is said that the correct interpretation of s. 15 of the Act of 1956 is that the discretion referred to can be exercised only once.

It is argued that the purported decision of the 28th April, 2009, is unreasonable to the extent that it cannot be permitted to stand. Counsel for the applicant concedes tha4 given that the Minister's discretion is an absolute one, it would be difficult to establish ordinarily that a Minister deciding to refuse a certificate to someone who had been convicted of drunk driving was acting so unreasonably that his decision should not be permitted to stand. Having regard to the clear wording of the section and in the light of cases such as *Nkaima Thomas Tabi v. Minister for Justice, Equality and Law Reform,* [2010] IEHC 109, (Unreported, High Court, Cooke J., 16th April 2010), this was a sensible concession. However, counsel says that when the subject of the decision is someone who has been told that a decision has been made to grant a certificate, the decision to refuse is indeed unreasonable.

In addition, the applicant says that the communication of the decision of the 20th January to grant a certificate created a legitimate expectation on the part of the applicant that if he made the appropriate declaration he would in fact receive a certificate.

In response, counsel for the respondent says tha4 while the wording of the letter of the 17th February, 2009, may not have been ideal, the reality is that the Minister could not have decided to grant a certificate, his absolute discretion to grant a certificate arising only when each of the conditions specified in s. 15 have been fulfilled. So, he says, despite the language of the letter, the Minister's position had to be seen as tentative or provisional. By the time the applicant attended at the District Court to make his declaration, the Minister had received a further report from the gardai about the applicant and had decided not to grant a certificate. He says the decision cannot be categorised as unreasonable and that the doctrine of legitimate expectation has no application.

The invalidity of the decision of 28th April, 2009

This is an area where there is a divergence between the procedure mandated by statute and the general understanding of what happens in practice. It is widely believed that the Minister considers an application on its merits, reaches a decision, informs the applicant and, if the decision is a favourable one, invites the applicant to make a declaration. A general belief would be that declarations are made only by individuals who have been approved for citizenship. I think it reasonable to conclude that anyone in receipt of the letter of the 17th February, 2009, would believe that and also believe that it is reasonable to infer that the author of the letter was working on just that basis.

However, the statutory procedure is materially different. The Minister has a discretion, indeed an absolute discretion, to grant a certificate to persons who have complied with the five conditions specified in the Act of 1956, one of which requires that an individual has made the statutory declaration. So, notwithstanding the misleading impression created by the letter of the 17th February, 2009, the Minister could not actually grant the application in February, 2009 because he could not have been satisfied that at that stage the applicant had complied with all the conditions. On the contrary, the Minister was fully aware that, as of that time, the applicant had yet to comply with one of the essential conditions.

In truth, the furthest that the Minister could have gone was to consider the matter and to form a view that he would grant a certificate once all preconditions were complied with.

That being so arguments based on a suggestion that a discretion, which could only be exercised once, had been exercised or purportedly exercised twice are misplaced. The discretion was exercised only once when the certificate was refused. I have referred to the discretion being exercised only once but it is probably more accurate to say that the Minister was concluding, in the light of up to date information, that the applicant as a person with a conviction for drunk driving was not a person of good character and so did not comply with the provisions of s. 15(1)(b) of the Act of 1956.

An unreasonable decision?

At the outset it is necessary to bear in mind that this is an area where the Minister enjoys an absolute discretion so that the scope for impugning a decision as unreasonable is very restricted. It must also be borne in mind that as Cooke J. pointed out in *Hasan Abedali Jiad v. The Minister for Justice, Equality and Law Reform*, [2010] IEHC 187, (Unreported, High Court, Cooke J., 19th May 2010) at p. 4, "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...". In these circumstances I find it quite impossible to conclude that, absent any special circumstances, a Minister taking the view that it was not appropriate to grant a certificate to a person with a conviction for drunk driving, as well as a previous conviction for an offence contrary to the Non-Fatal Offences Against the Person Act 1997, was acting unlawfully. Of note is that the offences involved in the present case are significantly more serious than those at issue in *Nkaima Thomas Tabi v. Minister for Justice, Equality and Law Reform*, to which I have referred. Indeed, as I have indicated the opposite view has not really been argued.

