THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 21

[2018/122]

Birmingham P.
Edwards J.
McCarthy J.
BETWEEN/

NICHOLAS KENDALL

APPELLANT

- AND –

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT delivered on the 16th day of January 2019 by Mr. Justice McCarthy.

Introduction
1. This is an appeal against the refusal by the High Court (Coffey J), on the 13th of March 2018, of an interlocutory application seeking discovery of documents in support of the appellant's application for certain relief by way of judicial review in the proceedings herein.

Background to the judicial review proceedings
2. The applicant pleaded guilty before the Special Criminal Court to certain offences involving the possession of explosives and a firearm and ammunition and ultimately, on appeal to this Court, was sentenced to imprisonment for a period of twelve years initially, although this was reduced to ten years on appeal. The last twenty one months of the sentence was to be suspended for a period of four years following the appellant's release on terms, inter alia, that the appellant should commit himself by way of an undertaking to the court to disassociate from dissident republicanism and that he would not associate with or put himself in the company of any person who had been convicted of an offence by the Special Criminal Court, and in particular that he would not associate or put himself in the company of a named individual.

3. On an unspecified date in November 2016, the appellant made an application to the respondent (the Minister for Justice and Equality) for temporary release under what is called "the Community Return Programme".

4. The respondent is invested with power under the provisions of s. 2 of the Criminal Justice Act 1960 ("the Act of 1960) as inserted by s.1 of the Criminal Justice (Temporary Release of Prisoners) Act 2003 to grant such release. By the provisions of s. 2(2) of the Act of 1960 the respondent, in directing release, must have regard, *inter alia*, to any report or recommendation made by An Garda Síochána. The application by the appellant was refused by the respondent and, on the 13th of January 2017, Mr Paul Mannering, an official in the Operations Directorate of the Irish Prisons Service, when communicating that refusal in an e-mail to the appellant's solicitor, on behalf of the respondent, stated *inter alia* that-

> "The decision reached is that it is not appropriate at this time to grant early release. In reaching this decision, information received from An Garda Síochána, the nature and gravity of the offence and the risk of the person committing an offence during any period of temporary release are the main factors which have been considered."

5. Subsequently, the appellant made a second application for temporary release, supported by representations made on his behalf by his solicitor. On either the 20th or the 23rd of February 2017 (there is some lack of clarity as to the exact date, but nothing turns on it,) the appellant's second application was also refused. Prior to that refusal, Mr Mannering, in a letter dated the 14th of February 2017 to the appellant's solicitor, having set out *in extenso* the matters which the Minister was required to consider, stated that :-

> "Having considered all of the above, the main reasons why your client has been refused temporary release is information received from An Garda Síochána, the nature and gravity of the offence and the risk of the person committing an offence during any period of temporary release. I can also confirm that material received from yourselves, your client and the Probation Service was also considered when the decision was being made"

6. Notwithstanding the fact that the appellant was due for release on the 17th April 2017 (having earned remission of sentence in the ordinary way to the extent of one quarter thereof) he commenced these proceedings on the 10th March 2017, grounded on a Statement of Grounds and the affidavit of Ms Shalom Binchy, his solicitor. An amended Statement of Grounds was delivered on the 5th March 2018. The appellant's proceedings claim *certiorari* in respect of both the decisions of the 13th January 2017 and the 23rd February 2017, respectively. Moreover, by the amended Statement of Grounds an order of *mandamus* and an associated declaration are also sought to compel the respondent to give "proper and adequate reasons" for his decisions.

The motion for discovery
7. The motion the subject matter of the present appeal seeks:

> *"The document or record or garda report in the possession of the Minister for Justice/Irish Prison Service setting out 'information received from An Garda Síochána' as referred to in the email from Paul Mannering of the 13th January, 2017 and further referred to in the letter from Paul Mannering of the 14th February, 2017 as follows: 'the information from An Garda Síochána which was considered in relation to the application. Such reports are compiled and submitted …' and the date and author saying."*

Background to the application for temporary release.
8. The appellant has acknowledged in his affidavit dated the 21st of March 2017 that the offences of which he was convicted, and to which he pleaded guilty, were of a serious nature. The appellant says he has made efforts towards rehabilitation while in prison, including partaking in educational classes, training, and work. The appellant further stated in his affidavit that the conditions in the basement area of Portlaoise Prison where he was incarcerated following his request to leave the republican landing were poor. The appellant says he was prevented from continuing to engage with educational and other services such as construction studies and home economics as they were held in the same area as prisoners whom he has wilfully disassociated himself with. This in turn made the appellant isolated, with little mental or social stimulation.

