THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 96 J.R.]

BETWEEN

S.H.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Ms. Justice O'Regan delivered on the 30th day of January, 2017

Issues

1. The applicant is challenging the decision of the respondent dated 27th November, 2015 refusing the applicant's application for Irish Citizenship.

2. The grounds upon which the relief is based are as follows:—

(a) the rationale or reasoning of the respondent is not sufficiently clear;

(b) the respondent did not assess the severity of the misrepresentations identified by the respondent and made by the applicant;

(c) the decision was based upon a clearly unfounded asylum claim in the UK however there was insufficient evidence to support such a fact;

(d) the applicant had a legitimate expectation that his application for citizenship would be acceded to based upon the fact that he had previously received residence permissions;

(e) the decision is based upon errors of fact and law;

(f) the respondent in the decision effectively replaced or altered findings of either ORAC or the RAT.

Background

3. The applicant is a Nigerian National born in 1972. He arrived in the State in 2002 and applied for asylum in November, 2002 which was refused by ORAC on 24th June, 2003. This refusal was appealed to the RAT which was heard on 15th October, 2003. The appeal was refused by the RAT in the decision of 22nd October, 2003.

4. Following the decision of the RAT aforesaid the applicant was furnished with an intention to deport letter from the respondent and as a consequence made representation to the respondent under s. 3 of the Immigration Act, 1999 seeking permission to reside within the State. This application was made on 21st January, 2004 and identifies the 5th October, 2002 as the date on which the applicant arrived in the State. In his application for Citizenship the Applicant states he arrived in the State on 20th September, 2002 and in a letter dated 24 April, 2015 he states he arrived in the State on 30th October, 2002. The representation included an assertion that he was living with his wife and that because he now had a wife he would like to stay with her as she was finishing studying in 2008. The applicant also indicated that he did not wish to return to Algeria as he was suspected of being a criminal without any factual or evidential basis.

5. The applicant was ultimately afforded permission to reside in the State on 19th March, 2009.

Application for citizenship

6. The applicant submitted his application in May, 2014 on the basis of documentation dated 10th March, 2014.

7. Following this application correspondence was entertained between the parties. In this regard the respondent raised certain queries in a letter dated 21st November, 2014 which the applicant responded to in letter dated 26th November, 2014. Further queries were raised in a letter dated10th March, 2015 and responded to by the applicant on 13th March, 2015. The final queries were raised by the respondent in a letter dated 22nd April, 2015 and responded to by the applicant on 24th April, 2015.

8. In the letter dated 21st November, 2014 the respondent was seeking confirmation that the adverse immigration history with the UK related to the applicant. The response of the applicant on the 26th November, 2014 was to the effect that, yes, this adverse application referred to the applicant but he was unaware as to the confusion as to his name. Subsequent clarification was sought as to the applicant's marital status and in a communication dated the 24th April, 2015 the applicant confirmed that he had never been married and he then was single. Further clarification was also sought of the applicant however not apparently germane to the ultimate decision.

9. In fact, it appears that the UK authorities furnished contradictory information as to the applicant, namely in a fax communicated on

29th April, 2003. It was indicated that the applicant had previously made an application in England although with a different surname and date of birth. The file was not then available. Further information from the UK authorities disclosed that there was an asylum refusal in respect of the instant applicant with the correct name and date of birth in England on 27th April, 2001.

The decision of the 27th November, 2015

10. By letter dated 27th November, 2015 the respondent advised the applicant that the Minister having considered the application has decided not to grant the applicant a certificate of naturalisation. It was indicated in this letter that the reasons for the refusal were given in the attached submission.

11. The attached submission includes the following recommendation:—

> "The applicant made a clearly unfounded application for asylum both in the State and in the U.K. and has been untruthful, which goes to his character. I am not satisfied that the applicant is of good character and I would not recommend the Minister to grant a certificate of naturalisation in this case."

12. Prior to the recommendation the following issues were raised, namely:—

(a) The applicant had already applied for asylum in the UK on the 14th June, 2000 under a different name and date of birth.

(b) The applicant stated in his asylum application that he arrived in the State from Algeria on 30th October, 2002, however, elsewhere he has stated that he moved to Ireland directly from the UK with his then girlfriend and claimed asylum.

