Neutral Citation Number: [2011] IEHC 166

THE HIGH COURT

JUDICIAL REVIEW

2007 1659 JR

BETWEEN

MAHMUD MOHAMMED FOTOOH

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

Judgment of Ms. Justice Mary Irvine, dated the 14th day of April, 2011

1. The applicant is an Egyptian national. He arrived in the State in 1998 and was granted refugee status in 2004. He is married with nine children. His wife and children all have Irish citizenship and on 26th November, 2004, the applicant applied to the respondent for naturalisation pursuant to the provisions of the Irish Nationality and Citizenship Act 1956, (as amended). On 5th February, 2007, the respondent informed the applicant that his application had been refused and that, "[i]n reaching this decision, the Minister has exercised his absolute discretion, as provided by the Irish Nationality and Citizenship Acts 1956 and 1986". No further explanation was provided to the applicant as to why his application for naturalisation was unsuccessful.

History

2. The applicant's legal representative applied for all documentation in relation to the applicant held by the Department of Justice, Equality and Law Reform under the Freedom of Information Act 1997. On 17th May, 2007, the Department responded, providing the applicant with what appeared to be the full file on record yet no reason, or basis, for the refusal of his application was ascertainable from the documentation furnished. On 2nd August, 2007, the applicant's legal representatives contacted the respondent's Department once more, inquiring as to "what matters the Minister had regard to in exercising his discretion". The respondent replied by reiterating that the Minister had refused the application by exercising his absolute discretion. On 27th May, 2008, the applicant sought voluntary discovery of all documents pertaining to the application for naturalisation. The respondent initially agreed, but then opted not to discover these documents. A motion seeking discovery came before the High Court but was adjourned to the hearing of the substantial judicial review proceedings.

3. Leave to seek judicial review was granted *ex parte* by Peart J. on 10th December, 2007, to seek, *inter alia*, the following reliefs:-

> (i) An order of *certiorari* quashing the decision of the respondent to refuse the applicant's application for naturalisation;
>
> (ii) A declaration that the applicant is entitled to know the reasons for the respondent's decision to refuse him naturalisation.

Peart J. also ordered that the applicant's time for making the application for leave was extended up to and including the date of the *ex parte* application.

The Statutory Framework

4. Section 14 of the Irish Nationality and Citizenship Act 1956, as amended, provides:-

> "Irish citizenship may be conferred on a non national by means of a certificate of naturalisation granted by the Minister [of Justice, Equality and Law Reform]"

Section 15 (1) of the 1956 Act states:-

> 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 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;
>
> (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 Minister, for special reasons, allows, a declaration in the prescribed manner, of fidelity to the nation and loyalty to the State.

The Applicant's Submissions

5. Counsel on behalf of the applicant submitted that in reaching a decision on an application for naturalisation, the respondent may

decide whether or not to grant a naturalisation certificate in his absolute discretion, but is obliged to carry out his statutory functions in accordance with basic fairness and to apply fair procedures in the decision-making process. It was submitted that, although the Minister has a discretion, he is required to act lawfully and within the "the boundaries of the stated objects of the Act" (*East Donegal Cooperative v. Attorney General* [1970] I.R. 317).

6. The applicant submitted that he does not claim a right to citizenship. However, it was argued that in order to have afforded the applicant fair procedures, the respondent was required to give the applicant the reasons for the refusal of his application and/or to inform the applicant of the matters to which the respondent had regard in reaching the impugned decision and to give the applicant an opportunity to respond to same. It was argued that such knowledge would not impinge upon the absolute nature of the respondent's discretion. The applicant claimed that the requirement to apply fair procedures would be satisfied if the respondent were obliged to do any one of the following:-

> (i) indicate to the applicant in advance of exercising his absolute discretion the policies and considerations he proposed to take into account in making a decision;
>
> (ii) give the applicant the opportunity of commenting on such considerations prior to a decision being arrived at;
>
> (iii) after the decision was taken – on request of the applicant, to indicate what policies or considerations were taken into account by the Minister in making his decision; and
>
> (iv) inform the applicant of the reasons for the decision taken.

7. Counsel on behalf of the applicant submitted that in a system based on the rule of law; governmental discretion cannot be unfettered and relied on the United Kingdom case of R v. Secretary of State for the Environment, *Ex parte Spath Holme Ltd*, [2001] 2 AC 349, where Lord Nicholls stated:-

> "No statutory power is of unlimited scope. The discretion given by Parliament is never absolute or unfettered. Powers are conferred by Parliament for a purpose, and they may be lawfully exercised only in furtherance of that purpose: 'the power and the objects of the Act'."

In *Pok Sun Shum v. Ireland* [1986] ILRM 593, Costello J. held:-

> "…the discretion given by [section 15 of the 1956 Act] is not an unfettered one; it is a discretion that must be exercised by the minister in accordance with the powers granted to him by the Oireachtas and, in addition, it must be exercised fairly and in accordance with the principles of natural justice."

he applicant argued that the Minister, in effect, would be in a position where he could place himself above the law, and exclude the jurisdiction of the court, simply by refusing to reveal to the applicant or to the court, the policies or considerations he had taken into account in reaching the impugned decision. It was claimed that without being informed of the decision-making process, the court would not be in a position to review whether the Minister, in exercising his discretion, failed to carry out the legal requirements imposed on him, or failed to act fairly.

8. The applicant submitted that despite the absolute nature of the Minister's discretion, the High Court nonetheless has reviewed the exercise of this discretion where the Minister has opted to provide reasons for his decision. In *L.G.H. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 78, Edwards J. considered a refusal of certificate of naturalisation where the Minister had included a letter explaining why the certificate was refused. The explanatory letter had referenced the fact that convictions had been recorded against the applicant's sons. Edwards J. held that "the Minister took into account irrelevant considerations in making his decision" and quashed the decision of refusal. In *Mishra v. The Minister for Justice,* [1996] 1 I.R. 189, Kelly J. considered the circumstance where the Minister refused to grant a certificate of naturalisation to the applicant, but filed a replying affidavit in the proceedings explaining the reasons for the refusal. The learned judge considered the policy that had been applied in that case and stated:-

> "It appears to me that the application of this general policy, involving as it does the making of an assumption adverse to [Dr. Mishra] concerning his future intention as solemnly declared, required, in fundamental fairness, at least that he be given an opportunity to clarify his position."