9. He made an application for enhanced remission in November 2015 but it was not dealt with quickly. On the 1st of June 2016, he was transferred to Castlerea Prison where the level of security is lower than that in Portlaoise. The appellant says he remained motivated to continue engaging with educational classes and training as an electrician. In order to complete his training, he asserted he required some form of enhanced remission or temporary release under the Community Return Scheme. On the appellant's instructions Ms Binchy wrote a letter seeking a response from the Irish Prison Service in relation to the application for enhanced remission. By letter dated the 16th of August 2016, the application was refused. That letter stated, *inter alia*:

> "Whilst it is acknowledged that you have engaged in some authorised structured activity, attending school and completing various computer course, the Minister having regard to the nature and gravity of your offences, the lack of offence focused rehabilitative work and the potential threat to the safety and security of members of the public is not satisfied that you are less likely to reoffend and are better able to reintegrate into the community."

10. The appellant stated that he was the only "Portlaoise Prisoner" in the late stage of a sentence who was not granted any form of pre-release by the respondent.

11. He met with an official from the Irish Prison Service, the aforementioned Mr Mannering, in November 2016. He explained to Mr Mannering that he had been making efforts to improve himself and that he had put his past behind him. Following this, the appellant made his first application for temporary release under the Community Return Scheme, and which, as has been stated, was refused. Thereafter, the appellant made his second application for temporary release and/or remission, to apply from the 3rd of April 2017, in order to facilitate his attendance on a course for trainee electricians. This however was also refused.

12. He says that he does not understand what "Garda information" the respondent is purporting to rely on as the basis for the decisions to refuse him temporary release; there was no information put to him from An Garda Síochána that was adverse to his applications for release at any point. He is aggrieved as he says his training had been delayed, despite his efforts while in prison to improve himself and states that had he remained in what is called the basement section of Portlaoise Prison, he would have been entitled to temporary release but this was not explained to him when transferring to the lower security prison in Castlerea.

Opposition to the motion
13. Mr. Mannering, in his affidavit dated the 3rd of April 2017, resists the appellant's request for discovery on the grounds that the applicant has not demonstrated that discovery is necessary for the fair disposal of the proceedings. He says that that Garda reports of which the appellant seeks discovery are compiled and submitted on a strictly confidential basis; any intrusion on such would have a negative impact on the flow of information to the Irish Prison Service from An Garda Síochána which enables them to manage prisoners, in particular in relation to temporary release and enhanced remission programmes. He does not accept that the appellant was not aware that the views of An Garda Síochána would be taken into account in his application for temporary release.

14. In her affidavit dated 5th of April 2017, Ms Rita McGahern, also of the Operations Directorate of the Irish Prison Service, makes reference to the fact that the appellant would enjoy one quarter remission of his full sentence on the normal cessation of his sentence on the 17th of April 2017. Ms McGahern disputes Ms Binchy's assertion in her affidavit that the appellant was held in solitary confinement in Castlerea Prison; she says there is no such regime in Castlerea. She says that the respondent asked to be segregated from groupings of republican prisoners and was therefore housed in the basement of the block. She notes that following an incident whereby the appellant blocked the observation window in his cell, he was moved to the Challenging Behaviour Unit, which is not "solitary confinement" as described by Ms Binchy in her affidavit dated 10th of March 2017. Ms McGahern goes on to say that it is clear from the appellant's affidavit that he would have been aware that by transferring from Portlaoise Prison to Castlerea, he would no longer be able to participate in the pre-release programme available to prisoners in Portlaoise. Further, he would have alternative schemes open to him in Castlerea Prison.

