Neutral Citation [2016] IEHC 408

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 610 J.R.]

BETWEEN

A.P. (Islamic Rep. of Iran)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Ms. Justice Stewart delivered on 19th day of July, 2016.

1. This is a hearing for, *inter alia*, an order of *certiorari* in respect of the decision of the respondent made on 1st September, 2014, to refuse an application for naturalisation as an Irish citizen. The applicant is also seeking an order of *mandamus* requiring the respondent to disclose the gist of the information adversely affecting said application. These proceedings are brought pursuant to a Notice of Motion dated 13th January, 2015.

Background

2. The applicant is an Iranian national, who was granted refugee status on 20th December, 1991. Since then, he has applied for a certificate of naturalisation on several occasions, the most recent being made on or about 23rd April, 2011. All of these applications have been denied, including the most recent one on 30th April, 2013. The respondent provided no reason for said refusal, relying on the provisions of the Freedom of Information Act 1997 (as amended) for so doing. The applicant challenged this decision by way of judicial review before McDermott J. in the High Court, seeking, *inter alia*, an order of *certiorari* quashing the respondent's decision and a declaration that the respondent's failure to provide reasons was unlawful. In these proceedings (Rec. No: 2013/347 JR), an affidavit was filed by the respondent alluding to the existence of certain documents concerning the applicant and his background. The respondent asserted executive privilege over those documents on the ground that disclosure would be adverse to the interests of the State.

3. The applicant sought to inspect the documents referred to in the respondent's affidavit, arguing that the respondent's actions breached his right to fair procedures, constitutional justice and an effective judicial remedy. McDermott J. delivered a written judgment on this motion ([2014] IEHC 17), in which he found it necessary for the Court to inspect the documents in question under the principles outlined in *Murphy v. Dublin Corporation* [1972] I.R. 215 and *Breathnach v. Ireland (No. 3)* [1993] 2 I.R. 458. He also held that the decision reached in *Ambiorix v. Minister for the Environment (No. 1)* [1992] 1 I.R. 277 enabled the Court to decide which public interest should prevail - the public interest involved in the production of evidence or the public interest involved in respecting executive privilege for the purposes of national security.

4. McDermott J. held that one document 'A' should be disclosed in full and that another document 'B' should be disclosed in a redacted form. The court upheld the claim of privilege over a third document 'C' in its entirety. This decision was not appealed. The case proceeded to hearing and McDermott J. also delivered a judgment on the substantive application for judicial review on 2nd May, 2014 ([2014] IEHC 241). In that decision, McDermott J. ruled in favour of the applicant, finding that there was nothing inhibiting the respondent from providing a more detailed reason or justification for the decision. A cryptic reference to the provisions of the Freedom of Information Act 1997 did not suffice.

5. Following McDermott J.'s judgment, the applicant made a further application for a certificate of naturalisation. Two civil servants working for the respondent prepared a report that set out, *inter alia*, the national security/international relations concerns in the applicant's case. The report recommended against granting the application on the basis that *"the Minister cannot have confidence* [in the applicant's declaration of fidelity to the Irish State] *in this case, nor be satisfied that the applicant meets the condition of good character as specified in Section 15(1)(b) of the Irish Nationality and Citizenship Act 1956, as amended"*. The report also states that the applicant's right to specific reasons is outweighed by national security interests in maintaining confidentiality over the information concerned. The respondent signed and dated the report on 25th August, 2014, indicating her acceptance of the negative recommendation in relation to the applicant's case. By letter dated 1st September, 2014, the applicant was informed of the refusal of his application. A copy of the report was also sent to the applicant.

The applicant's submissions

6. The applicant challenges the following matters in relation to his case:

a. the respondent's failure to provide any reason for her decision; and,

b. the failure of the two officials working for the respondent to provide any, or any adequate, reasons for the adverse inferences they drew.

