

**THE HIGH COURT
JUDICIAL REVIEW**

[2013 No. 347 J.R.]

BETWEEN

A. P.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice McDermott delivered on 17th day of January, 2014

1. This is an application seeking the inspection of documents in the course of judicial review proceedings pursuant to the provisions of O. 31, r. 18 of the Rules of the Superior Courts. Order 31, r. 15 provides that a party to proceedings shall be entitled, at any time by notice in writing, to give notice to the other party in whose affidavit reference is made to a document, to produce that document for inspection and permit copies thereof to be taken. The consequences of failing to comply with the notice to produce the documents in issue is that the party in default may not:-

"put any such documents in evidence on his behalf in such cause or matter, unless he shall satisfy the court that...he had some...cause or excuse which the court shall deem sufficient for not complying with such notice; in which case the court may allow the same to be put in evidence on such terms as to costs and otherwise as the court shall think fit".

Order 31, r. 18 empowers the court to make an order for inspection in such place and in such manner as it may think fit, but shall not make an order if "it is not necessary either for disposing fairly of the cause or matter or for saving costs".

2. The respondent is entitled to resist an application for inspection of otherwise relevant documents by claiming that the documents are privileged on the basis of public interest and the security of the state.

3. The parties in this case agreed that the legal principles applicable to the determination of whether a public interest privilege is properly asserted are well settled. In *Ambiorix v. Minister for the Environment (No. 1)* [1992] 11.R. 277, Finlay C.J. summarised the relevant principles initially elaborated in *Murphy v. Dublin Corporation* [1972] I.R. 215 as follows:-

"1. Under the Constitution the administration of justice is committed solely to the judiciary in the exercise of their powers in the courts set up under the Constitution.

2. Power to compel the production of evidence (which of course includes a power to compel the production of documents) is an inherent part of the judicial power and is part of the ultimate safeguard of justice in the state.

3. Where a conflict arises during the exercise of judicial power between the aspect of public interest involved in the production of evidence and the aspect of public interest involved in the confidentiality or exemption from production of documents pertaining to the exercise of the executive powers of the state, it is the judicial power which will decide which public interest shall prevail.

4. The duty of the judicial power to make that decision does not mean that there is any priority or preference for the production of evidence over other public interests, such as the security of the state or the efficient discharge of the functions of the executive organ of the government.

5. It is for the judicial power to choose the evidence upon which it might act in any individual case in order to reach that decision."

4. For the purpose of that determination the court has been furnished at its request, with three documents over which privilege has been claimed in order to assist in its determination of the relevance, if any, of the documents to the issues that arise between the parties. The court has considered each of the documents separately and their cumulative affect in the context of the evidence in the case.

5. This Court granted leave to the applicant to apply for judicial review on 13th May, 2013, seeking, *inter alia*, a declaration that the failure by the respondent to disclose the reason for his decision to refuse to grant the applicant a certificate of naturalisation on 30th April was unlawful, and an order of *certiorari* quashing the decision refusing to grant naturalisation to the applicant. The grounds upon which leave was granted are:-

"1. The refusal of the respondent to disclose his reason for refusing the applicant's application for naturalisation is unlawful. It is, *inter alia*, in breach of the applicant's right to fair procedures, to constitutional justice and to seek an effective judicial remedy. It prohibits the applicant from examining whether the refusal to grant him a certificate of naturalisation is lawful, and impairs him bringing an effective application in the future.

2. The respondent's reliance on the Freedom of information Act 1997, as amended, as a basis for not disclosing any reason for the refusal of the applicant's application for naturalisation is unlawful. In the case of *Mallak v. Minister for Justice, Equality and Law Reform*, Mr. Mallak had requested the reason for the refusal of his application for naturalisation pursuant to the Freedom of information Act, and this was refused by the respondent under the Act but, nevertheless, the

Supreme Court held that there remained an obligation on the respondent, as a matter of fairness, to disclose his reason for refusing naturalisation.