15. Ms McGahern made no comment in her affidavit on the information provided by An Garda Síochána in relation to the appellant, as she agrees that it was specifically provided and received on the basis that it is confidential. She stresses that the information contained in the Garda reports is just one of the factors considered in refusing the appellant temporary release; the decision was not made on that information alone. She disagrees with Ms Binchy's assertion that the decisions to refuse the appellant temporary release were fundamentally flawed and contends that the Minister acted lawfully.

The main proceedings
16. The grounds upon which it is sought to quash the decisions are the same in respect of each and are as follows:

> 1. Insofar as the respondent herein refused to grant early release in the decision of the 13th January, 2017 the said decision is fundamentally flawed by being contrary to fundamental reason and common sense and/or to be lacking in rationality having regard to all of the circumstances of the applicant's case, which include the following:
>
> (a) disassociating himself from other prisoners in Portlaoise prison by being placed in the "basement" for segregation purposes;
>
> (b) entering into a bond before the Court of Appeal disassociating himself from republican/subversive activities;
>
> (c) the applicant's participation is structured activities in Portlaoise prison and Castlerea prison;
>
> (d) the offer of employment by the applicant's previous employer;
>
> (e) the assessment by the probation officer of the applicant's application for early release; and
>
> (f) all of the circumstances of the applicant's case.

2. Alternatively, in making the said decision the Minister failed to comply with the precepts of fair procedures and natural justice in the following respects:-

> (a) failed to afford the applicant any opportunity to comment on the "information received from An Garda Síochána";
>
> (b) failed to afford the application the "information received from An Garda Síochána" and/or a summary of same in any form;
>
> (c) failed to afford the applicant any opportunity to comment on or make submissions on any "risk" of him committing an offence during any period of temporary release;
>
> (d) failed to treat the applicant in a non-discriminatory fashion where no other prisoner in a similar situation has been refused all forms of early release in some form or another; and
>
> (e) failed to afford the applicant reasons for the decision made to refuse him temporary release and/or early release.

3. Alternatively, the said decision failed to take account of all relevant factors and/or took into account irrelevant factors in the decision made. In particular, the respondent took undue account of any "information from An Garda Síochána" in relation to the applicant's position and failed to take due account of the applicant's activities within the prison environment.

4. Further, or in the alternative, the respondent has failed to give any or any adequate reasons for the decision as required by law, as the essential rationale of the decision has not been made known to the applicant. In particular, the respondent has failed to make known the essence of the "information from An Garda Síochána" or, alternatively, has failed to justify, adequately or at all, the non-disclosure of even the essence of that information. In the circumstances, the applicant does not know why he has been refused.

> 5. Further, or in the alternative to the foregoing, the failure to afford the applicant any form of temporary release whatsoever in the decision of the 13th January 2017 is contrary to the provisions of the Prison Rules 2007 for enhanced remission and/or s. 2 of the Criminal Justice Act, 1960 for temporary release where the respondent has not assessed the statutory criteria in a lawful and proportionate manner.
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> 6. The said decision is contrary to the policy of the respondent as applied to other prisoners in the same situation and/or convicted of the same or similar offences. While each decision must be made individually, no reason has been given for distinguishing between the applicant and others in the same position.

17. In both the original and amended Statements it is pleaded at paras 14 and 15 that the respondent failed to give any adequate reasons "as the essential rationale of the decision has not been made known to the applicant" (and in particular the essence of the "information from An Garda Síochána") such that the applicant did not know why he had been refused or that the decision maker failed to take into account all relevant factors "and or took into account irrelevant factors in the decision made. In particular, the respondent took undue account of any information from An Garda Síochána)." Consequently, the applicant, desiring to see what the Gardaí said in their report, sought discovery of it.

