THE HIGH COURT

[2020 No. 294 JR]

BETWEEN

ORLAITH FAHY

APPLICANT

– AND –

THE COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 30th June 2021 (comprising [A] an interim judgment of 3rd June 2021 and [B] an addendum of 30th June 2021 to that interim judgment).

[A] INTERIM JUDGMENT

I

Further Submissions Necessary?

1. The parties will see as they read this interim judgment that the court does not see any flaw to present in how the Commissioner proceeded, save in one potential respect, as identified in Part XIII below. Because the point in Part XIII has not been argued in detail, the court considers that it should give the parties the opportunity to make oral or written submissions regarding same, which submissions may conceivably include the submission that the court should not

receive further submissions and/or treat with the 'Part XIII issue'. The reason that the court considers that further oral/written submissions should be made regarding the 'Part XIII issue' is that the said issue seems ostensibly to have the potential to 'flip' this case from one in which the Commissioner succeeds to one in which Ms Fahy succeeds, notwithstanding that throughout the rest of this judgment the court respectfully prefers the Commissioner's case to that of Ms Fahy. The parties should note that in affording this opportunity for further submissions the court is not inviting an appeal against any aspect of this interim judgment: after hearing from the parties regarding Part XIII it will add an addendum to this interim judgment in which it will treat with those further arguments. This interim judgment and that addendum will then form the court's final judgment. If the parties then wish to appeal all or any aspect of that final judgment that is a matter for them. The court emphasises that it has reached no conclusions regarding any of the matters addressed in Part XIII.

II

Introduction

2. Ms Fahy is a sporting-woman who plays camogie for her local GAA team, does long-distance charity cycles, and has, at times, attained a level of fitness that would doubtless be the envy of many, albeit that, regrettably, she has not escaped injury. Despite her generally high level of fitness, and perhaps because of injury sustained through sport, she was unfortunate enough during her time as a trainee Garda and on into her time as a fully attested member of An Garda Síochána (during the period that she was still designated, by reference to her length of service, as a 'probationer' Garda), to fail a fitness test some six times, with the eventual result that she was dismissed from An Garda Síochána. For my part, I admit to having felt very sorry throughout these proceedings that Ms Fahy finds herself in the position that she is in – repeatedly failing a fitness test when she is clearly a woman who enjoys sport and who appears generally to have attained a very high level of fitness, at least until she was blighted by injury. However, as she no doubt appreciates, courts are required to proceed dispassionately by reference to the law, not on sympathy. The critical question of law presenting here is whether the Commissioner acted in accordance with law in dismissing Ms Fahy as he did.

III

Probationer Gardaí

3. This Court's judgment in *Murphy v. The Commissioner of An Garda Síochána* [2021] IEHC 354 was handed down on the day that this case was at hearing. In that judgment, the court observed, amongst other matters, as follows, at para.2:

> "*This application is brought by Probationer Garda (or 'P/Garda') Murphy. However, his counsel claims that in law there is no such thing as a 'probationer' Garda, that one can be a 'trainee' Garda and then, once attested as a member of the force, one becomes a 'Garda' but that the concept of a probationer Garda is something unknown to law. There is no doubt that a so-called 'probationer' Garda is an attested member of An Garda Síochána. However, that does not mean that it is not possible for the Commissioner to distinguish between* e.g., *probationer Gardaí and non-probationer Gardaí (the latter being Gardaí within typically the first two years of their careers as Gardaí, though this period is subject to extension). Section 123 of the Garda Síochána Act 2005, which is concerned with the making of disciplinary regulations, expressly provides, amongst other matters, at subsection (6), that 'The regulations may…(b) provide for the taking of different forms of disciplinary action against members of the Garda Síochána based on their rank or on any other factor', the phrase 'any other factor' patently including the period of time that has elapsed since once's attestation as a member of An Garda Síochána.*"

4. So, in legal terms, as a probationer Garda, Ms Fahy was a fully attested member of An Garda Síochána and so not a trainee Garda, albeit that she was among a cohort of early-career Gardaí whom the Commissioner, acting pursuant to s.123 of the Act of 2005, had lawfully elected to distinguish from non-probationer Gardaí by reference to time spent as members of An Garda Síochána, and who might colloquially, but not in a legal sense, be described as being at a training stage of their careers.

IV

Facts: Overview

5. Perhaps the best way of generally identifying the facts at play in this application is by way of summary chronology:

11.04.2016.	Ms Fahy commences Phase I of her B.A. in Applied Policing at the Garda College in Templemore.
15.04.2016.	Ms Fahy signs the Conditions of Service and Acceptance of Admission as a Trainee.
17.11.2016.	Ms Fahy is attested as a member of An Garda Síochána. Thereafter she commences Phase II of the B.A.
31.05.2017.	Ms Fahy fails the fitness assessment component of Phase II. (Attempt #1).
09.06.2017.	Intervention meeting with An Garda Síochána at which the consequences of Ms Fahy's failure to pass the fitness assessment were explained to her (both as regards continuing in the B.A. programme and ultimately as a member of An Garda Síochána).
23.08.2017.	Ms Fahy fails the fitness assessment component of Phase II. (Attempt #2).
12.09.2017.	Intervention meeting with An Garda Síochána at which the consequences of Ms Fahy's failure to pass the fitness assessment were explained to her (both as regards continuing in the B.A. programme and ultimately as a member of An Garda Síochána).
01.11.2017.	Ms Fahy fails the fitness assessment component of Phase II. (Attempt #3).
24.11.2017.	Intervention meeting with An Garda Síochána at which the consequences of Ms Fahy's failure to pass the fitness assessment were explained to her (both as regards continuing in the B.A. programme and ultimately as a member of An Garda Síochána).
13.12.2017.	Ms Fahy fails the fitness assessment component of Phase II. (Attempt #4).

