

THE HIGH COURT

[2022] IEHC 437
Record Number: 2021/212JR

BETWEEN

AMARDEEP SINGH

APPLICANT

- AND -

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

- AND -

Record Number: 2021/225JR

BETWEEN

KATARZYNA BARBARA ZYDEK

APPLICANT

- AND -

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

- AND -

BETWEEN

Record Number 2021/229JR

MUHAMMAD SHAHID ARSHAD

APPLICANT

- AND-

THE MINISTER FOR JUSTICE

RESPONDENT

EX TEMPORE Judgment of Ms. Justice Niamh Hyland delivered 28 June 2022

Introduction

1. I have decided to give one judgment in the three matters that were heard together before me on Thursday 23 June 2022, given that the issues in each case raise the same points requiring determination. However, because the facts in each case differ somewhat, I will deal with the individual facts first and then turn to the common legal issues thrown up by the facts. First, I will deal with the case of Mr. Singh.

Singh

2. Mr. Singh arrived in Ireland on a student visa in 2008. In 2012 he married Ms. Zydek, a Polish national. In May 2013 he was granted an EU Residence Card. On 20 April 2018 he applied for naturalised Irish citizenship. On the 24 August 2018 the Minister wrote to Mr. Singh stating he proposed to grant him a certificate of naturalisation subject to his completion of the application process. On 27 August 2018 Mr. Singh sent outstanding documents and the fee to the Department. On the 3 April 2019 the Minister invited Mr. Singh to a citizenship ceremony on 29 April 2019. On 16 April 2019 the Minister advised Mr. Singh not to attend at an oversubscribed citizenship ceremony scheduled for 29 April 2019. On 26 November 2019 the Department informed Mr. Singh that his application continued to be processed. In January 2020 solicitors wrote on Mr. Singh's behalf, threatening *mandamus* proceedings. That happened again in February 2021 when IMK Solicitors wrote, threatening *mandamus* proceedings.

3. On 22 March 2021, an application for leave to bring the proceedings was made and refused by the High Court. On 15 July 2021 that refusal was overturned by the Court of Appeal, which directed that leave application be brought on notice to the Minister. It was directed that the application for leave be telescoped to be heard with the substantive application and I am therefore dealing both with the leave and the substantive application here.

4. On 29 September 2021 An Garda Síochána arrested Ms. Zydek who was married at that time to Mr. Singh. On 7 October 2021 the Chief State Solicitors Office (“CSSO”) wrote to IMK Solicitors informing them that Mr. Singh and Ms. Zydek were under active investigation by An Garda Síochána and invited Mr. Singh and Ms. Zydek to discontinue the proceedings in the circumstances. On 15 October 2021 IMK Solicitors replied, refusing to discontinue the proceedings. Turning to those letters, the relevant passage for the purposes of this decision is the statement in the letter of 7 October 2021 from the Chief State Solicitor to the effect that the applicants are the subject of an active investigation by An Garda Síochána in relation to immigration offences and that good character is a statutory requirement that must be established before a certificate of naturalisation may be granted to any applicant.

5. On 15 October 2021 there was a reply, where the point is made by IMK Solicitors that none of the information was furnished to them nor to their clients in relation to the active investigation in the course of their dealings with the Department until the 29 September 2021, when Ms. Zydek was arrested and questioned. They make the point also that the investigation was not even advanced to an allegation, not to mention a finding. There is a further point to the effect that the Department does not have an unlimited or indefinite period to investigate the marriage of their clients. There is an acknowledgment that good character is a statutory requirement but note it was their understanding that their cases had been investigated and advanced to the stage of swearing fidelity and that therefore they do not see why character is at question. They identify that, in their view, the delay in processing the application was inordinate.

Statement of Grounds

6. A Statement of Grounds was filed in April 2021. The reliefs are effectively identical to those sought in the other two sets of proceedings, being *Zydek* and *Arshad*. I will

therefore recite the reliefs in these proceedings but will not do so in the other proceedings.

They are as follows:

- 1) An Order of *mandamus* compelling the respondent to complete the process of scheduling a citizenship ceremony and/or any alternative provisions to swear fidelity to the State and to grant the applicant a certificate of naturalisation forthwith or within a reasonable time frame, pursuant to s.15 of the Irish Nationality and Citizenship Act 1956 as amended by s.4 of the Irish Nationality and Citizenship Act 1986 and in accordance with the letter of 24 August 2018 and/or 3 April 2019.
- 2) A declaration that Mr. Singh by way of the doctrine of legitimate expectation and in accordance with the respondent's letter of 24 August 2018 – being the letter from the Minister indicating that she is intending to grant him citizenship - is entitled to be scheduled for a citizenship ceremony and should be granted a certificate of naturalisation pursuant to s.15 and in accordance with the letters as identified above at para. 1.
- 3) In the alternative, an Order of *mandamus* compelling the respondent to make a decision in Mr. Singh's application for a certificate of naturalisation which he applied for in or around March 2018 pursuant to s.15.
- 4) In the alternative, a declaration that Mr. Singh is entitled to a decision being made in his application having applied for a certificate of naturalisation in or around March 2018 and he is entitled to such a decision within a reasonable and expeditious time frame and having regard to the length of time he has been waiting and the respondent's commitment in general that the average application is 6 to 12 months.
- 5) Damages for the loss, stress, inconvenience and expense.

