Neutral Citation [2016] IEHC 416

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 679 J.R.]

BETWEEN

A.A. (Algeria)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Ms. Justice Stewart delivered on 21st day of July, 2016.

1. This is an application seeking judicial review by way of, *inter alia*, an order of *certiorari* quashing the decision of the respondent to refuse to grant a certificate of naturalisation to the applicant, pursuant to s. 15 of the Irish Nationality and Citizenship Act 1956 (as amended).

Background
2. The applicant is an Algerian national who left Algeria in May, 2000 and arrived in this State on 1st July, 2000. He sought asylum on 16th July, 2000, and was duly granted refugee status on 15th October, 2002. On 1st May, 2003, the applicant married his partner. The couple have two children, both of whom are Irish citizens. In the last 11 years, he has applied several times for a certificate of naturalisation. The impugned decision is the third such refusal of an application from this applicant.

Leave granted
3. On 17th November, 2014, the applicant applied *ex parte* for leave to seek judicial review by way of *certiorari* to quash the respondent's decision dated 24th June, 2014. Leave was granted by MacEochaidh J. with the order perfected on 21st November, 2014. The Notice of Motion was issued on 25th November, 2014, with Statement of Grounds and the applicant's Affidavit sworn on 13th November, 2014.

Reliefs sought
4. The applicant seeks the following reliefs:-

> a. An order of *certiorari* quashing the respondent's decision to refuse the applicant's application for a certificate of naturalisation;
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> b. A declaration that the respondent's exercise of her discretion to refuse the applicant's application lacks reasonable grounds, is not factually sustainable and is not in accordance with law;
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> c. A declaration that the failure on behalf of the respondent and her servants/agents to take into account relevant representations and submissions made by and on behalf of the applicant is in breach of fair procedures, the applicant's rights, natural law and constitutional justice;
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> d. If required, an order of *mandamus* directing the respondent and/or her servants/agents to review the applicant's application for a certificate of naturalisation, as well as the representations referred to above; and,
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> e. If necessary, an order of *mandamus* directing the respondent to provide information to the applicant about the factors that might affect further applications made by him for a certificate of naturalisation, so as to catalyse his naturalisation as an Irish citizen.

Previous court appearances
5. On 16th July, 2003, the applicant appeared before the District Court sitting in Macroom, Co. Cork, charged with possession of certain articles pursuant to ss. 6 and 7 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 (as amended). These charges were subsequently struck out by District Justice James O'Connor.

6. On 17th December, 2003, the applicant appeared again before the District Court sitting in Macroom, charged with custody of a false instrument under s. 29 of the 2001 Act. District Justice Terence Finn deemed it appropriate to apply s. 1(1)(i) of the Probation of Offenders Act, 1907, not only to the s. 29 charge, but also to the charges under ss. 6 and 7 of the 2001 Act, as all charges derived from the same incident.

7. On 10th May, 2004, the applicant appeared before the District Court sitting in Cork city, charged with failure to produce an insurance certificate and driving without insurance pursuant to the Road Traffic Acts, 1961-2014 (as amended). The applicant was convicted of driving without insurance. He received a €300.00 fine and a three year endorsement on his driving licence.

8. On 10th November, 2009, the applicant again appeared before the District Court sitting in Cork city, charged with failing to produce an insurance certificate and driving without insurance. Upon attending the District Court, the applicant produced his insurance certificate and a €400.00 fine was imposed. Both of the above fines were paid by the applicant.

Naturalisation applications
9. In August, 2005, the applicant first applied for a certificate of naturalisation. On 13th March, 2008, the respondent informed the applicant of the decision to refuse his application, pursuant to the respondent's absolute discretion pursuant to s. 15 of the 1956 Act, on grounds of dissatisfaction with to the applicant's good character. The second application, which was submitted in 2009, was refused in February, 2013 on the same grounds. The letter received by the applicant from the respondent, which communicated this second refusal, also stated that the applicant was entitled to re-apply at any time in the future.

10. The applicant acted upon this invitation and submitted a third application seeking a certificate of naturalisation. The applicant notes that he made full disclosure of his two previous summary convictions on the application form for his third application. On 6th February, 2014, the applicant received a letter from the respondent's agents which referred to incidents/offences contained in an attached Garda report and pertaining to the applicant. The respondent's letter requested submissions from the applicant in relation to the incidents/offences and confirmation that the fines imposed were paid by the applicant. The letter also requested details of the applicant's employment history and a copy of his Garda National Immigration Bureau card. On 14th February, 2014, the applicant replied to the letter, informing the respondent that all fines imposed in relation to road traffic offences had been paid. The applicant also re-emphasised that the charges in relation to his Macroom District Court appearances in 2003 had been dismissed and confirmed that he had not come to the adverse attention of An Garda Síochána since 2009.

