Neutral Citation Number: [2011] IEHC 306

THE HIGH COURT

JUDICIAL REVIEW

2009 492 JR

BETWEEN

GHANDI NAWAF MALLAK

APPLICANT

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Cooke delivered the 22nd day of July, 2011

1. The applicant is a national of Syria who was declared to be a refugee in the State on the 22nd November, 2002. On the 9th December, 2005, he applied to the respondent for a certificate of naturalisation with a view to obtaining citizenship under s. 15 of the Irish Nationality and Citizenship Act 1956 (as amended). By letter of the 20th November, 2008, the respondent refused that application. The refusal was expressed in these terms:-

> "The Minister has considered your application under the provisions of the Irish Nationality and Citizenship Act 1956 and 1986, as amended and has decided not to grant a certificate of naturalisation. In reaching this decision, the Minister has exercised his absolute discretion, as provided for by the Irish Nationality and Citizenship Act 1956 and 1986 as amended. There is no appeals process provided under this legislation. However, you should be aware that you may reapply for the grant of a certificate of naturalisation at any time. Having said this, any further application will be considered taking into account all statutory and administrative conditions applicable at the time of the application."

2. Clearly, therefore, the Minister relied upon his absolute discretion in making that refusal and gave no reason for it. Subsequent steps taken on behalf of the applicant including the present proceedings by way of judicial review have been directed at compelling the respondent to give reasons for his refusal and challenging the legality of his decision not to do so. The applicant was particularly aggrieved by the fact that on the 8th October, 2008, his wife was granted a certificate of naturalisation and he could see no reason why he should be differently treated.

3. Shortly after the refusal of the certificate, the applicant's solicitor wrote to the Minister requesting a statement of his reasons for the refusal in accordance with s. 18 of the Freedom of Information Act 1997 (as amended). By letter of the 26th January, 2009, the solicitor was informed that a decision on the case had been made "in accordance with s. 18(2)" of that Act. This amounted to a refusal. That refusal was in turn the subject of a review by a more senior official of the Department who affirmed the original refusal of the request on the 6th March, 2009. The applicant then applied by way of appeal to the Office of the Information Commissioner on the 19th June, 2009. That appeal review confirmed that the original decision had been based on s. 18(2)(b) of the Act of 1997 and the appeal was rejected by a decision of a senior investigator on the 9th February, 2010. The operative part of the decision was expressed in these terms: "Having carried out a review under s. 34(2) of the Freedom of Information Act 1997 (as amended) I hereby affirm the decision of the Department and find that it is not obliged to provide a statement of reasons under s. 18" (of the Act of 1997).

4. On the 27th May, 2010, the applicant's solicitors directed their attention to the provisions of the Data Protection Act 1988 and applied under s. 3 of that Act to the respondent to be informed whether data was kept in respect of the applicant and if so, to obtain a description of that data. A dispute then arose as to the entitlement of the Department to refuse the request in reliance upon a particular provision of the Data Protection Act but ultimately, by letter of the 30th August, 2010, the Department furnished the applicant's solicitor with a schedule of records listing the description of the data which effectively comprised the Department's file on the application for the certificate. In this schedule reference was made in the list to a "Garda Report". The applicant speculates that the reason for the refusal of the certificate is to be found in the contents of that report and the grounds now relied upon are effectively directed at the entitlement of the respondent to refuse the certificate in those circumstances and to refuse to either confirm or deny that the reason for the refusal relates to the content of the Garda Report.

5. By order of the Court of the 11th May, 2009 (Peart J.) the applicant was granted leave to bring the present application for judicial review upon the grounds set out in para. 5 of the statement of grounds dated the 7th May, 2009, and to apply for reliefs by way orders of *certiorari* quashing both the refusal of the certificate on the 20th November, 2008, and the refusal to provide reasons in the decisions of the 26th January, 2009, and the 6th March, 2009.

6. By order of this Court of the 14th March, 2011, the applicant was granted liberty to amend the statement of grounds so as to include relief by way of declarations that the conferring of an absolute discretion upon the respondent in ss. 15, 15A and 16 of the Act of 1956 was invalid as repugnant to Articles 34.3.1 and 40.3 of the Constitution and incompatible with the Charter of Fundamental Rights of the European Union.

