THE HIGH COURT

Record No. 2017 No. 473 EXT

BETWEEN

ERIC EOIN MARQUES

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered the 31st day of July, 2017.

INTRODUCTION AND BACKGROUND

1. The applicant is sought by the United States of America ("the USA") for the purposes of prosecution for four alleged offences relating to the advertisement and distribution of child pornography. The applicant was arrested in Ireland in August, 2013 on foot of a provisional arrest warrant issued by the High Court pursuant to s. 27 (6) of the Extradition Act, 1965, as amended ("the 1965 Act"). The High Court made an order committing him to prison to await the order of the Minister for Justice and Equality ("the minister") for his extradition (*Attorney General v. Marques* [2015] IEHC 798). The Court of Appeal dismissed his appeal (*Attorney General v. Marques* [2016] IECA 374) and the Supreme Court refused to grant him further leave to appeal (*Attorney General v. Marques* [2017] IESCDET 50).

2. The applicant had also challenged, by way of judicial review proceedings, the refusal of the Director of Public Prosecutions ("the DPP") to give reasons for her decision not to prosecute him in this jurisdiction for offences arising from the same acts for which his extradition was sought. This Court refused the applicant the relief he sought (*Attorney General v. Marques* above) and the Court of Appeal in *Marques v. The DPP* [2016] IECA 373, upheld the decision. The applicant sought leave to appeal to the Supreme Court (*Marques v. The DPP* [2017] IESCDET 51) but was refused leave on 25th May, 2017.

3. The minister, pursuant to s. 33 of the 1965 Act, ordered that the applicant be surrendered to the United States of America. The applicant challenges that decision, and the minister's failure to give reasons, by way of these judicial review proceedings. This judgment concerns an application for discovery in those proceedings. Leave for judicial review has not yet been granted and it is intended to have a telescoped hearing of the proceedings. That procedural approach has no affect on this application for discovery.

THE RELEVANT STATUTORY PROVISIONS

4. Under s. 33 (1) of the 1965 Act, the minister may;

> "if the person committed is not discharged by the decision of the High Court in *habeas corpus* proceedings, by order direct the person to be surrendered to such other person as in his opinion is duly authorised by the requesting country to receive him and he shall be surrendered accordingly."

5. However, under s. 15 (2) of the 1965 Act;

> "extradition may be refused by the Minister for an offence which is also an offence under the law of the State if the Director of Public Prosecutions or the Attorney General has decided either not to institute or to terminate proceedings against the person claimed in respect of the offence."

THE SUBSTANTIVE JUDICIAL REVIEW PROCEEDINGS

6. In the judicial review proceedings, the applicant seeks:

> 1) An order of *certiorari* quashing the order of the minister to surrender the applicant to the United States of America;
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> 2) Declaratory relief that the minister, under s. 15 (2) of the 1965 Act, has a duty to request the reasons of the DPP for not prosecuting the applicant in this jurisdiction;
>
> 3) An order of *mandamus* and/or an injunction requiring the minister to give reasons for her decision to surrender the applicant;
>
> 4) The applicant seeks any other or further order, including such interim and interlocutory relief, as this Court may find just.

7. An unsatisfactory aspect of these proceedings is that the precise grounds upon which the above relief was sought are not clearly set out in the statement grounding the application for judicial review. This occurred despite the fact that the applicant was granted time to amend his statement of grounds. Valuable court time was utilised in trying to tease out the grounds upon which the relief is sought. Furthermore, in the course of the application for discovery, it transpired that no amended statement of grounds had been filed and served, although the applicant was seeking to rely upon it in draft form. That necessitated the motion being adjourned so that the statement of grounds could be filed, a fresh statement of opposition could then also be filed and arguments properly marshalled in respect of the application.

8. The main grounds argued by the applicant, to the extent the Court can determine, are as follows:

> a) That the minister's decision is unsound and defective because she did not seek the reasons from the DPP as to why the applicant was not prosecuted in this jurisdiction (it is accepted by the applicant that discovery is not necessary for the applicant to be able to argue this ground);
>
> b) That the minister did not give proper reasons as to why she made the decision to surrender the applicant and that the decision is therefore presumptively invalid (it is also accepted by the applicant that discovery is not necessary for this ground);

c) That the minister had regard to irrelevant considerations and failed to have regard to relevant considerations. The applicant sets out, partially in correspondence and partially in the pleadings, a variety of matters which, he says, the minister failed to take into account. These include the fact he could be prosecuted here and his willingness to plead guilty, the public interest in prosecuting crime here, the various grounds for refusing extradition such as his family links here and his Asperger's syndrome and the possibility that the DPP's decision not to direct a prosecution in this jurisdiction was down to the simple expedient that his extradition has been requested by the United States of America (the applicant submitted that this ground is also a "proportionality ground" for which discovery is necessary);

d) That it was a breach of the applicant's right to natural justice and constitutional fair procedures not to be told the proper basis for a decision that affects his interests to a significant degree and he did not have a meaningful opportunity to make submissions on the issue (per para. 11 of the amended statement of grounds).

9. The above claims must be seen in the context of the correspondence between the parties. The applicant, on 31st May, 2017, wrote to the Chief State Solicitor regarding his potential surrender. The letter sought confirmation that the minister would seek the reasons of the DPP for the refusal to prosecute and also confirmation that the minister would have regard to the DPP's reasons. The applicant requested the minister not to order the applicant's surrender unless she was first satisfied that the DPP's decision not to prosecute was based solely on legitimate considerations and that the extradition was in the public interest. The letter stated that the applicant would consent to any procedure that would secure his guilty plea in this jurisdiction instead of being extradited. The applicant also stated in the letter that there was a strong compassionate basis for the minister to resist the extradition of the applicant. The letter referred to various grounds such as the applicant's Asperger's syndrome, the length of prison sentence he faces and certain aspects of the criminal justice system in the United States of America.

