THE HIGH COURT

JUDICIAL REVIEW

[2024] IEHC 105

[Record No. 2023/56JR]

BETWEEN

M

APPLICANT

AND

THE MINISTER FOR JUSTICE

RESPONDENT

JUDGMENT of Ms Justice Miriam O'Regan delivered on 23 February 2024

Issues

1. The applicant is a South African national who came to the State in 2021 and has resided here since. On 1 August 2017 the applicant made an application for a certificate of naturalisation to the respondent which was refused on 28 October 2022. The within proceedings seek to quash the said decision on the basis that: -

a. it is inconsistent, irrational and disproportionate;

b. inadequate reasons were afforded.

In addition, the applicant is seeking a declaration that the Minister only has been expressly authorised to make the decision under s.15 of the Irish Nationality and Citizenship Act 1956 as amended ('the Act'). It is common case that the decision was ultimately made by an officer within the Department of Justice, of Principal Officer rank, who works within established procedures. In this regard if the decision had been to grant a certificate of naturalisation the decision would be made by an Assistant Principal Officer.

Background

2. The applicant has worked continuously in the State since early 2021 with the Irish Wheelchair Association.

3. Initially the applicant made an application for refugee status which was refused in March 2009 and following an appeal such refusal was upheld in October 2009. She made an application for long term residency on 24 May 2009 and the application was refused. A second application for long-term residency was made on 8 December 2012 and this was also refused. On 21 of February 2019 an application for long term residency was successful and she was granted same for a period of five years from 21 July 2022.

4. The applicant made an initial application for certificate for naturalisation on 24 August 2006 which was refused in 2009. A second such application was made on 24 July 2014 which was refused on 20 February 2017. Accordingly, the impugned decision represents the third refusal of a certificate for naturalisation. Such refusals were based upon the Minister not being satisfied that the applicant was of good character.

5. In the instant recommendation to refuse the application for a certificate of naturalisation having recorded various convictions and explanations furnished by the applicant it is stated: -

> "The relevant information related to non-compliance by the applicant with the laws of the State is attached to the submission. I have considered the case in its entirety, including the report provided by An Garda Síochána, the explanations provided by the applicant and her solicitor in relation to the offences and the fact that the applicant has been residing in the State since 2001 and in fulltime employment with the Irish Wheelchair Association.
>
> An examination of the application confirms that the applicant does not meet all of the statutory conditions contained in s.15. I am not satisfied that the applicant satisfies the criteria provided in s.15(1)(b) of the 1956 Act on the basis of not satisfying the good character criterion due to her disregard for the Road Traffic Act in 2007, 2012 and 2021, in particular her offence of careless driving which resulted in a conviction and fine of €300 on 08 April 2021."

6. On 15 February 2007 the applicant had been convicted of an offence under s.49(4) and 6(a) of the Road Traffic Act 1961 (drink driving). On 6 July 2012 the applicant was convicted of offences under s.42 and s.102 of the Road Traffic Act 1961 (driving without an L plate and without an accompanied full licensed driver). On 8 April 2021 the applicant was convicted of careless driving (on 15 June 2019 she was involved in an accident).

7. Insofar as the representation/explanations of the applicant for the offences aforesaid in a letter of 20 October 2017 the applicant's solicitors wrote to the respondent and stated: -

> "Our client has instructed us that she was going through a very challenging period of her life between 2007 and 2012 (an end to her marriage and a divorce) and all the stress she was going through distracted her to become a stranger to even herself since the offences."

8. Insofar as the 2021 conviction is concerned the applicant wrote to the respondent identifying that she had travelled to visit her sister in County Cavan and while getting ready for bed she realised she had left her medication in Dublin. She stated: -

> "I then decided to drive back to Dublin that very same night. I drove until Dunboyne, County Meath. I am unsure what went wrong at this point. I heard a bang and I tried to stop the car. I was confused about what had just happened. I spoke to the toll plaza workers who informed me that I had been involved in an accident. I am unsure if I fell asleep from fatigue or if a significant delay in my medication had an impact on this, as I would normally take my medication very routinely."