(c) He has given his marital status as single on his application for a certificate of naturalisation whereas he indicated during his asylum application that he was married to his former girlfriend in a declaration dated the 21st January, 2004.

13. Insofar as the matter referred at 12 (b) above is concerned this contradiction as to what country the applicant had been in prior to arriving in Ireland is evident from a review of the applicant's asylum application before the RAT in which he appears to have advanced different reasons for his asylum application as well as identifying different countries he was in immediately prior to travelling to Ireland.

Case law

14. The following case law is relied upon:—

15. In *Mallak v. Minister for Justice Equality and Law Reform* [2012] IESC 59 being a Supreme Court decision of 6th December, 2012 and in particular the applicant relies on paras. 46 and 47 thereof to the effect that the exercise of a discretionary power can only be done within the boundaries of the stated objects of the Act and the Minister must act fairly and judicially in accordance with the principals of constitutional justice and such powers do not give him an absolute or unqualified or an arbitrary power to grant or refuse at his will. The Minister cannot take into account legally irrelevant considerations. Reasons have to be given as otherwise this would permit the Minister to exercise the power arbitrarily or capriciously.

16. The applicant further relies on the quote from *The State (Keegan) v. the Stardust Compensation Tribunal* [1986] I.R. 642 as contained in para. 63 of the judgment of Fennelly J. in *Mallak* to the effect that an unsuccessful applicant should be made aware in general and broad terms of the grounds on which he or she has failed.

17. The respondent does not dispute the application of the foregoing principles to the instant application.

18. The applicant also relies on *Hussain v. Minister for Justice Equality and Law Reform* [2011] IEHC 171, being a judgment of Hogan J. in the High Court of 13th April, 2011. This claim involved an application under s. 15 of 1956 Act as amended. During the course of his judgment Hogan J. dealt with the meaning of the words *"good character"* and indicated that they should take their meaning according to the relevant statutory context and general objects of the legislation. At para. 15 Hogan J. indicated that the meaning of "*good character*" is to the effect that the applicant's character and conduct must measure up to reasonable standards of civic responsibility as gauged by reference to contemporary values and the respondent cannot demand some exalted standard of behaviour that would be unrealistic nor can a private standard of morality be imposed that is isolated from contemporary values.

19. The respondent did not indicate any particular objection to this interpretation, however on behalf of the respondent it was indicated that the concept of a party lacking in good character did not equate to criminality — in other words the respondent contended for an understanding or an interpretation of good character as separate and distinct from any element of criminality.

20. The applicant also relies on the case of *O.T.A. v. Minister for Justice and Equality* [2016] IEHC 173 being a judgment of Faherty J. delivered on 15th April, 2016 for the purposes of establishing that in an application under s. 15 of the 1956 Act such as the instance case, there is an obligation on the Minister to give reasons for the relevant decision.

21. The respondent does not dispute this principle.

22. The applicant seeks to distinguish the case *M.A.D. v. Minister for Justice and Equality* [2015] IEHC 446 being a judgment of Stewart J. delivered on 14th July, 2015 notwithstanding that same dealt with a claim under s. 15 of the 1956 Act. In that matter Stewart J. referred to Hogan J.'s decision in *Hussain*, referred to above, to the effect that the reference to "*absolute*" referred to in s. 15 does not mean that the Minister is free from the obligation of adherence to the rule of law which is the cornerstone of the Irish legal system. Stewart J. also referred to the decision of Higgins C.J. in the Supreme Court in *the State (Lynch) v. Cooney* [1982] I.R. 337 to the effect that the consideration must be one "which is bona fide held and factually sustainable and not unreasonable".

23. Notwithstanding the foregoing, at para. 37 of the judgment of Stewart J. it was held that:—

> "While such a decision does certainly fall within the scope of judicial review, courts should be reluctant to intervene where the applicant might seek to achieve precision in the form of guidelines, especially where this would result in a fettering of the discretion conferred upon the minister by the statute."

24. The applicant, in attempting to distinguish that case from the instance case, suggests that the leave granted and the consideration being afforded by the Court was in respect of a very narrow issue and did not involve constitutional and natural justice.

25. I do not consider the statement of Stewart J. in para. 37 of her judgment to be other than a true reflection of the law.