10. The applicant sought the minister's reasons in the event that it was so decided that the applicant would be surrendered and in sufficient time so that the applicant could consider them. On 1st June, 2017, the minister, under s. 33 of the 1965 Act, signed an order directing the applicant's surrender to the United States of America. The minister stated in a letter of response, dated 2nd June, 2017, that she had considered the assertions made by the applicant in his letter of 31st May, 2017.

11. The minister also stated that, given the independence of the DPP,

> " it is neither necessary nor appropriate that she would seek an explanation from the Director as to the reasons why a decision was made not to prosecute Mr Marques in this jurisdiction."

The minister stated that the applicant had been able to raise any matter of concern to him in the course of the previous extensive proceedings. The minister said that the views of the High Court and the Court of Appeal regarding the previous judicial review proceedings were taken into account, as was the determination of the Supreme Court.

12. A statement of opposition was filed by the minister reiterating the responses in the letter of 2nd June, 2017. It is only necessary to highlight those points of particular relevance to this application. The minister pleads that s. 15 of the 1965 Act gives a statutory discretion to the minister to refuse extradition for an offence which is also an offence under the law of the state even if the DPP has decided not to institute or terminate proceedings. Save that the residual discretion of the minister is only exercisable after the DPP has made a decision not to institute or to terminate proceedings, it is denied that the minister has a statutory duty to consider or have regard to the decision of the DPP not to prosecute. It is pleaded that the subsection was intended to cover situations where there may be reasons not to give effect to an extradition request that are beyond the statutory bars to extradition.

13. The statement of opposition contains a plea that the minister expressly indicated that she had regard to all matters urged upon her on behalf of the applicant. The statement of opposition recites that the matters personal to the applicant (and raised by him at para. 7 of the statement of grounds) were raised and considered by the courts in the context of the extradition proceedings. The statement of opposition also states that the minister in her reply had said that she had considered the issues raised by the applicant and that, "accordingly, it is clear that all relevant matters were in fact considered."

14. The statement of opposition includes a denial that the reply of the minister was unclear. In particular, the minister denies that she was required to consider the reasons for the DPP who has statutory independence and that it was neither necessary nor appropriate for the minister to seek the reasons. It is also denied that adequate reasons were not provided by the minister. It is further denied that the giving of reasons is required to permit the exercise of her discretion under s. 15 (2) of the 1965 Act as alleged or at all. There was a denial of a breach of the applicant's rights to natural justice or constitutional fair procedures; the applicant made submissions to the minister prior to her making the impugned decision. The minister pleads it was mere conjecture on the part of the applicant to suggest that she had come to her own conclusions in respect of the DPP's reasons and substituted her own.

THE APPLICATION FOR DISCOVERY

15. The present application is for the discovery of:

> "[d]epartmental memoranda relating to the respondent's consideration of her decision on whether to direct the surrender of the Applicant to the USA, including departmental memoranda providing advices or recommendations to the respondent."

16. It is apparent from the applicant's discovery letter of 27th June, 2017, that the applicant seeks memoranda relating to the previous judicial review proceedings against the DPP in which the minister was a notice party. The applicant also seeks the memoranda which caused the production of a letter in January, 2017, indicating the applicant was to be surrendered (this was apparently sent in error as the Chief State Solicitor thought the stay on his surrender had lapsed) and the memoranda relating to the second indication of surrender on 26th May, 2017, after the decision of the Supreme Court to refuse leave to appeal. This request for voluntary disclosure was refused by the respondent in a letter dated 29th June, 2017. The letters, of 31st May, 2017, and of 2nd, 27th and 29th June, 2017, form part of the grounds on which the application for discovery is made.

THE GROUNDS FOR SEEKING DISCOVERY

17. Towards the end of the application for discovery, the applicant clarified in oral submissions that discovery was sought as being necessary and relevant to three grounds. These were:

> a) The issue of whether the minister took into account irrelevant considerations and failed to take into account relevant considerations. The applicant set out a series of issues that, he submits, discovery will enable the applicant and the Court to ascertain. These issues raise questions as to whether the minister made her own decision or speculated on other matters, e.g. "did the minister identify her own reasons why there was no domestic prosecution, and/or did she speculate

as to the DPP's reasons for not directing a prosecution?";

b) The minister failed to exercise properly her discretion under s. 15(2) of the 1965 Act. The applicant submitted that there were multiple constructions to be put on the letter of 2nd June, 2017 and the statement of opposition. When combined with the fact that there was a question mark as to when exactly the decision issued, the applicant submitted that discovery would shed light on how the minister went about making her decision;

c) The applicant also submitted that discovery was relevant and necessary for "a proportionality-type argument" which was an argument as to merits and which said ground was implicit within the pleadings.

18. There was also one overarching ground upon which the applicant sought discovery; this was on the basis of fair procedures. This went beyond the fair procedures argument that had been made in the statement grounding the application for judicial review. In his written submissions, the applicant states that fair procedures require:

> "that where a decision-maker on public law proposes to make a decision which has significant consequences for the affected party, the material and reasons which the decision-maker proposes to rely upon should be made available to the affected party, in sufficient time for such material and reasons to be considered and, if necessary challenged".