7. The order permitting amendments added three new grounds:

> (i) That the impugned provisions of the Act of 1956 were unconstitutional in that they ousted the jurisdiction of the Court to exercise its full original jurisdiction and power to review the legality of the exercise of the administrative or quasi-judicial function conferred on the respondent;
>
> (ii) The said provisions have the effect of depriving the applicant as a third country national of access to European Union citizenship;

(iii) In conferring on the respondent power which has the effect of deciding to deny the applicant access to Union citizenship without any obligation to state reasons therefore, the provisions infringe Article 41(2), paragraph 3, of the Charter of Fundamental Rights.

8. As acknowledged by the parties in written legal submissions to the Court and reaffirmed in oral argument, these grounds give rise in effect to two questions which can be stated broadly as follows:

(a) Can the respondent, notwithstanding the wording of s. 15 of the Act of 1956, be compelled in law to state reasons for a refusal to grant a certificate of naturalisation and, if not, are the provisions in question incompatible with rights of protection exercisable by the applicant under constitutional law?

(b) In refusing a certificate of naturalisation and thus access to Irish citizenship, is the Minister obliged to take into account any provisions or principles of European Union law upon the ground that such a refusal also denies access to European Union citizenship?

9. There is, in the view of the Court, one general observation which must first be made by way of preface to any consideration of these issues. It is an exercise of the State's sovereign authority to decide which persons will be permitted to enter its territory and the terms and conditions upon which they may be granted leave to remain or to reside. On the specific matter of citizenship, it is established and recognised in international law that it is one of the fundamental incidents of the sovereignty of a state that it alone can decide which persons will be its citizens; which persons may be admitted to its citizenship and the terms and criteria which it will apply for that purpose. This principle was recognised by the Permanent Court of International Justice in the *Nationality Decrees in Tunis* and *Morocco* case (P.C.I.J., Series B, No. 4, 1923, p. 24) and by that Court's successor, the International Court of Justice, in the *Nottebohm (Liechtenstein v. Guatemala*) case (I.C.J. Reports, 1955, p. 4). The principle has also been enshrined in a number of international instruments, including the 1930 Hague Convention on the Conflict of Nationality Laws and the 1997 European Convention on Nationality.

10. It is a necessary consequence of this basic principle that no national of a foreign country has a right to insist upon being admitted to citizenship, subject only to such commitments as the State may have entered into by way of international treaty or legislated for in its domestic laws.

11. In this jurisdiction the provisions governing the conferring and loss of Irish citizenship have been provided for by the Oireachtas in the Irish Nationality and Citizenship Acts 1956-2004. In particular, the Oireachtas has delegated the powers governing the acquisition of citizenship by naturalisation to the respondent. Thus, s. 14 of the Act of 1956 provides: "Irish citizenship may be conferred on a non national by means of a certificate of naturalisation granted by the Minister." Sections 15, 15A and 16 provide respectively for the conditions for the issue of a certificate of naturalisation to applicants generally; to the non national spouse of an Irish citizen and, under s. 16, the circumstances in which the Minister will have power to dispense with the conditions for obtaining a certificate of naturalisation applicable under ss. 15 and 15A.

12. In each of those three sections the power is explicitly expressed as being exercised by the Minister "in his absolute discretion". As counsel for the applicant readily conceded, this expression means exactly what it says and has been repeatedly so construed in a number of cases. It means quite literally that the Minister does not need to have or to give any reason for refusing an application for a certificate. If he does have a reason he is not obliged to divulge it to a disappointed applicant. In the judgment of this Court, the proposition is well settled in law and, quite apart from the fact that the cases are binding upon this Court, it would clearly fly in the face of the unambiguous intention of the Oireachtas as thus expressed, for this Court to attempt to hold otherwise.

13. The leading authority on these issues over the last quarter of a century has been and remains the judgment of Costello J. (as he then was) in *Pok Sun Shum v. Ireland* [1986] I.L.R.M. 593. As Costello J. pointed out and the parties in question accepted, although the expression "absolute discretion" is used in s. 15, it does not mean that the power exercisable by the Minister is wholly unfettered or that its exercise is wholly immune from judicial review. It is a discretion that must be exercised by the Minister according to the criteria stated in the provisions and must be exercised fairly and in accordance with the principles natural justice. The Minister cannot, accordingly, grant a certificate of naturalisation to anyone he chooses. Subject only to the power to dispense with some conditions under s. 16, the Minister can only grant a certificate when satisfied that the conditions at subs. (1)(a) – (e) of s. 15 are fulfilled. The significance of the "absolute discretion" conferred upon the Minister is that even where all of those conditions may be fulfilled in a given application, the Minister retains an entitlement to refuse without having to give reasons. Costello J. dealt in the judgment with the arguments that the rules of natural justice had been infringed in that case because the plaintiff had not been given a hearing on the application and had not afterwards been given reasons for the refusal. He said:-