7. The applicant argues that he has no idea what information led to his good name being impugned. The applicant contends that, whatever the information is, it is incorrect. He alleges that he is of good character and is being denied the opportunity to right any slur made against his name. In this respect, the applicant contends that his rights under Article 40.3 of Bunreacht na hEireann have been breached.

8. The applicant contends that, if the respondent chose to rely on document 'C' after the 2013/14 proceedings, she was obliged to disclose it to the applicant. It is submitted that, at a minimum, she must inform the applicant generally of the information that is being held against him, so that he could at least reply to it. The applicant contends that providing a general overview of the information

held against him would require disclosure of the information in the document and not disclosure of the document itself. The applicant states that there is a clear distinction between these two notions.

9. The applicant also asserts that the respondent had the option not to rely upon document 'C', given that she had already claimed executive privilege over it. Alternatively, the respondent could have given a synopsis of document 'C' to the applicant, so that he could be in a position to challenge the claims made against him. The applicant argues that these options were not pursued by the respondent and that this failure constitutes an infringement of his rights.

10. The applicant also argues that it is antithetical to due process for a government minister to rely on entirely secret evidence in a judicial review action. The applicant asserts that, if the respondent is allowed to proceed on this basis, the ensuing legal proceedings would effectively become meaningless because the applicant would be met with secret evidence that he cannot challenge. This would mean that the applicant has no effective remedy by which to resolve any aspersions made against his good name and/or character. The rule of law would, in effect, fall away from the applicant's proceedings on this issue.

The applicant's submissions regarding the claim of executive privilege

11. Counsel for the applicant submits that the applicant needs to know what information is being held against him so that his application for naturalisation can be determined in accordance with constitutional justice. Furthermore, the applicant alleges that his ability to vindicate his right to a good name has been hindered by the respondent's reliance upon evidence that was not, and could not be, disclosed to him. He submits that the assertion of privilege prevents the respondent from relying upon the privileged document. It is submitted that counsel for the respondent confirmed to McDermott J. at the substantive hearing that they would not be relying upon this document, as they had already been granted executive privilege. The applicant points to the affidavit sworn on 19th November, 2015, in which it is stated that the respondent did rely on Document 'C' in the 2013/14 proceedings.

12. The applicant makes it clear that, if the respondent relies on document 'C', the proceedings in which it is utilised become "farcical" in his eyes, as the Court would be asked to determine the legality of a decision involving secret information that it is not privy to. According to the applicant, this would be a fundamental breach of the rule of law.

The grounds of challenge

13. The applicant's first ground focuses upon the assertion that the respondent adopted the report and provided no reasons for her decision. The applicant submits that, in the absence of any clearly stated and reasoned findings by the decision-maker, the respondent's decision to refuse naturalisation is unlawful. The applicant also argues that the affidavit evidence submitted by the respondent is hearsay and inadmissible on this issue. This ground was amended on consent between the parties in order to clarify the Order granted on 13th January, 2015, by MacEochaidh J., who heard the application for leave.

14. The second and third grounds are joined and allege that the report contains no, or no adequate, reasons for refusing to accept the applicant's assertion that he is of good character. According to the applicant, such a refusal was a clear breach of his right to fair procedures under Article 40.3 of Bunreacht na hEireann. The applicant maintains that his rights are particularly affected because he cannot assess whether the adverse inference made upon him is made in accordance with law.

15. The fourth, fifth and ninth grounds are linked by the applicant, who submits that a synopsis of what is being held against him has not been disclosed to him. It is argued that this is a breach of his right to constitutional justice and to have his good name both protected and vindicated. The applicant maintains that any adverse inference can be disclosed to him without infringing upon the privilege claimed in respect of the document and that no reason has been provided as to why the respondent cannot even provide a synopsis of the inferences made against him.

16. Ground six maintains that s. 16 of the Irish Nationality and Citizenship Act, 1956 (as amended) could have been applied to waive the good character condition in the applicant's case. The applicant maintains that no reason was offered by the respondent as to why the condition for good character was not waived in the applicant's case. As a result, the applicant argues that it is not clear whether s. 16 of the 1956 Act was lawfully applied.