19. The applicant submitted that the memoranda were necessary for fairly disposing of the issues and for the saving of costs. Thus, the applicant submitted that discovery is necessary to achieve a just resolution of the issues before the Court in the judicial review proceedings. Counsel for the applicant further submitted at the oral hearing that even if discovery is not necessary for disposing fairly of the judicial review proceedings, it is necessary for saving costs. Counsel further submitted that the requested materials are necessary as they will likely assist the applicant in making his submissions in those proceedings. It is their contention that if this Court holds otherwise, the applicant will be placed at a litigious disadvantage and the impugned decision of the minister would be insulated from effective review.

20. The minister indicates that the category of discovery is not necessary as the matters contended for by the applicant may be established without the benefit of discovery. The minister also states that there is no factual dispute that requires resolution in order to adjudicate properly on the judicial review application as the only evidence before the Court is the affidavit of the solicitor for the applicant.

JUDICIAL REVIEW AND DISCOVERY

21. It is well settled law that discovery is available in judicial review proceedings but that it is inherent in the nature of judicial review proceedings that the necessity for discovery will be more difficult to establish than in plenary proceedings. The following dictum from Finlay Geoghegan J. in *K.A. v. Minister for Justice* [2003] 2 I.R. 93 at p. 100 restates this principle and the rationale behind the limited availability of discovery to judicial review proceedings:

> "In this jurisdiction, it appears that the principles according to which the courts will determine applications for discovery in judicial review proceedings are the same as those upon which they are determined in other forms of civil actions. […] It is however inherent in the nature of judicial review that the necessity for discovery will be more difficult to establish than in plenary proceedings. This follows from the fact that in judicial review what is at issue is the legality of the decision challenged. In many instances the facts are not in dispute. Discovery will normally, but not exclusively, be confined to factual issues in dispute. It can be envisaged that an applicant for judicial review may raise a factual issue and, whilst not disputed, consider that there are documents in the possession of the respondent which would assist in the proof of relevant related facts at the hearing and that a court would take the view that discovery of such documents is necessary for disposing fairly of the application for judicial review. The limitation on discovery in such circumstances is that it must not be considered to be a fishing exercise. It is difficult to state in a general way the precise dividing line but it is clear that it is not sufficient for an applicant simply to make an assertion not based upon any substantiated act and then seek discovery in the hope that there will exist documents which support the assertion. In *R. v. Secretary of State for Health, ex parte Hackney London Borough* (Unreported, English Court of Appeal, 24th July, 1994) Bingham M.R. […] put the test to be met by an applicant in the following terms:-
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> 'Have they raised a factual issue of sufficient substance, or adduced evidence which grounds a reasonable suspicion of unlawfulness, such that the application cannot be fairly resolved without discovery?'".

22. It is for those reasons that it has been said that discovery in judicial review proceedings "ought to be the exception rather than the rule" (Kelly J. in *Sheehy v. Ireland*, Unreported, High Court, July 30th, 2002). Laffoy J. in *Fitzwilton v. Mahon* [2006] IEHC 48 stated that the determining factor is whether it is necessary having regard to the ground on which the application is founded or the state of the evidence while also pointing out that the nature of judicial review proceedings means that the practical application of the principles may result in discovery being ordered less frequently.

23. More recently, McDermott J. set out in nine paragraphs the approach to be taken when discovery is sought in judicial review proceedings. At para. 25 of *McEvoy v. An Garda Síochána Ombudsman Commission* [2015] IEHC 203, he stated:

> "(1) An order for discovery should only be granted where the applicant seeking discovery establishes that it is relevant and necessary for the fair disposal of the issues in the case in the sense indicated by Brett L.J. in the Peruvian Guano case:
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> (2) The court must determine whether the documents sought are relevant to the issues to be tried as determined from the pleadings:
>
> (3) A party may not seek discovery in order to find out whether a document may be relevant and a general trawl through a party's documentation is not permitted. However, a reasonable possibility that the documents are relevant is sufficient.
>
> (4) Judicial review is not concerned with the correctness of a decision but the way in which the decision was reached. Therefore, the categories of documents which a court would consider necessary to be discovered would be much more confined than if the litigation was related to the merits of the case and this necessarily restricts what may be regarded as appropriate discovery.
>
> (5) Discovery will not normally be regarded as necessary if the judicial review application is based on impropriety which may be established without the benefit of discovery:

(6) If a decision is challenged as unreasonable or irrational, discovery will not be necessary because, if the decision is clearly wrong, it is not necessary to ascertain how it was reached:

(7) Discovery may be necessary where there is a clear factual dispute on the affidavits which must be resolved in order to adjudicate properly or fairly on the application or where there is *prima facie* evidence to the effect that a document that ought to have been considered before a decision was made was not or a document which ought not to have been seen before a decision was made, was considered:

(8) The court must consider whether discovery is necessary having regard to the grounds upon which the application was founded or the state of the evidence (per Laffoy J. in Fitzwilton cited above). But the question must be decided in respect of the issues that arise on the judicial review application rather than the substantive issue which was before the decision maker.

(9) An applicant is not entitled to go behind an affidavit by seeking discovery to undermine its correctness unless there is some material outside that contained in the affidavit to suggest that in some material respect the affidavit is inaccurate. It is inappropriate to allow discovery the only purpose of which is to act as a challenge to the accuracy of an affidavit."