9. Both the solicitor's explanation and the applicant's explanation are recorded in the impugned decision.

10. In respect of the second application of 24 July 2014 prior to the refusal on 20 February 2017, in May 2015 there was a recommendation made to personnel within the department to the effect: -

> "Given the nature of the offences and the fact that the applicant has come to further adverse garda attention since the previous submission, I would recommend that the Minister defer making a decision on granting a certificate of naturalisation for a period of twelve months to allow the applicant to demonstrate a longer period without any further incidents or offences."

General

11. A number of oral submissions were made on behalf of the applicant before the Court which were neither particularised in the statement of grounds nor indeed referenced in prior written submissions. Accordingly, they will not be dealt with in this judgment.

12. As the arguments presented and jurisprudence relied on overlap in respect of the issues of fair procedure and reasons these two issues will be dealt with together hereunder. The issue of whether or not the Minister should have personally made the decision impugned, will be dealt with separately.

Fair procedure/reasons

Jurisprudence

13. In *Hussain v Minister for Justice* [2011] IEHC 171 Hogan J in the High Court, dealing with a judicial review application to set aside a decision of the Minister under s.15 of the 1956 Act (where no charges were actually preferred against the applicant) at para. 14 *et seq* dealt with the concept of good character under s.15. He noted that there is no settled or fixed interpretation of the words "good character" and therefore the words would take their meaning according to the relevant statutory context and general objectives of the legislation. Naturalisation might be granted to persons who have resided in the State for an appreciable period of time and who intend to do so in the future. It was further noted that an applicant must make a declaration of fidelity to the nation and loyalty to the State. Hogan J suggested

that such a person must be prepared to make a public commitment that they will discharge ordinary civic duties and responsibilities. Against the above background the words “good character” must be understood. Viewed in this statutory context it is said that the character and conduct must measure up to reasonable standards of civic responsibility as gauged by reference to contemporary values. Exalted standards of behaviour would not be realistic. The Court noted that s.15 provides a purely gratuitous conferring of a privilege in exercise of the sovereign authority of the State.

At para. 19 Hogan J noted that the judge’s conclusion must be *bona fide* held and factually sustainable and not unreasonable.

14. In *GKN v The Minister for Justice* [2014] IEHC 478 Mac Eochaidh J cited the decision of Lang J in *Hiri v Secretary of State for the Home Department* [2014] ETHIC 256 to the effect that whether an applicant for naturalisation meets the requirement of good character, it is necessary for the defendant to consider all aspects of the applicant's character. This involves a much wider considerations than as to whether or not the applicant has previous criminal convictions. A party may be assessed as not having good character without a criminal conviction. The fact that a person has a criminal conviction does not necessarily deprive an applicant of being a person of good character. Criminal convictions are relevant, but their significance would vary greatly depending on the nature of the offence, the length of time which has elapsed and any pattern of repeat offending. The severity of the sentence within the sentencing range may also be a valuable indicator of the gravity of the offending. There has to be a comprehensive assessment of each applicant's character, as an individual, therefore any policy cannot be applied rigidly and inflexibly. Mac Eochaidh J was also satisfied that facts and mitigating circumstances must be involved in the relevant assessment.

15. In *Mallak v the Minister for Justice* [2012] 3 IR 297 Fennelly J in the Supreme Court at para. 52 indicated that the fact that if a person is applying for an important privilege for which he has no legal right to compel the State to grant him does not mean he enjoys inferior legal protection when pursuing his application.

16. In *Zaigham v Minister for Justice* [2017] IEHC 630 Faherty J in the High Court dealing with a similar type application as presents before this Court indicated at para. 32 thereof by way of a preliminary observation "that there is no question in this case of the Court assessing the decision from a proportionality standpoint since what is in issue is the conferring of a privilege and not any right to which the applicant lays claim, albeit that the respondent's decision must accord with the rule of law".

17. In *Kareem v Minister for Justice* [2018] IEHC 200 Keane J in the High Court at para. 29 expressed the view that there was no right of the applicant capable of attracting the principle of proportionality in the context of a s.15 application.

