THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 608 JR]

BETWEEN

A. A.

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

AND

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 183 JR]

BETWEEN

A. S.

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Faherty delivered on the 10th day of March, 2017

These are applications by the first and second applicants seeking inspection of documents pursuant to the provisions of Order 31 rule 18 of the Rules of the Superior Courts, in connection with their judicial review proceedings.

The first applicant: Background and procedural history

1. The first applicant is a foreign national who came to Ireland as an asylum seeker in 2000 and who was granted refugee status in 2002. He is a married man with five children, three of whom are Irish citizens by birth and the other two are naturalised Irish citizens.

2. Having been granted refugee protection, the first applicant and his wife (who was also granted refugee status in the State) applied for naturalisation as Irish citizens on or about 13th May, 2002. These applications were refused on the basis of "Ministerial discretion" on 29th March, 2004, without any reasons. They applied again on 6th October, 2006. These applications were again refused on the basis of "Ministerial discretion", without any reasons, on 9th November, 2007. They made further applications on 6th February, 2008 and were again refused on the basis of "Ministerial discretion" without any reasons on 16th August, 2011.

3. The first applicant and his wife again applied on or about 20th September, 2012. The wife's application for naturalisation was granted in August/September 2013. The first applicant's application was determined on 1st September, 2014, following the initiation of judicial review proceedings seeking *mandamus*. The decision was another refusal. In the submission to the Minister dated 14th August, 2014 which attached to the decision, it is stated: "There are national security/international relations considerations in this case. Please see attached report, which contains information received on a strictly confidential basis regarding the applicant. The information is of concern to the State."

The submission goes on to state, *inter alia*:-

> "It is established law that, notwithstanding the Minister's absolute discretion, applicants for a certificate of naturalisation are entitled to know the reasons for the decision on their application, or where the provision of reasons is being refused, be provided with a justification for not providing them. This is because if the reasons for a decision to refuse an application are not provided to an applicant then they will not know if the decision is unlawful or if there are matters that they might be able to address or mitigate in any future application. Normally, the Minister discloses the basis for her decision. However the basis for the decision in this case is based on confidential information in relation to national security matters and has possible implications for the State's international relations."

4. By Order of Mac Eochaidh J. dated 20th October, 2014, leave was granted to the first applicant to seek, *inter alia*, an order of *certiorari* quashing the decision dated 1st September, 2014. In summary, the grounds on which the decision is challenged are: that the applicant is not aware and is unable to ascertain the reason why he was refused naturalisation, even in the most general terms; that if he attempts to reapply for naturalisation he has no confidence that the application will be successful as he does not know why his previous application was refused; that referring to a "confidential" report about an unidentified risk to international relations from an unidentified source is not a proper reason for refusal; and that the respondent has a duty to provide reasons (at least in general terms) for a refusal of naturalisation in order to allow an applicant to try to address those reasons and/or to allow the court to assess whether the Minister has acted reasonably. The applicant also asserts that the decision is unreasonable and/or disproportionate. It is alternatively claimed that there is no real reason for the refusal, which is irrational.

5. On 4th June, 2015, the respondent filed a statement of opposition and the replying affidavit of Mr. John Kelly, Assistant Principal Officer in the Citizenship Section of the respondent's department, was sworn on 26th May, 2015. Mr. Kelly avers, inter alia, that the "attached report" which is referred to in the submission to the Minister contains information received on a strictly confidential basis concerning the applicant. He avers that "this confidential report and the information contained in it is the subject of executive privilege based on the public interest in national security and in the protection of the international relations of the State" and that

"the inspection, production or disclosure of this report would be inimical to the interests of the State."

6. By letter dated 29th June, 2015, the first applicant's solicitors wrote to the Chief State Solicitors Office requesting voluntary discovery of the report and/or the notification of the contents of the report referred to in the submissions to the Minister dated 14th August, 2014. By letter dated 9th October, 2015, the respondent replied to the said request asserting executive privilege over the report on the basis previously alluded to.

7. By notice of motion dated 3rd November, 2015, the first applicant sought discovery of the report. By the consent of both parties, on 22nd January, 2016, this court made an order for discovery.

8. On 26th January, 2016, via the second supplementary affidavit of Raymond Murray, Assistant Principal in the Citizenship Section of the respondent's department, the respondent, for the first time, identified the confidential report as "a report dated the 25th October, 2013, which was received by the Irish Naturalisation and Immigration Service from the Security and Intelligence Division of An Garda Síochána."

