

THE HIGH COURT
JUDICIAL REVIEW

2008 1080 JR

BETWEEN/

A. B.

APPLICANT

AND

**MINISTER FOR JUSTICE,
EQUALITY AND LAW REFORM**

RESPONDENT

JUDGMENT of Mr. Justice Cooke delivered on the 18th day of June, 2009.

1. By order of Finlay Geoghegan J. of 6th October, 2008, the applicant was granted leave to apply to the court for an order of *certiorari* to quash a decision ("the Contested Decision") dated 21st July, 2008, in which the respondent ("the Minister") refused to reconsider an earlier decision of 13th March, 2008, which had rejected an application by the applicant for a certificate of naturalisation under s. 14 of the Irish Nationality and Citizenship Act 1956 (as amended). The order also granted leave to seek additional reliefs including a declaration that the contested decision had been made in breach of the applicant's rights to constitutional and natural justice and an order of *mandamus* requiring the Minister to reconsider the original application.

2. The provisions of the 1956 Act which are relevant to the issues raised in this application are contained in ss. 14, 15 and 16, as follows:-

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

15(1) 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 –

(a)(i) is of full age or

(ii) is a minor born in the State;

(b) is of good character

(c) has had a period of one year's continuous residence in the State immediately before the date of the application and, during the eight years immediately preceding that period has had a total residence in the State amounting to four years;

(d) intends in good faith to continue to reside in the State after naturalisation; and

(e) 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.

(2) The conditions specified in paragraphs (a) to (e) of subsection (1) are referred to in this Act as conditions for naturalisation.

16. The Minister may in his absolute discretion grant an application for a certificate of naturalisation in the following cases, although the conditions for naturalisation (or any of them) are not complied with:

(g) where the applicant is a person who is a refugee within the meaning of the United Nations Convention relating to the status of refugees of 28th July, 1951, and the protocol relating to the status of refugees of 31st January, 1967, or is a stateless person within the meaning of the United Nations Convention relating to the status of stateless persons of 28th of September, 1954."

3. Leave was granted to seek those reliefs on the basis of the grounds set out in s. 5 of the proposed statement of grounds for judicial review. The four grounds in question are set out in largely narrative form in subparas. (a) – (d) of s. 5 so as to incorporate both matters of fact and argument rather than as precise definitions of specific illegalities; but the challenge to the Contested Decision can be described as effectively directed and the validity of the reason stated by the Minister for the original refusal of the certificate as contained in his letter of 13th March, 2008, namely, that the Minister did not consider that the applicant fulfilled the naturalisation condition of being of "good character" as required by subpara. (b) of s. 15(1).

4. The factual background which gives rise to this claim can be briefly summarised as follows:-

"(a) The applicant was born in Nigeria in 1973 but fled to this country in 2002 and successfully applied for refugee status which was granted on 15th May, 2003;

(b) On 7th July, 2005, he applied to the Minister for a certificate of naturalisation as an Irish citizen in accordance with s. 14 of the Act.

(c) By letter of 13th March, 2008, the Minister refused that application. The letter stated:

'The Minister has considered your application under the provisions of the Irish Nationality and Citizenship Acts 1956-1986 and has decided not to grant a certificate of naturalisation. A copy of the submission that was prepared for the Minister with his decision annotated thereon is enclosed for your information. In reaching this decision the Minister has exercised his absolute discretion, as provided for by the Irish Nationality and Citizenship Acts 1956 and 1986. 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. When considering making such a reapplication you should give due regard to the reasons for refusal given in the attached submission. Having said this, any further application will be considered taking into account all statutory and administrative conditions applicable at the time of application.'

(d) Attached to that letter of refusal was a file note in which the Citizenship Section of the department recommended to the Minister that the certificate be refused and the reason for the recommendation was given under the heading 'other relevant information' as follows:

'Mr. B. has come to the adverse attention of An Garda Síochána. On 15/02/2006 at District Court 51, Mr. B. was charged with no driving licence and failed to produce a driving licence – outcome – non-conviction, case not called in court.'

(e) This stated reason for the refusal came as a surprise to the applicant who was not aware of having come to such "adverse attention" and upon making further enquiry he learned that it arose from an occasion when he had been stopped at a checkpoint by Garda Emer O'Doherty on 8th May, 2005;

(f) According to the information supplied by the gardaí, on that occasion the applicant had been asked to produce his driving licence and, as he apparently did not have it on him at the time, he was required to produce it within ten days at a garda station;

(g) when he failed to do so Garda Doherty apparently applied to issue a summons in the District Court but this was never served or proceeded with and no conviction was recorded.

