Neutral Citation No.: [2008] NIQB 118 | *Ref:* **McCL7292**

Judgment: approved by the Court for handing down | *Delivered:* **21/10/08**

*(subject to editorial corrections)**

O8/092266/01

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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AN APPLICATION FOR JUDICIAL REVIEW BY
ELENA KOTRAYENKO
[NO. 1]

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McCLOSKEY J

[1] This is the first of two inter-related judicial review applications brought by Elena Kotrayenko. The other application bears the serial number 08/103341/01. Both applications were heard together, on 16th October 2008. The Respondent to both applications is the Secretary of State for the Home Department.

[2] The Applicant is a personal litigant. She was assisted throughout the combined hearing by Ms Inga Makarenko, who trades under the style of "Baltic Recruitment Translations", with an address in Bangor, and whose services were provided at public expense. Ms Makarenko provided an admirable service. Her understanding of the English language and her command of the spoken word were demonstrably excellent. The Applicant, by her speech and conduct, also displayed a reasonable comprehension of English. Moreover, the terms of certain letters addressed by the Applicant to the court, in particular a two-page letter dated 14th October 2008, speak for themselves in this respect. This is unsurprising, given the averment in her affidavit [paragraph 12] that she entered the United Kingdom as long ago as 7th May 2002 and was previously in the Republic of Ireland for an unspecified period. The pace and conduct of the hearing were fashioned by the court to reflect the Applicant's circumstances. A series of interventions and questions addressed to both the Applicant and Ms Makarenko confirmed to my satisfaction that the Applicant understood fully everything transacted during the hearing and had ample opportunity to present her case.

[3] Given the circumstances outlined above, it is unsurprising that the Order 53 Statement proved to be a less than reliable indicator of the central issue which the Applicant wished to expose for determination by the court. In the related judicial review application (which I have labelled "No. 2" for convenience) paragraph 16 of the Applicant's affidavit, referring to the *present* application, contains the following averment:

> "*I would like to draw to your attention that the issue of* ***that application*** *was to challenge my nationality as Ukrainian in the Home Office's records*".

The words "*that application*", highlighted above, refer to the present application for judicial review. This averment serves to illuminate the focal point of this challenge.

[4] Amongst the exhibits to the Applicant's affidavit sworn in the present case are United Kingdom Immigration Service documents which record that her place of birth was Winnitsa, Ukraine, USSR. Certain other documents state that the Applicant's nationality is Ukrainian. This was the focus of the Applicant's challenge at the commencement of these proceedings, on 26th August 2008, as confirmed by her letter dated 4th August 2008 to the Border and Immigration Agency:

> "*I invite the UKPA to reconsider the determination of my nationality … and delete word Ukraine as a mistake which does not correspond to the reality …*
>
> ***I am not a national/citizen of Ukraine!!!***".

[My emphasis].

[5] As these proceedings advanced, certain material letters were generated. Firstly, by letter dated 17th September 2008, the Crown Solicitor's Office informed the Applicant:

> "*(i) UK Borders and Immigration Agency do not, as a matter of law, consider you to be Ukrainian, but*
>
> *(ii) UK Borders and Immigration Agency have reason to believe that, if an application was made, you would be granted Ukrainian citizenship on grounds of your birth in the territory of Ukraine*".

The Applicant replied, by letter dated 3rd October 2008, addressed to the court:

> "*As a matter of law the Home Office is bound by the Crown Solicitor's letter that it does not regard me as Ukrainian*".

By letter dated 10th October 2008, the Crown Solicitor's Office replied:

> "*I contacted the Border and Immigration Agency and they have confirmed to me that the Home Office records have been amended to read '**Nationality Unspecified**' …*
>
> *Any further documents issued by the Border and Immigration Agency in relation to you should make no reference to your nationality as being Ukrainian*".

