Neutral Citation Number: [2011] IEHC 481

THE HIGH COURT

JUDICIAL REVIEW

2011 425 JR

BETWEEN

DANA SALMAN

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Kearns P. delivered the 16th day of December, 2011.

This matter comes before the court by way of application for judicial review. The applicant sought *inter alia* an order of *mandamus* compelling the respondent to issue a decision on the applicant's application for naturalisation and a declaration that the applicant is entitled to a decision on the application within a reasonable period of time following receipt of all relevant information in respect thereof.

BACKGROUND FACTS

The applicant is an Iranian national and is a recognised refugee in the State. On the 2nd of February, 2008, the applicant applied for a certificate of naturalisation. The application was made pursuant to the provisions of the Irish Nationality and Citizenship Act, 1956 (hereafter referred to as 'the 1956 Act') and was in the prescribed form. The application was still pending a decision until the eve of this hearing, despite repeated demands. The applicant had awaited a decision on the application for 3 years and 9 months.

There is evidence before the Court of correspondence between the parties. On the 25th February, 2009, the respondent informed the applicant that the average processing time was 23 months but that some applications may take a shorter or considerably longer period. On the 10th May, 2010, the applicant's solicitor wrote to the respondent complaining that 26 months had elapsed from the date of application. The respondent responded with an undated letter stating that applications are dealt with in chronological order and that the average processing time was 26 months. The letter confirmed that the processing of the applicant's case was ongoing and that the file would be submitted to the Minister for decision in due course. This letter further stated that the length of time taken to process applications should not be classified as delay as such period is a result of the time taken to carry out necessary checks. The letter states that applications must be processed in "*such a way which preserves the necessary checks and balances*".

On the 14th June, 2010, the applicant's solicitor wrote a letter to the respondent requesting the expedition of the application. On the 22nd September, 2010, the applicant's solicitor wrote a further letter threatening to institute proceedings. On the 23rd September, 2010, the respondent replied reiterating that the processing of the applicant's case was ongoing and that the file would be submitted to the Minister for decision in due course. The letter stated that the applications were dealt with chronologically and that the average processing time was 26 months. The respondent again referred to the need to process the applications in such a manner as to allow for the necessary "*checks and balances*". On the 5th October, 2010, the applicant sent a further letter of demand, and the respondent acknowledged receipt of same on the 7th October, 2010. On the 16th February, 2011, the applicant sent a further letter of demand. On the 17th February, 2011, the respondent acknowledged receipt of same. On the 10th March, 2011, the applicant's solicitor wrote a letter enquiring why the matter was taking longer than usual. On the 11th April, 2011, the applicant's solicitor sent a further letter of demand which was acknowledged by the respondent on the 26th April, 2011.

The applicant states that he was greatly inconvenienced by the delay in deciding his application. He states that he had been frequently detained for extended periods at immigration control when he attempted to travel out of the State, and that for this reason he had ceased travelling out of the State.

On the eve of this hearing, the respondent issued a decision granting the applicant a certificate of naturalisation. This decision, in effect, rendered the within proceedings moot. The sole matter that remained to be determined between the parties was that of the costs of the proceedings.

APPLICANT'S SUBMISSIONS

The applicant submits that the respondent, in considering the application for a certificate of naturalisation, is exercising a statutory function under the Irish Nationality and Citizenship Act, 1956, the Irish Nationality and Citizenship Act, 1986, the Irish Nationality and Citizenship Act, 1994, the Irish Nationality and Citizenship Act, 2001, and the Irish Nationality and Citizenship Act 2004 (hereafter together referred to as 'the Citizenship Acts'). In carrying out a statutory function, the respondent has a duty to comply with the law.

The applicant claims that the granting of citizenship is determined in accordance with law and in particular in accordance with the Citizenship Acts. It is submitted that the Oireachtas has legislated for the grant of citizenship and, once the Oireachtas has intervened in this manner, the regulation of citizenship is in accordance with the legislation and is no longer a matter of pure executive power.

