

## THE HIGH COURT

## JUDICIAL REVIEW

[2015 No. 723 J.R.]

BETWEEN

K A

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

## JUDGMENT of Ms. Justice O'Regan delivered on the 24th day of November, 2016

**Issues**

1. The applicant is seeking an order of *certiorari* to quash the decision of the respondent of 18th September, 2015 refusing the applicant's application for a certificate of naturalisation on the basis that the decision did not provide any adequate or sufficient reasons for the refusal and further, that there was an obligation on the respondent to put issues of good character to the applicant so that he could make a meaningful response to same. As a consequence the applicant suggests that fair procedures were not employed by the respondent in or about the making of the impugned decision of 18th September, 2015.

2. The within matter being listed for hearing on 15th November, 2016, the applicants served a notice to produce bearing date 8th November, 2016 on the respondent in respect of a confidential report relied upon by the respondent in or about the making of the decision of 18th September, 2015 aforesaid. By letter of 10th November, 2016 the respondent asserted privilege over such a report. In the events the applicant has brought a further application for the purposes of seeking inspection of the report. In this regard in the grounding affidavit of 11th November, 2016 the applicant specifically sought, for the purposes of determining the respondent's claim of privilege, that the Court would inspect the document, in order to determine whether the document or any part thereof may be inspected by the applicant, in the interests of constitutional justice and fair procedures.

**Factual Background**

3. The applicant is an Algerian national and arrived in Ireland in January, 2000 on a false French passport. He is a married man with five children, the fifth of whom, K, was born in the State in May, 2000 and as a consequence both of K's parents have been afforded permission to reside in the State since December, 2000.

4. The applicant applied for naturalisation as an Irish citizen in 2005 and 2007 and both of these applications were refused. The applicant made a further application in October, 2011 and this application was refused on 18th September, 2015 based upon the Minister's satisfaction that the applicant was not of good character. This is the decision which is the subject matter of the within judicial review proceedings.

5. The applicant's wife also made an application for naturalisation at the same time as the applicant (October, 2011) and she was successful in that the application for naturalisation was granted in October, 2013. In addition all five of the applicant's children are now Irish citizens.

6. In the Minister's communication of 18th September, 2015 to the applicant advising that a decision had been made not to grant a certificate of naturalisation, the Minister included a copy of the submission that was prepared for the Minister and it was also indicated to the applicant that the contents of the confidential report referred to in the submission was not being disclosed as the Minister asserted privilege over that document.

7. In the attached submission prepared in or about February, 2015 by Ms. Michelle Bartlett it was stated that there were national security/international relations considerations in the case and in this regard the attached report was referred to which was received on a strictly confidential basis. Thereafter it was indicated that the Minister had an obligation to ensure, as far as possible, that the rights, entitlements and safety of all Irish citizens and residents of the State are protected and that the Minister should have confidence in the declaration of fidelity to the Irish nation made by new Irish citizens. The author of the report goes on to opine that the Minister could not have such confidence in the applicant nor be satisfied that the applicant meets the conditions of good character specified in s. 15(i)(b) of the Irish Nationality and Citizenship Act 1956, as amended. Therefore, the author of the report recommended that the Minister, in her absolute discretion, would effectively refuse naturalisation based upon good character consideration. The submission noted that the applicant was entitled to know the reasons for the decision, or, where the reason is not given, entitled to be provided with justification for not providing such reasons. It is stated that the basis for the decision is based on confidential information in relation to national security matters and has possible implications for the State's international relations and that the relevant division had been informed that any disclosure of the confidential information would jeopardise its continued provision into the future and continued provision of such information is essential to the integrity of the naturalisation process.

8. It is common case that the decision took almost four years to issue following the application of the applicant for naturalisation in October, 2011 and in the intervening period correspondence between the parties was entered into and clarification sought which in due course was afforded by the applicant.

**Applicant's Submissions**

9. The applicant relies upon the Supreme Court decision of *Ambiorix Limited v. Minister for the Environment* [1992] 1 I.R. 277 where it was held that the law relating to the claims of executive privilege on the grounds of public interest were correctly stated in *Murphy v. Corporation of Dublin* [1972] I.R. 215, and that the 1937 Constitution committed to the courts the administration of justice so that any conflict between public interests in the production of the evidence on the one hand, and the confidentiality of documents on the other, fell to be decided by the courts. The Supreme Court was also satisfied that the Executive could not prevent the courts from examining documents relative to any issue in a civil trial for the purposes of deciding if they should be produced in evidence.