The second applicant: Background and procedural history
9. The applicant is a foreign national. He arrived in Ireland on 19th February, 2002. He is a married man. The second applicant and his wife were subsequently given stamp 4 residence in the State based on their parentage of an Irish citizen, which was renewed periodically. All five of the second applicant's children are now Irish citizens.

10. Having resided in the State for more than five years, the second applicant and his wife applied for naturalisation as an Irish citizen in or around March, 2008. The second applicant's application was refused on the basis of "Ministerial discretion" (without any reasons being given) on 29th August, 2013. His wife's application was granted in October, 2012. The second applicant made a second application for naturalisation on 13th September, 2013. This was refused by decision dated 11th March, 2015 on the basis that the Minister was not satisfied that the applicant was of "good character". The letter of 11th March, 2015 advised as follows:-

> "A copy of the submission as was prepared for the Minister, with decision annotated thereon, is enclosed for your information. The content of the confidential report referred to in the submission is not being disclosed, and the Minister asserts privilege over this document, but it is open to your client to make further application for a certificate of naturalisation at any time."

11. The submission to the Minister which attached to the decision, states, *inter alia*:

> "There are national security / international relations considerations in this case. Please see attached report, which contains information received on a strictly confidential basis regarding this applicant. The information is of concern to the State. In deciding whether to grant or refuse a certificate of naturalisation, the Minister has an obligation to ensure as far as possible that the rights, entitlements and safety off all Irish citizens and residents of the State are protected.
>
> …

It concluded as follows:

> "Normally the Minister discloses the basis for her decision. However, the basis for the decision in this case is based on confidential information in relation to national security matters and has possible implications for the States international relations. The Division has been informed that any disclosure of the confidential information would jeopardise its continued provision into the future and continue provision of such information is essential to the integrity of the naturalisation process.
>
> The context and basis for the recommendation have been outlined as far as possible in this submission, without disclosing the confidential information and this submission should be provided to [the second applicant] to inform him to the fullest extent possible the reasons for the decision in this case. The State's interests in protecting its security and international relations must in this case out way the applicant's interest in knowing the Minister's specific basis for refusing him this privilege."

12. The second applicant subsequently instituted judicial review proceedings in respect of the refusal of the naturalisation application seeking, inter alia, a declaration that as a matter of fair procedures the applicant is entitled to more specific reasons for the refusal of his application for naturalisation and/or to have matters of good character put to him in an appropriate form in order to allow him to respond.

13. By order of Mac Eochaidh J. dated 13th April, 2015, leave was granted to the second applicant to issue judicial review to seek the aforesaid declaration and an order of certiorari quashing the decision of 11th March, 2015. By and large the grounds of challenge echo those of the first applicant.

The respondent filed her statement of opposition on 11th March, 2016. In his replying affidavit sworn 16th March, 2016, Mr. John Cremins, Higher Executive Officer in the respondent's Citizenship Section, avers that the "attached report" referred to in the submission to the Minister contained "information received on a strictly confidential basis" concerning the second applicant. He avers that "[t]his confidential report and the information contained in it is the subject of executive privilege based on the public interest in national security and in the protection of the international relations of the State" and that "the inspection, production or disclosure of this report would be inimical to the interests of the State".

14. By letter dated 22nd March, 2016, the second applicant sought voluntary discovery of the report referred to in the submission to the Minister.

15. In response, the respondent prepared and filed a formal affidavit of discovery, sworn by Mr. Cremins on 5th April, 2016. Again, the respondent expressly claimed executive public interest privilege over this document, described in the Affidavit as a confidential report dated 20th November, 2013, received by the Minister from the Security and Intelligence Division of An Garda Síochána.

The motions for inspection
16. On 2nd February, 2016 and 14th April, 2016, respectively, pursuant to O. 31, r. 18 (1) of the Rules of the Superior Court, the applicants issued motions for inspection of the respective reports.

17. At the hearing of the motion, it was intimated on behalf of the respondent that it was open to the court to form a view on the issue of executive privilege based on the affidavits which had been sworn on behalf of the respondent. This approach was objected to by counsel for the applicants. Albeit accepting that there may be cases where, as put by Walsh J. in *Murphy v. Corporation of Dublin* [1972] I.R. 215, "*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*", this court duly determined that the court should view the respective reports for the purpose of determining the motions for inspection. The court ruled accordingly. The reports were duly provided to the court.

