

THE HIGH COURT**JUDICIAL REVIEW****2008 1204 JR****BETWEEN****A. N.****APPLICANT****AND****THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM****RESPONDENT****JUDGMENT OF MS. JUSTICE M. H. CLARK, delivered on the 29th day of July, 2009.**

1. This is an application for costs in respect of a decision of Edwards J. to grant an order of mandamus to the applicant requiring the Minister for Justice, Equality and Law Reform to make a determination with respect to the applicant's application for a certificate of naturalisation. Ms. Alice Fawsitt S.C. appeared for the applicant and Ms. Emily Farrell B.L. appeared for the respondent. The hearing took place at the Kings Inns in Court No. 1 on the 26th June, 2009.

Background

2. The applicant is a national of Pakistan. He entered the State on a student visa in 2002 and he attended at Cork Institute of Technology. He had a valid Pakistani passport. After he completed his studies he was granted a work permit. He began running a restaurant. He married an Irish citizen while in the State in April, 2004. He was granted Stamp 4 residency as the spouse of an Irish citizen. In August, 2005 his wife gave birth to their child.

3. The applicant lodged an application for a certificate of naturalisation in June, 2007, pursuant to s. 15A of the Irish Nationality and Citizenship Acts 1956-2004. He provided an amount of documentation in support of his documentation. Receipt was acknowledged and the application was deemed valid on the 4th September, 2007. The letter of acknowledgment advised the applicant not to address the matter as this would delay the process. Nothing further happened.

4. More than a year later, after the decision of Edwards J. in *K.M. and G.D. ("Mobin") v. The Minister for Justice, Equality and Law Reform* [2007] I.E.H.C. 234, two letters were sent to the Minister asking for an indication as to when the application would be decided. No response was received to the first letter. The Minister was then informed that proceedings would be commenced if a satisfactory response was not received and if the application was not determined within a reasonable time. On the 23rd October, 2007, the applicant was informed in response to the second letter that there was a backlog and it would take 29 months to process an application for a certificate of naturalisation. This would mean that the applicant would have a decision in November, 2009.

5. Proceedings were issued on the 30th October, 2007 seeking an order of mandamus directing the Minister to determine the application for a certificate of naturalisation within a period of time to be determined by the Court. In October, 2008 Edwards J. granted leave on an *ex parte* basis, stating that it was arguable that the Minister is obliged to deal with applications expeditiously and within a reasonable time. The relief sought was an order requiring the Minister to indicate to the applicant how long it would take for his application to be decided. The application was processed immediately thereafter and the Minister granted the applicant a certificate of naturalisation in February, 2009. He has been granted an Irish passport.

6. After the applicant was granted a passport his solicitors wrote to the Minister seeking clarification as to what would happen to the proceedings, which were declared to be moot in the light of the making of a certificate of naturalisation. It was suggested (without prejudice) that the proceedings be struck out with costs for the applicant. No response was received to that letter. Further letters were sent. On the 9th March, 2009 the matter came before the Court with counsel for the applicant seeking an order for costs. The matter came before the Court again the following week on the 16th March, 2009 and the State confirmed that they wanted their costs.

SUBMISSIONS

7. Counsel for the applicant argued that it was reasonable for the applicant to commence proceedings in the context of the state of the law following the decision of Edwards J. in *K.M. and D.G.* It was argued that a 29 month delay in processing the application was unreasonable and it was argued that the applicant was prejudiced because he would not be entitled to vote in elections in Ireland until a citizen. Counsel indicated that because there are differences between the rights enjoyed by citizens and non-citizens, this emphasises the importance of an application for a certificate of naturalisation being determined within a reasonable time.

8. Counsel for the respondent argued that it was the applicant and not the Minister who decided that the matter on which leave was granted was moot. She pointed out that the applicant's letter indicates that he considered the matter to be moot. She accepted that an application must of course be determined within a reasonable time, but she argued that what is reasonable depends on a number of factors, the first of which is the nature of the application being made and the extent of the discretion of the decision-maker. She pointed out that the Minister's discretion to grant a certificate of naturalisation is absolute. She submitted that if the applicant had been making an application for residency, he would

have been in a stronger position to argue that he was entitled to a quick decision. Counsel argued that there is no constitutional entitlement to apply for naturalisation – this is a right that is conferred by statute (i.e. the Irish Nationality and Citizenship Acts 1956-2004).