9. The applicant acknowledged that in *Pok Sun Shum v. Ireland*, Costello J. held that the requirement to afford the applicant fair procedures did not include the obligation to provide reasons for the Minister's decision. However, it was argued that in the particular context of that case, the learned judge was dealing with a situation where a significant amount of fair procedures had been observed as the applicant had been given the opportunity to give information on any point which the Minister may have considered in interviews with officials of the respondent's department. Costello J. was not considering the argument that in order for the court to be satisfied as to the lawfulness of the decision, it must be informed as to what had been taken into account by the Minister, nor was an argument made as to the nature of the Minister's policy, his obligation to disclose it or whether it was a lawful policy. The applicant considered the decisions of *Jiad v. MJELR* (Unreported, High Court, 19th May 2010) and *Abuissa v. MJELR* where it was held that the Minister was not required to provide reasons for his decision; the applicant argued that these decisions were inconsistent with the decisions in *Pok Sun Shum* and *Mishra*. The applicant examined the decision in *Abuissa* in detail and referred to the dicta of Clark J. at paragraph 34 where she stated:-

> "If [the minister] chooses to rely on his *absolute discretion*, then in the absence of a demonstrated breach of constitutional justice or manifest unfairness, or a *prima facie* case of *mala fides*, his decision cannot be challenged. If the Minister elects not to give reasons, that is within is prerogative and his decision must be accepted unless it can be shown that the actions of the Minister are *mala fides*."

This, it was argued, is inconsistent with the statements of Costello and Kelly JJ. in *Pok Sun Shum* and *Mishra* to the effect that the discretion is not unfettered and must be exercised fairly and in accordance with natural justice and within the powers granted to the Minister by the Oireachtas.

10. Finally, the applicant referred to the United Kingdom case of *R. v. Secretary of State for the Home Department, Ex parte, Fayed* [1998] 1 WLR 763. Under the equivalent legislative provision of the United Kingdom, the Secretary of State may grant naturalisation to persons who fulfil specified criteria, "if he thinks fit". The statute also includes a specific provision that the Secretary of State is not required to assign any reason for the grant or refusal of any application under that Act. It was submitted that the majority of the House of Lords held that if it were not for the stated provision excluding an obligation to give reasons, the decision of the Secretary

of State was one which would require the giving of reasons, that the obligation to act fairly remained and that fairness required that the Secretary of State should inform an application of the nature of any matters weighing against the grant of the application and afford the applicant an opportunity to address any such matters.

The Respondent's Submissions

11. The respondent submitted that not every decision-making process requires disclosure to an applicant of the material on which a decision may be based or the reasons for that decision (*O'Neill v. Ireland* [2004] 1 I.R. 298). In the context of naturalisation applications, the respondent cited the decision in *Pok Sun Shum v. Ireland* [1986] ILRM 593, where Costello J., although recognising that the s.15 discretion is not an unfettered one, noted that:-

> "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 case, because of the nature of the discretion which the Statute gives to the Minister, he is not required to inform an applicant of the reasons which may appear to him adequate. The Minister may be satisfied that all 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 given him an opportunity to comment on them."

Costello J. continued:-

> "I think it is relevant, in this connection, to bear in mind that under the 1956 Act the Minister was conferring a benefit of 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...this right of the courts to review decisions taken by administrative authorities does not, of itself, create an obligation in natural justice that reasons must be stated for decisions."

12. The respondent claimed that the precise issue between the parties in this case, namely, whether the respondent is obliged to provide the applicant with reasons for the refusal of his/her application for naturalisation when the decision was made in the respondent's absolute discretion, has been determined previously in favour of the respondent by Clark J. in *Abuissa v. MJELR* [2010] IEHC 366. In that case, Clark J. stated that "If the legislature had intended that the Minister should provide reasons, it is highly unlikely that he would have been given *absolute discretion* by the Act of 1956 or that the words absolute discretion would have been retained in the amendment in 1986" (para. 25). The learned judge continued by emphasising that a certificate of naturalisation is a privilege such that different principles apply compared to a situation where an applicant has a right to a particular benefit. Clark J. held that "the court rejects the applicant's primary contention that the Minister must provide reasons for his decision to refuse an otherwise qualified applicant" (para. 58). Similarly, in *Jiad v. MJELR* (Unreported, High Court, 19th May, 2010), Cooke J. refused leave to apply for judicial review in a similar case emphasising that the grant of citizenship is a privilege and not a right. The learned judge held that the Minister cannot be under an obligation to give reasons for his refusal in any case where he has relied upon his *absolute discretion*, to require otherwise, Cooke J. held, would be to deprive the basis upon which the statutory delegation has been enacted of its meaning and effect. The respondent submitted that in the instant case, this Court should follow *Abuissa* as a decision of a court of equal jurisdiction *(Irish Bank Trust Ltd v. Central Bank of Ireland* (Unreported, High Court, 12th March, 1976) and *Worldport Ireland Ltd (In liquidation)* [2005] IEHC 189).

13. The respondent submitted that there is no appeal against the decision of the Minister to refuse an application for naturalisation and that the reasons for the Minister's refusal are not reviewable by the court in the instant case. The respondent drew attention to another area where the Minister has a wide discretion; the granting of temporary release to prisoners. In *Murray v. Ireland* [1991] ILRM 465, Finlay C.J. stated that "the exercise of these powers of the executive is of course subject to supervision by the courts which will intervene only if it can be established that they are being exercised in a manner which is in breach of the constitutional obligation of the executive not to exercise them in a capricious, arbitrary or unjust way." In similar circumstances the Minister was not required to provide reasons for the exercise of his discretion in *Kinahan v. Minister for Justice* [2001] 4 I.R. 458 and *Breathnach v. Minister for Justice,* [2004] 3 I.R. 336. In the instant case, it was claimed that the failure to provide reasons did not mean that the Minister had acted capriciously, arbitrarily or unjustly, thus, the applicant has not shown any basis for the proposition that the exercise of the respondent's *absolute discretion* is reviewable.

