Neutral Citation Number: [2011] IEHC 171

THE HIGH COURT

2010 803 JR

BETWEEN

KASPAR HUSSAIN

APPLICANT

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on 13th April, 2011

1. Section 15 of the Irish Nationality and Citizenship Act 1956 (as inserted by s.4 of the Irish Nationality and Citizenship Act 1986) is a decidedly unusual statutory provision in that it gives the Minister for Justice, Equality and Law Reform the power to grant a certificate of naturalisation "in his absolute discretion" provided that he is satisfied that certain statutory requirements are satisfied. One of these statutory requirements (s. 15(1)(b)) is that the Minister must be satisfied that the applicant is of "good character". The fundamental issue which presents itself in these judicial review proceedings is whether the Minister violated the applicant's constitutional right to fair procedures by relying on material which had not previously been disclosed to the applicant and in respect of which - or, at least, so the argument runs - he had no opportunity of dealing.

2. In the present case Mr. Hussain applied for a certification of naturalisation in order to acquire Irish citizenship, but this was refused by the Minister on good character grounds. Mr. Hussain is originally from Pakistan, but he has been living here lawfully since 2000. He is currently living in Co. Wexford where he has been, for the most part, in regular employment.

3. Mr. Hussain applied for a certificate of naturalisation in 21st December, 2005. Paragraph 6.1 of the relevant form (described as Form 8: Application by a Person of Full Age for Naturalisation as an Irish Citizen) required him to give:-

> "particulars of any proceedings (civil or criminal) which have been taken against you in courts of law in the State or elsewhere. (The date, place and nature of the proceedings and the result should be stated.)"

4. This part of the form was left blank by the applicant. However, an information leaflet dealing with all aspects of naturalisation had also been published on the Minister's website. The leaflet provided in material part as follows:

> "*What does 'good character' mean?*
>
> The Garda Síochána (Ireland's national police) will be asked to furnish a report about your background. Any criminal record or ongoing proceedings will be taken into consideration by the Minister in deciding whether to grant naturalisation or not. Details of any proceedings, criminal or civil, in the State or elsewhere, should be disclosed at Question 1.9 on the application form."

5. It is, I think, accepted that the reference to Question 1.9 is to the present version of the application form, but that this question is in substance identical to Paragraph 9.1 of the application form which Mr. Hussain completed in December, 2005. At all events, in their submission to the Minister in January 2010, the Minister's officials recommended that the application be refused because it was said that the applicant had come to adverse Garda attention. The following details were given:-

Date	Court	Offence	Conviction/Outcome
04/12/2003		Applicant passed two forged €10 notes at Bolands garage when paying for repairs to van.	No Charges Preferred
20/12/2005		Search carried out under Copyright Act, large amount of counterfeit clothing seized from the applicant	No Charged Preferred

Comments: Applicant did not include the above information on question 6.1 of their Form 8 application for naturalisation which required that an applicant provide particulars of any proceedings (civil or criminal) which have been taken in courts of law in the State or elsewhere. (The date, place and nature of the proceedings and the result to be stated). As Mr. Kausar Hussain has come to adverse Garda attention as detailed above this application is not recommended.			

6. The Minister's officials then wrote to the applicant on 4th March, 2010, informing him of the adverse decision. It is clear from that correspondence that the Minister had endorsed the recommendation for the reasons stated therein. Mr. Hussain was informed that he could re-apply, but that if he did so he "should have due regard to the reasons for the refusal given in the attached submission." Leave to apply for judicial review was granted by this Court (Peart J.) on 14th June, 2010.

7. The first thing to note is that essentially two grounds were given for refusing the application. The first ground was that the applicant had not made an appropriate disclosure pursuant to the requirements of paragraph 6.1 of the form, whereas the second implied that the mere fact that the applicant had become to the attention of the Gardaí necessarily suggested that he was not of "good character" or, at all events, that the Minister might so regard him.

First ground: alleged failure by the applicant to make appropriate disclosure

8. So far as the first ground is concerned, it would have to be acknowledged that while the wording of the question might, perhaps, have been more happily phrased, it cannot be said that the applicant was at fault in leaving the form blank. The question is clearly referable to actual proceedings (whether civil or criminal) *involving the applicant*. So far as the forged banknotes issue was concerned, no charges were proffered as against the applicant and so there was thus plainly no obligation on the applicant to disclose the fact that he was questioned by members of An Garda Síochána in relation to this incident.

9. It is true that a search warrant was issued by District Court under s.143 of the Copyright and Related Rights Act 2000, and that - according to the Garda report - a "large amount of counterfeit clothing [was] seized from the applicant." For my part, however, I would greatly doubt if the grant of a search warrant by a District Judge is a judicial "proceeding" properly so called. Strictly speaking, the fact that the power to issue a search warrant is vested in a judge is no more than an endeavour by the Oireachtas to provide a further statutory safeguard for the community by committing the decision to issue the warrant to an independent judicial personage. There is no reason in principle why the power to issue a search warrant should not have been vested in a senior Garda officer, as indeed has been done by, for example, s. 29 of the Offences against the State Act 1939.