9. Counsel for the respondent argued that most if not all of the people who are in the queue to have their applications for naturalisation granted are people in the same situation as the applicant – they will have Stamp 4 Residency and a work permit. The applicant does not have a stronger reason than any of the others for having his application decided sooner than theirs.

10. With respect to the applicant's indication that he would be prejudiced by his inability to vote, counsel for the respondents indicated that the Electoral Act states that the applicant was entitled to vote in the local elections as he was registered in the local area – it was only the European elections in which he could not have voted. In any event he would have had to be a citizen of Ireland prior to a particular date in order to have the right to vote. She submitted that there is no evidence that the applicant would be treated differently to any other person in the same situation.

11. Counsel for the respondents argued that it was not reasonable for the applicant to seek from the Court an order directing the Minister to act in a particular way or directing the Department of Finance to allocate more funds to a particular task. She argued that if the Court was minded to have regard to the "floodgates" argument, it should be borne in mind that 8,000 people made an application for a certificate of naturalisation in 2008 and not all of those applications have been determined; by the same token not all of the applications made in 2007 have been determined.

DECISION

12. On the 26th June, 2009 I gave my decision *ex tempore* and refused the application. This is my written decision outlining in more detail the reasons for my findings that the applicant was not entitled to the costs of brings proceedings which I considered inappropriate and unreasonable.

13. The background to the proceedings is that the applicant is a non E.U. national who came to the State on a student visa and, after obtaining a work permit, married an Irish citizen. As such, he had a statutory right to apply for a certificate of naturalisation under s. 15A of the Irish Nationality and Citizenship Acts 1956-2004 once he had lived in the State with his spouse for the requisite amount of time being three years from the date of his marriage. The Act states at s.15 that the Minister may, in his or her absolute discretion, grant a certificate of naturalisation provided that the applicant meets certain pre-conditions and criteria. These involve nine pre-conditions which include being of good character, being married to a citizen in a subsisting and recognised marriage under the laws of the State for a period of at least three years and having the intention to reside in the State after naturalisation.

14. The applicant applied to be considered under the Act but was not prepared to wait in the queue while each application was dealt with in chronological order, as was outlined in correspondence with the Minister's office explaining that because of the huge increase in the number of applicants for naturalisation, it was likely that his application would not be dealt with for a period of between 29 and 30 months.

15. The applicant brought proceedings seeking an order for mandamus directing the Minister to determine the application for a certificate of naturalisation within such reasonable period as may be determined by the Court. Edwards J. granted leave to apply for judicial review on an *ex parte* basis on the 30th October, 2008 where relying on his own judgment he considered that it was arguable that the delay was excessive.

16. I have carefully considered the legal principles identified and acted upon in the case of *Mobin* and find that the facts of this case can easily be distinguished from those recited in that decision. Unlike in *Mobin* the circumstances of this case do not demonstrate any pressing social needs on the applicant's part who was legally in employment, living with his spouse with no limitation as to the right to remain in the country. His application was being dealt with in an identified time frame. There was no urgency such that would require an order of mandamus directed to the Minister to deal with this case within time limits identified by Edwards J. in *Mobin*. The facts of this case are therefore clearly distinguishable from the line of authority relied on in being *Phillips v. The Medical Council* [1992] I.L.R.M. 469, *Helen Ó Murchú v. The Registrar of Companies and the Minister for Industry and Commerce* [1988] I.R. 112 and *Halowane v. The Minister for Justice, Equality and Law Reform* [2008] I.E.H.C. 130. In *Phillips* the delay in registration was deemed to have prejudicial consequences for the applicant and where the decision making bodies were under a statutory duty to consider an application for registration. The facts of *Ó Murchú* relate to the difficulty or inability in providing company registration papers in the first official language and where in the circumstances O'Hanlon J. found it appropriate to issue judicial proceedings by way of mandamus. These cases are not on examination of any assistance in establishing the principle that it was reasonable or necessary to institute proceedings in this case.