7. An affidavit was sworn by Mr. Singh on 15 March 2021 verifying the facts in the Statement of Grounds. He exhibits the relevant correspondence referred to above. At paragraph 8 he says that he has waited for 36 months approximately since his application was lodged in March 2018. He says he is entitled to a decision in a timely manner and the delay is inordinate and unjustified in all the circumstances.

8. On 3 February 2022 Mr. Murray, assistant principal officer in the citizenship section of the Department of Justice swore a replying affidavit. At paragraph 8, he avers that on 16 April 2019 the respondent was informed by the Operation Vantage team within An Garda Síochána that Mr. Singh was suspected of having contracted a marriage of convenience with Ms. Zydek. At paragraph 10 he refers to the Covid-19 pandemic breaking out in February 2020. He avers that the restrictions resulted in significant delays in dealing with correspondence received in the office and had a negative impact on processing times for all applications. At paragraph 11 it is stated that all applications for naturalised citizenship including that of the applicant were delayed as a result of Covid-19 in June 2020 and 2021. At paragraph 15 he avers that on 31 March 2021 the respondent was informed by An Garda Síochána that they were investigating the immigration status of Mr. Singh under Operation Vantage. Information is given on Operation Vantage and he avers that more than 4,000 applications have been examined and over 3,400 of them have been finalised.

9. In the Statement of Opposition, it is pleaded. *inter alia*. that the respondent has not delayed unduly or at all with regard to the determination of Mr. Singh's application for a certificate of naturalisation. At paragraph 23 it is pleaded that if there is delay, it was justifiable by reference to (i) the operational impact of Covid-19 on the Department of Justice and (ii) the ongoing investigation into the applicant by An Garda Síochána. At paragraph 24 it is pleaded that it would be:

“wholly inappropriate for the Respondent to determine or progress the Applicant’s application for a certificate of naturalisation in circumstances where he remains the subject of an ongoing investigation by An Garda Síochána pertaining to the authenticity of his marriage to Ms. Zydek”.

10. A further affidavit is sworn by Mr. Singh on 21 April 2022 where he says that 48 months have passed since he applied for a certificate of naturalisation and that the respondent does not have an indefinite period within which to investigate and come to a finding in respect of his marriage to Ms. Zydek and his application for a certificate of naturalisation. He avers that he was in a loving marital relationship with Ms. Zydek which ended up in divorce granted on 23 February 2022 on the basis of irreconcilable differences.

Zydek

11. I turn now to the facts in the *Zydek* case. Ms. Zydek is a Polish national born on 2 February 1985. On 1 March 2010 she arrived in the State. On 18 October 2012 she married Mr. Singh, an Indian national whose facts I have dealt with above. On 22 February 2019 she applied for naturalised Irish citizenship. On 8 January 2020 the Minister wrote to the applicant stating she proposed to grant the applicant a certificate of naturalisation subject to her completion of the application process. On 23 February 2021 IMK wrote to the Minister on Ms. Zydek’s behalf, threatening *mandamus* proceedings if the application was not progressed.

12. On 22 March she brought an application for leave to bring judicial review and those proceedings took the same trajectory as in *Singh*, i.e. refusal by the High Court, that refusal being overturned by the Court of Appeal and the leave being directed to be made on notice to the Minister. This is therefore a telescoped hearing.

13. However, I should add that on 29 September 2021 Ms. Zydek was arrested by An Garda Síochána and questioned in relation to her marriage with Mr. Singh. On 7 October

2021 there was the correspondence between the CSSO and IMK Solicitors which I have already referred to above.

14. As with the *Singh* case, a Statement of Grounds appears to have been filed sometime in March 2021, although it is not possible to discern the date from the document. The reliefs sought are effectively identical to those in the *Singh* case, save that the dates of relevant facts are different, as may be seen from the chronology above. There is a grounding affidavit of Ms. Zydek which is in very similar terms to that sworn by Mr. Singh.

15. An affidavit of Mr. Murray is sworn on 3 February 2022. At paragraph 8 Mr. Murray says that the respondent was informed by An Garda Síochána that they were investigating the immigration status of Ms. Zydek's spouse, Mr. Singh, under Operation Vantage.

16. At paragraph 18 it is averred that on 29 September 2021 Ms. Zydek was arrested by An Garda Síochána and questioned in relation to the authenticity of her marriage to Mr. Singh. Again, Mr. Murray avers that any delay was justifiable by reference to the operational impact of Covid-19 and the ongoing investigation into the applicant by An Garda Síochána.

17. There was no replying affidavit filed by Ms. Zydek.

Arshad

18. I turn now to the case of Mr. Arshad. This case is quite different in certain respects. The first two cases, *Singh* and *Zydek*, concern a married couple. Mr. Arshad was married to and remains married to a lady, Sylvia Coleman, who is an Irish citizen but appears to have very strong links with Northern Ireland. The chronology of facts in respect of Mr. Arshad is as follows.

19. On 11 December 2011 he arrived in the State. On 28 May 2013 he married Ms. Coleman. On 27 August 2014 he was granted permission to remain on the basis of

marriage to an Irish citizen. On 25 October 2017 he applied for Irish citizenship. On 27 September 2018 the Minister wrote to Mr. Arshad stating he proposed to grant him a certificate of naturalisation subject to his completion of the application process. On 7 October 2018 the Department received an anonymous email asserting that Mr. Arshad paid to contract a marriage of convenience and that he had a wife and child in Pakistan. On 15 October 2018 the Department forwarded information to An Garda Síochána.