"Now, it is not suggested that there should have been a formal hearing, but it is suggested that he should have been appraised of the information on the file in relation to him and given an opportunity to comment on it. Undoubtedly, there are cases in which a person, whose position is going to be adversely affected, should be given an opportunity to know the consideration that may be used against him, but it is well known that the extent and scope of natural justice depends on the facts of each case. There is no general rule of natural justice that in each case where a decision might be made adverse to an applicant, there must be disclosure. And I think that in this case, because of the nature of the discretion which the Statute gives to the Minister, he is not required to inform an applicant of the reasons which may appear to him adequate. The Minister may be satisfied that all the conditions that are set out in s. 15 are met but nonetheless he may refuse on grounds of public policy, which have nothing to do with the individual applicant and the certificate of naturalisation. Because of the special control of aliens which every State must exercise, because of the very particular nature of the discretion that is given under the 1935 Act to the Minister in relation to aliens, it seems to me that, in considering the 1956 Act and the duties in relation to both certification under the 1956 Act and permission to reside in the State under the 1935 Act, the Minister is not required to inform an applicant of the information on the files and give him an opportunity to comment on them. The comments may be of no particular relevance to what the Minister may be required to do. In my view, there was no breach of natural justice in this regard."

14. Costello J. then considered the question as to the failure to state reasons and said:-

"It is true that no reasons were given to the plaintiff as to why permission to remain in the State was not now being given and as to why the certificate of naturalisation was being refused. There is, again, no particular rule of law in this matter. There is no general rule of natural justice that reasons for the decisions of an administrative authority must be given. Again, the extent and scope of the rule of natural justice must depend upon the particular statutory function which the Minster or the State department is carrying out. I think it is relevant, in this connection, to bear in mind that under the 1956 Act the Minister was conferring a benefit or a privilege on the applicant and that he was not issuing a licence to

which someone having complied with certain conditions, was entitled. This is a case where, even if an applicant complied with certain conditions, the Minster could refuse the certificate."

15. It is to be noted that in those passages Costello J. pointed out that even where an administrative decision has some adverse consequence for its addressee, there may be no rule of law requiring prior disclosure or a statement of reasons. While it might be said that the evolution of the principle of fair procedures and the obligation to state reasons over the last 25 years would have reduced the occasions when neither obligation arose in respect of a decision with adverse consequences, it remains the position in the view of this Court, that the principle of fair procedures and the requirement to state reasons can have no application where an administrative decision is wholly devoid of any detrimental or disadvantageous consequence for its addressee.

16. As Costello J. pointed out in the passage quoted above, the discretion conferred upon the Minister is in respect of a power to confer a privilege to which an applicant has no right in law even where the conditions of s. 15(1) are fulfilled. Thus, the power exercised is not one which involves the grant or refusal of a right, licence or other benefit or the imposition of any liability, obligation or disadvantage.

17. In argument, counsel for the applicant referred to the entitlement to an "effective remedy" under Article 13 of the European Convention on Human Rights and Article 47 of the Charter of Fundamental Rights of the European Union. He described as unfair a procedure in which the Minister has no obligation to divulge information he is considering which may be adverse to an applicant. But the need for an effective remedy only arises where there is some wrong to be made good. That is why it is well settled in the case law of the Convention that Article 13 does not give rise to any stand alone right, but is an entitlement to a remedy in respect of some alleged failure to afford protection provided elsewhere in the Convention (see *Silver v. United Kingdom* (1983) 13 E.H.R.R. 582 at para. 113). Similarly, the requirement of natural justice that a decision be arrived at in a procedure which is fair has application only where the decision will have some adverse consequence for the applicant. Contrary to the suggestion made here, the refusal of the certificate in no way alters the position or status of the applicant. He remains a refugee with an entitlement to continue to reside in the State. No question of his having to return to Syria arises. Indeed, as the refusal decision pointed out, the applicant remains entitled to make a new application for a certificate. Under the Act of 1956, no obligation is imposed on the Minister to give reasons for a refusal decision. Furthermore, as Costello J. also pointed out in the above judgment, as the Act gives no right of appeal against the exercise of the absolute discretion when a refusal decision is made, it is not possible to imply any entitlement to a statement of reasons. He added:-