17. Grounds seven and eight are joined by the applicant and relate to the findings made by the respondent in relation to the applicant's good name. The applicant submits that he was not informed of the findings made in relation to the sincerity of any future declaration that the applicant would have to make when being admitted to Irish citizenship. The applicant feels particularly aggrieved in this matter, as this is a finding of dishonesty and the manner in which it was found is in breach of the applicant's right to constitutional justice.

18. Grounds ten and eleven are also joined by the applicant. These grounds relate to the fact that the respondent's decision not to grant the applicant Irish naturalisation also means that the applicant's ability to obtain European Union citizenship is curtailed. If the applicant is continuously denied Irish citizenship, his derivative European Union citizenship rights would be denied as well. The applicant relies upon the decision in *Rottmann v. Freistaat Bayern (Case C-135/08)* [2010] E.C.R. I-1149. It is contended by the applicant that, in certain circumstances, entitlement to EU citizenship engages EU law. It was also submitted that EU law is engaged in decisions not to confer citizenship to an applicant.

19. The applicant submits that, as a declared refugee in Ireland, his rights under EU law are engaged. The applicant maintains that EU law implements the Refugee Convention of 1951 by giving efficacy to Article 34 of that Convention. The applicant also submits that Article 18 of the EU Charter of Fundamental Rights provides the necessary efficacy for the Convention's salient provisions. Article 34 of the Refugee Convention states that:-

> *"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."*

20. The twelfth and final ground relates to the storage of data by the respondent that is undisclosed and adversely affects the applicant's good name. The retention of such data without allowing the applicant an opportunity to correct any factual errors therein is, according to the applicant, a breach of his statutory (i.e. s. 3 of the European Convention on Human Rights (ECHR) Act 2003 and Article 8 of the ECHR) and constitutional rights.

The respondent's submissions

21. Counsel for the respondent submits that McDermott J. clearly held in his judgment that the respondent could rely upon executive privilege as a justification for refusing to give reasons or a detailed explanation of said reasons. It is also submitted that the applicant has completely misunderstood the effect of the judgments delivered by McDermott J. Para. 6 of the applicant's submissions states

that document 'C' was held to be privileged and "[a]*s a consequence, the* [r]*espondent could no longer rely on it.*" The respondent submits that this comment signifies the applicant's failure to fully grasp the meaning of legal privilege. The respondent had relied on document 'C' in reaching the decision of 30th April, 2013, as McDermott J. had upheld the respondent's claim that document 'C' was privileged from disclosure. This ruling, the respondent asserts, does not preclude the respondent from reading or utilising document 'C' in any future decision to be made. It may be used by the party that created or controls it without having to furnish it to any other party.

22. The respondent submits that they have not waived privilege over document 'C', either intentionally or unintentionally. The respondent submits that the document referred to in the report is the same document labelled as "document 'C' in McDermott J.'s judgments. Such utilisation is not a "deployment" of it. The respondent highlights that she has not made any reference to document 'C"s contents in the affidavits in this case.

23. The respondent does not accept the applicant's characterisation of the privilege exercised over document 'C'. It is submitted that "farcical" is not an appropriate assessment of the proceedings and the respondent reiterates that the applicant is still not entitled to know the contents of document 'C', pursuant to the judgment of McDermott J. The respondent points out that the applicant could have appealed the judgment of McDermott J., but failed to do so and is therefore bound by its findings. The respondent contends that he cannot now re-open the matter in these proceedings. In effect, the respondent asserts that the issue is *res judicata*. The respondent also alleges that any attempt to re-litigate the issue would cast this Honourable Court in the role of an appellate court in respect of the judgments of McDermott J.