It is accepted by the applicant that s. 15 of the 1956 Act grants the respondent a discretion. However, the applicant submits that the instant case does not constitute a situation where the respondent has "*absolute discretion*" once the statutory conditions set out in s. 15 have been complied with. The applicant argues that the respondent does not enjoy an absolute discretion to say that he does not need to consider an application submitted by an individual applicant, and that the respondent's statutory duty to consider the application should not be confused with his discretion as to the outcome of the application.

The applicant further submits that the respondent must adhere to the rule of law in the exercise of his statutory discretion and that he cannot claim that his decisions are unreviewable or claim that he is not subject to the public remedy of *mandamus* and/or declaratory relief.

The applicant accepts that the respondent cannot be compelled to decide the application for naturalisation in any particular way. It is submitted, however, that although the respondent has a wide discretion in relation to the outcome of the application does not mean that the respondent is absolved from the obligation to consider an application and to issue a decision within a reasonable time.

The applicant states that Article 34 of the U.N. Convention on the Status of Refugees and Stateless Persons, 1951 is predicated on a recognition that a refugee is required to remain outside his or her home country should at some point benefit from a "*series of privileges, including political rights*". The applicant accepts that Article 34 neither requires countries to grant citizenship to refugees, nor that refugees accept any offer of citizenship, but submits that an obligation to expedite the process is clearly mandated by Article 34 and the said requirement has been ignored in the instant case.

The applicant submits that there is a duty on a decision-maker in the exercise of a statutory function to make a decision in a reasonable time. The applicant further claims that, even where the respondent has the power to make a decision but no time is fixed by law for the decision to be made, there is nevertheless a duty to make the decision within a reasonable time. It is submitted that the delay in the case at hand of 3 years and 9 months is unreasonable in all of the circumstances.

The applicant states that the respondent filed a Statement of Opposition containing general denials that the applicant was entitled to the reliefs sought, and which further contended that the respondent operates a reasonable system for dealing with certificates of naturalisation, under which applications are dealt with in chronological order. The applicant claims that these assertions of fact are not supported by any affidavit filed by or on behalf of the respondent and, accordingly, pursuant to the Rules of the Superior Courts, this Court is precluded from permitting the respondent to rely on such facts as are unsupported by affidavit evidence.

The applicant claims that letters written by and on behalf of the respondent cannot constitute evidence. Notwithstanding this, the applicant claims that a consideration of the letters exhibited in the applicant's grounding affidavit clearly identifies an unreliable and arbitrary approach on the part of the respondent.

The applicant claims that the respondent has been in possession of all the required documentation in relation to the application since June 2008 and that there was never any indication of anything left outstanding. The applicant asserts that the delay on the part of the respondent has been egregious and unreasonable in determining the application.

RESPONDENT'S SUBMISSIONS

The respondent submits that *mandamus* is not appropriate in cases such as that at hand, and points in support of this submission to a number of High Court decisions, including *Nawaz v. Minister for Justice* (Unreported, High Court, Clark J., 29th July, 2009).

The respondent submits that there is no basis for the contention that there has been any unreasonable or unlawful delay by the respondent in determining the application made by the applicant. The respondent claims that he has in place a fair and rational system for determining applications for naturalisation, including dealing with them in a chronological order, and that this has been communicated to the applicant in correspondence.

The respondent asserts that the letters received by the applicant from the Department informed the former that the applications were being dealt with in a chronological order. The average time, *i.e*. 26 months, was set out in the correspondence, but it was stated that some applications would take longer than that. The respondent further claims that the applicant never informed him of any reasons why the applicant urgently needed a decision, and that it was not until the within proceedings that the applicant complained that he had on occasion been detained travelling to and from the State and that he now avoids travelling out of the State as a result of this.