18. *AA v The Minister for Justice* [2019] IECA 22 discussed the decision of the Supreme Court in *AP v Minister for Justice* [2019] IESC 47. At para. 30 of her judgment Baker J expressed the view that the Supreme Court endorsed a general proposition that sufficient and intelligible reasons must be given, capable of being understood by the recipient and flow from the facts before the decisionmaker of which the recipient is aware. Reasons would be insufficient where the underlying rationale was not known. At para. 40 the Court of Appeal further quoted from *AP* aforesaid in relation to a proper opportunity to participate. Para. 4.8 of *AP* identified in this regard that an applicant must have an entitlement to make representations as to why such a certificate should be granted to him and point to reasons of sufficient detail to meet the obligations of fairness. At para. 48 the Court of Appeal was

persuaded by the decision of O'Donnell in *AP* aforesaid to the effect that it may, in certain circumstances, be sufficient if an appellant knows "the areas of concern which could result in the application being refused."

In *AP* O'Donnell J noted that citizenship confers the entire range of constitutional rights and imposes obligations on the State.

19. In *Talla v Minister for Justice* [2020] IECA 135 Haughton J, when dealing with the refusal by the High Court to set aside the decision to refuse the applicant a certificate of naturalisation, noted that the appellant had been found guilty of speeding on one occasion and driving without insurance on another. At para. 36 in a discussion on "good character" he noted that in *Zaigham* aforesaid Faherty J was satisfied that not all road traffic offences would debar an application under s.15. The Court of Appeal indicated that minor offences do not necessarily reflect on a person's good character particularly if balanced against other matters in their favour. It was held that it is the case that where there are road traffic offences it is the nature of those offences and the circumstances in which they were committed that will demand more attention. The Court quoted from para. 35 of *Hiri* aforesaid which was adopted by the Court of Appeal to the effect that criminal convictions are relevant in the assessment of character but likely to vary greatly depending on the nature of the offence and the length of time which has elapsed and any mitigating factors. At para. 39 the Court of Appeal was satisfied that if the Minister is relying on the nature of road traffic offences to determine that a person is not of good character, the Minister must have an understanding of the nature of the offences. At para. 43 it was held that the Minister was entitled to have regard to what would otherwise be "spent convictions in considering good character for the purposes of assessing an application for a naturalisation certificate." At para. 34 it was noted that there was ample authority for the proposition that it is open to the Minister, in exercise of his

absolute discretion, to determine that a person is not of good character by reason of the commission of offences under the Road Traffic Acts, particularly where the offences are at the most serious end of the spectrum such as driving without insurance.

20. In *MNN v Minister for Justice* [2020] IECA 187 the matter came before Power J in the Court of Appeal by way of an appeal from the High Court order granting *certiorari* of refusal of a s.15 certificate on the grounds of lacking good character. The Court noted that the Minister must act within the rule of law although it is open to the Minister to consider offences under the Road Traffic Acts provided more than mere reference to such offences is made. It was further noted that the "absolute power" conferred on the Minister in s.15 does not refer to the "good character requirement" as assessed by an ordinary standard of reasonableness, fair proceedings and natural justice. At para. 52 the Court set out a summary of the principles, from the case law, to the effect that in describing the Minister's discretion as absolute the Oireachtas was emphasising that the certificate involved the conferring of a privilege. This did not mean that the applicant enjoyed an inferior legal protection when pursuing such an application. Such absolute discretion arises only if the applicant is of good character. The Minister will act within the rule of law and the good character assessment must be against reasonable standards of civic responsibility gauged by reference to contemporary values. It was also indicated that the connection between character and criminality can only be established when the Minister has all relevant information including context and mitigating factors in connection with the crime. At para. 80 it was indicated that something more than a mere reference to the existence of RTA offences is required if reliance is to be placed on them including that a person is not of good character. In reference to *Talla* it was stated that the nature of the offence (lack of insurance) which covered days rather than months is said to fall towards the less serious end of the spectrum. At para. 81 it was said that the decision referencing the nature of the offences does not identify the Minister's essential

rationale for regarding the applicant as not being of good character. There was no analysis as to why the nature of the two offences which were committed so long ago should lead to the conclusion that he was not of good character.