> "It is, of course true that an application for judicial review to the courts exists, but this right of the courts to review decisions taken by administrative authorities does not of itself, create an obligation in natural justice that reasons must be stated for decisions. I conclude therefore, that there was no breach of natural justice arising from the fact that reasons for the decisions were not given."

18. In support of the argument that all administrative decisions must be susceptible of judicial review and that this would only be possible where the duty to give reasons for the decision has been complied with, counsel for the applicant referred to the French case of *Ministre de l'agriculture v. Dame Lamotte* (Conseil d'Etat, 17th February, 1950). That case is certainly an authority in French administrative law for the proposition that "the *recours pour excès de pouvoir* is available, even without legislative warrant, to challenge every administrative act, and its effect is to guarantee respect for legality in accordance with the general principles of the law". (see Neville Brown and Bell, *French Administrative Law,* 4th Ed., (London, 1993) at p.162).

19. The case arose out of wartime legislation empowering a prefect to requisition unused land and to grant concessions to a new occupant for its cultivation. The legislation provided that such a decision to grant a concession could not be the subject of any judicial or administrative proceeding. The case is thus invoked as an example of the willingness of the administrative tribunals to assert the general principle of the *droit administratif* to the effect that all administrative measures are susceptible of judicial review.

20. It is a mistake however to thereby assume that all decisions or measures which might be considered administrative in character for the purpose of judicial review at common law will be so treated in French administrative law. Judicial review by the French administrative tribunals lies against an "*acte administratif*", but not all acts or measures emanating from an administrative authority fall within their competence to review including for example measures characterised as "*actes du gouvernement"* (see for example CE Ass.plèn. 29 September 1995 Greenpeace,) and "*mesures d'ordre intèrieur administratives*", (see for example, CE 20 Oct 1954 Chapou). Of more general importance is the requirement that the act sought to be challenged is an administrative decision or measure which has binding legal consequences ("*acte faisant grief*"). Thus, for example, an administrative circular of a purely advisory character cannot be challenged because it is devoid of legal consequences.

21. The French administrative law model of course, forms the basis of the judicial review competence of the Court of Justice of the European Union and the existence of this rule or principle is well illustrated by the jurisprudence of the Luxembourg courts in relation to Article 263 TFEU (ex Article 230 TEC). The action for annulment lies only against acts of an institution which are binding in producing legal effects. This means that they must be "capable of affecting the interests of the applicant by bringing about a distinct change in his legal position". (See for example Case 60/81 *IBM v. Commission* [1981] E.C.R. 2639 or Case C-242/00 *Germany v. Commission* [2002] E.C.R. 1-5603, paras. 39/46).

22. As already indicated above, the refusal of the certificate of naturalisation is a refusal to accord a privilege in respect of which there is no right or entitlement to qualify. It has no effect upon the personal status in law or on the legal rights of the disappointed applicant. Thus, neither French nor European law in relation to judicial review of administrative decisions affords any basis for departing from the approach of Costello J. to the entitlement to judicially review a measure devoid of legal effects upon its addressee or to the entitlement to a statement of reasons from the decision-maker for that purpose.

23. The further argument advanced was based upon the concept of European Union citizenship and a reliance on Articles 20-23 TFEU in particular. It was argued that "because the Minister's decision being disputed here, also determines whether Mr. Mallak should acquire EU citizenship, EU law plays a role in shaping that decision, albeit that the full contours of this role remain to be determined as the granting of citizenship is a matter for individual Member States". As the Court understood this argument, it was to the effect that because the acquisition of Irish citizenship automatically leads to the acquisition of EU citizenship, a refusal is simultaneously a refusal of EU citizenship. It was submitted that on that basis the general principles of EU law must be complied with by the Minister when exercising his discretion including, for example, the prohibition of discrimination on grounds of nationality and, especially, the duty to state reasons.