03.01.2018.	Intervention meeting with An Garda Síochána at which the consequences of Ms Fahy's failure to pass the fitness assessment were explained to her (both as regards continuing in the B.A. programme and ultimately as a member of An Garda Síochána).
April 2018.	Inspector Grogan appointed to assist in the compilation of a suitability file (to assist the Commissioner in determining Ms Fahy's suitability for retention in An Garda Síochána pursuant to reg.12 of the Garda Síochána (Admissions and Appointments) Regulations 2013 (S.I. No. 470 of 2013)). Ms Fahy was invited to, and did, furnish submissions which formed part of the suitability file.
20.07.2018.	Application made to the University of Limerick to remove Ms Fahy from the B.A. programme. The application was successful, reversed on appeal and Ms Fahy was granted a fifth opportunity to repeat the Phase II fitness assessment.
Sept. 2018.	Ms Fahy notified of the intention of the Director of Training and Continuous Professional Development at the Garda College to apply to the Garda College Examination Board to remove Ms Fahy from the B.A. programme. Ms Fahy is invited to made submissions, does so, and is allowed to undertake the fitness assessment for a (by then) sixth time.
18.09.2018.	Ms Fahy fails the fitness assessment component of Phase II. (Attempt #5).
01.11.2018.	Ms Fahy's probation extended for three months from 17.11.2018 to 17.02.2019.
17.11.2018.	Ms Fahy's original two-year probation ends.
17.12.2018.	Ms Fahy fails the fitness assessment component of Phase II. (Attempt #6).
19.01.2019.	Ms Fahy is notified by the Examination Board that she was removed from the B.A. programme on 14.01.2019.

	She is also advised that the failure to complete the B.A. degree may adversely affect her continuation as a member of An Garda Síochána.
05.02.2019.	Ms Fahy's probation extended for six months from 17.02.2019 to 17.08.2019.
14.02.2019.	Following appeal by Ms Fahy, the Quality Assurance Board of the School of Law at the University of Limerick notifies Ms Fahy of its decision to remove her from the B.A.
25.07.2019.	Commissioner issues a notice of this date to Ms Fahy pursuant to reg.12(9) of the Regulations of 2013 proposing to dispense with her services.
07.08.2019.	Ms Fahy's probation extended for three months from 17.08.2019 to 17.11.2019.
16.08.2019.	Following on the reg.12(9) notice, Ms Fahy furnishes her submissions to the Commissioner.
15.11.2019.	Minister for Justice and Equality consents to Ms Fahy's probation being extended by three months from 17.11.2019 to 17.02.2020.
07.02.2020	Commissioner notifies Ms Fahy that he is dispensing with her services. This is the impugned decision.

V

The Pleadings

6. A reading of the pleadings suggested that the following issues were being raised, albeit that the case as argued at the hearing seemed somewhat narrower (though the court notes and has proceeded in this interim judgment on the basis that reliance was also being placed, by both parties, on all aspects of their written submissions). Thus, it is contended (i) that the determination to dispense with Ms Fahy's services was done otherwise than in accordance with reg.12(8) of the Regulations of 2013, (ii) that the Commissioner mis-applied and misconstrued the Regulations of 2013, (iii) that the respondent deployed Ms Fahy's probationary period (and extensions thereof) for a purpose/objective that was not in compliance with the Regulations of

2013, (iv) that the Commissioner represented to Ms Fahy during a critical phase of her probationary period that it was possible for her to complete her probationary period, (v) that there was a pre-ordained conclusion to the reg.12(8) proceedings and that the invitation to make submissions was an empty process, (vi) that the procedures adopted by the Commissioner were artificial, futile and had no appreciable prospect of conferring any benefit on Ms Fahy, (vii) that the practice and procedures adopted by the Commissioner lacked the required transparency, (viii) that the Commissioner failed to provide any (or any sufficient) reasons for the decision made, and (ix) that there is no provision in the regulations of 2013 that entitles the Commissioner to deem the attainment of the B.A. in Applied Policing as an essential prerequisite to becoming an efficient and effective member of An Garda Síochána or, if there is such provision, that Ms Fahy should have been advised of this prerequisite in the reg.12(9) notice.

VI

Regulation 12

7. The key legislative provision at play in these proceedings is regulation 12(8)(a) of the Regulations of 2013 provides as follows:

> "*(8) (a) The Commissioner may, at any time, subject to the provisions of this Regulation, having assessed the suitability of a probationer for retention in the Garda Síochána, dispense with the services of the probationer if he or she considers that—*
>
> *(i) that probationer is not suited, physically or mentally, to performing the functions of a member, or*
>
> *(ii) having regard to one or more of—*
>
> *(I) the performance of that probationer,*
>
> *(II) the behaviour of that probationer,*
>
> *(III) assessments made by that probationer's Superintendent of the matters specified at (I) or (II) or of matters otherwise relating*

to that probationer's competence to serve as an efficient and effective member, or

(IV) the disciplinary record of that probationer,

***that probationer has not demonstrated during the probationary period the competence to serve as an efficient and effective member*" [Emphasis added].**

8. I have taken care in typing in this provision to lay it out as it appears in the online and .pdf versions of the legislation, because as laid out it seems to make very little sense. The problem is with the Bold text. The layout suggests that the Bold text applies to all the text that precedes it, even though as a matter of good grammar it patently belongs more properly to (ii). Following enquiry by me after the hearing was completed, counsel have agreed that I should proceed to judgment on the basis that the Commissioner was acting under reg.12(8)(a)(ii) (with the Bold text being a part of same). I am grateful to them for that clarification.

9. It appears that the Commissioner must have proceeded by reference to reg.12(8)(a)(ii)(I) as the impugned decision makes no reference to Ms Fahy's "*behaviour*" as a Garda (within the meaning of reg.12(8)(a)(ii)(II)), assessments made by the superintendent with responsibility for Ms Fahy (as referred to in reg.12(8)(a)(ii)(III)) or the disciplinary record of Ms Fahy (as referred to in reg.12(8)(a)(ii)(IV) – and, lest there be any doubt in this regard, Ms Fahy was never the subject of such proceedings). It follows therefore that the Commissioner could only have proceeded by reference to reg.12(8)(a)(ii)(I) and must have construed the word "*performance*" to have referred at the least to 'physical performance'

VII

Some Key Facts in More Detail

10. Regulation 12(9) of the Regulations of 2013 provides that:

"*Where the Commissioner proposes to dispense with the services of a probationer under paragraph (8), (a) the Commissioner shall notify the*

probationer in writing of the proposal and the reasons for that proposal, and (b) the probationer shall have 28 days from the date of the Commissioner's notification to make submissions to the Commissioner regarding the proposal".

11. As indicated in the summary chronology the Commissioner issued a reg.12(9) notice dated 25th July 2019, the main body of which, after reciting reg.12(8)(a) of the Regulations of 2013, proceeds as follows:

"*Your suitability with regard to your performance and/or competence has been assessed and the following allegations of commission/omission on your part have been brought to my attention:*

1. On the 31st May 2017, you attended the Garda College for your Phase II Fitness Assessment under the Professional Competence Module of the BA in Applied Policing and failed to meet the minimum standard required.

2. On 23rd August 2017, you attended the Garda College for your second attempt at the Phase II Fitness Assessment and again failed to meet the minimum standard required.