10. This very point was made by Barr J. in *Ryan v. O'Callaghan* (High Court, 22nd July, 1987), in the course of a judgment which upheld the constitutionality of s. 42 of the Larceny Act 1916. That section had vested the power to issue a search warrant in a Peace Commissioner and Barr J. rejected the argument that this involved the transfer of judicial powers to a non-judicial personage:-

> "The search of premises by the police under the authority of a search warrant is no more than part of the investigative process which may or may not lead to the arrest and charging of a person in connection with the crime under investigation or any other crime. In my view, the prosecution of an offence commences when a decision is made to issue a summons or prefer a charge against the person in respect of the particular crime alleged. It follows, therefore, that the issue of a search warrant prior to a commencement of a prosecution is part of the process of criminal investigation and is executive rather than judicial in nature."

11. In any event, it is clear that even if (contrary to my view) the grant of a search warrant under s. 143 of the 2000 Act does involve a judicial proceeding, it does not involve a proceeding *which had been taken against the applicant* which, after all, was the requirement stipulated by paragraph 6.1 of Form 8. This is clear from the terms of s. 143 itself which provides-

> "Where a judge of the District Court is satisfied by information on oath that there are reasonable grounds for suspecting—
>
> (a) that an offence under section 140 has been, or is about to be, committed in, on or at any premises or place, and
>
> (b) that evidence that such an offence has been, or is about to be, committed is in on or at those premises or that place,
>
> the court may issue a warrant authorising a member of the Garda Síochána, accompanied by such other members of the Garda Síochána or other person or persons as that member thinks proper, at any time or times within 28 days from the date of the issue of the warrant on production, where requested, of that warrant, to enter and search the premises or place specified in the warrant using reasonable force where necessary, and to do all or any of the following acts:
>
> (i) to seize any copies of any works, articles or devices in respect of which he or she has reasonable grounds for suspecting that an offence under section 140 has been or is about to be committed;

(ii) to make an inventory or prepare other evidence of infringement of copyright or potential infringement of copyright;

(iii) to seize anything found there which he or she believes on reasonable grounds may be required to be used in evidence in any proceedings brought in respect of an offence under this Act;

(iv) to require any person found there to give his or her name and address."

12. It is thus clear that the search warrant merely enables the Gardaí to search a particular *place*. It is not, as such, directed at any *individual person*.

13. It follows, therefore, that, objectively speaking, the applicant cannot be faulted for failing to make disclosure of these matters in paragraph 6.1, since it clear that the issue of a search warrant was not a civil or criminal proceeding and even it was, it was not a proceeding "which [has] been taken against" the applicant.

Second ground: whether the applicant was of "good character"

14. There is no settled or fixed interpretation of the words "good character". Applying the standard principle of *noscitur a sociis*, these words accordingly take their meaning according to the relevant statutory context and general objects of the legislation: see, *e.g.,* the comments of Henchy J. in *Dillon v. Minister for Posts and Telegraphs* (Supreme Court, 3rd June, 1981). It is implicit from the general tenor of s. 15 that the section is designed to empower the Minister to grant naturalisation to persons who have resided here for an appreciable period of time and who intend to do so in the future. Furthermore, the fact that s. 15(e) requires the applicant to make a declaration - generally in open court before a judge of the District Court - of "fidelity to the nation and loyalty to the State" suggests that such a person must be prepared to make a public commitment that they will discharge ordinary civic duties and responsibilities, given that the these words are themselves borrowed directly from Article 9.2 of the Constitution.

15. It is against this background that 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.

16. This brings us to the question of the "absolute" nature of the Minister's discretion under s.15. By describing the discretion as "absolute", the Oireachtas intended to emphasise that the grant by the Minister of a certificate of naturalisation "is the purely gratuitous conferring of a privilege in exercise of the sovereign authority of the State": *Jiad v. Minister for Justice, Equality and Law Reform* [2010] IEHC 187, per Cooke J..

17. This description nevertheless cannot mean, for example, that the Minister is freed from the obligations of adherence to the rule of law, which is the very "cornerstone of the Irish legal system": *Maguire v. Ardagh* [2002] IERSC 21, [2002] 1 I.R. 385 at 567, per Hardiman J. Nor can these words mean that the Minister is free to act in an autocratic and arbitrary fashion, since this would not only be consistent with the rule of law, but it would be at odds with the guarantee of democratic government contained in Article 5 of the Constitution.

18. Yet if the Minister could act *entirely* upon his own personal conceptions of what was entailed by good character on the basis that the Oireachtas had thereby vested him with an "absolute" discretion, the way would be opened for the imposition of private morality and arbitrary choice in the sphere of public law. In fairness, counsel for the Minister, Ms. Stack, fairly disclaimed any such contention, although she did argue that the words gave the maximum possible degree of leeway to the Minister in making an assessment of this kind.