20. I pause in respect of the forwarding of information to An Garda Síochána. That recitation comes from the chronology of the respondent, and I am going to deal with the precise involvement of An Garda Síochána shortly. Therefore, I am not going to treat the reference identified above in relation to 15 October 2018 as evidence as I do not believe that has been put on affidavit.

21. On 13 July 2019 Mr. Arshad enquired about his application. There was further correspondence from the Department informing him that his application continued to be processed. There was a letter from IMK on 19 February 2021 threatening *mandamus*.

22. On 22 March an application was made for leave and the same course of events took place as outlined above, i.e. refusal by the High Court, an overturning of that refusal by the Court of Appeal and a telescoped hearing.

23. On 30 July 2021 the Department of Justice wrote to the applicant expressing concerns about the validity of his marriage but in fact, as my detailing of that correspondence below will demonstrate, there was in fact correspondence from an earlier date from the Department, being December 2020.

24. On the 6 October 2021 the Chief State Solicitors Office wrote to IMK Solicitors to inform them the applicant was under active investigation, and I am again going to come to that correspondence because it is in different terms to that in relation to the *Singh* and *Zydek* cases. However, there was the suggestion that the applicant discontinue proceedings

and the refusal of that offer by IMK Solicitors. The refusal was in similar terms, observing, *inter alia*, that the delay in making the decision had been extremely lengthy.

25. In relation to the pleadings in *Arshad*, an affidavit was sworn by Mr. Arshad on 18 March 2021. He identifies that having received a letter of 27 September 2018 informing him that the respondent proposed to grant his application for a certificate of naturalisation, he paid the required fee of €950.

26. A Statement of Grounds was filed, and the grounds and the reliefs sought are essentially similar to those that I have read out above, apart from the relevant dates. A second affidavit is sworn by Mr. Arshad on 16 November 2021. It is a short affidavit that refers to his marriage with Sylvia Coleman of 28 May 2013 and exhibits a significant amount of correspondence with the Department of Justice in relation to his marriage to Ms. Coleman and the legitimacy of same and his entitlement to remain in the State. The correspondence appears to commence with a letter that raises issues about the legitimacy of his marriage from the Department of Justice of 3 December 2020, although that letter is not exhibited. Further correspondence passes between the Department and the applicant during the course of 2021 including a letter in February from the solicitors for Mr. Arshad, the letter of 30 July that I have already mentioned from the Department and the response of August 2021 from the solicitors.

27. In the response of August 2021, the detailed enquiries that had been made in the letter of 30 July by the Department are replied to by IMK Solicitors and documentation is referred to and included. In fact, in the letter of February 2021 a similar approach has been taken by IMK Solicitors, so there has undoubtedly been a significant amount of information provided to the Department pursuant to their requests during late 2020, and then during the course of 2021 up to August. It does not appear that there is any correspondence since that date, there

is certainly no affidavit evidence in that respect. I will therefore treat the situation as one where there is no further communication between the parties since August 2021.

28. It is clear from the correspondence that the Department is itself conducting an investigation as to whether or not Mr. Arshad's marriage to Ms. Coleman is one that should be recognised in the State. Reference is made to information provided by An Garda Síochána in the letters from the Department, but the investigation is clearly being carried out by the Department in contradistinction to the position with the other two applicants. From the letter of 30 July in particular, it is clear that An Garda Síochána are assisting the Department with its enquiries. The correspondence discloses that Ms. Coleman appears to have been residing in a psychiatric institution in Northern Ireland at the time of Mr. Arshad swearing the second affidavit and that Mr. Arshad has lost contact with her and is not living with her. He does not explain why this was not notified to the respondent. Mr. Arshad's permission to remain in the State is on the basis of his marriage to Ms. Coleman and a condition of the permission is that he must be residing as a family unit in the State.

29. A replying affidavit of Mr. Murray of the Department is sworn on 3 February 2022. He refers to the receipt of the anonymous email and avers that the validity of this marriage remains under active investigation. He refers to the letter of 30 July 2021 and the response of 25 August 2021 from the solicitors where they assert the validity and authenticity of the applicant's marriage. Reference is made by him to the letter of 6 October 2021 in similar but not the same terms as the letters I have described above, indicating that the proceedings are inappropriate and asking that they be withdrawn. I will return to that below.

30. At the last paragraph of Mr. Murray's affidavit, he refers to the fact that any delay is justifiable by reference to the ongoing investigation into the applicant's marriage and he refers to an ongoing investigation by An Garda Síochána. However, there is no reference to Operation Vantage in Mr. Murray's affidavit in contradistinction to the two other affidavits

that he has sworn. Further, there is no averment on affidavit about the date of the Garda investigation or the Department being contacted by the Gardaí in relation to a Garda investigation. No details of that investigation are provided on affidavit. Counsel referred to the reference to An Garda Síochána in the correspondence of 30 July. However, as I have noted above that correspondence makes it clear that An Garda Síochána are assisting the Department in their investigation and not the other way around.

31. Importantly, in the Statement of Opposition it is pleaded that any delay is justifiable, *inter alia*, by the ongoing investigation into the applicant's marriage. Unlike the other two cases, it is not identified that the delay is justifiable by the ongoing investigation by An Garda Síochána into the marriage. In the circumstances, given the evidence before me, I am treating this case as one where there is an investigation by the Department into the circumstances of Mr. Arshad's marriage but not an investigation by An Garda Síochána.