3. On the 1st of November 2017 you attended at the Garda College for your third attempt at the Phase II Fitness Assessment and failed to meet the minimum standard required.

4. On 13th December 2017 you attended the Garda College for your fourth attempt at the Phase II Fitness Assessment and failed to meet the minimum standard required.

5. On 20th July 2018 an application was made to the University of Limerick to remove you from the BA in Applied Policing Programme. As a result of the successful appeal, one further opportunity was given to you to repeat that Phase II Fitness Assessment.

6. On the 18th September 2018 you had your fifth attempt at the Phase II Fitness Assessment and failed to reach the required standard. Om 9th October 2018 you were removed from the BA in Applied Policing Programme.

7. On the 12th November 2018, following an appeal by you to the Garda College Mitigation Committee, a decision was made by the Garda College Examinations Board to allow you one further opportunity to complete the Phase II Fitness Assessment and you were reinstated on the BA in Applied Policing Programme.

8. On the 17th December 2018 you were you attended the Garda College to complete a sixth attempt at the Phase II Fitness Assessment. You failed to achieve the required standard and on 19th January 2019 you were advised that you had been removed from the BA in Applied Policing Programme.

9. You cannot now complete your training or attain the BA in Applied Policing.

These are serious matters and I have to consider and decide whether you are likely to become an efficient and effective member of An Garda Síochána in accordance with Regulation 12(8) of the Garda Síochána (Admissions and Appointments) Regulations 2013. Before doing so I hereby give you an opportunity in accordance with Regulation 12(9) of the Regulations of advancing to me on or before the 22 of August 2019 (28 days from [the] *date of this notification) any submission you wish to make concerning the allegation(s)*".

12. Following on the above, Ms Fahy made various submissions. Then, by decision letter of 7th February 2020, the Commissioner indicated that he was going to dispense with Ms Fahy's services. His decision letter refers to reg.12(8) of the Regulations of 2013, recites the key facts

presenting (in particular the six failed attempts at the fitness test) and then continues as follows:

> "*Your submission dated 16 August 2019 outlines your background in fitness and sporting activities. I note that you stated experiencing back pain in early 2017 while training for a charity cycle and I note the various reports attached to your submission.*
>
> *Your fitness failures on Phase II occurred from May 2017 to December 2018. You attended on six occasions and failed the assessment on each attempt. You were accommodated on four other occasions with a re-scheduled date. For each attempt at the fitness test you signed a declaration that you were fit to perform the test and were not suffering from any injury. This was read to you in advance of your signing and your signature witnessed. While you stated in your submissions that you 'should never have persisted in repeating the fitness tests while carrying an injury', it has been repeatedly highlighted to probationers that they are personally responsible for our own health and fitness. I note* [that] *you continued to work on full operational duties during this period.*
>
> *I have taken into account the steps you took to address your fitness failures and your efforts made to lose weights and incorporate exercise into your daily routine. I have also taken into account your personal submission, your wish to be a member of An Garda Síochána and the reports of your supervisors that you perform well in your role and there have been no performance issues. I note* [that] *you take full responsibility for the situation you now find in and* [that you] *regret* [that] *you did not take action to address the issue with fitness failures at an earlier stage. However, you were offered assistance with your fitness training by your Tutor Garda, who is a personal trainer, the use of the station gym and were referred to the Garda Welfare Services but did not take up these offers of assistance.*

You have been removed from the training programme and cannot now complete the BA in Applied Policing. I have deemed the attainment of the BA in Applied Policing as an essential prerequisite to becoming an efficient and effective member of An Garda Síochána. There is no provision to reinstate a probationer onto the training programme once all possible avenues of appeal have been exhausted.

Having considered the above I am to inform you that you cannot continue with your training or obtain the BA in Applied Policing as you have not shown yourself to be physically capable of completing the required Fitness Assessment.

Now, therefore, in exercis[ing] *the power conferred on me by Regulation 12 of the Garda Síochána (Admissions and Appointments) Regulations 2013. I hereby dispense with your services with effect from the 16th February 2020.*"

[Emphasis added].

VIII

An Aside on the B.A. in Applied Policing

13. Through a combination of their training at the Garda College and ongoing training while they are 'on the beat', trainee/probationer Gardaí eventually acquire a B.A. in Applied Policing which is accredited/validated by the University of Limerick. On the commencement of her training, Ms Fahy was provided with a since-updated 'Handbook of Garda College Templemore Academic Regulations 2014'. Between them, paras.1.4.1, 1.4.6, and 3.2.3.5 of the Handbook make clear that the College operates a modular continuous assessment system and that *all* physical competency assessments must be completed successfully to satisfy the academic regulations and alerts the reader to the potential for extension of a period of probation where a person fails to pass a module. So none of what has occurred to Ms Fahy can have come as a surprise to her, nor did it involve anything other than the application of a basically fair and non-discriminatory process.

14. In the 'Notes to Candidates' which were supplied to Ms Fahy at the commencement of her training (receipt of which was acknowledged by her in writing) the requirement to complete satisfactorily all elements of the training programme offered by the Garda College via the B.A. route was made clear to her. Ms Fahy therefore knew throughout her time as a trainee and probationer Garda that she was required to achieve a pass grade in her physical assessments at every phase of the B.A. programme, and she was aware too that failure to pass a physical assessment would preclude her from passing to the next phase of the B.A. programme. And she could not but have been aware from the materials supplied to her, and indeed from the correspondence that issued to her in the course of the 'interventions' that followed on her repeat failures, that the obtaining of the B.A. in Applied Policing was and is perceived by the Commissioner to be a necessary requirement to exiting the probationer phase of her career with An Garda Síochána.

15. If statutory basis is sought for the power of the Commissioner in this last regard, it seems to the court that s.26(1) of the Garda Síochána Act 2005 affords him ample power in this respect, empowering the Commissioner, *inter alia*, "*(a) to direct and control the Garda Síochána*", and "*(b) to carry on and manage and control generally the administration and business of the Garda Síochána, including by arranging for the recruitment, training and appointment of its members and civilian staff*".

16. So, not only does the Commissioner have the power to deem the attainment of the BA in Applied Policing as an essential prerequisite to becoming an efficient and effective member of An Garda Síochána but Ms Fahy really cannot have been in any doubt in this regard for the reasons stated previously above.