18. In the course of the hearing it was intimated by counsel for the applicant that both the court and counsel for the applicants would examine the documents for the purposes of deciding on the issue of inspection. Counsel submitted that such an approach might be of assistance with regard to any redacting exercise which the court might feel was necessary. The court declines the said offer.

19. Order 31, rule18 empowers the court to make an order for inspection in such place and in such manner as it may think fit, but it shall not make an order if "it is not necessary either for disposing fairly of the causes a matter or for saving costs".

It is not in dispute but that the documents in issue are relevant to the applicants' respective judicial review proceedings as the respective reports form the sole basis for the respondent's refusal of the applicants' respective naturalisation applications.

20. 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. The matter which the court must determine is which of the competing public interests should prevail.

The submissions advanced on behalf of the applicants

21. At the outset, counsel for the applicants asserts that it is vital that the applicants acquire naturalisation in the State. As regards the first applicant, he has been granted refugee status and his wife is a naturalised Irish citizen. His children are all Irish citizens. Similarly, the second applicant, while not a refugee, has residency in the State and his wife and all of his five children are Irish citizens.

22. Both applicants have challenged their respective refusal decisions on a fair procedures basis. They have been alerted to the existence of confidential reports yet they do not know what they contain. The applicants are being told that they are some sort of enemies of the State and perhaps other States. As far as the first applicant is concerned, this is against a background where he is very much involved in his community and in religious activities in the State to the extent that he has met the President of Ireland. It is submitted that both applicants received garda clearance in respect of their naturalisation applications and the first applicant has been able to travel abroad unhindered, factors, counsel submits, which run counter to the respondent's contentions.

23. The applicants have received no proper reason for the refusal decisions. Accordingly, they are hampered in their respective judicial review proceedings as they do not know reasons for the refusal of their naturalisation applications, save a reference in each case to a report about which they know nothing. It is further submitted that the information contained in the respective reports would be of benefit to the court in the substantive judicial review proceedings so as to enable it to assess the reasonableness of the respondent's negative decision as it pertains to each of the applicants.

24. It is submitted that the interests of justice should allow the applicants to see all or some of the respective reports, or alternatively that they should be given the gist of the respective reports, even where executive privilege is claimed. Counsel submits that there is no authority where executive privilege was granted to the respondent in full.

25. It is urged on the court that if inspection of the reports are granted to the applicants, this can be done subject to the inherent jurisdiction of the court to regulate the production/ inspection of the documents in such manner as the court thinks fit, including making provision (where the reports contain representations made by third parties to the respondent in the belief that such correspondence was confidential) that the reports would be disclosed to the lawyers acting on behalf of the applicants on the undertaking that they would not reveal their contents to their clients without the special leave of the trial court. It is submitted that such a procedure was alluded to by Finlay C.J. in *Ambiorix Ltd. V. Minister for the Environment* [1992] 1 I.R. 277 at p.278.

26. Given that there is no absolute privilege attaching to communications passing between sovereign states, the onus is on the respondent to establish a greater public interest in not disclosing the information contained in reports. Counsel contends that the respective affidavits of discovery sworn on behalf of the respondent disclose very little information as to why executive privilege is claimed. While in her written submissions the respondent has honed in on the reference by McKechnie J. in *Keating v. R.T.E.* [2013] IESC 22 to an identifiable threat where the "safety of the State" is in question, there is, counsel submits, no information in any of the various affidavits sworn by the respondent in the present proceedings such as would raise the present cases to the level referred to by McKechnie J. in *Keating*. In any event, even assuming that there is some information in the respective reports which require redaction, the applicants are happy for the court to make such redactions as may be necessary and then to grant the applicants inspection of the respective documents.

27. It is further submitted that the fact that the information has been furnished in confidence is not sufficient for the claimed privilege to arise. This has been reiterated in *Skeffington v. Rooney* [1997] 1 I.R. 22 and in *Keating*. Moreover, as is made clear in *Keating*, no presumption of priority exists as between competing interests. Furthermore, any plea of public interest privilege "*must be evaluated by reference to the circumstances actually presenting*", as acknowledged by O' Malley J. in *Nic Gibb v. Minister for Justice* [2013] IEHC 328. It is further submitted that insofar as confidentiality may have to be preserved in the present cases, the inspection can be granted on condition that there is redaction to preserve such confidentiality. This was an approach adopted by McDermott J. in *A.P v. Minister for Justice and Equality* [2014] IEHC 17.