24. In Hogan and Morgan's *Administrative Law in Ireland* (4th ed., Roundhall), para. 16-69, the following is stated:

> "While the ordinary discovery rules apply in judicial review, there are nevertheless special factors which have operated to limit the scope of discovery in judicial review matters. First, the facts are generally not the subject of controversy in judicial review proceedings (emphasis in original). Secondly, as judicial review is normally concerned with procedure rather than substance, this inevitably will narrow the range of documents which are relevant. Indeed, "discovery will not normally be regarded as necessary if the judicial review application is based on procedural impropriety as ordinarily that can be established without the benefit of discovery' [*Carlow Kilkenny Radio Ltd v. Broadcasting Commission of Ireland* [2003] 3 I.R. 528, 537]. Thirdly, discovery will generally be refused where the applicant has made out no positive case on a particular ground, but where discovery is simply sought 'in the hope of turning up something out of which he could fashion a possible challenge' [Re Rooney's Application [1995] NI 398, 414–5]. Here again if the challenge is based on irrationality or unreasonableness grounds, discovery will 'not normally be necessary because if the decision is clearly wrong it is not necessary to ascertain how it was arrived at' [*Kilkenny Broadcasting Co Ltd v. Broadcasting Authority of Ireland* [2003] 3 I.R. 528, 537]. The result of these factors is that discovery in judicial review applications is thus generally confined to cases where information is improperly withheld or where there is a relevant and material conflict of fact on the affidavits."

That passage has been cited with approval by Barrett J. in *Murphy v. Minister for Transport, Tourism and Sport* [2017] IEHC 315 and *Ryan v. The Commissioner of an Garda Síochána* [2017] IEHC 260 in saying it was as good a summary as any of the present law relating to discovery in judicial review.

25. The applicant did not disagree with the principles set out in the above case law but sought to establish that the application of those principles to judicial review involving personal rights, especially in the field of immigration, had moved towards a position where departmental memoranda were discovered or made available to an applicant as a matter of course. The applicant also sought to bring his own application within the long-established principles by pointing to the specific facts.

26. The applicant submitted the decision of the Supreme Court in *Carlow Kilkenny Radio Ltd, Kildare Radio Ltd* and *Carlow Kildare Radio Ltd v. Broadcasting Commission of Ireland* [2013] 3 I.R. 528 was distinguishable. He referred to the large numbers of documents sought in that application and contrasted it with the present. The applicant submitted that the present application for disclosure is not a fishing expedition as it is very limited in its remit, it involves a finite number of documents which are of a discreet category, which the applicant contends, must be readily available and undoubtedly exist. Counsel for the applicant further submitted that the category of documents is one which one would ordinarily expect to see openly exhibited in any judicial review proceedings, and submitted that seeking these documents is a reasonable and measured request.

27. The principle argument made by the applicant in support of the motion for discovery was that modern case law on administrative law strongly supports the view that fairness requires than an applicant challenging a public law decision should be provided with the material which is before the decision maker. He relied upon the decision in *G.S. v. Minister for Justice, Equality and Law Reform* [2004] 2 I.R. 417 in which Peart J. states at p. 423 of the report:

> "On balance it seems to me that the applicant in the present case must be in a position to make his best possible case at the leave stage. That is not to say that he is in any better position of entitlement to discovery than is a person who has been granted leave. To my mind these documents are documents which a person to whom leave has been granted would be entitled on discovery. The documents described at para. 1 of the letter dated the 27th February, 2004, are part of the material which was before the respondent when he made his decision and that is the very reason why the respondent furnished same, albeit in truncated form, to the applicant's solicitor and before any submissions were made. I think it is therefore arguable that the documents would be such as might have assisted the applicant in making the submissions made and which the respondent is obliged to consider before making his final decision on the matter. Not to order the discovery of same at this pre-leave stage has the potential to place the applicant in a less advantageous position in making his application for leave than if they were discovered and it therefore seems unfair to require leave to be granted prior to discovery being ordered."

28. In G.S., the statement of grounds contained an express ground that it was a fundamental failure of fair procedures to fail to make certain material available prior to making the decision to revoke the refugee status of the applicant in that case. The departmental memorandum had been made available in part to the applicant prior to the decision. The decision of Peart J. was influenced by what he saw as an invariable practice and the fact that the material at issue would have been furnished if it were not for the claim of privilege. Therefore, in his view, the issue in the discovery was one of privilege which could only be dealt with after discovery had been ordered. Peart J. stated that the courts would not countenance a situation where the application for discovery amounts to a "fishing exercise". In the view of this Court, this is an indication that Peart J. accepted that the general rules of discovery applied even in the case of judicial review and requests for departmental memoranda in cases concerning refugee status.

29. The applicant also relied upon the decision of the Supreme Court in *Cecily Cunningham v. President of the Circuit Court and the DPP* [2012] 3 I.R. 222 in support of his application. In that case, correspondence had been referred to in an affidavit of a Garda Superintendent for the purpose of supporting the reason for the delay and the Supreme Court, *inter alia*, said that applicants:

> "must have the opportunity of satisfying themselves that what the party has chosen to release from privilege represents

> the whole of the material relevant to the issue in question, and is accurately characterised."

That was a case in which a factual dispute existed between the parties arising from the affidavit sworn by the respondent. In circumstances where the affidavit referred directly to certain documentation, discovery was necessary to resolve the issue between the parties.