11. On 24th June, 2014, the applicant received a letter from the respondent's agents informing him that his third application was unsuccessful on the grounds that the respondent had exercised her absolute discretion as provided by the Irish Nationality and Citizenship Acts 1956 and 1986. This refusal document stated that "[G]*iven the nature of the offences, I am not satisfied that the applicant is of good character and I would not recommend that the Minister grant a certificate of naturalisation in this case."*

12. The applicant was "dismayed" by the respondent's decision. On 10th August, 2014, the applicant's solicitor wrote to the respondent requesting, *inter alia*, that the respondent revise the decision to refuse the applicant's naturalisation application on foot of the following mitigating circumstances;

> - With regard to the applicant's conviction of 10th November, 2009, for driving without insurance, he did possess insurance at the time,
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> - The offences with which the applicant was charged in 2003 were dismissed under 1907 Act,
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> - The applicant's wife is now a citizen of Ireland, having been granted a certificate of naturalisation on 31st March, 2014. Thus, he is the only member of his family that is not a citizen,
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> - The applicant satisfied the requirement as set out in *Hussain v. Minister for Justice* [2011] IEHC 171, that the "*applicant's character and conduct must match up to reasonable standards of civic responsibility as gauged by reference to contemporary values"*, and;
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> - Four character references of the applicant included with the letter, one of which was the applicant's wife.

13. On 11th August, 2014, the respondent replied to the applicant acknowledging receipt of the letter of the previous day. It appears that the applicant was unsure from the contents of that letter as to whether the respondent would consider the contents of the applicant's letter of 10th August. On 13th August, 2014, the applicant's solicitor again wrote to the respondent requesting that the representations contained in the letter dated 10th August be considered by the respondent.

14. On 18th August, 2014, the respondent wrote to the applicant acknowledging the representations contained within the letter of 10th August. The respondent also stated that correspondence was not submitted to the respondent for her consideration. That same letter also noted that there is no appeals process provided under the 1956 Act and again invited the applicant to re-apply at any time in the future.

Applicant's submissions
15. Mr. de Blacam, S.C., along with Ms. O'Leary, B.L., for the applicant, argued that the respondent acted in breach of law, the principles of European law and the guarantee of democratic government contained in Article 5 of Bunreacht na hEireann in refusing the applicant's application.

16. The applicant asserts that the respondent breached fair procedures in failing to state the reason for refusing the applicant's application. The applicant further argues that, by failing to provide the applicant with the information as to what factors might affect further applications for naturalisation, the respondent has acted in breach of fair procedures, the guarantee of democratic government contained in Article 5 of Bunreacht na hÈireann and in breach of law, including European law.

17. According to the applicant, the respondent is also obliged to comply with Article 34 of the Geneva Convention and *"as far as possible facilitate the assimilation and naturalisation of refugees".* The applicant maintains that the respondent has failed to comply with these obligations by failing to provide to the applicant information as to what factors will affect future applications. Without this information, he is allegedly being prevented from making relevant and effective representations in any future applications. By failing to provide the applicant with such information, the respondent is exercising her discretion in a manner that lacks transparency and is in breach of law, in breach of fair procedures and Article 5 of Bunreacht na hÈireann.

18. The applicant further argues that the respondent's statement that the decision was reached through the use of the respondent's absolute discretion permitted under s. 15 of the 1956 Act is incorrect. According to the applicant, the decision was made on the basis of a finding that the applicant did not fulfil the requirement of being of "good character" under s. 15 of the 1956 Act. The respondent had also recommended that, *"given the nature of the offences"*, a certificate should not be issued.