28. It is submitted that even where a finding was made by O'Malley J. in *Nic Gibb* that all of the documents were confidential, the learned judge granted inspection on terms. The applicants here ask no more than this.

29. Counsel submits that in the present cases the respondent's assertions as to international security, confidentiality and national security are vague in the extreme. It is contended that the applicants would have to be at high level of nefarious activity to be on the receiving end of this treatment by the State. If that is the case, there has been no effort by the respondent to prosecute the applicants and moreover, the regular gardaí gave both applicants a completely clean slate of clearance for the purposes of their respective naturalisation applications. The applicants are in the position where they are being apprised, effectively, of their being involved in serious criminality, but they are not being told what those crimes are, which is "*kafkaesque*", counsel submits.

The respondent's submissions

30. Counsel submits that the established jurisprudence recognises that issues of national security raise specific concerns. While the concerns of the respondent vis-á-vis the applicants are spelled out only in general terms, the reason for this has been explained on affidavit.

31. The matter for decision is whether the court should grant an order for inspection in the face of the claim of executive privilege. Accordingly, no question of the provision of a précis or summary arises.

32. Contrary to the applicant's suggestion, it is not the case that the respondent is relying on the fact that information was provided in confidence to the respondent. The thrust of the respondent's concern is to protect the confidentiality of the security information which has been provided. Furthermore, nothing should be inferred from the fact that criminal proceedings have not been instituted against the applicants. The respondent's position on these matters has been addressed in the affidavits sworn by Mr. Murray, Assistant Principal Officer in the Citizenship Section in the respondent's Department and in an affidavit sworn by Mr. Cremins, Higher Executive Officer in the same department.

33. The only issue before the court is whether the executive privilege asserted over the respective reports is properly claimed by the respondent. Counsel accepts that the applicable principles are to be found in *Murphy* and *Ambiorix*. Although the issue of national security did not arise in *Murphy* or *Ambiorix*, its importance was acknowledged in both cases.

34. It is submitted that case law establishes that there are circumstances in which the court may refuse production or inspection, albeit it is accepted that decision as to how the balance is to be struck between the competing public interests is for the court alone. Furthermore, as is clear from *Murphy*, if the court is satisfied that a document raises matter of national security, the court can refuse inspection.

35. The present cases can be distinguished from the factual matrix in *A.P.* Unlike the situation in *A.P.*, the respective submissions to the Minister were attached to the refusal decisions in each case. The specific concerns which arise in the case of the applicants are the reports which were furnished to the Irish Naturalisation and Immigration Service (INIS) by the Garda Intelligence Unit. The applicants have been made aware of the existence of the reports. Again, in contrast to what pertained in *A.P.*, the applicants have had the benefit of the respective submissions which had been prepared for the respondent by her officials and both had been advised that a particular report was being relied on by the respondent to refuse the application for naturalisation. Furthermore, in *A.P.*, McDermott J. accepted, at para. 22, that it was not "*the mere assertion that the information is obtained on a confidential basis that underlies the claim of privilege*". Rather, it is "*the maintenance of confidentiality in furtherance of a purpose which is in the public interest, namely the state's interest in insuring that it continues to receive information related to issues of national importance, including national security, relating to individual applicants for certificates of naturalisation*". McDermott J. agreed that that was a proper basis for privilege. While he was prepared to disclose the consideration of file in that case, McDermott J. upheld the claim of executive privilege over the entirety of one document and in respect of another document directed its disclosure only on a redacted basis.

36. It is accepted by the respondent that *W. v. Ireland* (No.1) [1997] 2 I.R. 132 is authority for the proposition that the Constitution does not countenance any form of absolute privilege in relation to communications passing between sovereign States. The respondent is not making the case that absolute privilege applies in the present cases. The case being made is not for confidentiality *per se*, but for the purpose of national security.

Considerations

37. The purpose of discovery, and, by extension, production and inspection, in litigation is to ensure as far as possible that the full facts concerning any matters in dispute before the court are capable of being presented to the court by the parties concerned, so that justice on full information, rather than on a limited or partial revelation of the facts arising in a particular action, might be done: *AIB v. Ernst & Winney* [1993] 1 I.R. 375.

