THE HIGH COURT

JUDICIAL REVIEW

[2009 No. 787 J.R.]

BETWEEN

ANASTASIJA SPILA AND JEKATERINA SPILA AND KSENIJA SPILA (A MINOR SUING BY HER MOTHER AND NEXT FRIEND ANASTASIJA SPILA)

APPLICANTS

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered the 31st day of July, 2012

1. By order of the Court (Peart J.) of 20th July, 2009, leave was granted to the applicants to apply for judicial review of a decision of the respondent Minister given to them by letter dated the 31st March, 2009, refusing applications for certificates of naturalisation in respect of the first and second named applicants and an order quashing a further decision given by letter dated the 15th June, 2009, refusing a certificate in respect of the third named applicant.

2. The applicants are respectively a mother and her older and younger daughters. The mother, the first named applicant, was born in 1967 at Riga in the territory that is now the Republic of Latvia, a Member State of the European Union. She is of Russian ethnicity. The mother arrived in the State in 1999, bringing with her the second and third named applicants who had also been born in Latvia in 1985 and 1992, respectively. The mother has since given birth in the State to two further children who are said to be Irish citizens. The mother had originally applied to be declared a refugee, but this application was withdrawn following the birth of the first Irish born child, when she was given leave to remain in the State. The second named applicant has in turn given birth to a child in the State whose father is said to be an Irish citizen.

3. In August 2005, Form 8 applications for naturalisation as an Irish citizen under the Irish Nationality and Citizenship Act 1956 (as amended) were submitted on behalf of each of the three applicants. At paragraph 1.2 of each of the forms the heading "Present Nationality" was completed; "Latvian (ethnic Russian)". Amongst the documentation submitted in support of the applications were copies of the applicants' passports. These were passports issued by the "Republic of Latvia" and bore on the outside cover (in English) the description "Alien's Passport". (The third named applicant appears to have been included for this purpose on her mother's passport).

4. By letter dated the 31/03/2009, the respondent Minister's Irish Naturalisation and Immigration Service (INIS) wrote to the applicants' solicitors informing them that the Minister had decided not to grant the certificates of naturalisation. A memorandum dated the 25th February, 2009, giving the assessment of the applications was attached to the letter which said: "In reaching this decision, the Minister has exercised his absolute discretion as provided by the Irish Nationality and Citizenship Acts 1956 and 1986. There is no appeals process provided under this legislation. However, your client should be aware that you may reapply for the grant of a certificate of naturalisation at any time. When considering making such a reapplication your client should give due regard to the reasons for the 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 the application".

5. The material part of the attached submission - which dealt with other applications as well- under the heading "Applicants for Naturalisation- Proposed refusal for availing of social welfare support"- was as follows:

> "The seven applicants listed in the appended table have availed of, or benefited from State financial support for lengthy periods in the past and do not belong to one of the categories (refugees, programme refugees and stateless persons) which, by virtue of their recognised status in the State, the Minister accepts, for the purposes of naturalisation, can avail of State support."

The letter further explained:

"The Minister has adopted a general policy that he will normally require an applicant for naturalisation (unless he/she belongs to one of the categories stated above) to show that he/she has supported himself or herself (and his or her family if appropriate) while residing in the State and, as far as can be determined, is in a position to continue that support in the future. He is generally speaking, satisfied to accept that an applicant is self supporting if there is no evidence that he or she has accessed State support in the three year period prior to the date of application or subsequently and has satisfied officials that they have supported themselves independently in that period.

6. In a letter of the 8th April, 2009, the applicants' solicitors responded to this refusal of the certificates. The letter said, *inter alia*:

> "Having taken instructions from our clients it appears that the recommendation did not advert to the fact that our clients could and should be classed as stateless persons within the meaning of the 1954 Convention. Our clients, born in Latvia, are both of Russian ethnicity and accordingly are classed by the Latvian State as aliens. They have no entitlement to vote in Latvia, would not be classed by the Latvian authorities as EU citizens and indeed are only entitled to "alien" passports under the Latvian authorities. We accept that the Minister, in making a determination in our clients' cases may not have had reference to the fact that our clients are stateless by virtue of their nationality being described in their application forms (form 8) as Latvian (ethnic Russian): the fact of the matter however, is that notwithstanding our clients' classification of themselves, they are not classified by the Latvian authorities as nationals of Latvia and

accordingly are stateless. In the circumstances you might please confirm that our clients' applications for naturalisation are being reconsidered and that the applications will not be refused on the basis that our clients availed of social welfare support."