The judgment of the High Court

18. The High Court refused discovery on the following basis:

> *'16. The applicant relies on the decision of Ní Raifeartaigh J. in Bradley v. Minister for Justice and Equality [2017] IEHC 422 in order to seek discovery in this case. I adopt the law as stated by Ní Raifeartaigh J. in Bradley together with my interpretation of the curial part of that decision in Brian McGinley v. The Minister for Justice and Equality [2017] IEHC 698 (Unreported judgment, High Court, Coffey J., 22nd November, 2017).*
>
> *17. In Bradley, Ní Raifeartaigh J. was careful to say that the mere fact that discovery is available in a case concerning a review of an executive action to which the "arbitrary, capricious or unjust" test may apply, does not mean that every time a prisoner makes an application for enhanced remission he is automatically entitled to see the underlying garda report. Neither does it mean that when judicial review proceedings are brought to challenge a refusal for enhanced remision the court must inspect the underlying garda report in respect of which privilege is claimed. Ní Raifeartaigh J. was persuaded to consider the issue of discovery in that case only because there was "an unusual evidential context" arising from "an apparent conflict" between the positive views which were expressed by the gardaí on oath at the applicant's sentence hearing and the contrastingly negative views which were apparently expressed to the Minister in the report which formed part of the reason for the refusal of enhanced remission. Accordingly, Ní Raifeartaigh J. held that discovery was necessary for the fair disposal of an issue that had arisen on the evidence established by the applicant. To paraphrase what I stated in McGinley, infra, in a case such as this where the restricted standard of review applies, discovery should only be considered where the applicant has established prima facie evidence to suggest that the Minister's reliance on the garda view was in some way "arbitrary, capricious or unjust".*

Decision

> *18. In this case the application for discovery is advanced merely on the basis that no information was provided as to the contents of the garda report other than the assertion that the gardaí were not in a position to recommend that the applicant should get temporary release. At its highest, therefore, the application is advanced on the purely hypothetical basis that the garda report may not be founded upon reliable or intelligence–based information so that any decision based upon it would, therefore, be tainted by irrationality. Accordingly, as the applicant has failed to lay the required evidential foundation for the consideration of discovery, I hereby refuse the application.'*

The grounds of appeal

19. Fifteen grounds of appeal of greater or lesser specificity have been filed:, but in his written submissions the appellant says that the issues on this appeal are as follows:-

> 1. Whether or not the appellant is entitled to the document as of right;

2. Whether or not the High Court applied the correct test in determining if discovery was relevant and necessary;

3. Whether or not the respondent could rely on public interest privilege to resist discovery;

4. Whether public interest privilege had been properly asserted.

and, the applicant further maintains that the High Court misconstrued the nature of the decision made by the respondent and was in error in confining the role of judicial review to a narrow spectrum. It is said that this error had consequential implications for the High Court's view as to the necessity for discovery. This is an matter which is inextricably linked with, and might be described as forming part of, the first and second issues identified above.

20. The third and fourth issues have been raised by the applicant ostensibly because the respondent's refusal in correspondence to furnish the relevant report was couched in the following terms-

> "Such reports are compiled and transmitted on a confidential basis and therefore the Irish Prison Service are not in apposition to disclose them. To disclose information reports given on a confidential basis may negatively impact the free flow of information between parties relating to prisoners, which is central to the Irish Prison Services' ability to make safe decisions in relation to the management of a prisoner's sentence. A frank and open exchange of information is essential to the effectiveness of prisoner management decisions."

Coffey J. did not deal with these two issues because, I infer, he perceived there was no need to do so. A question of privilege could only arise in the event of discovery being ordered, and inspection sought. A hypothetical claim of privilege is not, accordingly, a matter which can or should be addressed on this appeal.

Discussion and Decision
21. In the course of oral submissions, counsel for the appellant submitted that no reason, by which she meant no adequate reason, had been given for the refusal or refusals by virtue of the fact that her client was not informed of the gist or essence of what the Gardaí had said.

22. Whether or not this is so is one of the substantive matters raised in proceedings and it might well be that a fuller reason (without commenting upon the adequacy of the reasons given one way or the other) would have negated any supposed or alleged need for discovery of the document. Alternatively, the absence of that information may be an argument in favour of the proposition that discovery is necessary but these are different things from the free standing issue of whether or not the reasons ought to have been fuller.

23. Whether they are well founded or not, or sufficiently full or not, the simple fact remains that reasons have been given and the question for us is whether or not, having regard to their terms or otherwise discovery should have been granted *inter alia* because at this juncture it would appear to be the only way in which the applicant can obtain information as to what the Garda reports contained.