10. In the *Murphy* case the principals, in addition to the foregoing, also included that the duty of the judicial power to make the decision does not mean that there is any priority or preference for the production of evidence over other public interests, such as the

security of the State, and it is for the judicial power to choose the evidence upon which it might act in any individual case in order to reach that decision.

11. The applicant also relies on the case of *Skeffington v. Rooney & Ors.* (Supreme Court) [1997] 1 I.R. 22 where it was held that the fact that documents were furnished in confidence to the party against whom discovery was sought did not of itself make them privileged.

12. In the case of *Independent Newspapers (Ireland) Limited v. Murphy* [2006] 3 I.R. 566 Clarke J. in the High Court stated that the Court should apply a test of proportionality in ordering discovery of confidential documents and interfere with a right of confidentiality to the minimum extent necessary to ensure a fair hearing.

13. In addition to the foregoing cases the applicant relies on a number of asylum cases in support of production of the document to enable the applicant to consider his position in addition to the application to quash the decision of the Minister based upon a lack of reasoning, namely:-

a. The case of *Meadows v. Minister for Justice* [2010] 2 I.R. 701, and in particular the judgment of the Chief Justice where it was held that the Minister's decision should "*at least disclose the essential rationale on foot of which the decision was taken.*"

b. The Supreme Court judgment in the case of *Hussain v. Minister for Justice* [2011] 3 I.R. 257 which effectively followed the Supreme Court decision in *the State (Lynch) v. Cooney* [1982] I.R. 337 to the effect that the Minister's conclusion must be one "*which is bona fide held and factually sustainable and not unreasonable.*"

c. The Supreme Court decision in *Mallak v. Minister for Justice* [2012] 3 I.R. 297. In that case the applicant had applied for a certificate of naturalisation and was refused *simpliciter* by the Minister — without any reasons for the decision, maintaining that he was not obliged to provide reasons. Mr. Mallak had been granted refugee status and the Supreme Court noted during the course of its judgment that the Minister had power under s. 17 of the Refugee Act 1996 to restrict the rights otherwise enjoyed by the applicant if in the interests of national security or public policy it was necessary to do so. However the Minister had not exercised his powers in that regard and therefore the Court concluded that none of the grounds mentioned in the provisions of s. 17(2) existed in the applicant's case. The Court held that at the very least the decision maker must be able to justify the refusal, although Fennelly J. during the course of his judgment indicated that it would be wrong to speculate about cases in which the courts might be persuaded to accept a justification for refusal. It was noted that no reasons relating to public interest had been disclosed, even in the most general terms, and that the Minister had not sought to rely on non-compliance with the good character condition. The Court held that the Minister was under a duty to provide the applicant with the reasons for his decision to refuse and Fennelly J. went on to hold that "*any question of the adequacy of reasons he may actually decide to provide or any justification provided for declining to disclose them can be considered only when they have been given.*"

d. The judgment of McDermott J. in the High Court in the case of *A.P. v. Minister for Justice* [2014] IEHC 17.

This case also related to a refusal of a certificate of naturalisation on the basis of three documents over which privilege was claimed. In that matter the Court considered whether to grant an order for inspection and it appears that all parties were in agreement that the principles applicable to the determination of whether public interest privilege was properly asserted were identified in the aforesaid decision of *Ambiorex*. The three documents were provided to the Court and of the three documents one was discovered in full to the applicant, one was withheld in full from the applicant and the third was partially redacted and the balance furnished to the applicant. During the course of his judgment, McDermott J. stated:-

*"The respondent is clearly concerned that the maintenance of confidentiality is in furtherance of a purpose which is in the public interest, namely the state's interest in ensuring that it continues to receive information related to issues of national importance, including national security, relating to individual applicants for certificates of naturalisation as part of the rigorous examination of each case... The exchange of information and the reliance on external agencies is an essential feature of this process which ultimately enables the state to protect the process from abuse. The information obtained may be from confidential sources the exposure of which may compromise their safety and/or the effective operation of the agencies from which the information is obtained...*

*The use of confidential information or intelligence reports obtained from informants or otherwise, has been an accepted tool in the administration of justice in this jurisdiction for many years."*

#### **The Respondent's Submissions**

14. The respondent also relies on the foregoing case law and suggests that:-

a. The case of *Meadows* is authority for the fact that in cases affecting fundamental rights, the courts are entitled to consider the proportionality of a decision and the Court is also entitled to have regard to the degree of discretion afforded to a decision maker in the particular circumstances of any case. Accordingly it is suggested that *Meadows* confirms that the degree to which a decision must be supported by reasons will vary with the nature of the decision itself.