5. The applicant has, according to Dublin City Motor Tax Office, held a provisional driving licence since May 2003, and therefore held such a licence on 8th May, 2005.

6. The applicant concedes that he did not have the original driving licence on him on the occasion in question but claims that he showed a photo-copy of it to the garda and that he was not asked to produce the original within ten days as a result.

7. Having assembled written confirmation of this background from the gardaí and the Motor Tax Office the applicant had his solicitor write to the citizenship section of the Department on 11th July, 2008, placing the information before it and making the following points in forceful terms:-

- The applicant had been neither charged with nor convicted of any offence;
 - The applicant was in those circumstances entitled to the benefit of the presumption of innocence and that a mere allegation could not constitute the basis for a finding by the Minister that he was not of "good character" especially when he had provided references attesting to his good character;
 - That Article 34 of the 1951 Convention relating to the status of refugees obliges contracting states "as far as possible (to) facilitate the assimilation and naturalisation of refugees and in particular (to) make every effort to expedite naturalisation proceedings."
 - That the applicant was a recognised refugee since 2003 and had two Irish citizen children. The letter concluded "in the light of the above submissions, we now seek a review of the decision to refuse our client a certificate of naturalisation. We submit that a review of this decision should be taken in the interests of justice".

8. The Citizenship Section replied on behalf of the Minister by letter of 22nd July, 2008, in these terms:

"The Irish Nationality and Citizenship Act 1956, as amended, provides that the Minister may, in his absolute discretion, grant an application for a certificate of naturalisation provided certain statutory conditions are fulfilled. One such condition is that the applicant must be of good character. Applicants who have come to the adverse attention of An Garda Síochána are not considered of sufficient character to be granted Irish citizenship. Your client's application was forwarded to the Minister for a decision in November 2007, and he decided to refuse the application. In reaching his decision the Minister has exercised his absolute discretion as provided by the Irish Nationality and Citizenship Act 1956, as amended. There is no appeals process under this Act. It is open to your client to lodge a new application for a certificate of naturalisation at any time, however, he should give due regard to the reasons for previous refusal."

9. While the relief for which leave was sought and granted is directed exclusively at the refusal of the Minister on 22nd July, 2008, to review the original decision of 13th March, 2008, the arguments advanced have been directed, in effect, at the legality of the original refusal of the certificate and in particular, at the finding that the applicant was not of "good character" simply because he had come to the adverse attention of An Garda Síochána. To draw an inference adverse to the applicant's character on the basis of a district court summons which had never been proceeded with and of which the

applicant was wholly unaware was fundamentally unlawful in that it violated the applicant's presumption of innocence was a patently unfair procedure in the decision making process and a wholly irrational policy upon which to base the operation of section 15.

10. Counsel for the applicant placed considerable emphasis on the proposition that the Minister's refusal to reconsider reflected a policy in which "coming to the adverse attention of An Garda Síochána" was of itself adequate justification for the exercise of the Minister's absolute discretion to refuse the certificate, whether or not the adverse attention had any real bearing upon an applicant's character as such. There was, accordingly, no point in the applicant making a new application for a certificate so long as the Minister maintained such a policy having regard, in particular, to the Minister's statement in the letter of 21st July, 2008, about giving "due regard to the reasons for previous refusal".

11. It was also submitted that even if the applicant had failed to fulfil the "good character" condition, the Minister had erred in law in failing to consider the exercise of his discretion under s. 16 to waive compliance with that condition when the Minister knew that the applicant was a refugee.

12. In the course of arguments on these issues considerable attention is paid to the role of the Minister's "absolute discretion" under both s. 15 and s. 16 and the extent to which it might render his decision immune from judicial review. As was pointed out by counsel, these questions had been considered in some detail by Costello J. in his judgment in *Pok Sun Shun v. Ireland* [1986] ILRM 593. In that case arguments had been raised first, as to whether the requirements of natural justice and fair procedures entitled an applicant to be afforded an opportunity in advance of commenting upon proposed grounds for refusal of a certificate; and second, as to such an applicant's entitlement to be given a statement of reasons for a negative decision. At p. 599 of the judgement, Costello J. said:-

"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 section 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. ... The second particular point that is raised... relates to the Minister and his failure to state his reasons. It is true that no reasons were given to the plaintiff as to why permission to remain in the State was now not 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 decision of an administrative authority must be given. Again, the extent and scope of the rule of natural justice must depend on the particular statutory function which the Minister or 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 for which someone having complied with certain conditions, was entitled. This is a case where, even if an applicant complied with certain conditions, the Minister could refuse the certificate."