24. In the judgment of the Court, this argument is unfounded. Although the Treaties create the concept and status of citizenship of the Union, that status can only be acquired by means of citizenship in one of the Member States. Neither the Treaties nor any legislative measures of the Union institutions have sought to encroach in any respect upon the sovereign entitlement of the Member

States to determine the basis upon which national citizenship will be accorded, nor even to endeavour to harmonise to any extent the conditions or criteria for the grant of national citizenship.

25. In support of the argument reliance was placed upon the judgment of the Court of Justice in case C-135/08 *Rottmann v. Freistaat Bayern* [2010] E.C.R. I-0000 – a case relating to the corresponding Treaty provisions prior to the coming into force of the Lisbon Treaty. In that case the preliminary ruling of the Court upon the question referred to it by the German Court was in these terms:-

> "It is not contrary to European Union law, in particular to Article 17 EC, for a Member State to withdraw from a citizen of the Union the nationality of that State acquired by naturalisation when that nationality was obtained by deception, on condition that the decision to withdraw observes the principle of proportionality."

26. It is to be noted that the case in question involved not the acquisition of citizenship but a national law which provided for the withdrawal of citizenship in circumstances where it had been acquired by deception.

27. In its judgment the Court drew attention to Declaration No. 2 on nationality of a Member State annexed to the Final Act of the Treaty on European Union:

> "The conference declares that, wherever in this Treaty establishing the European Community reference is made to nationals of the Member States, the question whether an individual possesses the nationality of a Member State should be settled solely by reference to the national law of the Member State concerned."

28. It also drew attention to the "Edinburgh decision" of the European Council on the 11th and 12th December, 1992:

> "The provisions of Part 2 of the Treaty establishing the European Community relating to citizenship of the Union give nationals of the Member States additional rights and protection as specified in that Part. They do not in any way take the place of national citizenship. The question whether an individual possesses the nationality of a Member State will be settled solely by reference to the national law of the Member State concerned."

29. At para. 45 of its judgment the Court referred to earlier case law in which it had articulated the principle now invoked in support of the applicant's argument namely, that "the Member States must, when exercising their powers in the sphere of nationality, have due regard to the European Union law". In para. 48 this proviso that due regard must be had to European Union law is explained as not compromising "the principle of international law previously recognised by the Court and mentioned in para. 39 above, that the Member States have the power to lay down the conditions for the acquisition and loss of nationality, but rather enshrines the principle that, *in respect of citizens of the Union,* the exercise of that power, insofar as it affects the rights conferred and protected by the legal order of the Union, as is in particular the case of a decision withdrawing naturalisation such as that at issue in the main proceedings, is amenable to judicial review carried out in the light of European Union law". (*Emphasis added by this court.)*

30. It is clear, accordingly, that the principle that regard must be had to European Union law in this context concerns any decision at national level which encroaches upon the rights and protection afforded to an individual *as a citizen of the Union*. It cannot therefore have any application to an individual who is not a Union citizen. It is because the withdrawal of national citizenship automatically removes Union citizenship that the criterion of proportionality comes into operation. The judgment in question does not constitute authority for the proposition contended for in the present case namely, that the fact that acquisition of Union citizenship is dependent upon acquisition of citizenship of a Member State has the consequence that Union law has in some way intervened to curtail or circumscribe the sovereign authority of each Member State in determining the criteria and procedures for admission to citizenship.

31. It follows in the judgment of the Court that there cannot be said to have been any failure on the part of the respondent to comply with the requirement of Article 41(2), paragraph 3 of the Charter of Fundamental Rights of the European Union namely, the right to good administration including the obligation of the administration to give reasons for its decision. In accordance with Article 51 of the Charter, that provision is addressed to the administrative functions of the European institutions, bodies, offices and agencies and can apply to the Member States "only when they are implementing Union law". As the judgment in *Rottmann* makes clear, the laws governing the acquisition of Union citizenship are, in effect, exclusively the national laws on citizenship in the Member States. When considering an application for a certificate of naturalisation under s. 15 of the Act of 1956, therefore, the Minister is not "implementing Union law". He is exclusively engaged in the application of Irish law. This is so notwithstanding the fact that the grant of a certificate of naturalisation will have the consequence that Union citizenship will also be acquired as the automatic result of Article 20.1 TFEU.

32. For all of these reasons the Court is satisfied that the grounds for which leave was granted have not been made out and the application for judicial review will therefore be refused.