Whether the applicant is entitled to the document as of right

24. In this respect, it was submitted that an argument was made to the High Court to the effect that the appellant was entitled to sight of the report as of right but that the learned High Court judge fell into error in failing to deal with the argument. We do not accept that the High Court judge failed to deal with the asserted claim of right and it is not relevant since the issue before us is whether or not discovery should be granted and we deal with the substance of the point accordingly.

25. As appears from the written submissions, constitutional justice applies to any decision of the present kind (i.e. to grant or to refuse discovery) even though it deals with something which is a privilege and not a right. The issue is the extent to which the bundle of various procedural rights which go to make up constitutional justice are applicable in respect of particular types of decision. By definition this will be dependent upon the nature of the decision and the standard of review. Here, the courts may intervene only if the decision is shown by an applicant to be 'arbitrary, capricious or unjust' as decided in the case of temporary release under the prison rules which governed this matter before 2003 and as established in *Murray v Ireland* [1991] ILRM 465 and *Kinahan v The Minister for Justice* [2001] 4 I.R. 454: there is no basis for debate on this. Thus, in a criminal trial, the rules of constitutional justice might perhaps be at their most elaborate and extensive, whereas in the present case the issue is whether or not a person who had no right to release since he was a convicted prisoner serving his sentence, is entitled to see a particular document which had been before the decision maker. It is submitted on behalf of the appellant that "constitutional justice requires the giving of notice to a person affected by a decision of any material adverse to him" to the extent that "it should have been disclosed in the currency of the application" and further, that whilst in principle it might be accepted that derogation from the principles of constitutional justice (for example in the case of national security) might be warranted there are no such reasons here, and in particular, that what is alleged by the appellant to be the position of the respondent, namely, that there is a general immunity from disclosure, could not justify such refusal.

26. *Mallak v Minister for Justice* [2012] 3 I.R. 297, which is relied upon by the appellant, does not assist one way or the other on the issue of whether or not the document should be made available, since that merely establishes the principle that the rules of natural or constitutional justice apply to cases where the administrative decision in question concerns the grant of a mere privilege (as here) rather than a right, and in particular the right to be given reasons.

27. I think *Murphy v Ireland and Ors* [2014] 1 I.R 198 is of some assistance in addressing the question of entitlement as of right to the document as of right. That case concerned a challenge to a decision of the Director of Public Prosecutions to issue a certificate under s. 46 of the Offences against the State Act, 1939 for the purpose of returning the accused for trial to the Special Criminal Court. The applicant contended that the Director had unlawfully failed to inform him not only of the reasons for the issue of the certificate but to provide him with any information used to reach the decision to issue it. It was held that the obligation to give reasons was dependent upon, and a reflection of the reviewability of, the decision and the scope of that review. O'Donnell J. (p. 232) stated that:-

> "The obligation to give reasons is, as has been observed, dependent upon and reflection of the reviewability of the decision and the scope of that review. The decision made here is at the end of the spectrum, where review is most limited and attenuated."

Indeed, he went on to say that:-

> "A statement of reasons that the director believed the accused to be a member of, or associated with, an organisation that is prepared to interfere with the administration of justice, or even justifying the non delivery of such reasons, will be sufficient, unless the accused challenges the decision and provides sufficient information to the court to presumptively undermine the director's reasons"

and, additionally (of particular importance here) that:-

> "It follows, however, that the entitlement to obtain such reasons does not carry with it any right contended for by the plaintiff to obtain the gist of information grounding such a decision or to have a hearing or to make submissions before a decision is made."

28. It will be seen, accordingly, that there are circumstances in which it may be lawful, notwithstanding the general principle that reasons be given, to give none or, by implication at least, reasons which do not have a high degree of specificity and, further, that the entitlement to constitutional justice (which was not in debate) does not entitle the party to obtain the "gist" of the information upon which the Director's conclusion is arrived at, and that no requirement to have an oral hearing, or to make submissions arose, plainly being limitations on the various procedural rights which go to make up constitutional justice.

