THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 585 JR]

BETWEEN

J.O. (NIGERIA)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

JUDGMENT of Ms. Justice Stewart delivered on 11th day of November, 2016.

1. This is a hearing seeking, *inter alia*, an order of *certiorari* in respect of the decision of the respondent made on 30th June, 2015, to refuse an application for naturalisation as an Irish citizen and to over-ride a contrary intention expressed on 10th July, 2013. This decision was made pursuant to s. 15 of the Irish Nationality and Citizenship Act 1956 (as amended) and these proceedings are brought pursuant to a Notice of Motion dated 11th December, 2015.

Background
2. The applicant is a Nigerian national who arrived in the State on 10th March, 2000, and applied for asylum. He withdrew his application after acquiring a five year right of residence, on foot of his marriage to an EU National, on 18th December, 2001. In 2007, he made his first application for naturalisation, which was refused in 2010. The application that gives rise to these proceedings was made in 2011. In 2013, the applicant was informed that the respondent intended to grant his application. However, this was withdrawn in 2015 and the application was refused on the grounds of his adverse history with the United Kingdom's immigration authorities, his failure to properly disclose said history and the failure to fully resolve persisting discrepancies in regard to his date of birth.

Applicant's Submissions
3. Mr. O'Dwyer, S.C., with Mr. Haynes, B.L. for the applicant, relies on the case of *Mallak v. MJELR* [2012] 3 I.R. 297 in stating that the absolute discretion afforded to the respondent under the 1956 Act is not immune to judicial review and must be exercised within reason.

4. The applicant submits that he satisfied all the conditions for naturalisation, as outlined in s. 15(1) of the 1956 Act, in 2013, with the exception of the Citizenship Ceremony. Invitation to a ceremony was allegedly delayed due to logistical issues on the respondent's part and difficulties on the applicant's part in securing a renewal of his GNIB card. The applicant alleges that, by 9th June, 2014, these issues had been resolved and he was told an invitation to a Ceremony was forthcoming. He submits that notice of further consideration of his application was communicated on 15th July, 2014, and, almost a year later, the impugned decision was arrived at.

5. The applicant submits that the impugned decision is irrational because it is based on reasons that flow from information already within the knowledge of the respondent when the expression of intent was communicated. This allegedly includes knowledge of his criminal convictions and of discrepancies relating to his date of birth.

6. The applicant alleges that the respondent treated his convictions for the non-payment of fines and resultant committal history as serious in nature and/or as determinative of the good character requirement under s. 15 of the 1956 Act. He relies on a number of cases, including *M.A.D. v. MJE* [2015] IEHC 446 and *Okornoe v. MJE* [2016] IEHC 100, to outline the procedure through which criminal convictions should be considered in the context of a naturalisation application. He submits that the offences in question were minor, small in number and therefore should not be viewed as a serious blemish on his good character. The applicant relies on *Hussain v. Minister for Justice* [2011] IEHC 171 in defining "good character".

7. The applicant submits that he wrote to the respondent prior to the 2013 communication and pointed out the mistake in recording his date of birth. He draws the Court's attention to the respondent's delay in requesting an explanation for the discrepancies in his date of birth. Upon a second request, the applicant stated that the initial error (which recorded date of birth as "13/08/75") arose due to a mistake on his part, precipitated by the stress of the asylum process, and that the second error (which recorded date of birth as "03/08/75") stemmed from a fault in the Irish Marriage Registry. He submits that the respondent was furnished with an explanation for the second error from the Superintendent Registrar of the Civil Registration Office, who confirmed it to be a transcription error on their part. He therefore alleges that a material error of fact exists in regard to the references to "various" dates of birth and "[the failure to provide] a satisfactory explanation". The applicant highlights the efforts he has made to regularise his documentation. He takes issue with the respondents' use of this inconsistency to make adverse determinations as to his good character and identity in spite of his attempts to remedy the matter. If this ground is allowed to stand, the applicant is concerned that he will have no viable options available to remedy the situation and address the respondent's concerns.

8. The applicant submits that it is not rational for the Irish National Immigration Service (INIS) to accept his identity for the purposes of his EU Treaty Rights application and then impugn it in a parallel application for naturalisation.

9. The applicant also seeks an extension of time pursuant to O. 84 r. 21(3) of the Rules of the Superior Courts. The applicant submits that the 23-day delay in seeking leave was brought about by delays in the Freedom of Information Unit in disclosing the applicant's immigration file, without which the applicant's solicitor could not proffer sound legal advice.