30. In support of his submission that there must be a liberal approach to discovery in judicial review, counsel relied upon the dictum of McCarthy J. in the Supreme Court decision in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 to the effect that an applicant may call in aid the procedural weapons of discovery and interrogatories because an applicant must, so far as reasonably possible, identify and prove in evidence the material upon which the decision was made. In the view of the Court, that *dictum* is no more than a general statement of the necessity to prove a case while reciting that the law provides certain tools for the assistance of litigants in that regard. The subsequent case law referred to above has reaffirmed the general availability of discovery but has delineated how principles of discovery are applied in judicial review proceedings given the nature of those proceedings.

31. Counsel also submitted that what was at issue was a constitutional right of access to the court to challenge a public law decision that has significant implications for the applicant's future. He submitted that in order for that constitutional right to be vindicated, discovery was necessary. While the applicant recognised that the burden of proof rests upon him in the judicial review proceedings, he contended that fairness dictates that limited and reasonable discovery be granted, or that the burden of proof should be adjudged to shift to the decision maker in whose possession and power the small number of documents exclusively lies.

32. In support of these submissions, the applicant relied on the dictum of the Supreme Court in In *Re Article 26 of the Illegal Immigrants (Trafficking) Bill, 1999* [2000] 2 IR 360 that;

> "[…] an applicant, who establishes that his right of access to the courts has been prejudiced by the failure of the relevant State authority to make available material which is appropriate and necessary to enable him to exercise that right, is entitled to apply to the High Court for discovery of documents."

The applicant also relied on the dictum of McCarthy J. in *O'Keeffe v. An Bord Pleanála*, at p. 80 that:

> "[t]he burden of proof cast upon an applicant may be a deterrent unless one recognises that a stage may be reached where the burden of proof may shift to the administrative body concerned. I would reserve that question for an appropriate case."

33. The applicant also submitted that Article 41 of the European Charter of Fundamental Rights and Freedoms ("the Charter") by analogy supported the case for discovery. Although EU law was not at issue in these proceedings, he submitted that the provisions of the Article concerning the right of every person of access to his/her file as well as the right to be heard in any individual measure affecting them adversely, supported an understanding that the rule of law requires discovery.

34. Further, the applicant submitted that without the requested materials, the Court will be unable to perform its function of assessment and supervision of the lawfulness of such an important ministerial decision, due to the fact that the Court knows very little about the decision making process of the minister and that the Court's task of scrutinising the lawfulness of "what went on is made particularly difficult" by virtue of what the applicant describes as the uninformative way the minister responded to the applicant's correspondence and the tactical decision not to file an affidavit. It is the applicant's contention in his discovery submissions that the High Court's supervisory function in judicial review proceedings would be enhanced where a state respondent discloses the process which led to the making of the impugned decision. The most straightforward way of achieving this is having the requested materials that were before the minister at the time of making the impugned decision brought before the Court. He submitted that judicial review is a "process which falls to be conducted with all the cards faced upwards on the table and the vast majority of the cards will start in the authority's hands", relying on the words of Donaldson MR in *R v. Lancashire County Council DP Huddleston* [1986] 2 All ER 941.

35. The reference to cards being "face-up" is also made by McDermott J. in his decision in McEvoy at para. 33 as follows:

> "I am also satisfied that discovery is necessary for the fair hearing of this case. It is important that the procedure and process engaged in by the respondent is clear to the court and that all cards are "face up" at the hearing."

The decision to grant discovery in that case must be seen in the context of the issues in that case which concerned the making of a further complaint against a Garda in circumstances where those issues had been dealt with earlier and there was a claim to finality.

36. The applicant submitted that the case law indicates that where a respondent's affidavit is incomplete or fails to deal fully with a relevant issue, then an applicant is ordinarily entitled to discovery. The applicant stated that there is no affidavit from the respondent in this case and that, therefore, one may argue that there is no affidavit that is 'incomplete'. However, the applicant submitted that this is not a sufficient basis for distinguishing the principle arising from the case law because where a respondent has not filed an affidavit, the applicant submitted that that is hardly an engagement with the issue or a response that deals fully with the applicant's request. Further, the applicant submitted that on public policy level, the law ought not to incentivise obfuscation in correspondence or tactical withholding of information particularly as, in cases such as this case, the assertion is that the requested information is focused and of limited remit.

37. The applicant relied on a number of other cases. In the view of the Court, the decision of McDermott J. in *T.A.R. v. The Minister for Justice, Equality and Defence* [2014] IEHC 385 is not relevant to this application, as it concerns substantive judicial review proceedings rather than an application for discovery. For a similar reason the case of *Bradley v. The Minister for Justice and Equality* [2017] IEHC 422 is not relevant, although it does demonstrate that a point may be reached in judicial review proceedings where the relevance and necessity for sight of particular documents becomes apparent.

38. The applicant relied upon the case of *A.P. v. The Minister for Justice and Equality* [2014] IEHC 17 in which McDermott J. granted inspection of certain documents which were relevant to a challenge to the minister's refusal to grant reasons for the refusal of a grant of a certificate of naturalisation. The various *dicta* in that case are of limited assistance as the issue was inspection which was being resisted on the basis of public interest privilege and the security of the State.

39. The applicant also relied upon the dictum of McDermott J. in *McHugh v. The Governor of Portlaoise Prison* [2015] IEHC 641 at para. 46 as follows:

> "The respondents failed to present clear and untrammelled evidence concerning how the application was dealt with by the Prison Service or by the Minister. The court expects the respondents to be forthright and complete in their evidence as to how and why decisions were made or not, as the case may be. Judicial review of executive action, or inaction, is only effective if the court is furnished with an accurate history of the decision-making process. The facts should be readily ascertainable from the contents of the official files which are invariably in the possession of the decision-maker and were central to the issues in this case. It is not acceptable that such records should be presented in a piecemeal manner to the court."