38. In *Skeffington*, Keane J. stated, at p. 32:-

> *"However, the fact that the decision in civil or criminal proceedings before any court established under the Constitution of Ireland, 1937, as to whether documents should be discovered is exclusively an issue for determination by the judicial arm does not preclude the courts from identifying particular categories of evidence which, in general, will be regarded as privileged. In such cases, as has been frequently pointed out, the courts must balance the public interest in the production of documents which are relevant to the issues to be determined in the particular case against some other public interest which is invoked to justify their being withheld.*
>
> *…*
>
> *[A]s Lord Hailsham of St. Marylebone pointed out in D. v. N.S.P.C.C. [1978] A.C. 171 at p. 230:—*
>
> > *'The categories of public interest are not closed and must alter from time to time whether by restriction or extension as social conditions and social legislation develop.'"*

I hold that the above *dictum* applies also to the inspection of documents.

39. As to the exercise that this court must engage on where executive privilege is asserted, there is no dispute between the parties as to the applicable principles which apply. They are set out in the judgment of the Supreme Court in *Murphy* and restated by Finlay C.J. in *Ambiorix* where he states at p.283:

> *"1. Under the Constitution the administration of justice is committed solely to the judiciary by 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 the 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."

40. In *Skeffington*, Keane J. explained the judicial mandate in the following terms at p.35:

> *"The reluctance of courts in England to examine documents in respect of which a claim has been made by a public official that they belong to a class which has been recognised as privileged (usually because it is said that it was 'necessary for the proper functioning of the public service' that they be withheld) has not been shared by Irish courts. As was made clear in the decisions of this Court to which I have already referred, an issue as to whether a claim for privilege has been made out or as to whether the public interest involved in the production of evidence in judicial proceedings should prevail over the aspect of public interest involved in the confidentiality of documents pertaining to the exercise of the executive power of the State must be decided by the courts."*

41. As put by Clarke J. in *MacAodhain v. Ireland* [2012] I.R. 430 (applying *Murphy* and *Ambiorix*),"*it is ultimately for the court to form an assessment as to which public interest should prevail on the facts of any individual case*".

42. It is also well established that there is no absolute privilege in relation to communications passing between sovereign States, as set out in *W. v. Ireland (No. 1)* and *MacAodhain*. As stated in *W. v. Ireland (No. 1)*, the onus of establishing that there is a greater public interest in non-disclosure is on the State; a mere assertion that confidentiality would normally be expected is not sufficient. It is also well settled that the fact that documents were furnished in confidence does not of itself make them privileged, save that this principle does not apply to legal professional privilege: *Skeffington* and *Keating* refers, albeit that I note that in *Skeffington*, Keane J. recognised that the court might refrain from requiring members of other professions from disclosing confidential communications where it did not appear essential in the interests of justice. This is not the issue in the present case in any event.

43. It is also established law that no presumption of priority exists as between conflicting interests: See *Murphy* and *Keating*.

44. As to how to determine the "superior" interest in the case of competing public interests should be determined, in *Murphy*, Walsh J. addressed this matter in the following terms at pp.233-234:

> *"There may be occasions when the different aspects of the public interest "pull in contrary direction". 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."*

45. In *Keating*, albeit that the question of the security of the State did not arise in that case for determination (as was also the case in *Murphy* and *Ambiorix*), McKechnie J. noted the reference in both *Murphy* and *Ambiorix* to the considerations that might arise where the "security of the State" was in question. McKechnie J. observed at pp.21-22, that where a threat is identified to the public interest in

> *"our institutional structures and their functioning, in the integrity of citizens, as individual persons and as a collective body, in the security of homes, property and other possessions, or in whatever particular area should immediately be under peril [it] would have to be evaluated by reference to the circumstances actually presenting and be judged against the public interest in ensuring that the rule of law, in its full judicial sense, continued to afford true and meaningful protection to all."*

46. In *AP v. Minister for Justice*, McDermott J. had occasion to consider an application for inspection of documents where, as here, the respondent refused to grant a certificate of naturalisation. The respondent asserted executive privilege over a number of documents, one of which was the submission which had been made to the respondent by her officials in aid of her decision on the naturalisation application.

47. In the course of arriving at his decision as to what could or could not be inspected, McDermott J. stated:

> *"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."*

48. After acknowledging the "*state's legitimate interest in this area*" by quoting Walsh J. in *Murphy*, McDermott J. went on to address the question of the interests of the State, in the context of the claim being asserted by the respondent in AP, namely that inspection of the documents over which privilege was claimed would be "inimical to the interests of the State". He stated:-

"22. …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."

