[2013] SC (Bda) 46 Civ (16 May 2013)

IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION

2013: No. 66

IN THE MATTER OF ORDER 53 OF THE RULES OF THE SUPREME COURT

AND IN THE MATTER OF A DECISION TO FAIL TO GIVE REASONS FOR A REFUSAL TO GRANT NATURALISATION ON OR ABOUT THE 19 DECEMBER 2012

JOHN STEVENS

Applicant

-v-

THE GOVERNOR

First Respondent

-and-

THE DEPUTY GOVERNOR

Second Respondent

EX TEMPORE RULING
(in Chambers)

Date of hearing: May 16, 2013

Mr. Peter Sanderson, Wakefield Quin, for the Applicant
Mr. Michael Taylor, Attorney-General's Chambers, for the Respondent

Introductory

1. This is an application by the Applicant in a judicial review application for the costs of the action which was brought to an end voluntarily by the Applicant when, prior to the hearing of an application to set aside the grant of leave on April 25, 2013, reasons were given for the decision to refuse the Applicant naturalisation under the British Nationality Act.

2. The application has been opposed on the grounds that it was unnecessary or unreasonable for the Applicant to incur the costs of commencing the present proceedings because, in part, it is suggested that reasons were never refused. Alternatively it is suggested that the reasons which were given, which derive from the provisions of the British Nationality Act 1981, ought to have been obvious to the Applicant's Bermudian attorneys. And for that further reason it is said that costs should be refused.

The Application

3. The application was filed on March 14, 2013 and it had the present history to it. The Applicant received a letter from the Ministry of National Security Department of Border Control dated December 19, 2012 which stated as follows:

> "*I refer to your application for naturalization as a British Overseas Territories citizen under the provisions of section 18(2) of the British Nationality Act 1981.*
>
> *The Deputy Governor's Office has considered your application for Naturalization and has concluded that you are not currently eligible to apply to be naturalized as a British Overseas Territories Citizen. Therefore your application for naturalization has been refused.*
>
> *Under the provisions of section 44(2) of the British Nationality Act 1981, The Secretary for State, a Governor or a Lieutenant-Governor, as the case may be, shall not be required to assign any reason for the grant or refusal of any application under this Act the decision on which is at his discretion. And the decision of the Secretary of State or a Governor or a Lieutenant-Governor on any such application shall not be subject to appeal to or review in any court.*
>
> *Additionally please note that according to the Government Fees Regulations 2012 the application fee of $87(Naturalization) will be refunded in due course.*"

4. The Applicant responded to that letter on December 21, 2012 through his attorneys Wakefield Quin, who wrote in material part as follows:

> "*Please be advised that s.44(2) of the British Nationality Act, which you cite saying that the Deputy Governor is not required to give reasons for*

decision, is no longer in effect. Please refer to s.7(1) of the Nationality, Immigration and Asylum Act 2002. It follows that in accordance with principles of natural justice and procedural fairness Mr. Stevens should be entitled to be informed of any problem areas in his application so that he can address them, and to be given reasons for the refusal to grant naturalisation.

We therefore ask the Deputy Governor to reconsider the response to enable Mr. Stevens to address any potential problem areas and if ultimately still intends to refuse the application to give reasons for doing so.

We look forward to receiving a response forthwith given the on-going delay and a reasoned response to the application."

5. The response to that request for reasons came in an email from the Department dated January 25, 2013. That, it must be said, was by way of response to a chasing email sent 5 minutes earlier at 11.10 am from the Applicant's counsel:

> "*We last wrote to you in December in response to your letter that Mr. Stevens' application for naturalisation was refused. You said that there was no requirement to give reasons. I replied, providing you with the current UK statute, showing that the section stating that no reasons are required has been repealed. An applicant is entitled to know the potential reasons for dismissing an application so that he can address them before a final decision is made.*
>
> *<u>We look forward to hearing from you so as to avoid costly judicial review proceedings in order to ascertain the reasons for refusal.</u>*" [emphasis added]

6. The prompt response was a holding one, which simply said:

> "*The Department of Immigration are the Administrators on behalf of the Deputy Governor's Office for Naturalisation applications. I will need to consult with them on this matter and advise you accordingly.*"

7. The Applicant waited for approximately one month before sending the following chasing letter on February 22, 2013 which contained the following crucial sentence:

> "*If we do not receive a full response by Friday 1 March 2013, we are instructed to commence judicial review proceedings on the grounds that Mr. Stevens has been denied procedural fairness/natural justice, in that he has been denied an opportunity to respond to problem areas in the application and/or been denied the benefit of reasons for refusal.*"

8. March 1, 2013 came and went without any response to a letter which was headed in capital letters and underlined on page 1: "***<u>LETTER BEFORE ACTION</u>***".