IX

The Notice and the Decision Considered in More Detail

17. It has been suggested by Ms Fahy that the decision letter of 7th February fails to accord with basic fairness of procedures on the following grounds:

"***(a)*** ***Reasons are required as an aspect of fair procedures and justice guaranteed by the Constitution and as an unspecified right under Article 40.3***"

[Court Note: They are, and perfectly adequate reasons have been provided. The court has been referred in this regard to 'standard' case-law on reasons such as *State (Creedon) v. Criminal Injuries Compensation Tribunal* [1988] I.R. 51, *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39, *Golding v. Labour Court* [1994] E.L.R. 153, *Deerland Construction Ltd v. Aquaculture Licences Appeals Board* [2009] 1 I.R. 673, *Mallak v. Minister for Justice, Equality and Law Reform* [2012] 3 I.R. 297. These are well-known cases which point again and again to the importance of reasoned decision-making. The court does not see that it needs to engage into a detailed consideration of same. It suffices to note that in this case Ms Fahy has been provided with ample reasons in relation to the decision taken by the Commissioner to dispense with her services. And those reasons did not come in a vacuum: Ms Fahy actively participated in the process commenced by the reg.12(9) notice and was actively involved in the interventions that followed her regrettable, repeated failures to pass the required fitness test. So there is no doubt, for example, that the reasons given (and the process which surrounded the giving of same) conform to the requirements identified, for example, by the Supreme Court in *Mallak*.]

"***(b)*** ***The imposition of a requirement to furnish reason, where decision-making affects the rights or interests of the individual, stems from the democratic nature of the State recognised in Article 5 of the Constitution.***"

[Court Note: Noted.]

"***(c)*** ***The obvious means of achieving fairness is for reasons to accompany the decision***".

[Court Note: Agreed, though fairness will only be achieved if the reasons are good and comprehensible.]

"***(d)*** ***It must be possible to accurately determine what the reasons were***."

[Court Note: Agreed.]

"***(g)* [*sic*]** ***In the alternative and if the reason as it has been cited in the preceding paragraph above*** [*i.e.* the first of the two paragraphs that the court has written in Bold text in its quote from the impugned decision above] **was in fact the reason for the termination of the Applicant's employment, as a member of An Garda Síochána, or any reason, that reason is completely at variance with the procedures that the Respondent embarked upon by inviting the Applicant to make submissions, *i.e.* by the process commenced in the Respondent's earlier notice of the 21st July 2019**".

[Court Note: The reg.12(9) notice invites submissions in accordance with reg.12(9) and following on receipt of those submissions the Commissioner reached a conclusion by reference to reg.12(8). The court respectfully does not see how the Commissioner in his impugned decision can be said or could be found to have acted "*completely in variance with the procedures*" that he embarked upon by way of his reg.12(9) notice when he did precisely as is required of him by law. Subject to the just-stated

conclusion, it is worth considering the two paragraphs that the court has placed in Bold above just a little more closely.]

A. Letter: **"*You have been removed from the training programme…*". [**Court: Of course it is possible to go for training while one is working in a job. People up and down the country are given on-the-job training all the time. However, lest any confusion arises in this regard, the court notes (again) that Ms Fahy, by the time of the impugned decision, was not a trainee Garda, she was a fully attested member of An Garda Síochána. Yes, she was among a cohort of early-career Gardaí whom the Commissioner, acting pursuant to s.123 of the Act of 2005, had lawfully elected to distinguish from non-probationer Gardaí by reference to time spent as members of An Garda Síochána, But that did not mean that she was somehow less than an attested member of An Garda Síochána: one is either an attested member of An Garda Síochána or one is not, and Ms Fahy was a fully attested member of An Garda Síochána. Her being removed from a training programme in and of itself did not affect that status.]

B. Letter: **"*You have been removed from the training programme and cannot now complete the BA in Applied Policing…*"**. [Court: As a matter of fact, this is correct. However, as a matter of law, the fact of inability to complete a particular B.A. does not yield the conclusion that a dispensing with a probationer's services pursuant to reg.12(8)(a)(ii)(I) is *necessarily* valid.]

C. Letter: **"*I have deemed the attainment of the B.A. in Applied Policing as an essential prerequisite to becoming an efficient and effective member of An Garda Síochána.*"** **[**Court: What does the Commissioner mean by "*becoming*

an efficient and effective member"? Ms Fahy at the time of this letter *was* a fully attested member of An Garda Síochána. The court would repeat at this juncture the observations made at **A**, from which it follows that there was no question of Ms Fahy's "*becoming*" a Garda: she was a garda. What the Commissioner must therefore mean is that Ms Fahy, either since her becoming a fully attested Garda or at some point thereafter, had been or become a less than efficient and effective member of An Garda Síochána.]

D. Letter: "***There is no provision to reinstate a probationer onto the training programme once all possible avenues of appeal have been exhausted.***" **[**Court: The court would repeat at this juncture the observations made at **A**, from which it follows that what the Commissioner must be stating at this point is that he cannot return a probationer Garda to the status of trainee Garda. Legally, this seems correct (the court does not see that it has to reach a conclusion in this regard). However, it is unclear what significance the Commissioner perceives to attach to this statement. If he is suggesting that, as a matter of law, such perceived inability of itself impacts on one's status as an attested member of An Garda Síochána, he is, with respect, mistaken.]

E. Letter: "***Having considered the above I am to inform you that you cannot continue with your training***..." **[**Court: The court would reiterate at this juncture the observations made at **A**.]

F. Letter: "**[Y]*ou cannot…obtain the B.A. in Applied Policing***...". [Court: The court would reiterate at this juncture the observations made at **B**.]

X

A Pre-Ordained Outcome?

18. It will be recalled that the reg.12(9) notice of 25th July 2019 concluded with the following invitation to make submissions:

> "*These are serious matters and I have to consider and decide whether you are likely to become an efficient and effective member of An Garda Síochána in accordance with Regulation 12(8) of the Garda Síochána (Admissions and Appointments) Regulations 2013. Before doing so I hereby give you an opportunity in accordance with Regulation 12(9) of the Regulations of advancing to me on or before the 22 of August 2019 (28 days from* [the] *date of this notification) any submission you wish to make concerning the allegation(s)*"

19. Regulation 12(9), it will be recalled, provides as follows:

> "*Where the Commissioner proposes to dispense with the services of a probationer under paragraph (8), (a) the Commissioner shall notify the probationer in writing of the proposal and the reasons for that proposal, and (b) the probationer shall have 28 days from the date of the Commissioner's notification to make submissions to the Commissioner regarding the proposal*".

