

**THE HIGH COURT
JUDICIAL REVIEW**

[2021] IEHC 161
RECORD NO. 2020/195/JR

BETWEEN:

NK AND AR

APPLICANTS

AND

MINISTER FOR JUSTICE

RESPONDENT

JUDGMENT of Ms Justice Tara Burns delivered on 9th day of March, 2021.

General

1. In the substantive proceedings herein, the Applicants seek Certiorari of a decision of the Respondent refusing the Second Applicant's application for a review of a decision of the Respondent which refused the Second Applicant's application for a permanent residence card and revoked his current residence card. This application was made pursuant to the European Communities (Free Movement of Persons) Regulations 2015.
2. One of the grounds upon which the decision of the Respondent is challenged is that the Respondent acted in breach of constitutional justice by relying upon undisclosed and unparticularised information provided by the Garda National Immigration Bureau (hereinafter referred to as "GNIB") and/or the Hungarian authorities.
3. The Statement of Opposition filed in the matter denies that the Respondent acted in breach of constitutional justice in the manner claimed. It is pleaded that the Respondent arrived at her decision having due regard to all of the facts, information, circumstances and documentary evidence and that she did not rely on undisclosed and unparticularised information. It is further pleaded that the Respondent notified the Applicants prior to the decisions being made, that information provided from the GNIB indicated that the First Applicant had been living and working in Hungary since 2012. A verifying affidavit of Ms Stacey Morris, Higher Executive Officer in the Respondent's Investigation Unit of the EU Treaty Rights Division, avers at paragraph 6 of her affidavit, in relation to these pleas, that "the Respondent...did not have any information beyond that which was communicated to the Applicant: namely that the EU citizen had been living and working in Hungary since 2012". She avers that this information was provided to the Applicants by letter dated 24 May 2019, prior to the initial refusal and revocation decision. Ms Morris further avers that the Applicants did not provide any documentation contradicting this information throughout the course of their solicitors' communications with the Respondent. She again avers at paragraph 35 of her affidavit:-

"As previously stated in this Affidavit, the Respondent did not have any additional information from the GNIB and/or the Hungarian Authorities at the time of the first instance or review decisions.... All of the information in the possession of the Respondent was shared with the Applicants prior to the review decision being made."

Discovery

4. The Applicants have sought discovery of all documents relating to communications between the Hungarian authorities and the GNIB about the First Applicant. In their request for voluntary discovery they say that the verifying affidavit of Ms Morris has deployed this information in opposing their application but the actual information has not been exhibited. They further state:-

“Accordingly, that affidavit is incomplete or fails to deal fully with the issue of what the information was. The applicants must have the opportunity of satisfying themselves that what the Minister has chosen to refer to represents the whole of the information relevant to the issues in these proceedings and is accurately characterised. The Minister has a duty to make appropriate disclosure to the High Court of all relevant material before her when the decision under challenge was made.”

5. The difficulty with this assertion is that Ms Morris’s affidavit has not failed to fully deal with what the information from the Hungarian authorities was. Ms Morris’s affidavit is categorical that the information from the Hungarian authorities was to the effect that the First Applicant was living and working in Hungary since 2012; that this information was given to the Applicants; and that the Respondent had no further additional information from the Hungarian authorities regarding the First Respondent which was considered by her when making the initial decision or the review decision.

Discovery in Judicial Review proceedings

6. In *Marques v Minister for Justice & Equality* [2017] IEHC 597, Ms. Justice Donnelly summarised the law on discovery in judicial review proceedings from paragraph 21 onwards:-

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

‘In this jurisdiction, it appears that the principles according to which the courts will determine applications for discovery in judicial review proceedings are the same as those upon which they are determined in other forms of civil actions. [...] It is however inherent in the nature of judicial review that the necessity for discovery will be more difficult to establish than in plenary proceedings. This follows from the fact that in judicial review what is at issue is the legality of the decision challenged. In many instances the facts are not in dispute. Discovery will normally, but not exclusively, be confined to factual issues in dispute. It can be envisaged that an applicant for judicial review may raise a factual issue and, whilst not disputed, consider that there are documents in the possession of the respondent which would assist in the proof of relevant related facts at the hearing and that a court would take the

view that discovery of such documents is necessary for disposing fairly of the application for judicial review. The limitation on discovery in such circumstances is that it must not be considered to be a fishing exercise. It is difficult to state in a general way the precise dividing line but it is clear that it is not sufficient for an applicant simply to make an assertion not based upon any substantiated act and then seek discovery in the hope that there will exist documents which support the assertion. In *R. v. Secretary of State for Health, ex parte Hackney London Borough* (Unreported, English Court of Appeal, 24th July, 1994) Bingham M.R. [...] put the test to be met by an applicant in the following terms:-

"Have they raised a factual issue of sufficient substance, or adduced evidence which grounds a reasonable suspicion of unlawfulness, such that the application cannot be fairly resolved without discovery?"