26. The respondent relies on the case of *A.B. v. Minister for Justice Equality and Law Reform* [2009] IEHC 449 being a judgment of Cooke J. delivered on 18th June, 2009 to the effect that, as provided for at para. 17 of the judgment, when a new application is lodged the Minister is entitled, especially if there has been a lapse of time since the original application was made, to determine the application on the basis of up-to-date information and new inquiries. This point is raised by the respondent in answer to the applicant's suggestion that it is irrational of the Minister to now consider adversely the applicant's good character when in fact in 2009 and 2014 the Minister afforded the applicant residence within the State and that process by definition involved an assessment of the applicant's good character. Notwithstanding this argument made on behalf of the applicant, the applicant also acknowledges that the Minister is entitled to change his or her mind.

Severability

27. The issue of severability of portion of the decision, if necessary, in the event of it being factually or legally incorrect or inaccurate so that the balance of the decision might survive has not been addressed in either the statement of opposition or submissions made by counsel on behalf of the respondent. The applicant complains that this status is most unsatisfactory and not compliant with the Rules of Court. The respondent counters that it was the Court that raised the issue of severability — while this is true, nevertheless it does appear to me that the issue of severability was, since the application was first made by the applicant, clearly a relevant issue given the reference in the decision to the applicant using a different name and date of birth in his asylum application in the UK although this statement is clearly incorrect, and ultimately, at the conclusion of submissions in fact the respondent accepted the inaccuracy of this statement.

28. To hold with the Respondent the Court would have to assume that the Ministers decision would have been the same and the Minister would have reached that same outcome on the remaining reasons, in the circumstances where it is not for this Court to decide whether the decision reached by the Minister is the correct or incorrect decision nor is it for this Court to agree or disagree with the decision based on the established facts and evidence. Rather, it is for this Court to examine the process by which the Minister's decision was arrived at and ask can it objectively identify the reasons the Minister relied upon in making that decision.

29. Effectively severance creates a problem in this matter. The Court cannot objectively identify the weight attached to the reasons expressed in making the decision. Was it a culmination of them all? Was it one specific reason? Would the two remaining reasons have been sufficient? This Court cannot objectively say.

Conclusion

30. I am satisfied that notwithstanding the absolute nature of discretion afforded to the respondent in s. 15 of the legislation nevertheless there is an obligation on the respondent not to act arbitrarily or capriciously and to give reasons for the decision, which reasons must be factually sustainable.

31. I am satisfied that the respondent in the decision of the 27th November, 2015 did give reasons for the decision, namely (a) the untruthfulness of the applicant and (b) the clearly unfounded asylum application in the UK and in this State.

32. I do not accept the applicant's proposition that for an adverse assessment of good character to be made there must be some element of criminality involved.

33. I am satisfied that the reasons for the decision were clearly communicated to the applicant in this matter by reference in the letter dated 27th November, 2015 to the attached submissions.

34. From the respondent's point of view there are two difficulties with the decision, namely:—

(a) The decision clearly relies upon the fact that it is claimed that the applicant made an asylum application in the UK with a different name and different date of birth. In fact it is clear that this was the same belief held by the respondent in 2009 when affording the applicant a right of residence. It is now accepted by the respondent that the suggestion that the applicant made his asylum application in the UK under a different name and date of birth is factually incorrect.

(b) The decision refers to a clearly unfounded asylum application in the UK notwithstanding that in fact the fax communication from the UK Home Office dated 29th April, 2003 advises that the applicant file is unavailable and there is no evidence before the Court to the effect that this file became available to the respondent since the fax dated 29th April, 2003. Accordingly, the only information available to the respondent from the UK Home Office was to the effect that the applicant was refused asylum and lodged an appeal which was awaiting consideration. Such a status cannot in my view amount to a clearly unfounded asylum application in the UK and therefore I am satisfied that this assertion is factually unsustainable.

35. I am not satisfied that it is possible to effectively ring-fence the two factual inaccuracies contained in the decision so as to enable the decision to survive. In this regard, as has been pointed out on behalf of the applicant there is no evidence before the Court that if reference to the incorrect name and date of birth in the UK asylum application and reference to a clearly unfounded asylum application in the UK was expunged from the decision that nevertheless the Minister would have arrived at the same conclusion as is contained in the decision of 27th November, 2015.

36. For the reasons above I am satisfied that the decision of 27th November, 2015 should be quashed.