7. On the 15th June, 2009, a decision in the same terms was issued to the mother in respect of the application on behalf of the third named applicant refusing the certificate. On the 25th June, 2009, the solicitor wrote to the INIS challenging the refusal and pointing out that in the letter of the 8th April, 2009 attention had been drawn to the fact that all three applicants would be categorised as stateless persons and that this information did not appear to have brought about a reconsideration of the applications of the mother and older daughter and appear to have been ignored and treated as irrelevant in the case of the younger daughter. The letter warned that if there was no confirmation that the Minster was reconsidering all three applications proceedings to quash the refusal decisions would be commenced.

8. The present application was then commenced and in the order to the 29th July, 2009, leave was granted to seek judicial review of the contested decisions upon the grounds set out in part (e) of the statement of grounds. Although the substantive grounds are formulated as seven in number, the essential flaws raised against the decisions are that the Minister is (a) wrong in fact and law in refusing to treat the applicants as stateless persons for the purposes of the policy outlined in the decisions; and (b) the Minister has failed to apply his policy to the applications by conducting an adequate examination and assessment as to the actual status in international law of the applicants as individuals who are regarded by the authorities of their country of origin as "aliens" or "non-citizens". In other words, the essential issue raised by this application for judicial review is whether or not the applicants, as individuals who are ethnic Russians originating in Latvia by birth, are "stateless" and whether, in the application of his policy, the Minister has erred in answering that question.

9. In contesting this application for the grant of leave, the opposing parties have placed before the Court extensive expert opinion and legal advice as to the status of Latvian residents who find themselves in the position of the applicants. What emerges from this material is the clear indication that the issue is one of considerable complexity and the status of individuals such as the applicants in international law is very possibly entirely novel and unique. The material placed before the Court has included translations of the relevant Latvian legislation. On the side of the applicants, expert affidavit evidence has been filed by Paul Downes and Matiss Davis Kukanis. The latter is both an attorney and advocate of the Republic of Latvia and an attorney of the State of Illinois in the USA who has experience in immigration issues involving nationals of Latvia. His evidence emphasises the degree of exclusion of holders of "non citizen alien passports" from basic privileges in Latvia including the right to vote or to hold public office and while admitting that such non-citizens are entitled to apply for Latvian citizenship, emphasises the conditions as regards residence and ability to speak the Latvian language which make successful applications difficult. Mr Downes exhibits reports by Amnesty International in which the resident non-citizens in Latvia are described as "stateless".

10. On behalf of the respondents, affidavits have been submitted by, *inter alia*, Ms. Inga Reine of the Ministry of Foreign Affairs of the Republic of Latvia and that country's representative before international human rights organisations. Her affidavits explain the somewhat convoluted course of citizenship law in Latvia throughout the 201h century having regard particularly to the consequences of Soviet occupation prior to the independence of the Republic of Latvia in 1991. She explains that at the time of the adoption of the citizenship law in 1994, "the Latvian authorities faced the historic reality that there was a considerable group of persons who had migrated to Latvia during the period of illegal occupation, who had lost their USSR citizenship as a result of former USSR republics restoring or gaining statehood but who had never been citizens of the republic of Latvia. These persons were not eligible to become the citizens of Latvia and it was unclear which country's citizenship such individuals would choose at a later stage. Therefore the Latvia authorities, for humanitarian reasons, decided to establish a special temporary status to these former USSR citizens". In 1995, Latvia adopted the *"Law on the Status of those Former USSR Citizens who are not Citizens of Latvia or any other State*": the so called "Non- Citizens Law". It was this law that created the status of "Latvian non-citizen". In 2004, Latvia adopted a *"Law on the Stateless Persons"* which is said to state specifically that "persons that are subjects of (the non-citizen's law) cannot be regarded as stateless".