22. It is for those reasons that it has been said that discovery in judicial review proceedings 'ought to be the exception rather than the rule' (Kelly J. in *Sheehy v. Ireland*, Unreported, High Court, July 30th, 2002). Laffoy J. in *Fitzwilton v. Mahon* [2006] IEHC 48 stated that the determining factor is whether it is necessary having regard to the ground on which the application is founded or the state of the evidence while also pointing out that the nature of judicial review proceedings means that the practical application of the principles may result in discovery being ordered less frequently.
23. More recently, McDermott J. set out in nine paragraphs the approach to be taken when discovery is sought in judicial review proceedings. At para. 25 of *McEvoy v. An Garda Síochána Ombudsman Commission* [2015] IEHC 203, he stated:
 - (1) An order for discovery should only be granted where the applicant seeking discovery establishes that it is relevant and necessary for the fair disposal of the issues in the case in the sense indicated by Brett L.J. in the *Peruvian Guano* case:
 - (2) The court must determine whether the documents sought are relevant to the issues to be tried as determined from the pleadings:
 - (3) A party may not seek discovery in order to find out whether a document may be relevant and a general trawl through a party's documentation is not permitted. However, a reasonable possibility that the documents are relevant is sufficient.
 - (4) Judicial review is not concerned with the correctness of a decision but the way in which the decision was reached. Therefore, the categories of documents which a court would consider necessary to be discovered would be much more confined than if the litigation was related to the merits of the case and this necessarily restricts what may be regarded as appropriate discovery.
 - (5) Discovery will not normally be regarded as necessary if the judicial review application is based on impropriety which may be established without the benefit of discovery:

- (6) If a decision is challenged as unreasonable or irrational, discovery will not be necessary because, if the decision is clearly wrong, it is not necessary to ascertain how it was reached:
- (7) Discovery may be necessary where there is a clear factual dispute on the affidavits which must be resolved in order to adjudicate properly or fairly on the application or where there is prima facie evidence to the effect that a document that ought to have been considered before a decision was made was not or a document which ought not to have been seen before a decision was made, was considered.
- (8) The court must consider whether discovery is necessary having regard to the grounds upon which the application was founded or the state of the evidence (per Laffoy J. in Fitzwilton cited above). But the question must be decided in respect of the issues that arise on the judicial review application rather than the substantive issue which was before the decision maker.
- (9) An applicant is not entitled to go behind an affidavit by seeking discovery to undermine its correctness unless there is some material outside that contained in the affidavit to suggest that in some material respect the affidavit is inaccurate. It is inappropriate to allow discovery the only purpose of which is to act as a challenge to the accuracy of an affidavit."

Application to the present case

7. Counsel for the Applicant asserts that the necessity and relevance of this discovery is to ensure that Ms Morris is accurate in her categorisation of the information: that it is being sought for the purpose of verification. A factual dispute is not evident, nor indeed suggested.
8. This is not an appropriate basis for this court to order discovery. This application is seeking to go behind the affidavit of Ms Morris to verify whether she is correct in her averments without any basis being established as to why she may be incorrect.
9. Further, with respect to the ground pleaded in respect of this issue, discovery of the material is not necessary or indeed relevant. The contention is that the Respondent relied on undisclosed and unparticularised information. The Respondent says that the information was disclosed and was particularised and by affidavit sets out what the disclosed and particularised information was which the Respondent acted upon which was notified to the Applicant.
10. The discovery application in effect is seeking to establish that there was other information before the Respondent when making her decision which was considered by the Respondent and which was not notified to the applicant. There is no basis for any such suspicion nor any basis to challenge the averment that this was the entirety of the information before the Respondent. It is merely speculation on the part of the Applicant making this a classic fishing expedition.

11. Reliance has sought to be placed on *Hannigan v DPP* [2001] 1 IR 378 and *Cunningham v. DPP* [2006] 3 IR 541 where discovery of what might normally be classified as privileged material was ordered. This occurred in unusual circumstances where the respondent in each case sought to rely on some of its privileged correspondence in its defence of each applicants' claim. The Supreme Court categorised this as a waiver of privilege which necessitated the entirety of the material to be disclosed. These cases have no relevance to the instant matter whatsoever. Relevance and necessity was clearly established in those cases. They have not been so established in the instant case.
12. Reliance has been placed on the fact that it was not disclosed that the information at issue emanated from Hungary until the review decision was notified. The information disclosed was always to the effect that the information received from the GNIB was to the effect that the Second Applicant was living and working in Hungary since 2012. The fact that the information from GNIB emanated from the Hungarian authorities does not alter the fact that the legal basis for ordering discovery has not been met in this case.
13. I therefore refuse to order that the discovery sought be made and will make an order for the Respondent's costs in respect of the discovery motion as against the Applicant.