

THE HIGH COURT  
JUDICIAL REVIEW

[2019 No. 78 J.R.]

BETWEEN

ZHIGANG SHAO

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

(NO. 2)

**JUDGMENT of Mr. Justice Richard Humphreys delivered on the 3rd day of February, 2020**

1. Withholding relevant information from the Court is not a good look. That look is not improved where it's the State that's doing the withholding, or, indeed, where some of the withholding was done on foot of a conscious decision by State counsel. Nor does it particularly assist that the information withheld from the Court included material previously obscured by not being separately identified when responding to an application under the Freedom of Information Act, 2004; a response that was later relied on by the applicant for forensic purposes.

**Procedural background**

2. I gave judgment in this case in *Shao v. Minister for Justice and Equality (No. 1)* [2019] IEHC 826, dismissing the applicant's application for *certiorari* of a deportation order. While the judgment has been approved and published, no order has been perfected because the matter was adjourned initially for the purposes of costs. A number of affidavits have been filed since the date of the *ex tempore* judgment as follows:
  - (i). An affidavit of Eoin McGuigan, solicitor for the applicant, of 29th November, 2019, which showed that it was likely that the address at which the notice under s. 3 of the Immigration Act, 1999 was served had not in fact been registered with GNIB.
  - (ii). An affidavit of 13th December, 2019 of D/Garda Michael Byrne which *inter alia* explained difficulties with the GNIB registration system and that the system locks down so it cannot be updated after a point in time that is three months after the expiry of the last permission of a particular applicant. Thus he was unable to update the system on foot of the new address given to him by the applicant.
  - (iii). An affidavit of Mr. Alan King of INIS of 13th December, 2019 clarifying that what was and was not exhibited in the original affidavits filed on behalf of the respondent was decided on and dictated effectively by counsel for the respondent.
  - (iv). An affidavit of Alan King of 10th January, 2020 which disclosed that the two-page minute, crucial to the (*No. 1*) judgment, was not separately identified in the schedule of documents furnished under the Freedom of Information Act, 2004 but rather was part of the set of documents that were described as a single document "*report from GNIB 10/11/2018*" (not that the applicant or the court could have known that without being told).

3. The information contained in the first three affidavits is referenced in the written version of the No. 1 judgment but obviously that information was not considered when deciding to dismiss the application. I have now heard further helpful submissions from Mr. Conor Power S.C. (with Mr. James Buckley B.L.) for the applicant and from Mr. Anthony Moore B.L. for the State.
4. Leaving aside purely consequential issues, Mr. Power's application is now as follows:
  - (i). To reopen the (*No. 1*) judgment in the light of the additional material since the *ex tempore* ruling; and,
  - (ii). If the judgment is reopened to make an order of *certiorari*.
5. Those applications are opposed on behalf of the respondent.

#### **Respondent's duty of disclosure**

6. The duty to disclose relevant material exists anyway even in civil plenary proceedings although in that context it is relatively limited – one can stay silent about weak factual points in one's case as a general proposition but one cannot by silence create a misleading impression (*Meek v. Fleming* [1961] 2 Q.B. 366. *Philp v. Ryan* [2004] IESC 105 [2004] 4 I.R. 241, *Crowley v. AIB* [2016] IEHC 154).
7. The duty is however reinforced in the judicial review context where there is an obligation on respondents to disclose all relevant factual material. As it is put in *R. v. Lancashire County Council, ex parte Huddleston* [1986] 2 All E.R. 941 at 945, the respondent must put "*all the cards face upwards on the table*" in view of the fact that "*the vast majority of the cards will start in the authority's hands*". That principle has been applied and reinforced in a very large body of case law, and is further discussed in Marc de Blacam, *Judicial Review*, 3rd ed. at para. 49.24.
3. As put by the Court of Appeal of England and Wales in *Secretary of State for Foreign and Commonwealth Affairs v. Quark Fishing Ltd.* [2002] EWCA Civ. 1409 a defendant whose decision or action is challenged by way of judicial review owes a duty of candour to give a true and comprehensive account of the decision making process.
8. In *Tweed v. Parade's Commission for Northern Ireland* [2007] 1 A.C. 650, Lord Carswell at para. 31 refers to "*the obligation resting on a public authority to make candid disclosure to the court of its decision making process, laying before it the relevant facts and the reasoning behind the decision challenged*".
4. In *Treasury Holdings v. NAMA* [2012] IEHC 66 at paras. 126 and 127 Finlay Geoghegan J. approved the statement in Michael Fordham Q.C.'s *Judicial Review Handbook* (5th ed.) at para. 10.4 that, "*A defendant public authority and its lawyers owe a vital duty to make full and fair disclosure of relevant material*".
5. The same principle was also applied by McDermott J. in *McEvoy v. Garda Síochána Ombudsman Commission* [2015] IEHC 203.