11. The Court refers to these excerpts from the evidence placed before it not for the purpose of deciding the issue as to whether the applicants are regarded under the laws of Latvia or international law as being stateless but with a view to underlining the complexity and delicacy of the issue. It is clear to the Court also that the issue in question is fraught with linguistic difficulties. On the face of it, the use of the English term "alien's passport" on the outside cover of the passports held by the applicants in this case would appear to be potentially misleading. So far as the translations of the Latvian statutes are concerned, it would appear that the Latvian authorities have struggled to accommodate the historical legacy of the presence on their territory of substantial numbers of ethnic Russians by the creation of the unique character of "Latvian non citizen". The Court notes that the United Nations Human Rights Committee in its concluding observations on Latvia commented upon the status of non-citizens saying that they "are treated (in law) neither as foreigners nor as stateless persons but a distinct category of persons with long lasting and effective ties to Latvia, in many respects comparable to citizens but in other respects without the rights that come with full citizenship". If the evidence on behalf of the respondent and particularly that of Ms. Reine is to be accepted, "Latvian non-citizens" appear to be entitled to move freely in and out of Latvia; to reside there permanently when they wish to do so; and, subject to certain conditions, to apply to become Latvian citizens by naturalisation. The Court also notes that the circumstances in which Latvian non citizens live in that country have come up for consideration by the ECtHR on a number of occasions. See for example *Slivenko v Latvia [Application No. 48321/99]; Kaftailova v Latvia [Application No. 59643/00]; Andrejeva v Latvia [Application No. 55707/00].*

12. Fortunately, however, this Court is relieved of the responsibility for deciding whether these applicants are, as a matter of international law or otherwise, to be considered as "stateless".

13. The reason why the Court is relieved of this responsibility is twofold. In the first place, it is clear that when these applications were made, the Minister was not explicitly requested consider whether, as ethnic Russian Latvians they were "stateless" in any sense. As pointed out above, in the application forms, they declared themselves to be of Latvian nationality with the qualification of "ethnic Russian". It may be true that when the applications were presented, the applicants and their solicitor were unaware of the significance that might attach to the characterisation of "statelessness" for these purposes. Nevertheless, it is clear from the letter of the 8th April, 2009, from the applicants' solicitor referred to in para. 6 above, that it was only after the decision was received that it occurred to the applicants to assert their classification as stateless persons.

14. In an ordinary case of judicial review it might well be arguable that this element of being at cross purposes was a failure of fair procedures in administrative law in that the Minster could be accused of deciding the matter by reference to criteria of policy of which the applicants were unaware when they made their applications.

15. The position in respect of the challenges to refusals of certificates of naturalisation under s. 15 of the Act of 1956, is however, materially different in this context. It is an unquestionable principle of Irish law in the construction and application of the Act of 1956,

that the grant of the certificate is a privilege accorded by the State and no third country national has a legal right to the certificate. (See the judgment of Costello J. (as he then was) in *Pok Sun Shun v. Minister for Justice* [1996] ILRM 593). This is not purely a matter of domestic law but a principle recognised in international law namely that every sovereign state has, as an incident of its sovereignty, the entitlement to determine which third country nationals may enter its territory and the terms and conditions upon which they may be granted permission to remain there. The principle is recognised both under international law and in the law of the European Union. For example, the proposition was confirmed by the Court of Justice of the European Union in case C-200/02 *Zhu and Chen v. The Secretary of State for the Home Department* [2004] ECR 1-9925, at para. 37: "Nevertheless, under international law it is for each Member State, having due regard to community law, to lay down the conditions of the acquisition and loss of nationality". (See also the cases there cited of C-369/90 *Micheletti and Others* [1992] ECR 1-4329, para. 10 and case C-192/99 *Kaur* [2001] ECR 1- 1237, para. 19).

16. Accordingly, the question as to whether the applicants are in their particular personal circumstances "stateless" is first and foremost a matter of policy for the respondent Minister. Because the Minister's decision is based upon policy the issue is not one which can be judged by the High Court by reference to any treaty or statutory benchmark. The term "stateless" is given a definition in Article 1 of the UN Convention relating to the Status of Stateless Persons of 1954 (to which the State is a party) but it is not clear from the papers before the Court whether that is the basis upon which the policy of the Minister has been formulated. Given that the Minister has an absolute discretion in the matter, there is no reason to assume that the Minister, in adopting such a policy, might not take a more liberal view of what constitutes "statelessness" than that of the Convention definition especially when presented with unusual cases such as those of "Latvian non-citizens".