Legal Arguments of the applicants

32. I turn now to the legal questions requiring to be resolved and the arguments put forward by the applicants. Their claims may be divided broadly into two categories. The first is that each applicant is entitled to a certificate of naturalisation based on the correspondence with the Minister. The second, distinct argument, is that, if there is no such entitlement, they are entitled to a decision on their application bearing in mind the period of time that has elapsed since the application was made. I should clarify that the first argument that they are entitled to a certificate of naturalisation is both based on the correspondence with the Minister but also on the fact of delay.

Statutory context

33. Before adjudicating upon those arguments, it is important to set these applications in their statutory context. Section 15 of the Irish Nationality and Citizenship Act 1956 (as amended) provides as follows: -

“Conditions for issue of a certificate

Upon receipt of an application for a certificate of naturalisation the Minister may in his absolute discretion grant the application if satisfied that the applicant –

- a) is of full age or is a minor born in the State,*
- b) is of good character”*

Then there are conditions in relation to continuous residence and the intention to continue to reside in the State and then at paragraph e):

“has before a judge of the District Court in open court in a citizenship ceremony or in such manner as the Minister, for special reasons, allows-

- (i) made a declaration in the prescribed manner of fidelity to the nation and loyalty to the State, and*
- (ii) undertaken to faithfully observe the laws of the State and to respect its democratic values”.*

At subparagraph 2 the conditions specified are referred to as *“conditions for naturalisation”*.

34. Therefore, the Minister must be satisfied, *inter alia*, that the applicant is of good character. The Minister also has in the words of the statute *“absolute discretion”* in respect of the ground of the application.

35. The nature of the Minister’s discretion under s.15 has been explored in the case of *Mallak v Minister for Justice* [2012] IESC 59, the decision of the Supreme Court, Fennelly J. In that case a Syrian national was refused a certificate of naturalisation and no reasons were given for same on the basis that the Minister had an absolute discretion. The applicant challenged the failure to give reasons. Fennelly J. in the Supreme Court held that it was not correct to say that the absolute discretion conferred on the Minister meant he was not obliged to have a reason. Even leaving aside the question of the disclosure of reasons to an

effective person, he held “*it seems to me axiomatic that the rule of law requires all decision makers to act fairly and rationally, meaning that they must not make decisions without reasons*”.

36. This means that the fact that the decision is to be made as a matter of absolute discretion does not mean the decision maker can have no reason for making it, as that would permit the decision maker to exercise the discretion arbitrarily or capriciously. There is also an obligation to act fairly and rationally. The Court went on to hold that the Minister was obliged to provide reasons to the applicant for the refusal.

37. However, the reference to absolute discretion is in my view one of considerable importance and this is reflected in the case of *AMA v Minister for Justice* [2016] IEHC 466. In *AMA*, Humphries J. identified that the Minister’s discretion in naturalisation cases is as absolute as it is possible to get in a system based on the rule of law and while reasons must be provided, beyond that it would take very exceptional circumstances before the Minister could be said to have failed to apply the minimal level of natural justice applicable in the context such of a privilege such as naturalisation.

38. It is overwhelmingly clear that naturalisation is a privilege and not a right and when I am considering the question of delay it is important that that context be borne in mind.

Application for an Order of *mandamus* directing the Minister to grant the applicants certificates of naturalisation

39. In my view, the applications in this respect are quite misconceived insofar as they are based on either legitimate expectation and/or the letters indicating the Minister proposes to grant the application in each case. I have much more far-reaching reservations about the availability of relief that would direct the Minister to grant an application for citizenship in any circumstances, but I will deal with that in the context of delay.

40. In every case, the correspondence from the Minister makes it clear that her statement that she intends to grant the application for a certificate of naturalisation does not constitute a grant of a certificate of naturalisation. In each case the applicants received a letter from the Minister indicating that the Minister proposed to grant the application subject to the successful completion of the application process. At the top of that letter in bold underlined type, it was stated “*this letter does not constitute a grant of a certificate of naturalisation or permission to enter or remain in the state.*”

41. In the letter inviting Mr. Singh to the citizenship ceremony and giving him a date for same, it was stated that the Minister for Justice and Equality intends to grant his application for a certificate of naturalisation.

42. It is entirely predictable that the letters would have been worded in this way given the terms of the 1956 Act which makes it clear, as I have identified above, that the Minister cannot grant the application until the person in question has made a declaration in the prescribed manner of fidelity to the nation and loyalty to the State and has undertaken to observe the laws of the State and respect its democratic values. As I have identified, those conditions, including that at subparagraph (e) in relation to the declaration, are conditions for naturalisation. Subparagraph (e) is therefore one of the statutory requirements for a grant of citizenship.

43. In none of the cases has the declaration been made. In the circumstances there can be no question that the applicants are entitled to a declaration of citizenship on the basis of the letters sent to them.

44. Nor can the doctrine of legitimate expectations pleaded in the Statement of Grounds (although not heavily relied upon in the oral submissions) be of assistance to the applicants in this regard. First, that doctrine is usually used as a shield and not a sword i.e. it is generally not possible to use it to assert positive rights. However more importantly in this

case, the first ingredient of a legitimate expectation is an unconditional representation of a particular state of facts. The letters that I have referred to above make it absolutely clear that the Minister is intending to grant a certificate but has not granted a certificate and that the letter of intention cannot constitute a grant of a certificate. Section 15(1)(e) copper fastens this as I have identified above. In such circumstances, no legitimate expectation could have arisen on the part of the applicants by virtue of the receipt of the letters that they were entitled to a citizenship declaration, and they cannot rely on the doctrine of legitimate expectations in those circumstances.