49. Having viewed the documents over which privilege was asserted McDermott J. ordered inspection of the submission note which had been prepared for the consideration of the respondent and which contained the recommendation that naturalisation should not be granted. McDermott J. found that no public interest risk presented by its inspection and that fair procedures dictated that the applicant should be able to inspect this document.

50. As far as the applicants here are concerned, each has had sight of the submission note which was prepared for the Minister in respect of their respective naturalisation applications. Furthermore, unlike the position in *A.P.*, the applicants are aware from their respective refusal decisions of the existence of a report the contents of which, according to the respondent, give rise to "concern", albeit the applicants have not been made privy to the contents of the respective report in either case. Accordingly, they are at some remove from the situation which pertained in *A.P.* where it appears that the applicant in that case was left none the wiser from the letter of refusal as to any reason for the refusal.

51. McDermott J. went on to find that another document which had been provided to the Minister in the strictest confidence, and which referred to information concerning the applicant in *A.P.*, was a confidential document and that the asserted claim of privilege should apply to a considerable portion of its contents. He found that there was a public interest in maintaining the confidentiality of the information and information gathering process referred to in the said document. However, elements of it could be safely redacted for the purposes of affording inspection of the unredacted portions. (Para. 26)

52. The learned judge determined that a further document which attached to the confidential note was confidential and, having considered the contents of the document, he was "*entirely satisfied that it is in the public interest that it and its contents remain confidential*". (para. 28).

53. For the purpose of the within applications for inspection, this court has examined the respective reports and has done so having regard to the applicable principles as already outlined in this judgment. In particular, the court has evaluated the conflicting public interest considerations by reference to "*the circumstances actually presenting*". The circumstances which present, as far as this court is concerned, comprise the applicants' respective judicial review proceedings; the explanations tendered by the respondent in the various affidavits before the court as to why inspection of the reports would be inimical to the interests of the State; and the extent to which the applicants have been apprised of the existence of such reports. The presenting circumstances also comprise what is deposed to on behalf the first applicant in his solicitor Ms Berkeley's affidavit of 2nd February, 2016 and what is deposed to on the second applicant's behalf by Ms. Berkeley's in her affidavit sworn 14th April, 2016. Ms. Berkeley avers variously to the lack of any concern when the applicants were issued with Garda clearance for the purpose of their naturalisation applications, the first applicant's involvement in a programme for the welcoming and integrating of refugees from his country of origin into the State, a programme administered by the respondent; the first applicant's travel history in recent years without difficulty and the fact that the second applicant's permission to be in the State has been renewed for over ten years without issue.

54. In his affidavit sworn 26th May, 2015, in response to the first applicant's judicial review proceedings, Mr. Kelly outlined the factors upon which the respondent relies in order to preserve the confidentiality of the information contained in the reports. He avers as follows:

> "[I]n order to attempt to explain how the Respondent comes in to the possession of privileged information, and why it is not possible to disclose same even in the form of a précis, I set out hereunder some general information in relation to the Respondent's procedures for obtaining information and the factors which weigh heavily against the disclosure of information obtained on a confidential basis.
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> The Respondent's policy is to carry out rigorous checks into applications for certificates of naturalisation. This includes obtaining information from external agencies, including security agencies, in respect of certain categories of applicant. This information can have obvious relevance to the assessment of the character of applicants, in particular so far as regards their conduct outside this State. On a wider level, it is important to the integrity of Irish passports that foreign States have confidence in the naturalisation procedures followed by this State. Significant advantages that accrue to Ireland and its citizens because of the status afforded internationally to holders of Irish passports. This is demonstrated by the number of countries that permit travel without visas to Irish passport holders, such as Australia, Canada and, in particular, United States of America, which has in place rigorous entry controls on citizens of many foreign countries. These advantages benefit not only Irish tourists travelling to such countries but also business people based in the State who trade with them.
>
> In the course of carrying out these investigations, the Respondent sometimes receives information on a strictly confidential basis from external sources. This is information that the State would not otherwise be able to obtain through its own resources and hence the Respondent is dependent on the goodwill of the external agencies which currently provide this information. Consequently, in order to ensure that similar information will be available in the future, the Respondent must respect that confidentiality and not disclose it to an applicant whose application may be refused as a result."

