Neutral Citation Number [2007] IEHC 157

THE HIGH COURT

DUBLIN

Case No. 2005/4452P

SUFIAN AL ASWAD

PLAINTIFF

AND
THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

DEFENDANT

HUMAN RIGHTS COMMISSION

NOTICE PARTY

Judgment of Mr. Justice T.C. Smyth delivered Judgment as follows on Tuesday, 1 May 2007

1. The Relief
The Plaintiff seeks a declaration, in these proceedings, that he is entitled to have his application for a certificate of naturalisation made in the week commencing 16 December 2002 considered by the Defendant.

2. The Facts
The Plaintiff is a Syrian national who came to Ireland as a student in 1995 and became a lodger with the then recently widowed Mrs. Kavanagh who had two young children of her own living with her. Over the years of his secondary school and later third level education he had become effectively one of the family. Over the years he had various employments and is now an IT expert with a Masters Degree. In October 2002 he was minded to settle in Ireland and aspired to work here. His evidence was that he attended at the offices of the of the Defendant (at lunchtime one day), then at St. Stephen's Green Dublin, to obtain an application form for naturalisation and that while there some tall dark young man (name unknown) of about six feet in his early twenties with a coloured shirt came to him or was sent to him when he requested some form of unspecified assistance. The Plaintiff said he was given a "Form 5" and on enquiry as to whether it should be returned in person he was told or advised to send it by registered post; furthermore, he says he was advised that the process could or would take a period of 15 months from the receipt of the application. The Plaintiff duly took the form with him and had it completed and secured all necessary signatures except one by Sunday, 13 October 2002. The form required to be supported by a statutory declaration which was (as indicated in the explanatory leaflet accompanying it) to be made and signed before a Notary Public, Commissioner for Oaths, Peace Commissioner or practising solicitor. The Plaintiff says he knew none such and did not make any enquiries or any effort on his own part to locate such person. Mrs. Kennedy came to his assistance and after some enquiries ascertained that a Mr. Toal, solicitor, would be prepared to attend to the Plaintiff's requirement but that the earliest appointment that was available was 11 December 2002. The completed form with statutory declaration were dispatched on 16 December 2002 and apparently received on 2 or 3 January 2003. The reply of 7 January 2003 from the Department inter alia stated:

> "Your application is on the former Form 5 which ceased to be the official form for naturalisation on November 30, 2002. It will be necessary for you to complete the new Form 8 which is the statutory application form for naturalisation since that date."

The letter went on the deal with other matters and specifically noted that verbal instructions would not be accepted relative to change of address. The latter (which appears in a standard form) concludes in the following manner:

> "What happens to your application now?
>
> Your application, when the correct form is received, will be placed in chronological order along with all new applications. We are currently examining applications received in late 2001/early 2002. It is likely, therefore, that your application will be examined in the first half of 2004. If further documentation and/or clarification of any matter related to your application is required, we will be in touch with you at that time. Otherwise, you will receive a letter informing you of the Minister's decision on your application.
>
> IMPORTANT NOTE: Your application has not been examined in detail and we will be unable to confirm if it is a valid application or that you meet the statutory conditions for naturalisation until a detailed examination takes place."

The Plaintiff made a new application in 2003/2004 and eventually on 17 January 2005 he was informed that it was determined that he did not meet the criteria set out in section 15 of the Irish Nationality and Citizenship Act 1956, as amended, at the time when he applied. The examination of the Plaintiff's documents by the Defendant disclosed that he did not have five year's reckonable residence in the State. For the Defendant a Ms. Shortland, a Clerical Officer in the 'Citizenship Section' of the Ministry, stated that there were several hundred staff in the offices of the Ministry in Stephen's Green in October 2002 and that such was the volume of the applications at the time that it is highly unlikely, indeed improbable, except in the most extreme case that any personal assistance would have been given to a new or first time applicant. The practice at the time was that the only form available up to 30 November 2002 was Form 5 and this would be made available to personal callers at the reception desk and a help line phone number and service was available - a fact set out in the 'Explanatory Memo' or 'Application Guidelines'. The witness acknowledged that applicants whose application was in train were met by appointment, but it was not a practical possibility to provide such service to new or original applicants. The witness said that she could not identify the person in the Ministry to whom the Plaintiff said he spoke. She believed that all relevant information concerning the relevant provisions of the Irish Nationality and Citizenship Act 2001 would have been on the website of the Ministry and would have been accessible to all members of the public. In the trial no proof in this regard was possible in the time available and the witness considered that by the constant updating of material the information on the website as of October 2002 may not necessarily now be extant.

3. Determination on Facts
On a consideration of the evidence I hold:

> (a) That even if the Plaintiff did have the conversation he states he never raised the issue before proceedings were taken in December 2005, over three years after the event. On the balance of probabilities, given the volume of applicants to the Citizenship Section of the Ministry, and the reference in the guidelines and oral evidence and ubiquitous 'nondescript' indicators of the Plaintiff's informant and the stated 'lunchtime' encounter, the case of the Defendant is more credible.
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> (b) The Plaintiff, although having the benefit of a secondary and third level education and in the course of the latter in IT studies and skills, did nothing (whether or not available on the website of the Ministry) to assist himself between the date

of receipt of relevant documentation on or about 11 October 2002 or thereafter and such cannot amount to a negligence on the part of the Defendant.

(c) The absence of any reference to the Act of 2001 in the Explanatory Memorandum or Guidelines dated February 2002, although regrettable in the circumstances of the instant, case does not amount to negligence as against the Defendant.