[6] This last-mentioned letter prompted a rejoinder by the Applicant, in the form of a further letter to the court, dated 14th October 2008, containing the following material passages:

> "*I came to conclusion that the phrase 'nationality unspecified' is not a legal term. Thus, the designation of my nationality as 'unspecified' is **unlawful**. There is no legal basis to apply to me that senseless definition …*
>
> *I declare that I have no nationality. I am not regarded as a national by any State under the operation of its law. UKBA states that I have nationality but they cannot specify the State of my nationality*".

At the hearing before me, the Applicant confirmed, unambiguously, that the relief which she is *now* seeking from the court is a determination to the effect that the statement in the Crown Solicitor's Office dated 10th October 2008, written on behalf of the Respondent, that she is a person of "*nationality unspecified*" is unlawful. The Applicant submitted that the Respondent's records relating to her should state "*claims to be no nationality*" [sic]. In support of this submission, the Applicant referred particularly to an extract from the Home Office website under the title "Cases Where There is an Issue Relating to the Applicant's Nationality".

[7] I find no material distinction between the Applicant's claim that she has no nationality and the Respondent's statement that she is a person of "*nationality unspecified*". I find nothing unlawful about the classification of the Applicant in this manner. It betrays no error of law. It does not infringe any requirement of primary or subordinate legislation. Nor is the offending statement, in my view, incompatible with the Home Office website materials. The latter do not have the status of legal requirements in any event. Rather, as appears clearly from the opening sentence, they constitute an administrative "*instruction*" designed to provide "*guidance*" to officers in cases where a person's nationality is in issue. Further, I find the offending statement to be clear and intelligible, contrary to the Applicant's submission.

[8] Furthermore, under the immigration laws, the offending statement does not, in my view, constitute an act, decision or determination having legal effects or consequences. While it may feature in future decision making processes of this kind, it does not do so at present. I am of the opinion that the offending statement is

not susceptible to the grant of a remedy by an application for judicial review. In this respect, I refer to the following passage in ***Administrative Law*** [Wade and Forsyth, 9th Edition, p. 611]:

> *"It cannot be too clearly understood that the remedy by way of certiorari only lies to bring up to this court and quash something which is a determination or a decision …*
>
> *As the law has developed certiorari and prohibition have become general remedies which may be granted in respect of* ***any decisive exercise of discretion by an authority having public functions,*** *whether individual or collective …*
>
> ***[P. 612]*** *They will lie where there is some preliminary decision, as opposed to a mere recommendation, which is* ***a prescribed step in a statutory process which leads to a decision affecting rights, even though the preliminary decision does not immediately affects rights itself*** *".*

[Emphasis added].

The requirement that the impugned act or decision or determination of the public authority concerned must have legal effects or consequences is illustrated in ***Regina –v- Independent Television Commission, ex parte TSW Broadcasting Limited*** [1994] 2 LRC 414 (per Lord Goff especially). The important distinction between something which has legal effects or consequences and something which does not is illustrated in ***Re Kinnegar Residents' Action Group and Others' Application*** [2007] NIQB 90, at paragraphs [24] and [25] especially.

[9] In ***Re Federovski's Application*** [2007] NIQB 119, McLaughlin J stated:

> *"[16] The ultimate decision about grant or refusal of citizenship to any person is entirely within the remit of the administrative and judicial authorities of the Republic of Ukraine. For me to make any determination of citizenship would be an unauthorised trespass upon the jurisdiction of its courts and the sovereignty of the Republic of Ukraine and I repeat I make no attempt at such a determination. The function of this court is to inform itself of the relevant citizenship laws and to consider the factual circumstances surrounding the personal, social and family history of the applicant for asylum. On the basis of the facts available to me, and reading the law of the Ukraine as explained to me by the document from the Ministry of Foreign Affairs and the evidence of Ms Khanna, an expert whose evidence is unchallenged and which I accept, I am satisfied that the decision of the immigration authorities of the United Kingdom to remove the applicant from the United*

> *Kingdom to the Ukraine is entirely rational and legal. I am satisfied there are strong reasons to believe the applicant would be admitted to the state of Ukraine as a Ukrainian national under the Ukrainian law of citizenship. The Minister was therefore entitled to come to the same conclusion and his decisions of the 25 September 2006 and 24 February 2004 were lawful. No persuasive ground of challenge has been put before me and I therefore dismiss the application for judicial review.*"

Mr. Federovski is the husband of the Applicant.