20. Regulation 12(9) clearly contemplates (as a matter of law, how could it not?) that the submissions process will be meaningful. The regulations clearly contemplate that the probationer will be given a chance to put her side of things before the Commissioner proceeds to a potentially life-changing decision for the probationer. It does not contemplate that a probationer will be afforded a completely meaningless opportunity to make submissions with the outcome being pre-ordained no matter what the probationer has to say. Such a meaningless process would breach the right to fairness of procedures. Law aside, it would be an affront to common-sense: why on earth would one construct a system in which a probationer would be given a meaningless, as opposed to a meaningful, opportunity to make submissions?

21. The court does not see that the opportunity afforded to Ms Fahy in this regard was an empty one. It happened that the submissions that she made did not change the outcome. But that does not mean that any submissions she made would not have altered the outcome. Suppose, for example, and these are completely hypothetical examples that simply do not present here, that Ms Fahy had made submissions along the lines that, 'The person who tested me recorded the results wrongly', or 'The person who tested me dislikes me and has expressly told me that he will never pass me no matter what I do', or 'The person who tested me is known to require a bribe before he will pass anybody'. These are submissions which, if made, would have to be investigated and, if they proved to be true, could only lead to a favourable outcome for Ms Fahy. Doubtless there are other submissions which would have attained a like result. It just happened that the submissions made by Ms Fahy did not in fact advance her cause but that does not lead to the conclusion that the submissions process was an empty one.

22. What of the fact that because the Commissioner has "*deemed the attainment of the BA in Applied Policing* [to be]*…an essential prerequisite to becoming an efficient and effective member of An Garda Síochána*" and because "[t]*here is no provision to reinstate a probationer onto the training programme once all possible avenues of appeal have been exhausted*", then absent something in Ms Fahy's submissions that would change matters (for example, in the manner suggested in the previous paragraph) the decision was only going to go one way? Again, the court does not see that the Commissioner has acted unlawfully in this regard. He looks to completion of the B.A. as one measure by which he judges, *inter alia*, competence (including physical competence) of a probationer member of An Garda Síochána. However, the information gathering exercise that precedes and follows the issuance of a reg.12(9) notice, and which is apparent from the pleadings, shows that the Commissioner trawls widely before reaching a conclusion.

23. Ms Fahy contends that the Commissioner could have asked the Garda Medical Officer to assess her fitness. He could, but the court fails to see how having Ms Fahy's fitness objectively determined by the Garda Medical Officer is to be preferred to having her fitness objectively (and repeatedly) determined by the persons whom the Commissioner arranged to test her physical fitness.

24. Finally, under this heading the court cannot but recall the renowned observation of Hardiman J. in the penultimate line of his judgment in *G.K. v. Minister for Justice* [2002] 2 I.R. 418 that "*A person claiming that a decision making authority has, contrary to its express statement, ignored representations which it has received must produce some evidence, direct or inferential, of that proposition before he can be said to have an arguable case.*" There is no such evidence (direct or inferential) in this case. Indeed the impugned decision points to there having been an earnest consideration of the submissions by the Commissioner, a fact which runs counter to any notion that the outcome was pre-ordained.

XI

'*Delegatus Non Potest Delegare*'

25. Ms Fahy contends that in the manner in which the Commissioner had her fitness tested, he Commissioner was guilty of a breach of the '*delegatus non potest delegare*' maxim.

26. The maxim '*delegatus non potest delegare*' ('a delegate may not (re-)delegate') is not a rule of law but a rule of construction. In applying it in the statutory context there must be a consideration of the language of the entire statute, as well as its objects and purposes. The maxim applies to all persons empowered by statute to do anything and deals with a delegation by an authority of its statutory discretion. The word 'delegation' does not typically infer a self-denuding of power by the person who grants the delegation. Rather it points to the conferring on Person B by Person A (Person A being an entity vested with statutory discretion) of a power to do things which Person A would otherwise have to do himself. The fact that Person A has and retains a general power over Person B does not save the said conferral from being a 'delegation' and so falling within the ambit of the maxim. But if Person A exercises such a substantial degree of control over the actual exercises of discretion by Person B such that Person A can be said to direct his own mind to that exercise, there is in law no 'delegation' and the maxim does not apply.

27. The court does not see that the above maxim comes into play in the context presenting as there was simply no delegating by the Commissioner of his power to dispense with Ms Fahy's services. Prior to the issuance of the reg,12(9) notice he arranged to have Ms Fahy's fitness tested on six occasions and on each occasion she failed the fitness test. The Commissioner then

sent her a reg.12(9) notice pointing to this failure, indicating that her services might be dispensed with and inviting submissions from her; he then considered such submissions as were made and decided in the round that Ms Fahy was not (physically) competent to remain as a member of An Garda Síochána and issued a well-reasoned decision to this effect, the substance and meaning of which was thoroughly clear. There is just nothing unlawful in that, whether by reference to the '*delegatus non potest delegare*' maxim or otherwise. Nor in relying on attainment of a B.A-level standard of fitness by Ms Fahy was the Commissioner somehow bringing an *ad hoc* or arbitrary standard to bear. It was made clear to Ms Fahy from the day she became a trainee Garda that she would need to complete the B.A. and regrettably (and, as stated at the outset of this judgment, one cannot but feel sorry for Ms Fahy for she clearly wishes to be a garda) she failed to do so by virtue of her unfortunate six-time failure of the fitness tests.

28. In passing, the court admits to some doubt as to the merit of using the Latin language in legal judgments or more generally in legal documents. It can only make judgments less accessible in an age when very few people, judges and lawyers included, have received a Classical education.

XII

The Commissioner's Alleged Representations

29. In their written submissions, counsel for Ms Fahy contended that the reg.12(9) notice of 25th July 2019 "*expressly stated or by necessary implication made the following representations*". By way of overriding comment to the observations that follow, the court respectfully does not see that the issuance of a reg.12(9) involves the making of any representations: the notice states what it states and the Commissioner must thereafter proceed in accordance with law; that is the beginning and end of matters. What counsel for Ms Fahy advance as representations made are, in truth, or so it seems to the court, but aspects of the legal requirement to which the Commissioner is subject to observe fairness of procedures. Subject to the foregoing, the court identifies in Bold text the representations allegedly made or implied and makes comment thereon:

> "***(a) That the Respondent was about to enter upon a consideration relating to the Applicant.*"**

Court Note: He was (and did).

"***(b)*** ***That the consideration was for a specifically defined statutory purpose*****".**

Court Note: It was.

"***(c)*** ***That a discretion existed.*****"**

Court Note: It did.

"***(d)*** ***That any such discretion would be exercised reasonably.*****"**

Court Note: It was.

"***(e)*** ***That following consideration in accordance with the provisions of Regulation 12(8)(a) a decision would be made.*****"**

Court Note: Matters proceeded so.