29. The elements of constitutional justice in the case of a decision of the present kind appear from *McAlister v Minister for Justice* [2003] 4 IR 35, which again concerned a decision to refuse temporary release for failure to provide any or any adequate reasons. There, *certiorari* was sought to quash a refusal to grant temporary release under the then prevailing law (which, for present purposes, did not differ in any material respect from that now in force) and it was there held that natural justice indeed applied to a limited degree, and extended to the giving of reasons. However, it was explicitly held that on an application for such release there was no entitlement to a hearing or enquiry. It had been sought to compel the respondent to furnish a list of the persons whose observations had been sought in deciding the matter but this was refused since it could be of no assistance to the applicant having regard to the fact that he was not entitled to such a hearing. It is not clear from the report whether or not in reference to a hearing the learned judge (Finnegan P.) was referring to entitlement to be heard in writing or orally or both although the appellant here had a meeting with Mr. Mannering and was heard in writing by the agency of his solicitor before any final decision was made, (albeit with the limitation that there was no access to the report nor were the contents known.) It is, nonetheless, authority for the proposition that the extent to which the elements of natural justice are applicable in this type of case is limited.

30. It seems to me that as a matter of principle, given the nature of the decision here, that is to say, whether or not a guilty person with no entitlement to be at liberty is to be conferred with the privilege of being granted (by way of discovery) the information that he seeks, and given that the test for reviewing any such decision is whether it was arbitrary, capricious or unjust, there cannot be an objection to the limitation on constitutional justice which arises because there is no entitlement as of right to the Garda report.

31. I am of this view because the reasons themselves, even if they include a mere reference to the Garda report (without affording any information as to its contents), will provide a basis for *prima facie* determination, on the part of an applicant or otherwise, as to whether or not there is arbitrariness, caprice or injustice. In addressing such an issue a prisoner will, almost certainly of his own knowledge, have extensive information of a kind relevant to whether or not temporary release is or would ordinarily be granted such as, say, to take a straight forward example, his record in prison. The present case is a good example of the latter where he sought to place reliance to a significant degree (to put it no higher) on such conduct.

32. I think that a fair analogy can be drawn with the fact that an accused person is not entitled to the information which may be available to the Director of Public Prosecutions and upon which he may base his decision to try an accused for a non-scheduled offence in the Special Criminal Court. However, here, even if the report is not available as of right, discovery and hence access to the document, subject to any claim of privilege, is possible in a proper case. I am therefore satisfied that the High Court judge did not err in principle in the manner claimed under this heading.

Whether the High Court applied the correct test in determining

if discovery was relevant and necessary

33. It seems to me that if there is a rationale for obtaining sight of the document it must be to see whether or not the factual matters therein or any opinion expressed were capable of challenge for the purpose of testing whether or not the decision was lawful; in the present case that resolves itself into whether or not discovery is necessary for this purpose.

34. It is not in doubt that, as submitted by the appellant, the traditional rule elaborated in *Compagine Financiere et Commerciale du Pacifique v Peruvian Guano Co*. [1882] 11 Q.B.D 55 is applicable in judicial review proceedings. No one doubts but that the material is relevant but the question is whether or not it is necessary. It was submitted that the document in question is essential to consideration of whether the exercise of the power in question was capricious, arbitrary or unjust. In this connection reliance was placed on *Bradley v The Minister for Justice and Equality* [2017] IEHC 422 (which I will address further below) as authority for the proposition that reliance on a Garda report which was not itself based on reliable or intelligence-based information would render the decision arbitrary. It was submitted that, without the document, the appellant is not in a position to advance his case against the respondent and that discovery here would tend to advance or refute the appellant's contention that the decision was arbitrary, capricious or unjust.

35. The respondent submits, and again this cannot be in doubt, that apart from the restricted standard of review applicable here discovery in judicial review proceedings will be the exception rather than the rule (*see Sheehy v Ireland* (High Court, Kelly J., 30th July 2002), *K.A v The Minister for Justice* [2003] 2 I.R. 93 and *Marques v the Minister for Justice and Equality* [2017] IEHC 597). It will suffice, I think, to quote the following passage from the decision of Finlay Geoghegan J. in K.A. from which the appropriate approach to discovery in judicial review cases appears:-

> "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 on any substantiated act and then seek discovery in the hope that there will exist

documents which support the assertion."