Delay

14. The respondent opposed these proceedings further on the ground of delay. Whilst the impugned decision was notified to the applicant by letter dated 5th February, 2007, the proceedings were not instituted until 10th December, 2007, considerably outside the six month outer time limit set by O. 84, r. 21(1) of the Rules of the Superior Courts. At the *ex parte* stage, as noted above, Peart J. granted an extension of time for the making of the leave application. The respondent argued that it was not apparent upon what basis the extension of time had been granted and relied on the cases of *O'Flynn v. Midwestern Health Board* [1991] 2 I.R. 223, *Bane v. Garda Representative Association* [1997] 2 I.R. 449 and *Solan v. DPP* [1989] ILRM 491 as authorities for the proposition that in hearing the substantive judicial review case, the court can revisit the O. 84 time limit. The respondent rejected the applicant's submission that there was an issue as to the date upon which time started to run for the purposes of O. 84 citing the decision of Kearns P. in *Weldon v. Minister for Health* (Unreported High Court, 10th December, 2010) in support of the submission that correspondence subsequent to a decision which it is sought to impugn cannot extend the time allowed for the bringing of proceedings.

15. The respondent referred to the judgment of Denham J. in *Dekra Éireann Teo v. Minister for the Environment* [2003] 2 I.R. 270 where she emphasised the requirement that an applicant who seeks an extension of time must explain the full period of the delay that has occurred. This requirement was reiterated in *Azubugo v. RAT* (Unreported, High Court, 27th July, 2007) and *S.M.O. v. Refugee Applications Commissioner* [2009] IEHC 219. It was submitted that the supplemental affidavit of Maria Lakes, belatedly admitted into evidence on the morning of the hearing, amounted to little more than a chronology of events and offered no valid reason or justification for the delay in the institution of proceedings.

16. In reply, the applicant questioned whether any issue of delay arose in circumstances where he had taken steps to obtain the reasons for the refusal of his application by applying for information under the Freedom of Information Act 1997 before the six month period had elapsed. It was further claimed that the respondent should have pleaded the issue of delay within the meaning of O. 84 RSC in a discrete paragraph in its statement of opposition.

17. The applicant argued that the court did not have jurisdiction to revisit the issue of an extension of time as it had already been

granted by Peart J. at the *ex parte* stage and submitted that if the issue of delay could be argued at the substantive hearing then it was only to be argued as a factor that might act as a bar to discretionary relief which the applicant might otherwise be entitled to.

18. The applicant submitted that delay should not be dealt with as a preliminary issue and cited the dicta of Hardiman J. in *B.T.F. v. Director of Public Prosecutions* [2005] 2 I.R. 559 where, save in the plainest of cases, the learned judge doubted "whether it will normally be useful to deal with alleged applicant delay as a preliminary issue". It was asserted that the issue of delay should be considered in the context of the case as a whole and that the court should have regard to the non-exhaustive list of factors set out by Denham J. in *De Róiste v. Minister for Defence* [2001] 2 ILRM 241, which concluded that delay "should not 'of itself' disentitle an applicant".

Chronology
19. The chronology of events relevant to the delay in this case, are relevant and are set out in the affidavit of Maria Lakes. The following is a chronological summary of the matters alluded to in her affidavit.

5th February 2007: The decision was notified to the applicant.

9th February, 2007: The applicant consulted his solicitor, Mr. Smartt.

15th March, 2007: The applicant signed an authority at the request of his solicitor in relation to his citizenship file.

17th April, 2007: A letter was sent by the applicant's solicitor to the respondent requesting the applicant's file.

24th April, 2007: The respondent acknowledged the letter of 17th April, 2007 and sent a separate letter stating that any request should be dealt with by way of a freedom of information request.

26th April, 2007: The applicant's solicitor made an application under the Freedom of Information Act.

8th May, 2007: A letter sent was by the respondent indicating that a decision would be made by 6th June, 2007.

17th May, 2007: The applicant was notified of a favourable decision on Freedom of Information request together with enclosure of the applicant's full file.

23rd May, 2007: The applicant's solicitor sought the advice of junior counsel.

12th June, 2007: A letter was sent by the applicant's solicitor to the respondent requesting a copy of the letter of 5th February, 2007.

18th June, 2007: The respondent replied enclosing a copy of their letter dated 24th April, 2007.

21st June, 2007: The applicant's solicitor wrote informing the respondent that the incorrect letter has been furnished.

Unknown date: The respondent furnished a copy of the letter dated 5th February, 2007.

2nd August, 2007: The applicant's solicitor wrote to the respondent requesting details of the matters considered by the respondent in arriving at his decision.

15th August, 2007: The respondent replied to the effect that the Minister had exercised his absolute discretion and declined to furnish details of the matters considered by the Minister.

17th August, 2007: The applicant's solicitor threatened High Court proceedings without further notice.

17th September, 2007: Counsel was furnished with additional information that had been requested.

15th November, 2007: Draft proceedings were settled by senior counsel.

8th December, 2007: The applicant swore his grounding affidavit.

10th December, 2007: *Ex parte* application to Peart J.

Conclusion: Delay Issue
20. The first issue to be considered is the operative date for the purposes of the time limit provided for in Order 84, rule 21. In this regard, I accept the submissions made by counsel for the respondent that the operative date in the present case is 5th February, 2007 and reject the applicant's contention that the correspondence entered into between his advisors and the respondent, after the decision was notified to him, can be relied upon for the purposes of postponing the commencement of the relevant period. The decision of Kearns J. in *Weldon v. Minister for Health and Children and Lourdes Hospital Redress Board* [2010] IEHC 444 is of assistance on this issue.