"***(f)*** ***That no decision had already been made.*****"**

Court Note: There is no evidence to suggest that a decision had already been made.

"***(g)*** ***That the decision specifically related to the likelihood of the Applicant becoming an efficient and effective member of An Garda Síochána in accordance with Regulation 12(8)(a)*****".***

Court Note: The decision involved the bringing of reg.12(8)(a)(ii) to bear in the context of the particular circumstances presenting.

"***(h)*** ***That the immediate termination of employment was not warranted or justified.*****"**

Court Note: All that the court sees is that the Commissioner elected to proceed as he proceeded. The court respectfully does *not* see that because an employer elects not to dismiss someone summarily it follows as a matter of inexorable logic that the employer has necessarily taken the view that summary dismissal is not warranted or justified.

"***(i)*** ***That there existed a real and appreciable prospect that the Applicant would be considered or adjudged to be an efficient or effective member as defined.*****"**

Court Note: The notice indicated that the decision would see reg.12(8)(a)(ii) brought to bear in the context of the particular circumstances presenting. Submissions were sought in accordance with reg.12(9), such submissions were made, and they were duly considered.

"***(j)*** ***That an opportunity was*** **[being]** ***provided to the Applicant to make a case in response to the allegations as set out in the notice*****".**

Court Note: Such opportunity was afforded.

"***(k)*** ***That any submission made by the Applicant would not be futile.*****"**

Court Note: No decisionmaker could ever make such a representation: it is in the nature of decision-making that some submissions may ultimately prove futile. If what is meant is that the submissions process should not have been an empty process, the court does not see, for the reasons stated previously above, that it was an empty process.

"***(l)*** ***That the Applicant had all of the relevant material at her disposal which would have enabled her to make a proper submission in response.*****"**

Court Note: There is nothing in the evidence to suggest that Ms Fahy did not have this material.

"***(m)*** ***That the Respondent was about to enter upon a consideration of the matters in question having due regard to all of the relevant material and the relevant statutory provisions.*****"**

Court Note: He was (and did).

"***(n)*** ***That the representations were genuine and sincere*****".**

Court Note: For the reasons stated above, the court does not see that any representations were made by the Commissioner. He issued the notice, was then required to proceed in accordance with law, sought to do so, and his actions are now the subject of the within application. What the court can state is that, as one would instinctively expect, there is nothing in the evidence to suggest that the Commissioner proceeded otherwise than transparently and honestly.

"***(o)*** ***That the process did not have a predetermined outcome.*****"**

> Court Note: There is nothing in the evidence to suggest that process could, would, or did have a predetermined outcome. In fact, as indicated previously above, the evidence suggests the contrary.

30. It should be clear to the parties by now, having regard to the immediately foregoing, and all else that the court has stated in the preceding pages, that, save for (and subject to) the potential issue considered in the next section of the court's judgment, the court sees no legal deficiency to present in the Commissioner's actions. More particularly, the court amongst other matters: (i) does not see on the evidence before it anything to suggest that a decision was made by the Commissioner concerning Ms Fahy's case before the impugned decision was made; (ii) considers that Ms Fahy was assessed in accordance with established procedures and in accordance with the Regulations of 2013; (iii) considers it evident from the impugned decision that the Commissioner did consider the submissions made by/for Ms Fahy; (iv) considers that the invitation in the reg.12(9) notice to make submissions was genuine and sincere, as was the subsequent consideration of those submissions.

XIII

Extensions of Probationary Period

i. Introduction

31. The Commissioner has submitted, at para. 41 of his written submissions, that "*The Applicant's probationary period was extended on 4 occasions in accordance with the provisions of the 2013 Regulations*". A question arises whether this submission is correct, *i.e.* whether the extensions were in fact done in accordance with the Regulations of 2013, an issue that the Commissioner clearly sees to be in play, having made submission in this regard.

ii. The History of the Extensions Made

32. On 1st November 2018, Ms Fahy's probationary period was extended by a 3-month period from 17th November 2018 to 17th February 2019 (Extension #1). On 5th February 2019, Ms

Fahy's probationary period was extended by six months from 17th February 2019 to 17th August 2019 (Extension #2). On 7th August 2019, Ms Fahy's probation was extended by three months from 17th August 2019 to 17th November 2019 (Extension #3). On 15th November 2019, the Minister for Justice and Equality consented to Ms Fahy's probationary period being extended by three months from 17th November 2019 to 17th February 2020 (Extension #4).

33. The court does not see in the documentation before it that it has been provided with the text of Extension #1 or Extension #2.

iii. Some Applicable Legislation

34. Regulation 12(4) of the Regulations of 2013 provides as follows:

> "*Where a probationer has not demonstrated to the satisfaction of the Commissioner an ability to perform the functions of a member efficiently and effectively or otherwise to conduct himself or herself in a manner befitting a member, the Commissioner may, if he or she considers it necessary or expedient for the purpose of ascertaining whether the probationer concerned will demonstrate such ability, direct, on or before the expiration of the probationer's probationary period, that the probationers probationary period be extended for such further period as may be specified in the direction.*"

35. Regulation 12(10) provides that:

> "*Where the Commissioner proposes to dispense with the services of a probationer under paragraph (8), he or she shall, if he or she considers it appropriate and necessary, for the purpose of enabling the probationer to— (a) make submissions to the Commissioner regarding the proposal, or (b) obtain advice, including professional legal advice in relation to the matter, direct that the probationary period of the probationer be extended for a period not exceeding 28 days, and such period shall be specified in the direction.*"

iv. Some Commentary

36. Regulation 12(9) provides that a notice can only issue thereunder in circumstances "[w]*here the Commissioner proposes to dispense with the services of a probationer under paragraph (8)*". In this case the regulation 12(9) notice issued on 25th July 2019. At first glance, that would seem to mean that if the Commissioner was minded to make an extension to Ms Fahy's probation period thereafter, he should have proceeded under reg.12(10). However, Extension #3 (on 7th August 2019) proceeds by reference to reg. 12(4). How can that be so? At first glance it would seem that it could only be so if the following logic applies: reg.12(4) applies generally and its application is not ousted by reg. 12(10); while an extension can always be made under reg.12(4) it can also be made in the special circumstances detailed in reg.12(10). But that logic is arguably mistaken as there would seem to be no reason for reg.12(10) if the Commissioner could always proceed under reg.12(4). Arguably the more logical reading is that reg.12(10), to use a colloquialism, 'does what it says on the can'. In other words it applies "[w]*here the Commissioner proposes to dispense with the services of a probationer under paragraph (8)*" as the Minister did here on and from 25th July 2019, the date of issuance of the reg.12(9) notice. If that is so, then when the Commissioner came to issue his extension of 7th August 2019, he ought to have proceeded under reg.12(10) (he in fact proceeded under reg.12(4)), and, if he had proceeded under reg.12(10) he could only have granted an extension for a period of 28 days. All of this would have a knock-on effect. Regulation 12(11) anticipates building on an existing 28-day period established under reg.12(10). And reg.12(13) anticipates the Minister extending an existing probationary period. But if the probationary period has not previously been extended to the point from which the Minister proposes to extend it (as would be the case here if the Commissioner erroneously invoked reg.12(4) on 7th August 2019) then the probationary period of the affected member would by that time have come to an end. In Ms Fahy's case this would seem to mean that she was proceeded against as a probationer when she ought otherwise to have been proceeded against.