3. ...the respondent is obliged to comply with the Rules of the (Convention Relating to the Status of Refugees) the Geneva Convention, including Article 34, as a matter of European Union law and should "as far as possible facilitate" the naturalisation of the applicant, and/or the applicant has a legitimate expectation that the respondent will comply with Article 34. In light of the number of applications made by the applicant for naturalisation, it is incumbent on the respondent to state why he has refused the applicant's most recent application.

4. The acquisition of Irish citizenship also constitutes the acquisition of European Union citizenship such that it is a matter covered by European Union law. A failure to provide the reason for the refusal of naturalisation is in breach of the Charter of Fundamental Rights, including Article 41 thereof, and the principles of European Union law."

6. The relevant elements of the statement of opposition delivered by the respondent are as follows:-

"1. It is denied that the refusal of the respondent to disclose his reason for refusing the applicant's application for naturalisation is unlawful. The respondent has refused to disclose the reasons for refusing the said application on the ground that disclosure of the said reasons would be inimical to the interests of the state.

2. It is denied that this has breached the applicant's rights to fair procedures and/or to constitutional justice and/or to seek an effective judicial remedy. It is denied that it prohibits the applicant from examining whether the refusal to grant the applicant a certificate of naturalisation is lawful or that it impairs him from bringing an effective application in the future. Without prejudice to the foregoing, the respondent's *bona fide* interest in the protection of the State's legitimate interests justifies the withholding of the reasons for the decision, notwithstanding any alleged prejudice to the applicant.

3. It is denied that the respondent acted unlawfully in relying on the Freedom of Information Act 1997, as amended. The reference to the various sections of the Freedom of Information Act enclosed with the letter of refusal dated 30th April, 2013, advised the applicant that there was a valid justification for refusing to give reasons. That justification was valid, lawful and rational. The respondent, of course, relies on other grounds including the contention that the reliance upon the Charter of Fundamental Rights by the applicant is misconceived."

7. The relevant part of the letter notifying the refusal by the Minister to grant a certificate of naturalisation to the applicant states:-

"The Minister has also decided not to disclose the reason for his decision to you, having considered his obligation under the Freedom of Information Act 1997, as amended, with particular reference to ss. 18, 24, 25 and 26 of that Act.

Please note that there is no provision under the Irish Nationality and Citizenship Act 1956, as amended, for appeal of a decision in respect of an application for a certificate of naturalisation.

Please see attached extract from the sections of the Freedom of Information Act 1997, as amended, that are relevant to the Minister's decision in your case."

8. The extract of the 1997 Act attached to the letter contained only a copy of the relevant sections. No particular aspect of these provisions is highlighted or relied upon specifically in the letter. The connection between the refusal and the quoted extract is somewhat opaque to the court. In any event no application was made for information pursuant to the provisions of the Freedom of Information Act 1997 in the case, and the applicant contends that he is entitled to be informed of the reasons for the refusal of the grant of the certificate on the basis of the decision of the Supreme Court in *Mallak v. The Minister for Justice, Equality and Law Reform* [2012] IESC 59. The existence of the documents, an inspection of which is now claimed, came to light in the affidavit of Mr. John Kelly, Assistant Principal Officer in the citizenship section of the Department of Justice and Equality sworn 11th October, 2013, wherein he states:-

"3. The application made by the applicant for a certificate of naturalisation was duly considered and a recommendation prepared for the consideration of the Minister. Attached to that recommendation was a confidential note referring to certain information concerning the applicant which had been provided to the Minister in the strictest confidence. These are documents over which the Minister claims privilege in these proceedings.

4. The recommendation that was made to the Minister comprised two principal elements. Firstly, it was recommended that the application be refused. Secondly, it was recommended that the Minister not disclose the reason for his decision having regard to his obligations under the provisions of ss. 18, 24, 25 and 26 of the Freedom of Information Act, 1997 as amended. The Minister agreed with the recommendation on 11h July, 2013, and the decision was duly communicated to the applicant by means of the letter dated 20th April, 2013...