The real issue is whether, given that the Minister was making a decision in relation to an individual who had been told that his application for a certificate had been approved, it was unreasonable to proceed in the manner that the Minister eventually did. If the question is framed in these terms, the argument is closely related to the issue of legitimate expectation and I will consider both

arguments together. So far as legitimate expectation is concerned, while the doctrine has been around for over forty years, its scope and extent remains controversial. Counsel for both sides have engaged in a careful analysis of many of the leading authorities from this jurisdiction and further afield referring to classic cases such as *Webb v. Ireland* (1988] I.R. 353 and *Abrahamson v. The Law Society of Ireland* [1996] 1 I.R. 403 as well as more recent statements of the law such as *Lett & Company Limited v. Wexford Borough Corporation and Others* [2007] lEHC 195, (Unreported, High Court, Clarke J.,23rd May, 2007) and *Atlantic Marine Supplies Limited and Sean Rogers v. Minister for Transport, Ireland and the Attorney General* [2010] IEHC 104, (Unreported, High Court, Clarke J., 26th March, 2010).

This is a case where the applicant is seeking to hold the Minister to a position adopted on the basis of incomplete information and seeking to compel the Minister to make a decision other than the one that would appear appropriate to him in the light of the most complete information by reference to an earlier indication that was given.

It is useful to consider what the position would be of a Minister, on whose behalf a letter in terms similar to that of the 17th February, 2009, had been issued, but who then became aware of information before the process had been completed that the applicant was a serial rapist or had been complicit in war crimes. Would the Minister in such a situation be compelled to proceed to implement what had been his original intention or would he be entitled to give further consideration to the issue and reverse his original intentions? Would the Minister in that situation be forced to grant a formal certificate, notwithstanding that such an outcome was demonstrably undesirable, and then proceed to initiate the procedure for revocation that is provided for in s.l9 of the Act of 1956? Assistance in answering these hypothetical questions is to be found in the origin of the doctrine of legitimate expectation. It is an equitable doctrine, a development of the doctrine of promissory estoppel. Further assistance is also to be found in the fact that a certificate of naturalisation cannot be seen as a statutory benefit or entitlement. As we have seen no non-national has an entitlement to a certificate- if a certificate is issued, a privilege is being conferred. For my part, I see nothing particularly equitable in trying to hold a decision-maker to a decision made in the absence of complete information, even if the absence of information might be seen to derive from a systems failure for which the subject of the decision bears no responsibility whatever.

Until the applicant read the letter of the 17th February, 2009, he could have had no expectation of receiving the certificate; the most he could have had was a hope that there would be a favourable outcome and, given his record of coming into contact with the law, it is unlikely that he could have been particularly confident about the outcome.

No doubt on receipt of the letter he took it at face value and believed that his application had been approved. Unfortunately for him, as of that time, the Minister was not legally empowered to grant a certificate. By the time the applicant made his declaration, and thereby qualified himself on that ground to receive a certificate, additional information had come to the attention of the Minister and he had decided not to grant a certificate.

A belief that he had got through the net, which is all he could have had, is a long way from having a legitimate expectation. The difficulties surrounding the present application are illuminated if one looks at the reliefs sought. The first relief sought is a declaration that the decision of the respondent of the 20th January 2009 (communicated to the applicant by letter dated the 17th February, 2009) to approve the applicant's request for a certificate of naturalisation was a valid and final exercise of the respondent's discretion. However, as we have seen, clearly the respondent did not have any discretion on the 20th January 2009 to issue a certificate to the applicant.

The second relief sought is a declaration that the decision of the respondent to refuse the applicant's request for a certificate of naturalisation was void as it was *ultra vires*, irrational, based on irrelevant considerations and based on an error of law. The third relief sought is an order of *certiorari* quashing the respondent's decision of the 28th April, 2009,refusing the applicant's application for a certificate of naturalisation. Even if relief under these two headings were forthcoming this would be of little if any assistance to the applicant as he would remain without a certificate.

The fourth relief sought is a declaration that all of the requirements for the issuing of a certificate of naturalisation have been met by the applicant. This invites the court to declare to be the case what it knows to be false or, at the very least, what it knows to be very doubtful. It is clear that the Minister is now not of the view that the applicant is a person of good character and not someone who should receive a certificate. There has never been a moment in time when the applicant fulfilled all the criteria, so that the Minister could or should have issued a certificate. In January, 2009 the applicant had not made his declaration and so was not eligible to receive a certificate and by April, 2009, when he had fulfilled the requirement in relation to the declaration, it had emerged that his background and character were not such that the Minister in his discretion wished to grant a certificate. In these circumstances I cannot see how it would be appropriate to make the order sought.

The final substantive relief sought is for an order directing the respondent to issue a certificate of naturalisation to the applicant. This invites the court to ignore completely the doctrine of the separation of powers. The court has no function in deciding who should and who should not receive certificates. Instead, the Oireachtas has provided that it is for the Minister in the exercise of an absolute discretion to grant certificates to qualified persons.

This examination of the details of the relief sought confirms me in my view that the application before the court is not one to which I should accede.