Delay

45. The core of the applicants' complaint in each case is that there has been unreasonable delay and the delay is such that they are entitled to an Order of *mandamus* compelling the respondent to complete the process of scheduling a citizenship ceremony and following the same to grant the applicant a certificate of naturalisation.

46. I have been referred to a significant number of authorities by the applicants in their legal submissions on delay and whether same entitles a person to an Order of *mandamus* directing the taking of a decision. I will deal with the individual periods of delay in each case shortly but first I should set out the submissions of the applicants in this regard. The cases referred to by the applicants do not as far as I can ascertain deal with applications for a naturalisation certificate.

47. In the decision of *KM & GD v Minister for Justice* [2007] IEHC 234, which concerned an application for permission to reside in the State on the basis of marriage to an Irish citizen, Edwards J. considered the question of delay. He identified that the entitlement to a prompt decision was an aspect of constitutional justice, and that substantive fairness included a duty not to delay in the making of a decision to the prejudice of fundamental

rights. In considering whether there had been an unconscionable delay, he noted that the following were relevant considerations

- the period in question.
- the complexity of the issues to be considered.
- the amount of information to be gathered and the extent of enquiries to be made.
- the reasons advanced for the time taken.
- the likely prejudice to the applicant on account of delay.

48. The applicant also relies upon the decision in *Tangi v Minister for Justice* [2010] IEHC 85. In that particular case the applicant was seeking a residence card under EU treaty rights legislation. The Minister was obliged by the relevant Directive to render a decision within 6 months of the application but had failed to do so owing to a suspicion regarding the authenticity of the applicant's marriage. Edwards J. held that where the Minister has a suspicion, unsupported by clear evidence, that the marriage may be one of convenience and requires further investigation, the Minister is obliged to provide a decision within the 6-month period. In that respect he noted that the Minister would of course have the power to revoke it if clear evidence of fraud should subsequently emerge. Heavy reliance was placed upon this case by the applicants.

49. The respondent makes the point that here there is no statutory time limit for a decision and that there is no obvious way to revoke the naturalised citizenship given that the revocation mechanism under s.19 has been declared unconstitutional by the Supreme Court. The point is also made that any revocation would have prospective effect only under s.18 of the Act.

50. I am not particularly persuaded by the argument that there is no way to revoke a grant of citizenship, because it must be expected that there will ultimately be legislation providing for a constitutional means of revocation given that same was in the Act before it

was declared unconstitutional. However, I am influenced by the fact that there is no statutory provision providing that the naturalised citizenship would be void *ab initio*. This might result in a person obtaining rights that could not be removed, despite a later conclusion that they had concluded a marriage of convenience and that they therefore should have their citizenship removed.

51. But much more importantly, in circumstances where the Minister has an absolute discretion in relation to the grant of citizenship, albeit constrained in the way as described by Fennelly J in *Mallak*, the situation is quite different to that discussed in *Tangi*.

52. In that case, the fact that a decision had to be made within a 6-month period flowed from Article 10 of Directive 2004/38 which provided that the right of residence of family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issue of a residence card. This card is to be provided by the Member States not later than 6 months from the date on which they submit the application. Under EU law the right of free movement is a cardinal principle and includes the right to move and reside freely within the territory of the Member States. That right includes the right of residence of non-EU citizen family members of EU citizens. The Directive therefore gives a positive right of residence to family members and Article 10 gives life to this right by identifying that the residence card must be provided by Member States within the 6-month period.

53. That is about as far from the current situation as it is possible to be. Here, far from having a right to naturalisation, the Minister has an absolute discretion in relation to the grant of same, and it is, as I have already identified, a privilege not a right. Therefore, it does not seem to me that the decision in *Tangi* is of very much assistance at all to the applicant given the different circumstances.

54. However, I do accept that the framework identified by Edwards J. in *KM* is an appropriate one by which I should analyse the delay but always bearing in mind the

context i.e. this is an application in respect of which the Minister has absolute discretion and it cannot be considered to be in any sense a right or entitlement. I must also consider the appropriateness of *mandamus* in the circumstance of this case.

55. In the case of *Nearing v Minister for Justice* [2009] 4 IR 211, Cooke J. stated: -

“Mandamus does not issue against an administrative decision maker simply because there is a duty to make a decision. Mandamus lies to make good an illegal default in the discharge of a public duty. There must have been, either expressly or by implication, a wrongful refusal to make a decision or such an egregious and unjustified delay in dealing with the application as to be tantamount to a refusal in its effect”

56. I turn now to each of the individual cases to analyse the position in relation to delay.

Singh and Zydek

57. In respect of Ms. Zydek she applied in February 2019 for citizenship, and it is now June 2022. The delay is 3 years and 4 months. That is a substantial period of time. I consider that, because the remedy of *mandamus* is a forward looking relief, I should count the delay from the time the application was made until the present day. It is not I think, sufficient to count the delay simply up until the application for leave. That is because any decision that I will make will be considering whether at the present time there is a sufficient delay so as to warrant an Order of *mandamus*, whether in the context of granting a certificate or in the context of making a decision in relation to the application.