5. Accordingly, it was and remains the view of the Minister, that to disclose the reason to the applicant, or indeed the specific nature of the reason, for the refusal of the certificate of naturalisation would be inimical to the interests of the State. With due regard to this consideration and constrained thereby, I shall set out the underlying reasons for this position."

9. Mr. Kelly states that rigorous checks are carried out in applications for certificates of naturalisation which include the obtaining of information from external agencies, including security agencies. It is claimed that the benefit of carrying out these checks lies in the status afforded internationally to Irish passport holders as a result, insofar as they are allowed to travel without Visas to countries such as Australia, Canada and in particular, the United States of America which applies rigorous entry controls on citizens of many foreign countries. In that context, the consideration of an application for citizenship, it is said, must take account of this wider public policy and its implications for Irish passport holders.

10. It is also claimed that in carrying out these investigations, the Minister receives information on a strictly confidential basis from external sources which it would not otherwise be able to obtain. The respondent claims to be dependent upon the goodwill of the external agencies currently providing such information. In order to ensure the continuity of such information, the Minister has decided that confidentiality must be respected and that such information will not be disclosed to an applicant whose application may be refused as a result. In addition, information obtained in the course of the examination of an application may relate to issues of national importance including national security, which would render it inimical to the State's own interest to disclose it to a disappointed applicant. If this information were not available in the future from confidential external sources, it is claimed that the

State would be left with the choice of either rejecting large numbers of applicants as a matter of policy whose character could not be vouched, but currently can be, and are granted certificates of naturalisation or to grant certificates of naturalisation to persons who would include amongst their number some "who would harm the interests of the State or of friendly States" with the risk that this would entail to the reputation of an Irish passport holder.

11. In that context, it is also claimed that disclosure of even the nature of the reason for refusal of a certificate may give rise to a wider risk beyond the specific application in question. It is claimed that to give a general reason for refusal based on national security may in any given case be to confirm to a person who is such a threat, that the State's or friendly States' intelligence services are aware of his or her activities. In cases where the confidential grounds for refusing the certificate may not relate to national security or be provided by an external source, it is claimed that the disclosure of either the nature or source of information would in time allow applicants who are not given such information to deduce correctly that they are the subject of intelligence information relating to national or international security.

12. In the wake of the *Mallak* decision, the respondent accepts that he is now required to give a reason or to provide a justification for not giving the reason for the refusal of the application. It is also claimed that in line with that new policy, the applicant in this case was informed that the Minister had decided not to disclose the reason for the decision having considered his obligations under the provisions contained in the extract of the Freedom of Information Act 1997, attached to the letter. It was claimed that to give any more specific justification would, therefore, in the view of the Minister, be in conflict with the interests of the State.

The Freedom of Information Act 1997

13. Section 18 of the Act provides that the head of a public body shall following an application in writing by a person who is affected by an act of the body and having a material interest in a matter affected by that Act or to which it relates, cause a statement in writing to be given to the person of the reasons for the Act and of any findings on any material issues of fact made for the purpose of the Act.

14. Section 24 provides that a head may refuse to grant a request in relation to a record if in his/her opinion, access to it could reasonably be expected to affect adversely:-

- "(a) the security of the State,
- (b) the defence of the State,
- (c) the international relations of the State, or
- (d) matters relating to Northern Ireland."

15. Section 24(2) states that a head shall refuse to grant such a request if the record contains information:-

- "(i) that was obtained or prepared for the purpose of intelligence in respect of the security or defence of the State, or
- (ii) that relates to-
 - (I) the tactics, strategy or operations of the Defence Forces in or outside the State, or
 - (II) the detection, prevention, or suppression of activities calculated or tending to undermine the public order or the authority of the State,
- (b) contains a communication between a Minister of the Government and a diplomatic mission or consular post in the State or a communication between the Government or a person acting on behalf of the Government and another government or a person acting on behalf of another government,
- (c) contains a communication between a Minister of the Government and a diplomatic mission or consular post of the State,
- (d) contains information communicated in confidence to any person in or outside the State from any person in or outside the State and relating to a matter referred to in subsection (1) or to the protection of human rights and expressed by the latter person to be confidential or to be communicated in confidence,
- (e) contains information communicated in confidence from, to or within an international organisation of states or a subsidiary organ of such an organisation or an institution or body of the European Union or relates to negotiations between the State and such an organisation, organ, institution or body or within or in relation to such an organisation, organ, institution or body, or
- (f) is a record of an organisation..."