40. The foregoing dictum must be seen in the specific context of that case where the Court had found the behaviour of the respondents during the proceedings entirely unsatisfactory. The history of those proceedings showed a chaotic approach to the decision making process: reasons had been given; reasons resiled from; incorrect indications given that a decision had been made; constant changes of position from the respondents including during the hearing of the substantive application. The passage relied upon does not or could not indicate that McDermott J. meant to overturn his carefully identified approach to discovery in judicial review proceedings which he had delivered in the discovery application in McEvoy above less than 6 months earlier.

41. The applicant also relied on the decision of the House of Lords in *Tweed v. Parades Commission for Northern Ireland* [2007] 1 AC 650 in support of the submission that where issues of proportionality are involved, that the Court should access as far as possible the original documents from which the decision-maker received information and advice. In response, the minister points out that Hogan J. in *Evans v. University College Cork* [2010] IEHC 420 pointed out that the restrictive rule to the availability of discovery in judicial review that applied in the UK was not applied in theory or practice here. Hogan J. also observed that discovery can be more extensive in cases involving a challenge to the proportionality of any administrative decision.

DECISION OF THE COURT

42. Identifying the case as pleaded by an applicant, and the nature of the opposition thereto, is vital for any court when assessing if discovery is necessary for the fair disposal of the issues in the case. Undoubtedly, the central issues being advanced in this judicial review application are that the minister's decision to order the applicant's surrender to the USA was invalid because she did not seek or ascertain the DPP's reasons for not prosecuting the applicant in this jurisdiction and also that the reasons the minister gave for her decision were inadequate. These are not matters for which discovery is required, as has been accepted by the applicant. The Court must assess whether the remaining issues, which involve concerns about fair procedures, whether the minister took into account irrelevant considerations and failed to take into account relevant ones including a failure to exercise her discretion properly under s. 15 (2) of the 1965 Act, require discovery of the departmental memoranda.

43. As counsel for the applicant urged on the Court, discovery is to be ordered if it is necessary for disposing fairly of the cause or matter or for saving costs. The Supreme Court held in *Ryanair plc v. Aer Rianta cpt* [2003] 4 I.R. 264 that, in order to establish that discovery was necessary for disposing fairly of the cause or matter, the applicant did not have to prove that the documents sought to be discovered were in any sense absolutely necessary but rather that he would suffer a litigious disadvantage by not seeing them. It is in that sense that the Court assesses the necessity for discovery in these proceedings.

44. In the view of the Court, the fair procedures argument falls into two categories: (i) a claim pleaded in para. 11 of his statement of grounds and (ii) a general claim that fair procedures require that the documents that were before the minister should be available to the applicant. The claim under para. 11 that fair procedures require that the application be told the "proper basis for a decision that affects his interests to a significant degree" is, at its core, a claim that inadequate reasons were given. It will require the Court at the hearing of the substantive proceedings to assess whether the reasons given were adequate and, as a matter of law, complied with the requirement of fair procedures. It is also important to recall that departmental memoranda are not synonymous with the minister's decision. The decision and the reasons for that decision, as identified in the response of 2nd June, 2017, are available for critique by the applicant and for consideration by the Court. There is no litigious disadvantage for the applicant in arguing this point at the substantive hearing by not having the memoranda. Discovery is not necessary for the applicant to advance his claim that the reasons provided are inadequate.

45. In so far as para. 11 of the statement of grounds amounts to more than a formal challenge to the inadequacy of reasons, but instead is a claim that "the proper basis" was other than the reason given in the letter, this is an assertion based upon nothing more than speculation. Indeed, in his suggestion that the true or "proper" basis is other than what is being put forward, the applicant makes a general claim of bad faith on the part of the minister. I adopt what Hogan J. stated in Evans at para. 8 as follows:

> "This is almost a textbook example of what Sir Thomas Bingham MR had in mind in Hackney LBC, namely, an instance of an applicant making bare unsubstantiated allegations and then seeking wide-ranging discovery on the basis that the mere invocation of the talismanic words "bad faith" makes every document concerning the parties to the litigation relevant for discovery purposes, or at least potentially so for that reason, the courts cannot permit an applicant simply to make such a bare allegation - which, in any event and quite independently of any discovery considerations, ought to have been particularised - and then use it as the foundation for seeking extensive discovery of all possible documents which concern him. In these circumstances, I would decline for this reason to make the discovery sought in respect of the first category of documents at issue."

46. The second fair procedures claim, namely that fair procedures requires a general right to the information that was before the minister, is not borne out on the case-law. The Supreme Court and High Court have dealt extensively with discovery in judicial review proceedings in a series of decisions which post-date the main cases relied upon by the applicant (O'Keeffe v. Bord Pleanála and *In re Illegal Immigrants (Trafficking) Bill 1999*, both cited earlier). As demonstrated in this judgment above, the recent case law upholds that the principles of discovery apply to judicial review proceedings as they do to other proceedings. That case law also establishes that because of the nature of judicial review proceedings, which focus on the legality of the decision challenged, discovery is the exception rather than the norm. As seen from the cases referred to earlier in this judgment under the heading "judicial review and discovery", none of the cases relied upon by the applicant indicates a general right to discovery of the decision maker's file (or department memoranda) in every case that concerns fundamental rights. To the extent that there is *dicta* that might possibly appear to indicate otherwise, such *dicta* is case specific and acknowledged as such in the relevant judgments.