XIV

Conclusion

37. The parties are respectfully referred to Part I above. Counsel might kindly advise the registrar or the court's judicial assistant within 14 days of this interim judgment as to how they wish (and wish the court) to proceed.

[B] Addendum

I

The Point Arising

38. The court heard the parties further on this matter on 24th June 2021. The applicant contended that the point discussed by the court in Part XIII was properly before the court and agreed with the court's analysis. The Commissioner contended that the point raised was not properly before the court and thus was not prepared to make any submissions on the point in question. The Commissioner is perfectly entitled to take that stance, though it does mean that if the court is correct in its analysis, and it considers that it is, the Commissioner is – remarkably – satisfied to rely upon a procedural argument so as to stand over the patently legally flawed dismissal of Ms Fahy.

39. So, which of the parties is correct? Was the Part XIII point before the court or not? Before answering that question it is useful to remember what that point involves, though having now heard the parties and considered matters further the court is satisfied to state the point arising with more certainty.

40. Regulation 12(9) of the Regulations of 2013, it will be recalled, provides as follows:

> "***Where the Commissioner proposes to dispense with the services of a probationer under paragraph (8), (a) the Commissioner shall notify the probationer in writing*** *of the proposal and the reasons for that proposal, and (b) the probationer shall have 28 days from the date of the Commissioner's notification to make submissions to the Commissioner regarding the proposal*" [Emphasis added].

41. In this case the regulation 12(9) notice issued on 25th July 2019. At first glance, that means that if the Commissioner was minded to make an extension to Ms Fahy's probation period thereafter, he should have proceeded under reg.12(10). Regulation 12(10), it will be recalled, provides as follows:

> "***Where the Commissioner proposes to dispense with the services of a probationer under paragraph (8), he or she shall****, if he or she considers it appropriate and necessary, for the purpose of enabling the probationer to— (a) make submissions to the Commissioner regarding the proposal, or (b) obtain advice, including professional legal advice in relation to the matter, direct that the probationary period of the probationer be extended for a period not exceeding 28 days, and such period shall be specified in the direction*" [Emphasis added].

42. However, Extension #3 (on 7th August 2019) proceeds by reference to reg. 12(4). Regulation 12(4), it will be recalled, provides as follows:

> "*Where a probationer has not demonstrated to the satisfaction of the Commissioner an ability to perform the functions of a member efficiently and effectively or otherwise to conduct himself or herself in a manner befitting a member, the Commissioner may, if he or she considers it necessary or expedient for the purpose of ascertaining whether the probationer concerned will demonstrate such ability, direct, on or before the expiration of the probationer's probationary period, that the probationers probationary period be extended for such further period as may be specified in the direction*".

43. How could the Commissioner have proceeded under reg.12(4)? It would seem that he could only have proceeded so if the following logic applies: reg.12(4) applies generally and its application is not ousted by reg. 12(10); while an extension can always be made under reg.12(4) it can also be made in the special circumstances detailed in reg.12(10). But there would seem to be no reason for reg.12(10) if the Commissioner could always proceed under reg.12(4). So the more logical reading would seem to be that reg.12(10), to use a colloquialism, 'does what it says on the can'. In other words it applies "[w]*here the Commissioner proposes to dispense with the services of a probationer under paragraph (8)*" as the Minister did here on and from 25th July 2019, the date of issuance of the reg.12(9) notice. If that is so, and the court considers that it is, then when the Commissioner came to issue his extension of 7th August 2019, he ought to have proceeded under reg.12(10) (he in fact proceeded under reg.12(4)), and, if he had

proceeded under reg.12(10) he could only have granted an extension for a period of 28 days. All of this has a knock-on effect. Regulation 12(11) anticipates building on an existing 28-day period established under reg.12(10). And reg.12(13) anticipates the Minister extending an existing probationary period. But if the probationary period has not previously been extended to the point from which the Minister proposes to extend it (as is the case here through the Commissioner erroneous invocation of reg.12(4) on 7th August 2019) then the probationary period of the affected member will (and here had) by that time come to an end. In Ms Fahy's case this would mean that she was proceeded against as a probationer when she ought otherwise to have been proceeded against. The court is therefore satisfied that the Commissioner did not act lawfully when he proceeded under reg.12(4) instead of under reg.12(10), following upon his issuance of the reg.12(9) notice.

II

Some Submissions Adopted

44. Further to the preceding part of this addendum, the court respectfully adopts the following reasoning from the submissions of counsel for Ms Fahy:

> "**Substance of the Point Raised in the Interim Judgment**
>
> "[T]*he interim judgment is correct…that once the decision is made to invoke regulation 12(8)(a), the power to extend the probation exists solely in the power vested in the…*[Commissioner] *under regulation 12(10)….*[T]*his is the only logical reading of the regulations as…constructed.*
>
> *The power to extend…probation granted to the Commissioner at* [reg.]*12(4) is limited to circumstances where 'a probationer has not demonstrated to the satisfaction of the Commissioner an ability to perform the functions of a member efficiently and effectively…'….In other words the extension may only be for the purpose of ascertaining whether the probationer will demonstrate such ability.*
>
> *In contradistinction, in respect of regulations 12(10) the power to extend the probation is much more limited both in respect of its*

temporal limitations and its purpose. Such an extension may only be directed to enable the member concerned to 'make submissions to the Commissioner' or to 'obtain advice'. Further, the probationary period may only be extended for an initial 28 day period. Regulation 12(11) provides that this initial period of 28 days may then be extended by the Commissioner in exceptional circumstances.