19. The applicant submits that the respondent's refusal to grant a naturalisation certificate due to the finding that the applicant did not fulfil the requirement for good character was unreasonable, disproportionate, and is not factually sustainable, as the respondent failed to consider the following factors:-

> a. The summary nature of the convictions and penalties that were imposed by the District Court,
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> b. One of the 2003 charges was withdrawn and the other was dismissed under s. 1 (1)(i) of the 1907 Act, leaving the applicant without a criminal record,

c. The applicant did provide an explanation to the District Court with regard to the 2009 charge of driving without insurance and the Court was sufficiently satisfied to impose a fine on the lower end of the scale. The court did not endorse the applicant's driving licence on that occasion,

d. Both fines imposed upon the applicant were promptly paid in full,

e. A considerable period of time has elapsed since the offences were committed,

f. Since 2009, the applicant has not come to the adverse attention of the Gardaì,

g. The other members of the applicant's family, who are all Irish citizens, made submissions regarding the applicant's good character, and;

h. The applicant is the only member of his family who is not an Irish citizen.

20. The applicant also argues that the respondent has unlawfully fettered her discretion by adopting an unreasonable and fixed policy to refuse applications for certificates of naturalisation based upon convictions for summary offences that occurred, in the applicant's opinion, a considerable amount of time before the decision to refuse naturalisation was made.

21. As the acquisition of Irish citizenship also bestows EU citizenship, the applicant submits that the respondent is under an obligation to act in accordance with the general principles of EU law, in particular the principle of proportionality.

22. The applicant emphasises that the respondent's reasoning is unreasonably vague, as it only informs the applicant that the decision to refuse the naturalisation application relates *"to his criminal record"*.

23. The applicant submits that the appropriate test in discovering whether a candidate meets the criteria of "good character" is outlined in *Hussain*, where it was stated at para. 15:-

> *"Viewed in this statutory context, it means that the applicant's character and conduct must measure up to reasonable standards of civic responsibility as gauged by reference to contemporary values. The respondent cannot, for example, demand that applicants meet some exalted standard of behaviour which would not realistically be expected of their Irish counterparts. Nor can the respondent impose his or her own private standard of morality which is isolated from contemporary values."*

24. Counsel for the applicant also relies upon the decision in *G.K.N. v. Minister for Justice & Equality* [2014] IEHC 478, in which MacEochaidh J. adopted the comments of Lang J. in *Hiri v. Secretary of State for the Home Department* [2014] EWHC 254 (Admin), where it was stated at para. 35:-

> *"The statutory test is not whether applicants have previous criminal convictions – it is much wider in scope than that. In principle, an applicant may be assessed as a person of "good character", for the purposes of the 1981 Act, even if he has a criminal conviction. Equally, he may not be assessed as a person of "good character" even if he does not have a criminal conviction. Plainly, criminal convictions are relevant to the assessment of character, but they are likely to vary greatly in significance, depending upon the nature of the offence and the length of time which has elapsed since its commission, as well as any pattern of repeat offending. So, in order to conduct a proper assessment, the Defendant ought to have regard to the outline facts of any offence and any mitigating factors. She ought to have regard to the severity of the sentence, within the sentencing range, as this may be a valuable indicator of the gravity of the offending behaviour in the eyes of the sentencing court."*

Respondent's submissions

25. Counsel for the respondent, Mr. O'Connor, B.L., points out that the impugned decision was made on 24th June, 2014. Per O. 84 r. 21 of the Rules of the Superior Courts, 1986, the applicant had three months from that date to seek leave for judicial review. The respondent argues that no reason has been provided to explain this delay, nor to justify an extension of the time permitted to bring proceedings.

26. The respondent draws this Court's attention to s. 16(g) of the 1956 Act (as amended). In counsel's opinion, this amended section serves as the mechanism whereby Article 34 of the Geneva Convention on Refugees was transposed into Irish law by the Òireachtas. The respondent argues that it is not for this Court to substitute alternatives for that legislative intention, nor to direct the respondent toward the material she should consider in the exercise of her absolute discretion.

27. The respondent denies the assertions made by the applicant in his statement of grounds. In particular, it is denied that the respondent acted in breach of law, Article 5 of the Bunreacht na hÈireann, Union legal principles and/or fair procedures. The respondent also denies fettering her discretion under s. 15 of the 1956 Act by adopting the policy that led to the refusal of the applicant's naturalisation application.

28. The respondent also denies that the applicant's application was not adequately facilitated. It is argued that such facilitation does not require that such application be successful. The applicant, according to the respondent, has been facilitated at all times and was invited to re-apply at any time in the future.

29. The respondent denies that her servants/agents acted in breach of law, fair procedures and/or Article 5 of the Constitution by refusing to review the decision. No such statutory power exists by which to review that decision and it is submitted that the applicant has an effective remedy, namely making a fresh application.