58. The time period in respect of *Zydek* is sufficiently long so as to necessitate a consideration of the other factors identified by Edwards J. In relation to the complexity of the issues to be considered, this must be taken together with the third and fourth issues he identified, i.e. the amount of information to be gathered, enquiries to be made and the reasons advanced for the time taken. Here the Minister has identified, albeit for the first

time in the course of these proceedings, that Ms. Zydek was under investigation by An Garda Síochána in relation to completing a marriage of convenience. Ms. Zydek has been arrested and questioned. I am given very little detail of the nature of progress of the investigation.

59. However, the letter of 30 July 2021 in the case of *Arshad*, gives an idea of the types of matters that the Minister and/or An Garda Síochána will consider when looking at the question of a marriage of convenience. I accept that in this case there is information to be gathered, enquiries to be made and issues to be considered in this respect and that this investigation of both Ms. Zydek and her former husband – as she is now divorced from him – is a substantive reason for the Minister not concluding the process in relation to the naturalisation decision. Ms. Zydek was only arrested in September 2021, being 10 months ago. In those circumstances the period of time that has passed since her arrest does not appear to be over long or manifestly unreasonable or unconscionable and does not suggest that the investigation has stalled. It is often the case that once a person is arrested and questioned, new information will come to light and the Gardaí will have to investigate same.

60. In relation to the likely prejudice to Ms. Zydek on account of the delay, no prejudice is identified by her and that is not surprising given that she is an EU citizen and is therefore entitled to live and work in Ireland.

61. In those circumstances I am satisfied that the delay in the context of a citizenship application that has taken place in this case is explicable where there is an ongoing investigation into the legitimacy of her marriage to Mr. Singh. I cannot conclude there has been an egregious and unjustified delay. This is an ongoing investigation in the context of a wider investigation into marriages of convenience known as Operation Vantage. The State must be entitled to investigate whether marriages concluded are in fact fraudulent and

not true marriages. Good character is a statutory requirement that must be established to the satisfaction of the Minister before a certificate of naturalisation may be granted. It is difficult to see how the Minister could be satisfied in this respect while there is an ongoing Garda investigation. Nor, as I have already identified, is there any prejudice to the applicant.

62. In the circumstances, in my view, Ms. Zydek has not made out any entitlement to an Order of *mandamus* as she has not established an illegal default in the discharge of a public duty. In fact, as I identify above, I have real reservations as to the availability of *mandamus* to compel the Minister to complete the naturalisation process here, but I will deal with these below as they are more relevant in the case of *Singh*. However, whether one is looking at the forced completion of the naturalisation process or any obligation to render a decision, I do not accept that there is sufficient delay to entitle Ms. Zydek to a remedy at this point in time.

63. The period of time that has elapsed in respect of Mr. Singh is longer by a period of one year. He applied for citizenship in April 2018, and it is now June 2022. He has therefore been waiting for 4 years and two months. As noted above, Mr. Murray has averred that on 16 April 2019 after he (Mr. Singh) had been invited to attend a citizenship ceremony, the respondent was informed by the Operation Vantage team with An Garda Síochána that the applicant was suspected of having contracted a marriage of convenience with Ms. Zydek. It was reasonable for the respondent not to go ahead with the ceremony for Mr. Singh in those circumstances. The investigation into the marriage is clearly ongoing as evidenced by Ms. Zydek's arrest in September 2021. Moreover, in the letter of 7 October 2021, Mr. Singh and Ms. Zydek are stated to be the subject of an active investigation by An Garda Síochána in relation to immigration offences. As I note above, because good character is a statutory requirement that must be established before a

certificate of naturalisation may be granted to any applicant, the active investigation by An Garda Síochána is highly relevant.

64. Although the delay is greater in respect of Mr. Singh and the question of prejudice is much more real in this case given the benefits that Irish citizenship would afford to Mr. Singh, I do not find that the delay is unconscionable given that there is an ongoing investigation into immigration offences and the requirement of good character.

65. Moreover, insofar as *mandamus* is concerned, if I were to grant the relief requiring the Minister to proceed to a declaration of citizenship where she has a well-founded concern about the character of Mr. Singh, in the circumstances of this case, I would be requiring the Minister to effectively ignore her concerns and to make a positive decision in relation to good character on the basis of delay on her part in adjudicating upon the application.

66. Given the clear statutory framework and the Minister's obligation to consider the application in the absolute discretion conferred upon her, I conclude that it is not open to a court to effectively compel the Minister to proceed to grant a certificate of naturalisation. That would be to force the Minister to ignore the statutory requirements she is mandated to consider. A court cannot override legislative requirements. To do so would be to interfere with the separation of powers.

67. The same goes for a declaration directing that the applicant is entitled to a certificate of naturalisation since same would effectively be requiring the Minister to ignore the relevant statutory requirement and her own evaluation of good character.

Directing the Minister to make a decision

68. That therefore brings me to the next relief Mr. Singh is seeking i.e. that the applicant is entitled to Order of *mandamus* directing the Minister to make a decision. The objections that I have just identified above in relation to the *mandamus* Order or indeed a declaration

in respect of the granting of a certificate of naturalisation do not apply to a direction to the Minister to make a decision. This relief was the subject of some discussion at the hearing and it was accepted by counsel for the applicants that if a decision was made to refuse the applications on the grounds of good character, then the applicants would judicially review this conclusion in circumstances where An Garda Síochána was carrying out a continuing investigation or Department investigation was ongoing and no conclusions had been reached.