17. The questions posed by Edwards J in *Mobin* after he had reviewed the previous decisions on administrative delay were first, if there had been a delay and secondly, whether the delay was so unreasonable or unconscionable as to constitute a breach of the applicants' fundamental rights to constitutional justice, his right not to be subjected to degrading treatment under Article 3 of the European Convention on Human Rights and Fundamental Freedoms, and the rights under Article 41 of the Constitution and Article 8 of the aforementioned Convention. While I have reservations as to whether an applicant for citizenship can be said to enjoy personal rights under Article 41 before he has been granted the privilege which is in the absolute discretion of the Minister in the exercise of his statutory powers and in his inherent powers vested in his role as a minister of the Government I note nevertheless, that Edwards J. placed the bar for unreasonable and unconscionable delay at a high level indeed.

18. He considered that the following were relevant considerations:

1. The period in question;
2. The complexity of the issues to be considered;
3. The amount of information to be gathered and the extent of enquiries to be made;
4. The reasons advanced for the time taken; and
5. The likely prejudice to the applicant of account of delay.

19. The applicant was informed from the first opportunity that there would be a delay in dealing with his application. This was subsequently explained further. No valid reason was advanced for this applicant to demand / require / insist on the consideration of his application before the identified period. The Minister was never informed of any special or pressing circumstances requiring an earlier consideration. It is highly unlikely that the applicant would have been able to identify any such circumstances. I am therefore driven to conclude that the act of the applicant in seeking to compel the Minister is evidence that he considered the granting of naturalisation as an absolute right rather than a privilege subject to policy considerations in the interest of the common good.

20. The Minister has a great number of applications for naturalisation which must be individually considered and investigated. There is no question of accepting the contents of assertions made in an application form at face value or of establishing that all the boxes are ticked off. The marriage relied upon must be *bona fide* and one recognised in Irish law, and the married couple must be living together within that marriage. The applicant must be of good character which requires at least a garda clearance and perhaps some investigation into the applicant's compliance with the tax laws of the State. It is plain that a degree of investigation is required and then provided that the Minister does not act capriciously or arbitrarily, he determines in his discretion whether to grant a certificate of naturalisation.

21. I do not believe that in the absence of cogent evidence of arbitrary or capricious behaviour in the consideration of applications of the nature in question it is appropriate for a court to direct a Minister to carry out his discretionary functions within any particular time limit. It would seem to me to encroach on the constitutionally recognised and protected doctrine of the separation of powers between executive and judicial functions. It does not seem appropriate in a case such as this that it is appropriate for the court to determine what constitutes a reasonable period within which the Minister should perform his functions. The Irish Nationality and Citizenship Acts 1956-2004 at S. 15 uses the wording "*The Minister may, in his or her absolute discretion, grant a certificate of naturalisation*". These words have a meaning which would be reduced to an obligation to grant if the Minister were in ordinary circumstances to be directed by the Court to consider the application within a period determined by the Court.

22. I am not satisfied that any evidence of unreasonable and unconscionable delay has been established in this case nor has the applicant established any prejudice. I am not satisfied that it was reasonable that the applicant should have instituted proceedings in the manner as occurred in this case or for the reliefs sought.

23. In the circumstances the applicant fails in his application for an order for costs when the proceedings were withdrawn on the basis of the applicant's own estimation that when he obtained his certificate of naturalisation, the proceedings were moot.

24. While all persons in this State enjoy fundamental rights of access to the courts that right is not unqualified and is subject to imposition of a penalty of costs incurred by the responding party if those proceedings have been inappropriately commenced. However I have in my discretion decided to make no order for costs in favour of the Minister as this is possibly the first time that the issue of costs in such cases has been tested. It may be appropriate in subsequent cases arising from the same or similar facts that an order for costs against the applicant and in favour of the Minister should appropriately be made.