13. Although it is not entirely clear from the report of that case, it seems implicit in the reasoning relating to the absence of reasons for the decision that it was a case in which the Minister had relied on his absolute discretion to refuse the certificate rather than upon non-fulfilment of one or more of the naturalisation conditions of s. 15(1). In the present case, it seems to the court that a distinction has to be made in that regard. Section 15 provides that when the Minister is satisfied that an applicant fulfils the naturalisation conditions he may nevertheless refuse to grant the certificate in his absolute discretion. In such event the court cannot act as a court of appeal from the decision and while the Minister's discretion is not an unfettered one, the court cannot interfere so long as it has been exercised by the Minister in accordance with the powers granted under the section and has been exercised fairly and in accordance with the principles of natural justice. It is only where it is shown that the Minister has failed in some way to carry out the legal requirements of the section or failed to act fairly that the court has power to review the decision. (See the judgment at p. 596).

14. The Minister also has an absolute discretion under s. 16 in the case of the persons mentioned in subs. (1) to grant a certificate by waiving the need for compliance with one or more of the naturalisation conditions.

15. Notwithstanding the statement to the contrary in the letter of 13th March, 2008, it is not clear that the Minister has in fact relied on his absolute discretion to refuse the present application. Where the Minister is not satisfied that one or more of the naturalisation conditions has not been fulfilled by an applicant, his refusal is not an exercise of his discretion but an application of the requirements of s. 15(1). In a case where s. 16 is not applicable, the Minister has no discretion when satisfied that all of the naturalisation conditions have not been met. In this case the Minister has relied on absolute discretion only to the extent that it could be said that, knowing the applicant to be a refugee, he implicitly declined to consider the possible exercise of a discretion under s. 16 to waive the "good character" condition. The court is satisfied, however, that for the reasons given by Costello J. in the *Pok Sun Shun* case, the Minister cannot be compelled by court order to consider the exercise of a discretion to waive compliance with such a condition nor to provide a statement of reasons for a refusal to waive the condition.

16. The reality of the applicant's grievance in the present case is, clearly, the basis upon which the Minister considered him to fail to meet the "good character" condition. That, however, is a matter which goes to the basis of the original decision refusing the certificate in the letter of 13th March, 2008, which is not now before the court. Where the Minister is not relying upon his absolute discretion to refuse an application under s. 15 but is rejecting it upon the basis of non-compliance with one or more of the naturalisation conditions, his refusal is clearly amenable to judicial review and it would, in the court's view, be one of the circumstances in which fair procedures would require the reason for refusal to be stated as, indeed, the Minister has clearly done in the present case.

17. Where, however, the Minister gives a reason for refusal with which an applicant is dissatisfied the Minister cannot be compelled to reconsider his refusal or reopen the original application for fresh determination. As both of the Minister's letters clearly indicated, there is no appeal against the Minister's decision as such but every applicant is perfectly entitled

to make a new application for the certificate at any time if he or she considers that the Minister has made a mistake or that some omission on the part of the applicant has since been rectified. When a new application is lodged, however, the Minister is entitled, especially where there has been a lapse of time since the original application was made, to determine it on the basis of up to date information and new enquiries. The Minister cannot be compelled to confine himself to a reconsideration of the original application based on the state of the information available when the decision was made in disregard of any possible changes of circumstance (including the applicant's conduct and character,) which have intervened subsequently.

18. The relief claimed in this application, accordingly, must be refused because it is directed at the decision of 21st July, 2008, and, in the court's judgment, the Minister is not compellable to reconsider a decision taken under s. 15 of the Act.

19. Counsel for the applicant urged that the court had a discretion to reformulate the declaratory relief and could do so in order to afford the applicant a remedy by condemning the irrational policy of basing a finding of lack of good character on the mere circumstance of coming to the "adverse attention" of An Garda Síochána. While such a course might be technically feasible the court does not consider that it is an appropriate one to adopt in the case of an application under ss. 15 and 16 of the Act. It is for the Minister to determine what criteria fall to be considered in assessing whether the condition as to "good character" is met. At the very least there is a potential difference of recollection which the Minister may find it necessary to enquire into namely whether the applicant did show a photo-copy of his driving licence to the Garda member and whether he was in fact required to produce the original at a Garda station thereafter. The correct course for the applicant to adopt under the statutory scheme is, as has been indicated, to lodge a new application under s. 14 and, if necessary, to challenge by way of judicial review any further refusal with which he is dissatisfied by reference to the substantive reason given for such a refusal if it is based upon non-compliance with the conditions of naturalisation.

20. The application for the reliefs for which leave was granted by the Order of 6th October, 2008, is accordingly refused.