21. In *Demache v the Minister for Justice* [2022] 1 IR 669 it was noted at para. 68 that the control and entry or presence, and therefore of removal, of non-Irish nationals is an aspect of the executive power of the State.

Submissions

22. The applicant argues that there was delay in making the decision in this matter however no prejudice to the applicant has been identified.

23. In oral submissions it was indicated that the decision maker failed to take into account the periods of time which the applicant was clear of any offence for example the period from July 2019 to the date of the decision. In this regard there is a record of the timeline of the offences therefore the applicant hasn't demonstrated that the dates for which no offence was committed was not in fact taken into account.

24. The applicant argues that the decision was disproportionate. However, the respondent relies on *Kareen* and *Zaigham* aforesaid and the fact that there is no identification of any right of the applicant which has allegedly been interfered with. It appears to me that in the circumstances the applicant cannot succeed under this heading.

25. The applicant argues that the older convictions should not remain relevant consistent with the Minister's recommendation in May 2015 to defer an assessment to allow the applicant to demonstrate a period free from offences. The deferral however does not appear

to have been implemented and in any event the application was refused on 20 February 2017 without challenge by the Applicant. The jurisprudence herein before recited supports the proposition that even old road traffic offences might be considered under the heading of an assessment of good character, therefore there is no authority to suggest after a given period old road traffic offences are not to be considered.

26. It is stated on behalf of the applicant that the decision does not flow from the evidence before the Minister. However, I am satisfied that referencing all three convictions in particular that of 8 April 2021, in finding that the applicant had disregard for the Road Traffic Acts 2007, 2012 and 2021 does flow from the evidence.
The fact that the dates of the convictions were set out is in my view ample evidence that the Minister was aware of the date of the offences at the date of making of the decision.

27. Insofar as it is complained that the decision doesn't identify how serious the various offences were, nevertheless the offences were identified together with the penalties imposed which were minor in the scheme of things, however, it is noted that the applicant's general disregard for the Road Traffic Acts informed the Minister's decision.

28. Insofar as it is argued that there was no comprehensive assessment, the reasons were in my view sufficient, intelligible, capable of being understood by the applicant and flow from the facts as aforesaid. The underlying rationale is clear.

29. The applicant argues that she was granted long term residency in Ireland for a period of five years from 21 July 2022. Her prior applications for long term residency of 2007 and 2012 respectively were refused on the basis of good character therefore, it is argued, that the

Minister has acted inconsistently in finding that the applicant is entitled to long term residency based on good character but, on the same facts the Minister has decided the applicant is not entitled to a certificate for naturalisation based on a want of good character. The respondent argues that a higher standard is required in the naturalisation process, the long-term residency status is limited for a period of five years unlike a citizenship process and the grant of long-term residency can be revoked.
The applicant counters that there is no authority relied upon by the respondent to demonstrate that there might be different meanings of "good character".

In paras. 14 and 15 of *Hussain* aforesaid Hogan J found that there was no settled or fixed interpretation of "good character." He stated that the words would take their meaning according to the relevant statutory context and general objects of the legislation. This does suggest that depending upon the context in which the words appear and the objects of the particular legislation involved the meaning of good character might vary.

Hogan J further noted that because of the necessity to take a declaration of fidelity and loyalty to the State such a person must be prepared to make a public commitment that they will discharge ordinary civic duties and responsibilities. It was not irrational of the Minister to review repeat offending albeit over a protracted period of time as not being a discharge of ordinary civic duties and responsibilities. In the circumstances in the context of the within legislation and notwithstanding the grant to the applicant of a long-term residence card in July 2022 it was open to the Minister to view that the applicant was not of good character within the meaning and application of s.15.

30. The applicant has stated that the respondent failed to put to the applicant the fact that prior convictions would be relevant in the respondent's assessment. I am satisfied that, even

assuming this argument has been properly pleaded, that the applicant was aware from the two prior refusals of naturalisation prior convictions were likely to have an impact on the decision together with her explanation or excuse in respect of the two earlier convictions quoted in the decision.