9. On March 4, 2013 the application was filed. The application was twofold. It sought:

"*1. An order quashing the decision to refuse naturalisation and mandating the Respondents to reconsider the application giving the Applicant an opportunity to respond to any problem areas*" [and]

2. Alternatively, an Order mandating the Respondents to give reasons for refusing the application."

10. On April 22, 2013 the Deputy Governor's Office sent a letter to the Applicant's attorneys apologizing for the delay and setting out reasons for the decision. The crucial reasons were set out in the two final paragraphs of the letter:

    "*The application submitted by Mr. Stevens was rejected as he has a spousal letter but it is not indefinite as it has a stated expiry date. This means he is not considered to be free from Immigration restrictions and does not qualify for naturalisation at this time.*

    Mr. Stevens is subject to the immigration laws of Bermuda and will qualify to apply after he has been married to a Bermudian for 10 years immediately preceding the application and when he is considered to have been free from immigration restrictions for the period of 12 months prior to his application. Based on the information submitted it would appear that he can apply after 16 April 2021."

11. As a result of receiving that letter, the Applicant's counsel indicated on the hearing of the Respondent's application to set aside leave (which was issued by the Respondent on April 25, 2013 returnable for that same date) that he was planning to discontinue the matter and was only seeking costs.

Findings: merits of costs application

12. The simple principle applicable to costs is that costs follow the event. In this case it is true that there was partial success in the sense that the impugned decision was not quashed. However, the application was framed in the alternative and so the alternative head of relief, namely the obtaining of reasons, was in fact attained. So it seems to me that the facts of this case fall within the second of the two scenarios that were considered by Simon Brown J in *R-v-Liverpool City Council ex parte Newman et al*, Judgment dated July 13, 1992 where, at page 2 of the transcript in a passage relied upon by Mr. Sanderson, he said as follows:

    "*The position is, however, entirely different where, as here, the discontinuance follows some step which has rendered the challenge no longer necessary, which in other words renders the proceedings academic. That may have been brought about for a number of reasons. If, for instance, it has been brought about because the respondent, recognizing the high likelihood of the challenge against him succeeding has pre-empted his failure in the proceedings by doing that which the challenge is designed to achieve-even if perhaps agreeing to do no more than take a fresh decision-it may well*

be just that he should not merely fail to recover his own costs but indeed pay the applicant's."

13. On the facts of this case it seems to me to be manifestly just that the Respondent should pay the Applicant's costs because the reasons were only supplied after two warning shots across the bows of the Respondents to the effect that judicial review proceedings would be resorted to if the information was not supplied. When the letter before action was sent on February 22, 2013, all that was required to protect the Respondent from any costs exposure was the following: a simple response which sought the Applicant's indulgence for a further period on the grounds that the Respondent was not in fact refusing to supply reasons but was simply still in the process of considering the matter.

14. When a public authority receives a letter, ignores it and the citizen is compelled to incur legal costs in obtaining what the public authority accepts he is entitled to receive, then in my judgment it is contrary to the interests of good administration to punish the innocent citizen and reward the negligent public administrator for failing to extend the simple courtesy of responding to a simple letter.

15. Mr. Taylor advanced the argument that it seemed deplorable that the Applicant, who had an unmeritorious application for naturalisation, should be able to obtain costs merely because of delay. That argument, in my judgment and for the reasons already stated, ignores the reality which the correspondence records: that the Respondent's agents were guilty of more than delay but neglect in the way that they dealt with the Applicant's reasonable requests.

16. The other argument that counsel made was more subtle. That was that, if you looked at the Schedule to the British Nationality Act which was appended to the Applicant's application for judicial review, it was clear from paragraph 7 that he was not in fact eligible under sub-paragraph (c) which provides "that on the date of the application he was not subject under the immigration laws to any restriction on the period for which he might remain in the territory". This was, Mr. Taylor submitted, in essence the legal basis for the factual explanation which was ultimately given by the Respondent on April 22, 2013 for the refusal of the naturalisation application.

17. To say that the Applicant and/or his Bermuda counsel should have realised that this was the reason to is really the judgment of hindsight. In addition, it seems to me to be clear that, although the application is being handled in Bermuda, the British Nationality Act is United Kingdom legislation which does not form part of Bermuda law and on the face of it a Bermuda law firm would not be competent to give legal advice on how a United Kingdom statute is interpreted under United Kingdom law.

18. But even if this were to be wrong, it seems to me that the authorities on giving reasons are sufficiently broad to encompass the situation where an applicant plausibly is unsure of the specific basis on which a decision has been made against him. And in this case, having regard to the history of the application and the initial position taken that there was no obligation to give reasons, in my judgment it was on balance reasonable for the Applicant and his advisers to make enquiries as to what the specific basis of the refusal of his naturalisation application was.

19. And as a matter of Bermuda law it seems to me that this question was ultimately a question of fact because foreign law is a question of fact within this jurisdiction. This is one area where, on the face of it, one cannot presume that foreign law is the same as Bermuda law because one was dealing with an application under a United Kingdom statute which does not appear to me to form part of Bermuda law.

Conclusion

20. So for those reasons I award the Applicant the costs of the present judicial review application including the costs of today's hearing to be taxed if not agreed on the standard basis.

Dated this 16th day of May, 2013 ________________________

IAN R.C. KAWALEY CJ