24. Under grounds 1-3 and 6-8, the applicant complains that the respondent's decision contains inadequate reasons to explain the decision reached. However, the applicant's argument seems to suggest that there is an unrestricted right to reasons. The respondent highlights that McDermott J. followed the Supreme Court's decision in *Mallak v. Minister for Justice, Equality and Law Reform* [2012] 3 I.R. 297 and held that the respondent could indeed refuse to give reasons for a decision in some cases. However, she must provide a justification for doing so.

25. The respondent submits that, in the applicant's case, a question mark remains over how genuine a declaration of fidelity and loyalty to the State would be. The respondent was also not satisfied that he fulfilled the criterion of good character. The respondent justified the refusal to provide any further reasoning on grounds of protecting national security and international relations. The respondent submits that this must out-weigh the applicant's interests in knowing the specific reasons for the refusal.

26. The respondent continues by addressing grounds 4, 5 and 9 of the applicant's Statement of Grounds. Under these grounds, the applicant contends that, at the very least, he is entitled to the "gist" of document 'C'. The respondent submits that this is really just an alternative avenue of asserting that there is a duty to provide reasons for a decision. The respondent therefore repeats the objection that, in so far as it relates to the issue of privilege, this matter is *res judicata.* The respondent suggests that a "gist" essentially refers to the reasons required to be given by the common law. On affidavit evidence, it is stated by an officer of the respondent that it is not possible to disclose the "gist" of the information contained in document 'C' because doing so would undermine the State's interests.

27. In relation to Irish citizenship, the respondent submits that it is in no way dependent upon European Union law. The manner in which a Member State's citizenship is acquired is not a matter governed by European Union law and falls within the exclusive competence of the Member States. The respondent submits that they were not implementing EU law within the meaning of Article 51 of the Charter of the European Union, and, as a result, the Charter does not apply to the impugned decision. Even if the conferral of citizenship by national authorities were within the scope of EU law, the cases of *Kadi v. Council of the European Union (Joined Cases C-584/10P, 593/10P and 595/10P),* Grand Chamber, July 18, 2013) and *Z.Z. v Home Secretary (Case C-300/11*) are of little weight, in the respondent's opinion, because those cases involve substantive rights (namely to property and to the right to residence).

28. With regard to ground 12, the respondent submits that neither the constitutional right to privacy nor Article 8 of the ECHR apply in this case. The respondent submits that she has not disseminated any of the applicant's personal information and, therefore, has not breached the applicant's privacy. Furthermore, the respondent submits that obtaining and retaining personal data relating to public security and defence falls outside the scope of European Parliament and Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, O.J. L 281 23.11.1995.

Legal analysis

29. Section 15 of the 1956 Act confers a wide discretion upon the respondent in relation to decisions on naturalisation. Under this section, the respondent is essentially permitted to make a decision that best reflects the fundamental elements of fair procedures, balanced with the requirement to protect the safety of the State. By way of argument, counsel for the respondent opened a number of decisions from the European Court of Human Rights (ECtHR). These decisions engage, *inter alia*, Article 8 of the ECHR. In *Klass and Ors v. Germany* (1979-80) 2 E.H.R.R. 214, the ECtHR heard a challenge to a German law that permitted the interception of certain post and communications between private persons. The applicants argued that the law breached Article 8 (privacy) and Article 13 (effective remedy), as there was no obligation to notify the person after the surveillance had taken place and the domestic law precluded any remedy before the courts against an order of surveillance, which was required to be issued before surveillance could legally commence.

30. The most cogent element of the ECtHR's decision in *Klass* is their analysis of the margin of appreciation afforded to a Member State in order to ensure that fundamental policies, such as national security, are maintained. The foregoing is summarised in the well-quoted maxim of EU law: "*Within the bounds of what is necessary in a democratic society*." Paragraphs 46 and 48 of the Klass judgment are particularly instructive in this regard:-

> *"The Court, sharing the view of the Government and the Commission, finds that the aim of the G 10 is indeed to safeguard national security and/or to prevent disorder or crime in pursuance of Article 8 (2). In these circumstances, the Court does not deem it necessary to decide whether the further purposes cited by the Government are also relevant.*
>
> *On the other hand, it has to be ascertained whether the means provided under the impugned legislation for the achievement of the above-mentioned aim remain in all respects within the bounds of what is necessary in a democratic society…*
>
> *48… The Court has therefore to accept that the existence of some legislation granting powers [which infringe rights] is, under exceptional conditions, necessary in a democratic society in the interests of national security and/or the*

prevention of disorder or crime."