19. In this regard it should also be recalled that s. 15 requires that the Minister must be "satisfied" as to an applicant's good character prior to the grant of a certificate of naturalisation. Phrases such as "if the Minister is of opinion" or "if the Minister is satisfied" of certain matters which predicate the exercise of statutory powers are, of course, a familiar feature of the statute book. It has been clear since the Supreme Court's decision in *The State (Lynch) v. Cooney* [1982] I.R. 337 (if not, indeed, earlier) that the existence of such subjectively worded statutory formulae notwithstanding, the Minister's assessment is nonetheless amenable to judicial review. Thus, the Minister's conclusion must, in the words of the judgment of O'Higgins C.J. delivering the judgment of the Court on the constitutional issue, be one "which is *bona fide* held and factually sustainable and not unreasonable": [1982] I.R. 337 at 361. This point was further amplified by Henchy J. in his concurring judgment on the non-constitutional issues when he said ([1982] I.R. 337 at 380-381):

> "It is to be presumed that when it conferred the power, Parliament intended the power to be exercised only in a manner that would be in conformity with the Constitution and within the limitations of the power as they are to be gathered from the statutory scheme or design. This means, amongst other things, not only that the power must be exercised in good faith but that the opinion or other subjective conclusion set as a pre-condition for the valid exercise of the power must be reached by a route that does not make the exercise unlawful - such as by misinterpreting the law or by misapplying it through taking into consideration irrelevant matters of fact or through ignoring irrelevant matters."

20. In the light, therefore, of the Supreme Court's conclusion in *The State (Lynch) v. Cooney* (and, indeed, a wealth of subsequent case-law to similar effect) 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 *LGH 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.

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. Returning now to the facts of the present case, the Minister would obviously be entitled to conclude that a person who was knowingly in possession of either forged notes or counterfeited items was not a person of "good character" for this purpose, since this shows a level of calculated dishonesty which is plainly at odds with ordinary standards of civic morality. The real question, however, is whether the Minister was entitled, without more, to reach this conclusion on the facts of the present case.

22. It is true that the applicant has never been charged, much less convicted, arising from these incidents. That, *in itself*, cannot be decisive. It would be easy to think of instances where an applicant came to adverse Garda attention by reason, for example, of the possession of contraband in circumstances where a prosecution was never initiated. It could not be suggested that in such circumstances the Minister's hands were tied even though the applicant in question had never even been prosecuted. Assuming always that fair procedures have been complied with, the Minister would be entitled to refuse the application if it could reasonably be concluded that the applicant was involved in serious criminal wrong-doing, even though he had never been convicted or even charged with such an offence.

23. But it is equally the case that an applicant cannot be disqualified for s. 15 purposes, *merely* because he or she has come to adverse Garda attention. The Gardaí may, for example, be quite mistaken in their belief that the applicant had engaged in wrongdoing. In the present case, it means, for example, that the applicant may have a perfectly good explanation for both the forged notes and the counterfeiting incidents which shows that no moral blame attaches to him.

24. In the ordinary way, therefore, the Minister would be obliged to put these matters to the applicant as a matter of fair procedures before reaching an adverse decision: see, *e.g.,* the comments of Cooke J. in *Jiad*. Of course, it may be said - and this is the very essence of the Minister's case - that the applicant must already have known from the terms of the information leaflet that the Minister would commission a Garda report prior to making any decision on the application. If the Gardaí were asked to report, then these incidents would inevitably have come to the Minister's attention and that in such circumstances he cannot reasonably complain if the Minister relied on such information.

25. I am not unsympathetic to this argument. There is much to be said for the contention that it behoved an applicant to make advance disclosure of these incidents in making his application and to furnish a full explanation for them. Nevertheless, even if the applicant was put on notice by the information leaflet that a Garda report would be commissioned, the overall tenor of the statement was that this report would be confined to questions of a "criminal record or ongoing proceedings". One cannot read the leaflet as unambiguously requiring an applicant to make advance disclosure of incidents requiring Garda attention, but which did not proceed further.

26. In these particular circumstances, objectively speaking, the applicant cannot be faulted on this account either for failing to deal in his application with the two incidents in question. It followed, therefore, that if the Minister wished to reach a conclusion adverse to the applicant, he was obliged as a matter of fair procedures to put matters not involving a criminal record or pending civil or criminal proceedings to the applicant for his comments.

Conclusions

27. In conclusion, therefore, I feel coerced to quash the Minister's decision on two separate grounds. First, there was no basis for the suggestion that the applicant had failed to make appropriate disclosure in the manner required by the actual language of paragraph 6.1 of form 8 and this ground cannot properly form the basis of an adverse conclusion. Second, the Minister inadvertently breached fair procedures in that in the special circumstances of this case he was obliged to bring the contents of the Garda report to the applicant's attention.

28. In these circumstances, I further propose to remit the matter to the Minister for further consideration pursuant to the terms of O. 84, r. 26(4). I will further direct that the Minister should now write to the applicant inviting him to make submissions in writing in response to the Garda report. Given the delays which unfortunately have attended this application thus far - there was an interval of four years between the date of the application and the ultimate decision - it is to be expected that the Minister would take a fresh decision with all appropriate deliberation as quickly as possible once these further submissions have been received.