6. In *R. (Citizens U.K.) v. Secretary of State for the Home Department* [2018] EWCA 1812, Singh L.J. at para. 106 referred to the “*duty of candour and cooperation with the court*” on the part of respondents to “*assist the court with full and accurate explanations of all the facts relevant to the issues which the court must decide*”. He quoted with approval his judgment when sitting in the High Court in *R. (Hoareau and anor.) v. Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 1508 (Admin), at para. 20 that: “*The duty of candour and co-operation which falls on public authorities, in particular on HM Government, is to assist the court with full and accurate explanations of all the facts relevant to the issues which the court must decide. It would not, therefore, be appropriate, for example, for a defendant simply to off-load a huge amount of documentation on the claimant and ask it, as it were, to find the ‘needle in the haystack’. It is the function of the public authority itself to draw the court’s attention to relevant matters; as [counsel] put it at the hearing before us, to identify ‘the good, the bad and the ugly’. This is because the underlying principle is that public authorities are not engaged in ordinary litigation, trying to defend their own private interests. Rather, they are engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of law.*”

**Should the (No. 1) judgment be re-opened?**

7. In *Lavery v. DPP (No. 3)* [2018] IEHC 185, I endeavoured to summarise the eight different situations in which a judgment could be reopened after it has been delivered. The eight categories set out in *Lavery* may be viewed as exceptions to the general principle of finality. The potentially relevant headings here are exception 1, where the court can change a judgment order or simply change its mind prior to the perfection of the order; exception 4, where the judgment has been procured by what is described in *Lavery* as fraud but what also includes misleading the court; and exception 7, the general ground of exceptional circumstances in the interests of justice and constitutional rights. (To facilitate read-across with *Lavery I* will maintain this numbering system below.)

**Exception 1: new evidence or change of mind by the court prior to perfection of the order**

8. In *Re. L. and B. (Children)* [2013] UKSC 8, no less than authority than Lady Hale said at para. 19 that “*there is jurisdiction to change one’s mind up until the order is drawn up and perfected.*” As the order in the present case has yet to be perfected and as important new information has come to my attention, this exception is clearly satisfied here.

**Exception 4: the court being misled**

9. The classic instance of the court reopening an issue where it had been misled is *Meek v. Fleming* [1961] 2 QB 366. In that case Holroyd Pearce L.J. said at p. 379: “*Where a party deliberately misleads the court in a material matter, and that deception has probably tipped the scale in his favour (or even, as I think, where it may reasonably have done so) it would be wrong to allow him to retain the judgment thus unfairly procured. Finis litium is a desirable object, but it must not be sought by so great a sacrifice of justice which is and must remain the supreme object. Moreover, to allow the victor to keep the spoils so unworthily obtained, would be an encouragement to such behaviour, and do even greater harm than the multiplication of trials. In every case it must be a question of degree,*

*weighing one principle against the other. In this case it is clear that the judge and jury were misled on an important matter."*

10. Where Holroyd Pearce L.J. refers to the misleading being done "*deliberately*" that is meant in a sense very different from "*intentionally*". It does not particularly matter that counsel's decision to withhold information could be called a good faith judgment call that ultimately simply did not find favour with the court; because precisely the same could be said of *Meek v. Fleming*. Thus it is not a question of *mala fides*, there is no doubt that counsel in the present case used *bona fide* judgment, but that does not mean that the Court in the present case was not misled. It was.
11. As submitted by Mr. Power, the information that was withheld was materially relevant to a dispute in the case. Thus, the net effect was that the Court was misled, albeit unintentionally on behalf of the respondent. This exception is also satisfied in the present case.
12. While Mr. Moore made some mileage out of Mr. Power's side's failure to work out for themselves the possible implications of the registration details issue based on the information that they had, the fact remains that the respondent had all of the relevant information whereas the applicant only had some of it. On that basis, it is entirely understandable that Mr. Power's side did not realise the full implications of the issue.

**Exception 7: exceptional circumstances including mistake**

13. Here the analogy is with *Re. McInerney Homes Ltd* [2011] IESC 31, *per* O'Donnell J. at para. 62 where he said that, once the judge proceeded on an incorrect assumption, "*he was entitled, and indeed arguably obliged, to reopen the matter.*" Thus if "*the hearing and indeed the judgment had proceeded almost on the basis of common mistake ... justice required that the matter should be reconsidered*" (see also *Odeh v. Minister for Justice and Equality* [2016] IEHC 654). This exception also applies here.

