



**THE HIGH COURT
JUDICIAL REVIEW**

[2024] IEHC 487

[Record No. 2021 672 JR]

BETWEEN

KEALAN HARRINGTON

APPLICANT

AND

MINISTER FOR DEFENCE, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Marguerite Bolger delivered on the 31st day of July 2024

1. These judicial review proceedings challenge the applicant's discharge from the Reserve Defence Forces (hereinafter referred to as "RDF") on grounds of a breach of the relevant regulations and administrative instructions and of fair procedures. This judgment relates to the applicant's contested applications for discovery and for inspection of documents over which the Minister asserts public interest privilege.

Background

2. The applicant joined the RDF in 2019 having previously been a member in 2014. On 23 April 2021 he was summonsed by telephone to a meeting on 26 April 2021 at which he was told by Lieutenant Colonel Maher that he was applying to have the applicant discharged from the RDF because he was a security risk to the State. The applicant was invited to submit representations, which he did, and was later informed that his discharge was authorised on 17 May 2021. No documentation was furnished in advance of the meeting or the discharge. The existence of documentation pertaining to the discharge process has been averred to on behalf of the Minister in various affidavits in the substantive judicial review proceedings, including a letter that Lt. Col. Maher says he sent

to Brigadier General Cleary in January 2021 seeking permission to initiate the discharge process. Lt. Col. Maher averred that he has been unable to locate the final version of the letter and B.G. Cleary averred that he cannot recall if he received it. Emails of the 7 April 2021 in which reference was made to previous communications about the applicant, were also exhibited but the previous communications referred to therein were not. The Minister agreed shortly before the commencement of the discovery motion before this Court to provide the full email thread in which the exhibited emails of 7 April appear.

3. A Security Assessment (hereinafter referred to as "the assessment") was carried out on the applicant between October and November 2020 which Lt. Col. Maher examined at the offices of G2 (the Security Division in the 1st Brigade of the Defence Forces) on 10 November 2020. The applicant has not seen this assessment but claims that he needs to see it as he says it is central to his fair procedures case. The regulations and administrative instructions require that all supporting documentation was to be furnished to B.G. Cleary along with the discharge form that was signed by Lt. Col. Maher on 11 May 2021, but the assessment was not sent with the form. The form stated that the applicant was a security risk and his services were no longer required.

4. The applicant's solicitors wrote in June and again in July 2021 seeking reinstatement, which was refused by letter dated 9 July 2021 from the Defence Forces' Personnel Policy Branch. That letter referred to an undated incident at the gate of Colins Barracks in Cork but made no mention of the assessment.

Discovery Motion

5. The category of discovery that the applicant seeks was amended in the course of the proceedings before this Court and now seeks:

"All documentation including correspondence between any member of the Defence Forces relating to the initiation of the process (including its management) to discharge the Applicant from 1 October 2020 to 8 April 2021".

The applicant says he needs this documentation to make his case that the manner in which Lt. Col. Maher sought to initiate his discharge was flawed and contrary to the regulations and administrative instructions. He says the discovery that the Minister has agreed to make is insufficient to cover documentation beyond the email thread of 7 April that may exist. He relies heavily on what he says is the need for an explanation on affidavit of the missing letter of January 2021 and any earlier drafts of it.

6. In advance of the hearing of the discovery motion, the parties agreed that the respondents would deliver an affidavit of discovery concerning all drafts of the final version of the January 2021 letter (subject to any claim of privilege responsive to this category in the usual way). The agreed wording of category (a) is as follows: "All prior drafts of the letter sent by Lt. Col. Noel Maher to BG Brian Cleary in January 2021."

Discussion on discovery

7. Both sides have referred me to the detailed analysis and summary of the principles of the law on discovery in judicial review by Holland J. in *Marshall & Ors v. ESB* [2023] IEHC 173, where the existence of a factual dispute arising from the pleadings and the insufficiency of mere assertions is emphasised.

8. There is a factual dispute at issue in this case that links directly to the grounds on which the applicant was given leave to judicially review his discharge, namely, whether the requirements of the regulations and administrative instructions and of fair procedures were properly complied with. The letter of January 2021 is relevant to that as Lt. Col. Maher identifies this as the first time he sought permission to initiate the discharge process in accordance with the regulations. Lt Col. Maher has been unable to locate the final version of the letter and B.G. Cleary does not recall receiving it. An explanation for the apparent absence of this critical document and an account of whatever attempts have been made to locate a hard or soft copy of it or any drafts of it, must merit an affidavit of discovery.