He describes the receipt and exchange of confidential information as a "critical" part of the cooperation between this State and other States. He goes on to aver that the confidential report in relation to the first applicant "contains information about national security concerns" which relate to the first applicant. Mr. Kelly avers that it is the practice "of the intelligence agencies within the State, as is with all intelligence agencies internationally, that they never divulge their methodology, as to do so would give valuable information to the persons in respect of whom information is gathered." He avers that "such intelligence may be gathered by information from individuals willing to act as sources of intelligence, or from surveillance, as well as other methods which are not disclosed." He goes on to state: "Regardless of the method by which the intelligence is obtained by intelligence services, it is almost inevitably the case that disclosure of even an outline of the information to the person to whom it relates would alert that person to potentially to the source of it." Mr Kelly goes on to aver that had the intelligence in relation to the first applicant been generated entirely by the domestic intelligence agencies of the State there may have been the possibility of a risk assessment being conducted for the purpose of deciding whether the information could be disclosed. He states however that the first applicant's case was not such a case.

54. In his affidavit sworn 3rd March, 2016, Mr. Murray addressed the requirement to protect the confidentiality of the source of the information received in respect of the first named applicant; the fact that the first applicant had received clearance from the gardaí in respect of his citizenship application; and the fact that he has been able to travel overseas unhindered. He avers as follows:

> "Disclosure of this material might also give risk to risks to the life of persons who are the sources of the information contained there and I would ask the Court to consider this risk in determining the issues herein.
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> I say that by way of a Second Supplemental Affidavit sworn and served on 26th January, 2016, I confirmed that the said report was dated 25th October, 2013, and was received by the Irish Naturalisation and Immigration Service from the Security and Intelligence Division of An Garda Síochána. I say that, contrary to the assumption which appears to be the basis for the averments of Ms. Berkeley at paragraph 17 and 18 of her affidavit of 2nd February, 2016, the Security and Intelligence Division of An Garda Síochána is not the 'source' of the information relating to the applicant. The Security and Intelligence Division use various sources and methods in order to obtain information and/or intelligence on persons who are or may be a threat to national security. The Division itself is not the 'source' of the information but rather the Division of An Garda Síochána responsible for gathering intelligence of this nature from various sources. As outlined already in Mr. Kelly's affidavit, it is vital that the confidentiality of those sources and methods be maintained, firstly in the public interest in protecting national security and, secondly, in order to abide by the terms upon which foreign agencies supply information. I say that Ms. Berkeley's averment therefore misunderstands Mr. Kelly's averments in relation to the confidentiality of 'sources'.
>
> I say that the purpose of filing the affidavit of 26th January, 2016, was to identify the specific unit within An Garda Síochána dealing with national security and international relations matters in order to make it known to this Honourable Court that the Applicant herein was and is the subject of concerns relating to national security. The vetting report to which the Applicant and his solicitors refer was prepared by a branch of An Garda Síochána which relates to general police work only and not with national security concerns and it cannot be inferred from the fact that the report does not disclose national security concerns that none exist. On the contrary, the fact that the Security and Intelligence Branch of An Garda Síochána have compiled a report on the Applicant is itself supportive of the fact that such concerns exist in relation to the Applicant.
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> I also beg to refer to paragraph 19 of the affidavit of Ms. Berkeley of the 2nd February, 2016, when produced. It does not follow from the Applicant's travel to other States that there are no security concerns in relation to him. By way of hypothetical example, the gathering of intelligence often proceeds on the basis the subject of surveillance should be permitted to carry on his or her normal activities as this may give rise to further intelligence for security services. Furthermore, the travel demonstrates only that the authorities of the United Kingdom, Germany and Turkey did not deem it contrary to their national interests or national security to permit the applicant to travel to their countries for a limited time. It does not follow from that that any of those countries had no concerns about the Applicant. Furthermore, it does not follow from the fact of such travel that this State does not have national security concerns about the Applicant."

55. In his affidavit sworn 16th March, 2016, in the second applicant's proceedings, Mr. Cremins makes a similar case to that made by Mr. Kelly in respect of the first applicant for the preservation of the confidentiality of the information received in respect of the second applicant. In his later affidavit of 18th April, 2016, he clarifies that the Security and Intelligence Division of An Garda Síochána is not the source of the information relating to the applicant. He avers that the fact that the second applicant has not been charged with a criminal offence is "immaterial" to the issues in the within proceedings and avers that "intelligence giving rise to security concerns may not justify a criminal prosecution". He further avers that the absence of formal charges "would not mean that the intelligence was not relevant for other purposes including the exercise by the Respondent of her absolute discretion so as to refuse naturalisation".