LEGAL FRAMEWORK

Article 9.1.2° of the Constitution states as follows:-

> *"The future acquisition and loss of nationality and citizenship shall be determined in accordance with law."*

Section 15 of the Act of 1956 provides as follows:-

> *"Irish citizenship may be conferred on a non national by means of a certificate of naturalisation granted by the Minister."*

Section 15 of the Act of 1956, as inserted by Section 4 of the Irish Nationality and Citizenship Act, 1986 (hereafter referred to as 'the 1986 Act') provides as follows:-

> *"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 complies with the following conditions (in this Act referred to as conditions for naturalisation):*
>
> *(a) he is of full age;*
>
> *(b) he is of good character;*
>
> *(c) he has (in the case of application made after the expiration of one year from the passing of this Act) given notice of his intention to make the application at least one year prior to the date of his application;*
>
> *(d) he has had a period of one year's continuous residence in the State immediately before the date of his application and, during the eight years immediately preceding that period, has had a total residence in the State amounting to four years;*
>
> *(e) he intends in good faith to continue to reside in the State after naturalisation;*
>
> *(f) he 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."*

Ireland is a signatory to the United Nations Convention on the Status of Refugees and Stateless Persons, 1951 and the Protocol of 1967 thereto, which provides at Article 34 as follows:-

> *"The contracting states shall as far as possible facilitate the assimilation and naturalisation of refugees. They shall in particular make every effort to expedite naturalisation proceedings and to reduce as far as possible the charges and costs of such proceedings."*

DECISION

In *Laurentiu v. The Minister for Justice, Equality and Law Reform* [1994] 4 I.R. 26, the Supreme Court held that the Oireachtas was the sole body with the power to legislate and that it was for the Oireachtas to establish the principles and policies of legislation. Accordingly, only administrative, regulatory and technical matters may be delegated. It was further held by the Court that the legislature should not abdicate its position by simply handing over an absolute discretion to the executive. It should set out standards and guidelines to control executive discretion and should leave the executive only a residual discretion to deal with matters which the legislature could not foresee.

In *Berkut v. The Minister for Justice, Equality and Law Reform* (*ex tempore* judgment of Ryan J., delivered 12th October, 2011), Ryan J. held that the review of the exercise of the statutory powers of the Minister under s. 15 of the 1956 Act, as amended, is justiciable by the courts. Ryan J. referred to *Hussain v. The Minister for Justice, Equality and Law Reform* [2011] I.E.H.C. 171, where Hogan J. held as follows at para. 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."*

It follows, therefore, that the manner in which the respondent exercises his discretion, as here where there was substantial delay, does not constitute an executive decision which is not amenable to judicial review.

The Court will now consider whether the ministerial discretion in the instant case is subject to the rule of law. In *Hussain*, Hogan J. stated as follows at para. 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."*

In *O'Neill & Quinn v. Governor of Castlerea Prison & Ors*., [2004] 1 I.R. 298, Keane C.J. stated at p. 314 as follows:-

> *"However, the description given by the High Court Judge to the discretion as 'absolute' is not altogether satisfactory, insofar as it might suggest that the courts could never enjoy any function in respect of the exercise of the discretion. Like every other power conferred on any of the arms of Government, it can only be exercised in conformity with the Constitution and its correction in cases where it is not so exercised is exclusively a matter for the judicial arm. As was held by this court in* The State (Lynch) v. Cooney *[1982] I.R. 337, any such power must be exercised in good faith and in a manner which cannot be characterised as arbitrary, capricious or irrational."*

In *East Donegal Co-Operative v. Attorney General* [1970] I.R. 317, Walsh J. stated as follows:-

> *"All the powers granted to the Minister by s. 3 which are prefaced or followed by the words 'at his discretion' or 'as he shall think proper' or 'if he so thinks fit' are powers which may be exercised only within the boundaries of the stated objects of the Act; they are powers which cast upon the Minister the duty of acting fairly and judicially in accordance with the principles of constitutional justice, and they do not give him an absolute or an unqualified or an arbitrary power to grant or refuse at his will. Therefore, he is required to consider every case upon its own merits, to hear what the applicant or the licensee (as the case may be) has to say, and to give the latter an opportunity to deal with whatever case may be thought to exist against the granting of a licence or for the refusal of a licence or for the attaching of conditions, or for the amendment or revocation of conditions which have already attached, as the case may be."*