Thus it is apparent that the power to extend under [reg.] *12(4) is limited to circumstances whereby the member concerned is given an opportunity to demonstrate the ability to become an efficient member of the force….This is* [the] *primary focus of the Applicant's case in relation to the extensions of the probation from the date of notification in July 2019 namely that they were not for the purpose for which they are permitted under the regulation and that the said extensions were thereby unlawful.*

The corollary of that…is that the extensions pursuant to regulation 12(4) after July 2019 were unlawful in that they were not for the purpose provided for under that regulation but rather were solely for the purpose for which the power under regulation 12(10) is granted to the Commissioner.

[It follows that]*…not only is the extension in August 2019 unlawful but also the extension in November 2019 is similarly unlawful….Insofar as one or both of these extensions are unlawful the decision to dismiss the applicant pursuant to regulation 12(8)(a) is one which…cannot properly be made. The probation period of the applicant has concluded and the respondent may not rely on the provisions of regulation 12(8) to dismiss her as a result*".

III

Is the Point Considered at Part I in Issue?

45. The court respectfully does not understand how the issue considered at Part I of this addendum, and further expanded upon in Part II, can or could now correctly be contended by the Commissioner <u>*not*</u> to be properly before the court.

46. First, when the court looks to the reliefs sought by Ms Fahy, she has sought:

> "[1] *an order of* certiorari*…quashing the respondent's decision given on or about…7th February 2020, whereby the respondent, in purported compliance with the powers conferred by Regulation 12 of the Garda Síochána (Admissions and Appointments) Regulations 2013, determined the applicant's employment….*
>
> [2] *a declaration…that the respondent misapplied and/or misconstrued the relevant provisions of the Garda Síochána (Admissions and Appointments) Regulations 2013*".
>
> [3] *a declaration…that the respondent expropriated or unlawfully utilised the applicant's probationary period as a member of An Garda Síochána, or a significant portion thereof, to facilitate a purpose or objective not authorised by the…Regulations* [of] *2013 and (for that purpose or objective) represented to the applicant that the relevant portion of her probationary period, inured, operated and applied for her benefit and for the benefit of her employer, whereas it only operated for the benefit of her employer (the respondent)*".

47. When it comes to the third relief sought, the court does not see that any contrivance was at play. However, how else can one describe a complete misapplication of the Regulations of 2013 as anything other than the unlawful utilisation of Ms Fahy's probationary period to facilitate a purpose or objective not authorised by the Regulations of 2013, *viz*. her dismissal as a probationer when she was no longer a probationer?

48. The court notes that in respect of above reliefs it is pleaded, *inter alia*, as follows in the statement of grounds, at para.18:

> "*By reason of the fact that the applicant had served as a member of An Garda Síochána (while on probation) for a period exceeding three years, decisions were made to extend her probationary period and those decisions and the subsequent extensions were administrative and were put into place for the sole and predominant purpose of ensuring that the respondent artificially complied with the Regulations, consequently the various extensions did not amount to probation as envisaged by the Regulations*".

49. Thus the statement of grounds patently makes a plea dealing with the *vires* of the extensions following the issue of the notice of 25th July 2019, and expressly that the extensions of August and November 2020 were unlawful and contrary to the provisions of the Regulations. Again, the court does not see that any contrivance was at play on the part of Commissioner; however, it is undoubtedly the case, for the reasons outlined previously above, that decisions were made to extend Ms Fahy's probationary period and that the various extensions did not amount to probation as envisaged by the Regulations.

50. As can be seen, the *vires* in respect of the extensions is central to the issues before the court. Insofar as the Commissioner unlawfully extended the probation for a period outside that contemplated by the Regulations of 2013, the Commissioner's purported dismissal of Ms Fahy under the Regulations of 2013 is unlawful.

IV

Some Case-Law

51. Counsel for the Commissioner referred the court to the judgment of the Court of Appeal in *R.L. v. Her Honour Judge Heneghan and M.M.* [2015] IECA 120 to emphasise the point that, and the reasons why, a court should proceed on what is pleaded. For the reasons stated above, the court is satisfied that it has proceeded on what has been pleaded. That it agrees, but does not fully agree, with a point as pleaded does not mean that the point has not been pleaded; it means that the court agrees with the point as pleaded to the extent that it so agrees.

52. The court has also been referred to *MacDonncha and Sweeney v. Minister for Education Skills, Ireland and the Attorney General* [2018] IESC 50, including the point made therein that *vires* was alluded to at the hearing but the explicit point determined by the trial judge was not raised by the trial judge or by counsel. Reference was also made to the principle of *audi alteram partem* and fair procedure. Here, a point was expressly raised by the court in its interim judgment, the parties were given time to prepare submissions, and oral argument has been heard. That the Commissioner has elected not to offer any submissions on the substantive point that the court raised is his choice, perhaps even a telling choice. However, a point has been expressly raised, due opportunity to make argument allowed, all arguments heard and considered, and all on a point that, for the reasons indicated in the previous part of this addendum, the court is satisfied arises in and from the pleadings.

53. For the reasons stated in Part III of this addendum, the court does not see that Ms Fahy has strayed beyond her pleaded case in the manner cautioned against in *Moorview Ltd v. First Active plc* [2008] IEHC 211, the court does not see, to deploy the Classical imagery employed by Collins J. in *Morgan v. ESB* [2021] IECA 29, at para.11, that Ms Fahy has engaged in "*the pleading equivalent of the Trojan Horse*", and the court does not see that the Commissioner was deprived of the opportunity of pleading a defence to the claim made. Again, that the court agrees, but does not fully agree, with a point as pleaded does not mean that the point has not been pleaded; it means that the court agrees with the point as pleaded to the extent that it so agrees.

V

Conclusion

54. For the reasons stated in this addendum and elsewhere in its judgment, the court shall grant Ms Fahy (i) an order of *certiorari* quashing the respondent's decision given on or about 7th February 2020, whereby the respondent, in purported compliance with the powers conferred by Regulation 12 of the Garda Síochána (Admissions and Appointments) Regulations 2013, determined the applicant's employment; (ii) a declaration that the Commissioner misapplied and/or misconstrued the relevant provisions of the Garda Síochána (Admissions and Appointments) Regulations 2013; (iii) a declaration that through his misapplication of the Regulations of 2013 the Commissioner did not act lawfully when he proceeded under reg.12(4)

of those Regulations instead of under reg.12(10), following upon his issuance of the reg.12(9) notice, thus unlawfully using Ms Fahy's purported probationary period to facilitate a purpose or objective not authorised by the Regulations of 2013, *viz*. her dismissal as a probationer Garda when she was no longer a probationer.

55. In the unlikely event of any conflict arising or being perceived to arise between the terms of the court's interim judgment and this addendum, the terms of this addendum shall prevail.