21. In *Weldon*, the applicant had applied for compensation to the Redress Board which had been established to compensate certain patients who had received unnecessary medical treatment at Our Lady of Lourdes Hospital, Drogheda. The applicant failed to submit the requisite supportive medical report as a result of which the Board commissioned its own expert reports. Those medical reports concluded that the applicant's procedure had been medically warranted and accordingly, on 28th August, 2008, she was informed that her application had been rejected.

22. Subsequent to the aforementioned decision, the applicant's solicitors raised correspondence with the Board seeking access to various documents prior to submitting a supportive medical report in November 2008. However, at that stage the Board had been wound up and it was not until April 2009 that the applicant became aware of this fact when she received a letter marked "return to sender, Board closed down". Thereafter, the applicant with relative haste, sought leave to maintain proceedings by way of judicial review and argued that the relevant date for the purposes of the judicial review application was 21st April, 2009, rather than the date of the decision and she sought to rely on the correspondence with the Board post the decision for the purpose of postponing the operative date.

23. Kearns J. concluded that time, for the purposes of O. 84, r. 21(1), began to run when grounds for the application first arose. At p. 8 of his judgment he concluded:-

> "In accordance with Order 84, rule 21(1) time begins to accrue 'when grounds for the application first arose'. The key issue to be determined is to ascertain as to when the grounds first arose. Order 84, rule 21(2) provides that where *certiorari* is sought in respect of a judgment, order, conviction or other proceeding, the date when the grounds first arose is to be taken to be the date of that judgment, order, conviction or proceeding… It is a matter for the discretion of the court whether the time limits in Order 84, rule 21(1) will be extended and the exercise of that discretion involves a consideration of all the relevant circumstances as detailed in *De Róiste v. Minister for Defence* [2001] 1 I.R. 190. The applicant must demonstrate the 'reasons which both explain the delay and afford a justifiable excuse for the delay' as stated by Costello J. in *O'Donnell v. Dun Laoghaire Corporation* [1991] 1 I.L.R.M. 301 at p. 315."

24. The argument that the operative date in this case has been in anyway extended by virtue of the correspondence written by the applicant's solicitors following the decision of 5th February, 2007 is unconvincing. Clearly, the grounds for the present application first arose on that date. At that time, it was perfectly clear that the respondent had made his decision without having engaged in any consultation process with the applicant. Hence, insofar as the applicant now maintains an entitlement to have been consulted regarding any matters considered by the respondent or his officials to have been adverse to his interests prior to the making of the decision, the relief now claimed should have been sought promptly following the rejection of his application. Similarly, insofar as the applicant submits he was entitled, in addition to or as an alternative to the consultation process just referred to, to be given reasons for the decision or to be notified of the matters to which the Minister had regard, it was clear as of 5th February, 2007 that no such reasons or information would be furnished as the respondent had advised that he was standing on his statutory discretion as the basis for his decision. Accordingly, there is no reason why the relief now sought should not have been promptly applied for and certainly well within the timeframe provided for by Order 84.

25. Decision makers need to be able to move forward and build upon their decisions in the certain knowledge that, after the requisite period, those decisions are unassailable in a legal sense. Hence, the deliberately tight time limits provided for those who wish to impugn such decisions. If, by entering into correspondence subsequent to a decision the time limit could be moved, the system would be open to abuse. By way of example, in the present case, the respondent notified the applicant of his decision on 5th February, 2007. Just two days short of the six month time limit provided for in O. 84, the applicant's solicitor on 2nd August, 2007, wrote to the respondent requesting details of the matters considered by him in arriving at his decision. It is now maintained that the operative date for the time period prescribed in O. 84, should commence on 2nd August, 2007. That is a submission which if accepted would result in the applicant being afforded a timeframe of almost double that provided for in the rules of court and demonstrates how the integrity of the judicial review process could be undermined if correspondence of this nature, which could have been written immediately following notification of the decision, could, once written within the six month period provided for by O. 84, result in an extension of the permitted timeframe.

26. The next issue to be determined concerns the plea of delay raised by the respondent at para. 1 of the grounds of opposition. The said ground states "The applicant is debarred from obtaining the reliefs herein by reason of delay." It was contended that this ground does not suffice to place the applicant on notice of a potential defence under Order 84 and that the respondent should have pleaded same as a discrete ground of opposition. However, I find this argument unconvincing having regard to the fact that these are judicial review proceedings which the applicant knew were issued outside the permitted time considering that an extension of time was granted in the order of Peart J. on 10th December 2007. The applicant was clearly aware therefore, that delay was an issue in these proceedings and that the respondent would oppose the proceedings on that ground.

27. The applicant further raised the issue whether the plea of delay, insofar as reliance is placed on the provisions of O. 84, r. 21, may be raised by the respondent at the substantive hearing in circumstances where the court granted an extension of time on the hearing of the *ex parte* application.

28. Order 84, rule 21 of the Rules of the Superior Courts provides as follows:-

> "An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose, or six months where the relief sought is *certiorari*, unless the court considers that there is good reason for extending the period within which the application shall be made."

29. The first thing to record is that having considered the affidavit filed by the applicant for the purpose of the leave application, I am satisfied as a matter of fact that Peart J. when hearing the *ex parte* application did not engage upon any consideration of whether or not the applicant had demonstrated good reason to justify his failure to meet the deadline prescribed by Order 84, rule 21. He could not have done so because there was nothing in the applicant's affidavit dealing with this issue. In this regard the decision of Barr J. in *Solan v. Director of Public Prosecutions and District Justice Hubert* Wine [1989] ILRM 491, is of interest insofar as he makes it clear that the court must be given evidence on affidavit as to the reasons for the delay. At p. 493 he stated as follows:-

> "In this instance the application was made long out of time and, therefore, the applicant is obliged to satisfy the court that in all the circumstances it is in the interest of justice that time for making the application should be extended and that the court should exercise its discretion accordingly. This entails providing by way of evidence on affidavit an explanation for the delay which is sufficient to merit the indulgence of the court."