**Conclusion on re-opening the judgment**

14. As any one of these three headings would be sufficient to reopen the matter, the existence of three such independent grounds reinforces the conclusion that I should now reopen the (*No. 1*) decision and determine whether an order of *certiorari* should or should not be granted. Such a conclusion, for the avoidance of doubt, would have been arrived at even assuming I was wrong about any two of the three exceptions discussed above.

**Should an order of *certiorari* be granted?**

15. The two main questions under this heading are:
  - (i). Was the address at which the notice under s. 3 of the Immigration Act 1999 was served an address that was furnished to the local superintendent, being the local registration officer, simply by virtue of being given to a member of the GNIB?
  - (ii). If not, did the applicant furnish an address for service for the purposes of s. 3?

**Was an address furnished to the local superintendent simply by being given to a member of the GNIB?**

16. In the (*No. 1*) judgment I said that there must be an assumption of joined-up government and that giving the information to a member of the GNIB must be taken as giving it to the local registration officer. However, it now turns out that the member concerned was not in a position to enter the information on GNIB's registration system. I was not told that at the hearing of the matter – that only emerged after the *No. 1* judgment. It is clear that while joined up government is desirable it does not in fact exist here. On the evidence now before the court, there is no reason to think that D/Garda Byrne effectively communicated, or even was in a position to effectively communicate, the information to the local registration officer. The very notion of a registration officer implies some form of formal registration of the details a person or persons concerned; yet here the evidence is that D/Garda Byrne was not able to register those details on the GNIB system. Thus service at the address so given to D/Garda Byrne is not service at an address last furnished to the local registration officer in compliance with the statute.

**Did the applicant furnish an address for service for the purposes of the legislation?**

17. The phrase "*address for service*" is a term of art. It involves clear agreement by a person to be legally bound by service of formal documents at the address so furnished. Almost by definition, that is not the sort of thing that can be done implicitly. For all practical purposes, there is no such thing as the *implied* furnishing of an address for service. In almost all cases it must be furnished expressly. Giving a member of An Garda Síochána one's address orally which he or she writes in a notebook is not furnishing an address for service in general and is certainly not so here.

18. It is true that in the leave decision in *M.M. (Georgia) v. Minister for Justice, Equality and Law Reform* [2011] IEHC 529, Hogan J. said that in circumstances where the applicant had engaged in correspondence with the Minister at a particular address "*it may be, of course, that by engaging in correspondence with the Minister in this fashion, the applicant – perhaps tacitly or impliedly – might be taken to have furnished an address for service to the Minister for the purposes of s. 3 (6) (b) [of the Immigration Act, 1999]*". That comment was made on very different facts of course and in the context of a course of formal correspondence with the Department. But all that the judgment in *M.M. (Georgia)* decides is that leave should be granted to argue the point. That is what Hogan J. means by "*of course*" - that is, of course it could be argued that this point could be made. I do not interpret this judgment as meaning that "*of course*" an address for service could be furnished implicitly and I would not see that as a proposition that arises either as a matter of course or indeed at all, except perhaps in the most exceptional circumstances. In any event one might add that the phrase "*of course*" is not necessarily the most useful one; it's a bit patronising if one is actually stating the obvious, whereas if the point is disputable it comes across as both patronising and blustering. I'm probably as much an offender as anyone but, (like "*it is clear that*"), it's a phrase probably best kept to a minimum. *M.M. (Georgia)* decides only that the point is arguable. It does not assist the State here, their argument having been now been made and rejected.

19. *Q.W. v. Minister for Justice, Equality and Defence* [2012] IEHC 375 is not relevant to this case. It deals with a different situation where service was carried out in accordance with

the statute. In that case Hogan J. held that the fact that the applicant did not receive the documentation was irrelevant. *Q.W.* was a case where the statute was complied with as distinct from this case where it was not (see also per Finnegan J. as he then was in *D.P. v. Governor of the Training Unit* [2001] 1 I.R. 492, *M.A. (Pakistan) v. Governor of Cloverhill Prison* [2018] IEHC 95).