In that respect she quoted with approval from the decision of Bingham M.R. in R. v Secretary of State for Health (Ex Parte, Hackney London Borough, Unreported, Court of Appeal, 24th January 1994) when he said that the test to be met by an applicant is :–

> "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"

In *Marques*, Donnelly J. quoted with approval from the judgment of Laffoy J.in *Fitzwilton v Mahon* [2006] IEHC 48 where she said that the determining factor is whether or not it is necessary having regard to the ground on which the application is founded or the state of the evidence. Thus, it is an over simplification for the appellant to baldly assert that he is entitled to discovery on the application of the traditional principles elaborated in *Peruvian Guano Co*.

36. *In Bradley v the Minister for Justice and Equality*, the applicant had sought judicial review of a decision refusing him release on the basis of enhanced remission in accordance with certain prison rules. In accordance with the rules, the Minister, as he was entitled to do, had regard to the views of An Garda Síochána as to whether or not he ought to be released. By the proceedings he sought *inter alia* a copy of the Garda report. It was contended that the decision was "arbitrary, capricious or unjust" *inter alia* on the basis that in and about his refusal, the Minister relied on the Garda report "apparently adverse to him" in circumstances "where this view was apparently in direct conflict with the Garda view as expressed on oath at his sentence hearing". At the sentence hearing, evidence had been given by a Garda witness that since the commission of the offence the accused had not come to the adverse notice of the Gardaí. Counsel submitted to the judge that the question which elicited that evidence was not limited to convictions or charges but was an open question. Ní Raifeartaigh J. said the Garda had given the applicant a "clean bill of health", going considerably beyond what she characterised at the more routine and typical response that there had been no convictions during the period, which was apparently some five years. She took the view that when one juxtaposed that evidence with the uncontested inference that the Garda view in the report was unfavourable to the applicant, there was a conflict of fact, and she held that whilst a prisoner is not entitled automatically to see the Garda report on an application for enhanced remission:-

> "Bearing in mind that each case must be decided within its own evidential context, it seems to me that the issue of the Garda report is sufficiently important in the present case to have warranted the invocation of the necessary procedures concerning an adjudication on privilege. In the present case, an unusual evidential context arose from an apparent conflict between the Garda view as expressed on oath in open court at the time of the sentence hearing and the Garda view as apparently expressed to the decision maker in a 2016 report which formed part of the reason for the refusal of enhanced admission"

Thus, Ní Raifeartaigh J. did not in any sense exclude a party from obtaining such a report, but rather took the view that as a matter of principle it was not available as of right to an applicant for release, but that on the facts of a given case its release might well be appropriate.

37. *McGinley v the Minister for Justice and Equality* (High Court, Unreported, Coffey J., 22nd November 2017) followed Bradley, and on the facts of that case Coffey J. said that what he described as the "critical feature" giving rise to discovery in *Bradley*, namely, *prima facie* inconsistency between what was contained in the Garda report and what had been stated previously by the Gardaí at the sentence hearing, was absent. He said that:

> "This critical feature is absent in the instant case where no proper or any evidential foundation has been laid to even suggest that the Minister's reliance on "the Garda view" was in any way "arbitrary capricious or unjust". Instead, discovery of the relevant document is sought on a purely speculative basis and is designed not to assist a case that has already been made but rather to assist a case that may or may not unfold from an inspection of the document whose discovery is sought. It seems to me that in order to establish a *prima facie* entitlement to discovery in a case of this nature, the Applicant must demonstrate that the relevant document or material is required to resolve a live issue that arises from the evidence of some fact or circumstances that *prima facie* suggests that insofar as the Minister has relied on the "Garda view" his refusal of enhanced remission was "arbitrary capricious or unjust."

38. The reasoning in these cases is based on the earlier authorities on discovery in judicial review proceedings and we accordingly approve them.

39. In the present case Coffey J. followed those decisions and said that:

> "to paraphrase what I said in McGinley, *infra*, in a case such as this where the restricted standard of review applies, discovery should only be considered where the applicant has established *prima facie* evidence to suggest that the Minister's reliance on the Garda view was in some way "arbitrary, capricious or unjust."

40. The judge could not find anything on the evidence in this case to suggest that the Minister's reliance on the Garda view was "arbitrary, capricious or unjust" and hence there is no basis for intervention here.

41. We accordingly dismiss this appeal.