[10] More recently, a further application by Mr. Federovski for leave to apply for judicial review was dismissed, by Gillen J. The evidence before me includes the transcript of a hearing conducted by the learned Judge on 30th May 2008. On that occasion, he stated:

> "*Whatever may be written in any file this court can be absolutely clear that as a matter of law the UK Border Agency does not regard him, as of this moment, as a Ukrainian national*".

Mr. McGleenan, appearing for the Respondent in those proceedings, (a) confirmed the correctness of this and (b) responded affirmatively to the judge's question about whether Mr. Federovski could be "*absolutely certain*" about this matter. Before this court in the present application, Mr. McGleenan confirmed that these passages apply fully to the Applicant in these proceedings.

[11] Dismissing Mr. Federovski's appeal, the Lord Chief Justice stated:

> "*… Whatever may appear in its records the legal position – the unimpeachable, unchallengeable, irredeemable legal position – is that the Home Office has committed itself to the statement that they do not regard him as Ukrainian …*
>
> *[6] That statement and the record of it in the judgment of this court and the judgment of Mr. Justice Gillen trumps any document that may repose or reside in the database of the Home Department. As a matter of law the Home Office is bound by its statement that it does not regard Mr. Federovski as Ukrainian*".

I hold that this passage too applies fully to the present Applicant.

[12] The relief sought in the Applicant's Order 53 Statement is an Order of Mandamus requiring the Secretary of State to expunge from the Home Office records any statement to the effect that the Applicant is of Ukrainian nationality. This claim for relief is now moot, having regard to the letters dated 17th September and 10th October 2008 from the Crown Solicitor's Office. I shall treat the Applicant as, effectively, having amended her Order 53 Statement to seek appropriate relief to

reflect her contention that the current designation of her status by the Respondent as a person of "*nationality unspecified*" is unlawful. In this way, the judgment of this court takes account of the developments which have occurred in the course of these proceedings and addresses the current state of affairs. For the reasons explained above, I conclude that there is nothing unlawful about this designation of the Applicant by the Respondent.

[13] The sole form of relief sought by the Applicant is an Order of Mandamus. To reflect developments during the progress of these proceedings, I shall treat the Applicant as requesting this court to make an Order of Mandamus requiring the Respondent to expunge from its records its designation of the Applicant's status as a person of "*nationality unspecified*", substituting words such as "*claims to have no nationality*". An Order of Mandamus lies only where the public authority concerned is under a legal obligation to do something. For the reasons explained above, I hold that the Respondent has no legal obligation to take the courses urged by the Applicant.

[14] While the Applicant's case was considered by the court on previous occasions, leave to apply for judicial review was not granted. The court conducted a very full inter-partes hearing (on 16th October 2008). During this hearing, the Applicant confirmed that she did not wish to present any further evidence to the court. If this had proceeded as a more conventional leave hearing, the court would probably have declined to grant leave to apply for judicial review. However, in the particular circumstances, I grant leave to apply for judicial review and, having concluded that the Applicant's challenge is without foundation for the reasons explained above, I dismiss the application.

[15] Given that the Respondent's position appears to have altered during the course of these proceedings, some reflection on the appropriate costs order may be required. Of course, as the Applicant is a litigant in person, I shall assume for the moment that she has incurred no legal costs, though she may have expended certain outlays in initiating and advancing her judicial review application. It would be helpful if both parties were to reflect on this discrete issue. I shall not finalise the costs order until the parties have had this opportunity and, if desired, have addressed the court further.