69. The respondent argued that this meant I should not grant the relief because of the obviously negative consequences should I do so, i.e. it would lead to another judicial review. I do not accept that it might never be appropriate to grant an Order of *mandamus* compelling the respondent to make a decision, even in circumstances such as this. Turning back to the *dicta* of Cooke J., *mandamus* lies to make good an illegal default in the discharge of a public duty. If there is such an egregious and unjustified delay in dealing with the application so as to be tantamount to a refusal in its effect, then an Order of *mandamus* might lie directing the Minister to make a decision in circumstances such as these.

70. This is because if the respondent was simply entitled to refuse to make a decision on the basis of an ongoing Garda investigation without making any effort to ascertain the current state of the investigation or its likely determination date, and to continue to take the view she could not decide on good character (even in the absence of any enquiries or information in relation to the progress of the investigation), then at a certain point a court might reach a conclusion that the delay had been so egregious and unjustified that it would warrant an Order of *mandamus* directing the respondent to make a decision.

71. What I must decide is whether that point has been reached here in the cases of *Singh* and *Zydek*. I do not consider it has. The delay is substantial, but the investigation is clearly

ongoing. It is linked to the investigation in relation to Ms. Zydek. Relatively recent steps have been taken in that respect where Ms. Zydek was arrested in September 2021. In all the circumstances it seems to me that at this point in time, for the Minister to continue to await the outcome of the An Garda Síochána investigation in order to permit her to form a view on good character, is not unreasonable or egregious. I therefore refuse the reliefs in respect of Mr. Singh.

Arshad

72. The longest period has elapsed in respect of Mr. Arshad. He applied for Irish citizenship in October 2017 and therefore he has been waiting almost five years for a decision on his application.

73. It will be recalled that in October 2018 an anonymous email was sent in respect of an alleged marriage of convenience and that appears to have triggered an active investigation of Mr. Arshad's marriage. In Mr. Murray's affidavit he says that in July 2021 the respondent wrote to Mr. Arshad in respect of issues arising in relation to his marriage. However, as I identified above, when one looks at the material exhibited by Mr. Arshad the queries appear to have started earlier, i.e. 3 December 2020.

74. As I have mentioned already, a letter was sent on 6 October from the Chief State Solicitor to Mr. Arshad's solicitors. It is in different terms to the similar letters that I have referred to above. It provides in relevant part as follows: -

"We are instructed that Mr Arshad's immigration permission on stamp 4 conditions was granted in 2014 on foot of his application following his marriage to an Irish Citizen, Mrs Coleman. We are further instructed that the validity of this marriage and the couple's further cohabitation is under active investigation and that our client Department has been in correspondence with Mr Arshad and your office in

this regard and we would refer you to their letter of the 30th July and your response of the 25th August.

Good character is a statutory requirement that must be established before a Certificate of Naturalisation may be granted to an applicant.”

And again, there was a request that the proceedings be withdrawn in these circumstances.

75. In the circumstances, it is undoubtedly the case that there is an active investigation ongoing by the respondent. However, unlike the other two cases this investigation is being carried out by the Department and the Department is therefore in a position to control the timeframe of same and to update the Court if necessary, on the progress of same. No such updating has been provided in this case apart from a reference to the letter of 30 July.

76. For the reasons set out above I do not think relief that would either direct the Minister to proceed to grant a certificate of naturalisation or a declaration that the applicant is entitled to the grant of a certificate is appropriate in circumstances where the Minister clearly has ongoing concerns about good character and, as I note above, such an Order would mean that I was essentially directing the Minister to come to a positive conclusion on good character where there is an ongoing investigation in circumstances where she has identified her reasons for not being able to reach a conclusion at this point in time on that issue.

77. I have considered carefully however whether an Order of *mandamus* should be granted directing the Minister to make a decision, given the period of delay here. I refer to the factors that Edwards J. identified. The delay is in my view a real cause for concern. I have identified the reason, i.e. the ongoing investigation. I have also identified the fact that there has been no updating by the respondent since the reply of IMK in August 2021. Naturally there is a great deal of information that must be provided in an investigation such as this but what the correspondence exhibited by Mr. Arshad shows is that much of that

information has now been exchanged between the Department and IMK Solicitors. There have been at least two rounds of letters dating from December 2020 up to August 2021 where detailed queries have been raised by the Department and detailed information has been provided by IMK. The matter has a certain complexity but nonetheless the Department are well used to dealing with this issue. The questions as to, for example, the residence of Mr. Arshad's spouse, the residence of Mr. Arshad and the question of his previous possible marriage are all questions that the Department is well used to considering. I accept there is likely prejudice to the applicant.

78. When one looks at the period of time there is a real concern. The period of time is, as I have identified, almost five years, and in the circumstances, when I take into account all of the considerations identified by Edwards J. (even in the context of an application for naturalisation with all of the constraints that I identify in that respect), it seems to me that there is indeed egregious delay. There is an ongoing investigation and reasons for the delay. However, the period of time since the last correspondence – August 2021 – is unjustifiable given the very long delay that has already taken place in this case.

79. In those circumstances on balance, I have concluded that the threshold for an Order of *mandamus* i.e., such egregious and unreasonable delay as to amount in effect to a refusal, has been met. The Minister has known about the anonymous complaint since 2018. There has been no attempt whatsoever to explain the stage that the investigation is now at, or what has happened since August 2021. Obviously if one was simply looking at the period from August 2021 until the present day it would not justify a finding that there was egregious delay. However, I must look at it in the context of the entire period of time that has gone by. The Minister has not explained why the investigation cannot be progressed or why a decision cannot be provided. There is no plea in the Statement of Grounds, as I have identified already, that there is an investigation by An Garda Síochána. This is clearly an

investigation by the Minister. The Minister can both control the investigation and is in a position to tell the Court about the progress of the investigation. There has been no updating at all of the progress in relation to matters since 30 July 2021 when the last letter by the Minister was sent, now almost a year ago.