In *R. v. Tower Hamlets London Borough Council Ex Parte Chetnik Developments Limited* [1988] A.C. 858, Lord Bridge approved the following passage, at p. 872, from *Wade on Administrative Law* (5th Ed.), at pp. 335-356:-

> *"Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely - that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended. Although the Crown's lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that, in a system based on the rule of law, unfettered governmental discretion is a contradiction in terms. The real question is whether the discretion is wide or narrow, and where the legal line is to be drawn. For this purpose everything depends upon the true intent and meaning of the empowering Act."*

It is clear that public powers granted by statute are conferred on the basis that the exercise of those powers will be in a manner consistent with the public purpose for which the powers were conferred. Statutorily-endowed ministerial discretion is subject to the rule of law and so such discretion is fettered to the extent that the courts must ensure that the exercise thereof is consistent with the Constitution and the rule of law. The respondent in the instant case was not granted an unfettered discretion to issue a decision on the applicant's application at his leisure, or not to issue a decision at all. He was under a duty to exercise his statutory powers in a fair and reasonable manner.

In *K.M. and D.G. v. The Minister for Justice, Equality and Law Reform* [2007] I.E.H.C. 234, Edwards J. held as follows:-

> *"I am satisfied that the entitlement to a prompt decision is an aspect of constitutional justice. Moreover, quite aside from constitutional justice it is clear from the authorities that the idea of substantive fairness includes a duty not to*

delay in the making of a decision to the prejudice of fundamental rights."

In *Nawaz v. Minister for Justice* (Unreported, High Court, 29th July, 2009), Clark J. dealt with an application for costs in respect of an application to the High Court to grant an order of *mandamus* requiring the Minister to make a determination with respect to the applicant's application for a certificate of naturalisation. In similar circumstances to the case at hand, leave had been granted on an *ex parte* basis and the Minister subsequently granted the applicant a certificate of naturalisation. Clark J. refused the application and stated as follows:-

> *"The applicant applied to be considered under the Act but was not prepared to wait in the queue while each application was dealt with in chronological order, as was outlined in correspondence with the Minister's office explaining that because of the huge increase in the number of applications for naturalisation, it was likely that his application would not be dealt with for a period of between 29 and 30 months."*

The learned Judge referred to the decision of Edwards J. in *K.M.* and *D.G.* and stated as follows:-

> *"The questions posed by Edwards J. in [*K.M. *and* D.G.*] after he had reviewed the previous decisions on administrative delay were first, if there had been a delay and secondly, whether the delay was so unreasonable or unconscionable as to constitute a breach of the applicants' fundamental rights to constitutional justice, his right not to be subjected to degrading treatment under Article 3 of the European Convention on Human Rights and Fundamental Freedoms, and the rights under Article 41 of the Constitution and Article 8 of the aforementioned Convention…*

He considered that the following were relevant considerations:

> *1. The period in question;*
>
> *2. The complexity of the issues to be considered;*
>
> *3. The amount of information to be gathered and the extent of enquiries to be made;*
>
> *4. The reasons advanced for the time taken; and*
>
> *5. The likely prejudice to the applicant on account of delay."*

In the circumstances Clark J. was not satisfied that there was any evidence of unreasonable and unconscionable delay nor had the applicant established any prejudice. Accordingly, the Court held that it was not reasonable that the applicant had instituted proceedings and so the applicant failed in his application for costs.

In *Nearing v. The Minister for Justice, Equality and Law Reform* [2010] 4 I.R. 211, the applicant had sought a certificate of naturalisation but by the time the case had come on, the applicant had been granted residency and accordingly the case was moot save in relation to costs. Cooke J. referred specifically to the fact that what he was dealing with was not the exercise of a statutory power but a non-statutory administrative scheme and the Minister was under a duty to be bound by its self-imposed terms. Cooke J. stated as follows at para. 21:-