Respondent's Submissions
10. Mr. Caffrey, B.L., for the respondent, directs the Court's attention to paperwork drawn up for the purposes of his asylum application, which is wholly independent of his marriage certificate, in which his date of birth is erroneously stated to be "03/08/75". Attention is also directed to the fact that both applications for naturalisation, which were made six and ten years respectively after the asylum application was withdrawn, state date of birth to be "13/08/75".

11. The 2013 letter requested that the applicant furnish his GNIB card, which he allegedly did not. The stated reason for this was

that the card was currently in the possession of the authorities reviewing the applicant's EU Treaty Rights application. This application was rejected but a Stamp 4 Residence Permission was later granted on 23rd May, 2014, which remained valid for two years and expired prior to the commencement of this hearing.

12. The respondent highlights that the applicant did indeed disclose the offences committed in his naturalisation application but no evidence was proffered as to the payment of the resultant fines.

13. The respondent submits that, over the final six months of 2014, the respondent requested that the applicant submit several pieces of information, including details of his asylum application, a record of his immigration history with the United Kingdom (which had not been properly disclosed by the applicant before that point) and an explanation from the Nigerian authorities as to why the date of birth on one of his passports (13/08/75) did not match the date of birth on his birth certificate (13/09/75). The respondent alleges that the information requested was not provided to a satisfactory standard. She points out the dates of birth at issue in this case have been used interchangeably over a sixteen year period in a large body of paperwork related to the applicant and not limited to the material put before the Court in this case.

14. The respondent submits that the expression of intent communicated on 10th July, 2013, was not a grant of naturalisation and does not prohibit the respondent from reconsidering the situation or considering new information that comes to light. On that basis, it is submitted that it is irrelevant whether or not the information giving rise to refusal was within the knowledge of the respondent prior to the expression of intent. The respondent further submits that the legal tests outlined in *Meadows v. Minister for Justice* [2010] 2 I.R. 701 have been complied with.

15. The respondent's entitlement to consider background and criminal record has been affirmed in cases of *M.A.D.* and *Tabi v. MJE* [2010] IEHC 109. In the case currently before the Court, the respondent points out that consideration of the applicant's criminal background is filed under the heading of "Additional Information" and is not mentioned at all under the "Recommendation" heading when addressing the applicant's good character. It is therefore submitted that the applicant's allegations on this issue are baseless. The respondent submits that it is contradictory for the applicant to argue that his criminal background was determinative in the impugned decision, given that he is making a similar allegation in regard to the discrepancies over his date of birth.

16. The respondent submits that the Stamp 4 Permission was granted as an exceptional measure in consideration of the applicant's circumstances and does not serve as an acceptance of the applicant's details by the respondent. The respondent also argues that it is misleading to argue that the substance and consequences of naturalisation and EU Treaty Rights are parallel.

17. The respondent submits that the characterisation of a material error of fact based on the use of the word "various" is misguided, given the timeline of events and the failure to provide proper explanation for all the inconsistencies, as outlined above.

18. The respondent submits that there is no sufficient reason to grant an extension of time to cover the extra 23 days that accrued after the three month time limit expired.

Decision

19. With regard to the application for an extension in time, the Court is aware that the proceedings for leave were *ex parte* and the respondent did not have a chance to effectively address this topic until the day of hearing. However, if this were a serious issue of dispute, a ruling should have been sought promptly during the proceedings, so as to avoid wasting money and court time. As it stands, the applicant has provided an explanation for his delay in seeking leave. This went un-contradicted by the respondent and no element of prejudice was set out. This explanation was substantiated by evidence submitted by the applicant. The Court is satisfied that this case comes within the requirements outlined in O. 84 r. 21(3) of the Rules of the Superior Courts, 2011 and therefore grants the extension in time.

20. The applicant has argued that the respondent made a material error of fact in finding that the mistaken recording of date of birth as 03/08/75 was not sufficiently explained. The applicant alleges that this finding is incorrect because the discrepancy was explained by the Superintendent Registrar of the Civil Registration Service as a transcription error. This date of birth is referred to in several pieces of paperwork created for the purposes of processing the applicant's asylum application. The applicant has provided no satisfactory explanation as to how this particular mistake came to be proliferated outside his marriage certificate, given that the error allegedly brought about by the stress of the asylum process refers only to a mis-recording of the month of birth and not the day. In *Henry Denny & Sons (Ireland) Limited v. Minister for Social Welfare* [1998] 1 IR 34, Hamilton C.J. stated at p. 37:

> *"…the courts should be slow to interfere with the decisions of expert administrative tribunals. Where conclusions are based upon an identifiable error of law or an unsustainable finding of fact by a tribunal such conclusions must be corrected. Otherwise it should be recognised that tribunals which have been given statutory tasks to perform and exercise their functions, as is now usually the case, with a high degree of expertise and provide coherent and balanced judgments on the evidence and arguments heard by them it should not be necessary for the courts to review their decisions by way of appeal or judicial review."*

It is clear that the evidence submitted by the applicant on this ground is not sufficient to render the respondent's reference to various dates of birth as an unsustainable finding of fact. Regardless of the materiality of the finding, this ground must be dismissed.

21. The applicant submits that it is irrational for the respondent to accept his identity for the purposes of his EU Treaty Rights application and not for the purposes of a naturalisation application. The respondent replies that the grant of his Treaty Rights application was an "exceptional measure" and did not act as an acceptance of the applicant's identity. The Court notes that no submissions were made to explain what circumstances convinced the respondent to take said exceptional measures. Regardless, the applicant's attempt to place EU Treaty Rights and naturalisation within the same sphere cannot be condoned. The former clearly refers to rights that an applicant can seek to enforce. As outlined in *Mallak*, naturalisation is a privilege and, per the 1956 Act, the respondent enjoys an absolute reasoned discretion in the grant thereof. The decision-making powers afforded to the respondent are different in both cases and so the decision-making process must also operate differently. Given the respondent's expanded discretion and the consequences that flow from the grant of a naturalisation certificate, it is reasonable for the respondent to hold the applicant to a higher standard in demonstrating his identity. As outlined by Cooke J. in *Tabi v. MJELR* at para. 2:

> *"Unless the Minister relies upon some fact which is wrong or has recourse to some criterion or factor which is clearly absurd or manifestly irrelevant to the operation and the legislative objective of the naturalisation provisions of the Act, it is not the function of the High Court to intervene to direct the basis upon which the Minister's appraisal should be made."*

22. With regard to the applicant's criminal background, the Court is not convinced that this was a significant factor in the respondent's decision. The manner in which it was incorporated into the impugned decision clearly indicates that it was a subsidiary concern. Even if it had been determinative, the cases of *Tabi* and *G.K.N. v. MJE* [2014] IEHC 478 clearly establish that it is within the respondent's discretion to take criminal conduct into account, provided that all relevant information is placed before her when she does so. The Court therefore rejects this ground.

23. By the applicant's own admission, there was no point in time at which he met all the criteria outlined in s. 15 of the 1956 Act. Both parties suffered difficulties in facilitating the attendance of a Citizenship Ceremony. Even if there had been no difficulties on the applicant's part, mere logistical issues cannot serve as a basis for overlooking a key legislative criterion. As outlined in s. 16 of the 1956 Act, only the respondent can over-ride the s.15 criteria and no attempt was made to exercise that power in this case. As outlined by Birmingham J. in *Hodzic v. MJELR* [2010] IEHC 549, the respondent cannot exercise his discretion under the 1956 Act and grant a certificate until all of the active s.15 criteria have been met. Thus, the status of the 2013 communication, as an expression of intent or otherwise, is irrelevant. It is merely a preliminary viewpoint, which can be altered following further consideration or the provision of new information.

24. The applicant has submitted that the information upon which the 2015 refusal is based was within the knowledge of the respondent when the 2013 communication occurred. This is patently not the case. An examination of the 2014 paperwork relating to this case reveals that the respondent requested further information from the applicant on several occasions. The applicant's response to these requests was unsatisfactory. The Court is particularly concerned about the applicant's failure to fully disclose his relationship with immigration authorities in the United Kingdom. It is clear that the applicant did not provide all relevant information to the respondent prior to the 2013 communication. Thus, this ground of review is also denied.

25. The applicant is correct in stating that the inconsistencies in regard to his date of birth were a principal motivator in the rejection of his application. It is the Court's view that the respondent's findings in this regard are reasonable and were not arrived at by improper means. The applicant's explanations are wholly unsatisfactory. The date of birth "03/08/75" appears in paperwork that has no connection to his marriage certificate. Both of the applicant's applications for naturalisation employ "13/08/75" as the date of birth. None of the material submitted by the applicant properly explains how this came to be, nor does it fully answer the queries raised by the respondent in 2014.

26. The decision which the applicant seeks to impugn is, in my view, reasoned, rational and proportionate and I therefore refuse the reliefs sought.