This being so, the extension of time granted by Peart J. should perhaps be categorised at best as some type of interim relief or postponement of the issue raised for the court's determination under O. 84, r. 21 to the substantive hearing, notwithstanding the fact that the court order of 10th December, 2007, is not stated to be qualified in any way.

30. Even if Peart J. had considered the issue of delay on affidavit at the *ex parte* application, having heard the submissions of the parties I am satisfied that the court is, in any event, entitled to look at the issue of delay within the meaning of O. 84, de novo, at the hearing of the substantive issue, if the respondent raises a plea of delay as has occurred in the present case.

31. I reject any suggestion that the rules of court could be interpreted in a manner which would preclude a respondent, who had no opportunity to be heard on the *ex parte* application, from the right to challenge that decision particularly when it was made in relation to an issue where a specific burden of proof must be discharged by the applicant as a precondition to his right to pursue the relief sought.

32. The authorities opened to the court are of considerable assistance. In *Solan*, the applicant made a successful application *ex parte* to Johnson J. for leave to challenge orders of the District Court made eighteen months previously. Barr J., when dealing with the

interlocutory application, concluded that the extension of time that had been granted *ex parte* did not preclude the respondent from raising delay under the provisions of O. 84, r. 21 for the purposes of seeking to defeat the applicant's claim on the substantive hearing. At p. 494 he advised as follows:-

> "It is also argued on the applicant's behalf that, as Johnson J. extended time for making the applications for judicial review on foot of the *ex parte* motion before him, that question has been decided and, accordingly, it no longer forms part of the present application and ought not to be considered by the court at the interlocutory stage of the proceedings. I have no hesitation in rejecting that argument. I do not know the nature or extent of the submissions (if any) advanced before Johnson J. regarding the time factor in this case. But I am aware, of course, that my learned colleague did not have the benefit of hearing any argument in that regard on behalf of the respondents. I am satisfied that the extension of time granted by Johnson J. was intended to be and should be regarded as being in the nature of interim relief only for the limited purposes of enabling the applicant to open up the entire of his case for judicial review at the interlocutory stage of the application. I have no doubt that the time issue is justiciable by this Court at that stage of the proceedings and that it is for the court to make a final order thereon subject only to the applicant's right of appeal to the Supreme Court."

33. In *Bane v. Garda Representative Association* [1997] 2 I.R. 449, Kelly J. considered the effect of an extension of time granted *ex parte* at the time of the leave application. In that case, the applicants were found guilty of professional misconduct by their disciplinary body, the first named respondent. They later instituted judicial review proceedings seeking to quash decisions of the first named respondent but the application for leave was not made within the period provided for in Order 84, rule 21. Barr J., in the course of the *ex parte* leave application granted the applicants an extension of time to maintain the proceedings. As to the effect of that extension of time, Kelly J. at the interlocutory hearing stated as follows:-

> "In each case when granting leave, Barr J. extended the applicant's time for making the application. Those orders were made *ex parte* and the extension of time granted on that basis is not determinative of the issue. It has to be considered afresh by the trial judge if and when raised by the respondents. It was raised by the respondents in the present case."

34. Likewise, Kearns J. in *Weldon v. Minister for Health and Children and Lourdes Hospital Redress Board* [2010] IEHC 444, a case in which leave was granted *ex parte* nine months after a decision which it was sought to challenge, concluded that delay was not a matter to be dealt with exclusively at the *ex parte* leave stage but could also be addressed at the substantive hearing.

35. For these reasons, the fact that leave was granted by Peart J. is not an end to the court's consideration of the issue of delay in the context of O. 84 of the Rules of the Superior Courts.

36. What I must next consider is the approach to be taken by the court on the present interlocutory application to the plea of delay. Is it to determine whether the applicant has established "good reason" within the meaning of O. 84 for an extension of time or as urged by the applicant to consider solely the issue of delay as a basis for refusing relief that might otherwise have been granted to the applicant having regard to the overall facts of the case? Mr. McDonagh, S.C., submits that, since leave was granted by Peart J., the court has engaged upon the substantive hearing. Accordingly, he contends it is too late for the court to engage in consideration of delay in the context of O. 84, r. 21, that issue being one which was resolved in the applicant's favour and which was a precondition to the leave which he obtained. He submits that all of the authorities relied upon by the respondent demonstrate that the issue of delay was considered in the context of the overall merits of those claims rather than solely in the context of Order 84, rule 21.

37. In support of his submission, Mr. McDonagh relies upon the decision in *Regina v. Criminal Injuries Compensation Board* [1999] 2 AC 330. In that case, the Criminal Injuries Compensation Board refused the applicant compensation under the relevant scheme. He then applied *ex parte* for leave to apply for judicial review ten months after the making of the decision. Carnwath J. on the *ex parte* application granted leave stating "I think I couldn't shut this out on delay because that is a point that can be taken in the proceedings if leave is granted". At the interlocutory hearing, Popplewell J., having regard to what he described as the unexplained delay of the applicant in applying for leave, refused the substantial application relying upon the provisions of O. 53, r. 4(1) of the RSC. The Court of Appeal later concluded that he was wrong in so doing stating that in the absence of an application having been made by the respondent to set aside the order made *ex parte* the court was confined to considering whether the delay should deny the applicant the right to relief sought.