47. Furthermore, an application for discovery may not be the appropriate place to advance the wider argument that a person is entitled, as a matter of fair procedures, to have advance sight (or subsequent sight) of the departmental memoranda that were before the minister at the time the challenged order was made. If such a claim is to be made, it must be made clearly on the pleadings. Such a claim is not made in these proceedings, either expressly or, so it appears, impliedly. The applicant in this case had every opportunity to include such a claim if one was to be made (an amended statement of grounds was actually filed and served over three weeks after the application for leave had been brought). However, even if the Court is incorrect in determining such a claim is not implicit in the pleadings, it is a claim that may more appropriately be made at the substantive hearing (see below for

further discussion). Moreover, even if a general claim of fair procedures is being made, it would pre-determine such a claim if the Court was to order discovery on the very issue that was in dispute in the substantive hearing.

48. The applicant claims that the departmental memoranda are necessary for the determination of the issue that the minister took irrelevant consideration into account and failed to have regard to relevant considerations. In the applicant's submissions on the application for discovery, he lists points which he says were to be taken into consideration by the minister but were not so taken, or those which should not have been taken into consideration but could have been so taken onto account. The applicant's first list sets out the issues that he asked the minister to consider when he wrote to her asking for his surrender to be refused. The second list raises a series of questions which can only be interpreted as an attempt to impugn the minister's decision by speculating on what she may have had regard to when making that decision.

49. The claim made under the general heading of having regard to irrelevant considerations and failing to have regard to relevant ones is, in truth, a cross between procedural impropriety and unreasonableness. McDermott J. stated, in his fifth paragraph in *McEvoy* above, that discovery is not normally regarded as necessary if the judicial review application is based on impropriety which may be established without the benefit of discovery. As Geoghegan J. stated in *Carlow/Kilkenny Radio Ltd*, such procedural impropriety can ordinarily be established with the benefit of discovery.

50. A verifying affidavit grounding the statement of opposition has been sworn in this case. The minister contends that this affidavit does not raise any factual dispute relevant to the issue of discovery. Geoghegan J. stated in *Carlow/Kilkenny Radio Ltd* at p. 537:

> "Where discovery will be necessary is where there is a clear factual dispute on the affidavits that would have to be resolved in order properly to adjudicate on the application or where there is *prima facie* evidence to the effect, either that a document which ought to have been before the deciding body was not before it or that a document which ought not to have been before the deciding body was before it."

51. In the present case, there is no factual dispute in the sense outlined by Geoghegan J. There is no dispute arising from the affidavits about the process that was applied or what was not applied in a real sense; there is merely the applicant's assertion of such a dispute. There is no *prima facie* evidence as to incorrect documents being before the minister. There is nothing prima facie to suggest that she had failed to take into account a relevant item. On the contrary, the applicant's main claim is that the circumstances are "necessary to enable the applicant and the Court ascertain" if the minister's decision was based upon on a wide number of issues which the applicant puts forward. What is being put forward is, on the one hand, a general claim that she failed to take into account the items urged upon her by the applicant and the second is an exercise in guessing all the possible things that might have been taken into account. As example of the second is the applicant questioning whether the minister identified her own reasons as to why there was no domestic prosecution or whether the minister speculated as to the DPP's reasons for not directing a prosecution in this jurisdiction. There is also a claim that, because the Chief State Solicitor wrote to the applicant's solicitors stating that the extradition would proceed immediately, there is doubt about when the minister made her decision and on what basis.

52. In my view, the grounds put forward by the applicant amount to speculation and in some cases imputations of bad faith on the part of the minister. A claim of failure to take certain matters into account does not require discovery in the absence of a *prima facie* basis for holding that this may well be the position. Nothing the applicant has put forward amounts to more than speculation. Indeed, to the extent that the applicant argues that the reasoning is unclear or contradictory, these are matters for the substantive hearing.

53. The applicant claims that the manner in which the statement of opposition is worded, e.g. that s. 15 (2) of the 1965 Act "is intended to cover situations where they may be reasons not to give effect to an extradition request which are beyond the statutory bars to extradition," gives rise to an uncertainty that necessitates discovery. The issue of whether s. 15(2) of the 1965 Act was considered by the minister at all in light of the answer given in the letter and the statement of opposition, is but one example of an issue that falls to be determined in the substantive judicial review proceedings. It must be recalled that the duty of the minister under s. 33 and the effect of s. 15(2) of the 1965 Act on that duty, are matters of law and that no discovery is required for that purpose. If the minister has operated under a mistake of law when making her decision, it may follow that the decision cannot stand but that is a matter to be decided at the substantive hearing. Suffice to say that discovery is not necessary for the purpose of advancing arguments as to the true legal position with regard to the relevant sections.

54. If there has been a failure by the minister to exercise her discretion, which said failure the applicant says is inherent in the reasons that have been given in both the letter and the statement of opposition, this is a matter for the substantive hearing. The question of adequacy of reasons is a mixed one of law and of fact to be dealt with in the substantive hearing. Moreover, the fact that an applicant asserts that there appear to be different approaches to the reason or explanation for the decision would not give rise to discovery by virtue of the assertion alone. In this case, the minister asserts that the statutory basis is clear, the statutory scheme was followed and the reasons given were adequate. In the view of the Court, the specific issue of concern raised by the applicant does not require discovery to advance the matter as these are legal (and perhaps factual) issues that must be determined in the course of the substantive hearing.