9. In deciding that the applicant should be discharged, B.G. Cleary took account of the documents contained in the assessment, the inspection of which I address further below. The affidavit filed on behalf of the Minister uses careful language in describing how the assessment was utilised in the discharge process. B.G. Cleary averred that he "discussed" the assessment with Lt. Col. Maher in January 2021 and whilst the assessment was not furnished to him with the discharge form AF 97 B on 12 May 2021, he avers that he "*had sight of these documents and took them into account when deciding that the Applicant should be discharged.*" (at para. 5 of his affidavit sworn 9 November 2023). The reference to B.G. Cleary having "*sight*" of the assessment is also referred to in the Minister's statement of opposition (at para. 15 (vii)) in denying any breach of the regulations or administrative instructions. However, no detail is given about how or when the assessment was taken into account by B.G. Cleary, who has never averred to having read it in any of his carefully worded affidavits. Any further documentation, in addition to

what has been exhibited and will be provided by way of voluntary discovery, relating to the impugned discharge process including how account was taken of the assessment, is relevant and necessary for the fair discharge of the proceedings. Making that discovery will not impose an unreasonable burden or unfairness on the Minister. I therefore grant the discovery that has been sought.

Inspection Motion

10. The applicant says the assessment is central to his claim that his discharge from the RDF was affected in breach of his rights to fair procedures. The applicant was advised that the reason for his discharge was that he was considered to be a security threat and the Minister contends that was sufficient and that the contents of the assessment do nothing more than set out particulars of that reason. I do not accept that is sufficient. The particulars for the Defence Forces' view of the applicant as a security threat contained in the assessment is fundamental to the applicant's case and to his ability to effectively make representations and, in effect, to be heard in his own defence. In considering a claim of public interest privilege asserted over a document, the more fundamental that document is, the more necessary is its disclosure.

11. Commandant Tim Egar swore an affidavit, the purpose of which he said was to "*provide some context as to the Defence Forces' security intelligence structures and the level of confidentiality and secrecy that applies to their activities and to any documents that they produce and the importance of confidentiality and secrecy being maintained*" (at para. 3 of his affidavit sworn on 15 December 2023). The Minister submitted that those methods and sources are confidential and, depending on their contents, a report by G2 may contain material that cannot be disclosed in spite of the impact this could have on an individual's right to fair procedures. Undoubtedly this could be so in an appropriate case, the court having had regard to the material claimed to be confidential, but a claim of public interest privilege is not one to be accepted routinely (as per Finlay C.J. in *Ambiorix v. Minister for the Environment (No. 1)* [1992] 1 IR 277).

12. The assessment of the public interest privilege claim that the Minister makes here requires a balancing of the two competing interests of the administration of justice requiring the disclosure of documentation to a litigant versus the protection of the security of the State. The court must determine, by reference to the circumstances and the contents of the documents over which public interest privilege is claimed, which of those

competing public interests should prevail, by balancing whether the greater harm lies in requiring disclosure or not. Such an exercise was conducted by Faherty J. in *AA v. Minister for Justice Equality and Law Reform* [2017] IEHC 371 where she identified the circumstances by which the public interest considerations were to be evaluated as:

"...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 interest of the State; and the extent of which the applicants have been apprised of the existence of such reports." (at para. 53)

I have sought to conduct a similar exercise here, the details of which I set out below.

Examination of the documents

13. I agreed to examine a file of documents (hereinafter referred to as "the file") in order to determine the Minister's claim of public interest privilege which I understood to comprise the assessment referred to above. That assessment was described by Comdt. Egar in his affidavit as *"a physical file that consisted of a report from G2 and a number of other separate documents containing information concerning the Applicant"* (at para. 13 of his affidavit) and later (at para. 14) described it as relating *"to the security of the Defence Forces and the State, discloses Defence Forces' intelligence sources and discloses Defence Forces' surveillance methods"*. The Court was also told, twice, by Lt. Col. Maher (in his first affidavit of 3 February 2022 at para. 13 and again in his verifying affidavit of 31 March 2023 at para. 18) that he based his decision to apply for the applicant's discharge on that assessment and that his decision was *"further influenced"* by the incident of 24 October 2020 at the gate of Collins Barracks (hereinafter referred to as "the October incident"). Thus, there were two grounds for his decision being the contents of the assessment and, separately, the October incident.

14. The Minister has asserted public interest privilege over the assessment but has willingly exhibited documents in relation to the October incident including the Military Police Final Investigation Report of 24 March 2021 which is exhibited twice in Lt. Col. Maher's affidavits (exhibit 3 in his affidavit of 3 February 2022 and exhibit 2 in his verifying affidavit of 31 March 2023). Lt. Col. Maher has also exhibited (in his replying affidavit of 7 November 2023) a document dated 5 November 2020 addressed to Lt. Col. Maher from G2 entitled *"1112751 REC KEALAN HARRINGTON (AR), NO 5 BTY, 1 BAR"* which refers to having conducted enquiries in liaison with J2 (the Defence Forces' Security Division) and

"in addition" to having used their own sources to establish the applicant's involvement in the incident of October 2020. That document clearly treats the G2 enquiries as separate to the enquiries conducted into the October 2020 incident.

