THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 223 J.R.]

BETWEEN

NICHOLAS KENDALL

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Coffey delivered on the 13th day of March, 2018

1. This is an interlocutory application for discovery in which the applicant seeks discovery of:

> "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."

Factual Background

2. On a date unspecified in the affidavits, the applicant pleaded guilty before the Special Criminal Court to very serious offences which were committed when he was 20 years old on 8th October, 2010 and on 10th February, 2011(whilst he was on bail). The offences involved the unlawful possession of explosives, a firearm and ammunition. Following an appeal against severity of sentence, the Court of Appeal imposed a total sentence of ten years imprisonment in respect of all matters with the last 21 months suspended and backdated to the date on which the applicant entered his pleas of guilty. The sentencing court took account of the applicant's pleas of guilty, his relative youth, and the fact that he entered into a bond to disassociate himself from other dissident republicans whilst in and after his release from prison.

3. On the 1st March, 2016 the applicant applied for enhanced remission which the Minister refused by letter dated the 16th August, 2016. The letter stated:

> "Whilst it is acknowledged that you have engaged in some authorised structured activity, attending school and completing various computer courses. The Minister having had regard to the nature and gravity of your offences, the lack of offence focussed 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."

4. On a date prior to the 6th January, 2017 the applicant made an application for temporary release pursuant to s.2 of the Criminal Justice Act 1960, as inserted by s.1 of the Criminal Justice (Temporary Release of Prisoners) Act 2003.

5. By email dated the 13th January, 2017 the Minister refused the application and stated three reasons for so doing. The letter stated that:

> "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."

6. By letter dated the 9th February, 2017 the applicant solicitor's requested the Minister to reconsider her decision. The letter challenged the reasoning of the Minister and drew particular attention to the fact that the email did not state what information was received from An Garda Síochána and whether it related to historical or current matters. It further objected to the fact that the applicant had been given no opportunity to address any concerns arising from the "information" relied upon that had been provided by An Garda Síochána and other sources.

7. By letter dated the 14th February, 2015 the Minister reiterated the reasons for her decision and further indicated that the Minister was not in a position to disclose the relevant garda material because, it was argued, the said material was compiled and submitted on a confidential basis.

8. The applicant has since issued judicial review proceedings seeking to quash the relevant decisions of the Minister, to seek full and proper reasons for the Minister's decision and further to seek damages arising from the fact that the refusal for temporary release resulted in the applicant being unable to undertake a vocational course in or about the 3rd April, 2017.

9. By letter dated the 1st March, 2017 the applicant's solicitors sought voluntary discovery of the material, the subject matter of the application herein, from the Minister for the reasons set out in the said letter.

10. A replying affidavit was sworn in the course of these proceedings by Mr. Paul Mannering, sentence manager in the Irish Prison Service. At para. 8 of his affidavit, he objects to discovery on the grounds that the applicant has not demonstrated that discovery is necessary for the fair disposal of the application for judicial review and further on the ground that the garda report is subject to public interest privilege. At para. 12, he swore that the garda report was taken into consideration by the Minister in refusing temporary release. The affidavit does not state the basis of which public interest privilege is claimed. A further replying affidavit was sworn by Ms. Rita McGahern, another sentence manager in the Irish Prison Service, which discloses that in their confidential report to the Minister, the Gardaí indicated that they were not in a position to recommend that the applicant be granted temporary release.

Relevant Law

11. The Minister's power to grant temporary release is provided by s. 2(1) of the Criminal Justice Act 1960 ("the Act of 1960"), as inserted by s.2 of the Criminal Justice (Temporary Release of Prisoners) Act 2003.

12. Section 2(2) of the Act of 1960 obliges the Minister to have regard to 11 specified matters including at "(h) any report of, or recommendation made by – (ii) the garda síochána".

13. Section 2(3) of the Act of 1960 provides that the Minister shall not give a direction for temporary release under this section:

> "(a) if he is of the opinion that, for reasons connected with any one or more of the matters referred to in subsection (2), it would not be appropriate to so do"

14. It is common case that a restricted standard of review applies to the exercise of the discretion of the Minister to grant temporary release and that the sole circumstance in which the court would be entitled to interfere with a decision to refuse temporary release would be where it could be established that the discretion of the Minister was being exercised in a capricious, arbitrary or unjust way. This test was applied by Finlay C.J. in *Murray v. Ireland* [1991] ILRM 465, to a refusal for temporary release to applicants who were serving life sentences for murder. In *Kinahan v. The Minister for Justice* [2001] 4 I.R. 454 Hardiman J. stated that the ratio in *Murray* applied equally to persons serving a determinate sentence, as the applicant is in this case.

15. The standard of review that applies to the grant of temporary release implies that the Minister enjoys a very wide discretion so that the scope for review by the courts is thus very narrow. As stated by Faherty J. in Shaun Kelly v. The Minister for Justice and Equality [2017] IEHC 805 (Unreported judgment, High Court, Faherty J., on 23rd November, 2017):-

> "43. The court must approach the applicant's challenge to the removal of his temporary release programme from the standpoint that the applicant is in lawful custody and that there is no right to temporary release. As set out above, the Court cannot micromanage matters which are the exclusive preserve for the Executive, or those who run the prisons."

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.