THE COURT OF APPEAL

Court of Appeal Record Number: 2022/107, 2022/108

High Court Record Number: 2020/881 JR

Neutral Citation Number [2023] IECA 227

Costello J.

Faherty J.

Haughton J.

BETWEEN/

S.R.

APPELLANT/APPLICANT

-AND-

THE MINISTER FOR JUSTICE

RESPONDENT

-AND-

L.A.

APPELLANT/APPLICANT

-AND-

THE MINISTER FOR JUSTICE

RESPONDENT

L.A.

APPLICANT/APPELLANT

- AND –

MINISTER FOR JUSTICE

RESPONDENT

CONCURRING JUDGMENT of Mr. Justice Haughton delivered on the 3rd day of October 2023

1. In this judgment I set out my principal reasons for concurring with the comprehensive judgment delivered herein by Ms. Justice Faherty. I respectfully do not agree with the judgment delivered herein by Ms. Justice Costello.

2. These appeals again highlight the danger for administrative decision-makers of adopting boiler-plate language in stating that all relevant material has been considered. To quote fully the *dictum* O'Donnell C.J. in *Balz v. An Bord Pleanála* [2019] IESC 90 referred to by Faherty J. in her judgment: –

> "[46]. It is unsettling, for example, that when an issue arises where it is suggested that the Inspector (and therefore the Board) has not given consideration to a particular matter, it should be met by the bare response that such consideration was given (for a limited purpose) and "nothing has been proven to the contrary". Similarly, while the introductory statement in the Board's decision that it has considered everything it was obliged to consider, and nothing it was not permitted to consider, may charitably be dismissed as little more than administrative throat-clearing before proceeding to the substantive decision, it has an unfortunate tone, at once defensive and circular. If

language is adopted to provide a carapace for the decision which makes it resistant to legal challenge, it may have the less desirable consequence of also repelling the understanding and comprehension which should be the object of any decision."

3. Albeit that *Balz* was a planning judicial review under the Planning and Development Act, 2000, it has resonance with the present appeals. It concerned Wind Energy Development Guidelines 2006 which the appellant, in a submission to the Board, had argued were scientifically out of date and no longer widely accepted in so far as they concerned wind turbine sound emissions. The Inspector's report on the proposed development, which was adopted by the Board, effectively ignored these submissions on the basis that the Board was obligated to have regard to the 2006 Guidelines and whether they were out of date was not a relevant planning consideration. However the Supreme Court, overturning my own decision in the High Court, held that the Board had an obligation to engage with the submissions, and it was not apparent from the language used in its decision, in which it adopted the Inspector's report, that it had done so.

4. I respectfully do not agree with Costello J. at para. 109 of her judgment that the remarks of O'Donnell C.J. in *Balz* are to be confined on the basis that the Board was simply attempting to make its decision resistant to legal challenge. In my view he was voicing a wider criticism of the use of formulaic words to indicate that relevant materials have been taken into account when there is nothing else in the decision that shows that to be the case.

5. In the present appeals under para. 3.7 of the Special Scheme the Minister had an obligation to consider whether the applicants "have been of good character and conduct prior to your arrival and since your arrival in the State", and to do so, as Faherty J. succinctly puts it, "in the round". As I said in *Talla v. Minister for Justice and Equality* [2020] IECA 135, writing for this court in the context of a naturalisation application –

"[37]…The Minister in determining whether a person is of 'good character' must undertake

a comprehensive assessment of each applicant's character as an individual. While criminal convictions, or the commission of offences, are relevant to this enquiry and assessment, it is wider in scope that that, and the outline facts and any mitigating circumstances, the period of time that has elapsed since the last conviction, and other factors that may be relevant to character, must all be taken into consideration."

6. I do not agree with the submission of counsel for the respondent, which finds favour with Costello J., in her judgement, that the comparison with naturalisation jurisprudence is, in this respect, inapt. It is of course true that the Special Scheme is not made pursuant to a statutory power, and does not deal with constitutional or Convention rights, and is a purely administrative scheme made pursuant the executive power of the State to control entry and residency. But, while it confers no right to residency on applicants, and the onus is on them to show eligibility, applicants nonetheless have the right to have their applications duly considered and decided, to be advised of the reason(s) for ineligibility or refusal, and on request to have a review of the decision undertaken that has regard to additional documentary evidence submitted. There is also no question but that such review decisions are subject to judicial review.