30. The respondent argues that the status and security of the applicant's family unit is entirely unaffected by the decision to refuse the application for naturalisation.

31. The respondent also denies that the respondent has failed to provide the applicant with information as to what factors may be considered in any future applications the applicant may wish to make. The respondent emphasises that the applicant has been clearly notified of the reason that he has been considered as failing the statutory requirement of "good character": his criminal record. Moreover, he has been invited to address this fact in any future applications that he may make.

32. The respondent submits that the applicant is not entitled to place restrictions on the absolute discretion that the respondent enjoys under s. 15 of the 1956 Act. It is contended that the applicant is seeking to do just that by, in effect, seeking to limit the matters that the respondent may consider in the exercise of that unlimited discretion.

33. The respondent also argues that this Court is prevented from placing any fettering on the respondent's absolute discretion in the grant of a certificate for naturalisation, as doing so would offend the separation of powers principle.

34. The respondent relies upon the decision in *Abuissa v. Minister for Justice, Equality and Law Reform* [2010] IEHC 366, wherein Cooke J. held at para. 26:-

> *"In determining the issues raised, it is first necessary to restate that there is no right to a certificate [of] naturalisation. The grant of such a certificate is a privilege. In such circumstances, different principles apply compared with a situation where the applicant has a right to a benefit subject to compliance with statutory pre-determined requirements. The grant of a certificate of naturalisation which leads on to the entitlement to travel on an Irish passport as an Irish national is a privilege which for good reasons is jealously guarded."*

35. The respondent also relies upon the decision in Hussain (supra).

The impugned decision
36. In the 'Comments' of the submission document prepared for the respondent, it is stated:-

> *"He has not come to any further adverse attention of the Gardaí…The resulting fines imposed on him by the Courts have been paid. He has two Irish citizen children. His spouse has been approved for a Certificate of Naturalisation and is due to attend the next ceremony on 31/03/2014. This applicant is unemployed and in receipt of Jobseekers Allowance since 2007. He completed a course of training in Cork College of Commerce in Business Studies in 2010 and completed an accredited security officer training course in late 2013."*

37. The submission concludes with the 'Recommendation' section, which states:-

> *"Given the nature of the offences, I am not satisfied that the applicant is of good character and I would not recommend the Minister grant a certificate of naturalisation in this case."*

This submission is signed by two members of the 'Further Processing LSR Team' and by an Assistant Principal Officer in the unit.

Decision
38. The subject-matter of this review was previously ruled on by this Court in *M.A.D. v Minister for Justice and Equality* [2015] IEHC 446. In *M.A.D.*, the applicant sought a certificate on six occasions, each time being refused on the basis that "*having considered your client's application and the offences referred to in the attached report,* [the respondent] *has decided not to grant…a certificate of naturalisation."*

39. In *Tabi v. Minister for Justice, Equality and Law Reform* [2010] IEHC 109, a decision that was opened during proceedings in M.A.D., Cooke J. stated at para. 2:-

> *"The fact of those convictions is not contested. That being so, the Minister had a sound basis in uncontested facts for making the assessment that the condition of "good character" was not fulfilled. There is therefore no defect of either fact or law in the Contested Decision which would justify the issue of an order of certiorari to quash it."*

40. Furthermore, in *A.B. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 449, Cooke J. stated at para. 19:-

> *"It is for the Minister to determine what criteria fall to be considered in assessing whether the condition as to 'good character' is met."*

41. In *Hussain*, Hogan J. analysed the notion of 'good character' and stated at para. 15:-

> *"…the words "good character" must be understood and measured. Viewed in this statutory context, it means that the applicant's character and conduct must measure up to reasonable standards of civic responsibility as gauged by reference to contemporary values. The Minister cannot, for example, demand that applicants meet some exalted standard of behaviour which would not realistically be expected of their Irish counterparts. Nor can the Minister impose his or her own private standard of morality which is isolated from contemporary values."*

42. Hogan J. continued at paras. 20:-

> *"In the light, therefore, of the Supreme Court's conclusion in The State* (Lynch) v. Cooney..., *the Minister's assessment of the good character issue is plainly subject to judicial review. It is equally plain that the Minister must direct himself properly in law by reference to the question of what 'good character' actually means, so that, for example, if the Minister's decision could not stand if irrelevant considerations were taken into account: see, e.g., the judgment of Edwards J. in* L.G.H. v. Minister for Justice, Equality and Law Reform *[2009] IEHC 78. In that case the Minister took into account the fact that the applicant's two adult sons had (relatively minor) convictions for motoring offences in concluding that the applicant was not of good character. As Edwards J. pointed out, this was an absurd non-sequitur, since the applicant could not in any way be held responsible for the conduct of her adult children.*
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> *21. Nevertheless, provided that the Minister's application of these principles to the facts of the case is reasonable, then his or her ultimate decision is probably unimpeachable in law."*