38. I do not find the decision in *R. v. Criminal Injuries Compensation Board* to be of as much assistance as the Irish authorities on this issue as the facts and the prevailing statutory provisions in that case were substantially different to those that apply in the present case. Whilst the UK O. 53, r. 4(1) is equivalent to our O.84 there is a coexisting statutory provision in respect of which there is no similar provision in this jurisdiction, namely s. 31 of the Supreme Court Act 1981. That section provides as follows:-

> "(6) Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant –
>
> (a) leave for the making of the application; or
>
> (b) any relief sought on the application,
>
> if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.
>
> (7) Subsection (6) is without prejudice to any enactment or rule of court which has the effect of limiting the time within which an application for judicial review may be made.

39. Lord Slynn of Hadley at p. 341 of his judgment set out the effect of the aforementioned coexisting provisions and concluded, *inter alia*, that if a respondent failed to apply to set aside leave granted on an *ex parte* application, the issue of whether or not there was good or sufficient reason for extending the time under O. 53, r. 4(1) could not be reopened by the respondent at the substantive hearing. He stated as follows:-

> "At the substantive hearing there is no 'application for leave to apply for judicial review,' leave having already been given…The court has already granted leave; it is too late to "refuse" unless the court sets aside the initial grant without a separate application having been made for that to be done. What the court can do under section 31(6) is to refuse to grant relief.

(f) If the application is adjourned to the substantive hearing, the question under both Ord. 53, r. 4(1) (good reason for an extension of time) and section 31(6) (hardship, prejudice, detriment, justifying a refusal of leave) may fall for determination."

In other words, if the judge on the *ex parte* application determined that an applicant had good reason for the delay and granted an extension of time on that basis, then the remedy for the aggrieved respondent was to seek to set aside the order. If they did not do so then the respondent was confined to arguing delay in the context of the restrictions imposed by the provisions of s. 31(6) of the Supreme Court Act 1981. If, however, the judge on the *ex parte* application did not determine whether there was good reason for the delay and adjourned that issue to the interlocutory hearing then the court considered delay within the confines of **both** the rules of court and the statutory provision.

40. As already stated, the regime in this jurisdiction is entirely different because of the absence of an equivalent provision to that provided for in s. 31 of the Supreme Court Act 1981. There is accordingly no statutory restriction on the approach of the court on the hearing of the substantive issue insofar as a plea of delay in reliance upon O. 84 is concerned. The court is entitled to consider whether or not the applicant has discharged the burden of proof upon him in accordance with O. 84, r. 21 if requested to do so by the respondent. Further, the two cases are entirely distinguishable on the basis that the court in R. had evidence before it on the *ex parte* application demonstrating good reason for the delay whereas there was no evidence whatsoever before Peart J. and hence there was no testing of the entitlement of the applicant to the extension of time sought.

41. I also reject the submission made by counsel on behalf of the applicant that there is anything in the decision of Hardiman J. in *BTF v. Director of Public Prosecutions* [2005] 2 I.R. 559, which would lend support to the applicant's submission that delay, at the substantive hearing, may only be considered by the court in the context of its overall findings. In the course of his decision, criticising the approach of the trial judge who had admittedly dealt with the issue of delay in isolation, he stated as follows:-

> "Having regard to the range of matters which fall to be considered under this heading – and the six specific factors mentioned in *De Róiste v. Minister for Defence* [2001] 1 I.R. 190 are expressly stated not to be exhaustive of the matters to be considered – I doubt whether it will normally be useful to deal with the alleged applicant delay as a preliminary issue. Except perhaps in the very plainest of cases, the necessity to enquire into other matters such as those listed by Denham J. will render it inappropriate to deal with the matter by way of preliminary issue."

42. The aforementioned quotation makes it perfectly clear that the court has a discretion as to how it will deal with the issue of delay in the context of Order 84, rule 21. His decision is clearly consistent with the court having a discretion to deal with this issue albeit only in the "plainest of cases" at a separate hearing by way of preliminary issue; as a preliminary issue at the hearing of the substantive proceedings or as one of the arguments to be determined by the court in the context of the substantive claim. There is nothing in his judgment to support the proposition that the court, having considered the factors mentioned in *De Róiste* is not entitled to dismiss an applicant's claim simpliciter on the grounds that the applicant has not discharged the burden of proof as required by Order 84, rule 21.

43. It is clear from a number of the cited cases that the issue of delay within the meaning of O. 84 has in fact been dealt with and determined somewhat in isolation. In *Dekra*, the notice party brought a motion to strike out the judicial review proceedings on the grounds that the applicant had not complied with the time limits prescribed under O. 84A of the Rules of the Superior Courts 1986 claiming that there were no grounds which would warrant an extension of time. In *De Róiste*, the respondents applied to have a preliminary issue tried to have the proceedings struck out on the grounds of inordinate and inexcusable delay and also on the grounds that the applicant had not proceeded with his application within the time limits provided for in Order 84, rule 21. Further, whilst Kelly J. in *Bane & Ors v. Garda Representative Association & Ors* heard and determined the substantive issue in favour of the applicants prior to dealing with the issue of delay under O. 84, r. 21, it is clear that the court nonetheless separately determined whether or not the applicant had discharged the burden of proof of establishing "good reason" for the court extending the period within which the application could be entertained by the court. The court did not consider the issue of delay in the context of whether or not relief which might otherwise have been granted ought to be refused by reason of delay.

44. In the unusual circumstances of the present case where the affidavit grounding the *ex parte* application set out no reasons to explain or justify the delay in the institution of the proceedings, I am satisfied that notwithstanding the decision of Hardiman J. in *BTF v. DPP,* it would have been open to the respondent to have brought a motion to seek to set aside the order of Peart J. or alternatively to have the issue of the applicant's compliance with O. 84 tried as a preliminary issue. However, the respondent did not adopt either procedure. That being so and given that the court, on the application of the applicant at the commencement of these proceedings, agreed to admit into evidence an affidavit sworn by the applicant's solicitor dealing with the issue of delay, I have come to the conclusion that there are no reasons, when dealing with delay in the context of O. 84 to depart from the well established principles which are fully rehearsed in decisions such as *O'Donnell v. Dun Laoghaire Corporation* [1991] 1 ILRM 301, *De Róiste v. Minister for Defence* [2001] 1 I.R. 190 and *Dekra Éireann Teo v. Minister for the Environment* [2003] 2 I.R. 270.