15. I was, therefore, surprised to see what appears to be both of those documents (set out at para. 14 above) included in the file. No privilege could apply or realistically be asserted over documents that the Minister already exhibited. It is unsatisfactory that those documents have been included in the file that the Minister's submissions (at para. 14) described as *"privileged, highly sensitive and confidential intelligence file, the disclosure of which would significantly harm the Respondents' interests."*

16. The following documents in the file also refer to the incident of October 2020:-

- (i) 18 January 2021 "Offence against miscellaneous", which is stamped 'Confidential'.
- (ii) 2 November 2020 "Military Police Preliminary Investigation Report".
- (iii) 29 October 2020 "Internal Confidential Memo".
- (iv) 27 October 2020 email, stamped 'Confidential'.

I cannot see any information in those documents that is not contained in the documents about the incident of October 2020 that have already been exhibited to affidavits, as set out above. The inspection of these documents would not risk a greater harm to the security of the Defence Forces than the risk that non-disclosure poses to the applicant's fair procedures right to access documentation pertaining to the grounds for his discharge. Those documents should be made available for inspection.

17. The file also contains a copy of the applicant's vetting application and disclosure from 2014 along with a cover memo of 6 January 2021, a personnel management document of 16 October 2020 and a document stamped 'Confidential' comprising a list of applications for Defence Forces positions between 2013 and 2020. None of those documents contain anything on which a claim of public interest privilege could be asserted. Those documents should be made available for inspection.

18. There is a letter dated 12 January 2021 from Lt. Col. Maher to GOC (whom I assume to be B.G. Cleary) which bears similarities to the description of the January 2021 letter in relation to which Lt. Col. Maher said, on affidavit, a final version of which could not be located (as set out at para. 2 above). This version refers to the applicant's appearance in the media as a family representative to the Brady Family (a matter averred to by the

applicant in his affidavits) and to the incident of October 2020 and is not marked confidential. That fact and context of the applicant's appearance in the media is publicly available information. The fact that such material has appeared in the media could not be categorised as confidential information coming within what Comdt. Egar described in his affidavit (which, as set out above, explains the Defence Forces security intelligence activities) as:

"...a public interest in the Defence Forces' maintaining secrecy and confidentiality over its intelligence gathering methods, the manner in which intelligence is stored and collated and how it is analysed, even when some of the intelligence gathered is publicly available. If the Security Intelligence Assessment or even portions of the Security Intelligence Assessment were disclosed it would provide individuals and potentially those interested in undermining the Defence Forces' and/or the State's interests with valuable information that would enable them to tailor their behaviour to evade the Defence Forces' intelligence gathering methods in the future." (at para. 14 of his affidavit sworn on the 15 of December 2023)

This version of the letter of 12 January 2021 mentions "Ref B" which seems to be a letter of 5 November 2020 that is included in the file. A copy of that letter of 5 November 2020 has already been exhibited by Lt. Col. Maher in his replying affidavit of 7 November 2023 (referred to at para. 13 above). For the same reasons as I set out above at para. 15, no privilege could apply or realistically be asserted over documents that the Minister already exhibited. I do not see anything in this version of the letter of 12 January 2021 that attracts public interest privilege. Both letters should be made available for inspection.

Documents attracting Public Interest Privilege

19. A document headed "Confidential", reference number 1 BDE ----, comes within the confidentiality that the Minister asserts over the Defence Forces' intelligence gathering methods that grounds the claim of public interest privilege and, therefore, should not be made available for inspection. A document dated 19 October 2020, headed confidential, includes matters coming within the same confidentiality at paragraph 5, which paragraph should be redacted. Paragraph 3 contains public information with no reference to information or methods of gathering information that might render it sufficiently confidential to be covered by public interest privilege. It also refers to an attachment. The Minister has confirmed that G2 was made aware of the material through a confidential

source but that the attachment was accessed and downloaded from a publicly accessible website. The document, other than what is to be redacted as set out above, and the attachment should be made available for inspection.

Costs

20. The applicant is entitled to his costs, to be adjudicated upon in default of agreement, in respect of his motion for discovery and his inspection motion.

Counsel for the applicant: Feichín McDonagh SC, David Geoghegan BL.

Counsel for the respondents: Bairbre O'Neill SC, Eoin Sreenan BL.