55. In the view of the Court, the applicant has not demonstrated that the documents are necessary; he has not demonstrated that he would be at a litigious disadvantage. The request made is more appropriately considered a request in the nature of a "fishing expedition" even though the category is limited and readily identifiable. The applicant is fishing for information to bolster a claim which is either speculative or is more properly a matter for the substantive hearing as set out above. Simply because he has made a number of unsubstantiated assertions about the minister's failure to take into account proper considerations and taking into account improper ones, does not entitle him to discovery. This is precisely the kind of situation which Hogan J. warned about in Evans when he said at para. 6 that:

> "A further consideration is that, in the words of Sir Thomas Bingham MR for the English Court of Appeal in *R. v. Health Secretary*, ex p. Hackney LBC (July 29, 1994) it is not open to an applicant to make a series of bare unsubstantiated assertions and then call for discovery of documents by the other side in the hope that there may exist documents which will give colour to the assertion that the applicant, or the plaintiff, is otherwise unable to begin to substantiate."

56. The applicant also argued that costs would be saved if there was discovery of the departmental memoranda because court time would be saved. He submitted that there is uncertainty as to how to interpret the minister's letter explaining the reasons for her decision and court time will have to be spent discussing those interpretations. In counsel's submission, if the departmental memoranda are given, there will be no need to engage in each possible interpretation as to why the decision was made. That argument is without merit as it would reduce the granting of discovery to a contest of who could speculate the most about the constructions that could possibly be given to the reasoned explanation of a decision maker. At the hearing, counsel may make the appropriate arguments as to whether the reasons given are adequate or are, on their face, misleading. Discovery is not required for that purpose.

57. The applicant, in his submissions, raised what he terms a "merits-based argument", i.e. that it was not proportionate to order his surrender to the USA on the basis of all the particular circumstances of the case. It is noteworthy that he has not included in his judicial review application a claim for relief by way of an order preventing his surrender because it would be a breach of his constitutional and European Convention on Human Rights ("ECHR") right to respect for his family and private life to surrender him. That was one of the issues decided by the courts in the earlier proceedings. The issues concerning the particular circumstances of his situation that he set out in his letter to the minister appear to be those he raised in his objection to extradition before the courts. His claim of "proportionality" considerations must be viewed in the light of the claims made in these proceedings. If the applicant is truly making a case that it was disproportionate to surrender him, this is a claim concerned with the irrationality or unreasonableness of the decision. Discovery is not necessary for that purpose because if the decision is clearly wrong, it is not necessary to ascertain how it was reached. Furthermore, in the context of the present case and where the courts have adjudicated on this issue, in the absence of new evidence forwarded for consideration by the minister it is difficult to understand how discovery can be said to be necessary.

58. I have also considered the reference in Hogan and Morgan's *Administrative Law in Ireland* that discovery should be granted where information is "improperly withheld". That reference to "improperly withheld" is, in my view, a synthesis of the circumstances where discovery should be ordered; it is not a separate category in itself. In my view, even if that phrase has a slightly wider meaning, it cannot be said that this information has been improperly withheld. The departmental memoranda were not referred to in the minister's order (this Court has not yet seen this order but no reference to the memoranda being cited in the order was made by the applicant) or her letter giving reasons for her decision. Indeed, even if it is correct that it is an invariable practice that the departmental memoranda are made available in immigration cases, that does not automatically mean that they must be made available in extradition cases. Therefore, there is no indisputable or at least *prima facie* improper withholding of the memoranda that would require discovery as a matter of course.

59. The applicant will have to make his case at the hearing of the substantive judicial review application without the aid of the departmental memoranda. The Court is satisfied that discovery of the departmental memoranda is not necessary for the advancing of the case he has made on this judicial review application. The applicant will not be at a litigious disadvantage.

60. This appears to be the first time a minister's order under s. 33 of the 1965 Act has been challenged by way of judicial review and (although not formally stated) it appears that there is no practice in being of making the departmental memoranda available. This case broadly concerns the minister's duties and powers under s. 33 of the 1965 Act, her duties and powers under s. 15(2) of the 1965 Act, whether she exercised those duties and powers correctly, and whether she gave adequate and proper reasons for her exercise of that power. In the context of those main issues, the failure to have the departmental memoranda and the impact of that failure upon the issues of fairness of procedures, of proportionality, and of procedural impropriety are matters that could be addressed at the substantive hearing but only to the extent they are relevant to the issues pleaded. The Court is quite alive to the possibility of a situation arising, as in *Bradley* above, where the information and submissions before the Court necessitates further consideration of whether this documentation is required for the proper conduct of this litigation. That possibility does not mean that it is necessary for discovery to be ordered by the Court at this time. On the contrary, the application of the rules of discovery demands that the Court refuse discovery. Finally, this reference should not be taken to mean that the Court has a view on whether it is necessary or even appropriate for the absence of the departmental memoranda to be raised at the substantive hearing. It simply amounts to an observation that if the justice of the case demands a remedy, the High Court may fashion one.

CONCLUSION

61. For the reasons set out above, the Court refuses the application for discovery. The Court will now proceed to fix a date for the substantive hearing of this application for judicial review, and will order that an issue paper be prepared by the parties, and will order an exchange of submissions. I will hear the parties as to the timeline and procedure.