7. In this regard it is significant that the form for requesting review by the Minister expressly permits the inclusion of "new information" and requires that "[Y]ou should provide documentary evidence with this application to back up your reason." It is, as Costello J. says at para. 79 of her judgment, implicit that the reviewer will consider the new material where the is additional documentary evidence. While this does not make it a *de novo* assessment, in the sense that the reviewer is not simply reassessing from scratch the material that was before the first decision maker and making a fresh decision on that, it does have a new element. I cannot see how the reviewer can properly carry out the task of review without undertaking full consideration of the material accompanying the original application along with, and in light of, the new material (as well as any information obtained through "ancillary checks" undertaken

by INIS). The fact that the Scheme is non-statutory or may be characterised as *ex gratia* does not absolve the Minister from the obligation on review to carefully consider all the material in the light of the new information, and to do so "in the round".

8. I also respectfully disagree with a key part of the judgment of Costello J. (paras. 84-88) where she compares para. 3.7 to para. 3.6 in the Scheme, which requires that applicants have "no adverse criminal record in the State or any other jurisdiction", and failure to disclose such criminal convictions in any jurisdiction renders an application ineligible.

9. Firstly, para.3.6 is a "black and white" eligibility criterion which is absolute in its terms, and if there is a conviction the applicant cannot be eligible for residency under the Scheme. However para. 3.7 is very differently worded. It requires that the applicant "have been of good character and conduct prior to your arrival and since your arrival in the State". It requires the Minister to make a moral judgment, and is not absolutist in its terms. While one person might regard particular behaviour as making a person "not of good character" or "not to have been of good conduct", it will not necessarily be so regarded by another.

10. Secondly, while it is the case (as Costello J. points out) that s. 15 of the Irish Nationality and Citizenship Act, 1956 (as amended) refers only to "good character" as a qualification criterion, I do not agree that an analogy to that section means that in para. 3.7 of the Scheme "good conduct" should be disaggregated from "good character". Equally I cannot agree that a finding of a single example of behaviour that can properly be characterised as not "good conduct" leads to automatic ineligibility such that "the decision maker is not required to conduct a more holistic assessment of the individual's character as the decision maker would if he or she were operating a statutory scheme" (*per* Costello J. at para.88). The Scheme says in para.2 that decisions will be made "solely on the merits", and I do not believe it was intended in para.3.7 to thereby impose on applicants a requirement of perfect conduct. The inclusion of "good character and conduct" together in para. 3.7 suggests that if there is questionable conduct it should be

considered and weighed in the light of the applicant's general character, and it is still open to the decision maker to reach an overall conclusion that an applicant is of "good character" despite such conduct. In my view had the drafters intended a disjunctive effect such that bad conduct on its own would lead to automatic ineligibility this would have been stated expressly, and I believe the fact that clause 3.6 is a separate criterion, and worded the way it is, supports this view.

11. It follows that I cannot accept the respondent's submission that where an applicant has previously been found to have entered into a marriage of convenience, or proffered false documentation to support a residency application, they cannot complain about a later finding of bad character or conduct. I agree with Faherty J. that such an interpretation would lead to automatic refusals under the Scheme, without all the evidence in relation to character being consider "in the round", which would not be correct and would justify an order quashing the decision.

12. I agree with Faherty J. that a "discursive" decision is not required, but the Minister must consider and engage with the merits of application and it must be apparent on the face of the decision, not simply through the use of boiler-plate language, that this took place.

13. Similarly at the review stage the Minister is required to engage with the new material and arguments and to undertake the requisite weighing exercise in respect of the merits under para. 3.7. The Minister is then required to demonstrate in the review decision that this occurred.

14. I agree with Faherty J.'s conclusion that because of the wording of the Review Decisions the court cannot be satisfied that that exercise took place. The Review Decisions state at the outset that all information and documentation has been considered, but this statement is put in doubt by the penultimate paragraph in each case where it is stated: –

> "In arriving at this Scheme refusal decision, I found that the appropriate procedures were applied and the decision maker applied the correct interpretation of the eligibility criteria as

detailed in [the Scheme] which is available on the INIS website".

This suggests that the reviewer focussed on due process by the first decision-maker rather than engaging with the new material and undertaking a weighing exercise "in the round". While it is clear that the reviewer refused the reviews by reference to para.3.7 of the Scheme, the Review Decisions are not, to use the words of Faherty J., "sufficiently clear and unambiguous such that the Court could determine that the review decision-maker was correct to conclude that the applicants had not met the criterion in para. 3.7 of the Scheme", and "[T]here arises, therefore, from the face of the Review Decisions uncertainty as to whether the review decision-maker engaged with the *merits* (whatever they may be) of the applicants' respective review submissions".

15. I too would allow these appeals and remit the applicants' respective review applications to the Minister for re-consideration. I also agree with the costs order proposed by Faherty J.