20. Thus under this heading I find that the applicant's conduct in giving an address to D/Garda Byrne does not constitute furnishing an address for service and consequently the statutory provisions regarding service were not complied with.
21. I should note for the sake of completeness that I do not need to get into the issue of discretion because the respondent was not asking for the case to be dismissed on a discretionary basis. The statement of opposition consists purely of denials and there is no positive plea regarding lack of candour, abuse of the system, or otherwise. The Supreme Court decision in *E. v. Minister for Justice and Equality* [2018] IESC 20, [2018] 3 I.R. 317 was on the basis of the parties having agreed to compromise the case by the time judgment was delivered so, consequently, the Supreme Court only had to deal with the question of statutory interpretation and did not get to the question of discretion. The point remains that if a person plays ducks and drakes with the immigration system there comes a point where discretionary remedies may not be available even if they establish some legalistic flaw in the process.

#### **Order**

22. Before concluding it is probably helpful to recapitulate what happened here. The applicant made an FOI request to the respondent on 12th November, 2018. The reply on behalf of the respondent dated 2nd January, 2019 did not disclose the existence of a minute from D/Garda Byrne dated 2nd November, 2009 still less the attachment to that minute setting out the applicant's registration details as they then stood. On the contrary the response obscured that information by referring only to a "*report from GNIB 10/11/2018*" which we now know contained a series of other documents. The response may not constitute compliance with the Freedom of Information Act, 2004 although I am not concerned with that precise issue now. What I am concerned with is the fact that the FOI response was relied on for forensic purposes and the details were not filled in for the purposes of the proceedings by the respondent; so that that can be described as Withholding of Information No. 1.
23. The proceedings were commenced on 8th February, 2019. A statement of opposition dated 4th July, 2019 was filed on 5th July, 2019 and after further adjournment an affidavit of D/Garda Byrne was sworn on 16th September, 2019 and filed on 1st October, 2019, and an affidavit of Mr. Jim Boyle was sworn on 20th September, 2019 and also filed on 1st October, 2019. Neither of these affidavits or indeed the statement of opposition disclosed the content of the applicant's registration details as attached to the minute of 2nd November, 2019. Had they done so it would have been clear that the address registered in respect of the applicant was different to the address at which the applicant was served. That constitutes Withholding of Information No. 2.

24. Furthermore, none of these documents disclosed that D/Garda Byrne was unable to amend the GNIB registration system when the address was given to him by the applicant on 23rd September, 2019. That is Withholding of Information No. 3.
25. All of these aspects of non-disclosure only came to light after the *ex tempore* decision in favour of the respondent. I accept that there was no intention to mislead the Court on behalf of anybody. In particular D/Garda Byrne, Mr. Jim Boyle and indeed Mr. Alan King are totally blameless as they acted on counsel's advices; as indeed are the CSSO. These are the sort of matters that a reasonable person and a reasonable solicitor would rely on counsel for. As far as counsel is concerned I accept Mr. Moore's complete *bona fides*. The work of a barrister involves many judgment calls, some quite fine. Such judgment calls can't all be right. This was a judgment call which ultimately did not find favour with the court. There was no intention to mislead the court but unfortunately the court was misled. That warrants, indeed requires, the previous conclusions to be revisited. As in *Meek v. Fleming*, one can mislead by silence or by withholding information even if that is an anxiously-considered decision.
26. In Mr. Moore's defence it is worth emphasising that there has been some lack of clarity around what the respondent's disclosure obligations precisely are, as in recent times the emphasis has been more on the disclosure obligations on the applicant's side of the house. Perhaps the best statement is that of Singh L.J. quoted above, that the duty of candour and cooperation which falls on public authorities is to assist the court with full and accurate explanations of all the facts relevant to the issues which the court must decide. Indeed Mr. Moore has no issue with that principle. It just wasn't applied here. It seems to me that the problem in this case was consideration of disclosure was over-influenced by what the respondents case was, rather than by what the material issues overall were, taking due account of the points being made by the applicant.
27. I also need to make the further point in Mr. Moore's defence that the third element of withholding information namely D/Garda Byrne not being able to update the system wasn't withheld by reason of any tactical consideration at all; it simply did not come to counsel's attention until after the *ex tempore* ruling. Thus that particular item is more readily filed under the heading of human error rather than misjudgement.
28. The conclusion therefore is that I have jurisdiction to reopen the judgment, and that I should do so, and on doing so I will reverse the original decision in the (*No. 1*) judgment and I make an order granting *certiorari* quashing the deportation order. On the face of it that may seem inconsistent, but that would be a misunderstanding. Significant new information has come to light. In the aphorism attributed to John Maynard Keynes, previously referred to in *Seredych v. Minister for Justice and Equality (No. 3)* [2019] IEHC 730 at para. 25, "*When the facts change, I change my mind. What do you do, Sir?*"