31. The analysis of Article 13 of the ECHR in *Klass* assisted this Court in reaching its decision. At paragraph 69 of *Klass (supra)*, the ECtHR stated as follows:-

> *"69. For the purposes of the present proceedings, an 'effective remedy' under Article 13 must mean a remedy that is as effective as can be having regard to the restricted scope for recourse inherent in any system…".*

32. With regard to the applicant's EU rights arguments, Cooke J. effectively addressed this issue in *Mallak v. Minister for Justice, Equality and Law Reform* [2011] IEHC 306 at para. 23:-

> *"The further argument advanced was based upon the concept of European Union citizenship and a reliance on Article 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 [of a] Member State…*
>
> *26. It is to be noted that [Rottmann] 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.*

33. This aspect of the learned High Court judge's decision in *Mallak* was not interfered with by the Supreme Court. I accept and adopt that statement of the law in this regard. The determination of the Minister on an application for naturalisation is a matter of domestic law.

34. The Supreme Court in *Mallak* held that there is a duty to issue reasons so that arbitrariness in decision-making is prevented. By analysing this case through the rubric of the decision in *Mallak*, it is clear that there is a legitimate justification for the respondent not to issue reasons for its decision: a risk to the nation's security. The Court is satisfied by the judgments of McDermott J., who previously viewed the documents and delivered a judgment that upheld the claim of executive privilege. In that judgment, McDermott J. addressed Document 'C' at para. 28:-

> *"28. This document formed part of and was attached to the confidential note, Document B. I am satisfied that this document is confidential and having considered the contents of the document, I am entirely satisfied that it is in the public interest that it and its contents remain confidential."*

This Court takes note of the fact that McDermott J. distinguished between the document and its content, finding that both should remain confidential. Disclosing the gist of Document C, as the applicant has requested, would effectively lead to the disclosure of some measure of the document's content. This matter is, in my view, *res judicata* and the findings of McDermott J. are accepted in this regard. Thus, the applicant's rights, including his right to specific reasons, have been assessed and have been counterbalanced in the decision-making process.

35. Finally, with regard to the ground raised in respect of data protection issues, I am satisfied that the respondent has not published or disseminated any personal information related to the applicant and has not breached any alleged rights of privacy applicable to the applicant. In any event, the obtaining and retention of personal data that relates to public security, defence and State security is a well-recognised exception from data protection legislation and principles. It is expressly excluded from the scope of Union law, as confirmed by, *inter alia*, Article 3(2) of Directive 95/46EC. Similarly, the Òireachtas, in enacting the Data Protection Act 1988 (as amended), by s1(4)(a), provided that the Act should not apply to personal data that, in the opinion of the respondent or the Minister for Defence, are, or were at any time, kept for the purposes of safeguarding the security of the State. The Òireachtas accordingly chose, in accordance with Art. 3(2) of the Directive, to exclude such data from the scope of application of the Act. Section 5(1)(e) of the Act further provided an exception to the right of access to personal data in cases where the exercise of the right would be contrary to the interests of protecting the international relations of the State. The applicant is not entitled to an order from this Court that would have the effect, directly or indirectly, of conferring on him a right of access to information that has been expressly excluded by the terms of the 1988 Act. I am also of the view that such an order would be a trespass on the executive function of the respondent.

Decision

36. The applicant has failed to discharge the burden of proving that there was an error in the decision-making process engaged by the respondent in this case. For all of the above reasons, this application for, *inter alia*, orders of *certiorari* and *mandamus* is denied.