43. Although the applicant's previous convictions would reasonably be viewed on the lower-end of the scale of gravity, it is incumbent upon this Court to decide this matter with a degree of certainty and consistency and in accordance with established principles. The facts at hand are insufficient to render the respondent's findings unreasonable. The Court sees no reason to depart from the authorities outlined above in regards to the role previous offences play in the assessment of "good character".

44. With regard to the applicant's fair procedures argument, the respondent has made clear that the reason for refusing the application is the nature of the offences that brought the applicant to the adverse attention of Gardaì. In communications with the

applicant, the respondent has repeatedly suggested that the applicant "*give due regard to the reasons for refusal given in the attached submission.*" In essence, the reasons for the refusal are the factors that might affect further applications for naturalisation. The applicant has clearly been informed of this and there has been no breach of fair procedures. As to how the applicant may make relevant and effective submissions on the nature of his offences, this is a matter for him to address in future applications. The respondent is reviewing an application for the grant of a privilege. She is not facilitating the exercise of rights. There is no requirement to provide the applicant with a point-by-point guide that will definitively lead him to the promised land of naturalisation.

45. Furthermore, the applicant has also questioned the manner in which the respondent adopted and applied her policies in this case. As outlined by s. 15 of the 1956 Act and the Supreme Court in *Mallak v. Minister for Justice, Equality and Law Reform* [2012] IESC 59, the respondent has an absolute reasoned discretion in regard to the grant of applications for naturalisation. If the Court were to begin meticulously dictating the content and nature of the policies that the respondent can implement in the exercise of her discretion, that would severely limit the "absolute" nature of that discretion. As outlined in *O'H v. O'H* 1990 2 IR 558, it is a long-standing principle of Irish law that words should be given their ordinary and natural meaning wherever possible. In *Mallak*, Fennelly J. made it clear that the phrase "absolute discretion" was not so all-encompassing as to empower the Minister to act in an arbitrary, capricious or autocratic fashion. However, a plain reading of the word "absolute" would suggest to this Court that the discretion is very broad. Thus, it falls to the applicant to prove that the respondent has acted in an arbitrary, capricious or autocratic fashion when applying the relevant policies and procedures to this application. The evidence put forward by the applicant is insufficient to displace this burden.

46. The applicant's arguments as to the applicability of EU law in this area are rejected. In *Mallak v. Minister for Justice, Equality and Law Reform* [2011] IEHC 306, Cooke J. stated at para. 23:-

> *"The further argument advanced was based upon the concept of European Union citizenship…It was argued that "because the Minister's decision being disputed here, also determines whether Mr. Mallak should acquire EU citizenship, EU law plays a role in shaping that decision, albeit that the full contours of this role remain to be determined as the granting of citizenship is a matter for individual Member States". As the Court understood this argument, it was to the effect that because the acquisition of Irish citizenship automatically leads to the acquisition of EU citizenship, a refusal is simultaneously a refusal of EU citizenship. It was submitted that on that basis the general principles of EU law must be complied with by the Minister when exercising his discretion…*
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> *24. In the judgment of the Court, this argument is unfounded. Although the Treaties create the concept and status of citizenship of the Union, that status can only be acquired by means of citizenship in one of the Member States. Neither the Treaties nor any legislative measures of the Union institutions have sought to encroach in any respect upon the sovereign entitlement of the Member States to determine the basis upon which national citizenship will be accorded, nor even to endeavour to harmonise to any extent the conditions or criteria for the grant of national citizenship."*

47. For all the above reasons, this Court will refuse the reliefs sought.

48. Since the preparation of this judgment, the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016 has been enacted and commenced. When the requisite period outlined therein has elapsed, it may well be that the applicant will find some assistance from that Act. Indeed, the respondent may also wish to consider the approach adopted in applications such as that challenged in these proceedings in light of the principles guiding the new legislation. Such consideration may also bear in mind the comments of Hogan J. in *Hussain (supra)* in relation to the standard of civic responsibility applicable to applicants for naturalisation as judged by reference to contemporary values.