16. Section 25(1) provides that a Minister may be satisfied that a record is of sufficient sensitivity or seriousness to warrant a declaration that it is an exempt record by reason of sections 23 or 24. Section 26 deals with other circumstances in which information may be withheld.

17. The applicant was informed for the first time that the refusal to disclose the reasons for the refusal of his application for a certificate of naturalisation was on the grounds that such disclosure would be inimical to the security of the State in para. 1 of the statement of opposition. The reference to the extracts of the 1997 Act is wide ranging and non-specific. The rigorous checks carried out by the respondent are clearly checks into character and the conduct of applicants for naturalisation, which may include obtaining information from both domestic and foreign agencies including security agencies. This was acknowledged in para. 2 of the respondent's written submissions which states that:-

"The respondent carries out checks into the character and conduct of applicants for naturalisation, which may include obtaining information from both domestic and foreign agencies, including security agencies. Information is often received from external sources on a strictly confidential basis. As explained in the said affidavit (para. 7), the respondent is often

dependent on the goodwill of external agencies which provide information to the agencies of this State. The respondent is obliged to respect the confidentiality of that information so as to ensure the continued willingness to supply information to the agencies of this State."

It is clearly implied that as a result of these rigorous checks as to character and conduct (they do not appear to be in respect of anything else) a secret recommendation was formulated for the Minister.

18. Mr. Kelly verifies in his first affidavit that to disclose to the applicant the reasons or the specific nature of the reasons would be inimical to the interests of the State. I take that to be an umbrella term for all of the matters arising under the sections contained in the extract. Thus, even to describe the reason and failure to disclose as being related to the security of the State or the defence of the State or international relations or that it was based on confidential information from a reliable source would compromise the interests of the State. Indeed that is the basis for the claim of privilege as set out in the notice of the respondent dated 15th November, 2013, under O. 38, r. 17 and is said to be in accordance with the decision of the Supreme Court in *Mallak* and in particular with para. 77 which states:-

"Following the making of the order, it will be a matter for the Minister to consider the application afresh. It will be a matter for him to decide what procedures to adopt in order to comply with the requirements of fairness. It is not a matter for the Court to prescribe whether he will give notice of his concerns to the appellant or disclose information on which they may be based or whether he will continue to refuse to disclose his reasons but to provide justification for doing so. Any question of the adequacy of reasons he may actually decide to provide or any justification provided for declining to disclose them can be considered only when they have been given."

19. In *Mallak*, it was decided that the Minister was under a duty to provide the appellant with the reasons for his decision to refuse the application for naturalisation and that the failure to do so deprived him of any meaningful opportunity, either to make a new application for naturalisation or to challenge the decision on substantive grounds. It was considered that if reasons had been provided, it might well have been possible for the appellant to make relevant representations when making a new application. However, in the absence of any reasons, the decision was quashed. As in *Mallak*, in this case no reasons related to the public interest have been disclosed even in the most general terms. The provisions of s. 15(1)(b) of the Irish Nationality and Citizenship Act 1956, as amended, enable the Minister to decline a certificate if he is not satisfied that an applicant complies with the requirement that he be of "good character". This provision was not furnished as the basis for the refusal notwithstanding the acceptance by the Minister that matters of good character provide the basis upon which the rigorous enquiries are carried out.