Principles

45. In *De Róiste*, Denham J. summarised the principles to be applied by the court in any case where O. 84, r. 21 is relied upon by a respondent as a basis for refusing the relief sought. At p. 208 of her judgment, she stated as follows:-

> "In analysing the facts of a case to determine if there is a good reason to extend time or to allow judicial review, the court may take into account factors such as; (i) the nature of the order or actions the subject of the application; (ii) the conduct of the applicant; (iii) the conduct of the respondents; (iv) the effect of the order under review on the parties subsequent to the order being made and any steps taken by the parties subsequent to the order to be reviewed; (v) any effect which may have taken place on third parties by the order to be reviewed; (vi) public policy that proceedings relating to the public law domain take place promptly except when good reason is furnished. Such list is not exclusive. It is clear from precedent that the discretion of the court has ever been to protect justice. When criminal convictions are in issue the matter of justice may be very clear. However, it is the circumstances of each case which have to be considered."

46. The decisions of Fennelly J. in *De Róiste* and *Dekra* are of further guidance as to the approach to be adopted by the court where an applicant has failed to meet his obligations to institute proceedings within the timeframe provided for either under O. 84, r. 21 or Order 84A, rule 4. He made a number of important statements to which I will briefly refer. He stated that:-

> (i) the pronouncement of McCarthy J. in *State (Furey) v. Minister for Justice, Equality and Law Reform* [1998] ILRM 89, to the effect that he saw no logical reason why delay of itself should disentitle an applicant to a right to apply for *certiorari*, no longer correctly represents the law in this jurisdiction.

At p. 304 of his decision in *Dekra*, Fennelly J. referred to the legislative tendency towards the imposition of stricter time limits which had been met with a corresponding approach from the judiciary. He stated as follows:-

> "There has been a tendency in recent litigation to impose comparatively short time limits for the challenge of administrative decisions. The case of the Illegal Immigrants (Trafficking) Act, 2000 is a notable example. In delivering the judgment of the court in that case, Keane C.J. drew attention to the public policy in this field at p. 392:-
>
> > 'There is a well established public policy objective that administrative decisions, particularly those taken pursuant to detailed procedures laid down by law, should be capable of being applied or implemented with certainty at as early a date as possible and that any issue as to their validity should accordingly be determined as soon as possible'."

(ii) the burden of proof generated by O. 84 remains upon the applicant at the substantive hearing and the applicant cannot establish "good reason" for delay by relying, without more, upon an assertion that the respondent is not prejudiced by the delay that has occurred; (*Dekra* p. 304)

(iii) the onus is on the applicant to show that there are reasons which both explain and afford a justifiable excuse for the delay, as per the decision of Costello J. in *O'Donnell v. Dun Laoghaire Corporation* [1991] ILRM 301;

(iv) a short period of delay may require only slight explanation whereas a longer delay would require a more cogent explanation (*De Róiste* p. 221);

(v) the applicant must show good reason for all of the period of delay, including that which falls within the time provided for by the relevant rule. In *Dekra*, he referred to the provisions of O. 84A, r. 4 which require the application to be made "at the earliest opportunity" and "in any case" within three months from the date when grounds for the application first arose. He relied upon the clear link forged between the first and second parts of the rule by the use of the words "in any case" to support this requirement; and

(vi) differing levels of importance may be attached to an explanation in respect of the period of delay falling within the timeframe provided for in the rules and an explanation furnished in respect of the period outside the permitted time limit. He indicated that a greater degree of explanation would be required in respect of the period falling outside the time provided for by the rule. (*Dekra* p.302).

47. In relation to the guidance to be obtained from the aforementioned authorities, the last matter to which I will refer is the judgment of Denham J. in *Dekra* where she had cause to consider the slightly different wording provided for in O. 84A, r. 4 to that provided for in O. 84, r. 21. She concluded that the requirement that an application for judicial review be made "at the earliest opportunity and in any event within three months" imposed much the same obligation on the applicant as that imposed by O. 84, r. 21 which obliges the applicant to make his application "promptly and in any event within three months" .

Application of Principles to the Present Case

48. Having considered the affidavit of Maria Lakes, I am satisfied that the applicant has failed to discharge the burden of proof provided for by Order 84, rule 21. He certainly did not move "promptly" in issuing these proceedings and has not provided any "good reason" to explain or justify his failure to do so within the six month outer time limit therein provided.

49. Looking firstly at the period of time which falls within the permitted time limit for the issuing of judicial review proceedings i.e. from 5th February, 2007, to 4th August, 2007, the applicant has failed to explain his failure to act "promptly" over this period. This failure is difficult to understand or excuse in circumstances where the applicant had the benefit of legal advice from almost the very start of that period.

50. The applicant first consulted his solicitor on 9th February, 2007 and whilst Ms. Lakes sets out a chronology of the steps taken by her predecessor in dealing with the applicant's instructions, she fails to demonstrate any good reason or justification for the delay. Even if the court were to take the view that it was legitimate to postpone the issue of proceedings until a copy of the respondent's file dealing with his application was available or until such a time that the respondent had been asked to provide reasons for his decision; neither step was taken with any degree of urgency. It took the applicant's solicitor some five weeks to have him attend to sign an authority to obtain his file. Thereafter, the letter requesting the file was not sent for a further four weeks. As to the need to be appraised of the reasons underlying the decision of the respondent, the letter seeking those reasons was not written until two days before the expiry of the outer six month time limit provided for in Order 84, rule 21.