b. The respondent argues that the within matter is distinguished from the Supreme Court judgment in *Mallak* insofar as reasons have been afforded in the document attached to the Minister's decision. In addition the instant applicant was not a refugee and therefore the provisions of s. 17(2) of the Refugee Act were not engaged.

c. In the *A.P.* judgment of McDermott J. aforesaid, the Court recognised that information from confidential sources may be obtained and the exposure of such a source may compromise their safety and/or the effective operation of the agencies from which the information is obtained.

d. The respondent argues that the instant application involves a privilege and not a right and in all of the circumstances fair procedures were applied. Insofar as possible correspondence was entertained between the parties on issues upon which the Minister was in a position to engage. However, the private and confidential document in the instant circumstances could not be furnished to the applicant even on a redacted basis without prejudicing or jeopardising the privilege or confidentiality claimed.

15. In the circumstances the respondent argues that the overarching interest of the State takes precedence in the instant circumstances.

16. The applicant has countered that it would be open to the Court to decide that the decision on the lack of good character of the applicant was unreasonable without revealing anything whatsoever contained in the confidential document and also argues that some detail could be given without giving the report itself.

### **Decision**

17. I have read the confidential document.

18. Section 15 of the Irish Nationality and Citizenship Act 1956, as amended, provides that upon receipt of an application for a certificate of naturalisation the Minister may, in his absolute discretion, grant the application if satisfied as to four separate conditions identified, including that the applicant "is of good character".

19. The applicant is understandably frustrated with the fact that he has been denied a certificate of naturalisation based upon his inability to demonstrate good character yet he has not been afforded the details of why he has not reached that threshold. Such frustration has been compounded by the fact that, although he requested the Court to review the confidential document with a view to:-

1. ascertaining whether or not privilege was properly claimed and/or
2. whether or not a portion of the document might be redacted so that he could be advised of the unredacted portion and/or
3. that he could be afforded some summary of the facts or events which have led to his failure to achieve the good character standard;

nevertheless I have taken the view, having regard to the foregoing jurisprudence, that in fact the relevant confidential note is confidential and I am satisfied that it is in the public interest that it and its contents remain confidential.

20. In reaching my conclusion above, I have had regard to:

- a. The clear right of the applicant to be afforded reasons for the decision taken by the Minister
- b. The fact that the failure to provide the certificate of naturalisation will not have an immediate impact on the applicant's continued residence within the State, he having been resident here on successive permissions since December 2000.
- c. The fact that the applicant's application is to secure a privilege as opposed to vindicating a right.
- d. The competing interest of the State in the protection of confidential information or the source itself.
- e. The extent of the discretion afforded to the Minister under the provisions of the legislation.
- f. The content of the recommendation itself, a copy of which was afforded to the applicant when the Minister issued her decision to the applicant and the acknowledgment therein that an applicant be provided reasons for a refusal of a certificate or be provided with a justification for not being provided with reasons and the fact that it appears that insofar as the author of the recommendation possibly could, the context and basis for the recommendation have been outlined.
- g. The need to effect a proportional balance as between the competing interests of the within parties bearing in mind that there is no presumption of priority as between the conflicting interests raised in this matter (*Keating v. RTE* [2013] IESC 22).
- h. The Supreme Court in *Mallak* made reference to the Freedom of Information Act 1997. Section 24 thereof sets out various circumstances in which a request might be refused. The applicant in this case made a request of the respondent under the Freedom of Information legislation for access to the respondent department's records of all the naturalisation applications of the applicant and of his wife and he received a response under cover letter of 8th December, 2015 which did not include the confidential note.
- i. The within case differs from the *Mallak* case and the case of *A.P.* aforesaid in that the Minister has in fact, insofar as the Minister could without compromising the document, given reasons for the refusal.

21. I am likewise of the view that even if the document was substantially redacted, nevertheless the public interest would potentially be compromised so that it is not possible to safely redact the document.

22. I am satisfied that the document is in fact confidential and it is in the public interest that it and its contents remain confidential.

23. I am satisfied that in accordance with the Supreme Court judgment in *Mallak*, that the refusal of the Minister to disclose the confidential report or its contents was justified in the public interest and the Minister's decision, including the prior submission, has afforded the applicant, in general terms, the reasons based on public interest for non-disclosure. The essential rationale on foot of which the decision was taken was disclosed to the applicant.

### **Conclusion**

24. The application for production and for inspection of the confidential note is therefore refused as is the application to quash the decision of the Minister of 18th September, 2015.