20. It is submitted by the respondent that disclosure of the documents is not relevant to the determination of the issue in this case, namely that the refusal of the respondent to disclose his reason for refusing the applicant's application is unlawful because, *inter alia*, it prohibits the applicant from examining whether the refusal to grant him a certificate of naturalisation is lawful and impairs him in bringing an effective application in the future. However, it is clear that the applicant challenges both the refusal to give reasons and the decision to refuse the grant of naturalisation to the applicant. The documents which the court has seen are clearly relevant to a consideration of the refusal and the applicant's ability to challenge it. It is difficult to see how the applicant can be expected to address in a future application the issues raised against him if he simply has no knowledge, even in general terms, of what they are. He is placed in a very difficult position which is not simply frustrating for him as acknowledged by the respondent. He is placed at a complete disadvantage in attempting to formulate a challenge to the decision or to make a new application for a certificate at a later date. He has simply no understanding on the basis of the letter received of what the problem is or may be.

21. It is important to recognise also the state's legitimate interest in this area. As stated by Walsh J. in *Murphy v. Dublin Corporation* [1972] I.R. 215 at pp. 233-4:-

"There may be occasions when the different aspects of the public interest "pull in contrary directions"...If the conflict arises during the exercise of the judicial power then, in my view, it is the judicial power which will decide which public interest shall prevail. This does not mean that the court will always decide that the interest of the litigant shall prevail. It is for the court to decide which is the superior interest in the circumstances of the particular case and to determine the matter accordingly. As the legislative, executive, and judicial powers of government are all exercised under and on behalf of the State, the interest of the State, as such, is always involved. The division of powers does not give paramountcy in all circumstances to any one of the organs exercising the powers of government over the other. It is clear that, when the vital interests of the State (such as the security of the State) may be adversely affected by disclosure or production of a document, greater harm may be caused by ordering rather than by refusing disclosure or production of the document. In such a case the courts would refuse the order but would do so on their own decision. The evidence that the courts might choose to act upon to arrive at that decision would be determined by the courts, having regard to the circumstances of the case. Again, taking the example of the safety of the State, it might well be that the court would be satisfied to accept the opinion of the appropriate member of the executive or of the head of the Government as sufficient evidence of the fact upon a claim being made for non-disclosure or non-production, as the case may be, on that ground. I have referred to non-disclosure and non-production as distinct matters because in certain circumstances the very disclosure of the existence of a document, apart altogether from the question of its production, could in itself be a danger to the security of the State. As this is not such a case it is unnecessary to deal further with this aspect of public interest."

22. This matter was again touched upon by McKechnie J. in *Keating v. Radio Telefis Eireann* [2013] IESC 22. However, it does not appear that the privilege claimed in this case is primarily or immediately concerned with a threat to the "safety of the State". The claim is put on the basis that to furnish reasons would be inimical to the interests of the State. It is clear that the various lines of inquiry that must be rigorously pursued before the granting of citizenship pursuant to the Act necessarily involve confidential communications received from others, including agencies outside the state and that this flow of information is essential for the proper assessment of an application for naturalisation in respect of certain individuals and, in particular, in respect of the "good character" requirement under the Act. It is not the mere assertion that the information is obtained on a confidential basis that underlies the claim of privilege in this case. The respondent is clearly concerned that the maintenance of confidentiality is in furtherance of a purpose which is in the public interest, namely the state's interest in ensuring that it continues to receive information related to issues of national importance, including national security, relating to individual applicants for certificates of naturalisation as part of the rigorous examination of each case. The integrity of the process whereby certificates of naturalisation are granted depends on the capacity of the state to ensure the "good character" of an applicant within the state and in his/her dealings outside the state. The exchange of information and the reliance on external agencies is an essential feature of this process which ultimately enables the state to protect the process from abuse. The information obtained may be from confidential sources the exposure of which may compromise their safety and/or the effective operation of the agencies from which the information is obtained. The information thus supplied, may relate to any number of relevant issues ranging from simple abuse of the naturalisation process to criminal activity facilitated by that abuse. While it is important not to exaggerate the importance of the state interest in this matter, in some cases the protection of the

information will be of vital importance to the state.