51. As to the period outside the six month time limit, which is deserving of even greater scrutiny, the affidavit of Ms. Lakes does not set out any good reason or justification for the further delay of approximately four months. Two particular periods of delay which emerge from the chronology are hard to understand given that time should at that stage have been of the essence. By letter of 15th August, 2007, the respondent had advised the applicant's solicitor that reasons for his decision would not be furnished. She immediately responded by letter of 17th August, 2007, threatening High Court proceedings without further notice. However, it then apparently took until 17th September, 2007, for counsel to be furnished with all of the information required to enable the proceedings be drafted. There is nothing in the affidavit to suggest that counsel was contacted urgently; that draft proceedings were required with immediate effect or that an application to the court during the long vacation might be warranted. On the contrary, the approach to briefing counsel appears to have been what might be described as routine for a case in which time limits were not going to be an issue. Even when draft proceedings were ultimately settled by senior counsel on 15th November, 2007, the applicant did not swear his affidavit for a further period of three weeks and the application for leave was not ultimately made until 10th December, 2007.

52. Given that the court has considered the respondent's defence under O. 84, r. 21 against the backdrop of all of the evidence and submissions made to the court on the substantive issues, it is well placed to consider, *inter alia*, the six matters identified by Denham J. in *Dekra* and to take note of the additional guidance furnished by Fennelly J. referred to at para. 46 above.

53. It is clear from the nature of the present proceedings that the decision of the respondent which the applicant seeks to challenge has no effect on third parties unlike, for example, in *Dekra* where the decision which the applicant sought to challenge was one which had granted the notice party the contract to operate the system of testing motorcars in Ireland. Clearly, any delay in issuing proceedings in such circumstances could have significant adverse consequences for a third party and any such consequences would have to be considered by the court in the exercise of its discretion. However, no such considerations arise here.

54. I have already dealt with the conduct of the applicant in the context of the mandatory requirements of Order 84, rule 21. Insofar as the respondent is concerned, the chronology of events demonstrates that his conduct cannot be impugned as a basis for the

applicant's failure to issue these proceedings within the permitted timeframe. Every letter written by the applicant's solicitor was replied to promptly and a negligible proportion of the permitted six month period can be ascribed to any delay on the part of the respondent. Further, that delay can only be visited on the respondent if one accepts, which I do not, that the documentation or information sought from him was required for the purposes of challenging his decision.

55. In coming to my decision, I have also taken into account the effect that the respondent's decision has had upon the applicant from the date upon which it was made up to the present time. In this regard, the refusal on the part of the respondent to grant the applicant a certificate of naturalisation has merely maintained the status quo as existed prior to the decision. No rights formally enjoyed by the applicant were adversely altered by the respondent's decision. I accept that citizenship carries with it significant rights such as the right to vote, freedom from immigration control and other rights identified more fully by Woolf M.R. at p 773 of his judgment in *R .v. Secretary of State for the Home Department, ex parte Fayed* WLR [1998] 1 WLR 763 and that their value should not be minimised. However, it is also significant that if these proceedings are dismissed the applicant will not be precluded from further engaging with the citizenship process. Further, even if the applicant is refused a certificate of naturalisation following a further application he will not be denied access to challenge the lawfulness of that decision before the courts. In these circumstances, the argument that the respondent would not be prejudiced by the delay in the issue of the proceedings is not a good ground to overlook the public policy considerations which require that proceedings relating to the public law domain take place promptly.

56. Having concluded that the applicant has not discharged the burden of proof as required by O. 84, r. 21, the court might, lest it be proved wrong in relation to its decision on what is essentially a preliminary issue in other circumstances elect to proceed to determine as a matter of law the substantive issue in these proceedings. However, I do not intend to do so in the present case.

57. There are many decisions including those of Parke J. in *Irish Bank Trust Limited v. Central Bank of Ireland* (Unreported, High Court, 12th March, 1976) and more recently that of Clarke J. in *Worldport Ireland Limited (In Liquidation)* [2005] IEHC 189 which stress the importance of judges in courts of equal jurisdiction adopting a consistent approach when considering any particular legal issue. Unless it appears that a particular decision was given in the absence of sufficient authority being cited; was based upon the advancement of incorrect submissions; can be demonstrated to have been made by the judge having disregarded or misunderstood an important element in the case or where, by the passage of time, the jurisprudence of the courts in the relevant area might be said to have altered significantly, the decision of the judge of equal jurisdiction should be followed.

58. The key issues in this case concern the extent to which the respondent must engage with an applicant regarding any decision made by him in relation to an application for a certificate of naturalisation. The very same issues were considered at length by my colleague Clark J. in her recent decision in *Abuissa v. Minister for Justice* [2010] IEHC 366, where she reviewed, in extensive detail, the earlier decisions of the Superior Courts in relation to the relevant statutory process and in particular the nature and extent of the discretion which is afforded to the respondent under the Irish Naturalisation and Citizenship Act 1956, as amended. Shortly after that judgment was delivered, Cooke J. in *Jiad v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, 19th May, 2010), robustly endorsed the approach taken by the Clark J. in *Abuissa* and both of these decisions support the validity of the approach taken by the respondent to the applicant's claim for a certificate of naturalisation in the present case.

59. Counsel for the applicant in his submission advanced arguments destined to convince me that there are other decisions of the High Court including those of Kelly J. in *Mishra v. Minister for Justice, Equality and Law Reform* [1996] I.R. 189 and Edwards J. in *L G.H.* [2009] IEHC 78 which, although concerned with facts significantly different to those shared by *Abuissa, Jiad,* and the present case, would support his argument that *Abuissa* and *Jiad* were incorrectly decided.

60. The policy considerations underlying decisions such as those to which I have just referred make it inappropriate for me to consider again the issue of the Minister's discretion in dealing with an application for a certificate of naturalisation under the Irish Naturalisation and Citizenship Act 1956, having regard to the fact that these issues have been so recently been decided by my colleagues in *Abuissa* and *Jiad*. I believe it is more appropriate, particularly in circumstances where the respondent's defence based upon the provisions of O. 84 has been successful, to permit a definitive ruling on the issue to be dealt with by the Supreme Court in an appropriate case.

61. For all of the aforementioned reasons I would dismiss the proceedings.