> *"In the present case, as outlined in the summary of the correspondence above, there was, on the one hand, no element of urgency in the applicant's personal situation which would have required the Minister to depart from the normal administrative order for dealing with applications for long term residency so as to accord this application some priority. Even his 'long-term relationship' and expectant fatherhood could not be said to constitute such a factor. Moreover, nothing in the department's response to the application and subsequent inquiries could be said to have provoked any suspicion that the application was being put on the long finger or that the division operated some arbitrary and unreliable system for processing long term residency applications. On the contrary, the replies from the division gave a coherent and transparent account of the way in which it operated and the progress that was made. Applications were processed on a strict and, therefore fair, order of receipt and the applicant was kept informed from time to time as to how close the applications of August 2007 were to being processed."*

Cooke J. went on to hold at para. 25:-

> *"Once it is clear that the Department has in place a particular system for the administration of such a scheme, it is not the role of the court in exercise of its judicial function to dictate how a scheme should be managed or to prescribe staffing levels or rates of productivity in the relevant section of the department. Once it is clear from the evidence that there is in place an orderly, rational and fair system for dealing with applications, the Court has no reason to infer any illegality in the conduct of the Minister unless some specific wrong doing or default is demonstrated in a given case."*

In *Matta v. The Minister for Justice and Law Reform* (Unreported, High Court, 21st July, 2010), Clark J. considered an allegation that the Minister had failed to make a decision within a reasonable time in relation to an application for long-term residence. There was evidence before the Court that the application was determined in chronological order. Clark J. held that the proceedings were instituted on an unfounded basis. Referring with approval to the decisions of *Nawaz* and *Nearing*, Clark J. stated at para. 23:-

> *"The applicant was not in a position to identify any evidence of arbitrary or capricious behaviour in the Minister's consideration of his long-term residency and naturalisation applications when he issued mandamus proceedings. He had been made aware by both the long-term residency and naturalisation sections that the system was that applications are placed in a queue and dealt with in strict chronological order. There is no evidence that any other application was arbitrarily prioritised over Mr. Matta's or that his application was dealt with in any distinguishing way to that of other applicants."*

Clark J. went on to state at para. 31 as follows:-

> *"The respondent sought the costs incurred in refuting this claim and relied on Nawaz and Nearing. The decision in Nearing is in the Court's view particularly apt seeing that it involved an identical attempt to seek an order of mandamus to direct the Minister to process an application for an immigration status the grant of which lies firmly within his discretion. The Court totally endorses the reasoning in the Nearing decision. Mandamus was not appropriate there or in this case. The Minister had explained that there would be delay in dealing fairly with the application. If the Minister were*

> *to give priority to applicants who can afford to engage a solicitor to process their claims ahead of those who do not then the whole edifice of a fair, first come, first served edifice would crumble and all applicants would have cause to complain." (Emphasis in original.)*

In *Saleem v. The Minister for Justice, Equality and Law Reform* (Unreported, High Court, Cooke J., 2nd June, 2011), Cooke J. stated as follows at para. 41:-

> *"Having regard to the evidence as to the volume of such applications received and processed by the Department and to the absence of any basis for concluding that the resources applied for that purpose were so manifestly inadequate as to amount to a breach of duty on the part of the respondent, it would, in the judgment of the Court, be impossible to make such a determination [that the time taken to determine the application was unlawful]."*

In the case at hand there is no evidence before the Court of any purported system which is in place for dealing with applications for certificates of naturalisation. The letters sent by the respondent in the context of the application for the certificate cannot constitute evidence as to the truth of the matters alleged therein, i.e. that the respondent had a fair system in place whereby applications were dealt with in chronological order.

The respondent was in possession of all documentation necessary to make a decision since June 2008, and never indicated to the applicant that there was anything outstanding. The respondent did not at any time indicate what was causing the delay in processing the application and refused to explain why the period of delay extended far past the average time period put forward by the Department. There is no affidavit evidence at the time of bringing this application aside from the respondent's bare assertion, that the respondent had in place a fair and rational system for the processing of applications.

Had the application for judicial review in this particular case proceeded, the applicant would have been entitled to relief on the basis of the respondent's unexplained delay, and it follows that therefore the applicant is therefore entitled to his costs in the matter.