23. The use of confidential information or intelligence reports obtained from informants or otherwise, has been an accepted tool in the administration of justice in this jurisdiction for many years. It is widely used in the investigation and prosecution of organised crime and counter terrorism. Its use in the criminal law is subject to a degree of scrutiny consistent with a fair trial. There are many instances in which An Garda Síochána are empowered, having formed a requisite opinion, to obtain or issue a warrant to search homes or business premises or to effect an arrest on the basis of an opinion based entirely or partly upon confidential information received from a usually reliable source. The reasons for the formation of the requisite opinion are often explored in open court during the course of a trial and may be the subject of challenge and cross examination, though limited by the exigencies of the protection of confidentiality or the source itself whether by way of a claim of public interest or informant privilege. An Garda Síochána operate procedures whereby the quality of the sources of information may be reviewed in order to maintain the integrity of the information gathering process and to ensure its reliability as far as practicable. This is a feature common to police forces throughout the world. The sharing of information between police forces and other agencies necessarily requires confidence by the donor that the recipient agency will maintain an appropriate degree of confidentiality and protection in respect of the information received and its source. Even this limited capacity, available in criminal trials, to challenge the basis of an opinion formed relying upon confidential information, is unavailable to the applicant in this case: however, its availability in criminal trials demonstrates that it is possible to formulate and scrutinise a reason for an opinion whilst protecting the confidential source from disclosure.

The Documents

24. The three documents furnished to the court in respect of which privilege is claimed, are clearly relevant to the determination of whether the refusal to furnish reasons for the refusal of a grant of a certificate of naturalisation to the applicant is unlawful, and whether the decision to refuse the certificate itself is unlawful. I am satisfied that each of the documents contains information which may directly or indirectly enable the applicant to advance his case or damage that of the respondent. (See *Compagnie Financière et Commerciale du Pacifique v. Peruvian Guano Company* [1882] 11 Q.B.D. 55). The court has reviewed the three documents furnished in the light of the principles set out in the authorities referred to earlier in this judgment. Reference to the nature and content of these documents is necessarily limited by the requirement to preserve the interests of the parties in the matter. I have reached the following conclusions.

Document A

25. This is a note concerning the applicant's application for a certificate of naturalisation. This is a relevant document and I am not satisfied that there is any risk to the public interest presented by its inspection by the applicant or his legal team. As stated by Mr. Kelly in his affidavit, the document contains a recommendation prepared for the consideration of the respondent in respect of the application. In the normal course, this is a document which the court would expect to be furnished as a matter of fair procedures to the applicant, particularly having regard to the last paragraph on the first page of the document.

Document B

26. This document is referred to by Mr. Kelly as a confidential note "referring to certain information concerning the applicant which had been provided to the Minister in the strictest confidence". I am satisfied that this document is a confidential document and that the asserted claim of privilege should apply to a considerable portion of its contents. I am satisfied that there is a public interest in maintaining the confidentiality of the information and information gathering process referred to in this confidential note, but that elements of it may be safely redacted for the purposes of affording inspection of the un-redacted portions.

27. I would allow inspection of this document with the following redactions. I direct that paragraph 1 should be redacted. The second paragraph should be redacted save for the first sentence. I would allow the inspection of the third, fourth, fifth and sixth paragraphs in the document. I am satisfied that limited inspection of this document does not in any way compromise the confidentiality of any information obtained by the respondent or the public interest. However, I am satisfied that the disclosure or inspection of the redacted portion would be inimical to the interests of the state.

Document C

28. This document formed part of and was attached to the confidential note, Document B. I am satisfied that this document is confidential and having considered the contents of the document, I am entirely satisfied that it is in the public interest that it and its contents remain confidential.

29. In making this ruling the court is, of course, not determining the question as to whether the applicant is entitled to succeed on the substantive claim in respect of which leave to apply for judicial review was granted.