17. It is, accordingly, a matter for the Minister in the first instance to decide whether or not these applicants are "stateless" for the purpose of his policy on the basis they assert and in the light of the extensive evidence and expert opinion that has been presented by the parties during the course of this proceeding. The decisions which are sought to be challenged in this judicial review were not made upon the basis of the information and evidence that is now sought to be relied upon by the applicants in support of their original application. Having regard to the nature of the decision that is now demanded of the Minister, and to the clearly opposing views given in the expert affidavits, is it inappropriate that the Court should seek to usurp his function by deciding this mixed question of law and fact on the basis of information which he did not have before him at the time when the contested decisions were arrived at. It is clear that the central consideration in the refusal was the fact that the applicants had been in receipt of social welfare support not that they were not stateless.

18. The second reason for refusing judicial review in these circumstances is even more elementary. As the letter of the 8th April, 2009, effectively illustrates, the complaint made against the Minister is that there has been a misunderstanding on his part as to the basis upon which the applications were made. The decisions are characterised as having been made on the basis that Minister had a policy not to grant certificates to individuals other than refugees, programme refugees or stateless persons who had availed of state social welfare support. These applicants had applied for refugee status but withdrew their applications and had not explicitly claimed to be stateless. At most, they assert that the Minister was put on inquiry as to their character as stateless persons by the "alien passport" and "ethnic Russian" information attached to the applications. In the judgment of the Court, the Minister was not put on any such inquiry. More importantly, however, the refusal decisions explicitly opened to the applicants the possibility of making new applications "with regard to the reasons for refusal given in the attached submissions". In other words, the Minister was making it perfectly clear that if an applicant felt there was a misunderstanding or had a disagreement as to the appraisal made of the application in that submission, it was open to the applicants to make a new application. This was, in the judgment of the Court, a case which was clearly appropriate for the making of a new application as, indeed, the request for "reconsideration" in subsequent correspondence effectively admitted. At this point what the applicants require (and are entitled to) is not a reconsideration of the original applications but a decision on an application which incorporates all of the new information and expert opinion they now rely upon.

19. In the judgment of the Court, the present application for judicial review was unnecessary. Startling though the proposition may appear, judicial review is not compulsory. Not every administrative or quasi judicial decision of an administrative authority is required to be subjected to judicial review. Where, as in a case under s. 15 of the Act of 1956, the discretion of the Minister is exercised with a statement of reasons for the refusal and the possibility of an entirely new application is explicitly stated, the primary responsibility of legal representatives is to exploit the avenue of that new application before recourse to judicial review can be reasonably considered necessary. It is only where the stated reason for the refusal is arguably contrary to law or otherwise flawed in a way which is unlikely to be remedied by the making of a new application on the basis of the same facts, law and circumstances, that an application for judicial review of a refusal of a certificate of naturalisation made in the Minister's absolute discretion can be justified. It must also be borne in mind that, as has frequently been pointed out in the decided cases, (see paragraph 15 above,) there is no right on the part of a third country national to Irish citizenship. Its award is a privilege. The refusal of a certificate does not deprive the applicant of an entitlement and it has no effect in altering the status of the applicant in the State or in changing the terms of an existing permission. (See also *Mishra v Minister for Justice* [1996] 1 I.R. 189, *Mallak v MJELR* [2011] IEHC 306 and *Abuissa v MJELR* [2010] IEHC 366). Thus a refusal decision has no legal consequence for the applicant which requires that it be judicially reviewed when the possibility of making a new application is available.

20. For all of these reasons the Court is satisfied that this application for judicial review is unnecessary and unfounded and that the complex issue as to the possible status of the applicants as "stateless" individuals in international law or for the purpose of the policy maintained by the Minister must be decided definitively in the first instance by the respondent Minister before it need be judicially reviewed.