80. In the circumstances I conclude that the delay has now fallen into the egregious bracket and that Mr. Arshad is entitled to a declaration that he should have a decision on an application made in 2017 about which a complaint was made in 2018.

81. I will confer with counsel about the precise terms of the relief that Mr. Arshad is entitled to.

Disclosure of information by the Minister

82. I am going to finish by making some observations on disclosure of information by the Minister. One notable characteristic of all the cases is that, in each case, the applicants were informed of the Minister's intention to grant the certificate and in the case of *Singh* he was even invited to a naturalisation ceremony, when matters ground to a halt. Because of the issue of these proceedings, it then became clear to all applicants this was because of the investigations into their marriages. However, that did not become apparent until the letters of October 2021 from the Chief State Solicitor and the arrest of Ms. Zydek.

83. Indeed, the letters sent from the respondent, explaining the delay when the various applicants queried why the application was not being progressed, referred instead to general delays. For example, in Mr. Singh's case, he was invited by letter of 3 April 2019 to a ceremony of citizenship on 29 April 2019 but on 16 April 2019 he was advised not to attend due to the ceremony being oversubscribed. However, when one looks at Mr. Murray's affidavit it is clear that on the very same day the respondent was informed by the Operation Vantage team that the applicant was suspected of having contracted a marriage of convenience with Ms. Zydek. I therefore infer that the true reason that he was asked not

to attend the ceremony was not that it was oversubscribed but that he was suspected of having contracted a marriage of convenience.

84. Similarly, on 9 February 2020, in response to a query by the applicant's solicitors as to the progress of his application, it was stated that his application for naturalisation was being processed in the normal way to establish whether it met the statutory conditions for the granting of naturalisation. Reference is made to good progress in reducing the large volume of cases, but it is indicated that the nature of the naturalisation process is such that some cases take longer than others to process. Given that Mr. Singh had actually been invited to a naturalisation ceremony, it is understandable why he would have been perplexed at this latter response.

85. When questioned about this issue, counsel for the respondent indicated that there may have been a reluctance on the part of the respondent to divulge that there was an investigation ongoing for fear of jeopardising the investigation. Had that been placed on affidavit, I could have taken that into account. However, it was not on affidavit and therefore in my view cannot be deployed by way of counsel's submissions to justify the failure of the respondent to identify even in the most general way why its approach in relation to the naturalisation application had altered.

86. The approach of the respondent in all three cases in this regard meant that proceedings were initiated by the applicants without them having any idea as to the cause of the stalling of their citizenship applications. Had they known, it is possible that a different approach would have been taken by them in relation to issuing proceedings, although in this regard it is of course true that when the fact of the investigations was brought to their attention in October 2021, they nonetheless decided to proceed with the litigation.

87. Nonetheless, Court time was taken up before the applicants knew of the true situation, both in respect of the leave application and also the appeal to the Court of Appeal in respect of the refusal of leave. It seems sub-optimal to me that the respondent was not clear with the applicants in respect of the reason for the change of approach, particularly in circumstances where pre-application letters had been written by their solicitors.

Conclusion

88. For the reasons set out above, I refuse the reliefs sought by Mr. Singh and Ms. Zydek. I will grant limited relief in relation to Mr. Arshad.

89. I have considered the application that I refuse the relief sought by Mr. Arshad on the basis of the exercise of my discretion. At para. 6.3 of the written submissions, three reasons were given as to why I should refuse leave. First, it is stated that Mr. Arshad was given an opportunity to withdraw the proceedings without an adverse costs Order and refused to do so. That is not a basis for refusing relief. That may go to costs, but it is certainly not relevant to the refusal of relief, particularly where Mr. Arshad has been successful in relation to one aspect of his proceedings.

90. Second, it is said that in circumstances where the authenticity of his marriage was put in issue by the Minister, the applicant failed to address that issue, save in the most light touch manner in the second affidavit sworn on 20 April 2022 and failed to elaborate on the fact that he is no longer in contact with his wife who is in a psychiatric unit in Belfast. It is true that it was not identified in the affidavits, and it would have been better had that been done. Nonetheless that information was in the correspondence that the Minister is now relying on – the correspondence of July 2021 and the response of August 2021 – and in those circumstances I do not think it would be fair to disentitle the applicant to relief given that the relevant material was exhibited. It is of course also worth observing that the Minister himself was in a position to put that on affidavit and there was no such averment

by Mr. Murray, although I do accept that the obligation is largely on the applicant in this respect.

91. Finally, it is said that the applicant has not pointed to any substantial prejudice. I have already identified that in my view, given the benefits citizenship would afford to the applicant, it seems to me that I can treat the applicant as having been prejudiced. I have already considered this in my analysis, and it does not seem to me a further matter to consider in the exercise of my discretion. Rather, it is a substantive matter that has been considered in the course of this judgment.

92. Accordingly, I am proposing to grant Mr. Arshad an Order of *mandamus* compelling the respondent to make a decision in respect of his application for a certificate of naturalisation.

[Matter was put back for submissions to be made on the precise form of Order and costs]