Only the Minister can make or expressly authorise a decision

31. In *WT & Ors. v The Minister for Justice* [2015] IESC 73 McMenamin J in the Supreme Court considered the application of what was known as the Carltona Principle. The Court identified that this principle has been applied in Irish courts in the past for example *Tang* [1996] 2 ILRM 46 and *Devanney* [1998] 1 ILRM 81. In *Devanney* aforesaid Denham J described the principle as: -

> "The core of the Carltona Principle is that as a matter of statutory construction responsible officials may exercise some of the statutory powers of a minister. The officials would not consult him but may yet recite words such as 'I am directed by the Minister'. They are the alter ego of the Minister. They exercise devolved power" (para 5).

McMenamin J noted in *WT* that when the principle became recognised as part of Irish law it was characterised as being a "common law constitutional power." The Court recognised that the principle was capable of being negatived or confined by express statutory provision or by necessary implication. In such a case, very clear statutory terminology would be required to establish that a statute clearly conveys that the Carltona Principle is not to be recognised or clearly implies such a conclusion.

"It follows that a Court will be very slow to read into a statute any such implicit limitation; providing that the devolved power does not conflict with the duties of an official in the discharge of their specific functions, and that the decision in question is suitable to

their grading and experience."

Such a principle is now seen as a judicial recognition of the complexity of the administration of modern states, where it would be impracticable, that a Minister, as political head of a department, could personally take every decision (para 3).

32. As to the scope of the principle a distinction is made when a decisionmaker is a statutory office holder when different considerations arise and the Carltona principle does not apply to a statutory office holder but does apply to a civil servant assigned specific duties under statue operating a devolved power vested in the Minister.

33. In support of a disapplication of the Carltona principle the applicant relies on:-

a. the Minister has on occasion made decisions herself;
b. the reference to "absolute discretion" in s.15 establishes a clear requirement that the Minister must make the decision herself;
c. previously citizenship was secured by private act of parliament
d. there is no appeal within the department to a naturalisation refusal;
e. naturalisation is an executive decision and a key constitutional connecting factor between an individual and the State.

34. The respondent counters: -

a. deportation orders and leave to remain decisions also involve the exercise of sovereign authority without a right of appeal. In the case of *Lang* aforesaid the Supreme Court was of the view that the Carltona Principle applied to an application for leave to remain in the State and *WT* involved a deportation order nevertheless under such circumstances the Carltona Principle was held to apply by the Supreme Court;

b. the clear wording identified in *WT* by McMenamin J is absent;
c. the Court should be very slow to read into a statute an implicit limitation of the principle as per para. 5 of *WT*;
d. contrary intention is to be found within the legislation rather than outside of same;
e. the practicalities of the Minister dealing with all such applications is relevant (para. 3 of *WT*; para. 28 of the Affidavit of Darragh Brennan of 8 June 2023)

35. In circumstances where the principle applies both in relation to applications for leave to remain and deportation orders without an internal right of appeal the lack of a right of appeal in the instant circumstances is not dispositive of a disapplication of the principle. Furthermore referring to discretion as absolute doesn't incorporate the clear and precise wording identified by McMenamin J in *WT*.
The history of citizenship is not relevant as it is not within the legislation itself.
Deportation Orders and leave to remain applications also engage fundamental features of democracy of the State to control its borders. The fact that the Minister has chosen to make a s.15 decision on occasion does not amount to an obligation to do so, nor, a disapplication of the principle.

36. In the circumstances I am satisfied that there is neither a clearly expressed nor a clearly implied restriction or prohibition of the application of the Carltona Principle in the 2015 Act.

37. For the reasons above the application of the applicant is refused.

38. As this judgment is being delivered electronically, with regards to the issue of costs, as the respondent has been entirely successful, it is my provisional view that she should be entitled to her costs, to be adjudicated in default of agreement. As the parties have not had an opportunity to make submissions as to costs, I shall allow the parties the opportunity to make written submissions of not more than 1,000 words within 14 days of this judgment being delivered should they disagree with the order proposed. In default of such submissions being filed, the proposed order will be made.