56. When reviewing the reports, the court has also borne in mind that what is deposed to on the respondent's behalf arises out of the State's security services' dealings with international intelligence agencies, which is an ongoing phenomenon. As averred to by Mr. Kelly in his affidavit sworn 26th May, 2015, in the first applicant's proceedings, information is received by the respondent from the State's security services for the purposes of considering, *inter alia*, applications for naturalisation. In his affidavit, Mr. Kelly also avers that "to disclose either the document as a whole, or a précis or a summary of it, would give information to the Applicant as to the manner in which [the] information came to the attention of the agencies who then transmitted that information to the Respondent for the purpose of considering the application for naturalisation. I say and believe that if the Applicant were [apprised] of the manner in which such information was gathered, then a likely, or certainly possible consequence would be that he would alter his behaviour in order to ensure that such information could not be gathered in the future." In his affidavit sworn on 16th March, 2016 in the second applicant's proceedings, Mr.Cremins states: "[O]n the facts of this particular case, to disclose either the document as a whole, or a précis or summary of it, would give information to the Applicant as to the manner in which the information came to the attention of the agencies who then transmitted that information to the Respondent…I say and believe that if the Applicant was apprised of the manner in which such information was gathered, then a likely, or certainly possible, consequence would be that he would alter his behaviour in order to ensure that such information could not be gathered in the future. Further or in the alternative, the disclosure of even an indication or summary of the document would enable the Applicant to inform third parties of the manner in which the information was gathered."

The documents

57. The documents in issue in these applications comprise a single report in respect of the each of applicants which has been furnished to INIS by the Security and Intelligence Division of An Garda Síochána. The Security and Intelligence Division is not the source of the information contained in the reports. It is undoubtedly the case (and accepted by the respondent) that the documents are relevant to the determination of whether the respondent's refusal to furnish reasons for not granting naturalisation to the

applicants beyond what is contained in the respective decisions is unlawful, and to whether the refusal of naturalisation in each case is unlawful.

58. The court has considered the contents of the reports in issue here against the background of the public interest involved in the inspection of evidence and against the respondent's concerns that inspection of the documents could potentially damage the State in its information gathering on issues of national importance, including national security relating to individual applications for naturalisation and whether inspection has the potential for the applicants to be able to identify the sources of the information. The question for the court is which of the public interest arguments is the weightier.

The court's conclusions

60. As regards the report in respect of the first applicant, which is described as "confidential", I am satisfied that it is confidential. Having considered the contents of the document, I am satisfied that the concerns of the respondent to keep the information therein contained confidential, as outlined on affidavit, are credible and proportionate concerns in the public interest. In the circumstances of this case, I find that the harm which would be caused to the State's information gathering capacity by production of the document is greater than the harm to the applicants. Accordingly, I am satisfied that it is in the public interest that the report and its contents remains confidential and that inspection thereof would be inimical to the interests of the State. In the course of its examination of the documents, the court has also borne in mind whether inspection of the reports could still be directed on a redacted basis. I find however that redaction of the report is not feasible. I agree with counsel for the respondent that the question of a summary or précis does not arise, given the nature of the relief sought.

61. As regards the report, also described as "confidential", in respect of the second applicant, again, I am satisfied that it is confidential. Having considered the contents of the document, I am satisfied that the concerns of the respondent to keep the information contained in the report confidential, as outlined on affidavit, are credible and proportionate concerns in the public interest. I find that the harm which would be caused to the State's information gathering capacity by production of the document is greater than the harm to the applicants. Accordingly, I am satisfied that it is in the public interest that the report and its contents remains confidential and that inspection thereof would be inimical to the interests of the State. Again, the court bore in mind whether inspection of the reports could still be directed on a redacted basis. I find that redaction of the report is not feasible. I agree with counsel for the respondent that the question of a summary or précis does not arise, given the nature of the relief sought. Summary

62. Having regard to all of the circumstances presenting in these cases, the court is satisfied that the State's interest in maintaining confidentiality for the 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 is, in the words of Walsh J., "*superior*" to the public interest in ensuring that justice is administered on full information. Accordingly, the court declines to grant the relief sought by the applicants in the present applications. In so determining, this court is not determining whether the applicants are entitled to succeed in their respective substantive claims in their judicial review proceedings.