4. The Law

The Irish Nationality and Citizenship Act 1956 (the Act of 1956) provides that the Minister may make regulations in relation to any matter or thing referred to in that Act as prescribed or to be prescribed (Section 3) and as regards to certificates of naturalisation (section 14) as amended by the Act of 1986. Specifically s.17 of the Act of 1956 provides:

"1. An application for a certificate of naturalisation shall –

(a) be in the prescribed form, and

(b) be accompanied by such evidence (including statutory declarations) to vouch the application as the Minister may require."

The Act of 1986 per s.4 (*inter alia*) provided that the Minister (if satisfied that the Applicant) --

"(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 year's immediately preceding that period, has had a total residence in the State amounting to four years."

-- may, in his absolute discretion, grant the application. In the instant case under the regime the Applicant who in 2002 was approximately seven years in residence in the State could have qualified for naturalisation. In evidence the Plaintiff said that he wished to build up a strong case for himself and left it to 2002 to apply. I found considerable difficulty with this evidence given the provisions of the Act of 1986.

The Act of 2001, which with the Acts of 1956 and 1986 are to be construed as one (section 9(2)) which was signed by the President on 5 June 2001, provided by section 9(3) that certain parts of the Act of 2001, not the concern of this case, were deemed to have come into operation on 2 December 1999 and section 9(4) provided that, otherwise than by subsection 3 of the section, that all remaining sections would come into operation on such day or days as the Minister may appoint by order. By order dated 5 April 2002 the Minister by order of S.I. 128 of 2002 brought into effect all remaining sections of the Act of 2001 with effect from 30 November 2002. Notice to this effect appeared in Iris Oifigiúil of April 12, 2002.

On 30 November 2002 by Order (S.I. 567 of 2002) the Defendant Minister made regulations prescribing the procedure to be followed and the forms to be used by persons who make declarations for the purposes of the Acts of 1956 to 2001 or who apply for certificates of naturalisation.

5. Applying the law in the context of the submissions and the facts found

(a) Dr. Forde SC for the Plaintiff very properly did not place great reliance on the stated encounter of the Plaintiff with the unidentified person in the Ministry - in any event had a determination on fact been made in favour of the Plaintiff it would not and could not in the statutory context bind the Minister (by analogy *Dublin Corporation -v- McGrath* [1978] IRLM 208 applied).

(b) It is undisputed that the guidelines dated February 2002, a copy of which were available to the Plaintiff in October 2002, contained no reference to the Act of 2001. The question that arises is as to whether such omission amounts to negligence on the part of the Defendant such as to confer a right upon the Plaintiff which he lost or was unable to exercise (it clearly could not act as an estoppel for there can be no estoppel in the face of the statute). In this regard I accept the submission of Mr. O'Boyle SC on behalf of the Defendant that the Plaintiff's own delay was the real and proximate cause of the loss of any rights he may have had (in terms of reckonable residence) on or prior to 30 November 2002.

(c) The 'oversight' omission or lack of compliance with the terms of the Acts 1956 to 2001 which expressly refer to "the prescribed form" is not a matter of de minimis non curat lex (applying *Monaghan UDC v Alf-a-Bet Promotions* 1980 ILRM 64 per Henchy J. p69).

(d) The principal ground upon which the declaration sought was founded was that the Act of 2001 introduced "a reckonable residency" provision and this caused the Defendant to introduce a new form of application for naturalisation such should (a) have been the subject of extensive publicity and that a notice in Iris Oifigiúil was insufficient and that the press release of the Defendant of 27 November 2002 put in evidence at the hearing had not come to the knowledge or attention of the Plaintiff in time and (b) that on the occasion of the Plaintiff's call to the Defendant's office in early to mid October 2002 such imminent change ought to have been brought to his attention either (i) personally or (ii) in the explanatory memo or guideline documents and that neither occurred and (iii) that such explanatory memo made no reference to the Act of 2001. The totality of these stated shortcomings were referred to by Dr. Forde as an information deficit and that in all the circumstances of the case the Plaintiff should not be bound by the maxim ignorantia lex non haud excusat.

The submission for the Defendant was that his statutory duty had been fulfilled and that there was no additional duty upon him to inform the Plaintiff of any change in the law and therefore there was no negligence on his part and there was no special relationship created between the parties which would have led to the establishment of a duty of care. It was also submitted that the Plaintiff would not maintain a claim for an economic loss because no negligent misstatement in any special relationship context existed within the parameters set out in the Hedley Byrne case. In fact, such claim was not pursued at trial.

While it is never an attractive argument to have to make in a case where an individual is pitted against the State or any of its emandations, Mr. O'Boyle properly pointed out that the Plaintiff himself personally did nothing between 13 October and 30 November 2002 to seek completion of requisite form of declaration.

6. Determination
In my judgment:

(a) The Plaintiff had adequate time with which to fully complete and lodge his application before 30 November 2002.

(b) There was no negligence or breach of statutory duty on the part of the Minister.

(c) Constitutional concepts of fairness were not infringed by any act or omission by the Defendant.

(d) There can be no causation for a claim for damages where the granting of naturalisation is within the discretion of the Minister.

7. Conclusion

(a) The Court cannot override the statutory provisions and grant the first two declarations sought.

(b) The Defendant did not apply any of the statutory provisions retrospectively prior to November 2002 or apply provisions which commenced on 30 November 2002 prior to that date.

(c) No detailed analytical argument was advanced at the hearing that section 16A(3) of the Act of 1956 as amended is repugnant to the Constitution.

(d) No case was made at trial as to incompatibility of section 16(3) as aforesaid with the European Convention on Human Rights.

The Plaintiff fails in this action.